CAMBRIDGE Professional English

International Legal English

SECOND EDITION

A course for classroom or self-study use

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and

Legal

Suitable preparation for the International Legal English Certificate (ILEC)

Contents

1 The practice of law

PART I: THE LEGAL SYSTEM

1 Reading A: Bodies of law

1.1 Read the excerpts below from the course catalogue of a British university's summer-school programme in law and answer these questions.

1 Who is each course intended for?
2 Which course deals with common law?
3 Which course studies the history of European law?

A

LAW 121: Introduction to English law

This course provides a general overview of English law and the common-law system. The course will look at the sources of law and the law-making process, as well as at the justice system in England. Students will be introduced to selected areas of English law, such as criminal law, contract law and the law of torts. The relationship between the English common law and EC law will also be covered.

The course is designed for those international students who will be studying at English universities later in the academic year. Other students with an interest in the subject are also welcome to attend, as the contact points between English law and civil law are numerous. The seminars and all course materials are in English.

B

LAW 221: Introduction to civil law

More individuals in the world solve their legal problems in the framework of what is called the civil-law system than in the Anglo-Saxon case-law system. This course will introduce students to the legal systems of Western Europe that have most influenced the civil-law legal systems in the world. It aims to give students an insight into a system based on the superiority of written law. The course will cover the application and development of Roman law in Europe to the making of national codes all over the world.

The course is intended to prepare students who are going to study in a European university for the different approaches to law that they are likely to face in their year abroad.

1.2 Match these bodies of law (1–3) with their definitions (a–c).

1 civil law	**a** area of the law which deals with crimes and their punishments, including fines and/or imprisonment (also **penal law**)
2 common law	**b** 1) legal system developed from Roman codified law, established by a state for its regulation; 2) area of the law concerned with non-criminal matters, rights and remedies
3 criminal law	**c** legal system which is the foundation of the legal systems of most of the English-speaking countries of the world, based on customs, usage and court decisions (also **case law, judge-made law**)

1.3 Complete the text on the next page contrasting civil law, common law and criminal law using the words in the box.

based on	bound by	codified	custom	disputes	legislation
non-criminal	precedents	provisions	rulings		

The term 'civil law' contrasts with both 'common law' and 'criminal law'. In the first sense of the term, civil law refers to a body of law **1)** ..... written legal codes derived from fundamental normative principles. Legal **2)** ..... are settled by reference to this code, which has been arrived at through **3)** ..... Judges are **4)** ..... the written law and its **5)** ..... .
In contrast, common law was originally developed through **6)** ..... , at a time before laws were written down. Common law is based on **7)** ..... created by judicial decisions, which means that past **8)** ..... are taken into consideration when cases are decided. It should be noted that today common law is also **9)** ..... , i.e. in written form.
In the second sense of the term, civil law is distinguished from criminal law, and refers to the body of law dealing with **10)** ..... matters, such as breach of contract.

1.4 Which body of law is the basis of the legal system of your jurisdiction?

2 Reading B: The adversarial and inquisitorial systems

A further difference between the civil-law system and the common-law system lies in the way proceedings are conducted.

2.1 Read the text below comparing the two systems and answer these questions.

1. Which system is characteristic of common-law countries?
2. How does the way evidence in a trial is gathered and presented differ in the two systems?
3. What is the role of the attorney in each system?
4. In your opinion, which system is best suited for arriving at the truth?

The inquisitorial system, which is employed in most civil-law jurisdictions, can be defined by comparison with the adversarial system used in the United States and Great Britain. In the adversarial system, two or more opposing parties gather evidence and present it, and their arguments, to a judge or jury. The judge or jury knows nothing of the litigation until the parties present their cases to the decision-maker. Furthermore, in a criminal trial, for example, the defendant is not required to give testimony.

In the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, he or she is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. He or she actively steers the search for evidence and questions the witnesses, including the respondent or defendant. Attorneys play a more passive role, suggesting routes of inquiry for the presiding judge and following the judge's questioning with questioning of their own. Attorney questioning is often brief because the judge tries to ask all relevant questions. The goal of both the adversarial system and the inquisitorial system is to find the truth. But the adversarial system seeks the truth by pitting the parties against each other in the hope that competition will reveal it, whereas the inquisitorial system seeks the truth by questioning those most familiar with the events in dispute. The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth.

2.2 Underline the verbs in the text above that appear with the nouns below (1–3). Then combine the verbs in the box with the three nouns to make word partnerships. Some of the verbs go with more than one noun.

dismiss	gather	give	hear	present	provide	recant
reject	support	uncover				

1 evidence **2** testimony **3** arguments

2.3 Make sentences about the role of the judge in the inquisitorial system and the role of the attorney in the adversarial system using some of the verb–noun collocations from Exercise 2.2.

Reading C: Types of law

The word *law* refers generally to legal documents which set forth rules governing a particular kind of activity.

3.1 Read these extracts, which each contain a word used to talk about types of law. Where did each appear? Match each extract (1–5) with its source (a–e).

1

The new EU Working Hours **Directive** is reported to be causing controversy amongst the medical profession.

2

When a **statute** is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be.

3

The purpose of this Ordinance[1] is to regulate traffic upon the Streets and Public Places in the Town of Hanville, New Hampshire, for the promotion of the safety and welfare of the public.

4

These workplace safety and health **regulations** are designed to prevent personal injuries and illnesses from occurring in the workplace.

5

Mr Speaker, I am pleased to have the opportunity to present the Dog Control Amendment **Bill** to the House. It is a further milestone in meeting the changing expectations we have about what is responsible dog ownership.

[1] (UK) by-law/bye-law

a court ruling
b local government document
c newspaper
d parliamentary speech
e brochure for employees

3.2 Find words in the extracts in Exercise 3.1 which match these definitions.

1 rules issued by a government agency to carry out the intent of the law; authorised by a statute, and generally providing more detail on a subject than the statute
2 law enacted by a town, city or county government
3 draft document before it is made into law
4 legal device used by the European Union to establish policies at the European level to be incorporated into the laws of the Member States
5 formal written law enacted by a legislative body

3.3 Complete the sentences below using the words in the box.

bill	directive	ordinance	regulations	statutes

1 The Town Council will conduct a public hearing regarding a proposed ..... concerning property tax.
2 According to the ..... concerning working time, overtime work is work which is officially ordered in excess of 40 hours in a working week or in excess of eight hours a day.
3 Early this year, the government introduced a new ..... on electronic commerce to Parliament.
4 A number of changes have been made to the federal ..... governing the seizing of computers and the gathering of electronic evidence.
5 The European Union ..... on Data Protection established legal principles aimed at protecting personal data privacy and the free flow of data.

4 Speaking A: Explaining what a law says

There are several ways to refer to what a law says. Look at these sentences:

*The law **stipulates that** corporations must have three governing bodies.*
*The law **provides that** a witness must be present.*
*The patent law **specifies that** the subject matter must be 'useful'.*

These verbs can also be used to express what a law says:
*The law **states / sets forth / determines / lays down / prescribes that** ...*

Choose a law in your jurisdiction that you are familiar with and explain what it says using the verbs listed in the box above.

5 Reading D: Types of court

Courts can be distinguished with regard to the type of cases they hear.

Match each of these types of court (1–9) with the explanation of what happens there (a–i).

1 appellate court (*or* court of appeals, appeals court)
2 crown court
3 high court
4 juvenile court
5 lower court (*or* court of first instance)
6 magistrates' court
7 moot court
8 small-claims court
9 tribunal

a This is where a person under the age of 18 would be tried.
b This is the court of primary jurisdiction, where a case is heard for the first time.
c This is where small crimes are tried in the UK.
d This is where law students argue hypothetical cases.
e This is where a case is reviewed which has already been heard in a lower court.
f This is where cases involving a limited amount of money are handled.
g This is where serious criminal cases are heard by a judge and a jury in the UK.
h This is where a group of specially chosen people examine legal problems of a particular type, such as employment disputes.
i This is usually the highest court in a jurisdiction, the court of last resort.

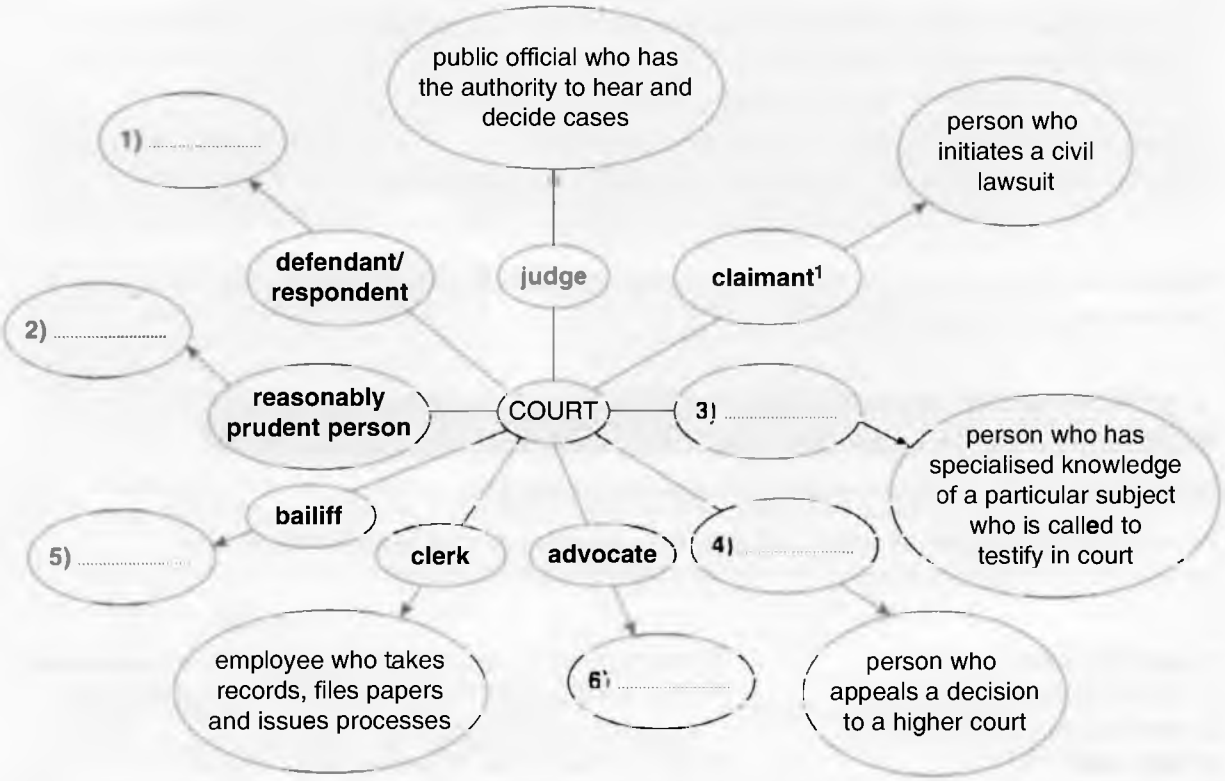
6 Speaking B: Civil-court systems

Work in small groups and discuss these questions.

1 Describe the different types of court in your jurisdiction and the areas of law they deal with.
2 Select one type of court in your jurisdiction and explain what kinds of case it deals with.

Reading E: Persons in court

Complete this diagram with the words and definitions below (a–f).



a expert witness
b appellant[2]
c person who is sued in a civil lawsuit
d officer of the court whose duties include keeping order and assisting the judge and jurors
e person who pleads cases in court
f hypothetical person who uses good judgment or common sense in handling practical matters; such a person's actions are the guide in determining whether an individual's actions were reasonable

[1] (US) *usually* plaintiff
[2] (US) *also* petitioner

8 Listening A: Documents in court

8.1 Listen to a lawyer telling a client about some of the documents involved in his case and answer these questions.

1 What claim has been filed against the client?
2 What does the lawyer need from the client to be able to prepare his defence?
3 Will the case go to trial?

8.2 Match these documents (1–9) with their definitions (a–i).

1 affidavit	**a** a document informing someone that they will be involved in a legal process and instructing them what they must do
2 answer	**b** a document or set of documents containing details about a court case
3 brief	**c** a document providing notification of a fact, claim or proceeding
4 complaint	**d** a formal written statement setting forth the cause of action or the defence in a case
5 injunction	**e** a written statement that somebody makes after they have sworn officially to tell the truth, which might be used as proof in court
6 motion	**f** an application to a court to obtain an order, ruling or decision
7 notice	**g** an official order from a court for a person to stop doing something
8 pleading	**h** in civil law, the first pleading filed on behalf of a plaintiff, which initiates a lawsuit, setting forth the facts on which the claim is based
9 writ[1]	**i** the principal pleading by the defendant in response to a complaint

[1] Since the 1999 reform rules, the term *claim form* is used in the UK.

8.3 Listen again and tick the documents that the lawyer mentions.

1 affidavit	☐	**4** complaint	☐	**7** notice	☐
2 answer	☐	**5** injunction	☐	**8** pleading	☐
3 brief	☐	**6** motion	☐	**9** writ	☐

8.4 Match each verb used by the lawyer (1–5) with its definition (a–e).

1 to **draft** a document	**a** to deliver a legal document to someone, demanding that they go to a court of law or that they obey an order
2 to **issue** a document	**b** to produce a piece of writing or a plan that you intend to change later
3 to **file** a document **with** an authority	**c** to deliver a document formally for a decision to be made by others
4 to **serve** a document **on** someone (or to **serve** someone **with** a document)	**d** to officially record something, especially in a court of law
5 to **submit** a document **to** an authority	**e** to produce something official

8.5 Decide which of the documents in Exercise 8.2 can go with these verbs. The first one has been done for you.

1 draft *an answer, a brief, a complaint, a motion, a pleading*
2 issue
3 file (with)
4 serve (on someone)
5 submit

9 Reading F: Legal Latin

Lawyers use Latin words and expressions when writing legal texts of every kind, from statutes to emails. The excerpt below is from the legal document known as an 'answer'. It was submitted to the court by the defendant from Listening A.

9.1 Underline the common Latin words and phrases in the excerpt. Do you know what they mean?

> The claim for breach of contract fails inter alia to state facts sufficient to constitute a cause of action, is uncertain as to what contract plaintiffs are suing on, and is uncertain in that it cannot be determined whether the contract sued on is written, oral or implied by conduct. The complaint alleges breach of contract as follows: 'At all times herein mentioned, plaintiffs were a part [sic] to the Construction Contract, as well as intended beneficiaries to each sub-contract for the construction of the house. In light of the facts set out above, defendants, and each of them, have breached the Construction Contract.'
> On its face, the claim alleges only that defendants 'breached the Construction Contract'. But LongCo is not a party to the Construction Contract. Therefore LongCo cannot be liable for its breach. See e.g. *GSI Enterprises, Inc. v. Warner* (1993).

9.2 Match each Latin word or expression (1–8) with its English equivalent and the explanation of its use (a–h).

1 ad hoc	**a** thus (*used after a word to indicate the original, usually incorrect, spelling or grammar in a text*)
2 et alii (et al.)	**b** for example (*used before one or more examples are given*)
3 et cetera (etc.)	**c** for this purpose (*often used as an adjective before a noun*)
4 exempli gratia (e.g.)	**d** against (*abbreviated to 'v.' in case citations, but to 'vs.' in all other instances*)
5 id est (i.e.)	**e** and others (*usually used to shorten a list of people, often a list of authors, appellants or defendants*)
6 per se	**f** and other things of the same kind (*used to shorten a list of similar items*)
7 sic	**g** by itself (*often used after a noun to indicate the thing itself*)
8 versus (vs. or v.)	**h** that is (*used to signal an explanation or paraphrase of a word preceding it*)

9.3 Match each Latin term (1–10) with its English equivalent (a–j).

1 de facto	**a** among other things
2 ipso facto	**b** per year
3 inter alia	**c** number of shareholders or directors who have to be present at a board meeting so that it can be validly conducted
4 per annum	**d** in fact
5 pro forma	**e** of one's own right; able to exercise one's own legal rights
6 pro rata	**f** proportionally
7 quorum	**g** by that very fact itself
8 sui juris	**h** as a matter of form
9 ultra vires	**i** as follows
10 videlicet (viz.)	**j** beyond the legal powers of a person or a body

PART II: A CAREER IN THE LAW

10 Listening B: Lawyers

10.1 Listen to this discussion between Javier, a Spanish student taking part in a university's summer school programme in the UK, and Robert, an English student. Match the words to describe lawyers (1–5) with the definitions (a–c) and usage notes (d–f).

1 advocate ☐ ☐
2 attorney ☐ ☐
3 barrister ☐ ☐
4 lawyer ☐ ☐
5 solicitor ☐ ☐

Definitions

a general term for someone whose job is to give advice to people about the law and speak for them in court
b more specific term for someone who is trained to prepare cases and give advice on legal subjects and can represent people in lower courts
c more specific term for someone who is qualified to give specialist legal advice and can argue a case in both higher and lower law courts

Usage notes

d mostly US term
e used in Scottish law
f mostly UK/Australian/Canadian term

10.2 Look up the terms **counsel**, **counsellor** and **paralegal** and their definitions and usage. Complete this table that Javier drew up after talking to Robert.

Word	Definition	Sample sentence	Usage notes
counsel	(verb) to give advice, especially in legal matters; (noun) a lawyer who pleads cases in court	Counsel for the defence argued that his client was not guilty	collocation: 'legal counsel' can be used to refer to one or more barristers pleading a case. Often used to address a lawyer in court in the third person: 'Counsel may present the evidence'.
counsellor			
paralegal			

10.3 Another type of lawyer found in many civil-law jurisdictions is called a **notary**. Below is a brief comparison of the civil-law notary with its US counterpart, the **notary public**, which appeared on the website of a law firm. Complete it using the verbs in the box.

administer	authenticating	drafting	executes	performs
serving	take	verify		

A notary in civil-law systems – *notario* in Spanish-speaking countries, *notaire* in French-speaking countries, *symvoulographos* in Greece – **1)** ..... a very different function than does a notary public in the United States. The civil-law notary is an attorney who has undergone special training and performs the following three basic functions: **2)** ..... legal documents such as wills, contracts and deeds; **3)** ..... legal instruments; and **4)** ..... as a public repository of legal instruments. By contrast, a notary public in the US need not be an attorney. The functions of a US notary public are basically to **5)** ..... oaths, **6)** ..... sworn statements and to **7)** ..... the identity of a person who **8)** ..... a legal document.

10.4 Discuss these questions.

1. Does your native language have more than one word for *lawyer*? Do they correspond to the different English words for *lawyer* mentioned on the previous page? If not, how do the concepts differ?
2. What is each type of legal practitioner in your jurisdiction entitled to do?
3. What English term do you use to describe your job or the job you would like to do?
4. What legal services can a notary render in your jurisdiction?

10.5 Combine the nouns in the box with the verbs below (1–6) to make combinations to describe the work lawyers do. Some of the verbs go with more than one noun.

cases	clients	contracts	corporations	decisions	defendants
disputes	law	legislation			

1. advise
2. draft
3. litigate
4. practise
5. represent
6. research

10.6 Choose three 'verb + noun' pairs from Exercise 10.5 and write sentences using them.

10.7 Choose the words from the box which can be combined with the word *lawyer* to describe different types of lawyer. Say what each one does.

bar	corporate	defence	government	patent	practitioner
public sector	sole	tax	trial		

11 Listening C: Legal education

In English-speaking countries, **the Bar** is a term for the legal profession itself, while a **bar association** is the association which regulates the profession. A person who qualifies to practise law is **admitted to the Bar**; in the US, a law-school graduate must pass the **bar examination**.

You are going to hear a German law student speaking to a group of other students at a US law school. He describes the education and training a law graduate must complete to enter the legal profession in Germany.

11.1 Listen and decide whether these statements are true or false.

1. In Germany, a student requires a university degree to study law.
2. Attendance is obligatory at the introductory lectures at a German law faculty.
3. German students of law learn to apply the relevant statutes to the cases they analyse in their coursework.
4. In Germany, the bar examination is administered in two parts.

11.2 Discuss these questions.

1. Is legal education in your country more similar to the US or the German model?
2. What does the speaker mean by 'the Socratic method'? What do you think the advantages and disadvantages of using this method might be?

12 Speaking C: Legal education

Describe the education of a lawyer in your country and include these points.

- Prerequisites for studying law
- Main subjects covered at law school
- Bar examination
- Student clerkships

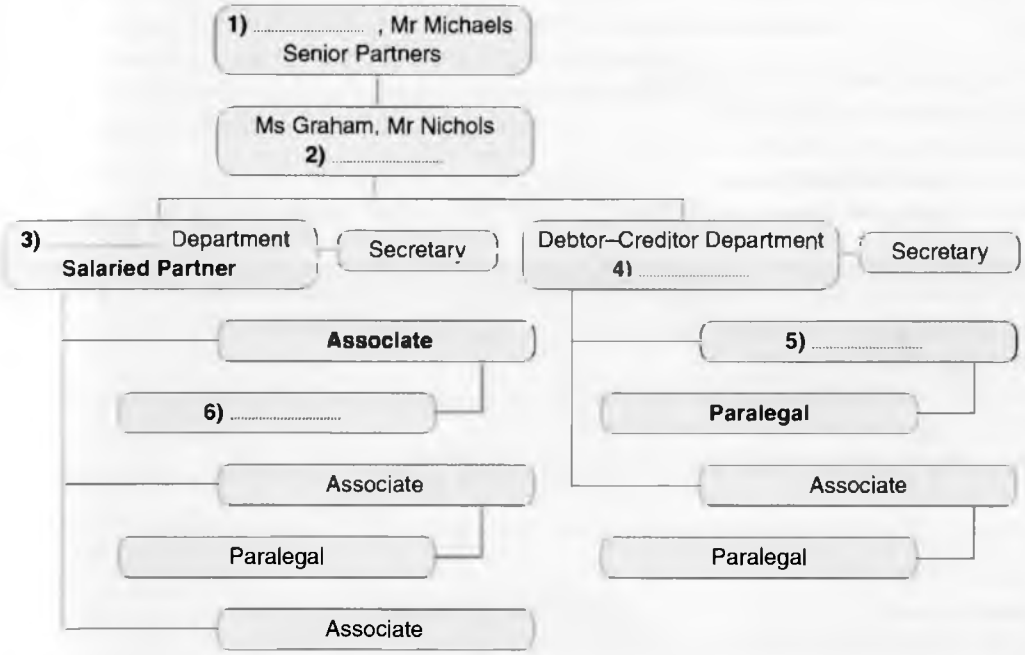
13 Listening D: Law-firm structure

13.1 A young British lawyer, Linus Walker, has applied for a position at a law firm. Listen to his job interview and answer these questions.

1. What does Mr Nichols say about the atmosphere of the firm?
2. What are the full partners responsible for in the firm?
3. What does Linus say about the size of the firm?

13.2 Listen again and complete this organigram of the firm using the words in the box.

Associate Full partners Mr Robertson Paralegal Real Property Salaried Lawyer



14 Speaking D: Describing a law firm

14.1 Look at these phrases used by Mr Nichols to describe the firm in Listening D. Which can be used to speak of a department or company, and which of a person? Which can be used for both?

- ... is/are headed by ...
- ... is/are assisted by ...
- ... is/are managed by ...
- ... is/are responsible for ...
- ... is/are in charge of ...
- ... report to ...

14.2 Using the phrases in Exercise 14.1, describe the structure of a law firm with which you are familiar or the one just described in Listening D. Refer to the positions and duties of the personnel.

15 Listening E: Practice areas

15.1 Listen to five lawyers talking about their firms, practice areas and clients. Tick the information you hear about each speaker.

Speaker 1 ...

1 has a few years' working experience. ☐
2 works as a clerk at a mid-size commercial law firm. ☐
3 will get to know other departments of the firm. ☐
4 meets with clients regularly. ☐
5 plans to specialise in commercial litigation. ☐

Speaker 2 ...

1 is a sole practitioner. ☐
2 works in the area of employment law. ☐
3 deals with wage disputes. ☐
4 represents clients in mediation. ☐
5 has many clients who are small businesses. ☐

Speaker 3 ...

1 works in the area of secured transactions. ☐
2 carries out trade-mark registrations. ☐
3 assists clients who are in artistic professions. ☐
4 serves as an expert witness in court. ☐
5 is a partner in a large IP firm. ☐

Speaker 4 ...

1 is a senior partner in a mid-size law firm. ☐
2 specialises in competition law. ☐
3 represents clients before the employment tribunal. ☐
4 deals with infringements of the Competition Act. ☐
5 has clients in the telecommunications sector. ☐

Speaker 5 ...

1 owns shares in his firm. ☐
2 argues cases in court. ☐
3 works in the area of real property law. ☐
4 represents landlords but not tenants. ☐
5 teaches courses on litigation at the law university. ☐

15.2 Discuss these questions.

1 Which kind of firm do you work in or would you like to work in?
2 Which areas of the law have you specialised in or would like to specialise in?

16 Listening F: Law-firm culture

16.1 Read this excerpt from an article in a law-school newspaper about law-firm culture. Which type of firm would you prefer to work for? Why?

One factor which plays an important role in the culture of a law firm is its size. Law firms can range from a one-person solo practice (conducted by a sole practitioner) to global firms employing hundreds of attorneys all over the world.

A small law firm, which typically engages from two to ten lawyers, is sometimes known as a 'boutique firm', as it often specialises in a specific area of the law. A mid-size law firm generally has ten to 50 lawyers, while a large law firm is considered to be one employing 50 or more attorneys.

16.2 You are going to hear Richard Bailey, a law student, talking to a group of first-year law students at an orientation event at law school. He tells them about his experience as a clerk in different law firms. Listen and answer these questions.

1 Why do the professors encourage students to do work experience?
2 How long have Richard's clerkships generally lasted?
3 What kind of work did Richard do at the larger law firms?
4 What is Richard's final piece of advice?

16.3 Listen again and tick the advantages of small and large law firms Richard mentions. In some cases, he says both types of firm have the same advantage.

Advantages	Small firms	Large firms
more autonomy and responsibility		
opportunity to work on prestigious cases		
chance to rotate through different practice areas		
asked to write briefs and letters		
allowed to conduct research and manage court books		
opportunity to make many contacts		
more training offered		
made to feel part of a team		
invited to participate in social events		
family-like atmosphere		
made good use of time		

16.4 Discuss these questions.

1 Do you have any experience working as a clerk in a law firm? In what ways was it similar to or different from Richard's experience?
2 What kinds of tasks and responsibilities do clerks in your firm have?
3 Do you agree with the way Richard characterises small and large law firms?

Unit 1

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 1.

2 Company law: company formation and management

1 Reading A: Introduction to company law

This text provides an introduction to the key terms used when talking about companies as legal entities, how they are formed and how they are managed. It also covers the legal duties of company directors and the courts' role in policing them.

Read the text below quickly, then match these phrases (a–f) with the paragraphs (1–6).

a directors' duties
b management roles
c company definition
d company health
e partnership definition
f company formation

1 A company[1] is a business association which has the character of a **legal person**, distinct from its officers and shareholders. This is significant, as it allows the company to own property in its own name, continue perpetually despite changes in ownership, and insulate the owners against **personal liability**. However, in some instances, for example when the company is used to perpetrate **fraud** or acts **ultra vires**, the court may 'lift[2] the **corporate veil**' and subject the shareholders to personal liability.

2 By contrast, a partnership is a business association which, strictly speaking, is not considered to be a **legal entity** but, rather, merely an association of owners. However, in order to avoid impractical results, such as the partnership being precluded from owning property in its own name, certain rules of partnership law treat a partnership as if it were a legal entity. Nonetheless, partners are not insulated against personal liability, and the partnership may cease to exist if a change in ownership occurs, for example when one of the partners dies.

3 A company is formed when a **certificate of incorporation**[3] is issued by the appropriate governmental authority. A certificate of incorporation is issued when the constitutional documents of the company, together with **statutory forms**, have been filed and a filing fee has been paid. The 'constitution' of a company consists of two documents. One, the **memorandum of association**[4], states the objects of the company and the details of its authorised capital, otherwise known as the **nominal capital**. The second document, the **articles of association**[5], contains provisions for the internal management of the company, for example shareholders' **annual general meetings**[6], or AGMs, and **extraordinary general meetings**[7], the **board of directors**, corporate contracts and loans.

4 The management of a company is carried out by its officers, who include a director, manager and/or company secretary. A director is appointed to carry out and control the day-to-day affairs of the company. The structure, procedures and work of the board of directors, which as a body govern the company, are determined by the company's articles of association. A manager is delegated

[1] (US) corporation
[2] (US) pierce
[3] (US) Generally no official certificate is issued; companies are formed when the articles/certificate of incorporation are filed (see footnote 4).
[4] (US) articles of incorporation *or* certificate of incorporation
[5] (US) bylaws
[6] (US) annual meetings of the shareholders
[7] (US) special meetings of the shareholders

supervisory control of the affairs of the company. A manager's duties to the company are generally more burdensome than those of the employees, who basically owe a duty of confidentiality to the company. A company's auditors are appointed at general meetings. The auditors do not owe a duty to the company as a legal entity, but, rather, to the shareholders, to whom the auditor's report is addressed.

5 The duties owed by directors to a company can be classified into two groups. The first is a **duty of care** and the second is a **fiduciary duty**. The duty of care requires that the directors must exercise the care of an ordinarily prudent and diligent person under the relevant circumstances. The fiduciary duty stems from the position of trust and responsibility entrusted to directors. This duty has many aspects, but, broadly speaking, a director must act in the best interests of the company and not for any collateral purpose. However, the courts are generally reluctant to interfere, provided the relevant act or omission involves no fraud, illegality or **conflict of interest**.

6 Finally, a company's state of health is reflected in its accounts[1], including its **balance sheet** and **profit-and-loss account**[2]. Healthy profits might lead to a **bonus** or **capitalisation issue**[3] to the shareholders. On the other hand, continuous losses may result in insolvency and the company going into **liquidation**.

[1] (US) financial statements
[2] (US) profit-and-loss statement *or* income statement
[3] (US) stock dividend

2 Key terms: Roles in company management

2.1 Some of the important roles in company management are discussed in Reading A above. Which roles are mentioned?

2.2 Here is a more comprehensive list of roles in company management. Match the roles (1–10) with their definitions (a–j).

1 auditor	**a** person appointed by a shareholder to attend and vote at a meeting in his/her place when the shareholder is unable to attend
2 company secretary	**b** director responsible for the day-to-day operation of the company
3 director	**c** person elected by the shareholders to manage the company and decide its general policy
4 liquidator	**d** person engaged in developing or taking the initiative to form a company (arranging capital, obtaining personnel, making arrangements for filing corporate documentation)
5 managing director	**e** person appointed by the company to examine the company's accounts and to report to the shareholders annually on the accounts
6 official receiver	**f** company's chief administrative officer, whose responsibilities include accounting and finance duties, personnel administration and compliance with employment legislation, security of documentation, insurance and intellectual property rights
7 promoter	**g** member of the company by virtue of an acquisition of shares
8 proxy	**h** officer of the court who commonly acts as a liquidator of a company being wound up by the court
9 receiver	**i** person appointed by creditors to oversee the repayment of debts
10 shareholder	**j** person appointed by a court, the company or its creditors to wind up the company's affairs

3 Listening A: Company formation

Lawyers play important roles in the formation of a company, advising clients which entities are most suited to their needs and ensuring that the proper documents are duly filed.

You are going to hear a conversation between an American lawyer, Ms Norris, and her client, Mr Herzog. The lawyer describes how a specific type of corporation is formed in the state of Delaware.

3.1 Listen to the conversation and tick the documents required for formation that the lawyer mentions.

1. DBA filing ☐
2. articles of incorporation ☐
3. stock ledger ☐
4. general partnership agreement ☐
5. stock certificates ☐
6. IRS and State S Corporation election ☐
7. bylaws ☐
8. organisational board resolutions ☐

3.2 Listen again and answer these questions.

1. According to the lawyer, what is the advantage of incorporating an entity in the state of Delaware?
2. What information is included in the articles of incorporation?
3. What happens at the first organisational meeting of a corporation?

3.3 Company types (USA) Look at this table, which provides information on the documents required to form and operate the different company types in the United States. Based on what you heard in Exercise 3.1, which type of business association was the lawyer discussing with her client?

US entities	Documents required for formation and operation
sole proprietorship	DBA filing
general partnership	General Partnership Agreement, local filings if partnership holds real estate
limited partnership	Limited Partnership Certificate, Limited Partnership Agreement
C corporation	Articles of Incorporation, Bylaws, Organisational Board Resolutions, Stock Certificates, Stock Ledger
S corporation	Articles of Incorporation, Bylaws, Organisational Board Resolutions, Stock Certificates, Stock Ledger, IRS and State S corporation election

3.4 Company types (UK) The table on the next page contains information about five types of common UK business associations, covering the aspects of liability of owners, capital contributions and management. (In many jurisdictions in the world, there are entities which share some or all of these characteristics.) Look at the table and decide which entity (a–e) is being described in each row (1–5).

a private limited company (Ltd)
b general partnership
c public limited company (PLC)
d limited partnership
e sole proprietorship

Entity	Liability of owners	Capital contributions	Management
1)	Unlimited personal liability for the obligations of the business.	Capital needed is contributed by sole proprietor.	Business is managed by the sole proprietor.
2)	Generally no personal liability of the members for obligations of the business.	No minimum share capital requirement. However, capital can be raised through the issuance of shares to members or through a guarantee.	Company is managed through its managing director or the board of directors acting as a whole.
3)	No personal liability; liability is generally limited to shareholder contributions (i.e. consideration for shares).	The minimum share capital of £50,000 is raised through issuance of shares to the public and/or existing members.	Company is managed by the board of directors; shareholders have no power to participate in management.
4)	Unlimited personal liability of the general partners for the obligations of the business.	Partners contribute money or services to the partnership; they share profits and losses.	The partners have equal management rights, unless they agree otherwise.
5)	Unlimited personal liability of the general partners for the obligations of the business; limited partners generally have no personal liability.	General and limited partners contribute money or services to the limited partnership; they share profits and losses.	The general partner manages the business, subject to any limitations of the Limited Partnership Agreement.

4 Reading B: A memorandum of association

An important document in company formation is the memorandum of association (UK) or articles/certificate of incorporation (USA). This document sets forth the objects of the company and its capital structure; as such, it represents a legally binding declaration of intent to which the members of the company must adhere.

4.1 Below is an extract from the articles of incorporation of a US company. Read through the extract quickly and tick the issues it addresses.

1 appointing members of the board of directors ☐
2 changing corporation bylaws ☐
3 procedures for holding a vote of the shareholders ☐
4 stipulations for keeping corporation records ☐

The power to alter, amend or repeal the bylaws or to adopt new bylaws shall be *vested in* the Board of Directors; *provided*, however, that any bylaw or amendment thereto as adopted by the Board of Directors may be altered, amended or *repealed* by a vote of the shareholders *entitled to* vote for the election of directors, or a new bylaw *in lieu thereof* may be adopted by vote of *such* shareholders. No bylaw which has been altered, *amended* or adopted by such a vote of the shareholders may be altered, amended or repealed by vote of the directors until two years shall have *expired* since such action by vote of such shareholders. [...]

The Corporation shall keep as permanent records minutes of all meetings of its shareholders and directors, a record of all action taken by the shareholders or the directors without a meeting, and a record of all actions taken by a committee of the directors in place of the Board of Directors on behalf of the Corporation. The Corporation shall also maintain appropriate accounting records. The Corporation, or its agent, shall maintain a record of its shareholders in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order, by class of shares, showing the number and class of shares held by each.

4.2 Read the extract again and decide whether these statements are true or false.

1 The board of directors only has the power to change the bylaws if the shareholders in turn have the power to amend any changes made by the board of directors.
2 The board of directors is proscribed at all times from changing any bylaw which has been altered by a vote of the shareholders.
3 Records must only be kept of decisions reached by shareholders and directors in the course of a meeting.
4 Records of the shareholders must list the number of shares they own.

proscribe
= prohibit, ban
prescribe
= stipulate

4.3 For each of these words or phrases, find the *italicised* word(s) in the extract that most closely matches its meaning.

1 passed	**3** instead	**5** cancelled	**7** given to
2 who have the right to	**4** on condition	**6** revised	**8** these

5 Language use: *Shall* and *may*

Read through the extract on page 23 again, noting how *shall* and *may* are used, and answer these questions.

1 Which of these words most closely matches the meaning of *shall* in each case?
a) will **b)** must
2 What do you notice about the use of *shall* in line 6?
3 Which of these words most closely matches the meaning of *may* in the text?
a) can **b)** could

In legal documents, the verb *shall* is mainly used to indicate obligation, to express a promise or to make a declaration to which the parties involved are legally bound. This use differs from that in everyday speech, where it is most often used to make offers (*Shall I open the window?*) or to refer to the future (*I shall miss you*), although this latter use is less frequent in modern English.

In legal texts, *shall* usually expresses the meaning of 'must' (obligation):

Every notice of the meeting of the shareholders ***shall*** *state the place, date and hour.*

or 'will' (in the sense of a promise):

The board of directors ***shall*** *have the power to enact bylaws.*

Shall can also be used in legal texts to refer to a future action or state:

... until two years ***shall*** *have expired since such action by vote of such shareholders.*

In everyday speech, this future meaning is commonly expressed using only the present perfect (*... until two years have expired ...*).

Another verb commonly found in legal documents is *may*, which generally expresses permission, in the sense of 'can' (this use is less common in everyday English):

... any bylaw or amendment thereto as adopted by the Board of Directors may be altered, amended or repealed by a vote of the shareholders.

In everyday English, *may* is sometimes used as a substitute for *might*, indicating probability (*He may want to see the document*).

Learners of legal English should be aware that the use of *shall* in legal texts has been criticised in recent years, particularly with regard to what some consider its inconsistent

and excessive use. Language reformers point out that in many instances, *shall* does not express obligation, but rather is used solely to give a text a 'legal feel'. This tendency, which can in part be attributed to the conservative nature of legal writing, can lead to undesirable consequences, ranging from legal disputes arising from the ambiguous use of *shall* in contracts to difficulties in translating English-language legislation into other languages. Furthermore, the fact that *shall* is often used in legal texts in ways which differ from general English usage serves to make these texts harder to understand and less transparent to the average person. For this reason, supporters of the Plain English Movement even recommend replacing *shall* with *must* to express obligation (see Unit 3). At the very least, learners of legal English should know about the issues surrounding the use of *shall* and exercise care when writing.

6 Listening B: Forming a business in the UK

You are going to hear a phone conversation in which a lawyer, Mr Larsen, discusses some of the characteristics of two business entities with Mr Garcia, a client who is interested in forming a company in the UK.

6.1 Listen to the phone conversation and decide whether these statements are true or false.

1 The client has not yet decided what type of company he wants to form.
2 The client has never founded a company before.
3 The lawyer points out that the two types of company differ with regard to the matter of personal liability.
4 The shares of a US C corporation can be freely traded on a stock exchange.
5 Both company types mentioned by the lawyer can be formed by a person who is a citizen of another country.
6 The UK company type discussed places a restriction on the number of people permitted to buy shares in the company.
7 The fastest way to form a company is to submit the documents directly to Companies House.

6.2 In the conversation, the lawyer compares and contrasts two company types. Complete the sentences below (1–4) using the phrases in the box (a–d).

a are like each other	**b** are similar to	**c** differs	**d** in both

1 C corporations ..... private limited companies in the UK in many ways, particularly in respect of liability.
2 Shareholders are not personally liable for the debts of the corporation ..... a C corporation and a private limited company.
3 In this respect, a private limited company ..... . Its shares are not available to the general public.
4 The two types of company ..... in that both can be founded by persons of any nationality, who need not be a resident of the country.

6.3 Compare and contrast two types of company from the table on page 23 using these phrases.

X differs from Y in that ...
X resembles Y in that ...

EXAMPLE: A sole proprietorship differs from a private limited company in that it is managed by the sole proprietor rather than by a managing director or a board of directors.

7 Speaking: An informal presentation: a type of company

When speaking briefly about a topic of professional interest, experienced speakers will organise their thoughts in advance. A simple but effective structure divides information into three parts:

1 introductory remarks **2** main points **3** concluding statement

The main points are also best limited to three, as this is easy to remember. Notes for a response to the exercise below might look like this:

Introductory remarks

A *publikt aktiebolag* is the closest Swedish equivalent to a public limited company – most common form for major international businesses in Sweden.

Main points

1 liability: no personal liability
2 management: board of directors (Swedish equivalent, *styrelsen*) has power to make decisions; shareholders don't participate in management
3 needed for formation: memorandum of association (*stiftelseurkund*) and articles of association (*bolagsordning*)

Concluding statement

An *aktiebolag* is similar to a public limited company, with the most significant difference being that its shares do not need to be listed on an exchange or authorised marketplace.

Which types of companies are there in your jurisdiction? Choose one and describe it as you would for a client from another country. In your description, refer to some of the features given in the UK company table on page 23. Tell your client which documents must be filed to complete the formation process. Wherever relevant, compare and contrast your company type with a UK business entity.

8 Reading C: Russian entity formation

Law firms often publish informative articles on their websites which they believe will be of interest to their clients. Typically, these articles deal with areas of the law in which the firm has particular expertise. The text on the next page, which appeared on the website of a US law firm, deals with entity formation in Russia, and contrasts a Wholly Foreign-Owned Entity (WFOE) with a representative office.

8.1 Read the first paragraph. Which three types of business enterprise are mentioned?

8.2 Read through the entire article and decide whether these statements are true or false.

1 The option of forming a WFOE to do business in Russia has existed for many years.
2 Establishing a representative office is not recommended for merchants unless they are primarily interested in engaging in marketing activities.
3 Since an OOO has the status of a legal person, it is fully liable for its own obligations, and the foreign entity is free from all liability.
4 Regarding employee permits, the same requirements apply for both business types.
5 The tax and reporting requirements connected with a WFOE are disadvantages that should be weighed against the advantage it offers with regard to the freedom to carry out business in Russia.

8.3 Is there a comparable WFOE in your jurisdiction? Describe its features with regard to the points listed in the table in the article.

One of the most common requests our law firm gets regarding Russia comes from a non-Russian company seeking assistance in setting up a Russian joint venture or a representative office. When we tell them in response to their queries that only rarely does it make sense to go into Russia with a joint venture or a representative office, they commonly respond either with surprise that there are other alternatives or by telling us that this is how their very well-run competitor entered the Russian market. When we explain that Russia now allows Wholly Foreign-Owned Entities (WFOE), they quickly realise the benefits of not getting enmeshed with a Russian joint-venture partner. However, the benefits of a WFOE over a representative office are more difficult to explain.

The purpose of this article and the accompanying table is to briefly compare the advantages and disadvantages of a representative office and of a limited liability company (known as an *Obschtschestvo s Ogranitschennoj Otvetstvennostju*, or OOO) wholly owned by a foreign entity in terms of those characteristics that are relevant for companies interested in establishing and running a business in Russia. At the outset, however, it must be made clear that if your intention is to buy or sell goods in Russia, you cannot legally go in as a representative office. A representative office is limited to representing or marketing for a foreign-owned entity. In the past, many foreign companies would go into Russia by way of a representative office and then conduct business within Russia, but only because they had no other real choice. Companies have that choice now.

Comparison	Representative office	Limited liability company (OOO)
Legal status	Not an independent legal entity. All property would be owned by the foreign (non-Russian) entity. Not allowed to conduct commercial activity, so it doesn't technically generate profits. Limited to negotiating contracts, marketing or conducting other supporting activities for the foreign entity.	Can act only through a manager authorised to act for and on behalf of the foreign entity pursuant to power of attorney. All the rights of a Russian company. Managing director elected by the foreign company can act on behalf of OOO without a power of attorney within the framework provided by Russian legislation, OOO corporate documents and agreements concluded between OOO and the director.
Liability	Foreign entity would be liable for acts of its representative office done pursuant to the power of attorney.	OOO is liable for its own obligations. The foreign entity's liability generally limited to its contribution to charter capital.
Charter capital	None	Approximately $330 minimum charter capital required
Fees and costs	$10,000–$18,000	$3,500–$6,500
Foreign employee issue	Foreign employees must obtain personal work permit.	In order to employ foreign employees, a company must obtain an employment permit. Afterwards, every foreign employee must obtain a personal work permit.
Taxation	Subject to payroll, retirement, road and social security taxes.	Subject to same taxes at same rates as representative office, but also subject to income tax, VAT (e.g. equipment shipped for sale to Russia is subject to VAT), property taxes and transportation taxes (if OOO owns vehicles). The foreign entity dividends received from OOO may be subject to either US or Russian taxation according to the Treaty signed between USA and Russia regarding double taxation.

In the course of deciding whether to establish a representative office or a WFOE, the investor must balance the convenience of a representative office with the ability to conduct business in Russia through a WFOE. A representative office in Russia can be opened and closed with relatively little formality. Since the office is not a Russian legal person, it is not subject to many of the burdensome regulations that apply to legally established Russian companies, such as tax and reporting requirements. However, the business activities of a representative office are severely restricted, to the point that it usually can do little more than act as a company's marketing arm in Russia. On the other hand, a WFOE entity in Russia is considered to be a legal person, and as such, it enjoys both the rights and obligations of any other Russian company. Thus the scope of business operations for a WFOE in Russia is nearly always equivalent to that of any other Russian company. But a WFOE in Russia is also subject to the same taxation, reporting and company regulation requirements of any Russian company. The burden of these obligations for a WFOE must be balanced against the freedom to conduct real business in Russia.

9 Reading D: Corporate governance

Lawyers often assist their clients in handling legal disputes involving corporate governance. The letter of advice below addresses one such dispute.

9.1 Read the first three paragraphs of the letter. What does the dispute specifically involve?

Re: Special shareholders' meeting of Longfellow Inc.

I have now had an opportunity to research the law on this point and I can provide you with the following advice.

Firstly, to summarise the facts of the case, a group of shareholders of Longfellow Inc. has filed an action in the district court seeking to set aside the election of the board of directors on the grounds that the shareholders' meeting at which they were elected was held less than a year after the last such meeting.

The bylaws of the company state that the annual shareholders' meeting for the election of directors be held at such time each year as the board of directors determines, but not later than the fourth Wednesday in July. In 2009, the meeting was held on July 17th. At the discretion of the board, in 2010 the meeting was held on March 19th. The issue in this case is whether the bylaws provide that no election of directors for the ensuing year can be held unless a full year has passed since the previous annual election meeting.

The law in this jurisdiction requires an 'annual' election of the directors for the ensuing 'year'. However, we have not found any cases or interpretation of this law which determine the issue of whether the law precludes the holding of an election until a full year has passed. The statutes give wide leeway to the board of directors in conducting the affairs of the company. I believe that it is unlikely that a court will create such a restriction where the legislature has not specifically done so.

However, this matter is complicated somewhat by the fact that there is currently a proxy fight underway in the company. The shareholders who filed suit are also alleging that the early meeting was part of a strategy on the part of the directors to obstruct the anticipated proxy contest and to keep these shareholders from gaining representation on the board of directors. It is possible that the court will take this into consideration and hold that the purpose in calling an early meeting was to improperly keep themselves in office. The court might then hold that, despite the fact that no statute or bylaw was violated, the election is invalid on a general legal theory that the directors have an obligation to act in good faith. Nevertheless, courts are usually reluctant to second-guess the actions of boards of directors or to play the role of an appellate body for shareholders unhappy with the business decisions of the board. Only where there is a clear and serious breach of the directors' duty to act in good faith will a court step in and overturn the decision. The facts in this case simply do not justify such court action and I therefore conclude that it is unlikely that the shareholders will prevail.

9.2 Read the whole letter and choose the best answer to each of these questions.

1 On which grounds did the shareholders file the action?
- **a** on the grounds of their rights as shareholders
- **b** on the grounds of a violation of the bylaws
- **c** on the grounds of an ongoing proxy fight
- **d** on the grounds of their lack of faith in the board of directors

2 What does the writer identify as the issue in the case?
- **a** whether the annual shareholders' meeting determines the term of the board of directors
- **b** whether the election of the board of directors requires a quorum
- **c** whether the annual shareholders' meeting must be held a full year after the last one
- **d** whether the bylaws define the term 'full year'

3 What does the writer say regarding earlier cases related to this one?
- **a** They provide for an analysis in favour of the shareholders.
- **b** They give the board of directors the freedom to run the company as they see fit.
- **c** They have merely provided an interpretation of the legislative intent.
- **d** They do not address the issue involved.

4 What does the writer conclude?
- **a** It is dubious that the shareholders will prevail.
- **b** The facts of the case do not support judicial intervention.
- **c** A court of appeal will only look at the facts of the case.
- **d** The board of directors has a duty to act in good faith.

9.3 Choose the best explanation for each of these words or phrases from the letter.

1 on the grounds that (line 5)
- **a** in the area of
- **b** on the basis of the fact that
- **c** despite the fact that

2 at the discretion of (line 9)
- **a** according to the decision of
- **b** through the tact of
- **c** due to the secrecy of

3 the ensuing year (line 11)
- **a** the past year
- **b** the present year
- **c** the next year

4 statutes give wide leeway (line 16)
- **a** statutes can easily be avoided
- **b** statutes allow considerable freedom
- **c** statutes restrict extensively

5 alleging (line 20)
- **a** stating without proof
- **b** making reference to
- **c** proposing

6 to act in good faith (line 26)
- **a** to act from a religious belief
- **b** to do something with honest intention
- **c** to plan for the future carefully

9.4 Answer these questions.

1. What do the bylaws of the company stipulate concerning the date of the election of company directors?
2. What do the shareholders claim was the reason why the annual shareholders' meeting was held early?
3. What role might the concept of 'good faith' play in the court's decision?

9.5 What is your opinion of the case? Do you think the shareholders' claim is justified?

9.6 In the letter, different verbs are used to refer to what the company bylaws and the relevant legislation say. Complete these phrases using the appropriate verbs from the letter.

1. The bylaws of the company ...
2. The law in this jurisdiction ...
3. The law ...

10 Text analysis: A letter of advice

10.1 Look at the letter on page 28 again and discuss these questions.

1. What is the purpose of the letter?
2. Who do you think might have requested it?
3. Looking at the letter carefully, what would you say is the function of each paragraph?

The text in Reading D represents a **letter of advice**, a type of text written by a lawyer for a client.

The function of a letter of advice is to provide an analysis of a legal problem so that the client can make an informed decision concerning a course of action. Another type of text which should be mentioned here because of its similarity to a letter of advice is a **legal opinion**. While the language of this type of text is similar, a legal opinion is generally much longer, as it entails thorough research and covers the issues in greater detail. A legal opinion also carries much more weight and greater potential liability for the lawyer or firm issuing it.

Regarding the contents, we can say that, in general, a letter of advice:

- identifies the legal issue at stake in a given situation and explains how the law applies to the facts presented by the client;
- indicates the rights, obligations and liabilities of the client;
- outlines the options the client has, pointing out advantages and disadvantages of each option;
- considers factors such as risk, delay, expense, etc., as well as case-specific factors;
- makes use of facts, relevant law and reasoning to support the advice.

The structure of the letter can be made clear by using standard signalling phrases. The table on page 31 provides examples of phrases used to structure the information in a text. These phrases serve as signals, pointing to information before it is presented, thus increasing the clarity of a text.

10.2 Read through the letter once again and look for 11 phrases with a signalling function. Add them where appropriate to this table.

Referring to the subject matter	*Thank you for instructing us in relation to the above matter. You have requested advice concerning ...* **1)** .....
Summarising facts	*Our opinions and advice set forth below are based upon your account of the circumstances giving rise to this dispute, a summary of which is as follows. Based on information provided to us, we understand that ...* **2)** .....
Identifying legal issue	*The legal issue seems to be ...* **3)** .....
Referring to relevant egislation/regulations	*The section which is relevant for present purposes provides that ...* *The section makes express reference to ...* *As the law stands at present, ...* **4)** ..... **5)** ..... **6)** .....
Referring to previous court decisions	*The court has held that ...* *We have (not) found cases or interpretation of this law which argue that ...*
Drawing conclusions	*We therefore believe that ...* **7)** ..... **8)** ..... **9)** ..... **10)** ..... **11)** .....
ndicating options	*In light of the aforesaid, you have several courses of action / alternatives / options open to you.*
Closing	*I await further instructions at your earliest convenience.* *Please contact us if you have any questions about the matters here discussed, or any other issues.*

11 Writing: A letter of advice

A client who is the managing partner of a Mexican energy-drink firm has asked you for nformation about establishing a business in Russia, with a view to launching a chocolate-lavoured energy drink called Xocoatl.

rite a letter of advice in which you should:

- say what a WFOE is;
- list advantages and disadvantages connected with it;
- recommend the best course of action for his firm.

Before you write, consider the purpose, the expected contents and the standard structure of a letter of advice. Refer back to Reading C for information about WFOEs in Russia and make use of signalling phrases from the table above to help structure the information in your letter.

Unit 2

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 2.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 stipulate specify proscribe prescribe
2 succeeding elapsing ensuing subsequent
3 responsibility duty discretion obligation
4 prior previous prerequisite preceding
5 margin leeway latitude interpretation
6 preclude permit forestall prevent

2 Vocabulary: word choice These sentences deal with company formation and management. In each case, choose the correct word or phrase to complete them.

1 The constitution of a company *comprises / consists / contains* of two documents.
2 The memorandum of association *states / provides for / sets up* the objects of the company and details its authorised capital.
3 The articles of association contain *arguments / provisions / directives* for the internal management of a company.
4 The company is governed by the board of directors, whilst the day-to-day management is delegated *upon / to / for* the managing director.
5 In some companies, the articles of association *make / give / allow* provision for rotation of directors, whereby only a certain portion of the board must retire and present itself for re-election before the AGM.
6 Many small shareholders do not bother to attend shareholders' meetings and will often receive proxy circulars from the board, seeking authorisation to vote *on the basis of / in respect of / on behalf of* the shareholder.

3 Word formation Complete this table by filling in the correct noun or verb form. Underline the stressed syllable in each word with more than one syllable.

Verb	Abstract noun	Personal noun
administrate[1]	administration	administrator
	audit	
	liquidation	
perpetrate		
	appointment	
assume		
authorise		
	formation	
issue		
omit		
provide		
	redemption	
require		
	resolution	
transmit		

[1] (US) administer

4 Vocabulary: prepositional phrases These prepositional phrases, which are common in legal texts, can all be found in Reading C. Match the prepositional phrases (1–4) with their definitions (a–d).

1 in terms of	**a** 1) for the purpose of; 2) by the route through
2 in the course of	**b** as an answer to; in reply to
3 by way of	**c** 1) with respect or relation to; 2) as indicated by
4 in response to	**d** while, during

5 Vocabulary: prepositional phrases Complete these sentences using the prepositional phrase from Exercise 4 that best fits in each one. For one of the sentences, there is more than one correct answer.

1 In the course... choosing the name of the company, a number of matters must be considered.
2 Confidential information acquired ..... one's directorship shall not be used for personal advantage.
3 I would advise that members of your project group formalise your relationship ..... a partnership agreement, incorporation or limited liability company.
4 This form of corporation is often considered to be the most flexible body ..... corporate structure.
5 Our company formations expert is unable to provide advice ..... your query, as there are a number of factors which need to be taken into account which do not relate directly to his area of expertise.
6 The relationship between management and boards of directors at US multinational companies has been changed dramatically through a series of corporate governance initiatives begun ..... corporate scandals, the Sarbanes-Oxley Act and other requirements.
7 Shareholders and other investors in corporations tend to view corporate governance ..... the corporation's increasing value overtime.
8 Regular and extraordinary board meetings may be held by telephone, video-conference and ..... written resolutions.

6 Verb–noun collocations Match each verb (1–5) with the noun it collocates with (a–e) in Reading D. If you have difficulty matching them, look back at the letter.

1 violate	**a** affairs
2 call	**b** representation
3 overturn	**c** a meeting
4 gain	**d** a decision
5 conduct	**e** a law

7 Collocations with *file* Decide which of these words and phrases can go with the verb *to file*. You may need to consult a dictionary.

an action an AGM an amendment an appeal a breach a brief charges a claim a complaint a debt a defence a dispute a document a fee an injunction a motion provisions a suit

3 Company law: capitalisation

1 Reading A: Introduction to company capitalisation

Company law is a very wide area. The text below serves as an introduction to the legal terminology and issues regarding how companies raise capital in the UK.

Read through the text quickly and decide whether these statements are true or false.

1. The shares of a company which are actually owned by shareholders are known as authorised share capital.
2. Share capital is subdivided into two basic types of share: ordinary and preference shares.
3. People who already own shares possess the right of first refusal when new shares are issued.
4. In addition to share capital, loan capital is another means of financing a corporation.

The term **capitalisation** refers to the act of providing capital for a company through the issuance of various securities. Initially, company capitalisation takes place through the issuance of shares as authorised in the **memorandum of association**[1]. The **authorised share capital**[2], the maximum amount of share capital that a company can issue, is stated in the memorandum of association, together with the division of the share capital into shares of a certain amount (e.g. 100 shares of £1). The memorandum of association also states the names of the **subscribers**. The minimum share capital for a public limited company in Great Britain is £50,000. **Issued share capital**, as opposed to authorised share capital, refers to shares actually held by shareholders. Accordingly, this means that a company may authorise capital in excess of the mandatory minimum share capital but refrain from issuing all of it until a later date – or at all.

The division of share capital usually entails two classes of shares, namely **ordinary shares**[3] and **preference shares**[4]. The ordinary shareholder has voting rights, but the payment of **dividends** is dependent upon the performance of the company. Preference shareholders, on the other hand, receive a fixed dividend irrespective of performance (provided the payment of dividends is legally permitted) before the payment of any dividend to ordinary shareholders, but preference shareholders normally have no voting rights. There is also the possibility of **share subdivision**[5], whereby, for example, one ten-pound share is split into ten one-pound shares, usually in order to increase marketability. The reverse process is, appropriately enough, termed **share consolidation**[6].

Shares in British companies are subject to **pre-emption rights**[7], whereby the company is required to offer newly issued shares first to its existing shareholders, who have the right of 'first refusal'. The shareholders may waive their pre-emption rights by **special resolution**.

[1] (US) articles of incorporation
[2] (US) authorized shares
[3] (US) common shares
[4] (US) preferred shares
[5] (US) stock split
[6] (US) reverse (stock) split
[7] (US) preemptive right

A feature of public companies is that the shares may be freely traded. Shares are normally sold to existing shareholders through a **rights issue**, unless pre-emption rights have been waived. Even here, though, new shares are not always offered in the first instance to the general public, but rather may be sold to a particular group or individuals (a directed placement).

Share capital is not, of course, the only means of corporate finance. The other is **loan capital**, typified by **debentures**. The grant of security for a loan by giving the creditor the right to recover his capital sum from specific assets is termed a **fixed charge**[1]. Companies may also borrow money secured by the company's assets, such as stock in trade. This arrangement is known as a **floating charge**.

[1] (US) security interest in specific assets (also *chattel mortgage* prior to the Uniform Commercial Code)

2 Key terms: Shares

2.1 Match these terms related to shares (1–8) with their definitions (a–h).

1 authorised share capital
2 dividend
3 issued share capital
4 ordinary share
5 pre-emption rights
6 preference share
7 rights issue
8 subscriber

a someone who agrees to buy shares or other securities
b offer of additional shares to existing shareholders, in proportion to their holdings, to raise money for the company
c type of share in a company that entitles the shareholder to voting rights and dividends
d entitlement entailing that, when new shares are issued, these must first be offered to existing shareholders in proportion to their existing holdings
e maximum number of shares that a company can issue, as specified in the firm's memorandum of association
f proportion of authorised capital which has been issued to shareholders in the form of shares
g type of share that gives rights of priority as to dividends, as well as priority over other shareholders in a company's winding-up
h part of a company's profits paid to shareholders

2.2 Underline the words (1–5) in the text. Then match them with their synonyms (a–e).

1 term	**a** to be an example of
2 to entail	**b** to give up
3 to waive	**c** name
4 to typify	**d** to regain
5 to recover	**e** to involve

2.3 According to the text, the minimum amount of share capital of a public limited company in the UK is £50,000. Do similar restrictions apply in your jurisdiction? If so, what are they?

3 Language use A: Contrasting information

Look at this sentence from Reading A that defines *issued share capital*:

Issued share capital, ***as opposed to*** *authorised share capital, refers to shares actually held by shareholders.*

When describing a new idea, it can be contrasted with an idea that your listener or reader is already familiar with, using the prepositional phrase *as opposed to.* The prepositions *unlike* and *in contrast to* can be used in the same way:

Issued share capital, ***unlike*** *authorised share capital, refers to shares actually held by shareholders.*

Issued share capital, ***in contrast to*** *authorised share capital, refers to shares actually held by shareholders.*

All three of these prepositional phrases can also appear at the beginning of the sentence if the previously defined term immediately follows them:

As opposed to / Unlike / In contrast to *authorised share capital, issued share capital refers to shares actually held by shareholders.*

They can also be used when defining two new terms at the same time. In such a case, however, it is necessary to insert *which* in the following way:

Issued share capital refers to shares actually held by shareholders, ***as opposed to / unlike / in contrast to*** *authorised share capital,* ***which*** *refers to the maximum amount of share capital that a company can issue.*

Or:

As opposed to / Unlike / In contrast to *authorised share capital,* ***which*** *refers to the maximum amount of share capital that a company can issue, issued share capital refers to shares actually held by shareholders.*

Read the information in the table below about the two basic classes of shares: ordinary shares and preference shares. Using the prepositional phrases explained above, make sentences contrasting the two share types.

EXAMPLE:

1 Unlike ordinary shares, preference shares do not usually entitle the shareholder to vote.
In contrast to ordinary shares, which entitle the shareholder to vote, preference shares do not usually give such a right to the shareholder.

	Ordinary shares	Preference shares
1	standard shares with voting rights	usually no voting rights
2	potential to give the highest financial gains; pro-rata right to dividends	have a fixed dividend; shareholder has no right to receive an increased dividend based on increased business profits
3	bear highest risk	low risk; rights to their dividend ahead of ordinary shareholders if the business is in trouble
4	ordinary shareholders are the last to be paid if the company is wound up	preference shareholders are repaid the par value of shares ahead of ordinary shareholders if the company is wound up

4 Listening A: A rights issue

Lawyers with expert knowledge of corporate finance are often asked to explain complex matters in simple terms to company members or to shareholders. This dialogue takes place at a seminar held at a large law firm specialising in capitalisation matters. A member of a shareholders' association [Ms Siebert] is asking a corporate finance expert [Mr Young] to explain a rights issue, one of the key terms in Reading A.

4.1 Listen to the dialogue and tick the points Ms Siebert asks about.

1. The purpose of a rights issue ☐
2. The procedure for issuing shares ☐
3. The reason why shares are issued to existing shareholders ☐
4. The meaning of the term *pre-emption right* ☐
5. What new shares cost ☐
6. The reason why new shares are discounted ☐
7. Whether it is necessary for shareholders to buy the newly issued shares ☐
8. How shareholders respond to rights issues ☐

4.2 Listen again and answer these questions.

1. What does the speaker mean when he says that new shares are 'offered proportionally'?
2. According to Mr Young, why would shareholders want to take up their pre-emption right?
3. Why are the new shares offered to shareholders at a price lower than the market price?
4. When is a share issue said to be 'fully subscribed'?
5. What does Mr Young say about shareholders' reactions to rights issues?

5 Reading B: Shareholders and supervisory boards

The excerpt below and on page 38 deals with the topics of shareholders' rights and the role of the supervisory board. It is part of the required reading in a comparative law course dealing with European and Anglo-American company management structures.

5.1 Read through the excerpt quickly and answer these questions.

1. What basic rights does a shareholder possess?
2. What options does a dissatisfied shareholder have in the Anglo-Saxon system?
3. What is meant by the concepts of the one-tier board and the two-tier board? (Note: the word *tier* means 'rank' or 'level'.) Which do you think is the best model of organisation?

Shareholders

A Shareholders are the owners of the company's assets. Normally, ownership of an asset entails a number of rights: the right to determine how the asset is to be managed; the right to receive the residual income from the asset; and the right to transfer ownership of the asset to others. The last two clearly apply to shareholders, but what of the first? Can shareholders exercise control if the directors fail to protect their interests?

B Two factors keep them from doing so. Both are related to the spreading of ownership needed for *risk diversification* in large corporations. In return for the privilege of limited liability under law, shareholders' powers are generally restricted. There is the AGM to approve the directors' report and accounts, elect and re-elect the board, and vote on such issues as allowed for in company legislation. But, apart from this, shareholders' rights are limited to the right to sell the shares. They have no right to interfere in the management of the company. *Awkward questions* can be asked at the annual meeting, but the chairman of the board usually holds enough proxy votes to hold off any challenge.

C The second factor is in many ways more fundamental. An essential requirement for the exercise of effective control is the possession of an adequate *flow of information*. As outsiders, shareholders *face* considerable *obstacles* in obtaining good information. Then there is *the free-rider issue*. Any one small shareholder investing in the information needed to monitor management will bear all of the costs, whereas shareholders accrue benefits as a group. Moreover, co-ordination of monitoring efforts is not easy to arrange. Often it is easier for the shareholder to sell the shares, and thus *vote with one's feet*.

D In short, someone with ownership rights in a company can express their disappointment with the company's performance by either getting rid of their shares or in some way expressing their concern Hirschman (1970) called this the dichotomy between 'exit' and 'voice'. Where there are obstacles to the exercise of voice, the right of exit and transferring ownership to another party becomes not so much the accompaniment but the substitute for the other two components of ownership rights.

Supervisory board

E Not all market systems prevent shareholders from directly influencing management. In Germany, for example, the use of 'voice' is encouraged through the accountability arrangements of the *Aufsichtsrat* (supervisory tier). In the Germanic countries, there is a formal separation of executive and supervisory responsibilities. With the Anglo-Saxon one-tier board, managing executives are also represented on the board, and all directors, executives as well as non-executives, are appointed by the controlling shareholders and must *answer to the annual meeting*. A two-tier board consists of an executive board and a supervisory board. The executive board includes the top-level management team, whereas the supervisory board is made up of outside experts, such as bankers, executives from other corporations, along with employee-related representatives. There is reliance on the supervisory board for overseeing and disciplining the management as well as for *co-operative conflict resolution* between shareholders, managers and employees.

F This control function has a broader setting than in Anglo-Saxon countries, for in the Germanic countries, the supervisory boards of large companies are legally bound to incorporate specific forms of employee representation. Under co-determination laws, some corporations with at least 500 employees, and all those with more than 2,000 employees, must allow employees to elect one half of the members of the supervisory board. Co-determination rules cover the supervisory board, the functions of which are to control and monitor the management, to appoint and dismiss members of the management board, to fix their salaries, and to approve major decisions of the management board. In 1998, the power to appoint auditors was vested with the supervisory board (Organisation for Economic Co-operation and Development (OECD), 1998).

G How effective is this 'voice'? Obviously, it allows a *participatory framework* between shareholders, managers and employees under the co-determination principle, but the supervisory-board system also is designed for overseeing and constraining management. The OECD argues that 'the degree of monitoring and control by the supervisory board in the German two-tiered board system seems to be very limited in good times, while it may play a more important role when the corporation comes under stress'. Of course, the same is true of Anglo-Saxon boards; they exert more authority in a crisis, too. But the boards in Anglo-Saxon countries have not been notably successful in preventing crises. Does the Germanic-type system of board structure do better? There is not much evidence on this point. Some argue that the system encourages worker commitment to the firm and reduces day-to-day interference in management decisions, allowing both to get on with the job. Others consider that the system encourages 'cosiness', with bad strategic decisions internalised rather than *subjected to the public gaze* as occurs when the 'exit' option is followed.

5.2 Read the excerpt again carefully. In which paragraph (A–G) are these things mentioned? Some may be found in more than one paragraph.

1 some stipulations of co-determination laws
2 the functions of supervisory boards in Germanic countries
3 two options open to a shareholder when dissatisfied with management
4 activities carried out at the annual general meeting
5 opinions on effectiveness of the two-tiered system in times of crisis
6 the difficulty of co-ordinating management monitoring efforts
7 three rights to which the owner of an asset is generally entitled
8 comparison of the composition of executive board and supervisory board

5.3 In your own words, explain to a partner the meaning of these expressions (in italics in the excerpt).

1 risk diversification
2 awkward questions
3 flow of information
4 face ... obstacles
5 the free-rider issue
6 vote with one's feet
7 answer to the annual meeting
8 co-operative conflict resolution
9 participatory framework
10 subjected to the public gaze

6 Language use B: Common collocations (verb plus noun)

Look at these verb–noun collocations from the text on pages 37–38.

*Can shareholders **exercise control** if the directors fail to protect their interests?*

*In return for the privilege of limited liability under law, shareholders' **powers** are generally **restricted**.*

*Any one small shareholder investing in the information needed to monitor management will bear all of the costs, whereas shareholders **accrue benefits** as a group.*

*Co-determination rules cover the supervisory board, the functions of which are to control and monitor the management, to appoint and **dismiss members** of the management board, ...*

6.1 Match the verbs (1–4) with their definitions (a–d).

1 exercise (control)
2 restrict (powers)
3 accrue (benefits)
4 dismiss (members)

a 1) to remove someone from their job, usually because they have done something wrong; 2) to cease to consider, to put out of judicial consideration
b to increase in number or amount over a period of time, especially in a financial sense
c to make use of / apply something
d to limit someone or something

6.2 Match the verbs in Exercise 6.1 (1–4) with the nouns in the box with which they collocate. Some nouns can go with more than one verb.

access	authority	benefits	capital	a case	caution	a charge	a claim
control	an employee	force	freedom	influence	interest	power	pressure
profits	restraint	revenue	rights	sales	spending		

EXAMPLE: 1 exercise: *authority, caution, ...*

6.3 Complete these sentences using *exercise, restrict, accrue* or *dismiss.*

1. A motion was filed by the Board of Directors to ..... the case.
2. The Chairman warned that if investors were asked for more money, they might ..... their option to sell their shares.
3. The Chief Executive resigned when the board tried to ..... greater control over the company's bankruptcy plan.
4. The company is expected to ..... its spending while its markets remain weak.
5. Financial benefits ..... to the owners and operators of the factories, as well as to the shareholders.
6. A company spokeswoman advised shareholders to ..... caution in their share dealings until a further announcement is made.
7. One important Commercial Code provision may ..... some of the freedom of directors to grant options without shareholder approval.
8. The annual general meeting has authority to draw up or amend the constitution and to elect or ..... member directors of the Board.

7 Writing: Summarising

The ability to summarise well is essential for legal writing; a lawyer will need to summarise the facts of a case, provide an overview of the legislation in a particular area, or characterise the viewpoints of others in respect of a legal issue.

Summarising involves expressing the ideas of another in your own words, usually in a shorter form, including only the key ideas and the main points that are worth noting.

At the same time, however, a summary should faithfully represent the standpoint and emphasis of the original source, while remaining neutral and impartial in tone.

How to summarise

- Read the text to be summarised at least twice.
- If possible, identify the main sentence of every paragraph; if it expresses the meaning of the paragraph, it can serve as a summary of that paragraph.
- Look for key points or any important distinctions which form the framework of the idea.
- Express those key points or distinctions in your own words.

A client of yours who is interested in investing in a German company has asked you to explain the differences between the one-tier corporate management system characteristic of Anglo-Saxon countries and the two-tier corporate management system found in Germanic countries. Write an email to your client summarising the differences. Refer to Reading B for information.
In your email, you should:

- divide the text into three distinct parts: an opening statement of the reason for writing; the body of the email presenting the main points; and a conclusion offering to provide further help or information if required;
- make use of the words and expressions for signalling contrast introduced earlier in the unit.

8 Listening B: Plain language

Lawyers often have to explain the meaning of a legal document to a client in plain language. This is due in part to the fact that legal texts have traditionally been written in a style that is difficult for non-lawyers to understand. You are going to hear a conversation between an Australian lawyer, Mr Mansfield, and his client, Ms Saito, about provisions concerning capitalisation.

8.1 Before you listen, discuss these questions.

1. Do you have any difficulties with legal language? Which do you consider more difficult: reading or writing legal English?
2. Think about the style of legal documents written in your native language and those written in English – are they equally difficult for non-lawyers to understand?

8.2 Listen and decide whether these statements are true or false.

1. The client finds most legal texts accessible because her English is quite good.
2. The lawyers at Mr Mansfield's firm have received instruction in clear drafting techniques.
3. The lawyer points out that a national policy regarding plain-language use has been implemented in his country.
4. The lawyer agrees in part with some of the arguments presented by opponents of the Plain Language Movement.

8.3 Listen again and answer these questions.

1. What is the Plain Language Movement?
2. Why do you think there might be some opposition to it?
3. What is the point Mr Mansfield makes about legal terms in legal documents?

Text analysis: Understanding legalese

Legalese – the special style of language used in legal documents – often poses problems for those unfamiliar with it, such as non-lawyers (clients). However, non-native English-speaking lawyers may also find legalese difficult to read. An awareness of some of the typical features of this writing style can make it easier to understand texts of this kind. Some of the features of legalese are:

- **lengthy and complex sentences**
  Several clauses are joined together with commas or the co-ordinators *and/but*.
- **archaic words and expressions**
  Words formed with *here-* and *there-* or words like *such, said, same, aforesaid* are used.
- **passive constructions**
  Passive constructions are common, e.g. *All assets shall be distributed ...* By whom? No agent is mentioned, thus highlighting the action to be carried out and not the person who does it.

9.1 This is an excerpt from provisions regulating the capitalisation of a corporation, written in legalese. Read it, noticing the lengthy and complex sentences. Then underline the passive verbs and circle any archaic words and expressions.

Par-value cumulative preferred shares and no-par-value common shares

1 The maximum number of shares of stock of the Corporation that may be issued is 25,000 of which 5,000 shares shall have a par value of $50 each and 20,000 shares shall be without par value.

2 The stated capital of the Corporation shall be at least equal to the sum of the aggregate par value of all issued shares having par value, plus the aggregate amount of consideration received by the Corporation for the issuance of shares without par value, plus such amounts as, from time to time, by resolution of the Board of Directors may be transferred thereto.

3 The shares shall be divided into preferred, to consist of 5,000 shares having a par value, and common, to consist of 20,000 shares without par value.

4 The holders of the preferred shares shall be entitled to cumulative dividends thereon at the rate of 6 per cent per annum on the par value thereof, and no more, when and as declared by the directors of the Corporation, payable semi-annually on the first days of January and July in each year.

5 Such dividends shall cumulate on such payment dates and no dividends shall be paid to, or set apart for payment to, common shareholders unless all past cumulated dividends on the preferred shares shall first have been paid, or declared and set apart for payment.

6 All remaining profits which the directors may determine to apply in payment of dividends shall be distributed among the holders of common shares exclusively.

9.2 For each instance of the word *such* in the text above, suggest a more natural-sounding alternative.

9.3 Match these words beginning with *there-* (1–6) with their equivalents (a–f). The first three occur in the text above.

1 thereto	**a** of it/them
2 thereon	**b** on it/them
3 thereof	**c** to it/that
4 therewith	**d** for it/that
5 therefor	**e** with that
6 therein	**f** in or into a particular place or thing

therefor = for it, for that
therefore = consequently

9.4 Complete the sentences below and on the next page using the words in the box

therewith	thereof	thereof	therefor	therein	thereon	thereto

1 Each partner shall maintain both an individual drawing account and an individual capital account; into the capital account shall be placed that partner's initial capitalisation and any increases ..... .
2 Every issuer must comply in all respects with the provisions, including all filing and notice deadlines ..... .
3 Her experience in corporate finance includes representing banks and other financial institutions in numerous secured financings, including drafting and negotiating credit agreements and security documents in connection ..... .

4 The Chair of the Committee shall, in consultation with the other members of the Committee and appropriate officers of the Company, be responsible for calling meetings of the Committee, establishing the agenda ..... , and supervising the conduct ..... .

5 The circular prescribes requirements for the accounting and reporting of interest on loans and other interest-bearing assets and for the capitalisation of interest ..... .

6 The memorandum of the company, together with a translation ..... , if any, certified and translated as prescribed in regulation 4, shall be lodged with the Registrar.

10 Speaking: Paraphrasing and expressing opinions

10.1 Working with a partner, take turns rephrasing the sentences from the text on page 42 in your own words as if you were explaining their content to a client. You may want to break them into shorter sentences and turn passive constructions into active ones (e.g. instead of *shares may be issued,* say *the corporation may issue shares*).

EXAMPLE:

(1) *A corporation can issue no more than 25,000 shares. Five thousand of these are worth $50 each and the remaining 20,000 have no par value.*

10.2 When expressing an opinion, it is common to begin the statement with a phrase signalling that it is an opinion. Read the transcript of Listening B on page 281 and underline the phrases the speakers use to signal an opinion.

10.3 Complete the phrases below using the words in the box.

ask	concerned	firmly	me	mind	my	opinion	point	see	seems	think	would

1 In my ..... , ...
2 The way I ..... it, ...
3 To my ..... , ...
4 In ..... view, ...
5 If you ..... me, ...
6 From my ..... of view, ...
7 As far as I'm ..... , ...
8 I .....
9 It ..... to me that ...
10 I ..... believe ...
11 For ..... , ...
12 I ..... argue that ...

10.4 Discuss this topic with a partner. Whenever possible, make use of phrases for expressing opinions.

Legal language differs greatly from everyday speech and writing. Do these differences lead to clearer and more objective communication, as lawyers generally claim, or do they actually have the opposite effect?

11 Reading C: New legislation – share capital developments in Bulgaria

The text on the next page, from the website of a large international law firm, deals with a recent change in Bulgarian legislation concerning share capital.

11.1 Read through the text quickly and answer these questions.

1 What does the new law specify?
2 What kind of company does it apply to?

The minimum share capital requirement for establishing a limited company in Bulgaria has been almost entirely abandoned.

The general view amongst lawyers in Bulgaria has been that, from the creditors' perspective, a company's registered capital provides some *measure of creditworthiness*. That view was the basis for a number of statutory rules meant to protect such expectations; for example, rules:

- seeking to ensure that there is a certain minimum share capital as a prerequisite to setting up a company; and
- prohibiting companies from granting financial assistance to shareholders and prohibiting shareholders from receiving *pecuniary benefits* from the company other than dividends and liquidation quotas.

The share capital requirements, as well as the financial assistance and capital maintenance rules, are different for the two major types of companies limited by shares under Bulgarian law – the limited company and the joint stock company.

Share capital requirements

The minimum share capital needed to set up a limited company was BGN 5,000 (approx. EUR 2,600). This threshold was regarded by some experts as hindering entrepreneurial activity, since it might prevent those lacking such funds from starting to offer their services or products on the market.

In order to promote the activities of small and medium-sized businesses, in October 2009, legislation was enacted reducing the minimum share capital for limited companies to the symbolic sum of BGN 2 (approx. EUR 1). When proposing the new share capital threshold before the Parliament, the government stated that a high minimum share-capital requirement would not protect creditors. Reference was made to a survey by the World Bank providing statistical evidence that the average sum a creditor actually recovers in an insolvency is not dependent on whether the insolvent debtor is from a country with high minimum share-capital requirements or from a country where no such requirements exist.

In reality, when extending credit, professional creditors do not rely on the registered capital of debtor companies, but rather on their assets, and such creditors would usually require some security in the company's assets. The existence of registered capital may even be misleading if that capital has been extracted or eroded as a result of unprofitable trading or other business events and if the debtor company has no valuable assets. Reliance on the registered share capital in such a case may be a poor substitute for the creditor requiring truly effective security. In this sense, the minimum share-capital requirement, when regarded as a means to protect creditors, *is something of an anachronism*.

The share capital for joint stock companies in Bulgaria must be at least BGN 50,000 (approx. EUR 26,000). Although the logic behind the above considerations is equally applicable to joint stock companies, it is not possible to abandon this higher share-capital requirement because it is mandated by the Second EU Company Law Directive, and Bulgaria has no discretion over whether to adopt it or not. Indeed, there are even higher minimum thresholds set for certain regulated businesses, such as banks, insurance companies, pension funds, etc.

Prohibition on financial assistance and capital maintenance rules

Joint stock companies are subject to certain capital maintenance rules, and there is an absolute prohibition on such companies granting loans or providing security for the acquisition of their own shares by a third party. That prohibition was imposed by way of implementation of the EU Second Company Law Directive rules in Bulgaria. Although, at the EU level, *the prohibition was relaxed* by the subsequent Directive 2006/68/EC, Bulgaria has not yet availed itself of the option to impose, in turn, less strict rules on financial assistance.

There is no similar prohibition on financial assistance or explicit capital maintenance rules with respect to limited liability companies. However, such a prohibition and such rules may arguably be construed from the express statutory provisions, which:

- prohibit shareholders from claiming back their capital contributions while the limited company is still *a going concern*; and
- limit the rights of shareholders vis-a-vis the limited company to dividends and liquidation quotas (should the company be wound up).

It remains unclear whether the above rules aim to preserve (i) the company's assets as a whole or (ii) its registered share capital only. The new minimum share-capital requirement of EUR 1 for limited companies has rendered any speculation on option (ii) pointless.

Investors are well advised to bear in mind the capital (and assets) maintenance principles when structuring a transaction between a Bulgarian limited company and its shareholders.

11.2 Read the text again and decide whether these statements are true or false.

1 One reason for lowering the minimum share-capital requirement was to encourage business activity.
2 A study demonstrated that there is a direct relation between the amount of minimum share capital required to establish a company and the amount of money recovered by creditors.
3 Bulgaria may also reduce the relatively high share-capital requirement for joint-stock companies in future.
4 There is no express provision that prohibits limited liability companies from granting a loan to a third party to buy their own shares, but the law can be interpreted as prohibiting such actions.
5 The article was written to inform prospective Bulgarian investors of the changed share capital requirements.

11.3 Discuss these questions.

1 Has similar legislation been enacted in your own jurisdiction?
2 Can you think of any examples of other laws passed recently in your jurisdiction concerning company capitalisation?

11.4 Explain the meaning of these phrases (in italics in the text) in your own words.

1 measure of creditworthiness
2 pecuniary benefits
3 is something of an anachronism
4 the prohibition was relaxed
5 a going concern

11.5 Complete the phrases below from the text using the prepositions in the box.

by	by	from	in	on	on	to	to	under

1 ... as a prerequisite ..... setting up a company ...
2 ... prohibiting companies ..... granting financial assistance ..... shareholders ...
3 ... two major types of companies limited ..... shares ..... Bulgarian law ...
4 ... creditors would usually require some security ..... the company's assets.
5 Reliance ..... the registered share capital ...
6 ... it is mandated ..... the Second EU Company Law Directive ...
7 ... there is an absolute prohibition ..... such companies granting loans ...

Unit 3

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 3.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 asset dividend equity share
2 irrespective of regardless of conversely despite
3 discretionary mandatory obligatory compulsory
4 entail suggest involve imply
5 consequently therefor therefore accordingly
6 relinquish cede waive postpone

2 Use of prepositions Complete the sentences below using the prepositions in the box. The sentences are taken from texts in this unit.

by for from in into of on through to under with

1 *Initially, company capitalisation takes place through the issuance of shares.*
2 A company may authorise capital in excess ..... the mandatory minimum share capital but refrain ..... issuing all of it until a later date – or at all.
3 In return ..... the privilege of limited liability ..... law, shareholders' powers are generally restricted.
4 Someone with ownership rights ..... a company can express their disappointment ..... the company's performance by either getting rid of their shares or in some way expressing their concern.
5 With the Anglo-Saxon one-tier board, managing executives are also represented ..... the board, and all directors, executives as well as non-executives, are appointed ..... the controlling shareholders and must answer ..... the annual meeting.
6 The shares shall be divided ..... preferred, to consist of 5,000 shares having a par value, and common, to consist of 20,000 shares without par value.

3 Adjective formation Add the prefixes *in–, ir–, il–, ab–* or *un–* to each of these words to form its opposite.

1 dependent independent
2 likely
3 respective
4 legal
5 normal
6 limited
7 restricted
8 direct
9 formal
10 comparable

4 Word formation and meaning The noun forms of the verbs in the table appear in Readings A–C. First match the verbs (1–9) with their definitions below (a–i). Then complete the table with the abstract noun form. Consult a dictionary if necessary.

Verb	Abstract noun
1 issue *e*	issuance
2 pre-empt	
3 refuse	
4 consolidate	
5 divide	
6 resolve	
7 diversify	
8 amend	
9 rely (on)	

a to become more varied or different
b to change the words of a text, typically a law or a legal document
c to make a decision formally
d to combine several things, especially businesses, so that they become more effective
e to produce or provide something official
f to do or say something before someone so that you make their words or actions unnecessary or ineffective
g to separate into parts or groups
h to need a particular thing or the help and support of someone or something in order to continue, to work correctly or to succeed
i to say that you will not do or accept something

5 Understanding legalese Summarise this text in one sentence.

Please accept without obligation, express or implied, these best wishes for an environmentally safe, socially responsible, low-stress, non-addictive and gender-neutral celebration of the winter solstice holiday as practised within the most enjoyable traditions of the religious persuasion of your choice (but with respect for the religious or secular persuasions and/or traditions of others, or for their choice not to practise religious or secular traditions at all) and further for a fiscally successful, personally fulfilling and medically uncomplicated onset of the generally accepted calendar year (including, but not limited to, the Christian calendar, but not without due respect for the calendars of choice of other cultures). The preceding wishes are extended without regard to the race, creed, age, physical ability, religious faith or lack thereof, choice of computer platform or sexual preference of the wishee(s).

4 Company law: fundamental changes in a company

1 Reading A: Introduction to changes in companies

This text provides an overview of the area of company law dealing with the changes made to a company that generally require the involvement of lawyers.

Before you read the text, match these key terms (1–7), which all refer to types of change in company structure, with their definitions (a–g). If necessary, consult the Glossary booklet.

1 constitutional amendment
2 consolidation
3 acquisition of controlling shares
4 voluntary liquidation
5 merger
6 sale of substantially all assets
7 compulsory winding-up

a the liquidation of a company after a petition to the court, usually by a creditor
b the combining of two companies to form an entirely new company
c liquidation proceedings that are supported by a company's shareholders
d a change in a company's name, capital or objects
e the purchase of shares owned by shareholders who have a controlling interest
f the acquisition of one company by another, resulting in the survival of one of them and dissolution of the other
g a form of acquisition whereby all or almost all assets and liabilities of a company are sold

At some point in the life of a company, the owners may wish to make fundamental changes to the company. Some of these changes may merely be basically administrative, such as changing the company's name. Other changes may entail alteration of the company's structure. These changes sometimes place the rights of **creditors** and **minority shareholders** at risk and are thus subject to special statutory regulation. The main examples of the types of alteration which fall into this group are **constitutional amendments, mergers, consolidations, sale of substantially all assets, acquisition of controlling shares** and **liquidation**.

The most common constitutional alterations in a company include alteration of the company's name, capital or **objects**. According to English law, a change of name can be made by **special resolution** in a general meeting, or all the members must sign a **written resolution** that the name of the company be changed to the new name. A signed copy of the resolution containing the new name must then be submitted to the **Registrar of Companies**. If the submission is in order, **Companies House** will issue a **Certificate of Incorporation on Change of Name**. A company may alter its **capital structure**, provided that the articles of association grant such power. Such an alteration might entail such things as an increase in share capital, a consolidation or division of shares, a subdivision of shares or a cancellation of shares.

A company may only reduce its share capital following court confirmation. A company may alter its **objects clause** by special resolution. However, the court may, at its discretion, set aside such a resolution upon application by a small group of minority shareholders.

A **merger** takes place when one company is absorbed into another company. Where company X is merged into company Y, company Y is the **acquiring company** and survives, while company X is the **acquired company** and disappears. In a consolidation, both company X and company Y disappear and a new company, Z, is formed.

A company may also **gain control** of another company by purchasing substantially all of the other company's **assets**. At **common law**, a sale of this kind normally required unanimous shareholder approval. However, today such sales may take place upon approval by some majority of the shareholders. Acquisition of shares is another method of gaining control of another company. This is achieved by purchasing all or the controlling portion of outstanding shares in a company. Many times this is achieved through a **takeover bid**[1], whereby company Y (the acquiring company or **acquirer**) makes a public invitation to shareholders of company X (the acquired company or **target**) to sell their stock, generally at a price above the market price. There can be **hostile takeovers** and **friendly takeovers**. In the former, the takeover is opposed by the target company's management, while in the latter the action is supported by management. Various regulations apply largely to protect the target company's shareholders.

Finally, **winding-up** or **liquidation** of a company is the process by which the life of a company is brought to an end. **Compulsory winding-up**[2] is ordered by the court when the company is **insolvent**. However, a **voluntary liquidation**[3] refers to a process which may be instigated by the members of the company where the company is **solvent**.

[1] (US) tender offer
[2] (US) involuntary bankruptcy
[3] (US) *also* dissolution *or* winding-up

2 Key terms: Opposing concepts in company law

2.1 The text contains several pairs of opposing concepts. Find the counterpart of each of these words.

1 acquiring company
2 hostile takeover
3 acquirer
4 compulsory winding-up
5 solvent

2.2 Work in pairs. Making use of the prepositions introduced in the previous unit (*as opposed to, unlike, in contrast to*), take turns contrasting the pairs of opposing concepts listed in Exercise 2.1.

EXAMPLES:

In contrast to an acquiring company, which is a company that purchases another, an acquired company is one which is purchased and taken over by another company.

An acquired company is one which is purchased and taken over by another company, unlike an acquiring company, which is a company that purchases another.

3 Listening A: Explaining legal aspects of an acquisition

A lawyer's involvement in the mergers and acquisitions of companies often entails communicating with the parties concerned: a lawyer may explain to the owner of a company what procedures have to be completed in the course of an acquisition or inform shareholders how the changes resulting from a merger will affect them.

In this listening exercise, you are going to hear a lawyer speaking to a group of business owners, each of whom is considering acquiring another business.

3.1 Listen to the first part of the presentation and choose the correct answer to each of these questions.

1 Which of these is the most likely entry for the talk in the programme?
- **a** Mr A. Crawford of Corporate Restructuring (evening session)
- **b** Mr A. Cranford of Mergers and Acquisitions (evening session)
- **c** Mr A. Crawford of Mergers and Acquisitions (evening session)
- **d** Mr A. Crawford of Mergers and Acquisitions (morning session)

2 What is the speaker's aim?
- **a** to provide the business owners with an overview of the law of mergers and acquisitions
- **b** to persuade the business owners that they should use this opportunity for their businesses to grow
- **c** to inform the business owners what they can expect if they decide to carry out an acquisition
- **d** to tell the business owners about the process of making their businesses more attractive as potential targets

3 Which of the following topics will *not* be included in the presentation?
- **a** factors involved in deciding on a company to acquire
- **b** staffing issues after an acquisition
- **c** evaluating the prospective acquired company
- **d** details of one specific deal the speaker has carried out

3.2 Listen to the second part of the presentation, in which the speaker discusses legal aspects of acquisitions. Decide whether these statements are true or false.

1 The important legal steps that must be carried out in the course of the acquisition process can be completed in any sequence.
2 'Due diligence' refers to the process of gathering and analysing financial information and other relevant information about a business before it is acquired.
3 One aspect of due diligence is verifying ownership of intellectual property.
4 In the course of due diligence, the acquirer should terminate all of the target company's contracts with suppliers.
5 A warranty is a written statement by a party attesting that a fact relevant to the deal is true.
6 The target may provide indemnities to protect the acquirer against future liabilities.

3.3 Discuss these questions.

1 The lawyer mentions *due diligence* in the presentation. Have you or a colleague taken part in a due-diligence investigation? How was the investigation conducted?
2 Warranties are also mentioned in the presentation. Why are warranties so important to the buyer?

4 Text analysis: Beginning a presentation

In Listening A, the lawyer began his presentation by introducing himself and his topic. Following this, he provided an overview of the points he planned to cover. He also informed his listeners about general matters related to his presentation, such as whether there would be a break or if questions were permitted.

The beginning of any presentation, whether short or long, informal or formal, should fulfil these functions. Listeners appreciate knowing what awaits them and what they can expect to hear.

4.1 This list provides useful phrases for the beginning of a presentation. Listen to the first part of the presentation again and complete each of the phrases using no more than three words.

1 Some of you may know me already, but allow me ..... . My name's Adrian Crawford.
2 ..... Mergers and Acquisitions department of our firm.
3 I'll ..... acquisitions this evening.
4 I'm ..... you about ...
5 Please feel free to ..... at any time, should you have any questions.
6 At this point, I'd like to give you a short ..... my presentation.
7 I'm going to start with a ..... how to ...
8 Then I'll ..... the issue of ...
9 After that, I'll ..... the process of ...
10 I think we'll ..... a short break at that point.
11 After the break, I'll ..... the legal aspects ...
12 At the end, I'll ..... a look at ...
13 There'll be time for ..... at the end.

4.2 Match each of the phrases in Exercise 4.1 (1–13) with the function (a–c) they serve. The first phrase has been done for you.

a introducing the speaker (name, affiliation) 1, ...
b informing about points that will be covered
c telling listeners about practical matters related to the presentation

5 Reading B: Spin-offs

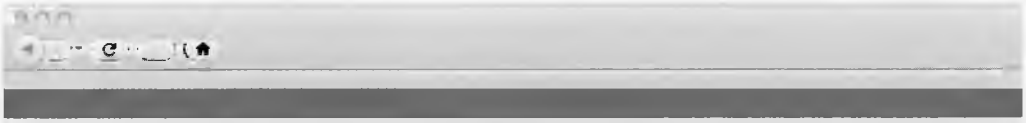
The text on page 52 is an excerpt from an article about spin-offs, an alteration in the structure of a company. It appeared on the website of a US firm. The primary purpose of this text is to provide information for clients. Do you think website articles are an effective way for clients to get information about complex topics?

5.1 Read through the text quickly and answer this question.

A subsidiary is a company which is controlled by another through share ownership. What exactly is a spin-off?

5.2 Decide which of these phrases (a–d) best expresses the topic of each paragraph in the text (1–4).

a Advantages of IRS Code Section 355
b Reasons for creating spin-offs
c Definition of the term *spin-off*
d Different ways stocks can be distributed



1 The term 'spin-off' refers to any distribution by a corporation to its shareholders of one of its two or more businesses. Sometimes the spun-off business is transferred first to a newly formed subsidiary corporation. The stock of that subsidiary is then distributed to the shareholders of the distributing corporation. Other times, the stock of a pre-existing subsidiary is distributed.

2 Spin-offs can include distributions on a proportional basis (i.e. pro rata), in which the receiving shareholders do not give up any of their stock in the distributing corporation when they receive the spun-off stock. Sometimes the distribution only goes to certain shareholders. In this case, the receiving shareholders give up some (or all) of their stock in the distributing corporation in exchange for the stock of the controlled subsidiary.

3 A spin-off is used to separate two businesses that have become incompatible. In a case where investors and lenders may want to provide capital to one but not all business operations, a spin-off can be a good solution. Spin-offs are also used to separate businesses where owner–managers have different philosophies. Spin-offs may furthermore be used by publicly held companies when the stock market would value the separate parts more highly than combined operations. The separation of business operations could also lead to a greater entrepreneurial drive for success.

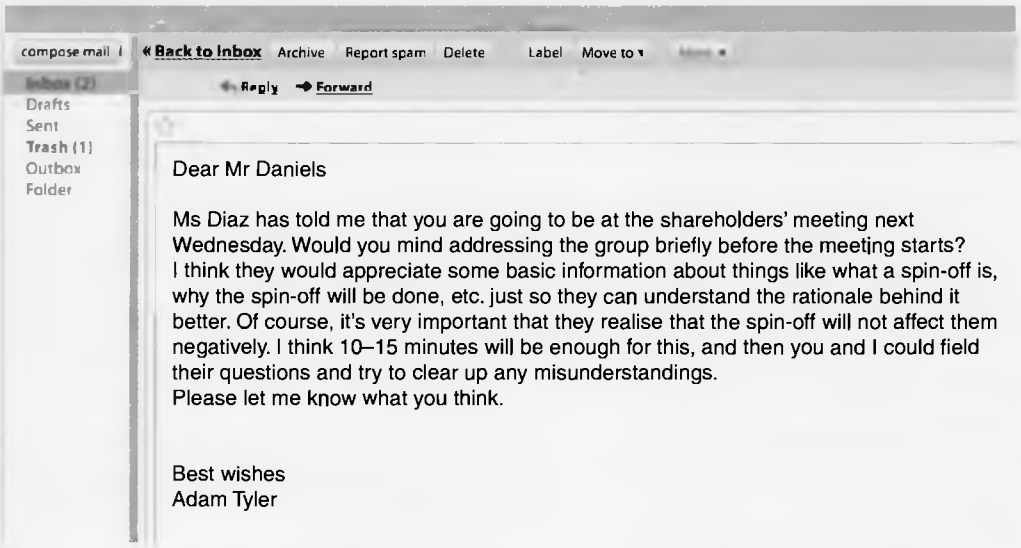
4 The tax characteristics of a qualifying spin-off under Internal Revenue Code Section 355 make this an attractive tool for solving certain corporate challenges. Without Section 355, the distributing corporation would have to recognize a gain on the stock it distributed as if it had sold that stock. In addition, shareholders receiving the distribution would be taxed on the shares received, either as a dividend or as capital gain. This double tax usually makes spin-offs extremely expensive. Code Section 355 permits a spin-off to be accomplished without tax to either the distributing corporation or to the receiving shareholder. Any gain realized by the shareholder is deferred until the stock is sold.

5.3 Read the text again and answer these questions.

1 Under which circumstances would a company typically decide to make a spin-off?
2 What benefits for the corporation and for the shareholders result from Internal Revenue Code Section 355?

6 Speaking: Presenting a spin-off

One of your corporate clients is planning to carry out a spin-off. He has written you this email.



6.1 Using the presentation in Listening A as a model and the information from Reading B, prepare the beginning of such a presentation.

6.2 Take turns presenting your beginning to a partner. Check that your partner has:

- ○ introduced him/herself;
- ○ informed you about what points will be covered;
- ○ mentioned any practical matters (questions, timing, etc.).

7 Listening B: A checklist

Lawyers play an important role in the processes involved in altering the structure of a company. For example, they review the documents connected with such changes to ensure that all the relevant statutes have been complied with.

Checklists are useful tools for making sure that the proper procedures have been followed and the necessary documents drawn up. Once an issue has been addressed, a lawyer will tick the box to confirm that he has considered the particular matter listed. You are going to hear two lawyers discussing such a checklist. A more experienced lawyer (Bob) guides his younger colleague (Jack) through the list of actions to be taken and documents to be filed.

7.1 Listen to the dialogue and answer these questions.

1. What kind of change are they discussing?
2. What two meetings need to be held?
3. How many documents need to be filed at Companies House?

7.2 Listen again and complete the missing items (1–10) in the left-hand column of the checklist, using up to three words for each space.

Checklist on increasing a company's share capital	**Matter considered**
• Check the memorandum of association to identify the company's **1)** ..... . See also *authority to increase capital* under Articles. Consider whether creation of new shares will involve variation of class rights. If so, appropriate consents may be required.	
• Has the company issued all its share capital?	
• **2)** ..... of increase of share capital.	
• Convene **3)** ..... at reasonable notice: Normal procedure or consider using written resolution procedure.	
• Ensure a quorum of **4)** ..... is present at the board meeting.	
• Directors have to **5)** ..... that they will put the increase of share capital to vote at an extraordinary general meeting (EGM).	
• Convene an EGM by notice or use written resolution procedure.	
• If written resolution procedure is not used, notice to shareholders must state: **a** date **b** time **c** place **d** proxy **e** ordinary resolution **f** consent to **6)**	
• Ensure the **7)** ..... presides at the EGM and that a quorum of shareholders is present.	
• Pass the ordinary resolution by **8)** ..... on a show of hands or by poll.	
• Draw up board and EGM minutes.	
• Lodge at Companies House **9)** ..... days: **a** ordinary resolution; **b** notice of increase of **10)** ..... (Form 123); **c** amended memorandum and (if necessary) articles of association.	

8 Language use A: Explaining a procedure

When explaining how a procedure is carried out, the order of the steps to be taken can be indicated using sequencing words. Look at these examples from Listening B:

*Well, **the first thing** you have to do is to check the memorandum of association ...*
***Then** you have to find out whether they've issued all their share capital already or not.*
***The next step** would be to determine the amount of increase of share capital.*
*But **before** the EGM can take place, the shareholders have to be informed by notice about the EGM.*
***Finally**, within 15 days, the following documents have to be filed at Companies House ...*

Here are some more sequencing words:

After that, Afterward(s), At this point, Following this, Once you have done that, Subsequently

Another feature of such an explanation is the use of words and expressions indicating necessity, such as *to have to, must, to be required* and *to be necessary*:

*The first thing you **have to** do is ...*
*Tell your client that they **have to** call a board meeting ...*
*This notice **must** state the following things ...*
*The chairperson **is required to** preside at the EGM, and **it's necessary that** a quorum is present.*
*Minutes of the two meetings ... **have to** be drawn up.*

Think about a complicated legal procedure you have to deal with in the course of your work or which you have studied. Make a checklist to identify what you have to do to complete this procedure. Explain the procedure carefully to your partner. He/She should make notes. When you have finished, ask your partner to repeat back to you the stages of the procedure.

9 Reading C: The minutes of a meeting

When fundamental changes are made to a company, meetings of the directors and/or shareholders must be convened so that the proposed changes can be voted on. The official record of the proceedings of such a meeting is called the *minutes*.

9.1 Discuss these questions.

1. Who writes the minutes of a meeting?
2. When would a lawyer have to read such a text?

9.2 On the next page are the minutes of a meeting held by board members of a small company. Read through the minutes quickly and answer these questions.

1. Why was the board meeting called?
2. Why was the EGM called?

Longfellow Ltd

Minutes of a meeting of the Board of Directors held at Company premises, Langdon Building, Sherwood Road, Manchester

On: 10 September, 2011, at 3 p.m.

Present: Debra Smith (Chairperson)
Anna Bean (Director)
Claire Thurman (Secretary)

1 The Chairperson confirmed that notice of the meeting had been given to all the Directors of the Company and that a quorum of the Board of Directors was present at the meeting.

2 Applications were presented to the meeting from Debra Smith, Anna Bean and Allison Sharp for the allotment of 10,000, 20,000 and 20,000 shares respectively by the Company, and it was resolved that their applications be approved subject to the approval of the extraordinary general meeting.

3 It was noted that Debra Smith and Anna Bean had declared their interests in the shares pursuant to s317 Companies Act 1985.

4 The Chairperson reported that it was proposed to increase the authorised share capital of the Company by 50,000.

5 The Chairperson reported that the Directors required authority to allot shares, as there was no power in the Company's articles of association.

6 The Chairperson also informed the members that the Company would need to disapply s89 Companies Act 1985 in relation to pre-emption rights.

7 There was presented to the meeting a notice of an extraordinary general meeting at which resolutions would be proposed to implement the above proposals to increase the Company's share capital; to authorise Directors to allot the new shares; and to disapply the requirements of s89 Companies Act 1985. It was resolved that the notice be approved, that the Secretary be instructed to send it to all the members and the auditors of the Company, and, subject to all the members agreeing to short notice, that the meeting be held immediately.

8 The meeting was adjourned to enable the extraordinary general meeting to be held.

9 The meeting resumed at 8 p.m. and the Chairperson reported that the resolutions set out in the notice of an EGM had been duly passed.

10 It was resolved that the application by Debra Smith, Anna Bean and Allison Sharp for 10,000, 20,000 and 20,000 shares respectively be accepted and that the capital of the Company be allotted to the applicants on the terms of the application.

11 The Secretary was instructed to enter the names of the applicants in the register of members of the Company as the holders of the shares allotted.

12 The Secretary was instructed to prepare share certificates in respect of the shares allotted and to arrange for the common seal to be affixed to them and to deliver the share certificates to the applicants.

13 The Secretary was instructed to prepare and file with the Registrar of Companies: Form 88(2) (return of allotments) in respect of the allotment just made; Form 123 (increase of capital); and the special and ordinary resolutions in connection with raising capital for the Company.

14 There being no further business, the meeting was closed.

Chairperson

9.3 Read the minutes again and answer these questions.

1 Which resolutions were passed at the meeting?
2 What steps must be undertaken by the Secretary subsequent to the meeting?

9.4 As a record of what occurred at a meeting, the minutes include an account of what the participants said. Verbs referring to speech acts, such as *to state* or *to propose*, are commonly used. Which verbs of this kind can be found in the minutes?

10 Language use B: Collocations

10.1 The minutes on page 56 contain examples of verbs that often appear together with the nouns *meeting* and *resolution*. Find and underline them.

10.2 Complete the table below to show which of the verbs in the box can be used with *meeting* and *resolution*. You may need to consult a dictionary.

adopt	arrange	attend	authorise	call	cancel	convene	draft	endorse
introduce	oppose	pass	preside at	schedule	summon	table		

meeting	resolution

11 Reading D: Shareholder rights

The letter on the next page was written by an American lawyer in response to a query concerning the rights of a shareholder.

11.1 Read the letter and discuss these questions.

1 What kind of letter is it?
2 What exactly is the query it responds to?

11.2 Read the letter again and decide whether these statements are true or false.

1 The shareholder seeks to set aside the transaction on the grounds that he was not able to vote at the shareholders' meeting.
2 The lawyer states that in a true merger, the statutes do not provide appraisal rights to the shareholder.
3 The lawyer points out that looking at the substance rather than the form of the transaction might appear at first to help the shareholder's case.
4 The lawyer believes that it is likely that the courts in the jurisdiction in question will decide along the lines of *Heil v. Star Chemical*.

Re: Shareholder Rights in Stock-for-Assets Transaction

Dear Mr. Fitzwilliam

You have requested advice regarding your rights as stockholder in Alca Corporation (the "Target Corporation") which entered into a stock-for-assets agreement with Losal Corporation (the "Purchasing Corporation").

The advice and statements set forth below are based on the facts you presented to me in our telephone conference of January 27. This advice should be viewed in light thereof and remains subject to future discovery and research.

The facts are as follows: you are a stockholder in the Target Corporation. On or about October 1 last year, the Target Corporation and the Purchasing Corporation entered into a Reorganization Agreement by which the Target Corporation agreed to sell all its assets to the Purchasing Corporation in consideration for 350,000 shares of the Purchasing Corporation's stock. The Target Corporation called a stockholders' meeting to approve the Reorganization Agreement and the voluntary dissolution of the Target Corporation upon distribution of the shares to the Target Corporation's stockholders. As I understand it, the stockholders' meeting approved the plan, 70% of all stockholders voting. You did not vote at the meeting. Your query to me is whether it is possible to set aside the transaction based on your rights as a stockholder.

Generally, a stockholder's rights in a merger situation are twofold. First, the stockholder has the right to approve or disapprove the agreement. Second, the stockholder holds an appraisal right, which means that he is entitled to have an independent appraiser determine what his shares are worth. The aforesaid provides the stockholder with assurance that the Purchasing Corporation is not getting a discount on the shares. As I understand it, you were not afforded any appraisal rights.

The difficulty in the *instant* case is that the transaction is not a "true" merger but rather a sale of assets in exchange for shares. In the latter case, strictly speaking, the statutes do not provide the shareholder appraisal rights. However, it might be argued that, due to the fact that the transaction at issue achieved the same results as a merger, the court should look at the substance of the transaction rather than its form in order to protect your rights as a shareholder. *In essence*, the argument is that a "de facto" merger has taken place and that you should be entitled to the same rights as if a "true" merger had taken place. If the court finds in your favor, the transaction could then be set aside as being in violation of the applicable statutes.

Although I consider the argument above to be *persuasive*, I doubt whether the courts of this jurisdiction will accept it. The doctrine of de facto merger is widely accepted in many other jurisdictions for the reasons I have set forth above. However, in this jurisdiction, the courts have been *hesitant* to take a position. In addition, in one particular case, Heil v. Star Chemical, the court, although not addressing exactly the same situation as in this case, referred to the fact that the provisions governing merger and the sale of all the assets in a corporation are separate and should be treated as such. The *mere* fact that they overlap does not change the legislative intent.

In summary, you have an argument, but in my opinion your chances are slim. It will most likely take an appeal to win, as I suspect the trial court will not stray from the reasoning established in the Heil case. Hence, as your attorney, I would suggest that you take a look at your options from a financial perspective and make a determination as to whether it is worth it.

As always, I remain at your disposal should you wish to discuss your options. I look forward to hearing from you and answering any further questions you may have.

Yours truly

Mark Sanders

11.3 Match these words and phrases from the letter (1–5) with their synonyms (a–e). The words are in italics in the letter.

1 instant	**a** basically
2 in essence	**b** simple
3 persuasive	**c** reluctant
4 hesitant	**d** convincing
5 mere	**e** present

11.4 According to the letter of advice on page 58, there is a good reason why a court might rule in favour of the shareholder, but also a good reason why it would not. Discuss these reasons with a partner and decide how you would advise your client in this situation.

12 Writing: Standard phrases for opening and closing letters and emails

Referring to previous contact
With reference to your letter of 15 February ...
In response to your query concerning ...
Further to our (telephone) conversation of ...
Thank you for your email of 15 February.

Stating the reason for writing
I am writing to inform you that ...

Closing, offering further assistance
Please contact me again if I can help in any way.
Should you have any further questions, do not hesitate to contact me.

Referring to future contact
I look forward to your reply / to meeting you / to hearing from you.

12.1 The letter of advice on page 58 has been written in response to a query.

1. How does the lawyer make reference to this query?
2. How is the previous conversation between lawyer and client referred to?
3. At the end of the letter, which sentences are used to indicate willingness to provide further help and to invite further contact?

12.2 As the associate for corporate counsel to Longfellow Ltd, you have received an email from a shareholder requesting information about what happened at the board meeting and the EGM documented in the minutes in Reading C on page 56. Respond to the request of the shareholder. In your email, you should:

- refer to the email sent by the shareholder;
- state the reason for writing;
- explain the circumstances under which the meetings were held;
- summarise the content of the resolutions passed;
- offer to provide further assistance if necessary.

Unit 4

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 4.

Language focus

1 **Vocabulary: distinguishing meaning** Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 pause suspend cancel adjourn
2 according to related to pursuant to in conformity with
3 exempt liable freed released
4 convoke call contend convene
5 continue resume pick up add on
6 said relevant aforementioned aforesaid

2 **Vocabulary: definitions** Match these words and expressions in italics (1–8) with their definitions (a–h). They are all taken from the Reading sections in this unit.

1 *pro-rata* distribution
2 *under* Internal Revenue Code Section 355
3 *prior to* distribution
4 *become a party to* a transaction
5 no *consideration* is paid
6 *de facto* merger
7 *applicable* statutes
8 provisions *governing* merger

a before
b enter into
c determining
d according to
e actual
f relevant
g payment
h proportional

3 **Word formation** Complete this table by filling in the correct verb or noun form. Underline the stressed syllable in each word that has more than one syllable.

Verb	Abstract noun
distribute, distribute	distribution
	merger
	regulation
submit	
	approval
consolidate	
acquire	
	liquidation
cancel	
	alteration

4 Language use: verbs plus prepositions Complete the sentences below using the correct forms of the 'verb + preposition' combinations in the box.

comply with	dispose of	enter into	~~lodge at~~	preside at

1 The resolution must be lodged at Companies House within 15 days.
2 According to the statutes, the chairperson must ..... the EGM.
3 The EGM authorised the Board of Directors to repurchase and ..... not more than 50,000 shares in the Company.
4 All of the requirements of the Companies Acts 1985 and 1989 in respect of reduction of capital have been ..... .
5 The two corporations announced that they have ..... a definitive merger agreement.

5 Language use: fixed phrases Match a word from each column to form three-word collocations as they appear in the unit.

EXAMPLE: convene shareholders' meeting

~~convene~~	ordinary	capital
reduce	proper	~~meeting~~
pass	share	procedures
follow	~~shareholders'~~	resolution

6 Vocabulary: word formation Complete this text using the noun form of each of the verbs in parentheses.

It is not uncommon for a company, or a group of companies, to undergo changes in corporate structure. The change may be due to the **1)** ~~takeover~~ (*to take over*) by one company of another, the transfer of a whole or part of a company's **2)** ..... (*to undertake*) to a new company, the **3)** ..... (*to merge*) of two or more companies into a new company, or a split of one company into two or more companies. These corporate **4)** ..... (*to transform*) are termed '**5)** ..... (*to reconstruct*) and amalgamations'. The terms are not actually defined in the Companies Act, but descriptions have been by case law. A reconstruction is a transfer by a company of its assets to a new company, or an **6)** ..... (*to alter*) to the capital structure of a company or a group of companies. An **7)** ..... (*to amalgamate*) is the **8)** ..... (*to unite*) of two or more companies under common control.

7 Vocabulary: antonyms Match these words (1–8) with their opposites (a–h).

1 compulsory	**a** formation
2 asset	**b** division
3 hostile	**c** pre-existing
4 oppose	**d** approve
5 purchase	**e** voluntary
6 consolidation	**f** liability
7 newly formed	**g** sale
8 dissolution	**h** friendly

Case study 1: Company law

The facts of the case

Your law firm has asked you to review the following company law case and the relevant documents in preparation for a meeting with the other party's lawyer.

Read this description of the facts of the case. What is the legal issue here?

The Greenview Company, a public company incorporated under the laws of the country of Westland, owned a golf course. Some land adjoining the golf course became available for sale, and one director of the corporation informed the board of this availability. If Greenview bought the adjoining land and sold it together with the golf course, this would greatly increase the value of the golf course. In fact, on several occasions, the directors and stockholders had discussed the possibility of acquiring more land next to the golf course. Although the board and the stockholders expressed an interest in buying this land, it again did not take any immediate steps to purchase it. A few months later, two other directors of Greenview (not including the one who had informed the company that the land was for sale) decided to buy the land in their individual capacities. A few years later, the golf course and the adjoining land were sold as a package to outside investors for a high price. A large share of the profit went to the two directors because of their ownership of the adjoining land.

Now a group of disgruntled minority shareholders wishes to bring an action against the two directors for a breach of their duty of loyalty to the company through the theft of a corporate opportunity.

Task 1: Role-play

Divide into two different groups, with one group representing the shareholders and the other representing the directors being sued.

1 Prepare for negotiations with the other party, referring to the relevant legal documents on the opposite page. You should:

- identify the legal issues of the case and determine arguments for your side;
- list the strengths and weaknesses of your side of the case;
- decide which parts of the relevant legal documents most strongly support your case and can be used to argue against the other party's case;
- make notes for the negotiation: What are your goals? What are you willing to give? What are you not willing to give?

2 Pair up with a representative of the other party and negotiate a settlement.

3 Report the results of your negotiations to the class.

Task 2: Writing

Write a letter of advice to one of the parties (your choice), in which you outline the legal issues raised by the case, refer to relevant statutes and provide your opinion as to the likely outcome of the case.

Relevant legal documents

Text 1: excerpt from Section 202 of the Westland Corporations Act

202

(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Text 2: Westland Principles of Corporate Law, Section 5.05, Part 3

The Westland Principles of Corporate Law, published by the Westland Law Institute, is used as a guideline for the interpretation of corporate law in Westland. Part 3 of Section 5.05 deals with the duty of loyalty owed by a director to his company.

5.05 A director shall act in the best interests of the corporation. This includes the duty of loyalty and the duty of care.

(3) The duty of loyalty includes not taking advantage of a corporate opportunity. A corporate opportunity is a business opportunity that:

(a) a director or senior officer becomes aware of in his or her corporate capacity;

(b) a director or senior executive should know the outside party is offering to the corporation;

(c) a director or senior executive, who became aware of it through the use of corporate information, should know the corporation would be interested in;

(d) a director or senior executive knows is closely related to the corporation's current or expected business.

Text 3: excerpt from a textbook on corporate law

Section 16.2 Corporate opportunity

The doctrine of corporate opportunity requires a corporate director to further the interests of the corporation and give to it the benefit of his uncorrupted business judgment. He may not take a secret profit in connection with the corporate transactions, compete unfairly with the corporation or take personally profitable business opportunities which belong to the corporation.

The basic test is a two-part test. The first part requires a determination of whether the opportunity falls within the line of business of the corporation; if this is so, then the second part examines the circumstances under which the director is nonetheless permitted to exploit the opportunity.

The 'line of business' test compares the closeness of the opportunity to the areas of business in which the corporation is engaged. Other factors may be relevant to this consideration, such as (i) whether the director became aware of the relevant opportunity as a result of his or her position, (ii) whether the director utilised property belonging to the company to take advantage of the opportunity, (iii) whether previous discussions were held regarding the opportunity within the corporation, and (iv) whether the opportunity was presented to the director as an agent of the corporation.

The second part of the test allows for a justification to relieve liability from an affirmative answer to the first part of the test. In this part, courts examine whether the director had a persuasive reason to take advantage of something which was in the company's line of business. Some examples of situations that courts have considered to be fair are that the corporation is incapable of taking advantage of the opportunity.

5 Contracts: contract formation

1 Reading A: Introduction to contract formation

This text gives an overview of some of the most important concepts and terminology related to what constitutes a legal contract and when it is enforceable.

Read through the text quickly. Then match these questions (a–e) with the paragraphs that answer them (1–5).

a What form can an enforceable contract take?
b When do third parties possess enforceable rights in a contract?
c On what grounds related to the formation of a contract may its validity be attacked?
d What are the elements of an enforceable contract?
e What are the essential terms of a contract?

1 As opposed to civil law, where contracts are generally formed simply through offer and acceptance, in the common law[1] a promise becomes an **enforceable** contract when there is not only an **offer** by one **party** (**offeror**) that is accepted by the other party (**offeree**) but also an exchange of legally sufficient **consideration** (a gift or donation does not generally count as consideration); hence the equation learned by law students: offer + acceptance + consideration = contract. The law regards a **counter offer** as a **rejection** of the offer. Therefore, a counter offer does not serve to form a contract unless, of course, the counter offer is accepted by the original offeror.

2 For a promise to become an enforceable contract, the parties must also agree on the **essential terms** of the contract, such as price and **subject matter**. Nevertheless, courts will enforce a vague or **indefinite** contract under certain circumstances, such as when the conduct of the parties, as opposed to the written **instrument**, manifests sufficient certainty as to the terms of the agreement.

3 An enforceable agreement may be manifested in either written or oral words (an **express contract**) or by conduct or some combination of conduct and words (an **implied contract**). There are exceptions to this rule. For example, the **Statute of Frauds** requires that all contracts involving the sale of **real property** be in writing.

4 In a contractual dispute, certain defences to the **formation** of a contract may permit a party to escape his/her obligations under the contract. For example, **illegality of the subject matter**, **fraud in the inducement**, **duress** and the **lack of legal capacity** to contract all enable a party to attack the validity of a contract.

5 In some cases, individuals/companies who are not a party to a particular contract may nevertheless have enforceable rights under the contract. For example, contracts made for the benefit of a third party (**third-party beneficiary contracts**) may be enforceable by the third party. An original party to a contract may also subsequently transfer his rights/duties under the contract to a third party by way of an **assignment of rights** or **delegation of duties**. This third party is called the **assignee** in an assignment of rights and the **delegate** in a delegation of duties.

[1] It should be noted that, in the United States, contracts for the sale of goods are governed by the **Uniform Commercial Code** (UCC) and in the United Kingdom by the **Sale of Goods Act,** and therefore the above common law contractual principles may have been supplemented or replaced by these statutory provisions.

2 Key terms: Defences to contract formation

Match these defences (1–4) with their definitions (a–d).

1 illegality of the subject matter
2 fraud in the inducement
3 duress
4 lack of legal capacity

a when one party does not have the ability to enter into a legal contract, i.e. is not of legal age, is insane or is a convict or enemy alien
b when one party induces another into entering into a contract by use or threat of force, violence, economic pressure or other similar means
c when either the subject matter (e.g. the sale of illegal drugs) or the consideration of a contract is illegal
d when one party is intentionally misled about the terms, quality or other aspect of the contractual relationship that leads the party to enter into the transaction

3 Text analysis: Understanding contracts

Lawyers are usually involved at the formation stage of a contract, which includes advising, drafting and negotiating. Drafting is commonly carried out with the help of contract templates or forms. Nevertheless, legal counsel must advise on the inclusion or omission of clauses and their wording. To do this, familiarity with common clause types and the language typically used in them is necessary.

3.1 Match these types of contract clauses (1–10) with their definitions (a–j).

1 Acceleration
2 Assignment
3 Confidentiality
4 Consideration
5 Force Majeure
6 Liquidated Damages
7 Entire Agreement[1]
8 Severability
9 Termination
10 Payment of Costs

a clause stating that the written terms of an agreement may not be varied by prior or oral agreements because all such agreements have been consolidated into the written document
b clause designed to protect against failures to perform contractual obligations caused by unavoidable events beyond the party's control, such as natural disasters or wars
c clause outlining when and under which circumstances the contract may be terminated
d clause concerning the treating of information as private and not for distribution beyond specifically identified individuals or organisations, nor used other than for specifically identified purposes
e clause in a contract requiring the obligor to pay all or a part of a payable amount sooner than as agreed upon the occurrence of some event or circumstance stated in the contract, usually failure to make payment
f clause setting out which party is responsible for payment of costs related to preparation of the agreement and ancillary documents
g clause expressing the cause, motive, price or impelling motive which induces one party to enter into an agreement
h clause referring to an amount predetermined by the parties as the total amount of compensation a non-breaching party should receive if the other party breaches a part of the contract
i clause prohibiting or permitting assignment under certain conditions
j clause providing that, in the event that one or more provisions of the agreement are declared unenforceable, the balance of the agreement remains in force

[1] (US) also *Merger* (The term ***Parol Evidence*** is used in both the UK and the USA.)

3.2 Add the name of each clause type (or its nearest equivalent) in your language to the list in Exercise 3.1.

3.3 Identify the type of clause listed in Exercise 3.1 exemplified by each of these clauses.

1 The seller's *liability for damages* shall in no case exceed the purchase price of the particular quantity delivered with respect of which damages are claimed.

2 Whenever, *within the sole judgment* of Seller, the credit standing of Buyer shall become impaired, Seller shall have the right to demand that the remaining portion of the contract be fully performed within ten (10) days.

3 Neither party shall be liable in damages or have the right to terminate this Agreement for any *delay or default* in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to, acts of God, government restrictions (including the denial or cancellation of any export or other necessary licence), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.

4 This Agreement may not be assigned without the *prior written consent* of the other party, except that Buyer may assign the Agreement to a subsidiary or related corporation so long as the owners of at least seventy-five per cent (75%) of the stock of such corporation are either Buyer or the shareholders of Buyer.

5 *In the event* Operator defaults in the performance of any covenant or agreement made hereunder, as to payments of amounts due hereunder or otherwise, and such defaults are not remedied to the Supplier's satisfaction within ten (10) days after notice of such defaults, the Supplier may thereupon terminate this agreement and all rights hereunder of the Operator but such termination shall not affect the obligations of the Operator to take action or *abstain from taking action* after termination hereof, in accordance with this agreement.

6 This Agreement, including the *Schedules and Exhibits* attached hereto, constitutes and contains the entire agreement of the parties with respect of the subject matter hereof and collectively supersedes any and all prior negotiations, correspondence, understandings and agreements between the parties respecting the subject matter hereof. No party is relying on or shall be *deemed* to have made any representations or promises not expressly set forth or referred to in this Agreement.

3.4 In your own words, explain these words and expressions in italics from the clauses in Exercise 3.3.

1 *liability for damages* (clause 1)
2 *within the sole judgment* of Seller (clause 2)
3 *delay or default* (clause 3)
4 *prior written consent* (clause 4)
5 *In the event* Operator defaults in the performance (clause 5)
6 *abstain from taking action* (clause 5)
7 *Schedules and Exhibits* (clause 6)
8 shall be *deemed* (clause 6)

4 Reading B: A covenant

The text on the next page is an example of the previously mentioned type of document known as a contract form, which is often used by lawyers at the formation stage of a contract.

4.1 Briefly scan the agreement and answer these questions.

1 What kind of agreement is it?
2 Why does the text have gaps in it?

4.2 Read the agreement more carefully. What types of clauses are 2b, 3, 5 and 6?

NON-COMPETITION AGREEMENT OF SHAREHOLDER OF SELLER IN CONNECTION WITH SALE OF ASSETS
COVENANT NOT TO COMPETE

This COVENANT NOT TO COMPETE (this "Covenant"), dated as of _____ , 20_____ , is made and entered into by and between _____ ("Shareholder") and _____ , a _____ corporation ("Purchaser"), with reference to the following facts:

A _____ , _____ corporation ("Seller"), and Purchaser are parties to that certain Asset Purchase Agreement, dated as of _____ , 20_____ (as amended, supplemented or otherwise modified from time to time, the "Purchase Agreement"), pursuant to which Purchaser agreed to purchase from Seller, and Seller agreed to sell to Purchaser, certain assets of the _____ business owned and operated by Seller located at _____ ("the Business"). Unless otherwise noted, capitalized terms used herein shall have the meanings *ascribed to* them in the Purchase Agreement.

B Shareholder owns all of the issued and outstanding capital stock of Seller.

C Shareholder, during the course of ownership and operation of the Business, *has acquired* numerous business contacts among the public, financial institutions, and _____ industry employees.

D Purchaser *shall expend* a considerable amount of time, money, and credit with respect to the purchase and operation of the Business.

E Purchaser does not desire to expend such time, money, and credit and then subsequently compete with Shareholder in the business of _____ .

F It is a condition precedent to the closing of the transactions contemplated by the Purchase Agreement ("the Closing") that Shareholder execute and deliver this Covenant and that Purchaser pay Shareholder certain amounts at Closing, all as more fully described below.

THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1 For a period of _____ years from the date hereof, Shareholder shall not have any controlling ownership interest (of record or beneficial) in, or have any interest as a director, principal executive officer, key employee, agent or consultant in, any firm, corporation, partnership, proprietorship, or other business that engages in any of the following activities within a _____-mile radius of the Business's current location [describe].

2 Additionally, Shareholder shall:
   a) not refer prospective purchasers or lessees of _____ in _____ , other than the Business; and
   b) subject to any obligation *to comply with* any law, rule, or regulation of any governmental authority or other legal process to make information available to the person entitled thereto, keep confidential and shall not use or permit his attorneys, accountants, or representatives to use, in any manner other than for the purpose of evaluating the transactions *contemplated by* the Purchase Agreement, any confidential information of Purchaser which Shareholder acquired in the course of the negotiation of the transactions contemplated by the Purchase Agreement.

3 As consideration for the agreements of Shareholder set forth in Sections 1 and 2 above, Purchaser shall, at the Closing, deliver to Shareholder $_____ by wire transfer of immediately available funds in such amount to a bank account designated by Shareholder.

4 The term of this Agreement shall be _____ months, *commencing* on the date hereof.

5 In the event that any provision or any part of any provision of this Agreement shall be void or unenforceable for any reason whatsoever, then such provision *shall be stricken* and of no force and effect. However, unless such stricken provision goes to the essence of the consideration bargained for by a party, the remaining provisions of this Agreement shall continue in full force and effect, and to the extent required, shall be modified to preserve their validity.

6 In the event of any litigation or legal proceedings between the parties hereto, the non-prevailing party shall pay the expenses, including reasonable attorneys' fees and court costs, of the prevailing party in connection therewith.

Agreed to as of this _____ day of _____ , 20_____ .

_____
SHAREHOLDER

_____
PURCHASER
By _____
Its _____

4.3 Find the verbs, italicised in the text, which match these definitions (1–7).

1 to follow
2 will be taken out
3 given to
4 beginning
5 has bought
6 envisaged in
7 will spend

5 Speaking A: Paraphrasing clauses

To paraphrase means to express something in your own words. The following phrases may help you to paraphrase:

This clause deals with ... and says that ...
According to this clause, the parties agree to ...
This clause regulates ...
It simply says that ...
This is about what happens when ...
In such a case, ...
Here it says ... , which means that ...
This part basically just says that ...

Working with a partner, take turns paraphrasing the contents of each of the clauses (1–6) in the agreement on page 67. Explain the contents of the clauses as if you were speaking to a client with little knowledge of the law.

6 Listening A: Negotiating

The contract formation process typically involves negotiating the terms and conditions of the agreement. Negotiating can be carried out face to face and/or in writing, with the use of both contract templates, as seen in Reading B, and **term sheets**. A term sheet is a document listing the terms and conditions of a business agreement. During the negotiation phase, it can be used by the parties as a guide; after negotiations, it often serves as the basis for the final agreement.

While a great deal of the negotiating process takes place today via email, face-to-face negotiating continues to play an important role. Undoubtedly, the ability to negotiate well in English depends to a large extent on experience. However, negotiating skills can be improved by learning about how negotiations are generally conducted and which techniques are employed by good negotiators.

6.1 Listen to the first part of an excerpt from a seminar held at a law firm for some of the firm's recently hired young lawyers and tick the topics that the speaker will cover.

1 preparing for a negotiation ☐
2 phrases and expressions for negotiators ☐
3 using agreement templates and term sheets ☐
4 classic 'tricks' used by negotiators ☐
5 general negotiating techniques ☐
6 dealing with objections from the other side ☐
7 different types of agreement usually encountered ☐
8 recognising a good deal ☐
9 role-plays ☐

6.2 Listen to the second part of the seminar and answer these questions.

1 What two things does the speaker say must be considered when using contract templates in a negotiation?
2 The speaker advises negotiators to categorise the issues under discussion into four types. What categories does he suggest?
3 What do you think the speaker means by *horse-trading*?
4 What is the speaker's advice concerning clauses in an agreement which the other party promises not to enforce?

7 Language use A: Giving emphasis

An experienced speaker will make use of phrases which highlight the importance of an idea before it is presented. For example, the speaker in Listening A uses the following phrase to point directly to important information:

It's important to realise that *negotiating with a contract template means that it's necessary to review the terms and conditions it contains carefully.*

This phrase can be emphasised further by the use of such adverbs as *particularly* or *especially*.

It's ***particularly / especially*** *important to realise that negotiating with a contract template means ...*

A speaker would give these adverbs greater emphasis by making them louder, longer and higher in pitch.

The beginning of the second part of the seminar contains several other examples of phrases that can be used to give emphasis to a point, in speaking as well as in writing.

Look at the first two paragraphs of the transcript of the second part of the seminar on page 283 and underline the phrases used for giving emphasis to a point. Which of them can be made stronger by adding the adverbs mentioned above?

8 Writing A: An informative memo

A memo is a formal text type used, for example, to outline or clarify a point of law or to provide a brief opinion on a case. Memos can be external (e.g. to a client) or internal (e.g. to another lawyer in the same firm). In either case, a memo serves to circulate information that requires the attention of its readers.

8.1 Match the halves of these sentences explaining the elements of a memo.

1 A heading
2 The subject line
3 The context
4 In the main message,
5 The action close

a refers to any sentences providing background information about the project in question (such as a reference to an event or to a previous request for information).
b individual points should be organised in descending order of importance, i.e. most important ones first, subordinate or supporting points later.
c is a clear call to action – an explanation of what should be done, in what way, by whom and by what date.
d includes the components *Date*, *To*, *From* and *Subject*.
e states the main idea of the memo in fewer than ten words.

8.2 Identify the elements from Exercise 8.1 in this internal memo.

Memorandum

To: All members of the legal staff of the Mergers & Acquisitions department

From: John Thornton

Date: 10 February 2011

Subject: In-company seminar on contract negotiations

As part of our in-company training programme focusing on professional communication skills, we have arranged for the well-known communication trainer and practising lawyer, Mr Tom Boland, to hold a half-day workshop on the topic of Successful Contract Negotiations.

We would like to invite all members of the legal staff in the department to attend this workshop, which will take place on 27 February, 9–11.30 a.m., Conference Room 12.

The workshop consists of a theoretical part, followed by practical role-plays offering an opportunity for negotiating skills training and personal feedback from the trainer. Thus it is imperative that you arrange your schedules so that you can be present for the entire workshop.

Please let me know by 9 a.m. on Monday, 14 February by email (j.thornton@lawfirm.com) whether you can attend.

J. Thornton

A junior colleague of yours who attended the in-company seminar on effective contract negotiations (Listening A) was asked by your superior to draft a memo for the other non-senior members of staff who were not present at the talk. He was told to summarise the three most important points raised by the speaker, particularly those made in connection with the careful use of contract templates and term sheets. The junior colleague has asked you to review his memo before he sends it.

8.3 Before you read your colleague's memo, review the transcript of Listening A on page 283 and identify the points that should be included. Think about how you would structure the memo.

8.4 Read the memo below and make suggestions for improvement. Use the Writer's checklist on page 72, paying attention to the overall structure and cohesion of the memo, sentence structure and language use. Add phrases for giving emphasis where necessary. One comment has already been made on the text.

Memorandum

To: All non-senior members of the legal staff of the Mergers & Acquisitions department

Subject: Seminar on contract negotiations

The (seminar) was very informative, and the speaker made a lot of good points about using templates and term sheets. The speaker told us that we should be careful when using templates. He said that we should review the existing terms and conditions carefully, and also think about what is missing from the agreement and should be included. He then said that it is a good idea to ask a senior attorney who has experience with the type of agreement you are negotiating to look at your agreement. You should keep good notes of all communications about the points in the agreement, too, all the information on the term sheets should be what the parties have all agreed on. Don't leave any language in the agreement which was originally in the template and which is not appropriate!

- Which seminar? Provide more background information!

Best wishes
Lydia Brown

Writer's checklist

STRUCTURE, CONTENT, COHESION

- Is there a clearly written and easily recognisable statement of the main purpose or subject of the text?
- Is sufficient background information provided, i.e. is the subject of the text put into context?
- Are the paragraphs arranged logically? Is the most important point stated first? Are further points listed in descending order of importance?
- Does each paragraph of the text have one main idea?
- Are any of the paragraphs too long? Would the text be easier to understand if these paragraphs were broken down into shorter ones?
- Are transitional words and phrases used effectively to lead from one idea to the next, from one paragraph to the next? (For example: *consequently, on the other hand* or *secondly*.)
- Are evidence and examples provided to illustrate and support the points made?
- Does the text end with a clear call for action so the reader knows what he or she is expected to do?

SENTENCE STRUCTURE

- Is there sufficient variety in the way sentences begin?
- Are various sentence types used: simple (one independent clause and no dependent clauses), compound (two or more independent clauses, joined by a conjunction) and complex (at least one main clause and one subordinate clause)?
- Are there any sentences that are too long to be understood easily? Can they be made shorter or broken up?
- Are parallel ideas expressed in terms that are grammatically parallel? (For example: instead of *The contract outlines your rights and what you are obliged to do,* write: *The contract outlines your rights and obligations.*)
- Are there any sentence fragments, i.e. sentences without a subject and main verb?

LANGUAGE USE

- Are any words misspelled? (Check the words you know you tend to misspell.)
- Do the subject and verb in every sentence agree in number? (For example: *The reasons why the claim has been filed are* ... is correct and not *is*, because the subject is plural.)
- Are any words or phrases inappropriate in style, in particular, too informal?
- Have any words been repeated too often where synonyms or pronouns could have been used instead?
- Is it always clear what words like *it, he, they, this* refer to?
- Is the use of tenses consistent? (For example: are there unjustified shifts from the present to the past, or from present simple to continuous?)
- Are the following words used correctly (not mixed up): *there/their/they're, its/it's, to/too, your/you're*?

9 Listening B: Contract negotiation

Lawyers are commonly requested to conduct contract negotiations on behalf of clients, particularly in matters in which strong negotiating skills are required. You are going to hear Arthur Johansson, a junior lawyer who attended the in-company seminar on negotiating techniques, negotiating the terms of an agreement for a client with the other party's lawyer, Ms Orvatz.

9.1 Listen to the negotiation and answer these questions.

1. What kind of agreement are they talking about?
2. What kind of business does it involve?
3. Which clauses do they mention?
4. What problem does the franchisee have with the contract?

9.2 Listen again and decide whether these statements are true or false.

1. The clause they are discussing would not allow the franchisee to operate any kind of restaurant within the prescribed area for a stipulated period of time.
2. The lawyer representing the franchisor argues that the purpose of the clause is to guard her client's legitimate business interests.
3. The franchisee's lawyer believes that his client is in a strong position in the negotiation.
4. The franchisee's lawyer offers to strike the arbitration clause in exchange for a reduction in the number of years set forth in the non-competition clause.

9.3 What do you think of the way Arthur Johansson negotiated the agreement? Did he use any of the techniques presented at the negotiation seminar?

10 Language use B: Negotiating expressions

In addition to learning about techniques employed by experienced negotiators, improving your negotiating ability in English can be achieved by becoming familiar with and using common phrases.

In one of the initial phases of a negotiation, the bidding phase, the two sides put forth proposals or suggestions. The phrases in Exercise 10.1 serve to introduce a proposal or suggestion, or to respond to such a proposal in a face-to-face negotiating session. (Note that these phrases would also be suitable for use in informal written communication, such as an email, between parties with an established and friendly working relationship.)

10.1 Listen to the negotiation in Listening B again and tick the expressions you hear the lawyers use.

1. I'm afraid we can't go along with ... ☐
2. I'm afraid that's out of the question. ☐
3. Our proposal is to ... ☐
4. That's certainly a step in the right direction. ☐
5. We suggest ... ☐
6. That would be difficult for us. ☐
7. We'd like ... ☐
8. What we're looking for is ... ☐
9. I think we could live with that. ☐
10. We're not entirely happy with that. ☐
11. We'd be happy with that. ☐

10.2 Decide whether each of the phrases in Exercise 10.1 is used to a) make a proposal, b) respond favourably, or c) reject a proposal. Which phrase is the most forceful for rejecting a proposal?

11 Speaking B: Negotiating an agreement

Role-play this situation with a partner. Use as many of the phrases for negotiating from Exercise 10.1 as you can.

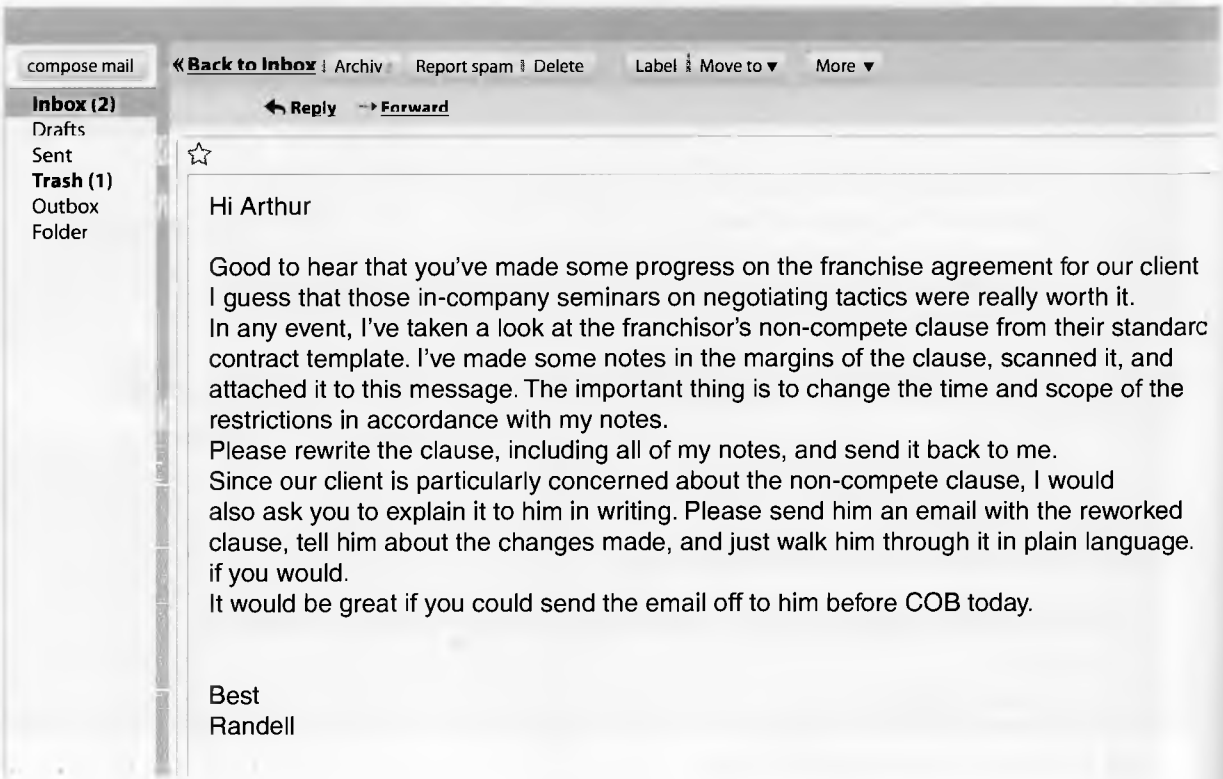
Student A: Turn to page 301.
Student B: Turn to page 302.

12 Reading C and Writing B: Adapting a contract template

As discussed previously in this unit, the use of templates in the contract formation stage can make the task of drafting a contract easier, but it also requires care and thought. In some cases, it will only be necessary to fill in the blanks of the template, while in others, additions are made and rewriting must be done. The following email, written to Arthur Johansson, the junior lawyer who carried out the negotiation in Listening B, deals with the contract he negotiated with the legal representative of a franchisor.

12.1 Read the email from Arthur's superior and answer these questions.

1. What does he want Arthur to do?
2. What does he mean by *walk him through it*?
3. What do you think *COB* means?



17.3 Franchisee covenants that, unless otherwise approved in writing by Franchisor, Franchisee shall not, for a continuous uninterrupted period commencing upon the expiration or termination of this Agreement (regardless of the cause for termination), and continuing for (two (2) years) thereafter (and in the case of any violation of this covenant, for (two (2) years) after the violation ceases), either directly or indirectly, for himself, or through, or on behalf of, or in conjunction with any person, partnership, corporation, limited liability company or other entity, own, operate, maintain, or engage in, be employed by, or provide assistance to, or have any interest in (as owner or otherwise) any business that: (a) offers products or services which are the same as or similar to the products and services offered by the Franchised Business under the System and (b) is, or is intended to be, located at or within a twenty-five (25) mile radius of the Approved Location or of any other Franchised Business under the System.

one year

10 mile

A bit wordy - sum these up using one term!

Che might to allow client to have 'passive interests' - shouldn't stop him from buying shares in similar companies in which he has no influence on decisions.

12.2 With a partner, summarise what the above clause says in everyday language, as you did in Speaking A in this unit. What changes did you make in word choice and sentence structure?

12.3 Write the email to the client as requested by Randell, referring to the attached reworked clause and explaining what it means. Look at Section 9 (Understanding legalese) in Unit 3 for guidance on simplifying the style of language used in the clause.

Unit 5

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 5.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 agreement franchise covenant contract
2 should in the event if whereas
3 consent authorisation injunction permission
4 withdraw breach cancel rescind
5 deleted taken out unwarranted removed
6 contention proposition proposal suggestion
7 valid efficacious enforceable in effect

2 Collocations Complete the table below using these verbs, which all collocate with the noun *contract*.

~~amend~~ cancel enter into execute modify rescind sign supplement terminate

To form or make a contract valid	To make a contract partly or wholly invalid	To change or add to a contract
		amend

3 Verb forms Complete the sentences below using the correct form of the verbs in the box.

breach ~~enter into~~ modify renew sign terminate

1 Minors and the mentally incompetent lack the legal capacity to ~~enter into~~ contracts.
2 Courts generally rule that if the parties have a meeting of the minds and act as though there was a formal, written and ..... contract, then a contract exists.
3 The lawsuit claimed that the defendant ..... a confidentiality contract by attempting to sell trade secrets as his own inventions.
4 'Evergreen clauses' are those clauses which cause automatic renewal unless the contract ..... .
5 While fixed-term contracts involve an agreement that the job will last for a specified period of time, provisions are often included to enable the contract ..... if so desired.
6 The committee shall have no authority to change or otherwise ..... contract language.

4 Word formation Complete this table by filling in the correct abstract noun form. Underline the stressed syllable in each word with more than one syllable.

Verb	Abstract noun
renew	renewal
draft	
include	
omit	
terminate	
encrypt	
adopt	
negotiate	
propose	
transact	

5 Vocabulary: antonyms Write the opposite of each of the adjectives used to describe a contract.

1 enforceable / unenforceable contract
2 implied / ..... contract
3 binding / ..... contract
4 valid / ..... contract

6 Prepositions Complete the contract clause below using the prepositions in the box. What type of clause is it?

between by by for hereby herein in

This agreement constitutes the entire agreement **1)** between the parties. No waiver, consent, modification or change of terms of this agreement shall bind either party unless in writing and signed **2)** ..... both parties. Such waiver, consent, modification or change, if made, shall be effective only **3)** ..... the specific instance and **4)** ..... the specific purpose given. There are no understandings, agreements or representations, oral or written, not specified **5)** ..... regarding this agreement. Contractor, by the signature below of its authorised representative, **6)** ..... acknowledges that the Contractor has read this agreement, understands it and agrees to be bound **7)** ..... its terms and conditions.

6 Contracts: remedies

1 Reading A: Introduction to contract remedies

The concept of damages is central to the topic of contract remedies. *Damages* can be defined as 'money awarded by a court in compensation for loss or injury'. The term should not be confused with the word *damage*, which means 'loss or harm which is actionable in law'.

1.1 Read the first two paragraphs of the text. Which of the key terms in the second paragraph is a synonym for *damages*?

1.2 Read through the whole text quickly and decide whether these statements are true or false.

1 According to the foreseeability rule, damages are awarded when it can be proven that harm or injury could have been seen or known in advance by the breaching party when the agreement was made.
2 Reliance damages are recovered when the breaching party is forced to give up profits it acquired under the breached contract.
3 Exemplary damages are collected from the breaching party as a kind of punishment for particularly objectionable behaviour.

When there has been a **breach of contract**, the **non-breaching party** will often seek **remedies** available under the law. This area of the law, known as 'remedies', is a broad area, but can be summarised generally.

Most remedies involve money damages, but **non-monetary relief** is also available in some cases. The basic remedy for breach of contract in the Anglo-American legal system is **pecuniary compensation** to an **injured party** for the loss of the benefits that party would have received had the contract been performed. Some examples of this kind of remedy include **expectation damages** or **'benefit of the bargain' damages**. Certain damages are recoverable regardless of whether the loss was foreseeable, while the recovery of other damages hinges on **foreseeability**. Where the damage is the direct and natural result of the breach, the breaching party will be held liable to pay damages for such without regard to the issue of foreseeability. When lawyers plead these damages in court, they commonly refer to **general damages**. However, where the damage arises due to the special circumstances related to the transaction in question, damages are limited by the **foreseeability rule**, which states that they are only recoverable when it can be established that the damage was foreseeable to the breaching party at the time the contract was entered into. When lawyers plead these damages in court, they commonly refer to **special** or **consequential damages**.

Where it is not possible to prove expectation damages, the non-breaching party can seek **reliance damages**, where the compensation is the amount of money necessary to compensate him for any expenses incurred in **reasonable reliance** on the contract. The non-breaching party is thus returned to the *status quo ante* with no profit or benefit from the contract.

Another measure of damages is **restitution damages**, which compel the breaching party to give up any money benefit it obtained under the breached contract. Restitution damages are, for example, awarded when one party (the breaching party) completely fails to perform its obligations under the contract.

The parties to a contract may, however, agree at the time they enter into the contract that a fixed sum of money shall be awarded in the event of a breach or to a formula for ascertaining the damages or for certain other remedies, e.g. right of repair. This type of damages is known as **liquidated damages** or **stipulated damages**.

In some cases, a party will be able to obtain **punitive** or **exemplary damages** through the court which are designed to punish the breaching party for conduct which is judged to be particularly reprehensible, e.g. fraud. This type of damages is normally only awarded where specifically provided by statute and where a **tort** in some way accompanies the breach of contract.

Where monetary damages would not be an adequate remedy, such as in a case where the parties contract for a portrait by a famous painter, but the portrait is painted by an inferior artist, the court may order **specific performance**. Specific performance involves an order by the court compelling the breaching party to perform the contract.

Finally, there are other remedies available, including the right to rescind or cancel the contract in the event of certain kinds of **default** by the other party. This constitutes an undoing of the contract from the very beginning. In addition, legislation such as sale of goods legislation also allows for various remedies, including a right to reject goods in certain cases and a right to return or demand repair or replacement.

2 Key terms: Types of damages

2.1 Match these types of damages (1–7) with their definitions (a–g).

1 expectation damages / 'benefit of the bargain' damages
2 general/actual damages
3 liquidated/stipulated damages
4 reliance damages
5 restitution damages
6 special/consequential damages
7 punitive/exemplary damages

a compensation agreed upon by the parties and set forth in the contract that must be paid by one or the other in the event that the contract is breached
b compensation determined by the amount of benefit unjustly received by the breaching party
c compensation for losses which are as a result of special facts and circumstances relating to a particular transaction and which were foreseeable by the breaching party at the time of contract
d compensation which seeks to put the non-breaching party in the position he would have been had the contract been performed
e compensation for a loss that is the natural and logical result of the breach of contract
f compensation which is imposed by the court to deter malicious conduct in the future
g compensation necessary to reimburse the non-breaching party for efforts expended or expenses incurred in the reasonable belief that the contract will be performed

2.2 What types of damages are distinguished in your jurisdiction? Write the equivalent names in the list in Exercise 2.1.

3 Reading B: Liquidated damages

The text below is an excerpt from a contract forms book, typically consulted by lawyers when drafting a contract. It is an introduction to the concept of liquidated damages. It also provides information about the elements of a liquidated damages clause, issues relevant for enforceability, and how the courts tend to rule in such cases.

3.1 Read the first paragraph. How are liquidated damages clauses defined?

Contractual remedies: Liquidated damages

1) .....

When parties enter into a contract, they often wish to calculate the damages which would arise for one or both of the parties in the event that there is a breach of contract by the other party. Provisions in a contract stipulating the amount required to compensate an injured party in the event of a breach are referred to as 'liquidated damages' clauses. The purpose of liquidated damages clauses is for the non-breaching party to avoid the costs which arise in the difficult task of proving the amount of the loss actually incurred. Such clauses are enforceable where they are carefully drafted to compensate the non-breaching party for the loss caused by the breach.

2) .....

A contractual party may, in certain instances, try to make certain that the other party performs its contractual undertakings by including provisions which, in reality, constitute a penalty for failure to perform. In contrast to a liquidated damages clause, a penalty clause is not intended to compensate the injured party for anticipated loss arising from the breach. On the contrary, the purpose of penalty provisions is to serve as a deterrent to breach in that it provides for damages which the parties know extend far beyond that which would normally compensate the non-breaching party for its loss.

In many jurisdictions, the courts will sever the penalty clause from the contract, holding it to be unenforceable as a penalty. The result is that the non-breaching party is forced to prove its loss in accordance with the general principles of contractual remedies. In light of the above, it is *crucial when drafting a damages clause that it contains the elements of an enforceable* liquidated damages clause as opposed to an unenforceable penalty.

3) .....

Historically, an enforceable liquidated damages clause will include the following elements:

a) the anticipated damages from the relevant breach are uncertain in amount or difficult to prove;
b) an intent by the parties to determine the damages in advance; and
c) a stipulated amount which is reasonable, not considerably disproportionate to the presumed loss or injury.[1]

The recent tendency of the courts is to give less or no weight to the subjective intent of the parties. Instead, the courts take into consideration all three elements, together with other factual circumstances, such as the relative bargaining power of the parties, to determine the reasonableness of the clause at issue.

The primary issue for the court to decide is that of reasonableness of the prescribed amount of damages in proportion to the presumed loss for the non-breaching party. As such, the court must assess whether the fixed amount is a realistic attempt to calculate the actual damages which may result from the breach, or whether the amount represents a penalty the non-breaching party is attempting to impose on the breaching party.

4) .....

The courts generally look to the time of contract in determining the reasonableness of the damages set forth in it. Consequently, the actual loss incurred is immaterial, provided the damages at the time of contract represent a reasonable prediction. Of course, the breaching party has a very difficult argument to make regarding unreasonableness where the predicted amount is close to the actual loss.The Uniform Commercial Code in the United States, in contracts for the sale of goods, permits liquidated damages clauses *which prescribe amounts reasonable considering the actual loss. In rare cases, where the non-breaching party incurs no actual* damages, the courts will not enforce a liquidated damages clause.

[1] Elements a) and c) are apparently contradictory. However, in practice, precedent determines what amounts to a penalty clause. and lawyers take this into account when drafting contracts.

3.2 Read through the whole text quickly. Then match these headings (a–d) with the sections they belong to (1–4).

a Liquidated damages provisions distinguished from penalty clauses
b Relationship between the stipulated amount and the damages sustained
c Components of a liquidated damages clause
d Definition of liquidated damages

3.3 Decide whether these statements are true or false.

1 A penalty provision is included in an agreement in order to compensate the non-breaching party for anticipated losses resulting from a breach.
2 Courts will generally strike down a penalty provision, leaving the injured party no further means of recovering damages from the breaching party.
3 Recently, courts have tended to place little importance on the intentions of the contracting parties when reaching decisions concerning liquidated damages.
4 The court's decision as to whether the stipulated damages are intended as a penalty or not depends largely on the reasonableness of the amount.

3.4 Do you have an equivalent to the Uniform Commercial Code in your jurisdiction?

3.5 Find words or phrases in the text which match these definitions.

1 failure to perform provisions of a contract without a legal excuse (section 1): b..... of c.....
2 to pay damages to the person harmed (section 1): c..... an i..... p.....
3 the relative strength to influence the setting of contract terms (section 3): b..... p.....
4 the part of the contract in question (section 3): c..... at i.....

4 Language use A: Talking about court actions and rulings

These phrases can be used for referring to the actions and rulings of the court.

1 The court **upheld** the decision.
2 The court **dismissed** the suit on the grounds that ...
3 The court **holds** that ...
4 The court **is reluctant to** ...

4.1 Underline phrases referring to the actions and rulings of the court in the text on page 80.

4.2 Decide which of these verbs can be used in place of the words in bold in the box above. Is the meaning the same as the original phrase, or does it change?

agrees	is hesitant to	overturned	rejected	reversed	rules	is unwilling to

4.3 The concept of liquidated damages can be found in jurisdictions all over the world. However, the practice of the court striking down a penalty provision is an approach followed mainly in Anglo-American countries, and is not characteristic of every jurisdiction. What is the practice in your own jurisdiction? You may need to research this information.

5 Listening A: A Danish remedy

Remedies for breach of contract and their enforcement differ from jurisdiction to jurisdiction. You will hear a law student talking about a type of remedy in Denmark as part of a university seminar on contract remedies in Europe.

5.1 Listen to the first part of the student's talk. Decide whether these statements are true or false.

1. *Specific performance* means that the breaching party is ordered to fulfil the original obligations of the contract.
2. Specific performance can be applied in all breach of contract cases.
3. When the court grants an order for specific performance, the breaching party always complies.
4. The non-breaching party who files a claim for specific performance is usually awarded money as damages from the judicial enforcement agent.

5.2 Listen to the rest of the talk and complete these notes about the five situations where specific performance can be applied, using no more than three words in each space.

1. Goods already .....
2. Goods procured from .....
3. Only a ..... is needed.
4. Involves ..... of pledged security.
5. When breaching party needs to be stopped from performing acts that are ..... to non-breaching party

6 Language use B: Using repetition to aid understanding

The speaker in Listening A used an effective technique for making information easier for her listeners to understand: repetition. People listening to complex information in a foreign language often have trouble understanding everything. In real-life speaking situations, listeners cannot go back to something they missed and listen to it again. Experienced speakers know this, and therefore repeat words and ideas (often in the form of a paraphrase) in order to aid understanding.

Read this excerpt from the transcript of the law student's presentation. Underline important words that are repeated more than once, as well as any paraphrases of ideas which serve to repeat a previous idea.

> The whole system works like this: the court must first determine whether an order for specific performance should be granted. Of course, the breaching party can do two things: either comply or not comply with the order. In other words, the defaulting party either takes the action necessary to perform the contract or he doesn't. If he doesn't, the other party can decide to go to the judicial enforcement agent. This judicial enforcement agent is called the *foged* in Denmark. A *foged* is similar to the bailiff in common law. He basically fulfils the functions of a bailiff. The Danish Code of Procedure 17 regulates what the *foged* has to do. This code stipulates that the *foged* can convert the plaintiff's claim into money damages. So, in reality, most claims for which specific performance is granted are converted into money damages.

7 Speaking A: Contract remedies

Prepare a brief talk on an aspect of contract remedies in your jurisdiction. Make use of repetition and paraphrasing to reinforce important ideas and make them easier for your listener to understand and remember. You should structure your talk in three distinct sections and give a brief overview of the points you will cover.

8 Reading C: Understanding contract clauses

The liquidated damages clause below is part of a construction industry agreement.

8.1 Read the clause and answer these questions.

1. Why do you think such clauses would be of particular importance in the construction industry?
2. What does the legal expression *time is of the essence* in the first line mean?
3. How much would the owner be entitled to receive as damages if the work were not completed in ten days as agreed, but rather in 15 days?
4. In the event of a breach of this clause, how will the owner receive compensation?

FAILURE TO FINISH THE WORK ON TIME

It is *mutually* agreed by and between the parties hereto that time is of the essence and that in the event of the Contractor's failure to complete the contract within the time stipulated and agreed upon, the Owner will be damaged thereby; and because it is difficult to definitely ascertain and prove the amount of such damages, *inclusive of* expenses for inspection, necessary traveling expenses and other similar expenses, it is hereby agreed that the amount of such damages shall be the liquidated sum of Two Thousand Dollars ($2,000.00) per calendar day for each day of delay in finishing the Work *in excess of* the number of working days *prescribed*; and the Contractor hereby agrees that such sum shall be *deducted from* amounts due the contractor under the contract or, if no amount *is due* the Contractor, the Contractor hereby agrees to pay to the Owner as liquidated damages, and not *by way of* penalty, such total sum as shall be due for such delay, calculated *as aforesaid*.

8.2 For each of these words, find the italicised word or expression in the clause above that most closely matches its meaning.

1. in the form of
2. specified in writing
3. more than
4. jointly
5. is owed to
6. including
7. as stated above
8. subtracted from

9 Listening B: Remedies

You are going to hear a dialogue in which an attorney, Ms Hayes, is consulted by a client, Mr Anderson, who has been having difficulties in connection with a contractual agreement. In order to establish the facts of the case, the attorney asks a number of questions. She also informs the client about the various remedies which may be available to him.

9.1 Listen to the first part of the lawyer–client interview and answer these questions.

1. Why couldn't the client deliver the website to the customer on time?
2. What was the client forced to do so that he could deliver the website?

9.2 Listen to the second part of the interview and answer these questions.

1 According to the lawyer, what should her client have done to mitigate his damages?
2 What is the lawyer going to do next?

9.3 Listen to both parts again and tick the questions asked by the lawyer.

1 Did they not deliver on time, or did they deliver something that didn't work? ☐
2 What are some of the features of the website you designed? ☐
3 Did you draft the contract yourselves, or did you engage an attorney? ☐
4 Were you able to deliver your website on time? ☐
5 Did you get in touch with anyone besides your cousin, say, another programmer here in town? ☐
6 How much do programmers get paid per hour in New York? ☐
7 Did they know what your deadline was? ☐
8 Do you expect to lose the customer as a result of this? ☐

9.4 Choose the correct answer to each of these questions.

1 What was wrong with the software program delivered to the client?
   a It was completed too late to meet the deadline.
   b It didn't work on all of the ferry company's PCs.
   c It wasn't designed in accordance with the specifications of the client.

2 Provided the contract doesn't waive the right to consequential damages, under which circumstances might the client be entitled to receive such damages?
   a If the reputation of the client in his town suffers
   b If the quality of the software turns out to be unsuitable for the purposes of the customer
   c If the loss of the customer and the necessity to grant a discount could have been foreseen

3 Why can't the client expect to be awarded punitive damages?
   a Weight gain does not qualify as emotional injury.
   b Punitive damages are not awarded in a breach-of-contract case of this type.
   c The possibility of personal injury was not foreseen in the contract.

9.5 Work in small groups and discuss the case. What do you think would be the likely outcome?

10 Text analysis: Initial interview with a client

In the previous dialogue, the attorney conducts a successful interview with a client. In such an interview, the primary aims of a lawyer are to establish a good working relationship, to ascertain the facts of the case, and to develop a theory of the legal issues involved. These objectives can best be achieved through an awareness of the stages of a client interview and the effective use of questions.

Complete the spaces (1–5) in the table on the next page using these stages in a client interview (a–e).

a Establishing facts and chronology of events
b Concluding the interview
c Getting an overview of the case
d Identifying issues, developing and supporting a theory
e Introduction

1)	
Greeting	*Nice to see you again, Mr Johnson. Please have a seat. It's a pleasure to meet you. Would you like a cup of coffee?*
Explaining what will happen in the interview	*I'll be asking you some questions about the situation ... We'll be spending the next hour discussing the facts of your case ...*
Discussing circumstances	*Let me assure you that everything you tell me today will be held in strict confidence.* *Before we get started, maybe I should tell you about my fees ...*
2)	
Identifying the nature of the dispute	*Would you like to tell me why you are here today?* *Please describe what happened.* *Tell me what brings you here today and how I can help you.*
Summarising the nature of the dispute	*So, if I understand you correctly, you are saying that ...* *Let me repeat what I have understood so far.* *Allow me to summarise what you've said.* *As I understand the situation, ...*
3)	
Asking open questions to gather information	*What happened next?* *What did you do then?*
Avoiding digressions	*Let's return to the course of events.* *Please tell me more about what happened.*
4)	
Establishing facts to support or negate a theory	(examples from listening text) *If they were a long-standing customer and Glaptech knew it, and if we can prove all of that at trial, you might be able to recover what are called consequential damages.* *You may be able to get what I mentioned earlier, consequential damages, which are damages that flow from the result of the breach of contract. Did they know what your deadline was?*
Asking about detail	*I need to know more about ...* *Allow me to ask you more about ...* *Can you explain why ...*
5)	
Assessing the case	*I think that we have a good chance of convincing the court that ...* *As I see it, we have good reason to be optimistic.* *I have to warn you that proving that ... will be extremely difficult.* *Let me tell you something about the legislation in such cases ...*
Describing next moves	(examples from listening text) *Let me go through the file and read through the contract. Then I'll prepare the complaint, which I should be able to file at the end of next week.* *I'm going to research these matters in detail and then I'll get back to you.*
Referring to next contact	*I'll call you next week and let you know how things look.* *You'll hear from me in a few days.*
Saying goodbye	*It was good seeing you.* *Thank you for entrusting me with this matter. Goodbye!*

11 Speaking B: Interviewing a client

With a partner, take turns conducting a lawyer–client interview. Each of you will play the role of lawyer and question the other about the facts of a case.

While playing the role of lawyer, follow the outline of a lawyer–client interview in the table on page 85 and use the sample phrases provided whenever possible. Take notes on the information you receive from your client.

When playing the role of client, respond to the questions posed by the lawyer as best you can, inventing details when necessary. Do not give all of the information at once; your task is to give your partner practice in posing questions and gathering information.

Student A: Turn to page 301.
Student B: Turn to page 302.

12 Writing: Follow-up correspondence to a client

Subsequent to an important meeting or phone call with a client, a lawyer will generally make detailed notes on what was discussed and agreed upon. These notes may then form the basis of a follow-up email or letter summarising the contents of the discussion.

12.1 Read the follow-up email on page 87, which was written after the interview you heard in Listening B, and answer these questions.

1 What do you think is the purpose of this email?
2 Find one factual mistake and one additional piece of information in the email. Read the transcript of the interview on pages 284–285 to check your answers.
3 Underline the phrases which are used to ask the client to provide material to serve as evidence in the case.
4 Underline phrases referring to the actions and rulings of the court.

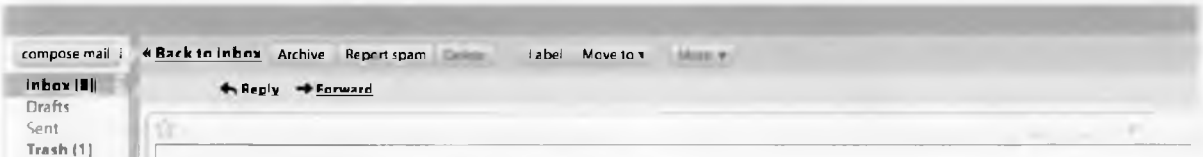
12.2 Match each of these functions (a–g) with the paragraphs (1–7) in the email.

a a summary of the facts of the case
b an outline of actions to be undertaken next
c a discussion of legal issues involved in the case
d a closing line referring to the next contact with the client
e a reference to the day, location and general subject of the interview
f a request for further information or evidence from the client
g an assessment of how successful the case is likely to be in court

12.3 Unscramble these phrases taken from the follow-up email to a client on page 87. Each of them is a sentence opener, typically used to signal the function of a paragraph. After unscrambling them, decide which of the functions listed in Exercise 12.2 each one can be used to signal.

1 our meeting / to / As / a follow-up / on June 24 ...
2 the facts / as / According to / them, / I understand ...
3 helpful / stage / it would be / if you could / At this / in the matter, / give me ...
4 your / are good, / chances of / While / I believe / some damages / recovering / ...

12.4 Using the notes you have taken and the information included on your role card in Exercise 11, write an email to the client you interviewed. Make use of the sentence openers that you unscrambled in Exercise 12.3.



Dear Mr Anderson

1 As a follow-up to our meeting on June 24 at my office, allow me to summarise what we discussed at that time.

2 According to the facts as I understand them, you are involved in a contractual dispute with the software-design company Glaptech concerning work you commissioned in order to fulfil a contract between you and a ferry company. The agreement that you concluded with the ferry company states that you would provide them with a website no later than 15 May of this year which would, among other things, enable customers to book a ferry passage online. Your contract states that this online booking feature would work for 'all customers using modern home computers'. You commissioned Glaptech to write a software program for the online booking feature to be incorporated into the website you designed. However, Glaptech delivered an unsatisfactory program to you, which contained unnecessary code and was not compatible with Macintosh computers. As a result, it was necessary to have Glaptech's program rewritten. For this reason, you requested an extension of three weeks from the ferry company. This extension was granted to you in exchange for a 20% discount on your work. The programmer you found to do the repair work charged a higher than normal rate, which meant that the work on the website as a whole resulted in a financial loss for you. Furthermore, you fear that the fact that you delivered your work late might result in the loss of a customer, as well as damage to your professional reputation.

3 You requested information from me regarding the recovery of damages. If you do in fact lose a long-standing customer, there is a chance that you may be able to recover consequential damages. However, proving that the defendant could have foreseen this loss will be difficult. It is also unlikely that you will be able to recover the full amount you spent to pay the relatively high-priced programmer who repaired the faulty program. Since you were obliged to make a reasonable effort to solve the problem as inexpensively as possible and you found another programmer without shopping around locally, it might be argued that you did not take sufficient steps to mitigate your damages. It would be necessary for us to show the court that another programmer would have charged more or less the same as the programmer you hired and would have done the same quality work. If we cannot do this, you will only be able to recover what a local programmer would have charged for the work. Nevertheless, it appears that your chances of recovering the discount that you gave to the ferry company are good, because your contract with Glaptech does not waive consequential damages. It will be necessary to show that Glaptech could have foreseen that you would have to give your customer a discount if the program they designed was unsatisfactory and had to be fixed, thus forcing you to deliver the goods late.

4 While I believe your chances of recovering some damages are good, the amount will ultimately depend on what we are able to prove in court.The courts in our jurisdiction tend to strictly construe contracts between commercial parties and are generally hesitant to award consequential damages unless the plaintiff can clearly demonstrate that the loss was foreseeable to the defendant.The court will look at the course of dealings between you and Glaptech, as well as any documentation you can produce which indicates that Glaptech could have reasonably foreseen the loss.

5 At this stage in the matter, it would be helpful if you could give me any documents or information which relate to the dispute. Naturally we will require a copy of the contract concluded with Glaptech. In addition, it would be extremely useful if you could provide documents indicating the nature and extent of your previous business relationship with the ferry company, as well as anything that would bear witness to the poor quality of the faulty software program provided by Glaptech.

6 Once I have received the contract from you, I will prepare the complaint, which I should be able to file within the week.

7 I will keep you informed of the progress of the case. Please do not hesitate to contact me if you have any questions.

Yours sincerely

Clare Hayes

13 Reading D: Types of breach

Different types of breach of contract can be distinguished, among them anticipatory breach, material breach and immaterial breach. The letter of advice below deals with a case of anticipatory breach.

13.1 Read the first paragraph and underline the sentence that expressly states the purpose of the communication.

Dear Dr. Robillard

You have requested advice regarding your possibilities for collecting damages in a lawsuit regarding an agreement with Pat Turner Breweries Ltd to supply the breweries with hops. I will outline the law in this jurisdiction as it applies to the facts in the instant case.

According to the information my firm has received, you entered into several independent contracts for the sale of hops with Pat Turner Breweries Ltd. Pursuant to these contracts, the breweries would purchase a certain amount each crop year. The price of the hops went down, and the buyer used the occasion of your firm's recent financial difficulties to repudiate the contract.

However, your firm still attempted to make the deliveries under the present contract. The buyer refused to accept them. You are inquiring as to whether you can bring an action for anticipatory breach of the contract for the remaining years.

It appears that the issue in the instant case is whether a seller of goods may bring an action to recover damages for anticipatory breach of a contract when the buyer states that he will refuse to accept the goods under the contract, even though the date for delivery has not yet arrived.

The law in this jurisdiction is quite clear: when a party announces his intention not to fulfil the contract, the non-breaching party has two options. Firstly, he may take the other party at his word and treat the notification of repudiation as releasing him from his contractual obligation to perform. He may then immediately bring an action for damages, subject to the requirement that he must take good-faith efforts to mitigate the damages. The second option would be for the non-breaching side to wait until the time when the performance was to take place, still holding the contract as prospectively binding, so long as such waiting is not harmful to the breaching side.

The courts here have reasoned that, under the reliance principle, an unqualified refusal by one side to perform should be treated as being in the same category of cases where the breaching party has put it beyond his power to perform. The breaching party, once absolutely having declared that it plans to breach, should not be permitted to object to the non-breaching side taking him at his word. Furthermore, why should the non-breaching party be required to wait until the day of performance, making futile preparations, and always keeping himself ready to perform, if the breaching side has left for more lucrative prospects? To require the non-breaching party to wait would be to violate the reliance principle.

Admittedly, there is a precedent stating that "to allow action before the date of performance is to expand the scope of the contract beyond the parties' consideration: A promise to perform in June does not preclude changing position in May." In *Wohl v. Wadman*, the defense argued that the announcement of intent to breach should be treated as an offer to rescind, not as a breach. Thus, the parties would keep the option to rescind until the date of performance, when it would become a breach. But the breaching side could revoke the offer to rescind at any time before then, if it is not acted upon by the other party. However, this would mean that the plaintiff, to recover anything, would have to remain ready and willing to perform, because if it accepted the "offer" to rescind, that would prevent any recovery. In a leading case on this point, Judge Hand stated that "a promise to perform in the future by implication includes an engagement not deliberately to compromise the probability of performance. A promise is a verbal act designed as a reliance to the promisee." In other words, if a party promises that he will do something in the future, he also commits himself to refrain from doing anything that might make it difficult for him to fulfil his promise. This seems to be the majority position in this jurisdiction.

Therefore, we feel that you have solid grounds on which to pursue an action to recover damages for anticipatory breach of contract. I suggest that you contact my secretary in order to schedule an appointment with me at your convenience in order to discuss our future course of action.

Best regards

Susan Whiteman

Susan Whiteman
Attorney-at-law

13.2 Read the whole letter and answer these questions.

1 In your own words, summarise the legal issue raised by the case referred to in the letter by completing this sentence:
The issue in the instant case is whether ...

2 In your own words, summarise the two options the client has under the law by completing these sentences:
The non-breaching party in this case has two options: firstly, ...
Secondly, ...

3 In your own words, say how the reliance principle relates to the case.
Under the reliance principle, ...

13.3 Underline the sentences in the letter which refer to the actions and rulings of the court.

13.4 Susan Whiteman has fallen ill and has had to hand over the Robillard case to a colleague while she is off sick. You have been assisting Susan and have been asked to write a memo to the new lead lawyer on the case. Write a short memo in which you:

- tell him the reason for writing;
- very briefly summarise the nature of the case;
- inform him how Susan has left the matter with the client;
- refer to the attached letter to the client;
- offer assistance if needed.

Unit 6

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 6.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 rely repudiate refuse reject
2 mitigate lessen relieve intensify
3 damages compensation injury reparation
4 option occasion choice alternative
5 reluctant curious hesitant unwilling
6 the Court found the Court argued the Court held the Court decided

2 Language use Complete the sentences below using the verb phrases in the box. In some cases, there is more than one correct answer.

~~are hesitant to~~ dismissed finding that held that rejected ruled that

1 Courts *are hesitant to* uphold restraints on trade.
2 The Court ..... punitive damages can be awarded in a contract case.
3 The Court ..... plaintiffs' claims that the disclosure constituted a breach of the parties' agreement, as reflected in the privacy policy the company posted on its website, not to disclose such personal information, ... the posting of such a policy did not create an enforceable agreement between the parties.

3 Word formation Complete this table by filling in the correct verb or abstract noun form. Underline the stressed syllable in each word with more than one syllable.

Verb	Abstract noun
~~remedy~~	remedy
	breach
intend	
	reliance
violate	
	enforcement
reverse	
anticipate	
	computation
perform	

4 Collocations with *damages* and *a clause* 1 Match the verb–noun collocations (1–9) with their synonyms (a–i). They all appeared in Reading B.

verb + *damages*

1 *incur* damages — **c** bring on
2 *stipulate* damages — **a** agree on
3 *ascertain* damages — **e** determine
4 *recover* damages — **b** get back
5 *anticipate* damages — **d** expect

verb + a clause

6 *insert* a clause — **h** add
7 *sever* a clause — **f** disapply
8 *draft* a clause — **l** write
9 *enforce* a clause — **g** put into effect

5 Collocations with *damages* and a *clause* 2 The verbs in the box commonly collocate with either *damages* or *a clause*. Match the verbs in the box with the correct noun.

1 damages: *award, ...*
2 a clause

~~award~~	claim	collect	contain	exclude	interpret	mitigate	perform
seek	strike	sue for	violate				

6 Vocabulary: word choice Choose the correct word or phrase to complete each sentence in this liquidated-damages clause.

LIQUIDATED DAMAGES FOR DELAYS

Contractor understands and acknowledges that time shall be 1) *on / by / in* the essence of this contract and agrees that the damages that may 2) *cause / result from / bring about* any delay in finishing the work or parts 3) *thereby / thereof / therein* will be difficult, if not impossible, to 4) *change / avoid / ascertain*. Thus, Contractor agrees that if the work and all parts thereof are not completed 5) *in / at / on* or before the dates stipulated for completion thereof, as extended in the manner specified 6) *herein / hereof / hereafter*, Contractor 7) *shall / may / should* pay to owner as stipulated, agreed and liquidated damages and not as a penalty, the amount stated on the cover sheet for each calendar day in which the work or any portion thereof remains uncompleted after such completion date as so extended.

7 Vocabulary: adjective plus noun Look at these adjective–noun combinations from Reading D (1–6). Match each of the adjectives (in italics) with its synonym (a–f).

1 *instant* case	**a** profitable
2 *contractual* obligation	**b** in the agreement
3 *unqualified* refusal	**c** useless
4 *futile* preparations	**d** sound
5 *lucrative* prospects	**e** present
6 *solid* grounds	**f** not limited or restricted

8 Word formation Read this text about remedies for breach of contract taken from a law firm's website. Use the words in the box to the right of the text to form one word that fits in the same numbered gap in the text.

A breach of contract results from the **1)** failure of one of the contracting parties to perform a duty **2)** ..... by the contract. The terms of a contract can be divided into different categories. For example, the terms can be conditions or warranties, which can either be **3)** ..... stated or implied in the contract. A condition is fundamental to a contract; **4)** ..... a condition allows the non-breaching party to terminate the contract by **5)** ..... it and to claim damages. Breaching a warranty only allows a claim for damages and does not lead to the **6)** ..... of the contract.	**1** FAIL **2** SPECIFY **3** EXPRESS **4** BREACH **5** REPUDIATE **6** TERMINATE

Case study 2: Environmental law

The facts of the case

Your law firm has asked you to review the following environmental law case and the relevant documents in preparation for a meeting with the other party's lawyer.

Read this description of the facts of the case. What is the legal issue here?

In 2008, the country of Euphoria contracted with Newton Construction Co. ('Newton') to install an underground water pipeline from Crystal Lake, Euphoria, to Marine Bay, Euphoria. The pipeline crossed several existing underground pipelines, including the Capable Company's ('Capable') methyl-alcohol pipeline. The new pipeline was installed through first digging an area to install a pipeline segment, thus uncovering the existing pipelines in that area. Newton then ran the new pipeline under the other pipelines. While digging in the area containing Capable's pipeline, a Newton employee struck and damaged that pipeline. The employee knew he had struck something, but did not know what it was, or that he had damaged Capable's pipeline.

Over the course of years, the damaged area of the pipeline deteriorated and cracked, allowing the methyl alcohol to leak from the pipe. After the leak was discovered, it was fixed by Capable. However, the ground was contaminated with 200,000 gallons of methyl alcohol. With the assistance of the Euphorian Government, Capable has cleaned up the ground at great cost. Capable is now seeking recovery of its clean-up costs from Newton, based on the Complete Environmental Reimbursement and Liability Act (CERLA).

Task 1: Role-play

Divide into two different groups, with one group representing Newton and the other representing Capable.

1 Prepare for negotiations with the other party, referring to the relevant legal documents on the opposite page. You should:

- identify the legal issues of the case and determine arguments for your side;
- list the strengths and weaknesses of your side of the case;
- decide which parts of the relevant legal documents most strongly support your case and can be used to argue against the other party's case;
- make notes for the negotiation: What are your goals? What are you willing to give? What are you not willing to give?

2 Pair up with a representative of the other party and negotiate a settlement.

3 Report the results of your negotiations to the class.

Task 2: Writing

Write a letter of advice to one of the parties (your choice), in which you outline the legal issues raised by the case, refer to relevant statutes and provide your opinion as to the likely outcome of the case.

Relevant legal documents

Text 1: The Complete Environmental Reimbursement and Liability Act, Section 320

CERLA imposes strict liability for environmental contamination upon four broad classes of potentially responsible parties. The relevant part reads as follows:

Section 320 – Liability

(a) Covered persons; scope; recoverable costs and damages:

(1) the owner and operator of a vessel or a facility;

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;

(3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and;

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for

(A) all costs of removal or remedial action incurred by the Euphorian Government not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Text 2: extract from a legal decision

An extract from one of the leading decisions in your jurisdiction regarding a similar case addressing CERLA Section 320.

Arranger liability attaches under CERLA when one has 'arranged for disposal' of hazardous substances. Because CERLA does not define 'arranged for', courts sometimes look to the definition and interpretation of 'disposal' for assistance in deciding if one is an arranger. While we have not provided a bright-line test for determining when one is an 'arranger', we have looked at 'disposal' in the context of the entire phrase. In the *New wood* case, we rejected a narrow interpretation of 'disposal', thereby leaving open the possibility that one who arranges for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient.

Text 3: extract from a legal decision

An extract from another leading decision in your jurisdiction regarding a similar case addressing CERLA Section 320.

In common parlance, the word 'arrange' implies action directed to a specific purpose. See Merriam-Webster's *Collegiate Dictionary* 64 (10th ed.). Consequently, under the plain language of the statute, an entity may qualify as an arranger under Section 320 when it takes intentional steps to dispose of a hazardous substance. See the Violine Inc. case ('[I]t would be error for us not to recognise the indispensable role that state of mind must play in determining whether a party has "otherwise arranged for disposal of hazardous substances"').

7 Contracts: assignment and third-party rights

1 Reading A: Introduction to contract assignation

The following text deals with a specific aspect of the law of contracts, explaining basic concepts associated with assignment and third-party rights.

Read through the text quickly and decide whether these statements are true or false.

1. A third-party beneficiary contract is one which intends for someone who is not a party to that contract to benefit from the contract.
2. The term *privity of contract* refers to the relationship which exists between the immediate parties to a contract.
3. The transfer of rights under a contract is known as *delegation.*
4. *Novation* is the renewal of a contract by the contracting parties.

Generally, a contract operates to **confer** rights and **impose** duties only on the parties to the contract and no other parties. The principle that follows from this is that third parties have no rights and, as such, cannot enforce contractual provisions. This contractual relationship is summed up in the term **privity of contract**. However, in many jurisdictions, there are two exceptions to this general rule: the first is when the original contract provides for rights to be conferred on a third party, and the second is when contractual **rights** and **duties** are transferred to a third party at a later date.

When speaking of the first type of situation, lawyers generally refer to **third-party beneficiary contracts**. The most common form of this type of contract is where party A enters into a valid contract with party B which stipulates that party B shall render **performance** for the benefit of party C, i.e. the **third-party beneficiary**. No problems arise if party B performs. But what happens when party B fails to perform? Have rights been **vested** in party C such that C can enforce the contract, or must party A do so? In many jurisdictions, this problem is addressed through a determination of whether the contract expresses an **intent** to create a legally **enforceable right** in the third party. However, must the intent be from both parties to the agreement (A and B) or just the recipient of the promise to be enforced, i.e. the **promisee** (A) as opposed to the **promisor** (B)? The courts usually look to the intent of the promisee and ask the question: According to the contract, who was to receive the *benefit* of the promise, the promisee or a third party directly?

In deciding the promisee's intent, the courts look at the following factors: (1) is the third party identified in the contract?; (2) is performance to be made directly to the third party?; (3) does the third party have any rights (specific or general) under the contract?; and (4) is there any relationship between the promisee and the third party such that it could be inferred that the promisee wished to enter into a contract for the benefit of the third party? Of course, the greater the number of times the court answers 'yes' to the above questions, the more likely it is that the court will rule that the third party is an **intended beneficiary**, and thus entitled to enforce the contract, as opposed to an **incidental beneficiary**.

In the second case mentioned above, rights and duties are transferred after the original contract has been signed. If in the original contract the transferring party (A) is owed a *right* by the non-transferring party (B), then A is known as the **obligee** and B is the **obligor**. However, if in the original contract A owes B a *duty,* then A is known as the obligor and B the obligee. When it is not specified whether rights or duties are being transferred, the term **assignor** can be used for A, who attempts to transfer his rights and/or duties under the contract to a third party (C, the **assignee**). If a right is being transferred, C becomes the obligee in place of A. (Although this does not necessarily release A from any obligations to B under the original contract.) If a duty is being transferred, A is known as the **delegator**, while C is referred to as the **delegate**[1]. The term **assignment of contract** can mean several different things. This term is ambiguous, as it does not indicate whether there is both an assignment of rights and a delegation of duties. In everyday usage, it generally means that both are applicable. However, in the interests of precision, the term 'to **assign**' should really be reserved specifically for the transfer of rights, and the term 'to **delegate**' should be used in connection with the transfer of duties (and therefore with performance). This distinction is crucial because, while an obligee can rid himself of a right merely by making an effective assignment, an obligor cannot rid himself of a duty by the same means. Generally, in order for the obligor to **discharge** his duties under the contract through assignment, the obligee must first **release** him from his obligations under the contract. When this takes place, there is a **novation** of the original contract, in which the obligor's position is taken on by a new party.

The right to assign is generally governed by an assignment clause, the enforceability of which depends on many factors, including the particular wording of the clause, the nature of the obligations to be performed and the nature of the contract.

[1] (US) delegatee

2 Key terms: Contracts

2.1 Complete the text below using the words in the box.

assignment (x3)	benefits	novation (x4)	parties	third party

1) ..... is a means by which one party to a contract totally removes himself from the contract by transferring not only all of the **2)** ..... conferred by that contract, but also all of the obligations. The **3)** ..... replaces the original party as a party to the contract. Following **4)** ..... , the other contracting party is left in the same position as he was in before it was carried out, except that there is a new obligor. A **5)** ..... requires the agreement of all three parties. In contrast, an **6)** ..... refers to transfer of a right (and sometimes, in general speak, obligations) of one person to another. **7)** ..... differs from novation in that the **8)** ..... to the contract do not change. Most rights and obligations are capable of **9)** ..... , but not all are capable of **10)** ..... .

2.2 Complete these verb–noun collocations as they appear in Reading A. Then express the meaning of each phrase in your own words.

1 confer rights... (paragraph 1)
This means to give rights to someone in a contract

2 impose d..... (paragraph 1)

3 enforce c..... p..... (paragraph 1)

4 render p..... (paragraph 2)

5 delegate d..... (paragraph 4)

6 assign r..... (paragraph 4)

3 Language use A: Nouns ending in *–or* and *–ee*

Words ending in *–or* and *–ee* (such as *promisor/promisee*) are commonly found in legal texts of all kinds, but particularly in contracts. In these words, the *–or* ending indicates the person initiating the action, and the *–ee* ending the one receiving it. Thus *promisor* refers to a person making a promise, while the *promisee* is the recipient of the promise, or the person to whom something has been promised. Note that words of this type are also found in everyday English (for example *employer,* someone giving employment; *employee*, someone receiving employment).

Complete these pairs of *–or/–ee* words from Reading A. Can you think of any others?

1 promisor promisee **3** o..... o.....
2 d..... d..... **4** a..... a.....

4 Speaking A: Explaining third-party rights

Paragraphs 2 and 3 of Reading A refer to third-party rights. In the context of third-party beneficiary contracts, the time when the third party's rights actually arise differs between jurisdictions. Some jurisdictions find that the third-party rights take effect immediately at the time the contract is made, while others find that these rights do not arise until the third party acquires knowledge of the rights and agrees to accept the benefits. Finally, some jurisdictions find that the third-party beneficiary must change his position in reliance upon the contract in order for his rights to arise. This means that in some jurisdictions the third-party beneficiary must take some type of action which he would not necessarily have taken or refrain from taking some type of action which he would not necessarily have refrained from taking, unless he thought he was to receive some benefit under the contract.

4.1 How is this question handled in your jurisdiction?

4.2 How are the different parties' rights affected, depending on when the third-party rights arise in each situation? If you are uncertain of the law in your jurisdiction, discuss what you think the law should be and support your position.

5 Reading B: Understanding contract clauses

Reading A introduced assignment clauses, which govern the contracting parties' rights to assign rights and delegate duties to others. The clause on the next page is a 'right of first refusal' clause.

5.1 Read the first paragraph of this example of a specific type of 'right of first refusal' clause, which is seen most often in shareholder agreements. What is the 'right of first refusal'?

5.2 Read the whole clause carefully and answer these questions.

1 Under which circumstances does the non-assigning party not have the right of first refusal?
2 What kind of information must be included in the written notice?
3 What options does the non-assigning party have after receiving all of the information it has requested?

RIGHT OF FIRST REFUSAL

The right of any party to assign, transfer or sell its interest in the shares shall, except for a transfer to the party's heirs, personal representatives or conservators in the case of death or legal incapacity, be subject to the non-assigning party's right of first refusal. This right of first refusal shall be exercised in the following manner:

1 The assigning party shall serve upon the non-assigning party a written notice clearly and unambiguously setting forth all of the terms and conditions of the proposed assignment and all available information concerning the proposed assignee, including but not limited to information concerning the proposed assignee's employment history, financial condition, credit history, skill and qualifications and, in the case of a partnership or corporate assignee, of its partners or shareholders.

2 Within ten (10) days after the non-assigning party's receipt of that notice (or if that party shall request additional information, within ten (10) days after receipt of the additional information), the non-assigning party may either consent or withhold its consent to the assignment, or at its option, accept the assignment to itself or to its nominee upon the terms and conditions specified in the notice. The non-assigning party may substitute an equivalent sum of cash for any consideration other than cash specified in the notice.

3 If the non-assigning party elects not to exercise its right of first refusal and consents to the assignment, the assigning party shall be free to assign the shares to the proposed assignee on the terms and conditions specified in the notice. If, however, the terms are materially changed, the changed terms shall be deemed a new proposal, and the non-assigning party shall have a right of first refusal with respect to the new terms.

5.3 Match the italicised expressions from the clause (1–7) with their definitions (a–g).

1 legal *incapacity*	**a** the act of receiving
2 *to exercise* a right	**b** significantly
3 *to serve* a written notice	**c** to make use of
4 *receipt of* notice	**d** to choose
5 *to withhold consent*	**e** to deliver
6 *to elect* not to exercise a right	**f** to deny permission
7 to change *materially*	**g** inability

6 Listening A: Preparing a lawsuit and developing an argument

When a lawyer is engaged to represent a client in court in a contract-related lawsuit, a good deal of time will be spent on the following:

- gathering information about the case;
- collecting evidence;
- researching relevant legislation and legal precedent;
- developing a strong line of argument.

The strength of the argument presented in court will significantly affect the outcome of the case. Generally speaking, the strength of such an argument depends on several factors: the clarity of the reasoning, the quality of the evidence presented to support it, and the lawyer's skill in using language to convey ideas.

You are going to hear a dialogue which deals with a lawyer's preparation of a contract-related lawsuit. In the first part of the dialogue, Ron, the lawyer preparing the case, is talking with Sam, a senior partner in Ron's law firm, about the facts of the case.

6.1 Listen to the first part of the dialogue and tick the facts of the case Ron mentions.

1 The Jones Corporation (the lessor) wanted to sell a restaurant to Keats (the lessee). ☐
2 Keats requires consent from the Jones Corporation to assign the lease to a third party. ☐
3 Prior written consent to assignment is not necessary. ☐
4 The Jones Corporation is not permitted to withhold consent unreasonably. ☐
5 Keats could not provide the information about the buyer that Jones requested. ☐
6 The prospective buyer withdrew his offer for the restaurant. ☐
7 The buyer is suing Keats for breach of contract. ☐

6.2 Discuss the case with a partner. What kind of argument would you make in this case? What would you have to prove in court?

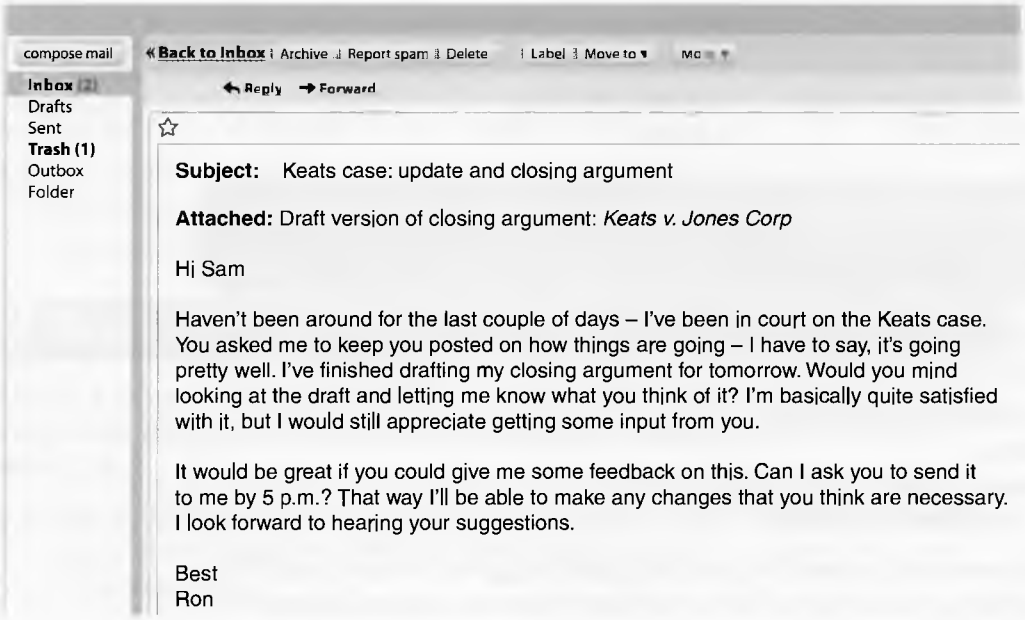
6.3 Listen to the second part of the dialogue, in which Ron mentions the arguments he plans to use in court. What are the three points of evidence Ron will use?

7 Reading C: A follow-up email

The email below was written by Ron to Sam following their discussion of the case. Attached to the email is a draft version of the closing argument which Ron intends to present to the court.

Read the email and answer these questions.

1 What are the purposes of the email?
2 What would he like Sam to do for him?



8 Language use B: Verb + *–ing* form

Some verbs in English are followed by another verb in the *–ing* form and others are followed by the infinitive with *to*. The email on page 98 contains several examples of verbs that are followed by another verb in the *–ing* form. Look at this example from the text:

I've finished drafting *my closing argument for tomorrow.*
It would be incorrect to write: *I've finished to draft my closing argument.*
You have to learn which verbs can be followed by which form.

8.1 Look at the email again and underline other examples of verbs + *–ing* form.

8.2 Read these pairs of sentences and decide which sentence is correct in each case.

1 **a** Ron considered asking a senior partner for advice.
b Ron considered to ask a senior partner for advice.

2 **a** The client decided settling the contract dispute in court.
b The client decided to settle the contract dispute in court.

3 **a** Case preparation involves interviewing witnesses.
b Case preparation involves to interview witnesses.

4 **a** By withholding consent, Jones risks being sued by Keats.
b By withholding consent, Jones risks to be sued by Keats.

5 **a** Sam suggests emphasising the idea that Jones withheld consent deliberately.
b Sam suggests to emphasise the idea that Jones withheld consent deliberately.

6 **a** The prospective buyer refused waiting any longer.
b The prospective buyer refused to wait any longer.

7 **a** The client mentioned having had an argument with his landlord.
b The client mentioned to have had an argument with his landlord.

8 **a** The defendants delayed responding to the plaintiff's request.
b The defendants delayed to respond to the plaintiff's request.

8.3 Complete the sentences below using the correct form of the verbs in the box.

argue	breach	gather	give	hear	re-draft	sue	tell

1 My client is considering ..... his landlord for breach of contract.
2 The defendants delayed ..... his approval for the assignment of the lease.
3 Jones risked ..... the assignment clause of the contract.
4 After reading his colleague's comments, the associate lawyer decided .....
his closing argument.
5 Among other things, preparing a strong case involves ..... evidence.
6 I am looking forward to ..... your closing argument when you present it in court.
7 My client refuses ..... us about the difficulties he had with his landlord.
8 The defendants' attorney suggested ..... that his client needed more
information before he could agree to the assignment.

9 Reading D: A closing argument

The draft of Ron's closing argument appears on page 101. Sam's comments on the text are written in the margin.

9.1 Read the closing argument and tick which kinds of information about the prospective buyer the defendants' lawyer requested.

1 birth certificate ☐
2 university diploma ☐
3 documents proving experience in the restaurant business ☐
4 a business plan ☐
5 letter of recommendation ☐
6 completed commercial lease application ☐
7 CV ☐

9.2 Decide whether these statements are true or false.

1 Ron's argument states that the court must decide whether consent to assignment of the lease has been withheld unreasonably.
2 Ron maintains that it is justified for subjective criteria to play a role in deciding whether to give approval for assignment.
3 Ron argues that delaying consent is not the same as withholding consent.

9.3 Match the words in italics (1–5) with their definitions (a–e).

1 *arbitrary* considerations	**a** unsuccessful
2 *credibility* of witnesses	**b** state something is true
3 *predicated on* a dispute	**c** not based on reason, random
4 defendant *asserts*	**d** can be believed
5 attempt is *unavailing*	**e** based on

10 Text analysis: Persuasive writing and speaking

The closing argument in Reading D is an example of a persuasive text.

A lawyer will use persuasive language in many professional situations: when arguing in court, when negotiating a contract, when writing a memo proposing a course of action to a client, or when discussing the choice of candidate to fill a position at a law firm. In all these situations, the key elements of a strong argument are the same:

- a clear statement of the issue and your position on that issue;
- the presentation of evidence and reasoned arguments to support your position;
- the rebuttal (arguing against) of opposing standpoints or arguments.

Evidence can take many forms, such as physical proof, expert testimony and documents.

Read Ron's closing argument in Reading D again and match these functions (a–f) with the corresponding paragraph in the text (1–6).

a presenting the standpoint to be argued
b drawing a conclusion from the evidence
c rebutting the standpoint of the opposing side
d reviewing the evidence presented
e identifying the legal issue involved
f summarising the facts of the case

Draft version of closing argument: *Keats v. Jones Corp.*

1 In determining whether a landlord has unreasonably refused to consent to an assignment, the court should consider only those factors that relate to the landlord's interest in preserving the value of the property, and the court must evaluate whether a reasonably prudent person in the landlord's position would have also refused to consent.

2 Arbitrary considerations of personal taste, convenience or sensibility are not proper criteria for withholding consent under such a lease provision. The court must determine the credibility of witnesses and the weight to be given to evidence and draw all justifiable inferences of fact from the evidence.

3 Here, when my client informed the defendants that he had a prospective buyer for his business, the defendants' lawyer requested that he provide personal and financial information on the buyer, as well as a business plan and evidence of the buyer's experience in operating a restaurant. The defendants' lawyer also provided my client with a commercial lease application for the buyer to complete. My client gave the defendants the completed application and information on the buyer and promptly responded to each of the defendants' requests for information.

If it was perfect, then no justifiable reason for withholding! Jones had nothing to lose if they approved assignment.

4 As acknowledged by the defendants' lawyer, the proposed buyer had a 'perfect credit rating'. My client's expert on commercial lease transactions, whom the court must find persuasive, testified that my client provided enough information for the defendants to make a decision and that their delay was unreasonable. Furthermore, there was evidence that the defendants' delay in approving the assignment was not related to the buyer's qualifications, but was predicated on a dispute with my client involving a prior lawsuit between the parties.

Key point; needs to be stressed more: expert says enough information was provided. Again, no reasonable reason for withholding

what kind of evidence?

5 Based on the evidence presented, the court must conclude that sufficient evidence supports a determination that the defendants unreasonably withheld consent to the assignment.

This point needs more emphasis! Jones lost a suit to Keats five years ago - that's the reason for the animosity!

6 The defendants nevertheless assert that they did not refuse consent, but merely delayed giving my client an answer until additional information was obtained. We reject this argument. The terms of the lease provided that the defendants could not unreasonably withhold consent, but this is exactly what they did. As defined in Webster's *Third New International Dictionary*, 'withholding' means 'not giving', while 'refusing' on the other hand may require some affirmative act or statement. Jones Corporation did not refuse consent, it is true. But Jones Corporation's decision to delay consent amounted to a withholding of consent, especially given my client's indication that time was of the essence. And, as noted above, the evidence supports the determination that this decision was unreasonable. Therefore, the defendants' attempt to distinguish between withholding consent and refusing consent is unavailing under the lease provision here.

Did your client expressly inform his landlord of this? In writing? If so, then say so.

11 Writing: A memo giving advice

On the basis of the notes written by Sam in the margin of Ron's closing argument, write a memo to Ron, indicating the changes he should make to strengthen his argument. You should:

- begin the memo by referring to your previous contact;
- state the reason for writing;
- present the points you want to make in the form of a list;
- close the memo with an offer to provide further help if needed.

Remember which verbs are followed by the *-ing* form rather than the infinitive.

12 Listening B: A closing argument

Ron has made the changes in his closing argument which Sam suggested. You are going to listen to Ron as he presents his closing argument in court.

Listen and discuss Ron's closing argument with a partner, then answer these questions.

1 Why does Ron say that the defendants' withholding of approval of the proposed buyer is unreasonable?
2 What does Ron suggest is the defendants' real reason for withholding approval?
3 Do you think his closing argument is convincing?

13 Speaking B: Emphatic stress

Sam suggests that Ron can improve his argument by giving more emphasis to key points. One way to emphasise ideas is to begin a sentence with a phrase that signals importance, e.g. *It is imperative that ...* or *It is important to realise that ...*

Another way to emphasise ideas is through emphatic stress. Within a sentence in spoken English, some words carry stress in accordance with the natural rhythm of the language. Emphatic stress, however, involves stressing certain words more than is natural to convey the importance of a point or a particular meaning.

13.1 Practise saying this sentence, each time stressing the underlined word. How does the meaning of the sentence change?

1 We're meeting the new client on Monday.
2 We're meeting the new client on Monday.
3 We're meeting the new client on Monday.
4 We're meeting the new client on Monday.
5 We're meeting the new client on Monday.

13.2 Listen again to the last section of Ron's closing argument and read the transcript on page 286. As you listen, underline the words or phrases which are given emphatic stress.

13.3 Read this excerpt from the closing argument aloud and stress the underlined words.

> In determining whether a landlord has unreasonably refused to consent to an assignment, the court should consider only those factors that relate to the landlord's interest in preserving the value of the property ...

13.4 Underline the words in this extract from another closing argument which you think should be given emphatic stress.

> As we have clearly demonstrated here today, the contract concluded between my client and the defendant, the software design company Glaptech, unambiguously stipulates that the defendant agrees to create a computer program enabling all customers to book a ferry passage online. Specifically, the contract expressly reads that the program must work for "all customers using modern home computers." We heard today, in the testimony of a recognized computer expert, that the concept of "modern home computers" can reasonably be construed to include Apple Macintosh computers. Therefore we must conclude that the creation of a program which does not function on this very type of computer system constitutes a clear breach of the contract concluded between my client and the defendant.

14 Language use C: Phrases referring to evidence

14.1 Match these phrases from Reading D (1–3) with their paraphrases (a–c).

1 to *give weight to* evidence
2 to *draw inferences* of fact *from* evidence
3 *the evidence supports* a determination

a to arrive at conclusions about facts based on the evidence
b the evidence provides a basis for a judicial decision
c to consider evidence important

14.2 Ron wins the case against the Jones Corporation on behalf of his client. Using the phrases referring to evidence in Exercise 14.1, write three sentences about the outcome of *Keats v. Jones Corp.*

15 Reading E: Keeping informed

It is essential for lawyers to keep informed about trends and recent developments in the law. Lawyers are obliged to update their knowledge continually, both in the interest of their own work and in the interest of their clients.

The text on the next page appeared on the blogsite of a large Scottish law firm. The blog is written by lawyers in the Technology, Information and Outsourcing Group of the law firm. Why do you think this group maintains a blogsite on legal topics?

15.1 Read the text quickly and answer these questions.

1 What is its subject?
2 Who do you think is the intended reader of the text?
3 What is the blogger's purpose in writing it?

Third-party rights

– Scots law stuck in the 17th century

comments

The problem
Imagine you are a bank with a complex group structure, i.e. multiple companies in your group. A core computer system has gone wrong, and most of the group companies have suffered loss as a result. So you sue the supplier.

The supplier's defence is that it only has a contract with one member of the group, and while that group member can recover its loss, the supplier isn't liable for loss suffered by the other group companies. This is a fairly valid legal argument.

Third-party rights as a solution
There are various ways to reduce this 'group loss v. single group contracting entity' problem. One way is to give all the group companies the right to enforce the contract against the supplier, so each of them can 'kick' the supplier. These are called third-party rights, because they give legal rights to a person who didn't 'sign' the contract (in legal terms, a third party).

Since 1999, this has been fairly easy to do in English law agreements as a result of the Contracts (Rights of Third Parties) Act 1998. (I say 'easy', but with my 'cover-your-back' head on, I should note that there are some drafting traps for the unwary.)

It has been possible to create such third-party rights under Scots law for quite a bit longer than that using the legal right ius quaesitum tertio, or IQT. You can tell it's really old because it has a Latin name!

Moving contracts between Scotland and England
As a lawyer working in England in the mid-nineties, I sometimes 'moved' contracts to Scots law in order to create third-party rights using IQT.

However, since the English Act came into force, I find myself doing the opposite, i.e. moving contracts to English law in order to use the English third-party rights legislation. Why?

Well, because the IQT is massively inflexible when compared to the position under the English Act. For example, once you create a third-party right under an IQT, it can be very difficult to amend or kill it. In contrast, that is possible under the English Act (if you draft the clause correctly).

Recently, I had a contract that had to be Scots law, but also needed to create flexible third-party rights. The solution was to expressly apply the English Act to the third-party rights clause, but have the rest of the Agreement subject to Scots law. Very ugly – so ugly, in fact, that it prompted me to blog about it (see: Let's update Scots law).

So I think the Scottish Law Commission should look into updating the law in Scotland in order to mirror (or better) the English Act.

15.2 Read the text again and answer these questions.

1. What does the writer suggest as the solution to the situation described at the beginning of the text, in which an entire group suffers a loss but only the contracting entity in the group can recover its loss?
2. According to the blogger, what has changed since the enactment of the Contracts Act of 1998?
3. What does the writer mean by 'moving' contracts to Scots law?
4. Why does the writer refer to his solution for a contract as being 'ugly'?
5. What action does the blogger call for with regard to Scottish law?

15.3 Discuss these questions.

1. What is the legal situation concerning third-party rights in your jurisdiction? Is there an enactment governing this right (as under the English Act), or is the right based on a general principle of law (as with the IQT)?
2. If third-party rights are recognised in your jurisdiction, what criteria must be met (i.e. what must be proved) by a party asserting this right?
3. Is it possible or necessary to 'move' contracts from one set of laws to another in your jurisdiction?

15.4 Which noun in the first two paragraphs of the text collocates with these words?

1 to suffer a .....
2 to recover a .....
3 to be liable for a .....

16 Language use D: Informal style

A blog is a text type that most people are familiar with from professional as well as personal life. Blogs are typically characterised by an informal style that is pleasant to read, even if the subject matter under discussion is serious or complex. Beginning bloggers are often given the advice to 'write the way you speak' or to 'write with a friend in mind'.

16.1 Identify features of the text in Reading E that strike you as informal. Which words or sentences in the text sound like spoken language?

16.2 The writer of this blog, a Scottish lawyer, expresses his dissatisfaction with Scottish law in the area of third-party rights. Which words or expressions does he use to do this? Do you feel it is appropriate or inappropriate for him to make remarks of this kind in a blog?

17 Speaking C: Discussing and evaluating sources of information

17.1 The blog on page 104 appeared on a law firm's website which supplies information to lawyers and their clients. Do you read any blogs regularly? Are you familiar with any blogs on legal issues or with blogs on legal English?

17.2 Discuss these questions.

1 What other sources of information on recent developments in the law are available to lawyers?
2 How can you keep your knowledge of the law in your jurisdiction up to date?
3 Which of the following sources of information do you consult? Which three do you think are most useful? Give reasons for your choices.

- O In-house seminars
- O Legal publications (in paper form)
- O Online legal journals
- O Law conferences
- O Internal company memos or reports
- O University courses
- O Colleagues
- O Government websites
- O Law-firm websites
- O Law blogs
- O Online law discussion forums
- O Podcasts on legal topics

17.3 Search for three or four English-language blogs on legal topics or on legal English and share what you have found with others in the group. In what ways do you think reading these blogs regularly could be useful for you?

Unit 7

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 7.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 duty (right) responsibility obligation
2 intent objective intention intensity
3 compose draft write enlist
4 convince propose induce persuade
5 appeal elect select choose

2 Vocabulary: word choice These sentences are from a tenant's Right of Assignment document. In each case, choose the correct word or phrase to complete them.

1 Notwithstanding anything to the *contrast / (contrary) / opposition* contained in the lease, Tenant *can / may / shall* have the following rights with respect to assignment, transfer or sub-lease (referred *to / in / as* hereinafter as a 'Transfer') of the demised premises.
2 Landlord agrees that it will not unreasonably *withdraw / rebut / withhold* its approval to any Transfer of the demised premises or any part *thereof / thereafter / thereunder,* provided such Transfer shall be subject to all of the terms and *circumstances / conditions / inclusions* of the lease.
3 Tenant shall *waive / have / own* the right to perform any of the following acts without the necessity to request or obtain Landlord's *refusal / withdrawal / approval* therefor.
4 Transfer the demised premises or any portion thereof *to / from / at* any 'affiliate company'. An affiliate company shall mean, for purposes of this Article 49, any corporation, partnership or other business *entirety / entreaty / entity* under common control and ownership with the Tenant, or with the parent or any subsidiary of the Tenant.

3 Prepositions with *contract* 1 Complete the phrases below using the correct preposition in the box. You may need to consult a dictionary.

against	from	to	to	to	to	under	upon

1 the parties ....to..... a contract
2 pursuant ..... the contract
3 to have rights and obligations ..... a contract
4 to benefit ..... the contract
5 to assign rights or delegate duties ..... a third party
6 enforce a contract ..... someone
7 a third-party beneficiary ..... a contract
8 in reliance ..... the contract

4 Prepositions with *contract* 2 Complete the sentences below using the correct preposition in the box.

against	of	on	~~to~~	to	to	to	to	under	under

1 A party ..to.. a contract may transfer the rights arising ..... the contract ..... another.
2 Privity of contract refers ..... the fact that only the actual parties ..... a contract should have rights and liabilities ..... the contract.
3 A third-party beneficiary contract is formed when the parties intend ..... confer a benefit ..... a third party.
4 The benefit ..... a contract is an enforceable right ..... the other party.

5 Vocabulary: nouns ending with *-or* and *-ee* Form pairs of nouns following the pattern of *promisor/promisee* using these verbs (1–4). Then match the noun pairs with their definitions (a–d).

1 franchise franchisor, franchusee d
2 lease
3 mortgage
4 transfer

a Someone (usually the owner) who gives a lease (right to possession) in return for a consideration / someone to whom a lease is granted and who uses the property
b Someone who conveys title to property or property to another / someone to whom title to property or property is conveyed
c Someone who borrows money and pledges real property as security for the loan / someone who lends money and receives real property as security for a loan
d Someone who owns the rights or licence of a business who grants the licence or permission to another / someone granted the rights or licence of a business

6 Word formation Complete this table by filling in the correct noun or verb forms. Underline the stressed syllable in each word with more than one syllable.

Verb	Abstract noun	Person
delegate	delegation	delegator, delegate, delegatee
assign		
	obligation	
imply		
	intention/intent	
consult		
	enactment	
	rebuttal	
construe		
determine		
	draft	
transfer		

8 Employment law

1 Reading A: Introduction to employment law

The following text provides an introduction to concepts related to employment law and recruitment, including factors to be taken into account when drawing up employment contracts, when dismissing employees and when resolving disputes.

Read the text quickly, then match each of these headings (a–g) with the paragraph (1–7) to which it best corresponds.

a Termination of employment
b Employment tribunals
c Terms of employment
d Employment legislation
e Labour law
f Protecting the disabled
g Recruitment

1 Employment law entails contracts between employers and employees which are normally controlled by specific legislation. In the UK, certain laws have been enacted regulating the areas of **sex discrimination**, **race relations**, **disability**, health and safety, and employee rights in general. Also, certain aspects of employment contracts are covered by the Trade Union and Labour Relations Act 1992.

2 In the recruiting processes, employers must take into consideration that it is unlawful to discriminate between applicants for employment on the basis of gender, marital status, colour, race, nationality, or ethnic or national origins. It is also unlawful to publish job advertisements which might be construed as discriminatory. It is unlawful for a person to discriminate against another based on sex or marital status in the hiring process and in respect of the **terms and conditions of employment**. However, there are exceptions to this rule, such as where sex or marital status is a **genuine occupational qualification** (GOQ).

3 The law protects disabled persons by making it unlawful to discriminate against such persons in the interviewing and hiring process and regarding the terms of the offer of employment. Employers are required to make reasonable adjustments in the place of work to accommodate disabled persons. However, cost may be taken into account when determining what is reasonable.

4 After the employee is hired, protection is provided generally under the Employment Rights Act 1996. In particular, this Act requires the employer to provide the employee with a document containing the terms and conditions of employment. The statement must include the following: identities of the parties, the **date of employment**, a statement of whether there has been continuation of employment, the amount and frequency of pay, hours of work, **holiday entitlement**, job title and work location.

5 Matters related to **termination of employment**, such as **unfair dismissal**, **discriminatory dismissal** or **redundancy**[1] **dismissal**, are governed by the Employment Rights Act 1996. Also, certain aspects of termination of employment are governed by the Trade Union and Labour Relations Act 1992 when the decision to terminate employment is in some way related to the activities of a **trade union**[2].

[1] (US) layoff
[2] (US) labor union

6 The protections mentioned above are largely enforced through complaints to an **employment tribunal**. The tribunal has the power to render decisions and issue orders in respect of the parties' rights in relation to complaints. It may also order compensation for loss of prospective earnings and injured feelings.

7 Employment law relates to the areas covered above, while labour law[1] refers to the negotiation, **collective bargaining** and **arbitration** processes. Labour laws primarily deal with the relationship between employers and trade unions. These laws grant employees the right to unionise and allow employers and employees to engage in certain activities (e.g. **strikes**, **picketing**, seeking **injunctions**, **lockouts**) so as to have their demands fulfilled.

[1] (US) labor law

2 Key terms: Employment

2.1 Match these key terms (1–4) with the examples (a–d).

1 discriminatory dismissal
2 redundancy dismissal
3 unfair dismissal
4 genuine occupational qualification

a An employee is laid off because his employer had insufficient work for him to do.
b Only female applicants are hired for jobs at an all-women hostel.
c An employee is fired when she becomes pregnant.
d A worker's employment is terminated because he took part in lawful union activities.

2.2 Answer these questions.

1 What does the phrase *construed as discriminatory* in paragraph 2 mean? What do you think would be involved in proving that a job advertisement could be construed as discriminatory?
2 What do you understand by the phrase *reasonable adjustments* in paragraph 3? What factors do you think might be taken into account when deciding if an adjustment is reasonable?
3 What do you think *compensation for [...] injured feelings* in paragraph 6 refers to? What kinds of work-related situation do you think could result in such a claim for compensation?

2.3 Match the words to form collocations as they appear in Reading A.

1 sex	**a** origins
2 marital	**b** dismissal
3 ethnic	**c** discrimination
4 holiday	**d** status
5 unfair	**e** entitlement

2.4 What laws govern employment in your jurisdiction? Do they regulate the same areas (sex discrimination, race relations, disability, health and safety, and employee rights in general) that the UK laws regulate?

3 Listening A: An employment tribunal claim

Lawyers are often consulted in employment rights disputes, providing consultation and representation for clients who want to make or defend claims to an employment tribunal. Employment tribunals are judicial bodies established in the UK to resolve disputes between employers and employees over matters involving employment rights, such as unfair dismissal, redundancy payments and discrimination. Do you have employment tribunals in your jurisdiction?

Generally speaking, the handling of a claim in the UK proceeds as follows: firstly, a claimant submits a claim, usually in person, to an employment tribunal. If there are any outstanding issues concerning such things as witness testimony, necessary documents, etc., the chair of the tribunal then holds a case-management discussion to clarify them. Sometimes this is followed by a pre-hearing assessment or review (which the claimant may attend if desired), at which time the tribunal decides whether the claim has merit. Lastly, there is a final hearing where a decision is made as to whether the claim succeeds or fails, and if it succeeds, the amount of damages to be awarded.

You are going to hear a telephone conversation between a lawyer (Jane) and a client (Gwen), who is an employer defending a claim filed with the employment tribunal. They discuss the preparations for a pre-hearing assessment. They mention a document called an **entry of appearance**. This is a written notice of appearance providing the respondent's full name and contact details, as well as a statement of opposition to the claim, including the grounds upon which it is opposed.

3.1 Listen and tick the actions that Gwen will take following the phone conversation.

1 attend a managers' meeting ☐
2 contact the employment tribunal personally ☐
3 inform the management about the status of the case ☐
4 send an email with the requested document ☐
5 discuss the case with the dismissed employee ☐
6 write an exact account of the circumstances leading to the dismissal ☐

3.2 Choose the correct answer to each of these questions.

1 What does Jane want Gwen to do with the draft entry of appearance?
- **a** submit it to the employment tribunal for the pre-hearing assessment
- **b** review it, make any necessary changes and send it back to her
- **c** decide on the basis of it whether they want to proceed with the case

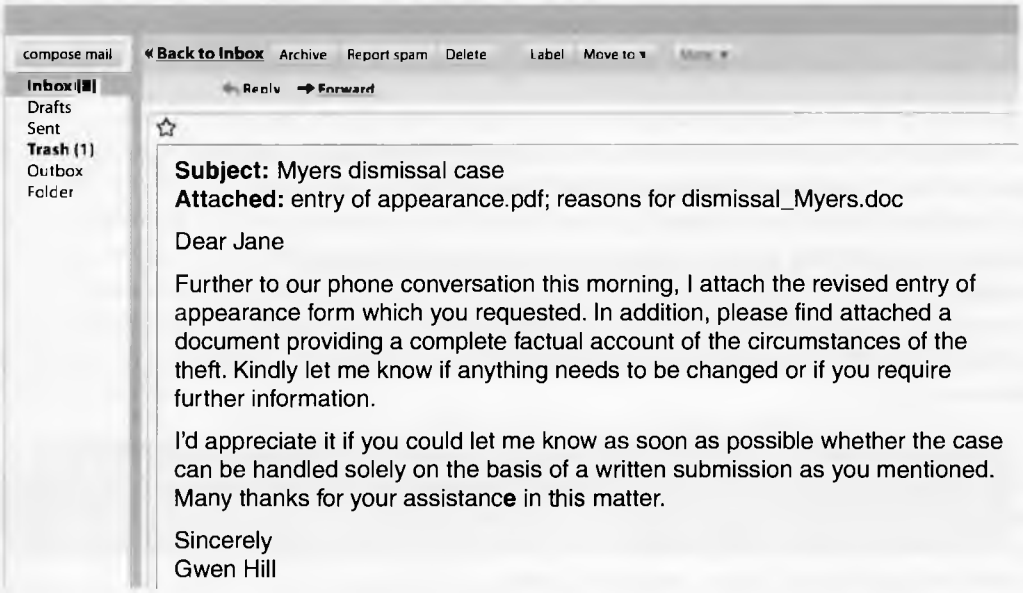
2 According to Jane, when would a lawyer make an application for a pre-hearing assessment?
- **a** when the defendant wishes to inform the court who will be representing him/her
- **b** when the defendant wants to present all of the evidence at the full hearing
- **c** when the defendant believes the claimant's case is weak

3 Why does Jane think it will be better for her client if the case does not go to final hearing?
- **a** because it would save the parties involved time, effort and money
- **b** because she thinks her client could lose the case
- **c** because she thinks the good faith between employer and employee would be lost

4 What does the client state is her firm's top priority in the case?
- **a** finding out exactly what the dismissed employee did with the confidential information
- **b** resolving the dispute successfully and getting back to work
- **c** avoiding the expense of having the case go to a full hearing

4 Writing A: Attachments and formality

4.1 This email was sent by Gwen to Jane as promised in the telephone conversation. What documents are attached to the email? Underline the sentences she uses to refer to them.


compose mail

« Back to Inbox Archive Report spam Delete Label Move to

Reply Forward

Inbox (3)
Drafts
Sent
Trash (1)
Outbox
Folder

Subject: Myers dismissal case
Attached: entry of appearance.pdf; reasons for dismissal_Myers.doc

Dear Jane

Further to our phone conversation this morning, I attach the revised entry of appearance form which you requested. In addition, please find attached a document providing a complete factual account of the circumstances of the theft. Kindly let me know if anything needs to be changed or if you require further information.

I'd appreciate it if you could let me know as soon as possible whether the case can be handled solely on the basis of a written submission as you mentioned. Many thanks for your assistance in this matter.

Sincerely
Gwen Hill

4.2 Although Jane and Gwen have a friendly working relationship and are on a first-name basis with each other, the style of Gwen's email to Jane is polite and formal. Which words or phrases contribute to the politeness and formality of the email?

4.3 Match these formal expressions (1–10) from the email above with their more informal counterparts (a–j).

1 Kindly let me know	**a** here's the
2 Further to our phone conversation this morning	**b** with all the facts
3 for your assistance in this matter	**c** if you need more information
4 which you requested	**d** Tell me
5 Sincerely	**e** As mentioned on the phone this morning
6 providing a complete factual account of the circumstances	**f** Thanks a lot
7 I attach	**g** Please tell me asap
8 Many thanks	**h** you asked for
9 if you require further information	**i** for helping me out with this
10 I'd appreciate it if you could let me know as soon as possible	**j** Best wishes

4.4 Jane has submitted the entry of appearance and the application for the pre-hearing assessment to the employment tribunal. She has also made a written submission of the case to the tribunal, and requested that the case be disposed of solely on the basis of this written submission.

Write an email from Jane to Gwen, informing her of the steps she has taken and providing her with copies of the documents submitted to the tribunal. Write the email in a formal, polite style.

You should include:

- a statement of the reason for writing;
- information about the actions she has taken in the case since their last contact;
- reference to the documents attached;
- reference to what Jane believes will be the outcome of the case;
- a closing line offering assistance if needed.

5 Reading B: A sex-discrimination case

In the UK, the law provides for sex-discrimination cases to be brought before an employment tribunal, which has the power to award compensation to the claimant. If the tribunal decides that the law has been broken, it can award compensation for financial loss, as well as for injury to feelings or health which has been suffered as a result of the discriminatory treatment. Furthermore, a tribunal may also award aggravated damages if the injury to feelings has been made worse by the manner in which the discrimination has been carried out. In certain circumstances, the tribunal may even order exemplary damages in order to punish the respondent. The article below provides information about the outcome of a case heard by an employment tribunal.

Solicitors are not immune from employment law cases being brought against them; in what is being heralded as a landmark case, a tribunal has awarded two female former employees of the London firm Sinclair, Roche and Temperley awards totalling £900,000. The employees successfully claimed that they were victims of sex discrimination and, in particular, that the discriminatory culture pervading the firm prevented women from becoming senior equity partners.

An interesting feature of the case is that the tribunal found that the way in which a partner at the firm behaved during the litigation was malicious and designed to discredit one of the applicants without having any real foundation. In consequence, the tribunal imposed £3,000 extra aggravated damages. Such awards encourage caution in the way in which proceedings are defended.

5.1 Quickly scan the article and decide which is the most appropriate headline.

1 LAWYERS FINED BY TRIBUNAL FOR DISCRIMINATORY BEHAVIOUR

2 HIGH AWARD OF DAMAGES IN DISCRIMINATION CASE

3 TRIBUNAL HEARS CONTROVERSIAL DISMISSAL CASE

5.2 Read through the article more carefully and answer these questions.

1. Who do you think the text was written for?
2. What was the case about? Who were the claimants? And the defendants?
3. What is a *landmark case*?
4. According to the claimants, what prevented them from becoming senior partners?
5. Why were extra damages imposed on the defendants?
6. What does the text say about the effect that the award of extra aggravated damages would likely have on future proceedings of this kind?
7. Explain what you think is meant by *a discriminatory culture* at a law firm.

6 Listening B: Liability risks

Lawyers often advise their clients how to avoid claims arising from work-related disputes, such as the one discussed in Reading B, by informing them of potential risks.

In the following interview, a lawyer (Ms Brewer) tells her clients (Mr and Mrs Howard), who are business owners and employers, about the liability risk associated with drug testing in the workplace.

Listen to the interview and decide whether these statements are true or false.

1 Mr Howard says that the drug problem at his company is affecting business.
2 Ms Brewer informs her clients that the issue of employee drug testing is an unsettled area of the law.
3 If they dismiss a worker on the basis of a drug test that reveals the worker has taken drugs, Mr and Mrs Howard risk being sued for infringing employees' rights.
4 Ms Brewer points out that under certain circumstances, the courts have decided that employers were entitled to dismiss an employee for work-related drug use.
5 Ms Brewer recommends laying off the workers suspected of consuming illegal drugs in the workplace.

7 Language use A: Expressing an opinion, agreeing and disagreeing

7.1 In the course of the interview in Exercise 6, the lawyer and her clients express opinions and agree and disagree about several points. The words and phrases they use are shown below. Match each phrase (1–11) to its function:

O expressing an opinion D expressing disagreement
A expressing agreement A+D expressing agreement, but adding an opposing view

1 Exactly!
2 I agree with you, Mr Howard, but we have to look at what the law says.
3 I don't think we can risk waiting until they've had a chance to kick their drug habits!
4 John's right – we need to act on this now.
5 I'm afraid I have to disagree with you both.
6 In my opinion, you risk more by acting hastily, by making a knee-jerk reaction to the problem.
7 That may be true, but we can't just sit back and do nothing.
8 I couldn't agree more!
9 I see your point ...
10 ... you're absolutely right – you do bear responsibility for the safety of others.
11 That's not a bad idea ...

7.2 Which phrases in Exercise 7.1 do you think express agreement strongly?

7.3 Look at these phrases for disagreeing and tick the ones which you think would be acceptable for a lawyer to use with a client.

1 You're wrong about that. ☐
2 I see what you mean, but I still feel ... ☐
3 I suppose that could be true. However, I think ... ☐
4 I agree with you to a certain extent, but ... ☐
5 I totally disagree. ☐
6 I'm not sure I entirely agree with you on that. ☐
7 That's not true. ☐
8 You've got that all wrong. ☐

8 Speaking: Agreeing and disagreeing

Using the phrases for agreeing and disagreeing presented in Exercise 7, discuss these statements with a partner.

1 Sex discrimination cases will decline as women are now enjoying more equality in the workplace.
2 Drug testing in the workplace is an infringement of an individual's right to privacy, a right which the courts should continue to protect.
3 It is an employer's responsibility to help its employees overcome problems with addiction or substance abuse.
4 Women should be able to resume their careers where they left off after taking time off to bring up a family.

9 Reading C: A justified dismissal

Awareness of the risks inherent in sharing private information on the Internet is growing. The article on the next page, which discusses a case that was heard before an arbitration board in Canada, sheds light on the limits of free speech in the context of employment relationships.

9.1 Read the title of the article and answer these questions.

1 What does the word *derogatory* mean?
2 What kind of derogatory remarks do you think could have led to an employee being dismissed?
3 Why do you think the dismissal is referred to as *justified*?

9.2 Read the whole article and answer these questions.

1 Who is the grievor (claimant) in the case?
2 Why was the employee dismissed?
3 What are the three reasons the union gave for challenging the dismissal?
4 Why did the employer believe that the employment relationship was irreparably undermined?
5 What were the reasons given by the Arbitration Board for upholding the dismissal?

9.3 Match the words in italics in the text with these meanings.

1 feeling no sorrow for doing wrong
2 in that way
3 incapable of being repaired or rectified
4 termination of employment
5 unfavourable or uncomplimentary
6 without fault

9.4 Complete the text below describing the facts of the case using the verbs in the box.

challenged	denied	denigrated	engaged in	invoke	sought
terminated	undermined	upheld			

An employee **1)** ..... misconduct when she **2)** ..... her co-workers in a blog. Her employer **3)** ..... the employment on the grounds that her actions had **4)** ..... the employment relationship. The union representing the employee **5)** ..... the dismissal and **6)** ..... reinstatement of the employee. The Arbitration Board **7)** ..... the grievance and **8)** ..... the dismissal, stating that employees cannot **9)** ..... freedom of speech in defence to dismissal in such cases.

Derogatory blog posts result in a justified dismissal

An Alberta arbitration board has recently released a decision concerning the dismissal of an employee as a result of the contents of the employee's online blog site. In this case, an administrative employee in the Alberta Public Service (the "Grievor") was dismissed after the employer became aware of the contents of her personal blog.

The Grievor's blog contained *unflattering* comments about a number of her co-workers and management, referring to them as "imbeciles," "idiot savants," and "lunatic-in-charge." After an investigation, the Grievor was interviewed about her blog. Perceiving the Grievor as largely *unrepentant*, the employer terminated the Grievor's employment.

The employer took the position that the contents of the blog postings and the Grievor's lack of remorse and understanding as to why the blog had been so offensive undermined the employment relationship *irreparably*, thereby justifying the Grievor's termination. This was especially so, in the employer's view, in a department that handled sensitive cases and whose well-publicized values emphasized respect, fairness, and co-operation.

The Grievor's union, in challenging the dismissal, argued that the employer had overreacted, that the Grievor's attempts at an apology had been derailed by management, and that the Grievor had a previously *unblemished* record of six years' service. As a remedy, the union sought reinstatement with appropriate compensation. The employer replied that in a relatively small workplace, it would be very unfair to the Grievor's co-workers for the Grievor to be reinstated in her employment.

In a 2–1 decision, the Arbitration Board denied the grievance and upheld the dismissal. The Board concluded that "while the Grievor has a right to create personal blogs and is entitled to her opinions about the people with whom she works, publicly displaying those opinions may have consequences within an employment relationship." The Board was satisfied that the Grievor, in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes, engaged in serious misconduct that irreparably severed the employment relationship, *thereby* justifying *discharge*. Employees cannot simply invoke freedom of speech to publicly make derogatory comments online about co-workers or management or to disclose confidential information obtained in the course of employment.

9.5 Discuss these questions in groups. Use the phrases for expressing an opinion, agreeing and disagreeing in this unit.

1. Do you think the dismissal was fair?
2. What, if anything, could the employer have done in advance to avoid this situation?
3. Would using the 'freedom of speech' defence have worked in your jurisdiction? Shouldn't the right to express oneself be considered more important than a few hurt feelings? What, if anything, makes it different in this case?

10 Language use B: Participle clauses with *–ing*

A participle or adverbial clause is an expression which does not constitute a complete sentence as it does not have a main verb. The article in Exercise 9 contains several sentences with participle clauses with *–ing*. Participle clauses often express condition, reason, cause, result or time more economically than an independent clause (which contains a subject and a predicate[1] and can stand alone) or a full adverbial clause (which also contains a subject and predicate, and modifies a verb). Look at these examples.

○ **Participle clause**
Perceiving the Grievor as largely unrepentant, the employer terminated the Grievor's employment.

[1] The part of a sentence which contains the verb and gives information about the subject

- **Two independent clauses**
  The employer perceived the Grievor as largely unrepentant and it terminated the Grievor's employment.
- **Adverbial clause**
  Because it perceived the Grievor as largely unrepentant, the employer terminated the Grievor's employment.

The first example expresses the same idea as the other two sentences, yet in fewer words. Note that the subject of the participle clause and the main clause are the same. Since the use of participle clauses is more common in writing than in speech, it can be said to be more characteristic of formal style.

Participle clauses with *–ing* can also be used after various conjunctions and prepositions. Look at these examples from the text.

... undermined the employment relationship irreparably, ***thereby justifying the Grievor's termination****.*

The Grievor's union, ***in challenging the dismissal****, argued that the employer had overreacted ...*

10.1 Find two further examples of participle clauses using *in* and *thereby* in the text in Exercise 9. What is the position of the participle clause in these examples?

10.2 Rewrite these sentences using a participle clause with *–ing*. In some cases, a preposition or conjunction can be used in the participle clause. More than one correct answer is possible.

1. Because she showed a lack of remorse about the content of her blog, the employee was deemed to have irreparably undermined the employment relationship.
2. The Grievor's union argued on behalf of the employee and it pointed out that she had had a clean record for six years.
3. When she invoked freedom of speech in defence of her actions, the employee argued that she had the right to express her opinions about her colleagues.
4. The Arbitration Board denied the grievance and it upheld the termination of employment.

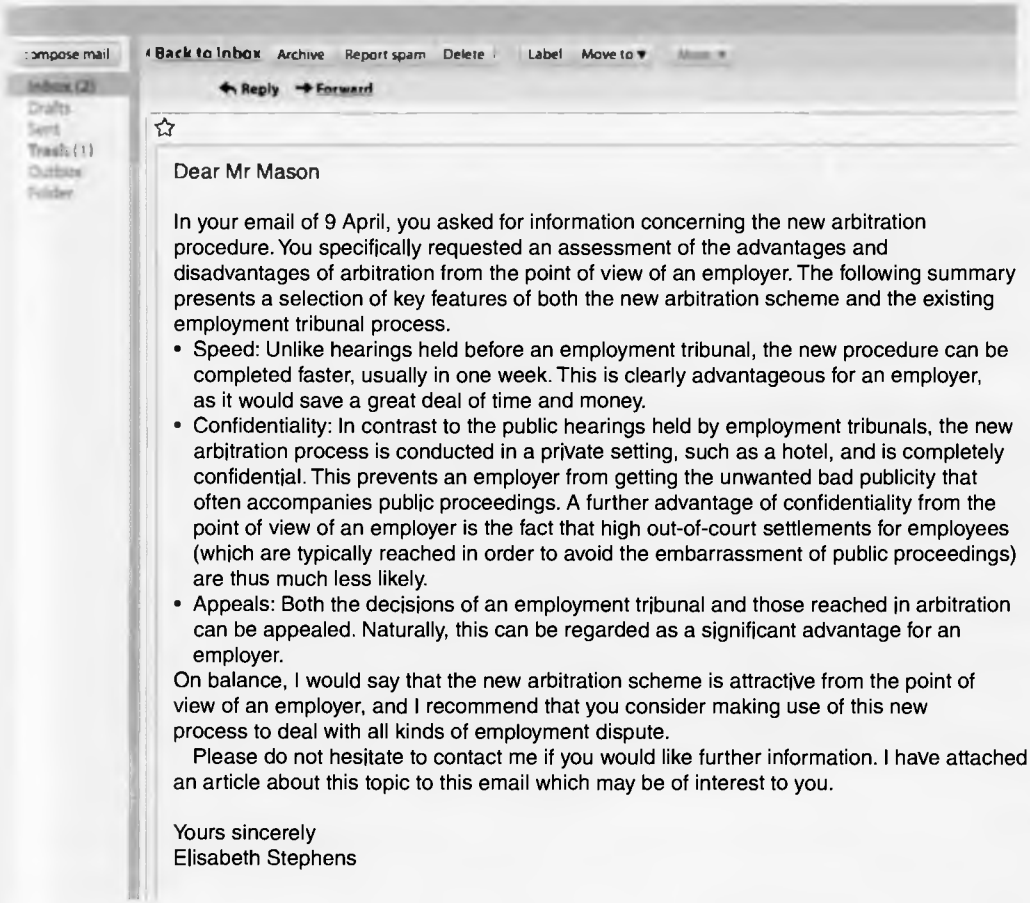
11 Reading D: Unfair dismissal

The article on the next page presents an alternative means of dealing with employment rights disputes. It appeared on a website offering news and analysis on European industrial relations.

11.1 The article is divided into three sections. Read the three headings. Which of the three sections do you think primarily contains opinions and attitudes?

11.2 Look at the first section of the article. Underline the explanation of how employment tribunals work, as well as the four adjectives describing the new arbitration scheme.

11.3 Read the whole article. Whose opinions of the arbitration procedure are reported? Why does the writer describe the introduction of the new scheme as 'ironic'?



Dear Mr Mason

In your email of 9 April, you asked for information concerning the new arbitration procedure. You specifically requested an assessment of the advantages and disadvantages of arbitration from the point of view of an employer. The following summary presents a selection of key features of both the new arbitration scheme and the existing employment tribunal process.

- Speed: Unlike hearings held before an employment tribunal, the new procedure can be completed faster, usually in one week. This is clearly advantageous for an employer, as it would save a great deal of time and money.
- Confidentiality: In contrast to the public hearings held by employment tribunals, the new arbitration process is conducted in a private setting, such as a hotel, and is completely confidential. This prevents an employer from getting the unwanted bad publicity that often accompanies public proceedings. A further advantage of confidentiality from the point of view of an employer is the fact that high out-of-court settlements for employees (which are typically reached in order to avoid the embarrassment of public proceedings) are thus much less likely.
- Appeals: Both the decisions of an employment tribunal and those reached in arbitration can be appealed. Naturally, this can be regarded as a significant advantage for an employer.

On balance, I would say that the new arbitration scheme is attractive from the point of view of an employer, and I recommend that you consider making use of this new process to deal with all kinds of employment dispute.

Please do not hesitate to contact me if you would like further information. I have attached an article about this topic to this email which may be of interest to you.

Yours sincerely
Elisabeth Stephens

12.2 Answer these questions.

1. Which method of organising a comparison described on page 118 is used in the email you have just read?
2. Which sentence in the email announces the organising principle to the reader at the beginning of the text?
3. Underline the phrases in the email which are used to compare and contrast.
4. Which phrases are used to point out advantages?

12.3 Rewrite the email above using method A to organise the information. Correct the factual mistakes and make use of some of these phrases for comparing and indicating advantages/disadvantages.

X has a number of advantages, such as ...

However, it also has some disadvantages/drawbacks ...

X differs from / is different from Y with regard to / in respect of ...

The first system / The former has the advantage/disadvantage of being ... , while the second system / the latter has the benefit/drawback of being ...

Unit 8

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 8.

Language focus

1 **Vocabulary: distinguishing meaning** Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 discrimination dismissal redundancy layoff
2 reduce outlaw prohibit forbid
3 solely exclusively primarily only
4 confidential certain private secret
5 essential key conventional important
6 speedy fast vast swift

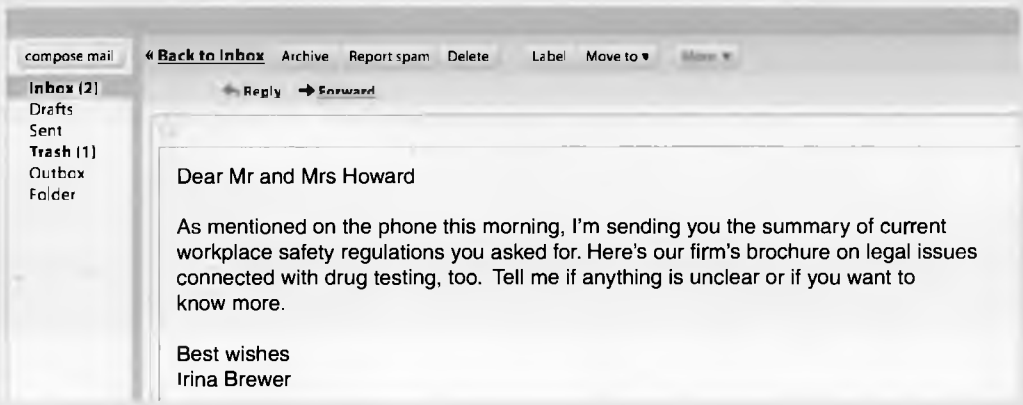
2 **Adjective formation** Add the prefixes *in–*, *non–* or *un–* to each of these words to form its opposite. The words marked with * have more than one possible form.

1 attractive *unattractive*
2 certain
3 confidential
4 conventional*
5 discriminatory
6 fair
7 lawful
8 necessary
9 reasonable
10 specific*
11 voluntary

3 **Word choice** These sentences are part of the UK Employment Rights Act 1996. In each case, choose the correct word or phrase to complete them.

1 An employee who *waives / intends / submits* to return to work earlier than the end of her maternity leave period shall give to her employer not less than seven days' *information / provision / notice* of the date on which she intends to return.
2 If an employee attempts to return to work earlier than the end of her maternity leave period without *complying with / referring to / relying on* subsection 1, her employer shall be *entitled to / subject to / requested to* postpone her return to a date such as will secure, subject to subsection 3, that he has seven days' notice of her return.
3 An employer is not entitled *to / under / in* subsection 2 to postpone an employee's return to work to a date after the end of her maternity leave period.

4 **Writing: formal style** Rewrite this email in a style more suitable for correspondence with a client. Make use of the formal expressions in Exercise 4.3 on page 111.



5 Use of prepositions Complete the sentences below using the prepositions in the box. The sentences are taken from the texts in this unit.

~~against~~	against	for	from	in	in	of	to	to	to	to	under	via

1 It is unlawful for a person to discriminate ~~against~~ ... another based on sex or marital status in the hiring process and in respect of the terms and conditions of employment.
2 After the employee is hired, protection is generally provided ..... the Employment Rights Act 1996.
3 A voluntary arbitration procedure in unfair dismissal cases is available ..... employers and employees as an alternative ..... the traditional way of resolving such cases ..... employment tribunals.
4 Solicitors are not immune ..... employment-law cases being brought ..... them.
5 The employees successfully claimed that they were victims ..... sex discrimination and that the discriminatory culture pervading the firm prevented women ..... becoming senior partners.
6 The tribunal has the power to render decisions and issue orders ..... respect of the parties' rights ..... relation to complaints.
7 If the tribunal decides that the law has been broken, it can award compensation ..... financial loss, as well as for injury ..... feelings or health which has been suffered as a result of the discriminatory treatment.

6 Verbs Complete the text below, in which a lawyer explains to a client what an employment tribunal is, using the verbs in the box.

awarded	decide	~~dismissed~~	file	goes	heard	includes	incurred
issue	pay	resembles					

'If you think you have been unfairly **1)** ~~dismissed~~ ... from your job, you can **2)** ..... a claim for your case to be **3)** ..... by an employment tribunal. A tribunal **4)** ..... a court, although it is more informal. It hears different types of complaint from employees. If your complaint **5)** ..... to a hearing, it will be heard by a panel of three people, which typically **6)** ..... the chair, who is a qualified legal practitioner, and two non-legally qualified members, who may have experience as employers or union representatives, for example. The tribunal will **7)** ..... whether your dismissal was unfair or not. If your case is successful, the tribunal will also decide whether compensation should be **8)** ..... , and if so, how much. The tribunal may **9)** ..... a cost order, requiring the claimant or the respondent (employer) to **10)** ..... the costs **11)** ..... by the other party.'

9 Sale of goods

1 Reading A: Introduction to sale of goods legislation

The following text gives an overview of the area of law which relates to the sale of goods. This can relate to a wide variety of transactions, from buying something tangible in a shop or on the Internet to paying for a service, such as repairs.

Read through the text quickly and complete the sentences below using the words in the box.

contracts	disclaimers	exclusions	title	transfer	warranties

1 A sale can be defined as the ..... of ..... in a good.
2 Implied ..... do not need to be expressed as they are implied by law.
3 Two means of limiting warranty liability are ..... and ..... .
4 The CISG sets forth rules that govern ..... for the international sale of goods.

The sale of goods entails a broad area of the law which is largely governed by legislation. Where an aspect of the law is not regulated by legislation, it is governed by the common law or by general principles of law in non-common-law jurisdictions.

The applicable legislation sets forth the nature of what is involved in the sale of goods. Naturally, this includes definitions of what constitutes a sale and **goods**[1]. A sale entails the **transfer** of **title** in a good from the seller to the buyer. Goods can be defined broadly as some type of **tangible chattel**. Application of the legislation depends upon: the type of sale; whether the seller is a **merchant** or not; and, if the seller is a merchant, whether he is trading in the course of his usual business.

The aspects of sale of goods governed by legislation include such things as contract formation, price, **passage of title**, **warranties of title**, **implied warranties**, **express warranties**, **disclaimers of warranties**, remedies for breach of warranty, delivery and acceptance of goods, and the **passing of risk**. The principal relevant legislation in the UK is the **Sale of Goods Act** 1979 (including its amendments).

Contract formation in this context includes the requirements applied to contracts in general with some added details such as agreements implied by conduct of the parties. The price to be paid for the goods is usually set forth in the agreement, but in some instances relevant legislation will determine the price if this term is left out. At the very least, the buyer is generally required to pay a reasonable price. Contractual provisions concerning the transfer of title dictate when **good title** is transferred, for example between a person who has possession but not title to a third-party buyer. Generally, good title cannot be transferred to a third party from a person not authorised to do so by the **holder of title**. Naturally, aspects of **good faith** and **apparent authority** come into play in this context.

Different warranties play a major role in the sale of goods. Implied warranties are such warranties which do not need to be expressed but which the law implies. Some of these types of warranty would include warranties of title, **fitness for a particular purpose**, and quality or **merchantability**. Many times the application of the latter two

[1] (US) *Good* can be used in the singular in US English.

types of warranty depends upon the type of sale (for example **sales by sample**) and whether the seller is a merchant acting **in the course of business**. **Express warranties** are warranties which are specifically stated either in writing or orally, as the case may be. Under many statutory provisions, an express warranty cannot negate an implied warranty of the relevant legislation. A common feature of legislation governing the sale of goods is to restrict the ability to limit warranty liability through **exclusions** or **disclaimers** in the contract.

Another general aspect of this type of legislation is to regulate performance between the parties. Aspects covered in this area would include delivery and acceptance, inspection by the buyer, the buyer's right to refuse acceptance and return of goods.

An international convention which should be particularly mentioned in this context is the **United Nations Convention on Contracts for the International Sale of Goods Act (CISG)**. The Convention sets forth rules that govern contracts for the international sale of goods and takes into consideration different social, economic and legal systems to remove legal barriers and foster the development of international trade.

2 Key terms: Sale of goods

2.1 Warranties Match these types of warranty and concepts related to warranties (1–7) with their definitions (a–g).

1 express warranty
2 implied warranty
3 warranty of fitness
4 warranty of merchantability
5 warranty of title
6 breach of warranty
7 disclaimer of warranty

a a warranty that the goods being sold are suitable for the purpose for which the buyer is purchasing them
b a warranty that the seller of the goods owns them (e.g. the goods have not been stolen or already sold to someone else)
c a violation of a warranty when the goods do not comply in some regard with an express or implied promise at the time of sale
d a spoken or written promise made by the seller about the quality, performance or other considerations concerning the goods covered by the contract which would affect the buyer's decision to purchase
e a negation or restriction of the rights under a warranty given by a seller to a buyer
f a warranty that the goods being sold are of a quality that generally conforms to ordinary standards of similar goods sold under similar circumstances
g a warranty which is not explicitly stated but that is imposed by the law due to the nature of the transaction

2.2 Buying and selling Complete the table below using the words in the box.

commodity	consumer	customer	to deal in	merchandise	merchant
to offer for sale	to purchase	purchaser	retailer	supplier	vendor	wares

1 words related to the act of buying	
2 words related to the act of selling	
3 words for buyers of goods	
4 words for sellers of goods	
5 words for goods	

2.3 Most of the words in the right-hand column of the table in Exercise 2.2 are not exact synonyms but are used in slightly different ways. Read this excerpt from a student's vocabulary notebook on the definitions and uses of two of the words for goods, and answer the questions below.

Word	Definition	Sample sentence	Collocations/usage
wares	small items for selling in a market or on the street, but not usually in a shop; a company's products	*The company must do more to promote their wares overseas.*	*to promote / to peddle* (= *sell*) *wares* word ending: *-ware* *hardware, tableware, kitchenware* Also: *warehouse*
merchandise	(formal style) goods that are bought and sold	*Being allowed to return or exchange merchandise is a privilege, not a legal right.*	*used / damaged / retail / wholesale merchandise* *merchandising*: products tied in to popular film, etc.

1 Which of these ways of recording vocabulary are exemplified in the table above?

- **a** providing an equivalent or near-equivalent in your own language
- **b** recording the pronunciation, indicating the stress pattern of a word (e.g. /ˈpɜtʃɪs/ or *PUR-chase*)
- **c** arranging words in lexical sets (words linked together by topic)
- **d** recording chunks of language (collocations, fixed phrases)
- **e** noting whether the word/phrase is more common in spoken or written language, and whether it is formal or informal
- **f** grouping words in word families (e.g. *litigate, litigation, litigator, litigious*)
- **g** supplying an example of the word or phrase in context

2 Which of the ways of recording vocabulary mentioned above do you use?

2.4 Choose one section of the table in Exercise 2.2, such as 'words for goods', and look up each word in a dictionary. How do the meanings differ? Find out if a word is used in some contexts but not in others.

3 Language use A: Terms and conditions of sale

Lawyers often assist suppliers of goods in drawing up standard terms and conditions of sale. These terms and conditions may be incorporated into contracts for the sale of goods or may be relied on as the legal framework of consumer sales. Legal counsel ensures that the terms and conditions are relevant to the specific circumstances of the seller in his particular trade, and that they provide adequate protection of the seller's rights.

3.1 These clauses are typically included in a company's general terms and conditions of sale. Match the clause types (1–10) with their descriptions (a–j) on page 125.

1 claims and credit
2 changes or cancellation
3 delivery
4 indemnification of vendor
5 limitation of remedies
6 orders
7 prices and payment
8 retention of title
9 title and risk
10 warranties

a Contains provisions governing the payment of the monetary consideration for the goods. It may include, among other things, terms governing the manner and time of payment, as well as modification of the amounts charged for the goods.

b Contains, among other things, provisions governing the ownership of the goods and exactly when the peril of loss is shifted from the vendor.

c Provides that, despite the fact that the purchaser has taken possession of the goods, the vendor maintains ownership thereof until some condition (usually payment) is fulfilled.

d Contains provisions governing the manner in which orders for goods are submitted by the buyer and accepted by the vendor.

e Contains, among other things, provisions regarding the time, limitations and manner of which the sale of the relevant goods becomes complete and final if payment has been made.

f Contains provisions governing the time and manner of any complaints by the purchaser regarding the goods.

g Contains, among other things, the terms and conditions governing any express warranties, often including provisions regarding inspection of the goods by the seller and liability, and limitations thereof, of the seller for breach of such warranties. Often matters related to notice of defects and disclaimers are included.

h Contains provisions restricting the vendor's legal responsibility to pay damages due to, among other things, errors in the goods and in many cases governing the maximum amount payable by the vendor for such things.

i Provides that the purchaser guarantees any possible loss the vendor might incur connected with any use of the goods, including violation of any intellectual property rights.

j Contains provisions governing modifications by the purchaser regarding, among other things, the character or manner in which the goods are manufactured, payment of any expenses related thereto and termination of any orders placed.

3.2 Decide which kind of clause each of the sentences (1–5) below would most likely be found in. Then explain them in your own words.

EXAMPLE: Prices and charges are subject to change without notice.
Prices and payment clause
It means that the prices and other fees can be changed at any time, and they don't need to give you any advance notice.

1 Title in the goods shall pass to the buyer on delivery of the goods.

2 Vendor's interpretation of a verbal order shall be final and binding where shipment is made prior to receipt of written confirmation.

3 Vendor does not make any representations or warranties except that those goods shall conform to the specifications supplied by Purchaser and that all processing applied by Vendor is performed in a good workmanlike manner in accordance with applicable industry trade standards and practices subject to any tolerances and variations consistent with the usual trade practices or as specified by Purchaser.

4 Purchaser hereby agrees to indemnify and hold harmless Vendor from and against all loss, damages, expenses, claims, suits and judgments arising, directly or indirectly, out of the design, installation, maintenance or operation of the goods.

5 Vendor may accept Purchaser's request to change the specifications or processing of the goods, but shall reserve the right to charge Purchaser for all costs and services necessary for such changes.

4 Listening A: Legal writing seminar on drafting clauses

In order to protect the rights and interests of a client, a lawyer will try to anticipate possible disputes arising from contracts entered into by the client. Careful drafting of contract clauses can provide protection for the contracting parties in the case of a breach. You are going to hear an excerpt from a legal writing seminar on drafting contracts, attended by both junior and senior members of a law firm. This part of the seminar deals with the drafting of retention of title (ROT) clauses in contracts of sale.

4.1 Listen to the first part of the presentation and answer these questions.

1 According to the speaker, why is it a problem if the ROT clause is interpreted as a charge?

2 In which cases is it not practically feasible to register the sale of goods as a charge?

charge[1] = a liability which secures payment; in the UK, a charge must, in most cases, be registered with Companies House to be effective

[1] (US) security interest

4.2 Listen to the second part and take notes as if you were attending the seminar yourself. What are the five tips for drafting effective retention of title clauses? Compare your notes with a partner.

4.3 Choose the best answer to each of these questions.

1 What is the main purpose of a retention of title clause?
- **a** to prevent the liquidation of the buyer
- **b** to protect the seller in the event of the insolvency of the buyer
- **c** to enable the seller to profit from the manufacture of the goods sold

2 Why don't sellers register every ROT clause as a charge?
- **a** It would be too expensive to register every one.
- **b** It is not permitted to register every one.
- **c** It would be too time-consuming to register every one.

3 Why does the speaker advise putting a serial number on all the goods sold?
- **a** so the seller can prove to a liquidator which goods belong to him
- **b** so the seller can keep a record of which buyer has bought his goods
- **c** so the seller knows exactly how many goods he has sold

4 Why should an ROT clause say that the buyer has a right of entry to recover the goods?
- **a** so that the buyer will not claim additional property that does not belong to him
- **b** so that the goods are not used to make a product, and thus impossible to recover
- **c** so that the buyer will have access to the place where the goods are stored

4.4 Complete the retention of title clause below using the words in the box.

buyer	due	in full	premises	recover	seller	solvency	supplied	value

The ownership of the goods **1)** ..... to the buyer shall remain with the **2)** ..... until payment **3)** ..... for all the goods shall have been received by the seller in accordance with the terms of this contract or until such time as the **4)** ..... sells the goods to its customers by way of bona-fide sale at full market **5)** ..... . If such payment is overdue in whole or in part, the seller may **6)** ..... or resell the goods or any part of it and may enter upon the buyer's **7)** ..... for that purpose. Such payment shall become **8)** ..... immediately upon the commencement of any act or proceeding in which the buyer's **9)** ..... is involved.

4.5 Does the clause above have the five characteristics of a well-drafted ROT clause mentioned by the speaker?

5 Listening B: A case brief

Law students are often required to summarise the facts and outcome of a case in the course of their studies. Practising lawyers also encounter situations in which they are asked to provide a case brief, either orally or in writing; a colleague may want to be briefed on the particulars of a certain case, for example, or a superior will request a written report on cases and rulings in an area of the law in which the firm is currently preparing a case for trial.

In a university law seminar, students are often asked to present case briefs which then form the basis of group discussion and debate. In the following exercise, you will hear a law student presenting the brief of a case involving an issue related to the sale of goods. The issue is known as 'shrink-wrap contracts'.

5.1 Listen to the case brief and answer these questions.

1. What exactly is the product involved in the dispute?
2. What is the central legal issue in the case?
3. According to the Appeals Court, in what sense is buying shrink-wrapped software like buying an airline ticket?

5.2 Decide whether these statements are true or false.

1. In the first instance, the court held that the sales contract was binding and in full force and effect.
2. In the view of the Court of Appeals, the purchaser could have returned the software if he did not agree with the terms and conditions.
3. The UCC states that a vendor may not propose limitations on the kind of conduct that constitutes acceptance of the terms of a contract.
4. According to the Court, the respondent had to acknowledge the terms of sale, since he could not use the software without doing so.

6 Text analysis: A case brief

6.1 Read the transcript on page 288 of the case brief of *ProCD, Inc. v. Matthew Zeidenberg and Silken Mountain Web Services*. Underline the paragraph where the speaker gives an overview of his brief. The speaker explicitly mentions the sections of the brief. What are they?

6.2 On two occasions in the presentation, the speaker uses a particular device to introduce a new topic. What is this device? Underline the two examples.

6.3 Complete the spaces (1–9) in the explanation on page 128 of how to prepare a case briefing using these phrases (a–i).

- **a** The court pointed out / noted that ...
- **b** In the first instance, the court ruled ...
- **c** The question before the court is whether ...
- **d** The court reversed the ruling of the first instance.
- **e** The court drew the conclusion that ...
- **f** The court upheld/affirmed the decision of the lower court.
- **g** The issue in this case is ...
- **h** The instant case involves the following circumstances ...
- **i** The court remanded the case back to the lower court for further proceedings.

Preparing a case brief

Although individuals or law firms usually have their own preferred ways of structuring a case brief, a typical one will include the following elements:

A The name of the case, the names of the parties

Cases acquire their names from the parties involved, with the name of the party who initiates the action appearing first.

Useful terms

claimant[1]: the party who files a complaint in a civil suit in a trial court
defendant: the party being sued
appellant[2]: the party who appeals the judgment of a lower court
respondent[3]: the responding party in an appeal

B A summary of the facts of the case

The circumstances leading to the dispute should be described briefly, but in all necessary detail. The history of the case, including the ruling of the lower courts, should also be mentioned.

Useful phrases

The facts of the case are as follows: ...
1) .....
The lower court held that ...
2) .....

C The legal issue(s) involved in the case

The point of law around which the case revolves or the legal issue it raises should be identified. This issue is often stated in the form of a question that can be answered with yes or no, or in the form of an indirect question beginning with *whether*.

Useful phrases

The question raised by this case is whether ...
3) .....
4) .....

D The ruling or holding of the court

The decision of the court in the case should be stated. This statement can take the form of an answer to the legal question raised by the case.

Useful phrases

The court held/ruled that ...
5) .....
6) .....
7) .....

E The reasoning of the court

Here, an account of the reasons leading to the decision of the court is given, usually making reference to previous cases and established principles of law.

Useful phrases

The court argued/reasoned that ...
8) .....
9) .....

[1] (US) *usually* plaintiff
[2] (US) *also* petitioner
[3] (US) *also* appellee

7 Writing and Speaking: Presenting a case brief

7.1 Following the guidelines for presenting a case brief given on page 128, prepare a case brief dealing with an issue related to the sale of goods. (You will have to research this issue first.)

7.2 Make an oral presentation of the brief.

8 Reading B: Retention of title

The law-journal article on page 130 provides a summary and discussion of a case concerning a dispute between a seller and a buyer of goods in which a retention of title clause plays a central role.

An important concept in the article is that of a **trust,** which refers to the setting aside of the money or property of one person for the benefit of one or more persons. A **trustee** is a person who holds something in trust for another. Does this concept exist in your jurisdiction?

8.1 Read the article, then match these phrases (a–g) with the paragraphs (1–7) they refer to.

a the legal issue in question
b the overall significance of the holding
c a brief summary of the High Court holding
d the reason for the failure of the seller's appeal
e the wording of the ROT clause
f the reason why the High Court rejected the rulings of the first two courts
g the High Court's definition of the legal relationship between the parties

8.2 Read the article again and answer these questions.

1 Explain the title of the article in your own words.
2 What is meant by the phrase *the Court noted that effect had to be given to the legal relationship the parties had entered into* in paragraph 5?
3 On what grounds was the Seller's appeal dismissed?
4 Explain the last paragraph of the article in your own words.

8.3 Complete the phrases and collocations below from the article using the prepositions in the box.

between for in (x3) into (x2) of over to

1 to breathe new life ..... retention of title clauses
2 by a four-.....-one majority
3 proceeds ..... sale
4 to hold part of the proceeds ..... trust
5 to have priority .....
6 to confer a proprietary interest ..... the proceeds
7 to be void ..... non-registration
8 to draw a distinction ..... trusts and charges
9 the particular clause ..... question
10 to enter ..... a legal relationship

1 The High Court of Australia has breathed new life into retention of title ('ROT') clauses. By a four-to-one majority, the Court has upheld the effectiveness of an agreement providing for the proceeds of sale of manufactured goods to be *held in trust*, thereby securing the manufacturer's indebtedness to the seller. The fact that the ROT clause created a trust, rather than a charge, meant it was effective despite not being registered under the Australian equivalent of the Companies Act.

2 In the case of *Associated Alloys v. ACN 001 452 106*, Associated Alloys ('Seller') sold steel to a customer ('Buyer') subject to an ROT clause. The critical provision in the clause stated:

'In the event that the [Buyer] uses the goods/product in some manufacturing or construction process of its own or of some third party, then the [Buyer] shall hold such part of *the proceeds of such manufacturing or construction process* as relates to the goods/product in trust for the [Seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [Buyer] to the [Seller] at the time of the receipt of such proceeds.'

3 The Buyer used the steel in the manufacture of pressure vessels, heat exchangers, and columns ('steel products'). It was agreed that the Seller had not retained title to the steel products since the steel it had supplied was no longer ascertainable in the products; the steel products were physically different property. The steel products were sold to a third party, with the third party making payments to the Buyer. The question for the Court to consider was whether the Seller had priority over those payments *by virtue of* the provision set out above.

4 The Judge at first instance, and the Court of Appeal, had held that the clause insofar as it operated to confer on the Seller a *proprietary interest* in the proceeds, was a charge over book debts and was *void for non-registration*. The majority in the High Court rejected that reasoning. In the majority's view, there is a critical distinction to be drawn between trusts and charges.

5 In drawing the distinction in relation to the particular clause in question, the Court noted that effect had to be given to the legal relationship the parties had entered into. On that basis, the Court held that the ROT clause created a trust. The fact that the amount subject to the trust was determined by reference to the amount that the Buyer owed the Seller did not reduce the importance of this characterisation.

6 In the end, and despite substantially upholding the Seller's arguments as to the effect of the clause, the Court dismissed the Seller's appeal *on an evidential ground*. The Seller had not *adduced evidence* to show a link between the steel it had supplied and the payments for products supplied to the third party. This gap in the evidence meant that the Seller's appeal failed.

7 However, despite the Seller's ultimate failure, the majority's decision strengthens a seller's position and consequently could alter the balance where sellers and secured creditors compete for priority.

8.4 Underline the phrases in the article used to introduce these components.

EXAMPLE: **a** The ruling or holding of the court = para. 1: *the Court has upheld ...*

a The ruling or holding of the court
b A summary of the facts of the case
c The legal issue(s) involved in the case
d The name of the case, and the names and roles of the parties
e The reasoning of the court

8.5 Find the phrases in italics in the article which match these definitions.

1. invalid because it was not registered
2. the income received from producing a product
3. offered evidence as proof
4. when property or assets are held by one party for the benefit of another
5. right of ownership
6. for evidence-related reasons
7. as a result of

9 Language use B: Talking about corresponding laws and institutions

The first paragraph of Reading B contains the sentence *The fact that the ROT clause created a trust, rather than a charge, meant it was effective despite not being registered* ***under the Australian equivalent of the Companies Act***.

The phrase in bold refers to a law in Australia which more or less corresponds, or is comparable to, a law in the UK. This phrase and the ones like it below can be used to refer to laws of all kinds as well as to institutions, and thus are useful for comparing one's own legal system to that of another country or another jurisdiction. Look at the examples:

The law ***is the*** *Australian* ***equivalent of*** *the Companies Act.*

This statute ***corresponds to*** *the German law on ...*

That's what we *in France* ***would call*** *...*

In Russia, ***we have something similar called*** the ...

Our law ***is comparable to*** *the UK's Companies Act.*

It's basically the same as *our/your ...*

Work in pairs. Using the phrases above, explain your country's equivalent of:

1. the Companies Act
2. Companies House
3. the Uniform Commercial Code

Unit 9

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 9.

Language focus

1 **Vocabulary: distinguishing meaning** Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 purchaser (vendor) buyer consumer
2 comparable distinct corresponding equivalent
3 claimant appellant defendant petitioner
4 postpone decide delay defer
5 void non-arbitrary invalid non-binding
6 material pecuniary monetary financial
7 originate from lead to arise out of result from

2 **Word formation** Complete these tables by filling in the correct forms. Underline the stressed syllable in each word with more than one syllable.

Verb	Noun
disclaim	disclaimer
	exclusion
indemnify	
	tolerance
	specifications
retain	
	postponement

Verb	Adjective
suit	
	acceptable
	implied
bind	
ascertain	

3 **Prepositions** Complete the sales contract clause below with the prepositions in the box.

by ~~for~~ in of under with

Governing Law
Anderson County, Texas, shall be the proper place of venue **1)** ....for.... suit on or in respect **2)** ..... the Agreement. The Agreement and all of the rights and obligations of the parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied **3)** ..... accordance **4)** ..... and governed **5)** ..... and enforced **6)** ..... the laws of the State of Texas.

4 Word choice Complete this paragraph about consumer rights by choosing the correct word in each case.

When you buy goods from any seller, you have the right to expect certain standards. The UK Sale of Goods Act 1979 states that the goods must be **1)** *for / (of) / in* satisfactory quality **2)** *in comparison to / by virtue of / in respect of* the appearance and finish of the goods, their safety and durability, and their freedom from defects – except where they have been pointed out to you before purchase. They must also be **3)** *special / fit / made* for their purpose, including any particular purpose mentioned by you to the **4)** *vendor / purchaser / consumer.* If the **5)** *merchandise / supply / sale* does not meet these standards, you are **6)** *obliged / entitled / required* to reject it and get your money back. You have a/an **7)** *reasonable / acceptable / exclusive* time to return faulty goods, after which you are **8)** *requested / deemed / implied* to have accepted the goods and their faults, although you may still be able to **9)** *claim / incur / charge* damages.

5 Contract expressions Match each of the words and phrases used in sales contracts (1–7) with the phrase that best expresses its meaning (a–g).

1 to be subject to change	**a** before receiving
2 on delivery	**b** to retain an entitlement
3 prior to receipt	**c** at the time of delivery
4 to conform to specifications	**d** to secure against loss or damage in the future
5 in a workmanlike manner	**e** may be changed
6 to hold harmless	**f** to be in agreement with or to follow precise description
7 to reserve a right	**g** competently

6 Disclaimer expressions Match the words in italics in the text (1–9) with the word or phrase below (a–i) that has a similar meaning.

Disclaimer of Warranty

The software is provided **1)** *'as is'* without warranty of any kind. [The Company] further **2)** *disclaims* all implied warranties including without limitation any implied warranties of **3)** *merchantability* or of **4)** *fitness* for a particular purpose. The entire risk **5)** *arising out of* the use or performance of the software and documentation remains with you.
6) *In no event* shall [the Company], its authors or anyone else involved in the creation, production, or delivery of the software be liable for any damages whatsoever (including, without limitation, damages for loss of business profits, business interruption, loss of business information or other **7)** *pecuniary* loss) arising out of the use of or inability to use the software or documentation, even if [the Company] has been **8)** *advised of* the possibility of such damages. Because some states/ countries do not allow the exclusion or **9)** *limitation* of liability for consequential or incidental damages, the above limitation may not apply to you.

a financial	7	**f** acceptable quality	
b told about		**g** restriction	
c suitability		**h** for no reason	
d resulting from		**i** in the present condition	
e denies			

Case study 3: Contract law

The facts of the case

Your law firm has asked you to review the following US contract-law case and the relevant documents in preparation for a meeting with a client.

Read the facts of the case. Why is this type of case referred to as a 'battle of forms'?

Colonial Incorporated makes cooling units that contain steel tubing supplied by a company called Lehigh[1] Steel Incorporated. Each year, Colonial sends a purchase order to Lehigh for the tubing Colonial will need for the year. During the year, Colonial sends out release orders to receive parts of the year's order from Lehigh. In return, Lehigh sends acknowledgement forms in response to the release orders to Colonial and then ships the tubing.

Lehigh's acknowledgement form disclaims all liability for consequential damages (such as lost profits) and limits Lehigh's liability for defects. These terms are different from Colonial's purchase order and, of course, are not contained in it.

Unfortunately, some of the tubing supplied by Lehigh, which Colonial incorporated into a cooling unit, was defective and burst, causing considerable damage and loss to one of Colonial's customers, Best Produce Corporation. Best Produce Corporation is claiming damages against Colonial, including consequential damages. In turn, Colonial has claimed recovery from Lehigh. In response, Lehigh argues that it has disclaimed all liability for any damages in accordance with the terms set out on its acknowledgement form.

Task 1: Role-plays

Work with a partner. Follow steps 1–3 below for each role-play.

a Student A: You are the client, a representative from Lehigh Steel.
Student B: You are the lawyer.

b Student A: You are the lawyer.
Student B: You are the client, a representative from Colonial.

1 If you are the client, prepare for the meeting by becoming familiar with the facts of the case.
If you are the lawyer, prepare for the meeting by:

- identifying the legal issues of the case and determining arguments for your side;
- listing the strengths and weaknesses of your side of the case;
- deciding which parts of the relevant legal documents most strongly support your case and can be used to argue against the other party's case;
- making notes for the meeting: What course of action should your client take?

2 Lawyers: pair up with your client to explain the legal issue involved and review the relevant documents. Remember to paraphrase their contents so that they are easy to understand. Advise your client on a course of action.

3 Report the results to the group, focusing on the client's (un)willingness to settle.

Task 2: Writing

You are an associate at the law firm representing Colonial Incorporated. The senior lawyer handling the case needs assistance regarding Colonial Incorporated's legal argument. Write a memo to the senior lawyer based on all the information you have.

[1] pronounced /li:'haɪ/

Relevant legal documents

Text 1: statement printed on Lehigh's form

Lehigh Steel Inc.'s acceptance of purchaser's offer or its offer to purchase is hereby expressly made conditional to purchaser's acceptance of the terms and provisions of the acknowledgement form.

Text 2: Uniform Commercial Code, Section 2–207

Section 2-207 of the Uniform Commercial Code applies in your jurisdiction and to this case. It addresses the issues arising from a 'battle of the forms'.

U.C.C. §2–207

Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of the Uniform Commercial Code.

Text 3: extract from a legal decision

This extract from one of the leading decisions in your jurisdiction regarding a similar case addresses the principles underlying section 2-207 (see Text 2).

One of the principles underlying section 2-207 is neutrality. If possible, the section should be interpreted so as to give neither party to a contract an advantage simply because it happened to send the first or in some cases the last form. Section 2-207 accomplishes this result in part by doing away with the common law's "last shot" rule. At common law, the offeree/counter-offeror gets all of its terms simply because it fired the last shot in the exchange of forms. Section 2-207(3) does away with this result by giving neither party the terms it attempted to impose unilaterally on the other. Instead, all of the terms on which the parties' forms do not agree drop out, and the U.C.C. supplies the missing terms. Generally, this result is fair because both parties are responsible for the ambiguity in their contract. The parties could have negotiated a contract and agreed on its terms, but for whatever reason, they failed to do so. Therefore, neither party should get its terms.

10 Real property law

1 Reading A: Introduction to property law

The following text serves as an introduction to basic concepts and terms used in real property law, many of which have been in use for hundreds of years.

Read the text and decide whether these statements are true or false.

1 The term of years of a freehold estate is not fixed.
2 *Conveyance* refers to the transfer of property title from one person to another.
3 A licence grants exclusive possession of a property.
4 The Statute of Frauds permits oral contracts in the case of leases if the duration is more than a certain number of stipulated years.

1 English-speaking jurisdictions generally distinguish between **real property** (or **immovable property**) and **personal property**. *Real property* is a general term for land (**freehold estates**) and anything affixed to the land, and **residential** and **commercial leases** (**leaseholds**) whereas *personal property* (or **personalty** or **movable property**) refers to everything which does not fall under the heading of real property. The term **real estate** is often used interchangeably with the term *real property*. Use of the terms is dictated by context and the fact that, generally speaking, real estate is considered to be a broader term. This brief summary addresses key terms in relation to real property.

2 Freehold estates and leaseholds differ primarily in that freehold estates are unlimited in time and can be inherited, while leaseholds are fixed in duration or capable of being fixed. The transfer of title in a freehold estate is called a **conveyance**. The agreement to buy and sell a certain piece of property is contained in a **Contract of Sale**[1]. Such contracts identify the parties, the relevant property and the purchase price. Normally, the Contract of Sale does not, in and of itself, transfer **title** in the property. Rather, the transfer of title must be registered by filing a formal document with the appropriate authority. For example, in the UK a transfer of registered title[2] must be filed with the UK **Land Registry**.

3 A leasehold is transferred through a **lease**, which is a contract between a **landlord** and a **tenant** for the tenant to take **exclusive possession** of the **leased premises** for a **term of years**, usually for a specified **rent** or compensation. Leases are usually categorised into residential or commercial leases. This is an important distinction for the landlord, as different laws apply depending on the intended use of the leased premises.

4 A leasehold should not be confused with a **licence**. The crucial test for determining whether a lease or a licence has been created is whether there is exclusive possession. If there is no exclusive possession, there is no leasehold. A good example of this is where the property remains in the control of the **grantor**, such as in the case of a hotel room or dormitory.

[1] (US) *also* Real Estate Contract
[2] (US) The formal document is called *a deed*, usually a *warranty deed*, which ensures marketable title to the property.

5 It is important to note that the **Statute of Frauds** requires that agreements regarding the sale of or interests in land must be in writing to be enforceable. In respect of leases, the Statute of Frauds for a particular jurisdiction will specify that leases for more than a certain number of years must be in writing to be enforceable, e.g. three years in England.

6 There are numerous other areas of real property law which commercial lawyers deal with on a day-to-day basis, which include such things as disputes between landlords and tenants, **easements**, **usufructs**, **mortgages** and other **financing measures**.

2 Key terms: Parties referred to in real property law

The key terms *landlord, tenant* and *grantor* all appear in the text on page 136. This is a more complete list of parties named in legal documents dealing with real property law. Match each pair (1–3) with its explanation (a–c).

1 decedent/heir **2** grantor/grantee **3** landlord/tenant

a a person who transfers property / a person to whom property is transferred (in real property law, synonymous with *assignor/assignee*)
b a person (usually the owner) who gives another person a lease in return for rent / a person to whom a lease is given in return for rent (in real property law, synonymous with *lessor/lessee*)
c a person who has died / a person who is entitled to inherit property

3 Language use A: Contrasting ideas

Two ideas can be contrasted with each other using the words *whereas* and *while*:

Real property is a general term used when referring to land and anything affixed to the land, and residential and commercial leases, ***whereas/while*** *personal property refers to everything which does not fall under the heading of real property.*

Both *whereas* and *while* can appear at the beginning of the sentence as well:

Whereas/While *real property is a general term used when referring to land and anything affixed to the land, and residential and commercial leases, personal property refers to everything which does not fall under the heading of real property.*

It should be noted that *whereas* is used in legal English in two distinct ways. The first use has the meaning of 'but on the contrary' (as in the present example). The second use is at the beginning of recitals, i.e. the setting forth of facts or other important matter in a deed, contract or other legal document.

Whereas*, the parties wish to amend certain terms of the Sales Contract; and* ***Whereas****, certain capitalised terms not otherwise defined herein are defined in the Sales Contract ...*

Contrast these key terms using *whereas* or *while*. You may need to consult the Glossary booklet.

1 freehold estate / leasehold
2 lease / licence
3 easement / usufruct

4 Language use B: Classifying and distinguishing types or categories

Classification is an effective way to structure complex information so that it can be more easily understood by readers or listeners. Paragraphs 1, 2, 3 and 6 of the text on pages 136–137 contain verbs and phrases for classifying ideas and distinguishing categories:

categorised, distinguish, fall under the heading of, include, is a general term for, refers to

4.1 Complete these sentences using the classification words and phrases in the box above. Some of the sentences contain groups of synonymous phrases in italics.

1. English-speaking jurisdictions generally ..... / *make a distinction* between real and personal property.
2. Real property ..... land and anything affixed to the land, and residential and commercial leases.
3. Personal property ..... everything which does not ..... real property.
4. Leases are usually ..... / *divided / classified / grouped* into residential or commercial leases.
5. There are numerous other areas of real property law which commercial lawyers deal with on a day-to-day basis which ..... / *encompass* such things as disputes between landlords and tenants, easements, usufructs, mortgages and other financing measures.

4.2 Rewrite sentence 2 from Exercise 4.1 in four different ways, each using a different classifying phrase. Make changes in sentence structure or add words as necessary.

EXAMPLE: Real property encompasses land and anything affixed to the land, and residential and commercial leases.

5 Listening A: Easements

One of the key terms mentioned above is *easement*, which is a right acquired for access to or use of another person's land for a specific purpose. You are going to hear an excerpt of a seminar held by a lawyer as part of a training course for estate agents. It is the lawyer's task to provide basic legal information on issues which the agents may one day encounter in the course of their work. In the excerpt, the lawyer presents a general classification of easements, explaining the different types his listeners need to know about.

5.1 Before you listen, discuss what other legal issues an estate agent might need to be informed about.

5.2 Listen and answer these questions.

1. What is the purpose of a temporary easement?
2. Explain what is meant by *open, notorious and continuous use.*
3. What does an *easement by necessity* refer to?

5.3 Complete these sentences, in which the speaker classifies information. Use no more than three words for each space.

1. Generally speaking, ... two fundamental types of easements: temporary and permanent.
2. Permanent easements can be ..... three common types. These three are the easement in gross, the prescriptive easement and the easement appurtenant.
3. This ..... those easements which are given to a quasi-public corporation, such as the electric or phone company.
4. ..... of an easement appurtenant is called an *easement by necessity.*

6 Language use C: Giving a presentation – structuring and signalling transitions

A presentation should begin with a clear statement of the topic. You should also use language for classifying ideas to help you structure your talk. For example:

My presentation will deal with the topic of X.

I will discuss the three most important types of X in my jurisdiction.

I would like to explain X in my jurisdiction.

In our country, we distinguish between two main classes of X ...

The overall structure of the presentation will be determined by the elements in the classification scheme, i.e. a three-part classification will lead to a presentation which includes an introduction, three main points and a conclusion.

When making the transition from one point to another, it is common to signal the move to a new point by using phrases such as the following:

Moving to my second point, ...

That brings me to my next point.

To turn to / Turning to the second type of X, ...

Listen again or read the transcript on page 288. How does the speaker indicate a change to a new point? Add the signals to the list above.

7 Speaking A: An aspect of real property law

Choose a topic related to real property law in your jurisdiction which lends itself to structuring by means of classification. Prepare a short presentation, making use of the phrases for classifying, structuring and signalling presented above.

Some possible topics are:

- Types of tenancy agreement
- Types of concurrent ownership of property
- Types of estate
- Tenants' rights
- Landlords' rights

8 Reading B: A law firm's practice areas

Law firms commonly print brochures or create web pages in order to make their areas of expertise known to prospective clients. This kind of text, or competency statement, is usually entitled 'Practice areas' and generally lists the areas of the law in which the firm has performed successfully and the areas which staff members have most experience in.

Practice areas

The law firm of Johnson, Fabian and Brugger was founded in 1983. Our staff lawyers *are experienced in handling* cases involving Natural Resources, Property and Real Estate law and *have represented* clients with issues involving local and national authorities and organisations. Our firm has *dealt with* a wide range of natural resource matters, including endangered species, forestry/timber, grazing, irrigation, mining claims, oil and gas, water and wildlife. We *have assisted* clients in various property matters, including federal, public, state and private lands, communication sites, condemnation, easements, land exchanges, property boundary disputes, ownership disputes and rights-of-way. In addition, our lawyers *have handled* a broad array of real-property/real-estate transactions, including commercial, residential, agricultural and conservation easements.

Due to our comprehensive natural resource and property capabilities, our firm can provide experienced counsel for all environmental and natural resource matters affecting property owners.

8.1 Read the competency statement of a large American law firm above and answer these questions.

1 What area of the law does the firm handle in addition to real property?
2 What two types of dispute are *explicitly* named in the text?

8.2 Decide whether Johnson, Fabian and Brugger is the right firm for these parties (1–4) to consult for legal assistance.

1 Mr Simmons is engaged in a dispute with Mr Burns concerning repairs that must be made to a pipe leading through Mr Burns's property to Mr Simmons's house. Mr Burns refuses to allow the workers access to his property.
2 Mr Wyatt produces a natural insecticide from the seeds of a type of Indian tree which grows on his property and has been selling it to organic farmers in his region. A pharmaceutical company is suing him for infringement of patent rights.
3 Mr Parker's neighbour operates a private childcare centre within her property. During the summer, the children spend a lot of time outside, and the noise level is extremely high. Mr Parker and his neighbour agreed to install a fence, but disagree about the exact boundary between their properties and about who should pay for the fence.
4 Mr Tanaka is a landscape architect working under subcontract with a construction company on the site of a large private home. The lead contractor has filed for bankruptcy protection. Mr Tanaka wants to know whether he can stop work, pack up his gear and walk off the job site. He also wants to know whether he can enforce his mechanics' lien rights against the real property's owner.

8.3 Read the text again and answer these questions.

1 What are the phrases in italics used to express?
2 Underline the verb tenses in the text. Which verb tense is used most often? Why?
3 Find two words in the text that are synonyms of the word *case*.
4 Which sentence of the text expresses what the firm can do?

9 Writing A: Describing a firm's practice areas

Using the phrases in italics in the text in Reading B, write a short description of the practice areas of your own law firm or of a law firm you are familiar with.

Note some of the important features of such a statement:

- It is written in the first person plural (the 'we' perspective).
- Much of the information is provided in the form of lists.
- The present perfect tense is used to refer to what the firm has done.
- The text may begin with a reference to the firm's history and may conclude with a statement that sums up what the firm can do.

10 Reading C: Understanding a lease or tenancy agreement

A landlord who wishes to lease property to a tenant will often consult a lawyer for assistance in drawing up a lease. A prospective tenant, on the other hand, might ask a lawyer to review the terms and conditions of a lease before entering into such an agreement. Both will require the services of legal counsel in the event of a serious dispute concerning a lease.

10.1 Tick the sections or clauses you would expect to find in a lease tenancy.

1 Parties ☐
2 Term ☐
3 Non-competition ☐
4 Statutory conditions ☐
5 Confidentiality ☐
6 Rent amount and payments ☐
7 Acceleration ☐
8 Method of payment ☐
9 Force majeure ☐
10 Deposit ☐

Can you think of any other clauses and sections that are generally included in a lease?

10.2 Look at the title of the text on page 142 and answer these questions.

1 What are statutory conditions?
2 What kind of things might come under statutory conditions in a lease agreement?

10.3 The text is an excerpt from a lease, setting forth the statutory conditions applying to the lease. Read it and complete the gaps (1–7) using these subheadings (a–h).

a Abandonment and termination
b Sub-letting premises
c Entry to premises
d Entry doors
e Conditions of premises
f Services
g Good behaviour
h Obligation of the tenant

STATUTORY CONDITIONS

The following statutory conditions apply:

1 .....
The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety, or housing.

2 (a) .....
Where the landlord provides a service or facility to the tenant that is reasonably related to the tenant's continued use and enjoyment of the premises such as, but not as to restrict the generality of the foregoing, heat, water, electric power, gas, appliances, garbage collection, sewers, or elevators, the landlord shall not discontinue providing that service.
(b) .....
A tenant shall conduct him/herself in such a manner as not to interfere with the possession or occupancy of other tenants.

3 .....
The tenant shall be responsible for the ordinary cleanliness of the interior of the premises and for the repair of damage caused by wilful or negligent act of the tenant or of any person whom the tenant permits on the premises.

4 .....
The tenant may assign, sub-let or otherwise part with possession of the premises subject to the consent of the landlord which consent will not arbitrarily or unreasonably be withheld or charged for unless the landlord has actually incurred expense in respect of the grant of consent.

5 .....
If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.

6 .....
Except in the case of an emergency, the landlord shall not enter the premises without the consent of the tenant unless:
(a) notice of the termination of the tenancy has been given and the entry is at a reasonable hour for the purposes of exhibiting the premises to prospective tenants or purchasers;
or
(b) the entry is made during daylight hours and written notice of the time of the entry has been given to the tenant at least twenty-four hours in advance of the entry.

7 .....
Except by mutual consent, the landlord or the tenant shall not during occupancy by the tenant under the tenancy alter or cause to be altered the lock or locking system on any door that gives entry to the premises.

10.4 Where do these ideas appear in the text? Write the number of the section or sub-section in which they can be found.

EXAMPLE: The landlord is not permitted to go into the flat unless the tenant agrees. 6

1. The tenant is not allowed to disturb other tenants in the building.
2. The landlord agrees that he will not stop providing the use of utilities such as gas or electricity.
3. The landlord is obliged to take advantage of any reasonable opportunity to reduce loss or damage if the tenant leaves unexpectedly.
4. The landlord is required to keep the flat in suitable condition.

5 The tenant agrees to repair anything broken by a person he has invited into the flat.
6 The landlord promises that he will not have the lock of the front entrance changed without the agreement of the tenant.
7 The tenant is permitted to rent the flat to someone else if the landlord gives him permission to do so.
8 The landlord can enter the flat if the tenant is moving out, and the landlord needs to show a new tenant around.

10.5 Match these words and expressions (1–11) with their definitions (a–k).

1 statutory	**a** agreement of both parties
2 premises	**b** what has been stated before
3 habitation	**c** when a tenant leases a leased property to a third party
4 the foregoing	**d** giving one's permission to something
5 wilful or negligent act	**e** something done knowingly or carelessly
6 sub-letting	**f** minimising any loss due to breach
7 grant of consent	**g** a piece of land, a building, or part of a building
8 abandonment	**h** created or regulated by statutes
9 mitigate damages	**i** the act of living in or occupying a place
10 mutual consent	**j** in a manner based on chance rather than being planned
11 arbitrarily	**k** leaving and no longer using a property

10.6 Match these verbs (1–4) with their synonyms (a–d).

1 abandon	**a** cause something to end or stop
2 terminate	**b** give or allow something
3 comply with	**c** leave a place, person, or thing
4 grant	**d** act in accordance with an order, set of rules or request

10.7 Match the verbs from Exercise 10.6 (1–4) with these nouns (i–iv) they collocate with in the text.

i consent
ii law
iii premises
iv tenancy

11 Reading D: A case review

Legal publications which present the outcome of disputes involving commercial property leases are of interest to lawyers, landlords and tenants alike. The decisions in such cases indicate how courts in a jurisdiction tend to rule in real property cases, and are therefore useful for parties when preparing a court case. The case report on page 144 was published in a law-firm newsletter.

11.1 Read the report and answer these questions.

1 Which business sector is involved in the case? Is the case in question relevant for other sectors of business as well?
2 The concept of *quiet enjoyment* is central to the case. What does the term mean? Is there a comparable concept in your own jurisdiction?

Quiet enjoyment

Goldmile Properties Ltd v. Lechouritis

What steps must landlords take, in deference to their covenants of quiet enjoyment, when complying with their repairing obligations under a lease? Is it enough for a landlord to take all *reasonable* precautions – or is the landlord required to take all *possible* precautions – to avoid disturbing its tenant?

The landlord brought in contractors to repair and clean the exterior of a building, which was let as a restaurant. The contractors erected scaffolding and fixed sheeting to the exterior of the premises. The interior of the premises became dusty and dark, and the restaurant appeared closed.

The Appeal Court said that, where the provisions of any contract come into conflict, they are to be interpreted and applied to give proper effect, where possible, to each. The obligation to keep the building in repair had to co-exist with the tenant's right to quiet enjoyment and vice versa. Neither obligation should take priority over the other.

It would have been possible to restrict the work to the days on which the restaurant was closed, but this would have been costly and impractical. The landlord had sent the tenant a copy of the estimate for, and had agreed to spread the cost of, the work. It had also postponed the start of the work to avoid interfering with the tenant's busiest period and had arranged the work to meet the tenant's requirements in so far as it could.

The landlord was under an obligation to take all *reasonable* steps – but not all possible precautions – to avoid disturbing the tenant, and had done so.

11.2 Find words or phrases in the text which match these definitions.

1 An agreement that the lessee can use the property in peace without being disturbed
c..... of q..... e.....

2 Something done in advance to prevent harm
p.....

3 Someone who enters into an agreement to perform a certain service or provide a certain product; (here) a company or trader which agrees to provide construction work
c.....

4 The expected cost of work to be done
e.....

5 To put off or delay until a later time
p.....

12 Speaking B: A case discussion

Discuss these questions in small groups.

1 What is the difference between reasonable precautions and possible precautions in the case in Exercise 11?
2 The Court reasoned that 'where the provisions of any contract come into conflict, they are to be interpreted and applied to give proper effect, where possible, to each'. How is this statement to be understood?
3 Do you agree with the Court's ruling in this case?
4 What do you think the outcome of such a case would be in your jurisdiction?

13 Listening B: Buying a house in Spain

Lawyers are often involved in all stages of the sale and purchase of real property. These stages include drafting, reviewing and negotiating the contract of sale, handling payment, as well as preparing and filing the documents required to close on the property.

When the purchase involves real property in another country, it will be necessary to obtain the help of a lawyer who is well acquainted with the procedures and documents required in that country.

13.1 What documents are required for the sale of real property in your country? Do many foreigners buy property in your country?

13.2 Listen to an interview between a lawyer (Ms Blackwell) and her client (Mr Watson), who intends to buy a house in Spain, then answer these questions.

1 Who is Señor Martínez?
2 Tick the steps that must be followed to buy a house in Spain.

- **a** Draw up power of attorney ☐
- **b** Submit financial history of buyer ☐
- **c** Apply for fiscal number ☐
- **d** Negotiate agent's commission ☐
- **e** Set up bank account ☐
- **f** Arrange financing ☐
- **g** Inspect premises ☐
- **h** Sign contract ☐
- **i** Hand over 1% of the purchase price ☐
- **j** Hand over remaining deposit (9% of purchase price) ☐
- **k** Sign final documents ☐

13.3 Decide whether these statements are true or false.

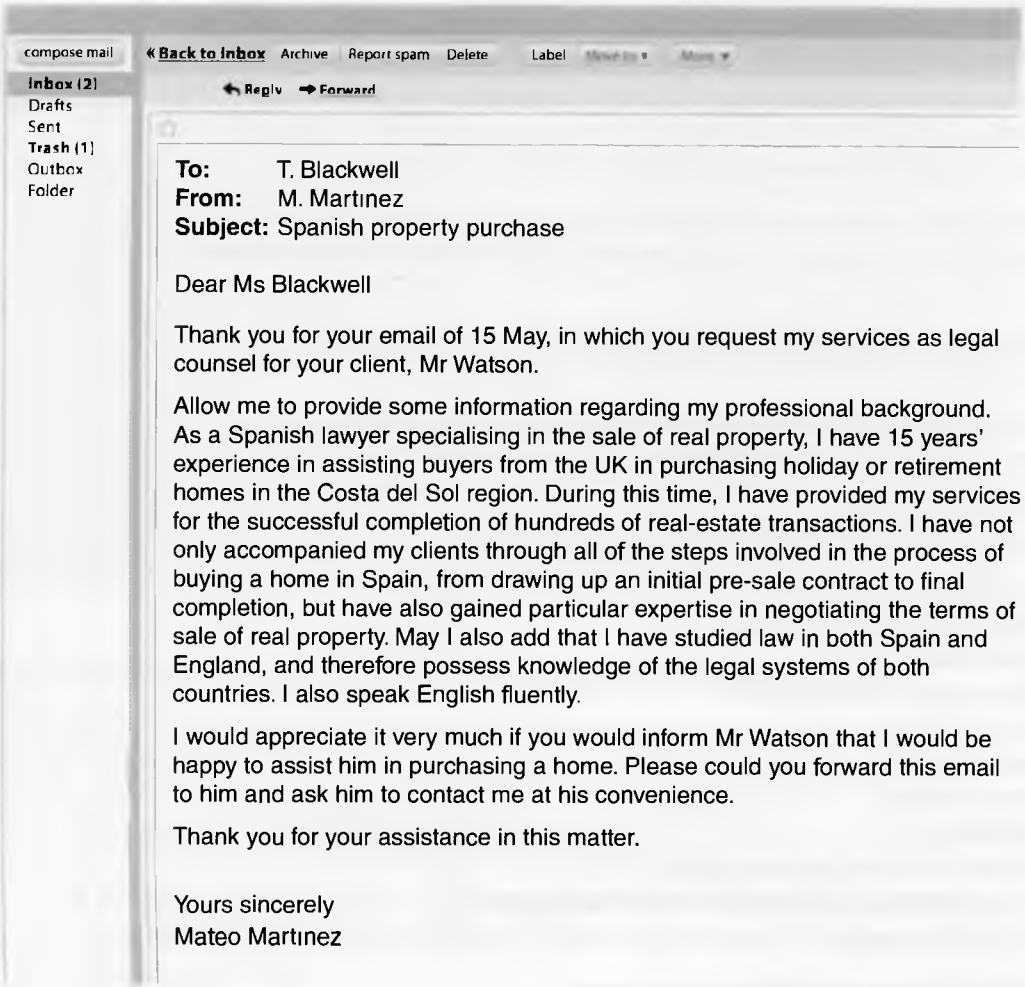
1 A notary will translate the power-of-attorney document.
2 A power of attorney allows the client's Spanish lawyer to complete necessary paperwork when the client is not in Spain.
3 The contract for the sale of the house will be written in both English and Spanish.
4 The client's English lawyer does not want to look at the contract, since Senor Martínez will be drawing it up and has extensive experience with such contracts.
5 The client must be present for the final signing so that he can hand over the rest of the deposit.

14 Reading E: A reference email

In Listening B Ms Blackwell discusses the steps to be taken by Mr Watson and his Spanish solicitor, Señor Martınez, when purchasing a house in Spain. The following email, written by Senor Martınez, is referred to by Ms Blackwell in the dialogue. In the email, Señor Martınez provides an account of his professional experience as a lawyer.

Read the email and answer these questions.

1 What is Señor Martınez's specific area of expertise?
2 What else qualifies Senor Martınez to help Mr Watson?



To: T. Blackwell
From: M. Martınez
Subject: Spanish property purchase

Dear Ms Blackwell

Thank you for your email of 15 May, in which you request my services as legal counsel for your client, Mr Watson.

Allow me to provide some information regarding my professional background. As a Spanish lawyer specialising in the sale of real property, I have 15 years' experience in assisting buyers from the UK in purchasing holiday or retirement homes in the Costa del Sol region. During this time, I have provided my services for the successful completion of hundreds of real-estate transactions. I have not only accompanied my clients through all of the steps involved in the process of buying a home in Spain, from drawing up an initial pre-sale contract to final completion, but have also gained particular expertise in negotiating the terms of sale of real property. May I also add that I have studied law in both Spain and England, and therefore possess knowledge of the legal systems of both countries. I also speak English fluently.

I would appreciate it very much if you would inform Mr Watson that I would be happy to assist him in purchasing a home. Please could you forward this email to him and ask him to contact me at his convenience.

Thank you for your assistance in this matter.

Yours sincerely
Mateo Martınez

15 Writing B: Summarising and requesting

15.1 These phrases can be used for making requests:

Could you please provide me with ...
Would you mind sending me ...
I'd appreciate your sending me ...

Read Senor Martınez's email again and find two more phrases to add to the list.

15.2 The English lawyer, Ms Blackwell, wants to respond to the email and to inform Senor Martinez of the matters she has discussed with their mutual client. Write her email to Senor Martínez, in which you should:

- thank him for his email;
- state the reason for writing;
- briefly summarise the content of the interview with the client (you may need to listen to the interview again or read the transcript of it on page 289);
- request copies of all documents Senor Martínez draws up in connection with the house purchase;
- offer your assistance, if needed;
- thank him for his efforts.

When asking for the copies of documents, use some of the phrases from Exercise 15.1.

15.3 Using Senor Martínez's email as a model, write a brief account of your own professional experience as a lawyer to send to a prospective client.

Unit 10

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 10.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 to rent to lease (to license) to let
2 lessee grantee heir tenant
3 to fulfil to comply with to set forth to satisfy
4 capability opportunity competence ability

2 Word formation Complete this table by filling in the correct adjectival form of the nouns listed. Underline the stressed syllable in each word with more than one syllable.

Noun	Adjective
statute	statutory
reason	
negligence	
capability	
inheritance	
prospect	
necessity	
safety	

3 Vocabulary: completing clauses Complete the clauses below from a tenancy agreement using the words in the box.

deemed harmless herein Lessee liable Premises quietly ~~reasonable~~ rules thereon

1 INSPECTION OF PREMISES. Lessor and Lessor's agents shall have the right at all reasonable times during the term of this Agreement to enter the ..... for the purpose of inspecting the Premises and all buildings and improvements ..... and also for the purposes of making any repairs, additions or alterations as may be ..... appropriate by Lessor for the preservation of the Premises or the building.

2 INDEMNIFICATION. Lessor shall not be ..... for any damage or injury of or to the Lessee, Lessee's family, guests, invitees, agents or employees or to any person entering the Premises or the building of which the Premises are a part or to goods or equipment, or in the structure or equipment of the structure of which the Premises are a part, and ..... hereby agrees to indemnify, defend and hold Lessor ..... from any and all claims or assertions of every kind and nature.

3 QUIET ENJOYMENT. Lessee, upon payment of all of the sums referred to ..... as being payable by Lessee and Lessee's performance of all Lessee's agreements contained herein and Lessee's observance of all ..... and regulations, shall and may peacefully and ..... have, hold and enjoy said Premises for the term hereof.

4 Verb tenses: past simple or present perfect Choose the correct verb form for each of these sentences.

1 Our lawyers *represented / have represented* landlords, property owners, developers and tenants in a wide range of real-estate and real-estate financing litigation.
2 Last month, our firm *won / has won* an important suit involving property owner and occupier liability.
3 In the past ten years, the attorneys in our firm *handled / have handled* a large number of landlord/tenant disputes.
4 Since it was founded, our firm *advised / has advised* clients on the full range of property issues.
5 In the year 2009, the real-estate department of our firm *was involved / has been involved* in a successful civil lawsuit concerning a large commercial development.

5 Collocations Match the nouns in the box with the verbs below which they commonly collocate with. Some of the nouns collocate with more than one verb. Consult a dictionary if necessary.

~~contract~~	lease	premises	regulation	requirement	site	statute	tenancy

1 abandon:
2 comply with: *contract*
3 terminate: *contract*

6 Sentence completion Complete these sentences using a suitable verb from Exercise 5. Some verbs are needed more than once.

1 The fact that tenants *abandon* the premises will not normally relieve them from the duty to pay rent.
2 The security deposit will be refunded if you ..... the lease.
3 The agreement contains a provision allowing the landlord to ..... the tenancy within six months of the beginning of the tenancy.
4 In the case of the non-payment of rent by the tenant, the landlord has the power to ..... the lease.
5 A lease which does not ..... the aforementioned requirements is wholly void.

7 Adjective or adverb? Choose the correct options to complete this text, in which a lawyer explains what quiet enjoyment means to a client.

A covenant for quiet enjoyment is **1)** *normal / (normally)* contained in any **2)** *good- / well-* drafted lease. The term 'quiet enjoyment' refers to the right of a tenant to use and enjoy a property and not be interrupted by an act of the landlord. It doesn't **3)** *actual / actually* refer to noise, as you might think. For example, there are **4)** *specific / specifically* things a landlord may not do, such as **5)** *continual / continually* obstruct access to the premises. He is also not permitted to cut off or **6)** *persistent / persistently* interrupt the gas or electricity supply. However, a **7)** *temporary / temporarily* inconvenience does not qualify as breach of the covenant of quiet enjoyment, and so a landlord is permitted to carry out **8)** *essential / essentially* repairs, for example.

11 Intellectual property

1 Reading A: Introduction to intellectual property

The following text provides a general introduction to the area of law which deals with intellectual property rights, one of the fastest-growing areas of law.

Read the text below and decide which of the terms in bold match these definitions.

1 exclusive right granted to authors of creative works to control the use of their original works
2 exclusive right granted by a government to an inventor which prevents others from making, using or selling his or her invention
3 distinctive registered mark used by a business to identify itself and its products or services to consumers
4 official order from a court that stops someone from doing something

Intellectual property is an expansive and rapidly changing area of the law which deals with the formulation, usage and commercial exploitation of original creative works. A majority of the issues that arise within this area revolve around the boundary lines of **intangible property rights** and which of those rights are afforded legal protection. The abstract quality of the property rights involved presents a contrast to other areas of property law. Furthermore, the rapid changes occurring in this field raise topical debates over such things as gene patenting, genetically modified food and peer-to-peer networking (e.g. music piracy on the Internet).

Traditionally, intellectual property rights are broken down into three main areas: **patents**, **trade marks**[1] and **copyrights**. Other areas which warrant mentioning are **trade secrets**, **design rights** and the concept of **passing off**.

A patent is a **monopoly right** in an invention. Patent law is regulated in various jurisdictions through legislation. A patent must be granted pursuant to the relevant legislation in order to create the monopoly in the invention. Once the patent is granted, the protection remains in force for a statutory period, e.g. 20 years in the UK. Most patent legislation requires that a patentable invention: 1) is novel; 2) involves an inventive step; 3) is useful or capable of industrial application; and 4) is an invention or, in the US, **non-obvious**. Many things are excluded from patentable subject matter due to unsuitability, public policy and morality.

A registered trade mark is similar to a patent in that it provides the **holder** with an **exclusive right** to use a 'distinctive' mark in relation to a product or a service. A common aspect of applicable legislation is that the mark must be distinctive. In other words, it must be capable of functioning as an identifier of the origin of the good and thereby avoid confusion, deception or mistake. Deception has been deemed to

[1] (US) trademarks

include, for example, the use by another of a domain name that is substantially similar to the trade mark, so-called **cybersquatting**.

Copyright is a right subsisting in original literary, dramatic, musical and artistic works and in sound recordings, films, broadcasts and cable programmes, as well as the typography of published editions. Copyright holders possess economic rights associated with their works, including the essential right to prohibit **unauthorised use** of the works. The most common requirements for copyright protection are that the work must be in material form (i.e. not just an idea) and it must be original in the sense that the work 'originates' from the relevant author. Copyright only provides a *partial* monopoly in a work, as various rules provide exceptions by which a work may be copied without infringing on the rights of the author. A good example of such an exception is the **right of fair use** recognised in the United States[1].

Of course, **infringement** of intellectual property rights may result in enforcement actions being brought against the infringing party. As part of these actions, remedies might include damages, **injunctions** and account of profits, depending on the right infringed and the extent and nature of the infringement.

[1] (UK) fair dealing (More restrictive than the US doctrine of fair use; in order to be protected, the use has to fall into one of several categories, while in the USA it is open-ended.)

2 Key terms: Intellectual property

2.1 Match the two halves of these definitions of key terms from the text. Consult the Glossary booklet if necessary.

1 The term *passing off* refers to the practice of a company ...
2 The term *design right* refers to a right ...
3 The term *cybersquatting* refers to the practice ...
4 The term *injunction* refers to an order issued by a court ...
5 The term *trade secret* refers to the intellectual property of a business ...

a which prohibits the copying of an original, non-commonplace design of the shape or configuration of a product.
b which prohibits a specific action from being carried out in order to prevent damage or injury.
c illegally trading on the reputation of another company by misrepresenting its goods or services as being those of the other company.
d which it does not want others to know about.
e of registering a trade mark as a domain name with the intention of later selling it to the rightful owner.

2.2 Explain what is meant by these terms related to intellectual property rights in your own words. Use the sentences in Exercise 2.1 as models.

1 intangible rights
2 right of fair use
3 infringement of rights

3 Listening A: Training of junior lawyers

Law firms generally provide training for young lawyers entering the firm in the form of formal instruction and practical work experience. Seminars are held by experienced lawyers to provide a theoretical framework for understanding the legal, business, ethical and practical issues that junior lawyers are likely to encounter. On the practical side, the practice known as 'shadowing' gives junior lawyers a chance to observe senior lawyers at work. Shadowing may include anything from attending meetings with a client and other lawyers, to participating in negotiations with opposing counsel, to attending a trial, or observing the closing of a transaction.

You are going to hear an extract from a seminar held for junior lawyers at a US law firm.

3.1 Listen to the extract and answer these questions.

1 What is the topic of the seminar?
2 The speaker says that her listeners will be shadowing a senior lawyer on a new case. What does the case involve?
3 What do the examiners at a patent office use as a basis for their decision to award a patent to an inventor?

3.2 Listen again and complete this extract from the outline of the speaker's notes for this part of the seminar. Use no more than three words for each gap.

Notes for seminar

- General remarks: Area which is changing rapidly; important new case (Whittaker)
- Overview: Topics to be covered in seminar: basic concepts, a few **1)** ..... presented by participants, recent holdings
- Requirements for patentability of an invention
  - First requirement: must be useful: **2)** ..... requirement. Invention must provide a **3)** .....
  - Second requirement: must be new: novelty requirement
  - Third requirement: must not be obvious to person with skill in the art: **4)** .....
  - Fourth requirement: must be patentable **5)** .....

Examples: processes, machines, a composition of matter (such as a synthesized chemical compound)
Subject matters traditionally **6)** ..... patentability: abstract ideas (in particular: business methods)

3.3 Decide whether these statements are true or false.

1 The question of whether an invention is patentable is generally decided by the courts.
2 In order for an invention to qualify as novel, the idea behind it should not already have been patented in another device.
3 A process, such as the idea for a machine, is not patentable.
4 Today, business methods are no longer automatically barred from patentability.

4 Reading B: The State Street case

The junior lawyers who are attending the seminar on business-method patents are asked to research relevant cases on the topic. One has been assigned the landmark case known as the 'State Street' case. In his research, he came across the summary of the case shown on page 153.

4.1 Read the title and first three paragraphs of the summary and answer these questions.

1 What effect has the court's decision had on the patent system in general?
2 What does the business method in question involve?

The 'State Street' case expands patent protection to methods of doing business

In 1998, the United States Court of Appeals for the Federal Circuit handed down a landmark decision in ***State Street Bank and Trust Co. v. Signature Financial Group, Inc.*** The 'State Street' case has attracted wide attention because it has opened up the patent system to inventions which are not within traditional technologies.

The case involved a patent issued to Signature Financial Group which was called a 'Data-Processing System for Hub and Spoke Financial Services Configuration'. The data-processing system allowed for complex calculations to be provided very quickly in relation to mutual funds (Spokes) pooled in an investment portfolio (Hub) which was organised as a partnership. The patent was challenged by State Street Bank and Trust.

The lower court held that the invention fell within two exceptions to patentable subject matter: 1) the mathematical-algorithm exception, and 2) the business-method exception. The court reasoned that the data-processing system merely performed a series of mathematical functions and that the patent was further invalid under 'the long-established principle that business "plans" and "systems" are not patentable'.

However, on appeal, the Federal Circuit Court reasoned that the cases relied upon by the lower court were inappropriately applied to the case. It stated that the focus of what constitutes patentable subject matter should be the essential characteristics of it and, in particular, its practical utility. And, with regard to the Hub and Spoke software in question, it produced a 'useful, concrete and tangible result'. The court ended by dismissing the 'ill-conceived' business-method exception to patentability in total.

Naturally, this new approach to business-method patents has been welcomed by inventors in the field of business. This is witnessed by recently issued patents in such areas as architecture, investment and marketing. The decision has truly increased the possibility of patent protection for ever-expanding methods of doing business.

4.2 Read the whole text and answer these questions.

1. On what grounds did the lower court hold that the software patent was invalid?
2. What was the reasoning of the Federal Circuit Court in affirming the patentability of the invention?
3. Why is the State Street case considered a landmark case?

4.3 Add the correct forms of the word *patent* to these sentences.

1. The Court affirmed the ..... of business-method-related software.
2. This decision has caused an increase in ..... application filings.
3. The lower court held that the software patent was invalid on the grounds that it was directed to an ..... 'mathematical algorithm'.
4. The ..... at issue in the State Street case pertained to a data-processing system for managing mutual funds.
5. Things which are generally considered ..... are processes, machines, a composition of matter and so on.
6. Traditionally, business methods could not be ..... .

5 Writing: Notes for a case brief

As part of the preparation of a case which your firm will soon argue in court, you have been asked to submit a memorandum on cases and rulings related to the patentability of business software, including the State Street case.

Using the information from the text on page 153, write notes for your memorandum. Refer to Unit 9 to review typical expressions used in case briefs. Order your notes under these headings:

- Facts of the case
- Legal issue in question
- Holdings and reasoning of the courts
- General legal significance of the case

6 Reading C: Business method patents

The legal opinion on page 155 was written by a senior lawyer in the law firm in which the seminar on business-method patents was held.

6.1 Read the opinion and answer these questions. Ignore the gaps (1–5) for now.

1 Which paragraph of the text refers to the fact that business-method patent law has undergone much change in recent years?
2 In which paragraph does the writer suggest an alternative to registering the business method as a patent?

6.2 Read the opinion again and complete the gaps (1–5) using these sentences (a–e).

a Unless the Supreme Court opts to review future business-method patent controversies, I believe it is unlikely that lower courts will break from this line of cases.
b Traditionally, inventors of business methods have relied upon trade-secret protection because such inventions were regarded as unpatentable.
c Ultimately, the validity of any patent claim depends upon satisfying the other requirements for patentability, including those of novelty and non-obviousness.
d Libris has developed a system called "Express Lane" through which a consumer may complete an online purchase on the Libris website using a single action—one click of a mouse button.
e Consequently, the success of any patent application for "Express Lane" will primarily depend on whether "Express Lane" comprises a patentable invention.

6.3 Match these words or phrases (1–4) with their definitions (a–d).

1 to state unequivocally
2 to be within the public domain
3 to review a decision
4 misappropriation

a to be freely available to all and to not be protected by intellectual property rights
b taking something from someone else and using it for your own benefit
c to say clearly, without any doubt
d to re-examine a court ruling

RE: Advice concerning business method patents

Dear Ms. Costa

A You have requested advice as to whether or not your one-click Internet ordering solution, "Express Lane," is patentable as a method of doing business.

B The following is a summary of the facts you have provided me with during our telephone conference. Your company, Libris, is an online retailer. **1)** ..... Libris would like to file an application seeking a U.S. patent, specifically a business-method patent, for this streamlined online-shopping solution.

C As we discussed briefly during our conference, this is an unsettled area of the law, and there has been much debate about the patenting of business methods, particularly with regard to the appropriate subject matter for patent protection. Among other considerations in the patent application process, patent examiners must decide whether a given invention comprises patentable subject matter.

D **2)** ..... Historically, the courts have ruled that business systems do not qualify for patents and have barred patents on business methods. However, the current trend is to allow such patents.

E Briefly, a recent and growing line of cases holds that the test for patentable subject matter is whether an invention achieves a "useful, concrete, tangible result." Moreover, these decisions have removed the business-method patent exception by unequivocally stating that business methods are subject to the same analysis as any other process. Notably, the Supreme Court has declined to review these business-method patent decisions. **3)** ..... As a result, business methods are eligible for U.S. patent protection, subject to the other requirements of the Patent Act.

F However, recent business-method patent case law emphasizes that all patented inventions remain subject to the requirements of the Patent Act. This means that simply fulfilling the patentable subject-matter requirement is not enough to justify the granting of a patent. **4)** ..... Accordingly, Libris must consider whether the invention claimed in "Express Lane" is already within the public domain, thus rendering it obvious and therefore not patentable.

G Alternatively, if the question of patentability is a close one, you may choose to protect "Express Lane" as a trade secret. **5)** ..... However, trade-secret law merely provides protection against misappropriation of the invention, and does not confer the full range of rights given by patent.

H In my preliminary opinion, "Express Lane" comprises patentable subject matter. However, a more detailed investigation of the claimed invention in "Express Lane" is required. If indeed the invention fulfills the additional patentability requirements of novelty and non-obviousness, I would advise you to submit a patent application for "Express Lane" to the Patent and Trademark Office.

I Please contact us if you have any questions about the matters here discussed, or any other issues.

Sincerely

Cindy Brewster

7 Text analysis: Discourse markers as sentence openers

The text on page 155 makes use of discourse markers to indicate how ideas interrelate. When placed at the beginning of a sentence, these openers point to a relationship between ideas or highlight individual ideas.

Look at the following sentence from Reading C, in which the discourse marker *as a result* signals a cause-and-effect relationship:

***As a result**, business methods are eligible for U.S. patent protection, subject to the other requirements of the Patent Act.*

In the next example, the word *notably,* which here means 'it should be noted that', serves to emphasise the idea expressed in the sentence:

***Notably**, the Supreme Court has declined to review these business-method patent decisions.*

There are a number of discourse markers expressing a variety of meanings. One meaning already covered in previous units is that of contrast, which can be expressed using words like *whereas* or *in contrast.*

7.1 The table below lists eight functions. Decide which one each of the words or expressions in the box fulfils and add it to the table. You may need to consult a dictionary.

As a consequence, As a next step, Besides, Finally, First of all, For example, For instance, Formerly, In addition, In contrast, In fact, In particular, In short, On the other hand, Previously, Secondly, Specifically, Summing up, Therefore, Thus, To begin with, To conclude

Function	Examples
Establishing a sequence	
Expanding on a point	
Contrasting	
Referring to the past	
Drawing a conclusion or inference through reasoning	As a consequence.
Emphasising	
Giving an example	
Summarising	

7.2 Go back to Reading A and Reading C. Look for any discourse markers used at the beginning of a sentence and add these to the table in Exercise 7.1.

8 Reading D: Trade-mark statutes

Lawyers assist their clients with all matters relating to trade marks, including advising on the availability of trade marks and trade names, registering trade marks and renewing trade-mark registrations, preparing licence agreements, identifying trade-mark infringement, and representing plaintiffs and defendants in litigation, to name a few.

The following text is Article 47 of the Council Regulation (EC) No. 40/94 on the Community Trade Mark. A CTM is a trade mark registered in the European Union. The Article deals with the process of renewing a Community Trade Mark, and would have to be consulted by an attorney assisting a client with the renewal of a registration.

8.1 Read the Article. Who informs the owner of the trade mark when that trade mark is about to expire?

Article 47: Renewal

1 Registration of the Community trade mark shall be renewed at the request of the proprietor of the trade mark or any person *expressly authorised* by him, *provided that* the fees have been paid.

2 The [Trade Mark] Office *shall inform* the *proprietor* of the Community trade mark, and any person having a registered right in respect of the Community trade mark, of the *expiry* of the registration in good time before the said expiry. Failure to give such information *shall not involve the responsibility of* the Office.

3 The request for renewal shall be submitted within a period of six months ending on the last day of the month in which protection ends. The fees shall also be paid within this period. *Failing this*, the request may be submitted and the fees paid within a further period of six months following the day referred to in the first sentence, provided that an additional fee is paid within this further period.

4 Where the request is submitted or the fees paid in respect of only some of the goods or services for which the Community trade mark is registered, registration shall be renewed for those goods or services only.

8.2 Match these words or expressions (1–7), italicised in the Article, with their definitions (a–g).

1 expressly authorised	**a** will not be the fault of
2 provided that	**b** the date something stops being valid or ends
3 shall inform	**c** if this has not been done
4 proprietor	**d** if
5 expiry	**e** given the legal power to do something
6 shall not involve the responsibility of	**f** will tell
7 failing this	**g** owner

8.3 Complete the simplified account below of the procedure described in Article 47 using the nouns in the box.

expiry	fees	renewal	request	trade mark

1 Office informs proprietor of .....
2 Proprietor submits ..... for .....
3 Proprietor pays .....
4 Office renews .....

9 Writing and Speaking: Paraphrasing in plain language

Lawyers often need to explain the contents of a legal text to a client in plain language the client can understand.

Generally, when paraphrasing complex sentences written in formal language, it is helpful to do the following:

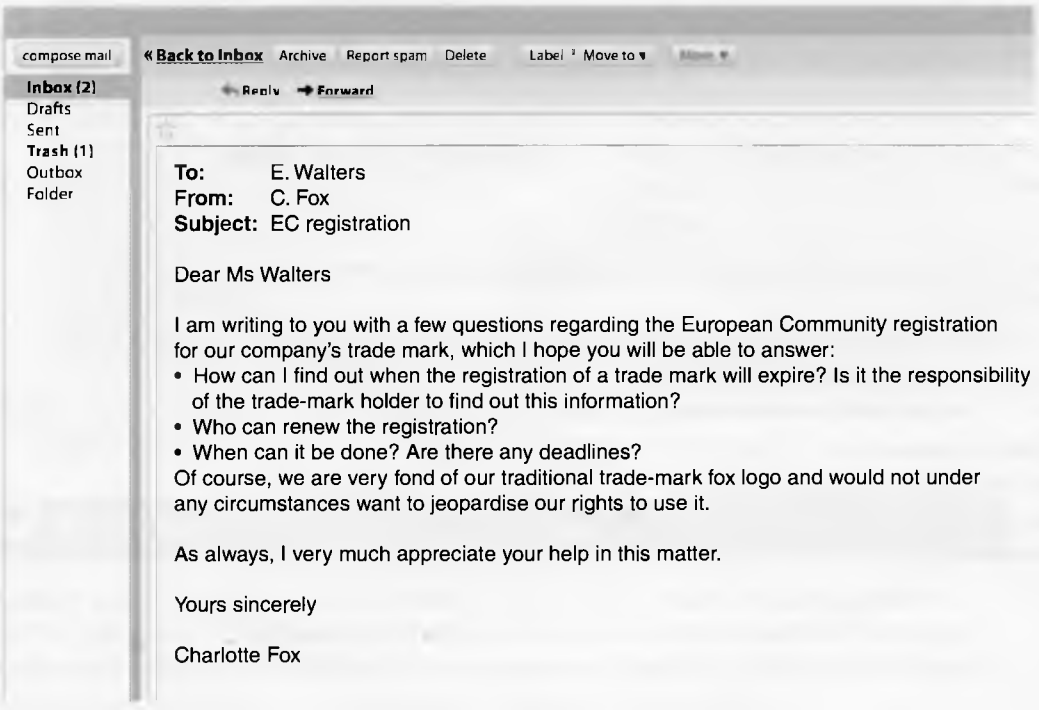
- Break long sentences down into shorter sentences.
- Make passive sentences into active ones:
  The request may be submitted. ➔ *You can submit the request.*
- Replace *shall* constructions with other verbs, depending on the meaning:
  - future forms: *Registration shall be renewed for those goods or services only.* ➔ *Registration will only be renewed ...* or *You will only be able to renew registration ...*
  - verbs of necessity: *The fees shall also be paid.* ➔ *You have to / must / are required to pay the costs.*
- Replace formal vocabulary with more common, everyday words.

9.1 Read this paraphrase of paragraph 1 of Reading D. What kinds of change have been made?

The owner of the Community trade mark can renew the registration of the trade mark himself. Another person can also renew the registration if the owner has given him the authority to do so. The owner can only renew the registration if he has paid the costs of registration.

9.2 Paraphrase paragraphs 2–4 in plain language. Write down your paraphrase first and then read it aloud. Does it sound natural?

9.3 Read this email from a client of yours. What information is she requesting?



9.4 Write a response to Ms Fox's email using the information in Reading D. Express the information in your own words. You should:

- refer to the email you received from the client;
- state the reason for writing;
- provide the information she has asked for (use discourse markers for putting points in order and adding ideas);
- offer your assistance with the renewal of registration.

10 Listening B: Discussing issues – copyright and fair use

The rapidly changing technologies regulated by intellectual property law – among them computer and Internet technologies – are the source of debates on various legal issues, in particular issues related to copyright. You are going to hear a discussion on the topic of the use of copyrighted material for educational purposes. An American junior lawyer named Thomas has been assigned to shadow two senior lawyers working on a case involving the 'fair use' doctrine in connection with distance-learning courses. Thomas meets Patrick, the senior lawyer, and his associate, Rebecca, in Patrick's office to begin shadowing them as they work on the case.

10.1 Listen to the discussion and answer these questions.

1. What do Thomas and Rebecca say about the concept of fair use in American law?
2. According to Patrick, what is the objective of copyright law?
3. Who does Rebecca think is in the stronger position now, copyright holders or educators?
4. According to Patrick, what are the four factors which need to be taken into account when assessing fair use?

10.2 Decide whether these statements are true or false.

1. The 'fair use' doctrine only applies to the use of copyrighted materials in traditional face-to-face classroom situations.
2. Thomas has a basic understanding of what distance learning is, and is aware of one of the intellectual property issues that it raises.
3. Rebecca argues that in the future it is likely that a teacher's right to use copyrighted material without permission will become increasingly restricted.
4. The four-factor analysis helps determine whether the use of copyrighted material falls under the 'fair use' doctrine.
5. Rebecca points out that the four-factor analysis is subjective and therefore not reliable.

11 Speaking: Phrases for discussions

When taking part in discussions, it is necessary to know how to express your own ideas and opinions in English [see Unit 3 for phrases for expressing your opinion]. It is equally necessary to know how to react to the statements of others [see Unit 8 for phrases for agreeing and disagreeing]. The table on page 160 provides further useful phrases for presenting and responding to ideas.

11.1 Complete the table below using these phrases taken from Listening B.

In what way?
So, in other words, ...
Yes, you have a point there.
Yes, but you can look at it another way, too.
That may well be true, but you have to see the bigger picture.
Well, from a legal point of view, the debate is about ...
Sorry, can I just finish my point?
As I was saying, ...
And what's more, ...
Yes, but that's only one side of the problem.
I think the important issue here is ...
Let me give you an example.
It seems to me that the real issue is ...

Asking for clarification	I'm not sure I follow you. Did you say that ...? Are you saying that ...? **1)** ..... Sorry, I'm not sure I understand.
Clarifying the issue	As far as I can see, the main issue is ... **2)** ..... **3)** ..... **4)** .....
Restating your point	The point I'm trying to make is ... What I mean to say is ... **5)** ..... To put it another way, ...
Adding a point	Let me add that ... Another point worth mentioning is ... **6)** ..... **7)** ..... And another thing to remember is ...
Expressing reservations about another speaker's opinion	Possibly, but ... **8)** ..... **9)** ..... **10)** ..... **11)** ..... I'm not sure about that. Don't you think ...?
Keeping your turn	Sorry, could I please just finish my point? Sorry, but if you could wait for a second, I'm just about to finish my point. **12)** .....
Continuing after an interruption	Going back to what I was saying, ... **13)** ..... To go back to my last point, ...

11.2 Complete these responses to a statement made by another speaker in a discussion using the words *point* or *view*. In one case, both words can be used.

1 I take your ..... .
2 I'm afraid I don't share your ..... on this.
3 That's really not the ..... at all.
4 In my ....., that's precisely the issue.
5 I don't quite get your ..... here.
6 It seems to me you're missing the ..... .
7 That's my ..... exactly.
8 I think that's beside the ....., really.

11.3 Discuss these questions.

1 What do you think about the fair use of copyrighted material for distance learning? Do you think the law should continue to allow educators to use such material without permission, or do you think the rights of the copyright holders need greater protection?
2 Copyright protection on the Internet is also a major concern of the entertainment industry. Some of the issues involved concern peer-to-peer file swapping of music and film piracy. What recent court decisions in this area are you familiar with? Do you think the rights of the music and film producing corporations should be better protected?

Unit 11

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 11.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 infringe (dismiss) violate encroach on
2 in addition for instance for example e.g.
3 confirm review uphold affirm
4 holder proprietor issuer owner
5 prerequisite suggestion stipulation requirement
6 thus therefore moreover consequently

2 Vocabulary: phrases with *copyright infringement* Complete the sentences below using the verb forms in the box. Then put the sentences in the order in which the actions are likely to have occurred.

dismissed	filed	settle	~~was guilty of~~	would be liable for

a On appeal, the Court found that the defendant was guilty of copyright infringement.
b In the first instance, the Lower Court ..... the copyright-infringement claim which formed the basis of the suit.
c A song-swapping company, which had created an online database of thousands of albums, was advised by their lawyers that they ..... copyright infringement.
d Major record companies ..... a copyright-infringement lawsuit against the song-swapping company, which threatened to shut down the free song-swapping service.
e Before the case came to trial, the song-swapping company unsuccessfully offered a high sum to the record companies to ..... the copyright-infringement lawsuit.

Order of the actions: 1 ..c.. 2 ..... 3 ..... 4 ..... 5 .....

3 Collocations Match the verbs in the box with the nouns with which they collocate (1–3). Some of the verbs collocate with more than one noun.

~~apply for~~	enforce	file	grant	infringe	misappropriate	patent	register

1 an injunction: apply for
2 an invention
3 a patent: apply for

4 Legal expressions: prepositions Complete the expressions below from Reading C using the prepositions in the box.

against	~~for~~	for on	to	to

1 to be eligible for..... something
2 to be subject ..... the requirements of the Patent Act
3 to confer rights ..... someone
4 to submit a patent application ..... the Patent and Trade-mark Office
5 to file an application ..... a solution
6 to protect ..... misappropriation

5 Adjective formation Add the prefixes *dis-*, *in-*, *non-* or *un-* to each of these words to form its opposite. In one case, more than one combination is possible.

1 tangible intangible
2 obvious
3 similar
4 authorised
5 valid
6 patentable
7 suitable
8 commonplace
9 exclusive

6 Vocabulary: court holdings Complete the sentences below using the verb forms in the box.

alleged	be infringed	enforce	had ruled	has been registered	~~proceed~~
to be determined	to issue				

1 The appeals court held that a trial regarding a claim of copyright infringement could proceed. .
2 The appeals court affirmed that an infringement claim could be made only if the copyright ..... .
3 The court held that because two former business partners both behaved badly in the course of a trade-mark dispute, it would not ..... the trade-mark rights held by one party.
4 The appeals court upheld the decision of the trial court which ..... that a commercial photographer was due payment of royalties for mass reproduction of a photograph that was used without permission.
5 After a group of instructors left their employer, who had developed a special training programme, and went into direct competition with him, an appeals court held that it was ..... at trial if the training programme was due trade-secret protection.
6 The appeals court affirmed that a patent was invalid, and thus could not ..... .
7 The court denied a request ..... an injunction against the sale of a book which the plaintiff ..... contained infringed copyrighted material.

7 Paraphrasing Paraphrase these sentences about partial transfers of trade marks taken from Rule 32 of the Commission Regulation on the Community Trade Mark. Write as if you were explaining the information to a client, following the guidelines for paraphrasing in Exercise 9 on page 158.

1 Where the application for registration of a transfer relates only to some of the goods and services for which the mark is registered, the application shall contain an indication of the goods and services to which the partial transfer relates.
2 The goods and services in the original registration shall be distributed between the remaining registration and the new registration so that the goods and services in the remaining registration and the new registration shall not overlap.
3 The Office shall establish a separate file for the new registration, which shall consist of a complete copy of the file of the original registration and the application for registration of the partial transfer; a copy of that application shall be included in the file of the remaining registration. The Office shall also assign a new registration number to the new registration.

12 Negotiable instruments

1 Reading A: Introduction to negotiable instruments

The following text provides an overview of some of the main concepts in the area of the law concerned with negotiable instruments. These are connected with finance and payment.

Read the text and decide whether these statements are true or false.

1 The possession of a negotiable instrument can be freely transferred physically or through signature.
2 An endorsement refers to a signature which serves to transfer ownership of the instrument to another party.
3 The *nemo dat* rule is strictly applied to the use of negotiable instruments.
4 If an instrument is 'payable to the order of' a certain person, this means that the holder of the instrument is entitled to payment.
5 Negotiable instruments are used to obtain credit or to pay financial obligations.

Negotiable instruments[1] are documents which represent an intangible right of payment. Examples include **promissory notes**, **certificates of deposit** and **cheques**[2]. When drafted using the correct and very particular language prescribed by common law or statute, a document becomes **negotiable**, which means that it can be freely transferred by **endorsement**[3] (usually by signature) or **delivery**. One of the most important features of negotiable instruments is that they are generally not subject to the ***nemo dat* rule**. This general principle of law states that 'he who hath not cannot give', i.e. a transferor who does not hold title cannot transfer title to a transferee. In the realm of negotiable instruments, that rule is sacrificed in order to facilitate the free **alienability** of negotiable instruments, which aids commerce in general.

A further explanation of 'negotiability' can be illustrated by a common type of negotiable instrument, a promissory note. A promissory note is a formal written document which contains an unconditional promise and is signed by the person making the note, the **maker**, to pay a certain sum of money to or **to the order of** a named person or **to the bearer of** the document. Payable 'to the order of' means that the sum of money is payable to the certain person and 'to the bearer of' means that the sum of money is payable to the holder of the instrument. Therefore, if a promissory note is eventually held by someone who is unconnected with the underlying transaction, but who holds the note in good faith and knows of no problems with the instrument, that person can become a **bona-fide purchaser for value** or **holder in due course (HDC)**. Specifically, the HDC takes good title to the instrument, even where the person transferring the instrument to him did not hold title. Thus, in a lawsuit between the HDC and the maker, the HDC still gets paid because he is immune from the normal defences to payment.

Negotiable instruments serve two different functions in commercial transactions: a credit function and a payment function. The credit function allows negotiable

[1] (US) *also* commercial paper
[2] (US) checks
[3] (US) indorsement

instruments to be used to obtain credit now, to be repaid out of future income. Common examples include promissory notes, certificates of deposit and **debentures**[1].

A certificate of deposit is a bank's written acknowledgement of a deposit and a promise to pay the depositor to his order, or to some other person or that person's order. A debenture is the most common form of long-term loan used by companies in the UK. It is usually repayable at a determined date in the future and secured by the assets of the company, although sometimes it is unsecured and referred to as a **naked debenture**.

The payment function allows negotiable instruments to be used in lieu of cash payments which may be inconvenient (or risky) to transfer directly. Common examples are cheques and **bills of exchange**[2].

A bill of exchange is a three-party instrument written and signed by the first party (the **drawer**), ordering the second party (the **drawee**) to pay a third party (the **payee**) a sum of money on demand or at a fixed or determinable future time. A cheque is a more specific term for a bill of exchange, usually on a printed form, drawn on a bank and payable on demand.

Another example of a negotiable instrument which should be mentioned here is the **letter of credit**. A letter of credit is a document issued by a bank (the issuer) to a third party (the beneficiary) at the request of an applicant, instructing the bank to pay a certain specified amount of money to the beneficiary once certain conditions that are stated on the document are met. Letters of credit are often used in the international import and export business, as they provide good documentary evidence of financing for the transaction.

[1] (US) bond or secured debenture (both are secured debt instruments). A debenture in the USA is a debt instrument which may be secured or unsecured, whereas in the UK, a debenture is usually a secured debt instrument evidenced by a document under seal (a deed) and protects the rights of the debenture holder.
[2] (US) also drafts

2 Key terms: Negotiable instruments

2.1 Complete these sentences using terms from Reading A.

1. A c..... of d..... is a record of a deposit with a fixed time period and a fixed rate of interest.
2. A loan raised by a company which pays a fixed rate of interest and which is secured on the assets of a company in the UK is called a d..... .
3. A c..... is a negotiable bank instrument which is payable on demand and which instructs a bank to pay the sum indicated to the party named on the instrument from funds held on deposit.
4. A note which unconditionally promises in writing to pay a sum of money to a party either on demand or at a time in the future is known as a p..... n..... .
5. A b..... of e..... (most often referred to as a d..... in the USA) is a written order which directs one party to pay a certain sum of money to a third party.

5.2 Answer these questions.

1. What are the circumstances surrounding the note received by the client? Who gave it to him and why? Who wrote the note?
2. What are the two requirements which the client's promissory note does not meet?
3. What condition did the borrower make regarding repayment?

6 Speaking B: Explaining ideas to a client

Here are some of the phrases Ms Benton uses in the interview to rephrase ideas so that the client can understand them:

There are certain formal requirements that have to be met [by a promissory note] for it to be negotiable, ***that is****, to be enforceable by you as a holder in due course. The note has to mention what is known as a 'sum certain'.* ***That is to say****, ...*
Allow me to explain. *'Unconditional'* ***means that*** *...*

Other phrases that can be used after an unfamiliar word or a difficult concept to introduce an explanation are:

In other words, ...
Put simply, ...
What this actually means is ...

Work with a partner, with one of you playing the role of a lawyer, Ms Chang, and the other the role of a client, Mr West. Mr West shows his lawyer the promissory note below and wants to know if it is valid.

Ms Chang should discuss whether the promissory note below meets all of the six requirements for negotiability referred to in Exercise 5.1, explaining each requirement in plain language to Mr West. Mr West should ask Ms Chang to explain any special terms.

These phrases for talking about requirements may be useful:

I don't think it meets the requirement about ...
There is also a requirement concerning ...
It certainly fulfils that requirement.
It doesn't satisfy the requirement dealing with ...

PROMISSORY NOTE

May 31, 2011 Collegeville, Pennsylvania

$30 00

FOR VALUE RECEIVED, and which must be received pursuant to agreement between the parties dated April 18, 2011, 3 months from the date of this Note, I promise to pay to Keith West the sum of thirty thousand dollars (30,000) with interest in an amount to be decided by the parties.

BY: Tobias Clack

7 Writing A: Summarising requirements

Following their interview about the poorly drafted promissory note, the lawyer, Ms Chang, receives this letter from her client Mr West.

Dear Ms Chang

Thank you for sharing your time and expertise with me last Thursday. I now realise (somewhat too late, I'm afraid) that promissory notes have to be drafted correctly to be legally binding. In order to avoid such regrettable situations arising in the future, I would ask you to provide the six requirements for me once more – this time in writing.

Many thanks in advance. I look forward to hearing from you.

Sincerely yours

Keith West

In order to fulfil her client's request, Ms Chang will need to summarise the six requirements she explained to him in their interview. How do you think the information should be organised in her response? What can Ms Chang do to make the information easier for her client to understand?

Write a letter in response to Mr West's request, in which you provide the information he has asked for. When stating the requirements for negotiability, explain difficult legal expressions in easy-to-understand plain language. In your letter, you should:

- refer to the previous contact with Mr West;
- provide the desired information in a clearly structured format;
- explain ideas in simple terms;
- offer further assistance and explain the importance of having a lawyer to review the wording to ensure enforceability and negotiability.

8 Reading C: Legislation governing electronic negotiable instruments

The growth of the Internet and of e-commerce has led to far-reaching changes in the way business is conducted. It should come as no surprise that negotiable instruments can now be exchanged in electronic form. The text on page 172 deals with US legislation governing electronic negotiable instruments and looks specifically at a newly created form of electronic negotiable instrument.

8.1 Skim the text quickly. What is this instrument called?

8.2 Read the text and match these headings (a–e) with the paragraphs (1–5).

a A new kind of instrument
b Provisions included in the Act
c The purpose of the Act
d Some possible effects
e Limits to applicability

The Uniform Electronic Transactions Act (UETA)

1) .....
The National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the UETA on July 29, 1999. The UETA's purpose is to provide a uniform national framework governing use and application of electronic transactions.

2) .....
The Act defines the terms "record," "electronic record," and "electronic signature" and provides as a general rule that electronic records and signatures satisfy legal requirements that a record be in writing or signed. The UETA also applies only to transactions between parties when each has agreed to conduct transactions by electronic means. Some types of transactions will be exempt. Although the UETA is intended to have broad application, under certain circumstances transactions governed by the Uniform Commercial Code (UCC) or the Uniform Computer Information Transactions Act (UCITA) will be excluded from the statute's affect.

3) .....
The UETA contains provisions governing provision or transmission of information in electronic form, attribution of electronic records and signatures, distributing risk of error in electronic transmissions, and retention of "original" electronic records. Other provisions govern automated electronic transactions or the use of so-called electronic "agents" and acceptance of electronic records and signatures by governmental agencies.

4) .....
The UETA also creates a form of electronic negotiable instrument, called a "transferable record." As long as an entity has "control" of the transferable record, it is a holder of the record as defined by UCC § 1-201(20) and has the same rights and defenses as a holder of a negotiable instrument or document under UCC Articles 3, 7, and 9. The requirements of delivery, possession, and endorsement are eliminated.

5) .....
A person has "control" over the record if "a system employed for evidencing the transfer of interests in the transferable record reliably established that person as the person to which the transferable record was issued or transferred." This requirement can be met by a system that creates, stores, and assigns the transferable record in a manner that satisfies six specific conditions listed in the UETA.

The UETA will affect the rules governing creation of enforceable contracts or instruments. Transactions existing or signed electronically that might be unenforceable under traditional principles of law may become enforceable when taking into account the UETA's provisions.

8.3 Collocations with *Act* Complete each of the sentences below describing what the UETA does using the verbs in the box.

applies to	contains	creates	defines	provide

1 The Act ..... the terms 'record', 'electronic record' and 'electronic signature'.
2 The Act ..... transactions between parties who have consented to carry out business transactions electronically.
3 The purpose of the Act is to ..... a uniform national framework which regulates the use and application of electronic transactions.
4 The Act ..... provisions governing how information is provided and transmitted in electronic form.
5 The Act ..... a form of electronic negotiable instrument which is known as a 'transferable record'.

8.4 Complete these expressions, which follow their definitions.

1 To be excused from a requirement: *to be e..... from* (paragraph 2)
2 To be put into effect in many cases: *to have broad a.....* (paragraph 2)
3 Agreements in which one or other party can legally force the other party to perform: e..... c..... (paragraph 5)

8.5 Has similar legislation been enacted in your jurisdiction governing the creation and use of electronic negotiable instruments? If so, describe which aspects of electronic negotiable instruments it governs.

9 Listening B: Advice from a senior partner

When encountering problems with a case, it is common for junior lawyers to request advice from senior partners in a law firm. A senior partner may have experience with similar cases, may be aware of relevant legislation or court decisions, or may be able to refer the junior colleague to other colleagues who are experienced in the matter at hand.

You are going to hear a dialogue between two lawyers (Ms Turner and Ms Wadman) involving a real-estate transaction and a promissory note.

9.1 Listen to the first part of the dialogue and answer these questions.

1 Why does the agent of the buyers group want to sign the promissory note on behalf of the group?
2 Why is the seller willing to agree to this?
3 Why do you think this is a problem?

9.2 Listen to the second part of the dialogue and decide whether these statements are true or false.

1 The senior partner suggests waiting until a test case has been brought before the courts.
2 The senior partner recommends that the lawyer bring the document to the prison and have it signed there.
3 The senior partner states that revisions to the UCC make it possible for the document to be signed by the agent on behalf of the others.
4 One suggestion made by the senior partner is that the document could be signed electronically.
5 The senior partner suggests signing the document in a few months.
6 The senior partner advises her colleague that the document could be delivered by courier, signed and then returned by courier.

9.3 Listen to both parts of the dialogue again and choose the best answer to each of these questions.

1 Why is *Ness vs. Greater Arizona Realty, Inc.* discussed in this context?
   a Because it indicates that an agent can be liable on a note when he fails to disclose his representative capacity.
   b Because it indicates that several people can be liable for a single instrument.
   c Because it indicates what the previous law was regarding this issue.

2 Why does the senior lawyer say that it is not a good idea to rely on the revisions to the UCC that allow a principal to sign a note as an agent on behalf of the other principals?
   a Because the courts continue to rule that no one is liable on an instrument unless he has signed it.
   b Because there have not been any rulings on similar cases since the law has been changed, and the senior lawyer would not want her client to go to court if the outcome is uncertain.
   c Because the revisions to the UCC have not yet been incorporated into the laws of the relevant jurisdiction.

3 Why does the senior lawyer advise her colleague to make sure the promissory note is signed by all of the principals?
   a So that the real-estate deal can go through on time.
   b So that the client can sue on the promissory note against all of them.
   c So that the client can sue at least one of the principals on the promissory note.

10 Language use: Making suggestions and recommendations

Look at some of the expressions used by the senior lawyer in the previous dialogue when making suggestions to her colleague.

I suggest that *you tell your client to refuse to accept the note until it has been signed by all of the principals.*
I recommend that *you advise the buyer that there are ways to get his business partners to sign the promissory note.*
Why don't you *propose that option?*
I would advise you to *look into e-signatures.*
Another way of *getting the signatures of all of the principals* ***would be to*** *send the document by courier and have it signed.*

Both *suggest* and *recommend* can also be followed by a verb + *–ing* form (see Unit 7):

I suggest telling your client ...
I recommend advising the buyer that ...

10.1 These phrases can be used to make suggestions and recommendations. For each pair of phrases, decide which one is more formal (F) and which is more informal (I). The formal phrases are more suitable for use in a letter to (or in an interview with) a client or colleague whom you don't know well, while the informal ones are more appropriate for conversations with (or emails to) a client or colleague with whom you have a friendly working relationship.

EXAMPLE: Why don't you ...	I	I would advise you to ...	F
1 I propose that you ...		Why not ... ?	
2 Try ...		Perhaps you could ...	
3 I recommend that ...		How about ... ?	

10.2 Imagine you are providing advice to a client and suggest ways of getting the signature of the person who is on a boat in the Caribbean. Decide if your relationship with your client is formal or informal and use appropriate expressions for making suggestions.

In some situations, when suggesting that a colleague or client take a particular course of action, it may be necessary to advise against another course of action. This can be done more or less emphatically. Look at these examples:

I would advise (you) against *accepting the note until it has been signed by all of the principals.*
I advise (you) against *accepting the note until it has been signed by all of the principals.*
I would strongly advise (you) against *accepting the note until it has been signed by all of the principals.*
I strongly advise (you) against *accepting the note until it has been signed by all of the principals.*

Note that the personal pronoun *you* can be left out of these sentences.

Suggest can also be used with a verb plus *–ing* form or a verb plus *to be* to advise someone against doing something.

I ***suggest not accepting*** *the note until it has been signed by all of the principals.*
I ***suggest you not (to) accept*** *the note until it has been signed by all of the principals.*

10.3 Which of the first four sentences in the box above is the most emphatic, and which is the least emphatic? Are these sentences formal or informal?

10.4 Make these sentences more formal and emphatic by rephrasing them and using the verb constructions from the box above.

1 Don't sign the promissory note for all of the principals.
2 Don't make a business deal with a man serving a prison sentence for tax evasion.
3 Don't put our clients in the position of being a test case for this issue.
4 Don't risk being sued by the drawee.

Writing B: Providing advice and making suggestions

The junior lawyer, Ms Wadman, wants to write an email to her client, Mr Lawson, recommending that he should not accept the promissory note for the down payment on the property if it has been signed by only one of the principals. Ms Wadman also thinks it is not a good idea to do business with a man who is in jail.

Making use of the phrases for making suggestions, write an email in which you should:

- state the reasons for writing;
- give advice concerning the promissory note;
- make suggestions regarding the prospective buyer in jail;
- offer to provide further assistance, if necessary.

Unit 12

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 12.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 upon request ~~with consent~~ on demand when needed
2 monetary outstanding unpaid due
3 main most important principle principal
4 increase incur accrue accumulate
5 meet a requirement make a requirement satisfy a requirement fulfil a requirement
6 suggest advise impose recommend

2 Vocabulary: legal Latin Complete the sentences below using the Latin expressions in the box.

~~e.g.~~ e.g. i.e. inter alia per annum

1 Our firm can assist you in the drawing up of all forms of negotiable instruments and other paper that is negotiable by mere delivery (....e.g.... bearer checks, drafts or notes) or by delivery and endorsement (..... order checks, drafts or notes).
2 An instrument is a document used for making some payment and it is negotiable, ... its ownership can be easily transferred.
3 The note, payable in monthly instalments of $100 or more, bears interest at ten per cent ..... with penalty for late payments.
4 The company engages in lending of all kinds, including ..... consumer credit, mortgage credit and the financing of commercial transactions.

3 Word formation Complete this table by filling in the correct adjectival or adverbial forms of the words listed. Underline the stressed syllable in each word with more than one syllable.

Adjective	Adverb
basic	basically
	electronically
principal	
reliable	
	specifically
strict	
uniform	

4 Prepositions The text below is an excerpt from the Uniform Electronic Transactions Act discussed in Reading C. Complete it using prepositions in the box.

for	in	in	in	of	of	to	~~under~~

SECTION 16: TRANSFERABLE RECORDS

(a) In this section, "transferable record" means an electronic record that:

(1) would be a note **1)** under Article 3 of the Uniform Commercial Code or a document under Article 7 of the Uniform Commercial Code if the electronic record were **2)** ..... writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control **3)** ..... a transferable record if a system employed **4)** ..... evidencing the transfer of interests in the transferable record reliably establishes that person as the person **5)** ..... which the transferable record was issued or transferred.

(c) A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned **6)** ..... such a manner that:

(1) a single authoritative copy **7)** ..... the transferable record exists which is unique, identifiable, and, except as otherwise provided **8)** ..... paragraphs (4), (5), and (6), unalterable.

5 Vocabulary: word choice Complete this excerpt from a promissory note by choosing the correct word in each case.

DUE DATE: The entire balance of this Note together with any and all interest **1)** *installed / increased / accrued* thereon shall be **2)** *owed / due / indebted* and payable in full on the 27th day of February, 2012.

DEFAULT INTEREST: After **3)** *instalment / maturity / demand,* or failure to make any payment, any unpaid **4)** *principal / principle / money* shall accrue interest at the rate of eighteen per cent (18%) **5)** *pro rata / per se / per annum* OR the maximum rate allowed by law, whichever is less, during such period of Maker's default under this Note.

PREPAYMENT: **6)** *Holder / Maker / Payee* may prepay all or part of the balance owed under this Note at any time without penalty.

CURRENCY: All principal and interest payments shall be made in **7)** *actual / lawful / current* money of the United States.

13 Secured transactions

1 Reading A: Introduction to secured transactions

The following text introduces concepts and terminology related to the area of the law referred to as 'secured transactions'. These offer a measure of security for anyone lending something of value (usually money).

Read the text, then choose the correct word to complete each of these definitions. You may need to consult the Glossary booklet.

1 A *loan / pledge / lien* is an arrangement in which a lender gives money to a borrower, who agrees to repay the money, usually with interest, at some time in the future.
2 A *loan / mortgage / pledge* is a debt instrument by which the borrower gives the lender a lien on real property as security for a loan.
3 The depositing of personal property by a debtor with a creditor as security for a debt is referred to as a *loan / mortgage / pledge.*
4 A claim which a creditor has on the property of the debtor to ensure payment (often for goods for which payment is outstanding) is known as a *loan / pledge / lien.*

security = 1) the state of feeling safe and free from anxiety; 2) something given as a guarantee that an undertaking will be fulfilled or a loan repaid

The purpose of secured transactions is to provide credit for the borrower and security for the lender. 'Credit' refers to the provision of a benefit for which monetary payment is to be made to the **beneficiary** of the **security interest** (the lender) at some time in the future. The most obvious example of this is a loan.

Security (in the context of the law of secured transactions) differs from other arrangements securing payment or performance because it gives the lender a right **in rem** which binds third parties, so that anyone interested in buying the security from the borrower cannot freely do so. These other types of arrangement are sometimes referred to as **quasi-security**. (It should be noted that mortgages are a form of security in land and are usually addressed within the scope of real-property law.)

There are two types of security interests, **possessory** and **non-possessory**. With a possessory interest, the creditor takes possession of the property which is the security interest (the **pledge**). The debtor (**pledgor**) transfers personal property to the creditor (**pledgee**) in order to secure payment or performance of the underlying obligation. An example of this would be pawning personal property to raise money. The most commonly encountered non-possessory security interests are the **fixed charge**[1] and the **floating charge**[2]. A fixed charge creates a security interest in specific property and affords the creditor control over its alienation. This means that the debtor cannot deal in the property without first satisfying the indebtedness secured by the property or receiving the creditor's consent. A floating charge creates a security interest in the assets of the debtor at any given time, which means that the debtor may freely deal with them in the **ordinary course of business**. It is only when there is a default or a similar event that the charge 'crystallises' and becomes fixed.

[1] (US) security interest in specific assets (also *chattel mortgage* prior to the Uniform Commercial Code)
[2] (US) usually referred to as a *floating lien* and not often used, though possible, under the Uniform Commercial Code

All the security interests mentioned above are **consensual**, since they are created through a **security agreement** whereby the **debtor** grants to the **creditor** an interest in debtor property (**collateral**) in order to enforce the performance of the debtor's obligations to the creditor. There also exist **non-consensual** security interests, such as those created by operation of law, e.g. unpaid sellers' **liens**, where a seller has a lien over goods in his possession for which he has not received payment. In order to invoke consensual security interests against third parties, **perfection** of the security interest must take place. Perfection is the action which gives the creditor **priority** over certain other creditors in the enforcement of the security interest. Perfection can take place in three ways: by registration of the security agreement, by possession of the collateral, and by **attachment** of the security interest. The underlying purpose of perfection is to put third-party creditors **on notice of the security interest** and so avoid any hidden interests in property. Attachment refers to the time at which the creditor's interest fastens to the property offered as security, giving the creditor a vested interest. In certain cases, attachment also constitutes perfection. Perfection upon attachment is sanctioned by statute, generally for purposes of commercial convenience and availability of other methods of protecting creditors.

2 Key terms: Comparing and contrasting concepts

2.1 Complete the comparisons of key concepts below using the verbs in the box.

attaches	attaches	crystallises	defaults	has	make	owns	seize	sell

Security / quasi-security: Security gives a creditor the legal right in property owned by the debtor, i.e. the right to **1)** ..... and **2)** ..... the debtor's property if the debtor **3)** ..... in repayment. However, in the case of quasi-security, the creditor typically **4)** ..... the property in question, while the debtor only **5)** ..... possession of it.

Fixed charge / floating charge: While a fixed charge **6)** ..... to the property in question as soon as the charge is created, a floating charge **7)** ..... only when it **8)** ..... , for example as a result of a failure to **9)** ..... a payment at the proper time.

2.2 Underline the words and expressions in the paragraphs in Exercise 2.1 which are typically used to compare and contrast ideas.

2.3 Match the nouns in the box with the verbs (1–6) with which they can collocate.

collateral	credit	indebtedness	a loan	payment	performance
a security interest					

1 to attach
2 to perfect
3 to pledge
4 to secure
5 to provide
6 to enforce

Reading B: A security agreement

A security agreement is a legal instrument signed by a debtor. It grants a security interest to a lender in personal property which is pledged as collateral to secure the loan. Lawyers assist clients in drawing up and filing these instruments, as well as in handling disputes arising from matters connected with them.

3.1 Read the excerpts from a security agreement below and answer these questions.

1. Which kinds of property are pledged as collateral for the loan?
2. What happens upon default of the agreement?

SECURITY AGREEMENT

This SECURITY AGREEMENT is made on this 11th day of May, 2011, between Appleby Designs Inc. ("Debtor"), and Richard J. Cross ("Secured Party").

1 *SECURITY INTEREST. Debtor grants to Secured Party a security interest in all inventory, equipment, appliances, furnishings and fixtures now or hereafter placed upon the premises located at 99 Appleby Road, Baltimore, MD (the "Premises") or used in connection therewith and in which Debtor now has or hereafter acquires any right and the proceeds therefrom. As additional collateral, Debtor assigns to Secured Party a security interest in all of its right, title and interest to any trademarks, trade names and contract rights which Debtor now has or hereafter acquires. The Security Interest shall secure the payment and performance of Debtor's promissory note of even date herewith in the principal amount of twenty thousand ($20,000) Dollars and the payment and performance of all other liabilities and obligations of Debtor to Secured Party of every kind and description, direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising.*

3 *DEFAULT. The Debtor shall be in default under this Agreement upon the happening of any of the following: (a) any misrepresentation in connection with this Agreement on the part of the Debtor; (b) any non-compliance with or non-performance of the Debtor's obligations under the Note or this Agreement; (c) if Debtor is involved in any financial difficulty as evidenced by (i) an assignment for the benefit of creditors, or (ii) an attachment or receivership of assets not dissolved within thirty (30) days, or (iii) the institution of bankruptcy proceedings, whether voluntary or involuntary, which is not dismissed within thirty (30) days from the date on which it is filed. Upon default and at any time thereafter, Secured Party may declare all obligations secured hereby immediately due and payable and shall have the remedies of a Secured Party under the Uniform Commercial Code.*

3.2 Read the excerpts again and answer these questions.

1. Where is the inventory located in which the Secured Party has an interest?
2. According to the agreement, what would constitute evidence of financial difficulty on the part of the Debtor?
3. Which remedies are available to the Secured Party in the case of default?

3.3 Match these words and phrases from the excerpts (1–5) with their definitions (a–e).

1 of even date
2 misrepresentation
3 contingent
4 non-performance
5 receivership

a failure or refusal to fulfil contractually agreed-upon terms or actions
b depending on something else in the future in order to happen
c the situation in which, during bankruptcy proceedings of an insolvent corporation or person, the court appoints a person to take charge of all assets in order to preserve them for creditors
d a false statement, often in order to obtain an advantage
e written on the same date

Language use A: Anticipating events and planning contingencies

When legal agreements like the one on page 180 are drawn up, the drafter will strive to anticipate possible events which may arise and plan contingencies, i.e. to deal in advance with events that may or may not occur. This is done by wording the text in such a way that these possible events are mentioned and thus covered by the agreement. Often opposing pairs of words are used in order to cover the full range of possibilities. Look at this example from the security agreement:

As additional collateral, Debtor assigns to Secured Party a security interest in all of its right, title and interest to any trademarks, trade names and contract rights which Debtor ***now has or hereafter acquires****.*

The word pair *now or hereafter* is used to refer to both currently existing assets as well as assets which may become the property of the debtor in the future.

4.1 Explain in your own words what is meant by each of the four word pairs in italics in this sentence from the security agreement on page 180.

The Security Interest shall secure the payment and performance of Debtor's promissory note of even date herewith in the principal amount of twenty thousand ($20,000) Dollars and the payment and performance of all other liabilities and obligations of Debtor to Secured Party of every kind and description, *direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising.*

4.2 Look for other word pairs of this kind in the security agreement. Explain them to a partner.

Reading C: A seminar on revised legislation

When legislation is revised, it is important for lawyers to find out what changes will take place and it is therefore common for them to attend intensive seminars focusing directly on the revised legislation and its practical implications.

The advertisement on the next page is for an upcoming seminar concerning the Uniform Commercial Code (UCC), which is a code of laws regulating legal aspects of business and financial transactions in the United States.

5.1 Look at the advertisement and answer these questions.

1 Where might you expect to see the advertisement?
2 What is the subject of the seminar?

The Shuttleworth Institute of Continuing Education for the Legal Profession

Understanding Revised Article 9 of the Uniform Commercial Code

What you need to know

August 19–20

A selection of topics to be covered
- Filings and perfections under Revised UCC Article 9
- Creating a secured interest: seven steps to follow, including drafting security agreements
- Secured transactions: rules governing transition from Prior Article 9 of the UCC to the new Revised Article 9 of the UCC
- Special rules applying to consumer secured transactions in Revised Article 9 of the UCC
- Intellectual property as collateral
- Security interests in personal property

Target audience

This two-day seminar is intended for attorneys and paralegals, loan officers, vice presidents, commercial loan officers, credit and collection managers, branch managers, loan department personnel, accountants, and auditors.

Featured speaker

John T. Kellogg (Partner), Knowles, Kellogg, and Granger
Mr. Kellogg has substantial experience in all aspects of business litigation emphasizing creditors' rights, secured transactions, and real-estate matters; bankruptcy and business reorganization; loan documentation and loan restructuring. Mr. Kellogg has represented secured and unsecured creditors, bankruptcy trustees, creditor's committees, and business debtors for the past 30 years.

Materials

Participants will receive a manual which has been compiled by the Institute specifically for this seminar. The seminar will be recorded; registration constitutes consent to such recording. If a registered participant cannot attend, he or she may order a set of the digitally recorded CDs and the accompanying manual from this program.
Contact the Shuttleworth Institute for hotel/seminar information at (555) 456-6048 (please call hotel for accommodations or directions only).
Cancellations: If you cancel six or more business days in advance, you will receive a full refund, less a $20 service charge. If you cancel within five business days, you are not entitled to a cash refund.

5.2 Read the advertisement again and decide whether these statements are true or false.

1 The seminar will deal with the issues involved when changing over from the old Article 9 to the new one.
2 The seminar is only suitable for senior legal personnel.
3 When they arrive at the seminar, the participants will be asked to give their consent to being recorded.
4 A participant can get his money back if he cancels one day before the seminar takes place.
5 The seminar does not cover the writing of legal documents.
6 The speaker has experience representing both sides in a secured transaction.

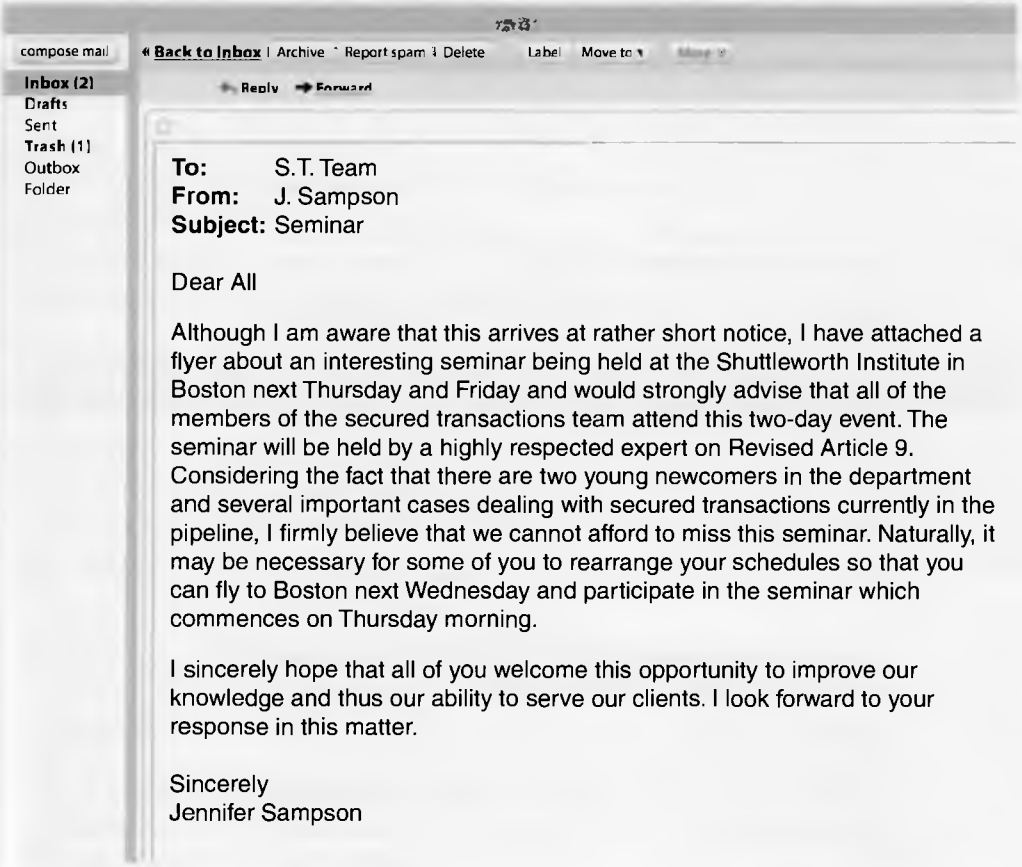
5.3 Have you attended any continuing legal education seminars of the type advertised? If so, what was the topic of the seminar? Do you think it is an effective way to learn about legal matters?

Reading D: An internal email

The seminar advertisement (Reading C) was sent as an attachment to the following email.

6.1 Read the email below and answer these questions.

1. Who sent it, and to whom?
2. Why does the writer think that the recipients should attend the seminar?



To: S.T. Team
From: J. Sampson
Subject: Seminar

Dear All

Although I am aware that this arrives at rather short notice, I have attached a flyer about an interesting seminar being held at the Shuttleworth Institute in Boston next Thursday and Friday and would strongly advise that all of the members of the secured transactions team attend this two-day event. The seminar will be held by a highly respected expert on Revised Article 9. Considering the fact that there are two young newcomers in the department and several important cases dealing with secured transactions currently in the pipeline, I firmly believe that we cannot afford to miss this seminar. Naturally, it may be necessary for some of you to rearrange your schedules so that you can fly to Boston next Wednesday and participate in the seminar which commences on Thursday morning.

I sincerely hope that all of you welcome this opportunity to improve our knowledge and thus our ability to serve our clients. I look forward to your response in this matter.

Sincerely
Jennifer Sampson

6.2 The email was written by a senior partner to her subordinates. Discuss these questions.

1. What is the level of formality of the email – is it friendly or respectful, familiar or distanced, informal or formal?
2. What language features of the text contribute to create this impression?
3. When would it be appropriate for you to use this level of formality?

7 Text analysis: Formality / Adverb–verb collocations

Generally speaking, it is useful to distinguish between a formal style of language and a neutral/informal style. Writers should be aware of features of a text which play a role in establishing the level of formality so that they can make conscious choices to ensure that the level is appropriate to the situation.

7.1 Complete this table using the more formal equivalents from the email.

Feature	Formal style	Neutral/informal style
contractions	Avoids using contractions: *I am, I have, do not, will not, cannot,* etc.	Uses contractions: *I'm, I've, don't, won't, can't,* etc.
sentence length	Tends to use longer, more complex sentences	Tends to use shorter, simpler sentences like in everyday speech
sentence structure	Tends to use subordination (joining clauses with words such as *while, because, although*)	Tends to use co-ordination (joining independent clauses with words such as *and, or, but*)
personal pronouns / passive verb forms	Tends to use personal pronouns less often; however, passive verb forms are often used to avoid naming a personal agent **1)** ..... **2)** ..... **3)**	Uses personal pronouns freely and often; prefers personal and active constructions: *A highly respected expert will hold ...* *Two of you are newcomers ...* *You may need to ...*
vocabulary and fixed expressions	Uses formal words: **4)** ..... **5)**	Uses neutral or informal words: *I really think you should ...* *I really think that ...*
	Uses formal fixed expressions: **6)** ..... **7)**	Uses informal fixed expressions: *Best wishes* *Let me know what you are going to do.*
	Uses formal verbs, often polysyllabic, often of Latinate origin **8)** ..... **9)**	Uses phrasal verbs / neutral verbs: *... and take part in the seminar ...* *... which starts on Thursday morning.*

7.2 The email contains examples of adverb–verb collocations commonly used in professional correspondence, as well as in more formal speaking situations. Underline the three adverb–verb collocations.

7.3 Match the verbs in the box with the adverbs (1–6) to make all possible collocations.

advise	agree	believe	hope	object to	recommend	regret	suggest	support	understand

1 deeply
2 firmly
3 fully
4 sincerely
5 strongly
6 wholeheartedly

8 Writing: A polite refusal

8.1 You receive Jennifer Sampson's email. Write an email in response, telling her it will not be possible for you to attend the seminar, as you will be in court that day. (You are also aware that other members of the secured transactions team have important appointments.) In your email, you should:

- refer to her email to you;
- state the reason you are writing;
- express your agreement with the idea of attending a seminar on the topic;
- explain why you cannot attend on that date;
- suggest an alternative to attending the seminar in question;
- offer to make arrangements for such an alternative.

Use at least two adverb–verb collocations in your email.

8.2 Rewrite the email from Jennifer Sampson to make it less formal, so that it would be appropriate for a lawyer to send to a colleague with whom he or she has a friendly relationship. Do not change the content of the email.

9 Listening A: Creating a security interest

One of the topics covered in the continuing education seminar advertised in the flyer on page 182 is that of creating a security interest. You are going to hear an excerpt from the seminar, in which the speaker outlines seven steps in creating a security interest in the USA.

9.1 Before you listen, try to put the steps involved in order.

Step ..... :	Draft the security agreement.
Step ..... :	Identify the debtor.
Step ..... :	Perfect the security interest by filing a financing statement.
Step ..... :	Confirm that secured party has given value.
Step ..... :	Identify the collateral, either by a list of specific property or by a categorical description.
Step ..... :	Confirm that the debtor has rights in the collateral. Ask for bills of sale, invoices, etc.
Step ..... :	Authenticate the security agreement, either by signing or by email.

9.2 Listen and check your answers.

9.3 Listen again and answer these questions.

1. According to the speaker, why is it important to identify precisely the party granting a security interest?
2. What is meant by a *blanket lien*? Why does the speaker think such a lien is problematic?
3. When would a security agreement describe property with the phrase *now owned or later acquired*?
4. What does the speaker mean when he says that 'the requirement of value is easily met in the typical lending relationship'?
5. What is meant by *authenticating* a security agreement?

9.4 How is a security interest created in your jurisdiction? What are the most common problems or issues arising from a security interest?

10 Reading E: An unsettled area of the law

Lawyers need to inform themselves of recent developments and rulings in unsettled areas of the law. Generally speaking, an unsettled area of the law is one in which the law is open to interpretation, due to the fact that case law decisions are inconsistent with each other or with legislation. Often such areas are new, growing and with little precedent.

The text on page 187 deals with an unsettled area of the law in which two of the key terms introduced in this unit, fixed charges and floating charges, play an important role.

10.1 Read the first paragraph and answer these questions.

1 What is the issue in question?
2 Who is affected by this issue?

10.2 Read the whole text. It discusses the court rulings in two important cases and explains their general significance. Complete the ruling(s) and a summary of its significance (1–5) for each case, using the sentences below (a–e).

Siebe Gorman & Co. Ltd v. Barclays Bank Limited
Ruling: **1)** .....
Significance: **2)** .....

National Westminster Bank Plc v. Spectrum Plus Limited
First ruling: **3)** .....
Ruling on appeal: **4)** .....
Significance: **5)** .....

a The court held that the bank only had a floating charge over book debts.
b Since the specific wording of debentures had created a fixed charge for 25 years, this wording was reasoned to have acquired that meaning by customary usage.
c The court held that the charge on book debts was a valid fixed charge.
d The decision was reversed by the Court of Appeal; it held that restrictions imposed by debentures on book debt meant the bank had a fixed charge.
e This resulted in banks and creditors taking fixed charges on book debts.

10.3 Complete these definitions of words or expressions from the article.

1 B..... d..... are the debts owed to a business, as recorded in the business's accounting records. They are also known as 'accounts receivable'. (paragraph 1)
2 An unsecured debt obligation which is issued against the general credit of a corporation is known as a f..... c..... . (paragraph 3)
3 A promise given by a bank that it will repay the debt of another person if that person does not pay the debt is called a b..... g..... . (paragraph 4)
4 A p..... creditor is a creditor who has the right to receive payments distributed by a liquidator before other unsecured creditors. (paragraph 5)

10.4 Which unsettled areas of the law in your jurisdiction are you aware of?

The last word on book debts[1]?

1 There have been court battles for more than a century over whether it is possible to have a fixed charge on the book debts of a company. This is a topical issue of particular concern to company directors, bankers, other lenders and creditors.

2 The modern practice of lenders taking a fixed charge on book debts arose in the UK from a court decision in 1979, in the case of *Siebe Gorman & Co. Ltd v. Barclays Bank Limited*. In that case, Barclays Bank had taken a fixed charge on book debts and a floating charge on other assets of the company. The judge held that the charge on book debts was a valid fixed charge. He said that the critical feature distinguishing a floating charge from a fixed charge was the company's power to deal with assets in the ordinary course of business. He interpreted the charge as meaning that the company was not free to draw its account without the consent of the bank, even when it was in credit, and so the charge on book debts and their proceeds was a fixed charge. The overall effect of the Siebe Gorman case was to expand the practice of banks and other lenders taking fixed charges on book debts.

3 In the most recent case of *National Westminster Bank Plc v. Spectrum Plus Limited*, the court said that Siebe Gorman had been wrongly decided. It held that the bank only had a floating charge over the book debts because the company was entitled to collect its book debts and use the proceeds in the normal course of business unless the bank intervened. However, the case went to appeal, and the Court of Appeal reversed the decision and said that the restrictions imposed by the debenture on the use of the proceeds of the book debt were enough to give the bank a fixed charge.

4 What is significant about this case is that the Court of Appeal pointed out that, for the last 25 years, debentures with the wording that had been approved in the Siebe Gorman case had been used on the understanding that this would create a fixed charge. The Court of Appeal said that banks have relied upon this understanding and bank guarantees have been given on this basis. It also said that even if the interpretation in the Siebe Gorman case had appeared erroneous, it would have held that the wording had, by customary usage, acquired the meaning which the Siebe Gorman case had attributed to it. However, the case of Spectrum Plus Limited is going to be looked at by the House of Lords, and it may very well reach a different conclusion from that of the Court of Appeal.

5 But does all this really matter? Well, yes, it does, because the reason why there has been so much conflict over charges is that book debts are often a very significant part of a company's assets. If a company becomes insolvent, book debts can become critical for a debenture holder. If the charge was a floating charge only, then the book debts would go to the company's preferential creditors – mainly the Inland Revenue, Customs & Excise and employees. That said, the picture changed radically in September last year when, by legislation, the Inland Revenue and Customs & Excise lost their rights as preferential creditors in insolvencies. Now they are part of the body of unsecured creditors.

6 As time goes by, the number of such cases will fall away, but it is still a problem for many debenture holders and for people who gave guarantees on behalf of companies that later became insolvent. If a debenture holder is unable to be paid from book debts, where possible, a claim will be made under a personal guarantee instead.

US) accounts receivable

11 Listening B: Intellectual property in secured transactions

Another unsettled area of secured transactions law concerns intellectual property (IP). In recent years, lawyers and lenders have seen a significant increase in the importance of IP as collateral. However, in the US, as in many other countries, rulings in this area remain inconsistent, while the applicability of statutes is not yet always clear.

The continuing legal education seminar on the revised UCC in Listening A included a presentation called 'Intellectual property as collateral'. You are going to hear two lawyers who attended the session, Peter and Jack, telling a colleague, Matsuko, about it.

11.1 Listen to the discussion and choose the correct answer to each of these questions.

1 Why is Jack happy that the topic of Intellectual Property was covered in the seminar?
- **a** Because it is an area of the law he knew nothing about previously.
- **b** Because it is an area of the law which is so unsettled.
- **c** Because it is an area of the law that is growing in importance.

2 What does Jack say regarding foreign companies not conducting any business in the UK?
- **a** They need to register charges against intellectual property with Companies House.
- **b** They may or may not have to register charges against intellectual property with Companies House.
- **c** They cannot create security interests in intellectual property in the UK.

3 What does Jack say that he learned about perfecting security interests internationally?
- **a** He says it would be better to wait until the law has become more settled before filing.
- **b** He says that the main issue is knowing where something should be filed in each country.
- **c** He says it's best to have the help of local lawyers in the countries in question.

4 What does Matsuko ask to be told more about?
- **a** perfecting security interests in copyrights
- **b** trade marks in Hong Kong specifically
- **c** the Revised Article 9

11.2 Listen again and decide whether these statements are true or false.

1 Both Jack and Peter would probably recommend the seminar held by Mr Kellogg to others.

2 The seminar focused mainly on how security interests in IP as collateral are perfected in the UK.

3 Due to the revisions of Article 9 of the Uniform Commercial Code, the area of Intellectual Property in secured transactions is particularly unsettled in the United States.

4 Only registered copyrights are considered 'general intangibles' under the revised law.

12 Language use B: Requesting information

In Listening B, Matsuko asked her colleagues Jack and Peter to tell her about the seminar which she was unable to attend. These are the phrases she used to request information.

Can you fill me in on *what he said?*
And what did he say about *the situation internationally?*
Can you give me an example?
And what did he have to say about *perfecting security interests in the US?*
I'm interested in copyrights. ***What can you tell me about*** *those?*
Where could I get more information on *what was covered in the seminar?*

The style of Matsuko's requests for information is informal, suitable for speaking with colleagues with whom she has a friendly relationship. One way to make requests of all kinds more polite and thus more formal – including requests expressed in writing – is to use the word *could* instead of *can*.

Could *you help me with these forms?*

Another way to make a request more polite and formal is to begin the request with one of the following phrases:

I wonder if you could *help me with these forms.*
I was wondering if you could *help me with these forms.*
Would you mind *helping me with these forms?*

Rewrite Matsuko's requests for information so that they are more formal.

13 Speaking: Requesting and presenting information

This task is intended to give you an opportunity to present information in the course of a discussion and to make use of the phrases for requesting information presented in Exercise 12.

- Gather information about one aspect of secured transactions in your jurisdiction. You may want to choose a topic like perfecting a trade mark or patent as a security interest, or the appropriate institutions, methods or deadlines for filing, for example.
- Present the information informally to two or three others, as if you were telling colleagues about a topic you are knowledgeable about in the course of a discussion.
- The listeners should ask for further information about the points you raise as you are speaking.
- Then switch roles and listen to another speaker. Ask about points that are of interest to you.

Unit 13

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 13.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 loan security interest charge lien
2 indebtedness instalment obligation debt
3 to pawn to pledge to give as security to attach
4 contingent on unconditional subject to dependent on
5 hereby after this hereafter in future

2 Prepositions used with expressions of time Complete the expressions of time below from the security agreement in this unit using the prepositions in the box.

at	from	of	of	~~on~~	on	upon	upon	within

1 ....on..... this 11th day ..... May
2 promissory note ..... even date herewith
3 ..... the happening of any of the following
4 assets not dissolved ..... thirty (30) days
5 thirty (30) days ..... the date ..... which it is filed
6 ..... default and ..... any time thereafter

3 Collocations Match the pairs of words as they appear in this unit.

1 bankruptcy	a debts
2 debenture	b description
3 security	c proceeding
4 categorical	d holder
5 book	e interest

4 Expressions with *take* Complete the sentences below using the words in the box. They come from the reading texts in this unit.

care	charge	part	place	~~possession~~	precedence

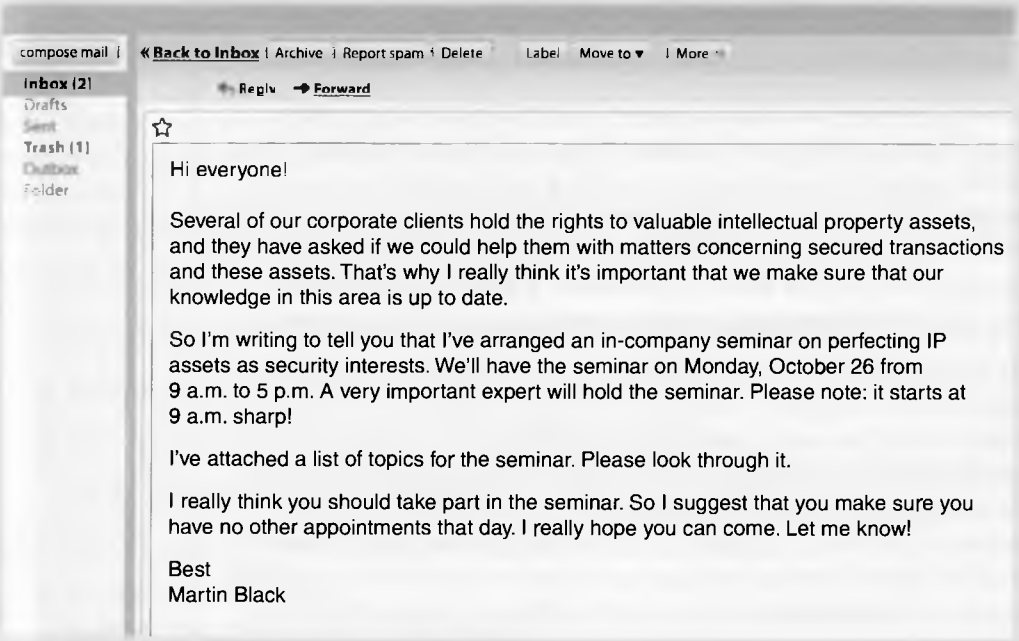
1 With a possessory interest, the creditor takes [redacted] of the property which is the security interest.
2 In order to invoke consensual security interests against third parties, perfection of the security interest must take ..... .
3 Receivership is the situation in which, during bankruptcy proceedings of an insolvent corporation or person, the court appoints a person to take ..... of all assets in order to preserve them for creditors.
4 I really think you should take ..... in the seminar.
5 I'm sure you will agree that this court appearance takes ..... over the seminar.
6 Identify the debtor. Take ..... to identify precisely which person or entity will be granting a security interest.

5 Formal verbs Legal documents such as legislation, agreements and legal correspondence are characterised by the use of formal verbs not generally found in everyday speech. Many of these verbs are of Latinate origin. Match the formal verbs (1–15) with their more informal counterparts (a–o).

1 assist	**a** get
2 commence	**b** stop
3 comprehend	**c** ask
4 deem	**d** show
5 desist	**e** tell
6 endeavour	**f** look through
7 enquire	**g** start
8 ensure	**h** have
9 evince	**i** suggest
10 inform	**j** think
11 intimate	**k** keep
12 peruse	**l** try
13 possess	**m** help
14 receive	**n** make sure
15 retain	**o** understand

6 Writing: formal style Rewrite the email below to make it more formal. Use the words and phrases in the box and verbs from Exercise 5. Add formal fixed expressions used in correspondence where appropriate. Wherever possible, join two sentences to make a more complex one. You may choose to make one or two active sentences passive.

verbs: assist, commences, enquired, ensure, inform (x2), peruse, possess
discourse markers: therefore, thus
adverb–verb collocations: strongly advise, firmly believe, highly respected, sincerely hope



14 Debtor–creditor

1 Reading A: Introduction to debtor–creditor

The following text introduces the area of debt and the remedies available to creditors.

Read the text, then match the three main types of lien (1–3) with their explanations (a–c).

1 consensual lien
2 judicial lien
3 statutory lien

a a lien created as the result of a legal process
b a lien created by agreement between the parties
c a lien created by legislation governing the relationship between debtor and creditor

Debtor–creditor is the area of the law which relates to the rights and obligations of debtors and creditors. The law outlines what happens when the debtor is unable or unwilling to make payments and what remedies are available to the creditor in this situation. It does not focus on the creation of the debtor–creditor relationship but, rather, on the collapse of the debtor–creditor relationship.

With this in mind, debtor–creditor law largely involves how creditors get paid when the debtor does not have the resources to make payment. This question is determined by whether the creditor has some type of 'favoured status'. Broadly speaking, creditors get favoured status by two means, either by **lien** or by **priority**.

There are three different types of lien: consensual, judicial and statutory.
A **consensual lien** is one which is created upon agreement between the debtor and creditor. Usually, this type of lien must be **perfected** through some type of registration process in order to be invoked against third parties (e.g. other creditors seeking payment from the debtor from the same property). Examples of these types of lien would be **mortgages** and registered **security interests**. Mortgages are liens created in land, whereas security interests are generally related to other types of property. **Judicial liens** arise as a result of some sort of judicial proceedings brought by the creditor to secure an interest in the debtor's property. Examples of this type of lien include **attachment liens**, **garnishment**, **judgment liens** and **execution liens**. These liens generally entail seizure of the debtor's property by a public official (such as a bailiff) to enforce the obligations of the debtor. **Statutory liens** are liens created by legislation due to the economic relationship between the debtor and creditor. Common examples of this type of lien are **tax liens** and **mechanic's liens**. In some cases, **perfection** of this type of lien is required in order to be valid against third parties.

Priority becomes an issue when the debtor is unable to make payment of his debts when they become due and a group of creditors take action to secure payment of their particular claim. Most commonly, creditors bring some form of action or claim during the course of insolvent liquidation[1] proceedings. In such a circumstance, the usual procedure is to gather the debtor's property and to distribute it among the creditors. When there is not enough property to go around, the law has a system of priorities under which certain creditors are paid before others. Most of the rules that apply in this situation are **first-in-time** rules related to different classes of creditors.

[1] (US) involuntary bankruptcy

Examples of **priority creditors** would be wage earners, landlords and tax collectors. Other creditors are usually subject to first-in-time rules to determine their priority.

The majority of creditors will not have any favoured status, by either lien or priority. These creditors are often referred to as general creditors. In the context of group actions, these creditors generally end up receiving nothing upon distribution of the debtor's property. In order for these creditors to secure their claims to some degree, they will have to bring an action to attain the status of lien creditor.

2 Key terms: Types of lien

Match these types of lien (1–8) mentioned in the text with their explanations (a–h). You may need to consult the Glossary booklet.

1 attachment lien
2 execution lien
3 garnishment
4 judgment lien
5 mechanic's lien
6 mortgage
7 security interest
8 tax lien

a a claim against property which secures payment for taxes owed to the government
b a claim imposed on a person against whom a judgment has been entered but remains unsatisfied
c a legal instrument which creates a claim upon real estate in order to secure the payment of a debt
d a claim against real property which secures payment for work or services carried out on that property
e a claim resulting from a legal proceeding in which a creditor requests a court to order a third party holding property of or owing money (e.g. wages) to the debtor to release the relevant property/money to the creditor
f a pre-judgment interest in assets resulting from a court order or writ to seize such assets
g a right created by a court order or writ directing the seizure of assets of a debtor in order to enforce a judgment
h a legal right to property an owner gives to a creditor as collateral for repayment of a debt through the creation of a security agreement

3 Reading B: Statutes governing attachment

One of the key terms introduced above is attachment lien, which involves the seizure of assets of a debtor before a court decision has been reached. The text on page 194, an excerpt from an American civil practice and remedies statute, outlines the circumstances under which the remedy of attachment is available to a creditor in a lawsuit.

3.1 Read the text and answer these questions.

1 What is the name of the document which in this case shows the right to attachment?
2 What does the word *grounds* mean in the context of the text?
3 How does the text refer to the creditor? And the debtor?
4 How many of points 1–4 (Section 61.001) and points 1–9 (Section 61.002) must be satisfied in order for attachment to be available to plaintiff?

3.2 Explain these expressions, in italics in the text, in your own words.

1 to harass the defendant
2 to serve the process of law on someone
3 to dispose of property with the intent to defraud creditors
4 to obtain property under false pretence

61.001 GENERAL GROUNDS

A writ of attachment is available to a plaintiff in a suit if:

(1) the defendant is justly indebted to the plaintiff;
(2) the attachment is not sought for the purpose of injuring or *harassing the defendant*;
(3) the plaintiff will probably lose his debt unless the writ of attachment is issued; and
(4) specific grounds for the writ exist under Section 61.002.

61.002 SPECIFIC GROUNDS

Attachment is available if:

(1) the defendant is not a resident of this state or is a foreign corporation or is acting as such;
(2) the defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff;
(3) the defendant is in hiding so that *the ordinary process of law cannot be served on him*;
(4) the defendant has hidden or is about to hide his property for the purpose of defrauding his creditors;
(5) the defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts;
(6) the defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors;
(7) the defendant has disposed of or is about to *dispose of all or part of his property with the intent to defraud his creditors*;
(8) the defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors; or
(9) the defendant owes the plaintiff for *property obtained by the defendant under false pretences.*

3.3 For each of these situations (1–4), identify the specific ground in paragraph 61.002 of the statute above which describes it.

EXAMPLE: The defendant has sold all of his possessions and placed the money in a foreign bank account. 8

1 The defendant is going to move abroad and has said he will not pay the plaintiff what he owes him.
2 The defendant is a French firm with an office in Germany, where the suit is being brought.
3 The defendant purchased several expensive motor vehicles from the plaintiff with a bad cheque.
4 The defendant has left his known address and cannot be found.

4 Listening A: Protecting assets from judicial liens

A lawyer is responsible for informing his clients about what they can do to legally minimise their risk of loss from the hazards of business and personal liability. This is known as asset protection. You are going to hear a lawyer speaking to a group of clients who are interested in learning about asset protection.

4.1 Listen to the first part of the presentation, in which the speaker explains two types of lien, a pre-judgment attachment lien and a judgment lien. Tick the features of each type of lien.

Pre-judgment attachment lien

1 allows attachment before the case is decided ☐
2 generally attaches to your salary ☐
3 is granted in all types of case ☐
4 usually occurs in contract disputes involving money ☐

Judgment lien

5 allows attachment after the case is decided by the court ☐
6 applies if the court decides in favour of the plaintiff ☐
7 attaches to all real estate in your name and all accounts ☐
8 is fundamentally different from a mortgage ☐

4.2 Listen to the second part of the presentation, in which the speaker describes the examples of two clients, and answer these questions.

1 What did the lawyer's firm do to protect Ed's assets?
2 How did the asset-protection plan improve Ed's position in negotiations with his creditors?
3 Why was the pre-judgment attachment lien unsuccessful in the second case cited by the speaker?

5 Reading C: A career as an insolvency practitioner

An insolvency practitioner advises insolvent entities about how to deal with their financial difficulties and assists with bankruptcy and liquidation procedures. The excerpt on page 196 from a career guide provides information about the profession in general. It explains how one can become a licensed insolvency practitioner in the UK, describes recognised professional bodies and outlines the routes to qualification.

5.1 Read the excerpt and answer these questions.

1 Explain what you think this sentence from the text means: *Insolvency work is as much about people as it is about figures.*
2 What role do professional bodies play in the making of a career as an insolvency practitioner?

5.2 Decide whether these statements are true or false.

1 The insolvency practitioner profession is rapidly expanding, with many new practitioners being licensed every year.
2 Both revised legislation and a change in the way people think have led to the trend of rescuing businesses.
3 Once a practitioner has been licensed by one of the recognised professional bodies, this licence cannot be cancelled.

MAKING a career as an
INSOLVENCY PRACTITIONER

Insolvency is possibly the most demanding career option a professional can undertake. It is certainly one of the most challenging, involving and rewarding. The insolvency profession is also one of the smallest – there are fewer than 2,000 licensed insolvency practitioners in the UK.

Insolvency practitioners can find themselves running businesses, constructing and negotiating deals, or investigating and advising on the viability of a business and its restructuring (and, sometimes, the integrity of its directors).

The work of the insolvency practitioner affects the lives, prospects and livelihoods of both creditors and debtors. Insolvency work is as much about people as it is about figures. Insolvency practitioners need the personality and skills to deal with angry creditors, anxious directors, distraught employees and, amongst others, hard-bitten businessmen with an eye for a bargain.

The insolvency scene is always changing. In particular, the effects of the Insolvency Act 1986 and the attitudes of banks and other creditors mean that, more than ever, insolvency practitioners are business rescuers. Whilst much of the work done by the profession involves formal insolvency procedures, increasingly insolvency practitioners are using their skills to restructure and rescue businesses (both in the UK and abroad) without recourse to formal insolvency procedures.

Where an insolvency practitioner is appointed in a formal insolvency, the most common procedures are the liquidation of companies by a variety of routes and bankruptcies of individuals. Even in these cases, often regarded as the 'end of the line' for businesses, imagination and determination are still needed to preserve as much of the business (and its associated jobs) as possible, or, as a last resort, to get the best possible price for its assets.

Even where a formal insolvency procedure is necessary, in many cases a positive approach to the rescue of businesses and jobs can be taken through the application of administrations, administrative receiverships and voluntary arrangements.

The profession has been able to rescue increasing numbers of jobs and businesses in recent years, because of both legislative changes and the changing attitudes of creditors. Overall, some 20 per cent of insolvent businesses are rescued in one form or another, in part or in whole, and one in every six insolvent individuals enters a voluntary arrangement as an alternative to bankruptcy.

Since 1986, all insolvency practitioners have been required to be licensed by a recognised professional body (RPB) or the Department of Trade and Industry (DTI) in England and Wales, or the Department of Enterprise Trade and Investment (DETI) in Northern Ireland. An individual's licence can be revoked if the holder ceases to be a fit and proper person to act as an insolvency practitioner. Only licensed insolvency practitioners are authorised to take appointments as administrative receivers, administrators, liquidators, trustees in bankruptcy or sequestration, supervisors of voluntary arrangements, and trustees under deeds of arrangement and trust deeds.

If you have decided to make your career in this area of insolvency, you will first need to choose a route to becoming a licensed insolvency practitioner.

5.3 Complete these definitions by choosing the correct word or phrase.

1. An administrative receiver is an insolvency practitioner who is appointed by the holder of a debenture which is *vested / entitled / secured* by a floating charge of a company's property, whose function is to realise the value of the assets for the *behalf / benefit / behold* of the debenture holder.
2. An administrator is appointed by the court to deal *in / for / with* the assets and liabilities of a person who died without a *legally / legal / legalistic* valid will.
3. The term 'voluntary arrangement' refers to a plan for repaying debts as an alternative to bankruptcy or liquidation which is usually *filed / proposed / controlled* by debtors and shareholders and monitored by a supervisor.
4. A liquidator is appointed to wind *down / up / over* a company, i.e. to deal with the assets and liabilities of the company.

6 Speaking A: Discussing insolvency work

6.1 Working with a partner, explain these phrases from the text in your own words. Consult a dictionary if you are not sure what individual words mean. Discuss in what way these concepts relate to the work of an insolvency practitioner.

1. the viability of a business
2. the integrity of the directors of a business
3. hard-bitten businessmen with an eye for a bargain
4. to rescue a business

6.2 Have you considered practising in this area of the law? Why? / Why not?

7 Reading D: Job opportunities in insolvency

Recent law-school graduates and young lawyers with a few years' working experience often read job advertisements in the hope of finding interesting and well-paid career opportunities. What sources of job advertisements are you familiar with? Which do you prefer and why?

7.1 In the UK, job adverts aimed at the two groups mentioned above – recent law-school graduates and young lawyers – will typically include the abbreviations *PQE* and *NQ*. Read the headings of the job advertisements on page 198. What do you think these abbreviations stand for?

7.2 Quickly scan the two advertisements and decide for which job (A or B) you:

1. will have the opportunity to travel.
2. need no previous experience.
3. will have a chance to specialise in information technology law.
4. need to speak more than one language.
5. need to belong to a particular association.

7.3 Read the advertisements again and answer these questions.

1. Compare the description of the law firm in the second advert with that in the first. How do the two firms differ? In what way are they similar?
2. Which of the two job adverts looks more interesting to you?

A

Vacancy Type: Private practice lawyer
Practice Areas: Banking/Finance, Insolvency
Location: based in London
PQE: 2–4 years

Our firm was formed in 2005, following the merger of Johnson and Hall in the UK, Europe and Asia, and Paoletti, Heider and Robinson in the US. The merged firm comprises over 3,000 people in 29 offices and 17 countries around the world. Our vision is to be one of the top full-service international law firms, while upholding strong core values, which include investing in our employees, our clients and the community.

As an associate in the Restructuring and Insolvency team, you will act for insolvency practitioners, creditors, debtors, investors and regulators on corporate restructurings, rescues, formal insolvency procedures and investigations. You will gain international experience which may include cross-border co-operation activities. As our clients' business becomes increasingly global, you will be working to find creative commercial solutions to reconcile the often differing requirements of several domestic law regimes.

Your general role as an associate will comprise three main components:
- Pure legal work
- Managing the client relationship
- Raising your personal profile within the practice by participating in client events and contributing to training sessions and the production of know-how

Professional requirements/qualifications
- Keen interest and relevant experience in restructuring and insolvency work
- Current membership in a recognised Insolvency Practitioners Association
- Strong analytical skills
- Fluency in spoken and written English and preferably another European language
- Willingness to travel
- Excellent interpersonal and communication skills
- Ability to work effectively in a multi-ethnic and multicultural environment

Applicants may send their application to i.hall@halljohnson.com

B

Vacancy Type: Private practice lawyer
Practice Areas: Company/Commercial, Insolvency
Location: south-west UK
PQE: NQ–1 year

We are offering an exciting opportunity for a NQ Company Commercial Solicitor to join an established team. Our clients include small and medium-size enterprises, as well as large firms, among them international corporations based in the UK.

The position will involve general company and commercial work, including some insolvency. You will be working with the head of the department and supporting the team as a whole on transactional work. You will also have the opportunity for some specialisation within the areas of IT and e-commerce, and this will involve working closely with a salaried partner. This is a great opportunity for someone wishing to join a market-leading, forward-thinking firm.

Applicants may send their application to harold.jackson@jacksonreeves.com

8 Text analysis: A covering letter

A covering letter[1] is an important part of a job application. Submitted along with a CV[2], the covering letter serves as an applicant's introduction to a potential employer. As such, it is a valuable opportunity for you to communicate a few key facts about yourself and your suitability for the position in question. It also gives you a chance to demonstrate your ability to write a clear and well-structured business document in English. Thus it is necessary to proofread your covering letter carefully and to make sure it does not contain errors of any kind.

Like most professional correspondence, a covering letter ideally has a three-part structure consisting of:

- an introductory paragraph stating the purpose of the letter;
- a main part (one or more paragraphs) with the most important information;
- a concluding paragraph bringing the letter to a close and a final sentence inviting further contact.

[1] (US) cover letter
[2] (US) resume *or* resume

Read the covering letter below, then match these functions (a–f) with the sentence or sentences in the letter (1–10) which express them. Each function can be used more than once.

a Referring to any relevant work experience you have in the field
b Identifying your current status
c Referring to future contact
d Explaining how you found out about the position
e Demonstrating an interest in the firm to which you are applying
f Highlighting particular skills, qualifications or accomplishments

Dear Mr Jackson

1) I would like to apply for the post of a Company Commercial Solicitor in your firm as advertised on the website www.legalpositions.com. **2)** As a recent law-school graduate, I was particularly happy to see that the position you are offering is open to newly qualified lawyers. **3)** You will see from my enclosed CV that I completed my law studies in Rome with honours, and spent one year studying law in Edinburgh. **4)** Since I have relevant work experience in the field of insolvency, I am especially interested in the position you are offering. **5)** For three summers, I worked as a clerk in a mid-sized commercial law firm in Manchester. **6)** While assisting with the insolvency work carried out there, I developed a keen interest in becoming an insolvency practitioner. **7)** In addition, I am a student member of the Insolvency Practitioners Association in the UK, and two articles I wrote in English were published in their newsletter. **8)** Finally, I may also add that I achieved a high score on the International Legal English Certificate Examination. **9)** I would welcome the opportunity to work as part of your successful team, to benefit from your extensive experience, and to put my training, experience and enthusiasm into practice for your firm.
10) I look forward to hearing from you.

Yours sincerely

Fabio Scataloni

9 Writing A: A covering letter

Write an application letter of your own in response to one of the job advertisements on page 198 or to one you have found. You should:

- structure your letter in three parts;
- include the functions listed in Section 8;
- write your letter in an appropriate style;
- proofread the text carefully.

When you have finished writing, exchange letters with a partner and proofread his or her letter. Circle any mistakes you find.

10 Listening B: A job interview

The job interview gives an employer an opportunity to form an impression of you as a person and to decide whether you would be suited to join the firm. An interviewer will typically pose questions which invite a wide range of possible responses and lead to discussion. You are going to hear a candidate, Mr Berger, being interviewed for one of the positions described in the job adverts on page 198.

10.1 Read these questions, typically posed in an interview for a legal position. Which do you think would be most difficult for you to answer?

1 What can you tell me about yourself? ☐
2 What are your greatest strengths/weaknesses? ☐
3 Why did you decide to study law? ☐
4 What was the most valuable experience you had in law school? ☐
5 What qualities do you think a good lawyer needs to have? ☐
6 Which accomplishment are you most proud of? ☐
7 What do you know about this firm? ☐
8 Why do you want to work for this firm? ☐
9 Why should we hire you? ☐
10 How would you describe your ideal job / boss / law firm? ☐
11 What can you tell me about your work experience? ☐

10.2 Listen to the interview and answer these questions.

1 Which position has Mr Berger applied for?
2 What does he say he likes about working on cross-border insolvency cases?

10.3 Listen again and tick the questions in Exercise 10.1 the interviewer asks.

10.4 Listen to the interview again and answer these questions about Mr Berger's responses.

1 How did he find out about the law firm and the job opening?
2 Why does he want to work for the firm?
3 Why is he already familiar with London?
4 What does he say about his English skills?
5 What kind of work does he do in his present job?
6 What reasons does he give when asked why the firm should hire him?
7 What does he ask the interviewer about the firm?

11 Speaking B: A job interview

Using one of the job advertisements on page 198 or one you have found in a newspaper or on the web, prepare to be interviewed for the job. Think about how your education, skills and work experience relate to what is required of the applicant. Your partner should play the role of the interviewer and should ask you some of the questions from Exercise 10.1. When the interview is finished, discuss which of your answers were good and which need improvement. Then switch roles and interview your partner for the job he or she has found.

12 Writing B: A thank-you note

Following a job interview, it is a good idea to send a short note thanking the person who interviewed you. The purpose of this note is to show your continued interest in the position and to reinforce a positive image of yourself. For this reason, it is common to emphasise one or two of your strong points once again, while referring specifically to something discussed in the course of the interview.

12.1 Read the note below, then complete the spaces (1–5) using these phrases (a–e).

a As I mentioned during our conversation
b I appreciated
c The interview convinced me that my background
d Thank you again
e I am confident that my ability to

Dear Mr Greene

1) ..... for the opportunity to interview for the position of Senior Insolvency Practitioner in your firm. **2)** ..... your hospitality and enjoyed meeting you and members of your staff. I especially enjoyed hearing about your firm's plans for expansion. **3)** ..... , interests and skills are compatible with the goals of your firm. **4)** ..... , the experience I gathered in my previous employment has prepared me well for corporate insolvency work. **5)** ..... supervise a case from commencement of liquidation to closure will be of value to your firm.

I look forward to hearing from you.

Yours sincerely

Julia Fenton

12.2 Answer these questions.

1 Which sentence in the note refers to a topic discussed in the interview?
2 Which sentence reinforces points mentioned by the applicant during the interview?
3 What is the purpose of the final sentence of the main paragraph of the note?
4 Which part of the thank-you note refers to future contact?

12.3 Write a thank-you note from Franz Berger to Ms Hall as a follow-up to the interview in Listening B. You should:

- mention one or two topics discussed in the interview;
- reinforce one or two points about the applicant's background which were discussed in the interview;
- use the sentence beginnings found in the model text above;
- refer to future contact.

13 Reading E: Making a case

In the job interview in Listening B, Mr Berger states that he welcomes the challenges posed by cross-border insolvencies in Europe. The writers of the following excerpt from an article from a financial law journal identify what they believe to be a serious weakness in the European legislation governing insolvencies and argue for its reform.

13.1 Look at the title of the article. What is meant by the word *case* in this context?

13.2 Read the first two paragraphs of the excerpt and answer these questions.

1 What is the weakness the writers point to?
2 Which system do they propose as a model for reform?

The case for unifying the EU's insolvency laws

Over the last five years, there have been a number of big insolvencies and debt restructurings across Europe. It must be obvious to all objective commentators that Europe simply does not have an effective, or indeed any, *legal regime* to support court-supervised restructuring, as opposed to bankruptcies or liquidations. It is astonishing that there is simply no legal middle ground between out-of-court restructurings, with all of their uncertainties and differences of approach, and liquidations. Why does Europe not have an equivalent to the US practice of court-supervised debt restructuring?

The principle that it is preferable for insolvent companies (as well as their creditors and other stakeholders) to be reorganised rather than liquidated has long been recognised in the US and is now accepted in most European jurisdictions. However, while the US Bankruptcy Code's Chapter 11 provides a clear framework for such reorganisations, the equivalent statutory regimes in Europe do not.

Chapter 11 provisions significantly improve companies' prospects of restructuring their balance sheets and avoiding insolvency. These provisions are not perfect, but after more than 20 years of application in the US, most commentators would probably agree that Chapter 11 provides a comprehensive and workable mechanism for delivering a restructuring.

The key provisions operating to minimise destruction of value in liquidation are:

- early protection – a company is able to *file for Chapter 11* protection voluntarily and, importantly, can do so regardless of whether it can show that it is, or is likely to be, insolvent;
- the automatic stay, which prevents both secured and unsecured creditors from taking proceedings against the company (also leading to a sensible and practical approach to handling secured claims);
- so-called debtor-in-possession powers, which permit existing management to continue running the company;
- priority for debtor-in-possession (DIP) financing – this super-priority status has resulted in the evolution of a specialised market place where the DIP can borrow *fresh funds* to continue its business during the restructuring; and
- limitations on contractual termination provisions.

In addition, two sets of provisions that particularly help insolvent companies to restructure allow the US Bankruptcy Court to reorganise the *equity* of an insolvent company without a vote of the shareholders and provide for the Court to enforce a reorganisation plan, despite objections from some creditors (known as 'cramdown provisions').

The absence of provisions equivalent to some or all of the above in Europe both affects the economics of restructurings in Europe and adds an *onerous* layer of complexity and transaction risk.

13.3 Read the whole article and decide whether these statements are true or false.

1. The authors argue that while reorganisations of insolvent companies are increasingly being carried out in Europe, the legislation in Europe does not provide a legal framework for these reorganisations.
2. In the USA, they try to save bankrupt companies rather than wind them up.
3. Under the early protection provision, it is necessary for a company to show that it is insolvent before it can file for protection under the law.
4. The authors think that DIP powers are an advantage to insolvent companies, as they permit an insolvent company to continue functioning during restructuring.
5. Chapter 11 does not allow the court to implement actions against the will of a company's creditors.

13.4 Match these words or phrases (1–5) (italicised in the text) with their definitions (a–e).

1 legal regime	**a** new loans
2 to file for Chapter 11	**b** assets of a company less its liabilities
3 fresh funds	**c** difficult
4 equity	**d** statutory framework
5 onerous	**e** to declare bankruptcy

14 Speaking C: Discussion on restructuring

Look at these counter-arguments to the standpoint presented in the article on page 202 and decide whether you agree or disagree with them.

- 'In my opinion, court restructuring of an insolvent business can result in negative publicity. This could have a bad effect on the business by reducing consumer confidence.'
- 'As I see it, out-of-court restructuring is faster and cheaper, as it involves less paperwork (official forms, schedules and procedures). I'm convinced that the time and effort spent on court restructuring can be better spent on rescuing the business.'

Unit 14

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 14.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 precedence distinction priority favoured status
2 confiscate seize take possession of relinquish
3 demanding urgent onerous difficult
4 legislation legal regime judicial review statutory framework

2 Word formation Complete this table by filling in the abstract noun form of each of the verbs. Underline the stressed syllable in each word with more than one syllable.

Verb	Abstract noun
seize	seizure
proceed	
execute	
secure	
liquidate	
restructure	

3 Vocabulary: classes of creditors Complete this text about classes of creditors by choosing the correct verb in each case.

In every bankruptcy, there are generally three classes of creditors. These **1)** *contain / include / consist* secured or lien creditors, priority creditors, and unsecured or general creditors. Generally, if a secured creditor has **2)** *perfected / improved / submitted* its lien prior to the bankruptcy filing, the secured creditor must be **3)** *entitled / paid / owed* in order for the debtor to keep his or her property after the bankruptcy is discharged. A secured creditor has security for its debt, which can be personal or real property that was **4)** *borrowed / pledged / attached* by the debtor to secure the debt. Priority creditors have a priority for the repayment of their debt before the unsecured creditors are paid. Income taxes, wages, child support and administrative expenses **5)** *collected / suspended / incurred* in the bankruptcy are usually classified as priority creditors. Unsecured creditors are creditors who do not have any security. Some examples of unsecured debts are credit-card bills, medical bills and personal loans.

4 Asking questions in an interview Decide which sentence beginning (A or B) can be used to form questions that an applicant might ask in a job interview. In some cases, both sentence beginnings can be used to form a question.

A Can you tell me something about ...
B What is ...

1 ... what you are looking for in an associate? A
2 ... the atmosphere in the firm like?
3 ... the management structure of the firm?
4 ... how attorneys are trained in your firm?
5 ... your most important clients?
6 ... the firm's attitude toward pro bono work and community service?
7 ... a typical caseload of an associate like?
8 ... how associates are rotated through the departments of the firm?
9 ... your area of expertise?

5 **Vocabulary: types of trustee** Reading C mentions several different trustee roles that can be carried out by an insolvency practitioner. A trustee can be defined as a person who controls property and/or money for the benefit of another person or an organisation. Insolvency practitioners can serve in various trustee roles. Complete the explanations of types of trustee below using the words in the box.

abandon	~~appointed~~	insolvent	ownership	pledged	seizure	trust	vests

1 A **trustee in bankruptcy** is a trustee *appointed* by a court to handle the affairs of a bankrupt party. The property of the bankrupt party ..... in this trustee.

2 A **trustee in sequestration** refers to the role of trustee in the case of a sequestration. Sequestration is when a debtor's property is taken, either voluntarily or involuntarily (by .....), into the possession of a third party, i.e. the trustee, until the court determines the ..... of that property.

3 A **trustee under a deed of arrangement** refers to the role played by a trustee under a contract made between an ..... entity and its creditors. Under this agreement, as much of the debt as possible is paid, and the creditors consent to ..... their claims to payment in full. The property of the bankrupt party may be transferred to a trustee during this process.

4 A **trustee under a trust deed** is a role played in a transaction in which real property is ..... as collateral for a loan. The borrower transfers the legal title for the property to the trustee, who holds the property in ..... as security for the payment of the debt. If the borrower defaults in the payment, the trustee may sell the property.

6 Prepositions complete these sentences by choosing the correct preposition in each case.

1 An unsecured creditor has a general claim *against* / *to* / *with* a debtor, which is not secured *by* / *through* / *with* any particular asset of the debtor.

2 A Bill of Sale is a document that shows that legal title *of* / *for* / *in* goods has passed from one party to another. It is often retained *for* / *as* / *in* security by the party with title but not having possession of the goods in question.

3 A tax lien attaches *by* / *to* / *through* all taxable property on this date to secure payment of taxes imposed for the year.

4 A creditor who has provided a service for the debtor, such as a builder or contractor who worked on the debtor's property, can place a lien *for* / *over* / *on* the property if he does not receive payment.

5 When personal property, such as a car, has been put up *in* / *as* / *for* collateral or security for a loan, it may be taken through repossession.

6 An example of a priority creditor is the Internal Revenue Service, which has priority *to* / *on* / *over* all other creditors when the debtor becomes insolvent and files for bankruptcy.

Case study 5: Transnational insolvency law

The facts of the case

You have been asked to review the following insolvency law case and the relevant documents in preparation for a meeting with the other party's lawyer.

Read this description of the facts of the case. What is the legal issue here?

Bliss Cosmetics Ltd ('Bliss') is a wholly owned subsidiary of Revon, Inc. (Revon). Bliss is incorporated in the country of Nirvania with its registered office in the city of Parken, Nirvania. Revon is incorporated in the country of Atlantia and has its registered office there. Both Nirvania and Atlantia are members of the Union of Cooperating States (UCS).

Revon fell upon hard financial times and collapsed. As a result, Bliss has also collapsed. Bliss's largest creditor, Payme Bank, filed a petition with the High Court of Parken and was granted the appointment of an interim liquidator and the commencement of a compulsory winding-up (liquidation) procedure.

Ten days later, the Government of Atlantia appointed Mr Doright as administrator of Bliss in order for him to restructure the company. Bliss was declared insolvent three days later by a City Court in Atlantia. Payme Bank and the Nirvanian interim liquidator challenged the actions of the Government of Atlantia and the City Court. However, their challenge was dismissed by a Regional Administrative Tribunal in Atlantia. The High Court of Parken disagreed with the Regional Administrative Tribunal in Atlantia and confirmed the decision to liquidate Bliss in Nirvania.

The case is now with the Supreme Court of Nirvania, which has asked the main parties to the dispute, Mr Doright and Payme Bank, to discuss settlement using the applicable law of the UCS before referring the case to the highest court of the UCS, the Supreme Court of the UCS.

Additional factual information to assist in negotiations

The following has been established in the case:

- Bliss was incorporated in Nirvania only to ease the flow of cash to Revon.
- Bliss's registered office in Nirvania was a mailbox.
- Bliss had no employees located in Nirvania.
- Bliss owned real property in Nirvania.
- Bliss did carry out some business operations in Nirvania.
- Bliss had its main office building in Atlantia and was managed from this location.
- Bliss used Revon's factories in Atlantia to produce all its products.

Task 1: Role-play

Divide into two different groups, with one group acting as lawyers for Payme Bank and the other acting as the legal team assisting Mr Doright.

1. Prepare for negotiations with the other party, referring to the relevant legal documents on the opposite page. You should:
   - identify the legal issues of the case and determine arguments for your side;
   - list the strengths and weaknesses of your side of the case;
   - decide which parts of the relevant legal documents most strongly support your case and can be used to argue against the other party's case;
   - make notes for the negotiation: What are your goals? What are you willing to give? What are you not willing to give?
2. Pair up with a representative of the other party and negotiate a settlement.
3. Report the results of your negotiations to the class.

Task 2: Writing

Write a letter from Mr Doright to the Regional Administrative Tribunal in Atlantia and the Government of Atlantia in which you advise them of the likely arguments of the other party based on the relevant facts of the case and applicable law, and tell them how you intend to meet these arguments.

Relevant legal documents

Text 1: UCS Regulation on Insolvency, Section 5

Section 5
International jurisdiction

1 The courts of the Cooperating State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2 Where the centre of a debtor's main interests is situated within the territory of a Cooperating State, the courts of another Cooperating State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Cooperating State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Cooperating State.

3 Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

Text 2: UCS Regulation on Insolvency, Section 18

Section 18
Principle

1 Any judgment opening insolvency proceedings handed down by a court of a Cooperating State which has jurisdiction pursuant to Section 5 shall be recognised in all the other Cooperating States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Cooperating States.

2 Recognition of the proceedings referred to in Section 5(1) shall not preclude the opening of the proceedings referred to in Section 5(2) by a court in another Cooperating State. The latter proceedings shall be secondary insolvency proceedings in accordance with the provisions of this Regulation.

Text 3: excerpts from a leading decision regarding the application of Sections 5 and 18

An entity's centre of main interest must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings.

Section 5's presumption can be rebutted by factors which are both objective and ascertainable by third parties and which enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

15 Competition law

1 Reading A: Introduction to competition law

The following text gives a brief overview of competition law and the terminology connected with it. This area of law has grown increasingly complex as markets have become more global and international mergers and takeovers more common.

Read the text below and match the words in the box with their definitions (1–4).

cartel	merger	monopoly	oligopoly

1 a market situation in which a small number of firms compete with each other
2 an organisation or group that has complete control of an area of business so that others have no share
3 a group of similar independent companies who agree to join together to control prices and limit competition
4 the joining together of two or more companies

Competition law[1] concerns itself with the regulation of business activities which are **anti-competitive**[2]. This area of the law is very complex, as it combines economics and law. The legal English used is also complex and is made even more so by the differences in the language and law employed by the two major actors in competition regulation, the European Union and the United States. EC competition law is rooted in the creation of the **single European market** and, as such, prohibiting private **undertakings**[3] from partitioning the Community market along national lines is a fundamental goal. The origins of competition law in the United States, on the other hand, can be found in the term '**antitrust**'. In the late 19th century, enormous amounts of wealth were amassed in some important national industries such as railways, steel and coal. The 'barons' who controlled these industries artfully created **trusts** to shield their fortunes and business empires. Those who fought against these practices came to be called **trustbusters**. Their efforts culminated in the **Sherman Act**, which was enacted to put an end to these practices. The overall purposes of competition law are often the subject of debate and differ from jurisdiction to jurisdiction. However, on the whole, it is accepted that competitive markets enhance **economic efficiency** because they maximise consumer benefit and optimise the allocation of resources, which is good for **market economies**. Competition law regulates **cartels**, **monopolies**, **oligopolies** and **mergers**. A cartel is a type of agreement among undertakings which would normally compete with each other to reduce their output to agreed levels or sell at an agreed price. One of the key ingredients in sustaining a cartel is a defined **relevant market** with high **barriers to entry** so that new undertakings cannot **penetrate the market**. The classic tool used by the cartel to gain monopoly profits is **price fixing**. In broad terms, a monopoly is an undertaking or inter related group of undertakings which either control the supply

[1] (US) antitrust law
[2] (US) An American antitrust lawyer would describe such behaviour as 'restraint of trade' (from one of the governing acts (the Sherman Act)).
[3] This is the term used in Article 81 of the EC Treaty. In the US, any number of terms could be used here, including *business*, *firm* or *enterprise*.

(and therefore the price) of a product or service or exclude competition for that product or service. An oligopoly is a market with only a small number of market actors, who are able to adopt **parallel behaviour** in relation to price-setting or output decisions. Common aspects of enactments aimed at preventing anti-competitive activities include restrictions on **abuse of a dominant position**[1] through such instruments as **predatory pricing** and **tie-in arrangements**, among others. The United States even prohibits behaviour which attempts to gain a monopoly position.

Merger regulation is another common aspect of legislation aimed at limiting anti-competitive concentration of market power. In this context, it is also important to discuss the terms *horizontal* and *vertical*. 'Horizontal' denotes the joining of undertakings which are at the same level in the economic supply chain; 'vertical' denotes the joining of undertakings at different levels in the economic supply chain.

[1] (US) abuse of monopoly power

2 Key terms: Anti-competitive activity

Match these terms (1–4) with the examples of anti-competitive activity they describe (a–d).

1 barriers to entry
2 price fixing
3 predatory pricing
4 tie-in arrangement

a A manufacturer of computer components requires that consumers purchase other equipment made by the firm in order to keep the warranty valid.
b The major petroleum corporations in a country all agree to raise the prices of petrol and petroleum products.
c A company interested in entering the telecommunications market in a particular country has to deal with restrictive government licensing practices and complex bureaucratic procedures which inappropriately favour domestic suppliers before it can offer its services.
d A new Internet provider enters the market, and the main provider in the region temporarily lowers the cost of its services dramatically.

3 Reading B: Anti-competitive activities and antitrust measures

The large number of competition-law cases heard before the courts and other bodies which deal with anti-competitive activities represents a challenge for lawyers who need up-to-date information about measures taken. The text on page 210 is an excerpt from a list of case summaries published regularly by the Institute of Competition Law, an institute which maintains a database on national competition case laws and antitrust measures taken in 30 countries in Europe.

3.1 Quickly look at the list on the next page and answer these questions.

1 Who do you think would be interested in reading such information?
2 Why do you think the list appears in this form?
3 What does *NCA* stand for?

3.2 A lawyer writing a report comparing recent measures taken against anti-competitive activities in the waste-management sector with other sectors in Europe is looking for information. Will the list of case summaries be of use to him?

- The Bulgarian Competition Authority held that a network of vertical exclusivity agreements covering 86% of the relevant market has anti-competitive effects (Megalan – Universities).
- The Bulgarian Supreme Administrative Court handed down an NCA decision finding that a holder of the trade mark 'Der Grüne Punkt' abused its dominant position on the collective waste-management market (Ecopack Bulgaria).
- The Czech Competition Office fined a mineral-water-producing company for export bans, but substantially lowered the fine, taking into consideration co-operation and commitments (Karlovarske mineralnı vody).
- The Irish High Court found that four Dublin local authorities acted in breach of Irish competition law in proposing changes to how the domestic-waste sector is regulated (Nurendale Limited – Panda Waste Services).
- The German Federal Cartel Office cleared a merger in the market for waste-disposal services subject to remedies including the divestiture of an asset/share package (Sulo/Cleanaway).
- The German Federal Cartel Office prohibited a waste-glass joint-purchasing cartel between container-glass manufacturers (GGA).
- The Macedonian Administrative Court upheld the NCA's decision establishing abusive charges on the electricity distribution market (Elektrostopanstvo).
- The Macedonian Administrative Court upheld the NCA's decisions establishing abusive charges on the mobile telecommunications market (T-Mobile).
- The Macedonian Competition Authority found anti-competitive practices on the market for radio advertising (Ros Metropolis Radio).
- The Polish Competition Authority imposed the biggest fine in its history on members of a cement cartel (Lafarge Cement et al.).
- The Polish President of the Office for Competition and Consumer Protection fined an operator and ten distributors for vertical price collusion with respect to trailer accessories (Knott).
- The Portuguese Competition Authority handed out fines totalling €14.7 million to five undertakings implicated in the Canteen Cartel and used the leniency regime for the first time (Eurest, Trivalor, Uniself, ICA/Nordigal, Sodexo Portugal).
- The Romanian Competition Authority imposed an 8% fine on an association of undertakings for price fixing and referred for the first time to criminal investigation bodies (Association of the Depositories of Cereals).
- The Turkish NCA imposed a fine of €17.3 million on the incumbent telecommunications operator for its abusive practices in GSM and mobile marketing services market (Turkcell).

3.3 Skim through the list quickly and answer these questions.

1. In which country was a network of vertical exclusivity agreements found to have anti-competitive effects?
2. How much did the National Competition Authority fine a telecommunications operator in Turkey?
3. In which sector did the German Federal Cartel Office clear a merger?
4. How many distributors were fined in Poland for vertical price collusion?
5. Why were five undertakings fined in Portugal?

3.4 The lawyer writing the report mentioned in Exercise 3.2 has decided to reorganise the information in the list of case summaries on the basis of industry rather than country. Use the information from the list above to complete the gaps in the table on the next page.

Sector	Country	Measure taken	Violation	Authority
education	Bulgaria	decided	anti-competitive activity	**1** .....
waste management	Bulgaria	handed down NCA decision	abuse of dominant position	Bulgarian Supreme Administrative Court
	Ireland	decided	abuse of dominant position and anti-competitive effects	Irish High Court
	Germany	**2**		German Federal Cartel Office
	Germany	decided	formation of cartel	German Federal Cartel Office
food	Czech Republic	fined	export bans	Czech Competition Office
	Portugal	fined	**3**	Portuguese Competition Authority
	Romania	**4**	price fixing	Romanian Competition Authority
electricity	Macedonia	upheld NCA decision	abuse of dominant position	Macedonian Administrative Court
5	Macedonia	upheld NCA decision	abuse of dominant position	Macedonian Administrative Court
	Turkey	fined	**6**	Turkish Competition Authority
advertising	Macedonia	decided	anti-competitive activities	Macedonian Competition Authority
construction	Poland	fined	formation of cartel	**7** .....
automotive	Poland	fined	**8**	Office for Competition and Consumer Protection

3.5 Match these verbs (1–5) with the nouns (a–e) they collocate with in the list of case summaries on page 210.

1 abuse	**a** a cartel
2 clear	**b** prices
3 collude on	**c** a fine
4 prohibit	**d** one's position
5 impose	**e** a merger

4 Writing A: Using passive constructions

4.1 A client has asked you to inform him of recent anti-competitive activities in the waste-management sector in Europe and the measures taken against the offending companies. Look at the relevant cases in the table above. In what way do the violations committed and the measures taken differ?

4.2 Using the information in the table, write a short email to your client in which you compare the anti-competitive activities in the waste-management cases. Where appropriate, use passive constructions to focus on the receiver of the action and the action taken.

EXAMPLES:

A telecommunications company in Turkey was fined for abusing their dominant position on the mobile marketing services market.

The Macedonian NCA's decision establishing abusive charges on the electricity distribution market was upheld by the Administrative Court.

5 Listening A: Advising on competition law risks

High-profile cases involving competition-law violations committed by large, well-known companies often appear in the news. However, undertakings of all sizes and sectors of the economy are equally bound by the laws prohibiting anti-competitive activities. For this reason, lawyers must advise their business clients about the competition-law risks associated with certain business practices and warn them of the possible consequences of such illegal behaviour. You are going to hear a dialogue between a US lawyer, Mr Langston, and his client, Mr Greene, the owner of a taxi company.

5.1 Listen to the discussion and tick the terms mentioned by the lawyer.

1 anti-competitive behaviour ☐
2 bid-rigging ☐
3 price fixing ☐
4 per se violation ☐
5 tie-in arrangement ☐
6 territorial allocation ☐
7 predatory pricing ☐
8 vertical agreement ☐
9 abusing a dominant position ☐

5.2 Listen again and decide whether these statements are true or false.

1 Mr Greene is worried that the entry of a new competitor into the market will adversely affect his business.
2 His competitor has suggested a tie-in arrangement that would make entering the market more difficult for the new taxi undertaking.
3 Mr Greene thinks that small businesses should operate under different rules from large corporations.
4 The lawyer warns his client that anti-competitive activities always result in criminal prosecution.

6 Language use: Warning a client of risks

In the discussion, Mr Langston warns his client of the risks associated with anti-competitive activities. He uses the following phrases:

Let me caution you that *the fines can be very high for this sort of activity.*
I must warn you that, *in this jurisdiction, individuals directly involved in serious anti-competitive behaviour face the threat of criminal prosecution, which could lead to imprisonment.*
You should be aware that *the risks of being a party to an anti-competitive agreement or abusing a dominant position are serious.*

Other phrases that can be used in this way are:
I must advise you that ...
I urge you to consider that ...

Working with a partner, conduct two lawyer–client interviews, taking the role of the lawyer in one and of the client in the other.

When you play the lawyer

- Read the information about an area of anti-competitive activity.
- Conduct an interview with the client, asking questions to learn more about the situation.
- Think about how the information you have read applies to the situation he/she describes. Inform your client of the risks and warn him/her of the possible consequences.
- Make recommendations for his/her future behaviour.

When you play the client

- Answer your lawyer's questions, supplying one piece of information at a time. Allow your lawyer to ask you questions; don't tell him/her everything at once. Be creative and invent answers to questions when necessary.
- Respond to the questions and the information and advice you are given as you think a business person would in the given situation.

Student A: Look at the notes on page 301.
Student B: Look at the notes on page 302.

7 Text analysis: A proposal

Following a conversation with a client, a lawyer will often write a letter to suggest a particular course of action.

The letter on page 214 was sent by a lawyer who works in a large law firm to one of his clients, the managing director of a construction company.

7.1 Read the letter and answer these questions.

1 What is the client's problem?
2 What solution does the lawyer propose?

7.2 Match these functions (a–f) with the paragraphs of the letter (1–6) which serve these functions.

a Benefits of the solution
b Closing
c Proposed solution
d Reason for writing
e Implementation of the solution
f Description of the problem

The letter was written to suggest a possible solution to the client's problem, so in some instances, the writer informs the reader what would happen if a particular course of action were taken or if certain conditions were applied. In these cases, a word or phrase expressing the meaning of *if* and a phrase with *would* are used to indicate the possible outcomes. However, the writer also employs verb constructions with *would* to express desire or inclination, to state an opinion, or to make a request politely.

7.3 Read the letter and identify all the uses of *would* in the letter and determine their meaning.

Dear Mr Richardson July 30, 2012

1 As a follow-up to our telephone conversation last week in which we discussed some of the tendering difficulties your construction company has been having recently, I would like to make a few recommendations.

2 You described in detail the sudden and marked drop in the number of contracts awarded to your company in the last 12 months, particularly in the commercial property sector, which has traditionally been one of the principal areas of activity of your firm. You also told me about several recent calls for tender in which your company participated; your very competitively priced bids were all rejected, and the contracts in every case were awarded to two of your competitors.

3 After consulting with my colleague David Fisher of our Antitrust and Competition Department, I have come to the conclusion that it would be wise to look into the possibility that anti-competitive agreements have been concluded by your competitors. As you are surely aware, behaviour of this kind is not unusual in a market situation such as the present one. It could certainly account for the dramatic decrease in business you have been experiencing.

4 In the event that your competitors are found to have been engaging in activities of this kind, the benefits for your own company would be considerable. These benefits would range from a likely increase in market share to more intangible, but nonetheless valuable, benefits such as a reputation for honest dealings.

5 Should you be interested in pursuing this course of action, David Fisher would be happy to assist you. Mr Fisher has a great deal of experience in investigating cases of this kind. At your request, he could begin an enquiry into the matter, which, in its early stages, would involve information-gathering in the broadest sense (including an analysis of relevant tendering processes). Such an enquiry could take a substantial amount of time to conduct. Should this enquiry uncover information confirming our suspicions, then our firm is well prepared to assist you.

6 Please let me or David Fisher know if you would be interested in having us undertake such an enquiry on your behalf, or if you have any other questions about the matter.

I look forward to hearing from you.

Yours sincerely

Martin Stockwell

8 Writing B: A proposal

Using the letter above as a model, write a proposal in the form of a letter to a client who is the managing director of a large company in the service sector. Your client's industry has seen cases of cartel formation and price fixing in the past. In order to protect your client against the risks of anti-competitive activities, you recommend that he set up guidelines for his employees to help prevent anti-competitive behaviour. In your letter, you should:

- state the reason for writing;
- outline the problem and warn your client of the risks of anti-competitive activities;
- make your recommendation as a solution to this problem;
- point out the benefits to his firm;
- briefly discuss how such guidelines can be developed and implemented with your assistance;
- use *would* where appropriate to inform your client what would result from a particular course of action;
- offer to provide further help, if necessary.

9 Reading C: A cartel case in China

9.1 Read the title and the first paragraph of the text below, then answer these questions.

1. What kind of text is this? Who was it written for?
2. Which companies are involved? What sector of the economy are they in?
3. Which illegal activities were the firms engaged in?

China fines agricultural companies for agreeing to raise the price of their products

Background

On 1 July 2010, China's NDRC, the body responsible for all price-related antitrust actions under the Anti-Monopoly Law ('AML'), announced that it, acting with assistance from the Ministry of Commerce ('MOC') and the State Administration of Industry and Commerce ('SAIC'), had fined a number of agricultural companies for conspiring to raise the price of green mung beans across 16 provinces, regions and municipalities in China.

The Green Mung Bean Cartel is the second cartel case to have been brought by the NDRC in recent months and reaffirms its intention to clamp down on anti-competitive behaviour.

The Green Mung Bean Cartel

The Green Mung Bean Cartel was alleged to have been formed on 17 October 2009 following a meeting between over 100 distributors of green mung beans at the Jingta Hotel, in the city of Taonan, Jilin Province. The organisers of the meeting, Jilin Corn Centre Exchange ('JCCE'), summoned 109 distributors from 16 provinces, regions and municipalities across China for a so-called 'conference' on the price and production of green mung beans.

In order to make companies think that green mung beans were in high demand, JCCE is reported to have fabricated a report called 'Research Report on Green Mung Bean Plantation 2009', claiming that 'output in major mung-bean production regions had fallen by 64.05 per cent in 2009'. This was in contrast to the official Chinese government figure, recorded in the China Agricultural Yearbook, that showed an actual decrease of 14.9 per cent.

JCCE, together with other surrounding provinces and other agricultural companies, is alleged to have fabricated and spread false information of the reduced supply and reached a consensus on a price increase for green mung beans. The consensus reportedly resulted in the price of green mung beans increasing from 9 Yuan per kilogram in October 2009 to 20 Yuan by May 2010 across the whole of China.

Penalties imposed

As alleged chief co-ordinator of the cartel, JCCE received a fine of RMB1million (£100,000) for its part in organising the 'conference' and producing and circulating the fraudulent information. This is the largest fine that the NDRC has awarded for anti-competitive activities since the AML came into force.

Three other enterprises providing the main co-operation in the alleged cartel were subject to fines ranging from RMB300,000 (£30,000) to RMB500,000 (£50,000).

Comment

We previously criticised the NDRC for its lack of activity since the inception of the AML, as it appeared to be lagging behind SAIC and the MOC in beginning to fulfil its enforcement duties. However, the Green Mung Bean Cartel Case, its second cartel investigation in three months, shows that the NDRC is really starting to step up its anti-monopoly enforcement activities under the AML.

What is clear is that the NDRC is becoming more focused on cartel activities involving price, and we can expect to see more enforcement actions in the near future. Companies that are part of a cartel or monopoly agreement should be concerned about the NDRC exercising its power more widely and should be aware of the possibility of on-site investigations, dawn raids and substantial fines.

9.2 Read the whole text and answer these questions.

1 What did the anti-competitive activities of the mung-bean producers entail?
2 What is significant about the amount of the fine imposed?
3 What is the general importance of the case for companies doing business in China?

9.3 Complete these phrases from the text. Then explain what each phrase means in your own words.

1 to clamp ..... on anti-competitive behaviour
2 to be ..... high demand
3 to reach a consensus ..... a price increase
4 to be subject ..... a fine
5 to be lagging ..... SAIC
6 to step ..... its anti-monopoly enforcement activities ..... the AML

9.4 Which of the phrases in Exercise 9.3 are phrasal verbs (a verb and one or more additional words, usually a preposition or adverb, which has the function of a verb and behaves as a semantic unit)? What other phrasal verbs do you know? Brainstorm a list with a partner.

9.5 Discuss these questions.

1 What is your opinion on the case? Do you think the fines were particularly severe, lenient or just? Do you think fines deter others from engaging in such activity?
2 In your opinion, what do you think the NDRC's actions indicate about the agricultural sector in China? Do you think the NDRC's actions represent a state-dominated economy or an effort to integrate the domestic economy into the international one?
3 Think about how you would tell another lawyer who is not familiar with the case about it. How would that differ from the way you would tell a client who deals in food products in China about it?

9.6 Reduce the information in the article to a few key points. Then present the information to another student. One of you should present the information as if to another lawyer, and the other should summarise the article as if to a client.

10 Listening B: Merger control

Another important area of anti-competitive policy is merger control. Lawyers working for governmental institutions are involved in the investigation of proposed mergers. Their work is aimed at preventing the creation of structures that will lead to anti-competitive activities.

You will hear an excerpt from a speech on the evaluation of mergers given by a representative of the South African Competition Tribunal to an audience of business people and lawyers. The purpose of the Competition Tribunal is to adjudicate competition matters in accordance with the South African Competition Act. The speaker outlines the steps taken in the evaluation of mergers.

10.1 Listen to the excerpt and answer these questions.

1 Which of these phrases best expresses the main purpose of this part of the speech?
   a to compare South African merger regulation with that of other countries
   b to convince the listeners of the importance of merger control
   c to help companies planning to merge to formulate their arguments in favour of merging more effectively
   d to explain the reasons for renewing the Competition Act

2 What does the speaker mean when he says that 'there's no public policy presumption against mergers'?
   a The merger evaluation process primarily seeks to prevent proposed mergers based on exaggerated claims from being carried out.
   b The competition authorities acknowledge the fundamental necessity of corporations to restructure their business to increase productivity.
   c Merger investigators tend to favour small-scale mergers that do not infringe on competition requirements.
   d A merger that has been designed with the aim of dominating the market will not be approved.

10.2 Listen again and choose the best answer to each of these questions.

1 According to the speaker, what is the first step in the evaluation of a merger?
   a determining whether the merger will lead to the company having a small or a large market share
   b analysing the effect of the merger on competition
   c defining the state of international trade in the product

2 The speaker recommends that when a company argues that a merger will increase its efficiency, the company should:
   a present data to support this claim.
   b refer to the economies-of-scale idea.
   c speculate on the advantages that can be expected to result.

3 According to the speaker, the third and final step in the evaluation process involves:
   a considering the effect of the merger on public interest.
   b surveying public opinion regarding the merger.
   c deciding whether the merger can be administrated effectively.

10.3 Discuss these questions.

1 How is merger control carried out in your jurisdiction? Which authority is responsible for it?
2 What do you think the speaker means when he says 'efficiency gains from the merger'? Can you identify some of the gains alluded to? How are these gains analysed and weighed in your jurisdiction? Are benefits to consumers, such as lower prices, included in this analysis? Should they be?

11 Reading D: Report on changes in merger regulation

Lawyers assist their corporate clients in the EU in getting clearance from the European Commission or a Member State(s) on the competition-law aspects of a merger or acquisition. Naturally, they need to be aware of any changes in the procedures to follow and the deadlines which apply. The text on page 218 is an excerpt from a report on changes resulting from the reform of the European Community Merger Regulation (ECMR). The report was published on the website of a law firm serving large corporations.

11.1 Read the first paragraph of the report and answer these questions.

1 What does the term *one-stop shop* usually refer to, and what does it refer to here?
2 The word *threshold*, which appears several times, refers here to the turnover threshold. Explain *turnover threshold* in your own words.

11.2 Read the whole text and answer these questions.

1. What are the two purposes of a pre-notification request?
2. According to the text, what are the advantages and disadvantages associated with the pre-notification process?

11.3 Match these words (1–4), italicised in the text, with their definitions (a–d).

1 to *notify* to the Commission	**a** while awaiting
2 to *object* to a request	**b** directing
3 *pending* the final case allocation	**c** to oppose
4 *referral* of cases to an authority	**d** to inform officially

Jurisdiction

One of the great strengths of the ECMR is its one-stop shop – the ability *to notify once to the Commission* rather than in each of the 25 Member States. Whereas the largest mergers and acquisitions meet the ECMR thresholds and need therefore be notified only in Brussels, it has become clear that a significant number of mergers with a European dimension do not meet the ECMR thresholds and require notification in each of several Member States, creating unnecessary burdens and costs for the parties. In future, where a case falls below the existing thresholds, and where notification would otherwise have been required in at least three Member States, the parties will be able to make a pre-notification request to the Commission to take over the case from the national authorities. If no Member State concerned opposes the application within 15 working days, the Commission will have exclusive jurisdiction throughout the EEA. If any Member State *objects*, the case will not be referred.

In the opposite scenario, the parties may also make a pre-notification request that the case should be examined by a national competition authority rather than the Commission. If the Member State does not object and the Commission agrees within 25 working days that a distinct market exists in that Member State and that competition in that market may be significantly affected by the concentration, it may refer the case to that national authority and national law will apply in that Member State. The Commission will apply EC law in other Member States.

This pre-notification process will inevitably involve a degree of uncertainty *pending the final case allocation* and will therefore need to be managed carefully if the desired result (usually a single filing) is to be achieved. Clearly, this additional stage will tend to increase the timescale to obtain clearance. The criteria for post-notification *referral of cases* between the Commission and national authorities and vice versa are also made more flexible.

12 Writing C: An informative email

As a lawyer in the Competition Law department of your law firm, you want to inform one of your corporate clients who is considering a merger about the new pre-notification process described above. Write a letter telling your client how pre-notification works and what advantages it would have for his firm.
In your letter, you should:

- state the reason you are writing;
- explain the cases in which a pre-notification request can be filed;
- point out the advantages of pre-notification;
- indicate possible disadvantages;
- offer to provide further information if required.

13 Speaking: Giving opinions: a competition-law case

A competition-law case which received a great amount of publicity was the Microsoft case.

One of the key charges in the antitrust suits against Microsoft was that the packaging of the Internet Explorer browser with the Windows operating system constituted an illegal tie-in sale.

You can refer to the opinions of others using the following expressions:
The Microsoft Vice-President ***suggests/implies that*** *...*
Attorney-General John Ashcroft ***maintains/claims that*** *...*

You can say whether you agree or disagree by saying:
I completely agree/disagree *(with this view).*
He/She ***is clearly right*** *(with regard to this).*

Read these diverging opinions on the effect of Microsoft's monopoly position on the market and on consumers and say what you think. Has Microsoft's position in the market helped or harmed competition and consumers?

US Attorney-General John Ashcroft, on the settlement imposing restrictions on Microsoft's behaviour:

'A vigorously competitive software industry is vital to our economy, and effective antitrust enforcement is crucial to preserving competition in this constantly evolving high-tech arena. This historic settlement will bring effective relief to the market and ensure that consumers will have more choices in meeting their computer needs.'

Microsoft Vice-President Bob Herbold in a letter to Ralph Nader, activist attorney and consumer rights advocate:

'[The] premise that Microsoft has been a disincentive to competition and innovation is simply wrong. As an AT&T executive observed last year, the cost of computing has fallen 10 million-fold since the microprocessor was invented in 1971 ... Meanwhile, American software companies provide over 600,000 direct American jobs and grew at seven times the rate of the US economy from 1987 to 1994. That's certainly not a portrait of an industry in decline due to lack of competition. In fact, the growth in jobs and decline in the cost of computing has been helped by the operating system technology in Microsoft Windows, which has enabled software developers and hardware manufacturers to develop thousands of compatible products.'

Unit 15

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 15.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 undertaking enterprise (cartel) firm
2 dimension threshold level limit
3 practices offences activities behaviour
4 secret agreement oligopoly collusion conspiracy
5 to misuse to breach to abuse to use improperly

2 Word formation Complete this table by filling in the correct word forms. Underline the stressed syllable in each word with more than one syllable.

Verb	Abstract noun	Adjective
monopolise	monopoly	monopolistic
collude		
	abuse	
		competitive
discriminate		
	restriction	
		regulatory
allocate		
fine		
notify		

3 Vocabulary: collocations 1 Complete the phrases below using the nouns in the box.

access bids cartel complaint fines petition position practices proceedings

1 to initiate proceedings against a company
2 to suspect a company of abusive pricing .....
3 to abuse its dominant .....
4 to collude on .....
5 to participate in an illegal .....
6 to file a fine .....
7 to limit ..... to a market
8 to impose ..... on a company
9 to lodge a ..... against a company

4 Vocabulary: collocations 2 Complete each of the collocations in these sentences using a word or a form of a word from the phrases in Exercise 3.

1 The Competition Authority fined 20 construction companies over €30 million for participating in an illegal cartel.
2 The Competition Authority is investigating tow-truck service providers who are suspected of ..... pricing practices in breach of Article 81 of the EC Treaty.
3 A consortium of banks was fined for infringement of the Competition Act by means of horizontal agreements between the banks and abuse of a ..... position.
4 Record fines were ..... against drug companies for colluding to fix the price of vitamins.
5 Six roofing contractors have been found to have agreed to fix the prices of roofing services through bid ..... .
6 Diamond dealers plan to ..... a complaint with EU regulators against a giant South African diamond corporation for anti-competitive practices.

5 Vocabulary: collocations with *merger* Decide which of these verbs collocate with the noun *a merger*.

allocate	approve	evaluate	impose	investigate	lodge	reject

6 Vocabulary: irregular plural forms Choose the correct plural form (a or b) for these words. For some of the words, both options are acceptable. Consult your dictionary if necessary.

1	addendum	**a** addendums	**b** addenda
2	analysis	**a** analysises	**b** analyses
3	appendix	**a** appendixes	**b** appendices
4	attorney-general	**a** attorney-generals	**b** attorneys-general
5	bureau	**a** bureaus	**b** bureaux
6	criterion	**a** criteria	**b** criterions
7	forum	**a** forums	**b** fora
8	index	**a** indexes	**b** indices
9	memorandum	**a** memoranda	**b** memorandums
10	notary public	**a** notaries public	**b** notary publics
11	phenomenon	**a** phenomenons	**b** phenomena
12	prospectus	**a** prospectora	**b** prospectuses

7 Prepositions Complete the sentences below using the prepositions in the box.

against	by	for	in	in	of	~~on~~	on	to

The Competition Authority filed a fine petition **1)** ...on... 1 February 2010 accusing FabNet Corporation **2)** ..... having abused its dominant position **3)** ..... the telecommunications market **4)** ..... applying business conditions that discriminated **5)** ..... other companies **6)** ..... order to limit their access **7)** ..... the market. The Competition Authority also imposed fines **8)** ..... the telecommunications companies Chicha Corporation and LinTel Corporation **9)** ..... concluding a vertical agreement restricting competition.

16 Transnational commercial law

1 Reading A: Introduction to transnational commercial law

The following text provides an overview of this increasingly important area of commercial law. It describes what transnational commercial law[1] encompasses and enumerates conventions that govern international commercial transactions.

1.1 Read through the text quickly. Then match each of these questions (1–6) with the paragraph (A–F) that answers it.

1 Which international institutions have introduced measures to harmonise the legal rules and principles governing international commercial transactions?
2 What does the term *transnational commercial law* refer to?
3 When do model laws and uniform rules have the force of law?
4 How does public international law differ from private international law?
5 What areas of the law can transnational commercial law include?
6 What are the most important international conventions governing transnational commercial transactions?

A **Transnational commercial law** is a term used to refer to a set of **international conventions**, **model laws** and **uniform rules and uniform trade terms** which govern international commercial transactions common to a significant number of legal systems. As opposed to other terms sometimes associated with this area of the law, such as **international law**, **public international law** or **private international law**, this term more clearly describes the area of law that international business lawyers deal with on a daily basis. Thus, this unit will focus on private law (as opposed to public law) and cross-border transactions (as opposed to domestic transactions).

B International law can be said to include public international law and private international law. Public international law relates to relations between sovereign states, while private international law (or **conflict of laws**[2]) relates to the law governing rights and obligations of private citizens **domiciled** in two or more different **jurisdictions**, primarily regarding which **domestic** law of the jurisdictions involved shall apply to a dispute. As such, transnational commercial law encompasses private international law.

C Transnational commercial law has emerged over recent decades, pushed on by the growing demand for **harmonisation** of the legal rules and principles governing international commercial transactions. It is estimated that some 60 instruments make up this area of the law, which covers a broad range of subject areas including sales, contract law, electronic commerce, international credit transfers and bank payment undertakings, secured transactions, agency and distribution, insolvency, conflict of laws, international civil procedure, and international commercial arbitration.

[1] Sometimes referred to as *international commercial law*; however, this can cause confusion with *international law* (meaning *public international law*) and *conflicts of law* (meaning *private international law*) as used in the US.
[2] (US) used instead of *private international law*

D In addition to the Rome and Brussels[1] Conventions related to the contractual obligations and jurisdiction and enforcement of judgments of the **supranational** European Union, some of the most successful harmonisation measures have been introduced through international institutions. International conventions and model laws have been supported by the International Institution for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL). Significant uniform rules and trade terms are endorsed by the International Chamber of Commerce (ICC), which is a **non-governmental organisation**.

E Of course, conventions must be **incorporated** into national law to have the **force of law** at a national level. Some examples of significant international conventions governing international commercial transactions include the United Nations Convention on Contracts for the International Sale of Goods (CISG) (1980), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Vienna Convention on Contracts for the International Sale of Goods (1980), the Geneva Convention on Agency in the International Sale of Goods (1983) and the United Nations Convention on the Assignment of Receivables in International Trade (2001).

F Model laws have no legal force *per se*. These instruments only provide a model which a state can **adopt** into law in whole or in part. Good examples of model laws are UNCITRAL's Model Laws on International Commercial Arbitration, Cross-Border Insolvency and International Credit Transfers. Uniform rules and trade terms only have the force of law when **invoked** through reference in contract or established through a previous **course of dealing** or **custom and usage** of trade. The ICC has sponsored most of the measures in this genre, including **Incoterms** (2000), the Uniform Rules for Collections (1995) and the Uniform Rules for Demand Guarantees (1992).

[1] officially referred to as Council Regulation (EC) no. 44/2001

1.2 Answer the questions in Exercise 1.1 in your own words.

1.3 Read the text again and decide whether these statements are true or false.

1. Transnational commercial law deals with the full range of business transactions: both those conducted between sovereign states as well as those between private parties.
2. Harmonisation has progressed, despite the lack of distinct calls for it.
3. International institutions such as UNIDROIT and UNCITRAL introduced the Rome and Brussels Conventions.
4. Uniform rules are only legally binding when they are stipulated in the contract or established by the conduct of the parties.

1.4 Discuss these questions in pairs.

1. To which of the conventions named in the text is your country a signatory?
2. Which conventions have been applied to transnational cases you have dealt with or learned about?

2 Key terms: Transnational commercial law

2.1 Match these key terms from transnational commercial law (1–15) with their definitions (a–o). Some of them can be found in the text on pages 222–223.

1 arbitration clause
2 comity
3 conciliation
4 course of dealing
5 forum
6 hard norms
7 harmonisation
8 jurisdiction
9 lex mercatoria
10 member state
11 NGO (non-governmental organisation)
12 arbitration
13 soft norms
14 supranational
15 uniform rules

a binding international treaty provisions
b contract clause providing that any dispute arising under the contract will be submitted to arbitration, in the place and according to the laws and rules specified in the clause
c recognisable pattern of previous conduct between the parties of a more recent transaction from which a dispute has arisen
d the principle under which countries recognise and enforce each other's legal decrees
e form of dispute resolution (an alternative to litigation through the court system) in which disputes are heard and decided by an impartial arbitrator or arbitrators, chosen by the parties to the dispute
f similar to mediation, in which an impartial third party helps the parties to a dispute to resolve their problem, but which (unlike arbitration) does not lead to a decision to which the parties are bound
g a sovereign state which is a member of a confederation of other such states, such as the European Union or the United Nations
h a court of law or judicial tribunal where disputes are heard and decided
i co-operation between governments and organisations to make laws more uniform and coherent
j beyond national boundaries, at a level above national governments
k body of legal principles that govern business transactions deriving from the established customs of merchants
l the many interpretative and non-binding statements, for example by treaty-monitoring bodies, that can contribute to an understanding and greater compliance of the law
m non-profit and/or voluntary organisation that is not part of government
n the power, right or authority to interpret and apply the law
o norms drafted by authoritative bodies, e.g. UNCITRAL, to create a standard, which may be adopted by various jurisdictions, to govern a particular area of the law, e.g. transport of goods

2.2 Complete the sentences below and on the next page using the key terms in the box.

arbitration clause	comity	course of dealing	forum	harmonisation
jurisdictions	lex mercatoria	member states		

1 EU directives are designed to promote ..... , while leaving it to the ..... to choose the manner of implementation to achieve the intended result.
2 Canada normally follows the principle of ..... and voluntarily enforces judgments rendered in foreign ..... in exchange for the promise of similar treatment.

3 Where two oral contracts for the sale of barley did not incorporate, expressly or by prior ..... , a(n) ..... contained in a standard form contract, the claimant was not precluded[1] from pursuing a claim for breach of contract in the courts, even where it had initially referred the claim to arbitration.

4 While arbitration is regarded as the ideal ..... for resolution of mercantile disputes, and voluntary compliance as the ideal mode of enforcement, national courts may be called upon to resolve such disputes and in so doing, to apply ..... .

3 Reading B: Conflict of laws in private international law

Private international law has undergone rapid transformation over recent decades, growing in both relevance and complexity. Lawyers working on transnational commercial law cases must understand the procedural rules that determine which legal system, and the law of which jurisdiction, applies to a dispute involving cross-border transactions. To acquire advanced specialised legal training, many lawyers enrol in LLM (Master of Laws) programmes in the field of private international law. In many countries, law firms increasingly prefer to hire job candidates with such a degree. The text on the next page, which was assigned to students enrolled in an LLM programme, provides an introduction to basic concepts connected with the issue of conflict of laws.

3.1 Discuss these questions with a partner.

1 What subjects would you expect to find in the curriculum of an LLM programme in Transnational Commercial Law?
2 How important is an LLM degree in your law firm? In your country? What difference would it make to the type of job you could get?

3.2 Scan the text and find terms to complete these definitions.

1 The legal status of an individual with respect to a country, established by an individual being resident in a country with the intention of making it their permanent home, is called ..... . (paragraph 1)
2 The principles and rules applied by courts in order to determine which law is applicable to one or more of the legal issues to be decided in a case are referred to as ..... . (paragraph 2)
3 The practice of seeking to file a lawsuit so that it will be heard by the court most favourable to the party filing the suit is called ..... . (paragraph 4)
4 The principle whereby a court can decline to hear a case if the court believes that another jurisdiction would provide a more convenient forum for the parties is known as ..... . (paragraph 4)
5 The principle by which favours or privileges granted by one state to the citizens or legal entities of another are returned is referred to as ..... . (paragraph 6)

3.3 Read the text again carefully and answer these questions.

1 What are the three issues involved in questions of conflicts of law?
2 In what way is the question of jurisdiction distinct from the choice-of-law question?
3 How do procedural law and substantive law differ?
4 What are some of the factors on which the recognition of foreign judgments can depend?

[1] *To preclude* means 'to prevent' or 'to make impossible'

Conflict of laws is the body of law that deals with disputes that implicate the laws of more than one country or state because some of their constituent elements are connected with more than one jurisdiction. *These elements* may be the events that give rise to the dispute, the location of its object, or the nationality, citizenship, domicile, residence or other affiliation of the parties.

Conflict of law consists of three parts: 1) jurisdiction, which deals with the question of which of the involved states' courts or other organs will adjudicate the dispute; 2) choice of law, which deals with the question of whether the merits of the dispute will be resolved under the substantive law of the state of adjudication or under the law of another involved state; and 3) judgment recognition, which deals with the requirements under which the courts of one state will recognise and enforce a judgment rendered in another state.

The jurisdictional question and the choice-of-law question are distinct, although in many cases they are practically interrelated. *The jurisdictional question* focuses on the relationship between the defendant and the forum state, and asks whether that relationship is sufficiently close as to fairly subject the defendant to litigation in *that state* and to justify utilising *that state's* judicial resources to adjudicate the dispute. *The choice-of-law question* focuses on both parties and their dispute and seeks to identify that state, be it the forum state or another state, whose relationship to the dispute is such as to render most appropriate the application of its law to the merits of the dispute. In many cases, the same relationship that forms the basis of a state's jurisdiction to adjudicate the case can also be the basis for applying that state's law to the merits.

In many conflicts of law, the courts of more than one state may have concurrent jurisdiction to adjudicate the same dispute. In such a case, the plaintiff, who always has the choice of where to file the lawsuit, may shop for the most advantageous forum, a technique known as *forum shopping*. One of the mechanisms devised to discourage this technique is the doctrine of forum non conveniens, which allows a court to decline to adjudicate the suit if, despite the existence of jurisdiction, litigation in that state would be seriously inconvenient, and if another, more convenient, forum is available to the plaintiff.

When a court exercises its jurisdiction to adjudicate a case with foreign elements, the court applies its own procedural law to the proceedings before it. With regard to the merits of the case, however, the court may or may not apply its own substantive law. This is the choice-of-law question, which may be answered legislatively, as in most civil-law systems, or through judicial precedent, as in most common-law systems. These rules may point to the law of either the forum state or another state, depending on each state's pertinent contacts with the case. For example, in tort cases, these rules may point to the state where the tort was committed or the injury occurred (lex loci delicti), in contract cases to the state where the contract was made (lex loci contractus) and in cases involving land, to the state where the property is situated (lex rei sitae).

Regarding the recognition question, recognition of foreign judgments in some countries depends on whether the rendering court applied the law that would have been chosen under the choice-of-law rules of the recognising court or reached a substantially equivalent result. In other countries, recognition is usually denied on public policy grounds to judgments awarding 'excessive' sums of money. Finally, some countries condition recognition on reciprocity – that is, on whether the country of rendition would recognise similar judgments from the second country – while other countries refuse recognition outright in the absence of a treaty requiring such recognition.

3.4 Say whether each of these verbs (1–6) collocates with *a dispute* or *a judgment* in the text. Then explain what the collocations mean in your own words.

1 to adjudicate
2 to give rise to
3 to enforce
4 to render
5 to resolve
6 to recognise

4 Text analysis: Cohesion

The italicised words and phrases in paragraphs 1 and 3 of the text on page 226 serve as cohesive devices, relating one part of a text to another. Such devices link ideas together and give the text as a whole a sense of continuity. These are some of the most common ways to achieve cohesion in a text:

- **Reference:** referring to something previously mentioned, usually with a pronoun (e.g. *it, they*), a determiner (e.g. *this, that*) or by using formulaic expressions (e.g. *the aforementioned, the former*)
- **Substitution:** replacing a word mentioned previously with another, usually more general one (e.g. *such things*)
- **Lexical cohesion:** repeating the same word or using synonyms to refer to it
- **Conjunction:** using connecting words to show the interrelationship of a previously stated idea with a new one (e.g. *consequently, in so doing*)

Read through the text again and underline any other words that have this function. Which of the methods listed above is used in each case? Identify the ideas they refer back to.

5 Listening A: Drafting arbitration clauses

The Law Society, a student organisation at a university offering an LLM programme in Transnational Commercial Law, sponsors guest speakers and informal discussions, providing students with opportunities to meet lawyers practising in the international arena. You are going to hear a guest lecture, hosted by the Law Society and given by a practising lawyer in a large international law firm. An expert on drafting contracts for international commercial transactions, he is speaking about drafting arbitration clauses in accordance with guidelines put forth by the International Chamber of Commerce's (ICC) International Court of Arbitration.

5.1 Before you listen, discuss these questions in pairs.

1 What should an arbitration clause in an agreement concerning an international commercial transaction contain?
2 What kinds of problem can arise in connection with such a clause?
3 The word *arbitral* is used to refer to something related to or resulting from arbitration. What is an *arbitral award*?
4 Which organisations administer arbitration proceedings in your jurisdiction?

5.2 Listen to the speaker and tick the points he mentions.

1 limited ability of the parties to a contract to determine the arbitration process ☐
2 disadvantages of national arbitration organisations ☐
3 features of the ICC model clause ☐
4 different versions of the ICC arbitration rules ☐
5 possible effects of changing ICC arbitration rules in an arbitration clause ☐
6 problems enforcing arbitral awards ☐

5.3 Here is the sample arbitration clause for inclusion in international contracts mentioned by the speaker. Listen to what he says again and underline the three expressions below that he identifies as 'key'. Then discuss what he says about them in pairs. Do you agree about their importance?

> All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

5.4 Answer these questions.

1. What is the speaker's view on 'all-purpose' arbitration clauses?
2. Why does the speaker recommend that parties choose the ICC to administer the arbitration of international commercial agreements?
3. What is the advantage of adopting the rules governing arbitration which are in force at the time the contract is made? What is the advantage of opting to have the amended or modified rules apply?
4. What does the speaker advise with regard to altering the ICC rules?

5.5 Which nouns does the speaker use together with the adjective *arbitral*? Listen again and note the collocations he uses. Can you think of any others?

6 Speaking: A short presentation

In pairs, prepare a short presentation on one of the following topics and present it to another pair. Research your topic on the Internet if necessary.

- International arbitration in your jurisdiction
- Enforcement of arbitral awards in transnational cases
- Advantages of ICC-administrated arbitration proceedings
- What to avoid when drafting arbitration clauses

7 Listening B: A cross-border dispute

You are going to hear a conversation which takes place during a strategy meeting at a Dutch law firm. Betje, a senior lawyer experienced in handling transnational commercial law cases, is discussing a new case with Thomas, a young colleague from an affiliated law firm in the US, who is spending a year at the Dutch firm to gain experience in the law of a supranational political entity, the EU.

7.1 Listen to the conversation and answer these questions.

1. Who are the parties involved in the legal dispute?
2. What gave rise to the dispute?
3. What course of action does the senior lawyer believe should be taken in the case, and why?

7.2 Read the letter on the next page from the client, TransGerman GmbH. Then listen to the conversation again and make notes on the letter about the information the junior lawyer has to find out. The first note has already been written for you.

Dear Ms Van Bruggen

I am writing to request your help in a legal matter. We recently contracted with one of our customers, Lukas Sportswear, to transport a consignment of clothing from the Netherlands to France. Unfortunately, some of the goods were damaged in transit, and Lukas Sportswear now wants compensation for the damaged goods and a refund of customs duties.

where is Lukas incorporated?

What actually happened is still not completely clear. However, as I understand it, the goods were picked up in Rotterdam and loaded onto two trucks bound for Lyon, France. During the transport of the goods, the two drivers stopped at a petrol station to refuel and eat dinner. When they left the station restaurant, they discovered that a fire had started in one of the truck trailers. The second truck was damaged by smoke.

I received a letter yesterday from Lukas Sportswear demanding €675,000, representing the loss of all of the consignment in the fire-destroyed container. They are also claiming loss for smoke damage to the remaining part of the goods plus German duties owed on the goods.

Could you please inform me what our options are and how we should proceed? I have a meeting scheduled next week with representatives of Lukas Sportswear and would therefore appreciate a quick written response.

Sincerely

Sabina Belling

Assistant Managing Director

TransGerman Forwarding & Shipping, GmbH

8 Writing A: Planning the contents and structure of a letter

When writing to a client, care should be taken to plan the contents and structure of the letter. Discuss these points in pairs.

1 What should the letter to TransGerman contain? Make a list of content points. (You may want to look at the table about letters of advice on page 31 and the content points for a follow-up letter (a–g) on page 86.)
2 Choose appropriate sentence openers for these content points. (You may want to look at the phrases on page 59.)
3 How should the letter be structured? Agree on the optimum order of these sections.

9 Reading C: An article from the CMR

This is the article referred to by the senior lawyer in the meeting about the TransGerman case. It is from the Convention on the Contract for the International Carriage of Goods by Road (CMR), a United Nations convention relating to legal issues concerning transportation of cargo by road, which was ratified by most European states.

9.1 Read the article quickly. Generally speaking, what does it deal with? More specifically, how does it relate to the TransGerman case?

Article 31

1 In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a *contracting country designated by agreement between the parties* and, in addition, in the courts or tribunals of a country within whose territory: (a) the defendant is ordinarily resident, or has his *principal place of business*, or the branch or agency through which the contract of carriage was made, or (b) the place where the goods were taken over by the carrier or the place designated for delivery is situated.

2 Where in respect of a claim referred to in paragraph 1 of this article *an action is pending before a court* or tribunal competent under that paragraph, or where in respect of such a claim a judgment has been entered by such a court or tribunal, no new action shall be started between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the country in which the *fresh proceedings* are brought.

3 When a judgment entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit *the merits of the case* to be re-opened.

9.2 Read the article again and discuss the meaning of these expressions, marked in italics in the text, in pairs.

1 contracting country designated by agreement between the parties
2 principal place of business
3 an action is pending before a court
4 fresh proceedings
5 the merits of the case

9.3 Answer these questions about the article.

1 In which courts or tribunals may a party bring an action?
2 When is it permissible for a new action to be brought before the court in a dispute which is already pending or for which a judgment has already been entered?
3 When does a judgment become enforceable in other states which are party to the Convention?

10 Writing B: Textual transformation

When writing, lawyers commonly make use of information from one or more texts to create a new text. Often certain changes must be made in the way language is used so that it is appropriate for the reader or listener of the target text. This can be necessary, for example, when turning notes taken during a discussion into a report or email, or when explaining a complex written text, such as a statute, to a layperson in everyday language the client can understand. These changes, which can be referred to as textual transformation, can include changes in:

- register, for example from informal to formal style
- mode, for example from speech to writing
- the way information is represented, for example from visual to verbal representation (e.g. when writing about a diagram or table)
- the degree of specialised or technical language used (e.g. when paraphrasing a statute for a non-lawyer)
- the order and the choice of words (e.g. when summarising the ideas of another writer or speaker).

Specifically, when writing a text that involves reporting or re-using information from a written or spoken text in a new text, the writer has to consider these questions:

- Does the reader know the technical legal terms, or do they need to be explained?
- Are there any archaic words in the source text that should be avoided?
- Should the sentences be made shorter and less complex so that they are easier for the reader to understand?
- Is the use of personal or impersonal language more appropriate?
- Should the style of the target text be formal or informal? What word choices suit the appropriate style? (You may want to look at the table on the features of formal and informal style on page 184.)
- Where can cohesive devices be used to connect and interrelate ideas?

10.1 Select the information from Article 31 on page 230 which relates to the TransGerman case. In pairs, paraphrase the relevant clauses in your own words, as if you were talking to a client. Then write down these paraphrases, making sure your sentences are correct and in a style appropriate for a letter to a client.

10.2 Discuss what kinds of textual transformation the junior lawyer will have to carry out when writing the letter to TransGerman.

10.3 Formulate the questions he needs to ask in a style appropriate for a letter to a client (see page 146 for phrases for requesting information).

10.4 Write the letter to TransGerman, paying attention to the use of cohesive devices to link the ideas in your text.

Unit 16

To improve your web-based research skills, visit www.cambridge.org/elt/ile2, click on Research Tasks and choose Task 16.

Language focus

1 Vocabulary: distinguishing meaning Which word in each group is the odd one out? You may need to consult a dictionary to distinguish the differences in meaning.

1 legal proceedings claim (dispute) action
2 agreement convention treaty norm
3 contracting country member state party signatory
4 arbitration litigation mediation conciliation
5 decide render adjudicate rule

2 Word formation Complete this table by filling in the missing noun or verb forms. Underline the stressed syllable in each word with more than one syllable.

Noun	Verb
adjudication	adjudicate
designation	
	enforce
	reciprocate
recognition	
	resolve

3 Relative clauses with prepositions Complete the sentences below using the prepositions plus relative pronouns in the box.

by which	in which	to which	~~under which~~	under which

1 One of the requirements under which Article 9 recognises international trade usage is that the usage is internationally known and regularly observed.
2 The principle ..... national courts recognise and enforce arbitral awards is undermined when awards that are set aside in one national jurisdiction are enforced in another.
3 There are a number of situations ..... a case can be brought before a Norwegian court, even if the defendant is not resident in Norway.
4 The European Community and Denmark entered into a parallel agreement ..... the rules set out in the Brussels I Regulation were applicable between Denmark and the other Member States.
5 There are rules on alternative judicial venues in a number of international conventions and agreements ..... Denmark is a party, namely the Brussels Convention, the Lugano Convention and the Brussels I Regulation.

4 Word formation read this excerpt from Article 31 of the Convention on the Contract for the International Carriage of Goods by Road. Use the words in the box to the right of the text to form one word that fits in the same numbered gap in the text.

The **1)** provisions of paragraph 3 of this article shall apply to judgments after trial, judgments by default and **2)** ..... confirmed by an order of the court, but shall not apply to interim judgments or to awards of damages, in addition to costs against a plaintiff who **3)** ..... or partly fails in his action. Security for costs shall not be required in **4)** ..... arising out of carriage under this Convention from nationals of **5)** ..... countries **6)** ..... or having their place of business in one of those countries.	**1** PROVIDE **2** SETTLE **3** WHOLE **4** PROCEED **5** CONTRACT **6** RESIDE

5 Vocabulary: Latin terms in transnational commercial law Latin terms are used to refer to those elements of a dispute which are taken into account when making decisions regarding choice of law. Match terms 1–5 with definitions a–e and terms 6–10 with definitions f–j.

1 lex causae	**a** the law of the place where a legal act takes place
2 lex domicilii	**b** the law (usually foreign) which applies to a case once the conflicts-of-law or choice-of-law rules have been applied
3 lex fori	**c** the law of the place of arbitration
4 lex loci actus	**d** the procedural law of the jurisdiction in which a legal action is brought
5 lex loci arbitri	**e** the law of the domicile
6 lex loci contractus	**f** the law of nationality
7 lex loci delicti	**g** the law of the place where the contract is made
8 lex loci solutionis	**h** the law of the place where the tort was committed
9 lex patriae	**i** a plea that a suit is pending in another court for the same cause of action
10 lis alibi pendens	**j** the law of the place where a contract is to be performed or a debt is to be paid

6 Vocabulary: collocations with *law* Complete the missing letters to form words that collocate with *law*. Then explain what each expression means in your own words.

1 m o d e l laws
2 c _ _ f _ _ _ t o _ laws
3 d _ _ _ _ _ _ c law
4 to i _ _ _ _ _ _ _ _ _ e a c _ _ _ _ _ _ _ _ n into national law
5 to have the f _ _ _ _ of law
6 c _ _ _ _ e of law
7 p _ _ c _ _ _ _ _ l law

7 Cohesion Underline the words and phrases that create cohesion in this text about arbitration clauses. Identify the ideas they relate to.

Being an inexpensive, speedy and amicable method of settling disputes, arbitration – along with mediation, conciliation and negotiation – is encouraged by the Supreme Court. Aside from unclogging judicial dockets, arbitration also hastens the resolution of disputes, especially of the commercial kind. It is thus regarded as the 'wave of the future' in international civil and commercial disputes. Brushing aside a contractual agreement calling for arbitration between the parties would be a step backward.

refers back to arbitration in the preceding sentence

Consistent with the above-mentioned policy of encouraging alternative dispute resolution methods, courts should liberally construe arbitration clauses. Provided such clause is susceptible of an interpretation that covers the asserted dispute, an order to arbitrate should be granted. Any doubt should be resolved in favour of arbitration.

Case study 6: Transnational commercial law

The facts of the case

Your law firm has asked you to review the following transnational commercial law case and the relevant documents in preparation for a meeting with the other party's lawyer.

Read this description of the facts of the case. What is the legal issue here?

Gumlex, Inc., a company located in the State of Pennonia, sold and delivered rubber to Lynx Distributors Co., located in the State of Disperia. The contract of sale was formed through oral negotiations and supported by a subsequent purchase order and the conduct of the parties. The rubber was to be delivered on March 15, but was not delivered until May 12. After delivery and inspection, Lynx refused to pay for the rubber, alleging that the rubber was of an inferior quality. Gumlex then examined the delivered rubber at Lynx's premises and confirmed Lynx's due notice of defect with the reservation that 'the rubber is not in as bad a condition as that claimed'. Gumlex offered to take back the rubber in order to market it itself. Lynx neither refused this offer nor claimed damages or replacement of the rubber.

Now, three months later, Gumlex is claiming the purchase price for the rubber. In response, Lynx argues that the contract was avoided based on the delay in delivery and agreement between the parties.

The agreement between the parties did not contain any provisions governing which law was applicable to the agreement.

Both Pennonia and Disperia are parties to the Convention on the International Sale of Goods (CISG).

Task 1: Role-play

Divide into two different groups, with one group representing Gumlex Inc. and the other representing Lynx Distributors Co.

1 Prepare for negotiations with the other party, referring to the relevant legal documents on the opposite page. You should:

- identify the legal issues of the case and determine arguments for your side;
- list the strengths and weaknesses of your side of the case;
- decide which parts of the relevant legal documents most strongly support your case and can be used to argue against the other party's case;
- make notes for the negotiation: What are your goals? What are you willing to give? What are you not willing to give?

2 Pair up with a representative of the other party and negotiate a settlement.

3 Report the results of your negotiations to the class.

Task 2: Writing

Write a letter of advice to one of the parties (your choice), in which you outline the legal issues raised by the case, refer to relevant statutes and provide your opinion as to the likely outcome of the case.

Relevant legal documents

Text 1: Convention on Contracts for the International Sale of Goods, Article 1

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different states:

(a) when the states are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

Text 2: Convention on Contracts for the International Sale of Goods, Article 18

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

Text 3: Convention on Contracts for the International Sale of Goods, Article 29

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

Text 4: Convention on Contracts for the International Sale of Goods, Article 47

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Text 5: Convention on Contracts for the International Sale of Goods, Article 49

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so in respect of:

(a) late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) any breach other than late delivery, within a reasonable time after:

(i) he knew or ought to have known of the breach;

(ii) the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) the expiration of any additional period of time indicated by the seller, or after the buyer has declared that he will not accept performance.

Exam focus

Reading

Parts 1–3 of the Test of Reading focus on your use of English, while Parts 4–6 primarily test your reading skills. The texts used are extracts from authentic law-related source material, such as a legal textbook, a contract, a legal website, a law journal article or legal correspondence. Parts 1–3 carry 1 mark for each correct answer, and Parts 4–6 carry 2 marks for each correct answer.

Part 1

What you have to do

This part of the examination consists of two short texts which are not linked thematically. Each text is a multiple-choice cloze: there are six gaps, and your task is to choose the correct option from the four available to fill each gap. An example is given at the beginning.

What is being tested

The task tests your ability to distinguish between similar words and to select words carefully. It also tests your knowledge of collocations, fixed phrases, phrasal verbs and linking words and phrases.

Tips

- Skim the whole text to get an idea of its general meaning.
- The four multiple-choice options provided are all the same part of speech, so they may fit in the gaps grammatically, but not make sense in the sentence. Always read the sentence carefully to check if an option fits the meaning of the sentence as a whole.
- Look carefully at the words preceding and following the gap, as they may serve as clues. You may recognise words that collocate with the correct answer.
- If there are words you do not know in a sentence, try to get a general understanding of the sentence by thinking about its meaning in the context of the text. You may then be able to guess the meaning of the word you are looking for.

Questions 1–6

Read the extract from a legal opinion on the next page.
For each question **1–6**, choose the best word to fill each gap from **A**, **B**, **C** or **D**.
There is an example at the beginning **(0)**.

Our opinions and advice **(0)** ..... out below are based upon your account of the circumstances giving rise to this dispute, a summary of which is as follows. The vendor of the above property is threatening to **(1)** ..... proceedings against you to **(2)** ..... the contract for sale, which you have refused to complete because you take the view that the contract released you from any personal liability. You stated that Mr Little was made **(3)** ..... aware of the fact that Goodwright Tools Ltd was in the process of being formed on the date of signing the contract and the contract contains provisions evincing that fact.
The contract for sale is a standard form agreement **(4)** ..... by the Law Society of England and Wales, and the only section which is relevant for present **(5)** ..... is Section 8 which **(6)** ..... that 'any and all agreements, covenants and warranties shall be construed as being made with the company provided that the incorporation thereof is completed on or before (the completion date).'

EXAMPLE: **0 A** done **B** set **C** kept **D** put

1	**A** submit	**B** terminate	**C** commence	**D** register
2	**A** obstruct	**B** remit	**C** enforce	**D** amend
3	**A** subsequently	**B** obviously	**C** widely	**D** expressly
4	**A** allotted	**B** approved	**C** remanded	**D** concluded
5	**A** purposes	**B** situations	**C** points	**D** questions
6	**A** claims	**B** suggests	**C** indicates	**D** provides

Questions 7–12

Read the following extract from a rental contract.

For each question **7–12**, choose the best word to fill each gap from **A**, **B**, **C** or **D** below.

Integration

This Agreement constitutes the entire agreement between the Parties with regard to the subject matter hereof. All prior agreements and covenants, express or **(7)** ..... , oral or written, with respect to the subject matter hereof, are hereby **(8)** ..... by this agreement. This is an integrated agreement.

Severability

If any provision of this Agreement is **(9)** ..... to be void, invalid, or unenforceable, that provision shall be severed from the remainder of this Agreement so as not to cause the invalidity or unenforceability of the remainder of this Agreement. All remaining provisions of this Agreement shall then continue in full force and **(10)** ..... .

State Law

This Agreement shall be **(11)** ..... and enforced under the laws of the State of California. This Agreement is intended by the **(12)** ..... to comply with all applicable state law governing the rights and duties of landlords and tenants.

7	**A** explicit	**B** suggested	**C** suspended	**D** inferred
8	**A** terminated	**B** superseded	**C** amended	**D** followed
9	**A** stipulated	**B** contended	**C** disputed	**D** deemed
10	**A** intent	**B** application	**C** effect	**D** function
11	**A** imposed	**B** construed	**C** considered	**D** conducted
12	**A** Parties	**B** Lessees	**C** Bodies	**D** Legislators

Part 2

What you have to do

This part of the examination consists of a single law-related text. The task is an open cloze: you have to supply one word for each of the 12 gaps. The text also includes an example.

What is being tested

The task mainly tests your knowledge of grammatical words and structures and text cohesion, which refers to the flow of a text and the interrelationship of ideas. The kinds of item that may be tested in this task include prepositions, auxiliary verbs, pronouns, conjunctions and linkers.

Tips

- Skim the whole text to get an idea of its general meaning. Then read each sentence carefully, bearing in mind that the missing word often has a structural function in the sentence which may only become clear when you have understood the meaning of the sentence as a whole.
- As in the previous task, it is a good idea to look carefully at the words preceding and following the gap, as they may serve as clues. You may recognise words that collocate with the correct answer or grammatical structures that go with it.
- Reread the whole text with your answers in place to check it makes sense.
- Check your spelling, as every word must be spelled correctly.
- Write your answers clearly in capital letters.

Questions 13–24

Read the following extract from provisions regulating the capitalisation of a corporation. Think of the best word to fill each gap.

For each question **13–24**, write **one** word in CAPITAL LETTERS in each gap.
There is an example at the beginning **(0)**.

Upon dissolution, **(0)** WHETHER voluntary or involuntary, the holders of preferred shares shall first be entitled to receive, **(13)** ..... of the net assets of the Corporation, the par value of their shares plus unpaid accumulated dividends, without interest. All of the assets, **(14)** ..... any, thereafter remaining shall be distributed among the holders of the common shares. The consolidation or merger of the Corporation **(15)** ..... any time with any other corporation or corporations, or a sale of all or substantially all of the assets of the Corporation, shall not be construed **(16)** ..... a dissolution, liquidation, or winding-**(17)** ..... of the Corporation. **(18)** ..... as herein otherwise expressly provided, or as otherwise provided **(19)** ..... the laws of this state, the holders of the common shares shall exclusively possess all of the voting power of the Corporation **(20)** ..... all voting purposes, and the holders of the preferred shares shall have no voting power and no holder thereof shall be entitled to receive notice of any meetings of the shareholders of the Corporation. **(21)** ..... the event the Corporation shall default in the payment of dividends on said preferred shares, and said default shall continue **(22)** ..... that three semi-annual dividends (whether or **(23)** ..... consecutive) shall be in default, then during the continuance of any default in the payment of such dividends, but no longer, the holders of preferred shares shall be entitled to notice of all shareholders' meetings and shall have the sole **(24)** ..... exclusive right to vote thereat.

Part 3

What you have to do

This part of the examination consists of two short law-related texts which are not linked thematically. There are six gaps in each text. You have to fill these gaps by transforming the word supplied on the right into a suitable related form of that word. An example is given at the beginning.

What is being tested

The task tests your knowledge of vocabulary and, in particular, affixation and compounding.

Tips

- First, read the text quickly to get a general idea of its meaning.
- Read each sentence carefully to determine the part of speech required to fill the gap(s) in it. Looking at the words adjacent to each gap can help you do this.
- Word transformation involves creating the noun, verb, adjective or adverb form of the word given, usually by adding a prefix and/or a suffix.
- Think carefully about the meaning of the text; for example, a negative prefix may be needed to fit the sense.
- If a noun is required, read the surrounding text to decide whether it needs to be a singular or plural form.
- Check your spelling, as you will not get a mark for any word spelled incorrectly.

Questions 25–30

Read the following extract from Article 81 of the EC Treaty taken from the website of the European Commission.

For each question **25–30**, use the words in the box to the right of the text to form one word that fits in the same numbered gap in the text. Write the new word in CAPITAL LETTERS in the gap.

There is an example at the beginning **(0)**.

1 The following shall be prohibited as **(0)** INCOMPATIBLE with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, **(25)** ..... or distortion of competition within the common market, and **(26)** ..... those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a **(27)** ..... disadvantage;

(e) make the conclusion of contracts subject to **(28)** ..... by the other parties of **(29)** ..... obligations which, by their nature or according to **(30)** ..... usage, have no connection with the subject of such contracts.

0	COMPATIBLE
25	RESTRICT
26	SPECIFIC
27	COMPETE
28	ACCEPT
29	SUPPLEMENT
30	COMMERCE

Questions 31–36
Read the following news item from a legal journal.
For each question **31–36**, use the words in the box to the right of the text to form one word that fits in the same numbered gap in the text. Write the new word in CAPITAL LETTERS in the gap.

The Rights of Third Parties Act 1999

This Act fundamentally reforms contract law by allowing **(31)** ..... parties to confer **(32)** ..... rights on third parties. For **(33)** ..... , the Act presents a new way of allocating risk in complex deals, and a way to protect the customer in prime and sub-contractor situations. The Act erodes the position of the prime contractor and **(34)** ..... the hand of the sub-contractor.

Before the Act, the doctrine of privity of contract prevented a person who was not a party to a contract from enforcing a term of that contract. This meant that even if a contract affected other people, only the parties to it had rights and **(35)** ..... under it. Until now, the only answer for English law contracts was to create either a complex web of trusts or back-to-back contracts or to allow end-users to call off direct contracts with the **(36)** ..... under a general umbrella agreement.

31	CONTRACT
32	ENFORCE
33	SOURCE
34	STRONG
35	OBLIGE
36	PROVIDE

Part 4

What you have to do
This part of the examination usually consists of a single law-related text which is divided into four sections. Alternatively, it can consist of four short texts which are thematically linked. It is a multiple-matching task: you have to match each of the six statements provided to the section of the text to which it corresponds. An example is given at the beginning.

What is being tested
The task tests your ability to scan a text for specific information and to understand the main ideas. It also tests your understanding of the item and your ability to relate it to a part of the text which is expressed in different language.

Tips

- First, read through the six statements; then read the text quickly to get a general understanding of what it is about. Then return to the statements individually and read the text more carefully to find the correct answers.
- Remember that it is unlikely that you will find the exact wording of a question in the text. Instead, look for words or phrases which have a similar meaning.
- Don't try to match the same words in the questions and texts ('word-spotting'), as this may lead you to the wrong answers.

Questions 37–42
Read the questions and the extract on the opposite page from a journal article about the partnership structure of law firms.
For each question **37–42**, decide which section (**A**, **B**, **C** or **D**) the question refers to.
You will need to use some of these letters more than once.

There is an example at the beginning (**0**).

0 In the USA, attorneys are prohibited from forming law firm partnerships with people who are not practising lawyers. D

37 Some observers believe that the prevailing organisational framework of law practices will ultimately be replaced by something else.

38 Professional associations have established regulations which ensure that law partnerships differ from other commercial partnerships.

39 Increasingly, law firms are adopting behaviour typical of businesses.

40 A partnership structure could interfere with a legal counsel's obligations to his clients.

41 The US legal system has traditionally favoured the notion of a lawyer's personal liability for actions taken on behalf of clients.

42 US attorneys may not receive payment for services rendered together with a business associate who is not a lawyer.

Partnership: Can it survive in today's mega-firms?

A One of the most striking changes in the evolution of the American legal market in recent years has been the extraordinary growth of law firms. In 1980, the 250 largest law firms in the country averaged only 95 lawyers. By 2001, the 20 largest firms in the US averaged 1,220 lawyers, and there were 12 firms in the country with more than 1,000 lawyers. This growth has caused many law firms to take measures to increase their commercial viability, such as reorganising their governance and management systems to marshal their resources, marketing their services, and managing their client relationships more effectively. The move toward more centralised governance and management systems has, however, placed increasing pressure on the concept of 'partnership' as the organising model for large law firms. Indeed, it has led many to question whether partnership can survive as the dominant form of law-firm structure.

B The organisation of law firms as partnerships has its roots in the history of English law, in the traditional role of the English barrister as the 'personal representative' of his client. To assure the effective operation of the adversary system, barristers were required to take oaths to the courts to conduct themselves objectively and in the best interests of their clients, without any conflicts of interest whatsoever. As a consequence, barristers were required to operate as individuals and were not permitted to be in partnership with others. They were personal representatives of their clients, and they were liable to both the courts and their clients for the conduct of their office.

C This idea of the lawyer as personal representative was transplanted to America along with the English Common Law itself. American law rejected the notion that lawyers should be required to practise only as separate individuals. It did, however, embrace the concept that lawyers should have personal relationships with their clients and should remain personally liable to their clients for their actions. That led to the requirement that associations for the practice of law could only take the form of partnerships, since only that organisational structure preserved the full personal participation and liability of the lawyers themselves. The partnership model was effectively incorporated into law in most states through the adoption of prohibitions against limitations on personal liability for lawyers.

D In order to enhance the status of lawyers as 'professionals', state bars across the country promulgated rules forbidding lawyers from engaging in activities that are common for other types of businesses. The current Rule 5.4 of the ABA's Model Rules of Professional Conduct reflects these prohibitions: for example, lawyers are forbidden from sharing legal fees with non-lawyers; prohibited from forming partnerships with non-lawyers for the practice of law; and are banned from practising in any type of association in which a non-lawyer has any ownership interest, is a director or officer, or has any right to direct or control the lawyers' professional judgment.

Part 5

What you have to do

This part of the examination consists of a single law-related text, from which six sentences have been removed. You have to read the text and then identify the correct sentence to fill each gap. Eight sentences are provided, which are marked A–H. Sentence H is always the example, and one other sentence is a 'distractor', which does not fit any of the gaps.

What is being tested

The task tests your understanding of the meaning of the text, as well as of the way it is structured, including the way discourse markers can be used to enhance the structure.

Tips

- First, read the text quickly to get a general understanding of what it is about, then read through all of the eight items. You should then return to the items individually and read the text more carefully to find out where they belong.
- Pay attention to any discourse markers – words that signal and link ideas – at the beginning of the items, as they may serve as clues. Similarly, words such as pronouns which refer back to something said in a previous sentence can help you to identify where a sentence belongs.
- Make sure you read the whole text with your answers in place to check that it makes sense.

Questions 43–48

Read the extract on the next page from an entrepreneur's guide to venture-capital negotiations.
For each gap **43–48**, choose the best sentence **A–H** to fill it.
Do not use any letter more than once.
There is one extra sentence which you do not need to use.
There is an example at the beginning **(0)**.

A Key distinguishing factors include experience and depth of the management team, state and proprietary nature of the technology, competitive environment and similar factors.

B These devices, which adjust the number of shares received by the investor (through the use of warrants, conversion price adjustments or other means), operate only when the company achieves (or fails to achieve) a preset financial or business milestone.

C In the former case, dilution is borne solely by the founders, and in the latter case, dilution is borne ratably by the founders and the venture-capital investors.

D Once a venture capitalist makes a preliminary decision to invest in an emerging business, the parties must negotiate the terms of the investment.

E Continuing with the above example, if the company has 500,000 shares of common stock outstanding prior to the investment, the venture capitalist will pay $4 per common stock equivalent share and receive 250,000 shares for its $1 million investment.

F This will include a thorough review of the company's past operating history (should there be any) and its future projections as disclosed in the company's business plan.

G Because such future financings will dilute the prior investors, the greater the expected need for future financing, the more important it is for the venture capitalist to maximise its initial ownership interest.

H Post-money valuation is equal to the pre-money valuation of the business plus the amount of the venture capitalist's investment in the company.

An entrepreneur's guide to venture-capital negotiations

Venture capitalists often refer to the 'pre-money' and 'post-money' valuation of a business. Pre-money valuation is the value the parties agree to place on the entire enterprise prior to the investment of the venture capitalist. **(0)** ⊬ Because the negotiations are often conducted with reference to what percentage of the company's equity the investor will receive for its investment, it may be easier to work from post-money valuation than pre-money valuation. For example, if an investor receives one-third of the company's equity for a $1 million investment, the post-money valuation is $3 million (3 x $1 million) and the pre-money valuation is $2 million (the $3 million post-money valuation minus the $1 million investment).

To determine the value of the emerging business, venture capitalists will conduct an in-depth financial analysis. **(43)** ..... For many early-stage businesses, financial projections are so uncertain that current conditions in the venture market may be the most important single factor in determining valuation. For example, if most start-up businesses in the software industry are receiving first-round pre-money valuations of approximately $2 million at a given time, the negotiation for a particular investment may focus not on the precise financial forecast for the particular business, but on the ways in which that particular business differs from the 'typical' software start-up. **(44)** ..... Another critical part of the analysis will be the likely need for, and size of, prospective rounds of financing that may be required before the venture capitalist is able to 'cash out' its investment. **(45)** .....

Once valuation is established, the price per share can be calculated. **(46)** ..... Equity ownership that is assigned to or included in the pre-money valuation does not dilute the equity interest received by the venture capitalist. Therefore one point of negotiation that should be addressed by companies is whether rights to acquire stock that exist or are created at the time of investment, including shares reserved for employee stock options or shares issuable upon exercise of warrants, are to be considered outstanding before the investment or after the investment. **(47)** ..... At times, valuation negotiations may reach an impasse. In order to bridge a gap between the entrepreneur and investor, performance-based adjustment mechanisms may be employed. **(48)** ..... The practical effect of these mechanisms is often to shift investment risk from the venture capitalist to the entrepreneur.

Part 6

What you have to do

This part of the examination consists of a single, long, law-related text. It is followed by six multiple-choice questions, each with four options. The multiple choice may take the form of a question about an idea or an opinion expressed in the text, about a word or phrase used in the text, or about the meaning of a paragraph in the text. A question may consist of an incomplete sentence which you have to complete by selecting the correct option.

What is being tested

The task tests your ability to read a text for detail. It requires you to be able to recognise and understand implication and opinion, and to be able to identify the detailed meaning of a paragraph, as well as what individual words refer to.

Tips

- As with the other longer exam tasks, it is advisable to skim the text first in order to orient yourself, and then to read through the questions quickly. When reading the text carefully a second time, you should pay attention to detail.
- Remember that when you are asked about opinions or viewpoints expressed in the text, you should answer according to the information contained in the text, and not according to your own opinions or knowledge.
- The function of a paragraph can often be determined more easily by identifying the main or topic sentence of that paragraph.

Questions 49–54

Read the article on the next page about European mergers and acquisitions from a law firm's website. For each question **49–54**, choose one letter (**A**, **B**, **C** or **D**).

49 What is the main point in the first paragraph?

A Many people in the press and government would welcome the end of 'golden shares'.

B Three decisions have been reached with regard to this special shareholders' rights issue.

C Three decisions were issued which allow governments to keep control over former state industries.

D New European High Court decisions will increase the rights of shareholders of privatised enterprises.

50 What does the writer say about golden-share schemes in the second paragraph?

A The French and the Portuguese laws concerning golden shares were approved, despite the fact that they restrict the movement of capital.

B The Court will only tolerate golden-share schemes if the governments safeguard shareholders' rights.

C Golden shares will be permitted under certain carefully defined circumstances, subject to judicial review.

D Golden-share schemes which are based on objective criteria will be lawful if they can be shown to be necessary.

The end of 'golden shares'?

A closer look at the European High Court decisions and what they mean for European M&A

On June 4, 2002, the European High Court issued three decisions regarding 'golden shares', i.e. special shareholder rights designed to enable national governments of EU member states to retain certain controls over formerly government-owned and subsequently privatised business enterprises. The press over-eagerly announced the end of golden shares in Europe.

I The reasoning of the Court

A closer look at the decisions, however, reveals that this is not yet the case. First, the Court struck down only two of the three golden-share schemes at issue (namely the French government's special rights in Elf-Acquitaine and Portugal's law on privatisations), but upheld the Belgian regulation. Second, the Court held that special governmental shareholder rights will be considered justified, even though they constitute a restriction of the free movement of capital, if they: are designed to safeguard the provision of services in the public interest or strategic services as opposed to mere financial interests; lay out well-defined procedures and objective criteria that are subject to judicial review; and do not go beyond what is necessary to attain the objective pursued.

After the Court stated the above justification requirements, it addressed whether the requirements were met in the schemes of each of the countries. The French scheme was struck down because, although it pursued a justified objective (namely, to guarantee supplies of petroleum products in the event of a crisis), the measures employed went clearly beyond that which was necessary to do so. In addition, the Court considered that the French provisions lacked precision and allowed the government too much discretionary power to control the company in question, Elf-Acquitaine.

The Portuguese scheme was struck down primarily because it prohibited the acquisition of more than a given number of shares by nationals of other member states. The Court reasoned that the Portuguese rule provided for the manifestly discriminatory treatment of investors from other member states, with the effect of restricting free movement of capital. The Court rejected the justification arguments which were based on economic grounds.

On the other hand, the Court upheld the Belgian scheme, which was aimed at maintaining minimum supplies of gas in the event of a serious threat, as it met the justification requirements stated above. The objective of safeguarding energy supplies constituted a legitimate public interest, and the Belgian scheme provided for the least restrictive means of attaining such and set out well-defined procedures.

II The impact on European M&A

Although the discussed judgments address specific regulations in France, Portugal and Belgium, the principal reasoning of the Court may be extended to many other forms of special shareholder rights with which takeovers can be impaired or blocked which currently exist in the legal systems of certain member states. In Germany, the Volkswagen Act is now expected to come under closer scrutiny. This regulation caps the voting power of any shareholder in Volkswagen AG at 20%, regardless of the number of shares held. The German state of Lower Saxony, holding a share of close to 20%, has, by virtue of the Act and its complicated rules on proxy voting, a de facto majority of votes present at the annual general meeting. The EU Court has been quite clear in its reasoning that the objectives justifying an overriding interest of a member state must be of a public, general interest and that economic interests cannot constitute a valid justification for restrictions on the fundamental freedom of movement of capital. Whether the Volkswagen Act will stand up against *such concerns* remains to be seen, but it appears that the State might find it difficult to argue public reasons for an interest that is obviously, albeit for good historical grounds, an economic one.

51 In the writer's view, the main reason the proposed French law was not approved was because

A it could not truly guarantee that petroleum products would always be available.
B the objective was not justified, and the proposed measures cannot be considered necessary.
C it ultimately served to increase the power of the petroleum companies.
D the measures were excessive, giving the government too much influence over the company.

52 According to the writer, the foremost reason why the Court rejected the Portuguese scheme is that

A it placed unfair constraints on investment by other Europeans.
B it enabled citizens of other member states to purchase shares.
C it led to investors discriminating against shareholders from other states.
D there were no sound economic reasons for it.

53 What does the phrase *such concerns* refer to in the third last line?

A the German government's valid historical reasons for maintaining a controlling share of Volkswagen AG
B the Court's insistence on objective criteria for justifying continued governmental control
C the Court's position that a member state can only retain control over a company if it is in the public interest
D the interest of the government of Lower Saxony in preventing unwanted takeovers of key industries

54 What is the main point made by the writer in the sixth paragraph?

A Economic interests are a valid justification for restrictions on the free movement of capital throughout the European Union.
B The Court rulings may also be applied to shareholders' rights issues related to takeovers in other EU countries.
C The Volkswagen Act will most likely be upheld due to the overriding public interest.
D The Court is certain to strike down similar schemes in other member states, such as Germany.

Writing

The Test of Writing consists of two parts, which are weighted differently. Part 1 receives 40% of the marks, and Part 2, which requires a longer answer, carries 60%.

Part 1

What you have to do

This is a letter-writing task. You have to write a letter of 120–180 words in a neutral/formal style in response to another letter. Your letter must include the five content points which are written in the form of notes on the letter provided.

What is being tested

This task tests your ability to organise the content of a letter, to use language accurately and appropriately, and to carry out various language functions, such as explaining, refuting, correcting, presenting/developing arguments, suggesting, etc.

Tips

- Make sure you include all of the content points from the handwritten notes in a logical order – make a plan before you start so that you don't forget anything.
- Try to avoid using the same language as in the notes, which may be too informal.
- Maintain an appropriate level of formality, using a correct opening and closing.
- Keep the word limit in mind while writing. You will be penalised if you write too few words.
- Use paragraphing to organise your letter clearly.

You **must** answer this question.

Your client, Lumber Products, Inc., contracted with Computer Analysts, Inc. for the purchase of a program to manage a computerised ordering system. The system was not completed on time, and it failed to perform the functions intended. The president of Computer Analysts, Eric Vollbreckt, has now sent a letter to your client's president.

Read the letter from Mr Vollbreckt, on which you have made some notes. Then, **using all the information in the notes**, write a letter to Mr Vollbreckt on behalf of your client.

As you are aware, an invoice in the amount of $200,000 is still outstanding on the work performed by Computer Analysts pursuant to our agreement. As you have indicated, implementation of the system was delayed by several months. However, you were informed of the delay and made no objections to it. In addition, all of the problems related to the functionality of the system were rectified months ago, and the system is operating in accordance with contract specifications.

Yes, we did

In consideration of the above, and the fact that the system has been implemented, Lumber Products has waived any right to claim breach due to delay and clearly no other breach has been committed by Computer Analysts.

No, it's not - problems receiving orders.

No! No written notice given.

In light of the above, this is a final demand for receipt of full payment within ten business days of this letter. In the event that Lumber Products fails to make payment in full within this period, we intend to have our lawyers file an action against your company for breach of contract.

What about breach of warranty? - reasons

We have attempted to settle this matter with you on an amicable basis. These attempts have been met by unwarranted claims.

Claims aren't unwarranted - suggest a meeting

Sincerely,

Eric Vollbreckt
President, Computer Analysts, Inc.

Write a **letter** of between **120** and **180** words in an appropriate style. Do not write any postal addresses.

Part 2

What you have to do
This part of the examination involves the writing of a memorandum. Based on the information provided in the rubric, you should write 200–250 words in a consistently appropriate style, covering all four content points mentioned.

What is being tested
The task tests your ability to organise information in a memorandum, to present and develop arguments, express and support opinions, and evaluate ideas. Furthermore, the task presents an opportunity to demonstrate your range of structures and vocabulary, as well as your ability to use language correctly and appropriately, and to carry out various language functions in writing, such as describing, summarising, recommending, persuading, explaining, apologising, reassuring, complaining, etc.

Tips

- Structure your memorandum carefully – it may help to make a plan before you start writing.
- Include an introductory statement of purpose at the beginning, as well as a concluding statement at the end.
- Whenever possible, link and signal ideas using discourse markers.
- When arguing in favour of an idea, support your opinions with evidence.
- Use a variety of language, including appropriate legal expressions.

You **must** answer this question.

You work in the Real Estate Department of your law firm, a large international firm with clients around the world. Your superior has asked you to write a memorandum addressed to the Director of Human Resources outlining and explaining your suggestions for improving the continued training of the members of your department.
Write a **memorandum** to the Director of Human Resources. Your memorandum should:

- outline the current situation in the department
- suggest ways to improve the methods and content of training courses
- recommend legal English language training
- summarise the benefits for the department.

Write your answer in **200–250** words in an appropriate style.

Listening

Part 1

What you have to do
This part of the examination consists of three short monologues or dialogues set in a legal context. They are not linked thematically. For each extract, there are two three-option multiple-choice questions. The recordings will be played twice.

What is being tested
The tasks test your ability to listen for both main points and specific details. They also test how well you are able to recognise the function or topic of an extract, and to identify the purpose of a speaker, as well as a speaker's attitude, feelings or opinions as expressed in the extract. Finally, the tasks measure your ability to draw inferences from what the speakers say.

Tips

- At the beginning of each section of the recording, time is provided to allow you to look through the questions. Read each question and all three options carefully and thoroughly in advance, otherwise you may miss important information.
- Since many of these questions deal with attitudes, feelings and opinions, pay particular attention to the verbs, adjectives and adverbs that express these.

Questions 1–6

You will hear three different extracts.
For questions **1–6**, choose the answer (**A**, **B** or **C**) which fits best according to what you hear. There are two questions for each extract. Each extract will be played **twice**.

EXTRACT 1

You will hear a conversation between a lawyer and his client.

1 Why has the client come to speak with her lawyer?
- **A** She is being sued by her neighbour over property rights.
- **B** She is contemplating taking legal action against the seller of her house.
- **C** She would like to create an easement on her property.

2 What does the lawyer say about the next step in the client's case?
- **A** He believes that more information needs to be gathered.
- **B** He suggests beginning negotiations with the neighbour.
- **C** He wants to file a suit against the former owner of the property.

EXTRACT 2

You will hear an associate lawyer, who works for a large law firm, talking about her first year at the firm.

3 The purpose of the speaker is to
- **A** report to one of the senior partners about her first year at the firm.
- **B** tell junior colleagues what they can expect in their first year in the department.
- **C** inform her supervisor in the department why she would like to remain there.

4 She feels that her first year was a valuable experience because she
- **A** was able to make many social contacts.
- **B** learned how to carry out research.
- **C** was continually exposed to new things.

EXTRACT 3

You will hear two partners discussing the performance of two young lawyers at their firm.

5 What impresses the male partner about the lawyer called Marcus?
- **A** his intelligent understanding of the subject matter
- **B** his ability to work independently of others
- **C** his willingness to help colleagues with their work

6 The female partner thinks that the lawyer called John
- **A** should spend more time researching his cases.
- **B** needs to review some essential concepts.
- **C** ought to be more careful with routine paperwork.

Part 2

What you have to do

This part of the examination consists of a dialogue set in the context of, for example, an interview, a meeting, a hearing, a consultation, a negotiation or a social situation. The dialogue involves two or more people. You are required to answer five three-option multiple-choice questions. The recording will be played twice.

What is being tested

The task tests your ability to listen for specific information as well as for gist meaning. You must also be able to identify the opinion or attitude of the speakers.

Tips

- You will need to concentrate on a longer piece of dialogue than the extracts in Part 1. Use the time at the start of the recording to read the questions and the three options so that you know what key points to listen out for.
- Be aware that an option is not necessarily the correct answer just because it contains a word from the recording. Often the incorrect options will contain words from the recording to act as distractors. Choose your answer by trying to understand the underlying meaning of what the speakers are saying.

Questions 7–11

You will hear a conversation between a senior insolvency lawyer, Mr Sanderson, and a young trainee, Thomas.
For questions **7–11**, choose the best answer **A**, **B** or **C**.
The recording will be played **twice**.

7 What does Mr Sanderson say about being an insolvency lawyer?
- **A** It is suitable work for people who are not shy.
- **B** It is the ideal profession for people who want to get ahead.
- **C** It is the right work for people who like to think.

8 According to Mr Sanderson, what does the R3 organisation offer its members?
- **A** exam preparation and mentoring
- **B** further education and specialist publications
- **C** job opportunities and professional advice

9 What advice does Mr Sanderson give about preparing for the examination?
- **A** He suggests Thomas takes a course to improve his professional writing skills.
- **B** He recommends observing carefully how insolvency work is carried out.
- **C** He advises studying the relevant legislation in detail.

10 What does Mr Sanderson say the phrase *higher insolvency work* refers to?
- **A** working for at least two years on insolvency cases
- **B** shadowing a licensed practitioner on all kinds of insolvency case
- **C** carrying the main responsibility for an insolvency case

11 What does Mr Sanderson suggest Thomas should find out more about?
- **A** the academic requirements for joining the IPA
- **B** the number of years' experience in insolvency work needed
- **C** the qualifications required for a practising certificate

Part 3

What you have to do

This part of the examination consists of a monologue set in a legal context, such as a legal training seminar, presentation or lecture. You are required to complete nine sentences which contain missing words (usually one word is needed for each sentence but it can be up to three words). The recording will be played twice.

What is being tested

The task tests your ability to understand and record specific information.

Tips

- Fill in the gaps as best you can when listening to the monologue the first time. Then use the second listening opportunity to confirm that the answers you have written are correct.
- If you do not understand the answer to a question, forget it and focus on the next question. Otherwise you risk missing something. Remember that you may understand the item better the second time you listen.

Questions 12–20

You will hear an announcement at a meeting about a future seminar for lawyers. For questions **12–20**, complete the sentences.
The recording will be played **twice**.

Seminar on e-commerce

The seminar will take place on 7th ..... **(12)**.

Morning

The first session will be an overview of the ..... **(13)**, with questions.
The second session on harmonisation is organised as a ..... **(14)**.
During the third session, a film on ..... **(15)** will be shown.

Lunch

The optional lunchtime session on ..... **(16)** must be booked in advance.

Afternoon

The guest speaker, Sally Greenside, will talk about ..... **(17)** disputes.
Rob Bateman will run the session on online contracts for ..... **(18)**.
The main theme of the panel discussion will be ..... **(19)**.

Price for CPE members is £ ..... **(20)**, including materials.

Part 4

What you have to do

In this part of the examination, you will hear five short monologues on a theme, spoken by five different speakers. There are two multiple-matching tasks, each with a discrete focus, with each task consisting of six options. The recordings will be played twice.

What is being tested

This task tests your ability to understand gist or global meaning, as well as to be able to recognise the attitude, feeling or opinion of the speakers. You may also be required to identify the speakers or the topic, or draw inferences from what the speakers say.

Tips

- Since this section requires you to keep two sets of information (the items in Task 1 and Task 2) in mind as you listen, read all the options carefully first.
- Bear in mind that one of the options is extra, and does not match with any of the speakers' statements.
- Don't choose an option simply by matching a word you hear with the same word in the option: the word may be there to distract you from the real answer.

Questions 21–30

You will hear five short extracts in which various employees of a law firm specialising in intellectual property are talking about their work.

TASK ONE

For questions **21–25**, choose from the list **A–F** the disadvantage of his or her work that the speaker mentions.

TASK TWO

For questions **26–30**, choose from the list **A–F** the future aim that each speaker mentions.

The recording will be played **twice**. While you listen, you must complete both tasks.

A not being able to select projects **B** not having much contact with clients **C** having to research complex matters **D** having to conduct searches for clients' papers **E** having to get testimonies from difficult people **F** bearing financial responsibility	Speaker 1 ..... **(21)** Speaker 2 ..... **(22)** Speaker 3 ..... **(23)** Speaker 4 ..... **(24)** Speaker 5 ..... **(25)**	**A** to argue cases in court **B** to remain in present position **C** to have sole responsibility for a case **D** to assist a partner in court **E** to be involved with another area of IP law **F** to improve own leadership qualities	Speaker 1 ..... **(26)** Speaker 2 ..... **(27)** Speaker 3 ..... **(28)** Speaker 4 ..... **(29)** Speaker 5 ..... **(30)**

Speaking

The Test of Speaking consists of four parts and lasts for 16 minutes. The test is taken in pairs, and there are two examiners, an assessor and an interlocutor. The assessor does not take part in the interaction. If there is an uneven number of candidates at the end of an examining session, the last test is taken in a group of three, and the timing of the test is increased.

Part 1

What you have to do

In this part of the Test of Speaking, the interlocutor welcomes you both and asks for your mark sheets. He or she then asks you a few questions about yourselves, your legal studies or legal work experience, and about one or two law-related topics. This part of the test is designed to put you at ease and find out a little about you.

What is being tested

Your ability to respond to questions and to expand on these responses. You are expected to be able to give personal information related to your study of the law or your work, and to express opinions on law-related topics.

This part of the test only lasts two minutes.

Tips

- Take advantage of this initial opportunity to demonstrate your speaking ability. Avoid pauses and answer the questions quickly, but without going into too much detail (remember that this part only lasts two minutes).
- Do not memorise longer, prepared answers. Speak naturally and clearly so that both the interlocutor and the assessor can hear you.
- If you are feeling nervous, take a deep breath and start to speak as you breathe out.
- Remember that the examiners want you to do well, so try to relax and enjoy the test.

Interlocutor: Good morning (afternoon/evening). My name is ..... and this is my colleague, ...

And your names are?
Can I have your mark sheets, please?
Thank you.
First of all, we'd like to know a little about you.

Ask candidates the following questions in turn.

- Where are you both from?
- (Candidate A), have you ever practised law or are you a law student?
- And what about you, (Candidate B)?

Ask candidates who have practised law one further question, as appropriate.

- Could you briefly describe the organisation you work for?
- Could you tell us what you find most enjoyable about being a lawyer?
- What advice would you give to lawyers starting their careers?

Ask candidates who have not practised law one further question, as appropriate.

- Could you tell us in which area of the law you would like to practise?
- Could you briefly describe what you are studying?
- What have you found difficult about studying law?

Ask each candidate one further question, as appropriate.

- In your opinion, how could universities in your country improve the study of law?
- What opportunities are there for newly qualified lawyers in your country?
- What opinion do people in your country have of those who work in the legal profession?

Part 2

What you have to do

In this part of the Test of Speaking, you and your partner both give a different **one-minute** talk. The interlocutor hands each of you, in turn, two written topics, and you have one minute to choose one from the set of two and prepare to talk about it. Both topics include three prompts, which you may use if you wish.

After you have given your talk, your partner will ask you a question. This question-and-answer section also lasts about one minute.

What is being tested

Not your legal knowledge, but your ability to give a short, informative talk on a law-related topic. You are assessed on how well you can organise information and ideas, use vocabulary appropriately, express and justify opinions, and convey a clear message.

This part of the test lasts seven minutes.

Tips

- When preparing your talk, organise your thoughts around a few key ideas.
- Begin your talk by picking up on the topic and developing different aspects of it, using the prompts if you wish.
- Don't worry if you don't have time to cover all the prompts given.
- Speak coherently and avoid pausing for too long.
- Try to link ideas and sections of the talk with connecting words and phrases (discourse markers).
- Try to use a range of grammar and vocabulary to show the examiners what you can do.
- Listen to the other candidate's talk carefully so that you will be able to ask an appropriate question.

TASK 1A

Marketing legal services
- recent developments in marketing legal services
- marketing by lawyers
- problems raised by marketing legal services

TASK 1B

Business associations
- the role of lawyers in forming business associations
- the legal differences between a partnership and a company
- the advantages of forming a company

TASK 2A

Training for the legal profession
- legal education in your country
- why people want to train for the legal profession
- professional training after law school

TASK 2B

Competition law
- the purpose of competition law
- the difficulties of enforcing competition law
- penalties for breaking competition law

Part 3

What you have to do

In this part of the Test of Speaking, you and your partner take part in a collaborative task. The interlocutor reads out the task and gives you both one written copy of the task and three prompts. You are expected to discuss the topic together without the intervention of the interlocutor.

What is being tested

Your ability to engage in a discussion, to take turns (to initiate and respond appropriately) and to collaborate with your partner. This part may also involve exchanging information, expressing and justifying opinions, agreeing and/or disagreeing, suggesting, speculating, comparing and contrasting, and decision-making.

This part of the test lasts four minutes.

Tips

- In addition to agreeing and disagreeing with your partner, try to pick up on their comments and ideas and develop them further.
- Don't dominate the discussion or interrupt your partner during the discussion, as these are not considered to be good interactive communicative skills.
- Don't worry if you occasionally have difficulty remembering a specific word. Try to paraphrase the idea you want to express or use another word.
- Use the prompts – and your own ideas – to keep your discussion going for three minutes.
- Never ask the interlocutor if the time is up – just keep talking until he/she says 'Thank you'.
- Try to give the impression that you are genuinely interested in what you are talking about.

Interlocutor: Now, in this part of the test, you are going to discuss something together, but please speak so that we can hear you.

A senior associate has asked you to write a report on the effect the Internet has had on the way lawyers work. Talk together about what to say in the report.

There are some discussion points to help you.

You will have about three minutes to discuss this. Is that clear?
Please start your discussion now.

The effect of the Internet
A senior associate has asked you to write a report on the effect the Internet has had on the way lawyers work. Talk together about what to say in the report.

Discussion points

- The advantages and disadvantages of the Internet for lawyers
- The problems associated with intellectual property rights
- Whether the Internet has reduced the cost of legal services to clients

Part 4

What you have to do

In this part of the Test of Speaking, you and your partner take part in a discussion with the interlocutor, who asks you questions related to the task in Part 3.

What is being tested

Your ability to respond to questions and comments appropriately, develop topics, exchange information, express and justify opinions, and agree and/or disagree.
This part of the test lasts about three minutes.

Tips

- Remember that the purpose of the interlocutor's questions is to encourage discussion. There is no right or wrong answer to the questions.
- Whether you have an opinion or not, it is important to respond to the questions without undue hesitation. So if you have no opinion, invent one quickly.
- Try to engage actively in the discussion and to play an active part in developing the topic.
- If you find it difficult to think of something to say, try to relate the question to your own experience.

Interlocutor: Select any of the following questions as appropriate:

- What role should governments play in protecting intellectual property rights of material available over the Internet?
- How can organisations prevent personal information about clients becoming public knowledge?
- What effect has the Internet had on legal research?
- What problems do you think might occur in the future regarding the Internet?
- Besides the Internet, what other things have changed the way lawyers work nowadays?

ILEC practice test

Test of Reading

TIME 1 hour 15 minutes

Part 1

Questions 1–6

Read the following extract from an article about UK employment law.
Choose the best word to fill each gap from **A**, **B**, **C** or **D** below.
For each question **1–6**, mark one letter (**A**, **B**, **C** or **D**) on your answer sheet.
There is an example at the beginning (**0**).

Extension of effective date of termination

Under UK law, there must be continuous employment for a period of not less than one year before an employee may **(0)** ..... a claim for unfair dismissal. The period of one year is calculated from the date work started and ends on the effective date of termination.
In certain **(1)** ..... , the effective date of termination can be extended. The purpose of this rule is to ensure that an employee is not **(2)** ..... of their rights by wrongfully dismissing them without notice just before they reach the **(3)** ..... period to present a claim.
In **(4)** ..... , all employees are entitled to one week's **(5)** ..... minimum notice. In a situation where an employee is wrongfully dismissed without notice a few days before completion of their one-year period of employment, the effective date of termination can be extended by one week. This gives the employee the necessary year's continuous employment to **(6)** ..... an unfair dismissal claim to an employment tribunal.

Example: A bring **B** take **C** open **D** hold

0	A	B	C	D

1	**A** details	**B** occurrences	**C** circumstances	**D** matters
2	**A** defrauded	**B** deprived	**C** denied	**D** declined
3	**A** qualifying	**B** authorising	**C** certifying	**D** endorsing
4	**A** custom	**B** process	**C** practice	**D** action
5	**A** judicial	**B** lawful	**C** legislative	**D** statutory
6	**A** tender	**B** suggest	**C** propose	**D** present

Questions 7–12

Read the following extract from an article about damages.
Choose the best word or phrase to fill each gap from **A**, **B**, **C** or **D** below.
For each question **7–12**, mark one letter (**A**, **B**, **C** or **D**) on your answer sheet.

Mitigation of loss

The measure of compensation that a claimant is entitled to recover is the loss naturally flowing from the legal **(7)** ..... . This measure of damage is offset by a duty to mitigate – or minimise – losses suffered by them by taking all reasonable **(8)** ..... to mitigate the loss consequent on the breach. Thus, simply because a defendant breaches a contract or **(9)** ..... copyright does not mean that a claimant is entitled to recover endless damages or compensation for their conduct. Unsuccessful litigants are not required to compensate a successful claimant where the claimant has sat back and allowed damages to accumulate or to pay sums that are too **(10)** ..... in law to recover.

(11) ..... , if a supplier of goods or services fails to deliver, the buyer is not entitled to sit back on a rising market or wait until a contract for onward supply has fallen through, and then claim the loss from the defendant. They must **(12)** ..... the market with reasonable speed and buy equivalent goods or services.

7	**A** insult	**B** wrong	**C** mistake	**D** flaw
8	**A** acts	**B** events	**C** movements	**D** steps
9	**A** infringes	**B** breaks	**C** disobeys	**D** flouts
10	**A** isolated	**B** immaterial	**C** remote	**D** detached
11	**A** Nevertheless	**B** For example	**C** Even so	**D** Besides
12	**A** approach	**B** advance	**C** attempt	**D** admit

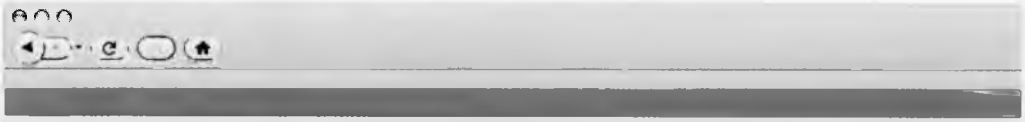
Part 2

Questions 13–24

Read the following extract from a website article about shares.
Think of the best word to fill each gap.
For each question **13–24**, write **one** word in CAPITAL LETTERS on your answer sheet.
There is an example at the beginning (**0**).

Example:

0	U	P													



Changing classes of shares

To set **(0)** ..... new classes of shares, the first stage will be to describe the different share classes and the rights attached to **(13)** ..... in the company's articles. This is a question **(14)** ..... drafting the articles clearly **(15)** ..... that they include the right provisions, and adopting the new articles **(16)** ..... the articles of association of the company by passing a special resolution and filing the articles at Companies House. Any changes, **(17)** ..... small, must be approved by the directors and separately by the shareholders by the right type of resolution, **(18)** ..... can be passed as a written resolution under the Companies Act 2006 (CA 2006). It is important that the correct procedures are followed and documents and forms produced. All shares will rank equally **(19)** ..... the articles say otherwise.

Class rights can only be varied in accordance **(20)** ..... the provisions contained in the articles or, in cases **(21)** ..... the articles are silent, by requirements under the CA 2006. The articles will usually stipulate **(22)** ..... certain level of consent to any change, in default of which the CA 2006 requires the holders of 75% in nominal value to consent, or holders of shares of that specific class to pass a special resolution approving the change. Companies creating new classes of shares or members, or varying the rights of existing classes of shares or members, **(23)** ..... required to register particulars of the rights created or affected with Companies House. **(24)** ..... the variation was effected by an amendment of the company's articles or by written consent of the relevant class does not affect this obligation.

Part 3

Questions 25–30

Read the following extract from a book about contract law.
Use the words in the box to the right of the text to form one word that fits in the same numbered gap in the text.
For each question **25–30**, write the new word in CAPITAL LETTERS on your answer sheet.
There is an example at the beginning (**0**).

Example:	**0**	***NEGOTIATION***	**0**

Terms and representations

Not every statement made by the parties in the course of **(0)** ..... leading to the contract is a term of the contract. Some information only amounts to a **representation**, and does not become legally **(25)** ..... . The **(26)** ..... of the distinction between a representation and a term is the intention of the parties, and this is judged objectively by taking into consideration a miscellany of factors such as the language used, the **(27)** ..... or knowledge of the parties and the **(28)** ..... of the statement.

In *Baker v. Asia Motor Co. Ltd* [1962] MLJ 425, the high court in Singapore decided that a statement made by the defendants that a car was a 1958 model when in fact it was a 1953 model had become a term of the contract of sale. Therefore the action against the defendants for breach of contract was allowed. The court then went on to determine, quite **(29)** ..... , the question of whether the representation was innocent or **(30)** ..... . It would have been of far more value if it had determined if the term was a condition or a warranty.

0 NEGOTIATE

25 BIND

26 BASE

27 EXPERT

28 PRECISE

29 NECESSARY

30 FRAUD

Questions 31–36

Read the following extract from an article about the law relating to hazardous waste disposal in the US.

Use the words in the box to the right of the text to form one word that fits in the same numbered gap in the text.

For each question **31–36**, write the new word in CAPITAL LETTERS on your answer sheet.

Hazardous Waste Disposal: Rules and Resources for Small Businesses in the US

Hazardous wastes create many dangers and, if disposed of **(31)** ..... , can cause fires and explosions, corrode metals, or expose people to toxic chemicals, causing injuries, sickness, or death. In order to **(32)** ..... the threats caused by these materials, Congress has **(33)** ..... a law to make sure that hazardous waste is managed and disposed of in a safe and responsible fashion. The Resource Conservation and Recovery Act (RCRA) addresses the issue by outlining specific rules for dealing with hazardous wastes. **(34)** ..... , the rules define what hazardous wastes are subject to regulation, in addition to identifying who is responsible and how they are responsible for dealing with the waste.

Regulations applicable to businesses vary depending upon the amount of hazardous waste being generated. In some cases, small businesses are not subject to full RCRA **(35)** ..... because they generate a small amount of waste; other businesses can claim complete **(36)** ..... because their amount of waste is negligible.

31 PROPER

32 MINIMUM

33 ACT

34 SPECIFIC

35 REQUIRE

36 EXEMPT

Part 4

Questions 37–42

Read the questions below and the extracts from a website article about litigation management.

Which section (**A**, **B**, **C** or **D**) does each question **37–42** refer to?

For each question **37–42**, mark one letter (**A**, **B**, **C** or **D**) on your answer sheet.

You will need to use some of these letters more than once.

There is an example at the beginning (**0**).

Example: 0 the benefits of giving lower-ranking staff overall responsibility for a case

0	A	B	C	D

37 an increase in the number of fee structures that can be used

38 adapting ways of working to suit specific situations

39 overcoming a reluctance to exploit all readily available resources

40 sending out the message that legal action will not be taken

41 improving outcomes by reducing the number of people working on a case

42 the advantage of giving the lawyer a financial interest in the outcome of the case

Litigation management – How to get maximum value for legal services.

A For some time now, corporate counsel have been trying to control rising legal costs. As a result, they may be reluctant to defend against a potential claim or file an offensive lawsuit, eager instead for a quick, and cheap, resolution. But failing to litigate a claim with merit or to defend a baseless lawsuit can be harmful to a business, not only in terms of lost dollars but also because of the dangerous precedent set for the company's competitors, vendors and customers. Litigating a claim does not have to be a cost-prohibitive proposition. There are ways to sensibly and effectively litigate commercial claims, but corporate counsel and outside counsel may need to rethink some of the old rules of litigation and tailor their efforts to the case at hand.

B The single biggest factor in how efficiently a matter is handled is the team of attorneys working on the matter on a day-to-day basis. A lean team, including a junior lawyer who can focus a significant portion of her time on the matter, leads to better decision-making and lower costs. A well-trained, carefully supervised junior attorney who is allowed to do frontline work will be highly motivated and engaged, resulting in better work product. It is equally important to consider who is leading the litigation team; not every case requires the top name partner in a firm. Most firms have younger partners (with lower billing rates) who also have a lot of experience and can provide hands-on management of the matter.

C Communication between the client and outside counsel is absolutely key to controlling costs. Often, outside counsel are unwilling to bother clients with details of the litigation process, and many clients are either too busy to be heavily involved or prefer to leave matters to the 'experts'. Certainly the client need not be involved in the drafting of every interrogatory or be familiar with the details of each meet-and-confer, but clients often have critical information about the factual record that can save time, energy and, ultimately, legal fees. Outside counsel should also make use of the client's accounting experts and legal assistants, to save costs.

D Many law firms are more open to risk-sharing arrangements than they have been in the past. Gone are the days when the only two options were traditional hourly billing and full contingency arrangements. Many other options are now available to suit the client and counsel. Allowing the client to shift some of the risk to the law firm aligns the law firm and the client's incentives while reducing risk to the client. A discussion of all the options at the start of a case will determine the best way forward for a particular matter. To conclude, litigation should not be dismissed out of hand as cost-prohibitive, as there are ways to control costs and to make it a potent, yet cost-effective, tool in a company's arsenal.

Part 5

Questions 43–48

Read the following extract from an article relating to a legal case.
Choose the best sentence from the opposite page to fill each of the gaps.
For each gap **43–48**, mark one letter (**A–H**) on your answer sheet.
Do not use any letter more than once.
There is one extra sentence which you do not need to use.
There is an example at the beginning (**0**).

The obligation of a supplier to warn its customers about faults

Does a manufacturer or supplier of goods, materials or equipment have an obligation to warn its customer if it subsequently discovers faults or shortcomings in them? **(0)** .....H..... The case of *Coal Pension Properties Ltd v. Nu-Way Ltd* [2009] goes some way to answering these questions. Coal Pension Properties (CPP) was the freeholder of a London store occupied by the retailer BHS. It sought to recover damages resulting from an explosion in a gas booster designed and produced by Nu-Way and installed at the BHS store in 1986. The accident at BHS was not the first time that there had been an incident involving a Nu-Way booster. **(43)** ..... As a result of this research, the design of the product was modified and updated. By 1998, Nu-Way was aware that the boosters with the old-style fan casing could be damaged in the event of spindle failure and, if damaged, there would be no protection against a gas leak. Although Nu-Way issued product guarantee reports, it did not draw attention to the risks in relation to the unmodified boosters. CPP asserted that Nu-Way had failed to issue adequate warnings in light of the product history. **(44)** ..... This stated that even if it had given a warning in the terms CPP required, it is likely that it would have been ignored, and the explosion would have occurred anyway. The law requires a manufacturer or supplier to warn its customers of serious dangers in goods, materials or equipment supplied. However, to succeed in recovering substantial damages the claimant has to prove causation by establishing they would have heeded the warning and therefore the loss would not have occurred. **(45)** ..... It is unlikely that such an obligation would be extended to circumstances where only pure economic loss is suffered, unless it could be argued that the defendant had assumed responsibility for such economic loss. Additionally, the General Product Safety Regulations 2005 impose obligations in relation to unsafe products. They require producers to provide consumers with information to enable them to assess the risks inherent in a product throughout the normal period of its use. **(46)** ..... The Court held that Nu-Way had failed to provide adequate warnings which specifically addressed the problem with the gas-booster fan casing. The issue had been dealt with by manufacturing modifications, but unmodified boosters were still in operation, and the additional instructions issued by Nu-Way did not make recipients aware of the risks. The question of causation was paramount in this case. Merely establishing that there was a duty to warn and that this duty had been breached was not enough to claim substantial damages. There needed to be evidence that the warning would have been acted upon. **(47)** ..... It therefore found that even if an adequate warning had been given, on the balance of probabilities, CPP would not have acted upon it, and therefore the loss would not have been avoided. Regardless of whether a warning should or should not have been given, if a court can be persuaded that such a warning would not have been observed, then the duty to warn is largely immaterial for the purpose of recovering damages at common law. **(48)** ..... The only reason it escaped liability was because the warning would not have been followed.

Example:

A In addition, the duty to warn of manufacturing defaults is generally limited to situations where the default poses a risk to people or damage to property.
B In this instance, the manufacturer should have given a specific warning, but did not.
C Several separate events had been investigated and recorded by Nu-Way between 1990 and 2001.
D On a practical level, this creates an onerous level of proof for any claimant.
E The Court analysed BHS's approach to maintenance and held that its maintenance regime was poor.
F Conversely, Nu-Way argued that it had done so, and also raised a causation argument.
G This is to ensure that, even where these are not immediately obvious, consumers can take appropriate precautions.
H If a warning is not given when it should have been, does this mean that the manufacturer or supplier is liable to pay damages?

Part 6

Questions 49–54

Read the following article about commercial contracts in the UK and the questions on the opposite page. For each question **49–54**, mark one letter (**A**, **B**, **C** or **D**) on your answer sheet for the answer you choose.

Cases reviewing termination for breach and exclusion of liability provisions

Typically, 'termination for breach' clauses allow for a remedy period during which the party at fault can put right the breach before the other party is permitted to terminate. Recent cases have narrowed the classes of irremediable breaches. In *Akici v. Butlin* [2006], Neuberger J held that whether or not a breach is remediable is a practical rather than a technical question. He stated that, in principle, the majority of breaches of covenant should be capable of remedy, including breaches of negative covenant where ceasing the offensive activity will generally be sufficient (except in cases of breach of confidentiality).

Nevertheless, the courts have sought to uphold the parties' intentions where a contract contains specific rights to terminate for breach, such as by expressly providing for termination in particular circumstances. *In Tele2 International Card Company v. Post Office Ltd* [2008], Tele2 was required to provide a letter of guarantee at the start of each calendar year to the Post Office. Tele2 failed to do so in 2004. Under the terms of the contract, this was 'a breach incapable of remedy therefore entitling [The Post Office] to terminate this agreement'. The Post Office sent Tele2 notice of termination on 1 December 2004. Despite the Post Office's admission that the failure by Tele2 to send the letter was not its reason for terminating the contract and that it had no concerns about the viability of the guarantee, the High Court held that the language of the clause was clear and that termination by the Post Office was effective.

Although the decision was recently overturned on appeal, because the Post Office was deemed to have affirmed the contract and abandoned its right to terminate by continuing performance of the contract for nearly a year, the principle in respect of specific rights to terminate for breach still applies. Had the Post Office chosen to terminate for Tele2's breach of its obligation to send a letter of guarantee nearer the time of the breach, it is likely that the court would have upheld the Post Office's right since it was specifically contemplated in the contract.

This can be contrasted with the finding in *Schuler v. Wickman Machine Tool Sales Ltd* [1973]. Here, the court held that although there was a presumption that where a term was described as a 'condition' in a contract, any breach of such a term would give a right to terminate, the court was not bound to hold that the term was a 'condition' if, by construing the contract as a whole, it would have produced an unreasonable result. Therefore parties entering a contract should always include specific rights to terminate in the contract.

In *Ferryways v. Associated British Ports* [2008], a ship's captain was killed at port while supervising cargo operations. The ship operator sued the port operator for breach of a stevedoring contract. The port operator sought to rely on an exclusion clause which provided that 'where the Company is in breach ... [there shall be] no liability ... for any loss [or] damage ... suffered by the Customer which is of an indirect or consequential nature including ... loss of profit, revenue, goodwill, business, production or liability to any other party.' The loss claimed by the ship operator was for its liability to the next of kin of the captain, which, the defendant port operator argued, fell under the category of loss described as 'liability to any other party' and was excluded.

The Court of Appeal held that the ship operator's liability to the next of kin was a direct loss and could not be excluded under the contract because, although it did fall squarely within 'liability to any other party', this was listed as a category of indirect or consequential loss. Since the liability here was a direct loss, it could not be excluded. This highlights the need for clear drafting of exclusion clauses, as courts will construe them strictly against the party intending to rely on t he clause.

49 The writer uses the case of *Akici v. Butlin* to illustrate the fact that

A parties are justified in seeking to terminate as a result of breach of contract.
B the drafting of 'termination for breach' clauses lacks clarity in many cases.
C there are few situations where automatic termination of a contract is justifiable.
D in many cases remedying the breach of covenant is a question of practicality.

50 In the second paragraph, we learn that The Post Office

A made attempts to remedy the situation with Tele2 before terminating the contract.
B terminated its contract with Tele2 because of its failure to deliver reliably.
C was under no obligation to explain the reason behind its decision to terminate.
D used Tele2's breach of covenant as a pretext for terminating its contract.

51 According to the third paragraph, the decision of the Court of Appeal would have been different if the Post Office had

A stopped working with Tele2 as soon as the breach occurred.
B made a provision for this particular breach in the contract.
C respected the true intention behind the covenants in the contract.
D been able to demonstrate its willingness to resolve the dispute.

52 The judgment in *Schuler v. Wickman Machine Tool Sales Ltd* [1973] illustrates the fact that

A it is difficult to draw conclusions based on the judgment of a single case.
B courts continue to refine the way they interpret certain contractual terms.
C there is little consensus on what constitutes a 'condition' of the contact.
D it not advisable for parties to rely on imprecise wording in the contract.

53 In *Ferryways v. Associated British Ports* [2008], the port operator claimed that

A it had not breached any of the terms of its contract.
B actions taken by the ship operator rendered the contract invalid.
C it was not liable, as the payment was not owed to the ship operator.
D the contract lacked a clause that specifically dealt with the issue at hand.

54 According to the sixth paragraph, why did the Court of Appeal find against the port operator?

A It had deliberately refused to perform its contractual obligations.
B The term it was relying on was incorrectly classified.
C Its attempt to exclude itself from liability was unreasonable.
D The exclusion clause was vague and open to a variety of interpretations.

Test of Writing

TIME 1 hour 15 minutes

Part 1

You **must** answer this question.

You are a lawyer representing a software company, Oxcel, which is in the process of selling the company. In preparation for the sale, Mr Shelton, one of Oxcel's IT specialists, was asked to set up a data-room website for potential purchasers to look at. Mr Shelton has been suspended due to his failure to adequately perform his duties.

Read the letter from Mr Shelton, on which you have made some notes. Then **using all the information in your notes**, write a letter to Mr Shelton on behalf of Oxcel.

With regard to my recent suspension, I must raise the following points:
The agreed date to open the website for potential purchasers was 15th May. I have no record of it being delayed until 15th June and, therefore, I made the site accessible to named potential purchasers on 15th May.

[Minutes of a meeting recording new date]

When I was appointed to prepare the data-room website, I was given detailed instructions as to which information should be available to potential purchasers at the first stage. I did not include information which was to be kept confidential at the first stage, as you claim.

[Stage 2 information made available at Stage 1]

Moreover, the non-disclosure agreement, which potential purchasers have to sign before gaining access to the data room, was prominently displayed. Purchasers should have had no problem finding this.

[It's almost impossible to find!]

Finally, I cannot find any wording in the information presented in the data room which could be regarded as reflecting negatively on Oxcel.

[There is!]

I urgently request a meeting with you to discuss these matters.

Yours sincerely

Jason Shelton

[Set up meeting]

Write a **letter** of between **120** and **180** words in an appropriate style.
Do not write any postal addresses.

Part 2

You **must** answer this question.

You are handing over some of your workload to a lawyer who has recently joined the firm. A client – a major retailer, Fulcher's – is involved in a dispute with a supplier. Furniture arrived damaged and resulted in the client's stores not being able to maximise profits in their sale period.

Write a **memorandum** to your colleague. Your memorandum should:

- outline the background to the case
- discuss the consequences of the damaged goods for the client
- discuss possible remedies
- evaluate the client's possibilities of receiving remedies.

Write your answer in **200–250** words in an appropriate style.

Test of Listening

TIME Approx. 40 minutes

Part 1

Questions 1–6

You will hear three different extracts.
For questions **1–6**, choose the answer (**A**, **B** or **C**) which fits best according to what you hear.
There are two questions for each extract. You will hear each extract **twice**.

Extract one

You hear a lawyer talking to a client, John Roberts, who is interested in franchising.

1 What reason for the popularity of franchising in developing countries does the lawyer give?

A It allows small businesses to expand into other regions.
B It requires less capital investment than other start-ups.
C It is a low-risk way to do business.

2 What does the lawyer warn her client about franchising in certain countries?

A the lack of franchise-specific legislation
B the need to scrutinise prospective business partners
C the difficulty of enforcing legal rights

Extract two

You hear a lawyer, Brigit Capper, announcing her firm's plans to merge with another law firm.

3 According to Capper, what is the main reason for the merger?

A The regions the firms cover will complement each other.
B The two firms have their origins in a similar backgound.
C Buying a going concern was paramount for her firm.

4 Most clients have not yet realised that the merger could result in their

A doing business in new markets.
B getting legal advice much more quickly.
C needing fewer law firms for complex transactions.

Extract three

You hear two IP and IT resolution lawyers discussing a recent case involving an author and a publishing company.

5 What was the deciding factor in the court's ruling in the case discussed?

A the age of the contract in question
B the definition of a word
C a change in copyright law

6 What do both lawyers think will happen as a result of the case?

A Digital piracy will increase.
B Authors will choose to self-publish.
C Publishers will tighten up their contracts with authors.

Part 2

Questions 7–11

You will hear two lawyers, Jack Ward and Sarah Briggs, discussing tendering to be on the legal panel for a large supermarket chain. For questions **7–11**, choose the best answer (**A**, **B**, or **C**).

You will hear the recording **twice**.

7 In Jack's opinion, why is the supermarket carrying out a review of its legal panel for retail development?

A It intends to reduce costs.
B It is part of a larger company review.
C It needs advisers with international expertise.

8 Which aspect of tendering for the supermarket's business worries Sarah?

A The supermarket has asked for evidence of innovation.
B The deadline for submissions may not be realistic.
C The competition from other law firms is strong.

9 What do they agree may be a disadvantage of getting the business?

A finding suitably experienced staff at short notice
B a restriction insisted on by the supermarket
C the lack of long-term security of the contract

10 A law firm who was previously on the supermarket's legal panel has not been asked to tender because it

A acted against the supermarket in an IP case.
B lost an IP case brought against the supermarket.
C no longer employs the IP specialist who worked with the supermarket.

11 Why does Jack think their tender could be successful?

A They have a good reputation as a client-centred firm.
B They are seen as a proactive law firm.
C They offer a wide range of services.

Part 3

Questions 12–20

You will hear a senior partner in a law firm giving information about a conference on mergers and acquisitions (M&A). For questions **12–20**, complete the sentences.
You will hear the recording **twice**.

Conference on mergers and acquisitions

Erik Mayer, who is a US **12** ..... , will lead the first discussion, 'A Review of the Worldwide M&A Marketplace'.

The session called 'Credit Crunch' will focus on legal issues when working with **13** ..... firms in particular.

During the session on acquiring a company in distress, there will be a discussion of how to deal with **14** ..... and their part in a bankruptcy.

On Day 2, the focus will be on recent regulatory issues in the session entitled '**15** ..... Deals'.

The final session will be on **16** ..... and its impact on M&A deals.

Those who register before **17** ..... will receive a 10% discount on conference fees.

Reduced rates are available for **18** ..... , but for no other non-legal professionals.

The member's fee is **19** ..... when paid less than one month before the conference.

There is a new website on **20** ..... Law which is worth looking at.

Part 4

Questions 21–30

You will hear five short extracts in which lawyers talk about the firm they work for.

TASK ONE

For questions **21–25**, choose from the list **A–F** the type of law each speaker's firm specialises in.

A Business litigation
B Environmental law
C Corporate transactions
D Intellectual property
E Labour and employment
F Telecommunications

Speaker 1 ..... **(21)**
Speaker 2 ..... **(22)**
Speaker 3 ..... **(23)**
Speaker 4 ..... **(24)**
Speaker 5 ..... **(25)**

TASK TWO

For questions **26–30**, choose from the list **A–F** the opportunity that each speaker has recently taken.

A to be involved in policy development
B to become a lecturer
C to make contacts overseas
D to initiate community youth programs
E to write for a legal journal
F to mentor new attorneys

Speaker 1 ..... **(26)**
Speaker 2 ..... **(27)**
Speaker 3 ..... **(28)**
Speaker 4 ..... **(29)**
Speaker 5 ..... **(30)**

You will hear the recording twice. While you listen you must complete both tasks.

Test of Speaking

ILEC SPEAKING | **Sample Paper** | **PART 1 (2 minutes)**

Interlocutor Good morning (afternoon/evening). My name is ..... and this is my colleague, ...

And your names are?

Can I have your mark sheets, please?

Thank you.

First of all, we'd like to know a little about you.

Ask candidates the following questions in turn.

- Where are you both from?
- *(Candidate A)*, have you ever practised law or are you a law student?
- And what about you, *(Candidate B)*?

*Ask candidates **who have practised law** one further question, as appropriate.*

- Could you briefly describe your practice and your area of expertise?
- Could you tell us what you find enjoyable about being a lawyer?
- What kind of qualities do you think a good lawyer needs?

*Ask candidates **who have not practised law** one further question, as appropriate.*

- Could you tell us what you are currently studying?
- Could you tell us what made you decide to study law?
- In your opinion, is studying law more difficult than studying other subjects?

Ask each candidate one further question, as appropriate.

- In your opinion, what effect is technology having on the practice of law?
- What do you think law firms look for in associates when considering forming partnerships?
- How do lawyers advertise their services in your country?

Thank you.

ILEC SPEAKING | **Sample Paper** | **PART 2 (7 minutes)**

Interlocutor Now, in this part of the test I'm going to give each of you a choice of two different topics. I'd like you to choose one of the topics and give a short talk on it for about a minute.
(Candidate A), it's your turn first. Here are your topics and some ideas to help you.
*Place a **Part 2** booklet, open at **Task 1A/B**, in front of each candidate.**
You have a minute to choose your topic and prepare your talk. After you have finished your talk, your partner will ask you a brief question about it.
Up to one minute of preparation time.
All right? Now, *(Candidate A)*, which topic have you chosen?

Candidate A *States chosen topic.*

Interlocutor *(Candidate B)*, please listen carefully to *(Candidate A's)* talk, and then ask him/her a question about it. *(Candidate A)*, would you like to start?

Candidate A *One minute.*

Interlocutor Thank you. Now, *(Candidate B)*, can you ask *(Candidate A)*, a question about his/her talk?

Candidates *Up to one minute.*

Interlocutor Thank you. Now, *(Candidate B)*, it's your turn. You have a minute to choose your topic and prepare your talk. After you have finished your talk, your partner will ask you a brief question about it.
All right? Now, *(Candidate B)*, which topic have you chosen?

Candidate B *States chosen topic.*

Interlocutor *(Candidate A)*, please listen carefully to *(Candidate B's)* talk, and then ask him/her a question about it. *(Candidate B)*, would you like to start?

Candidate B *One minute.*

Interlocutor Thank you. Now, *(Candidate A)*, can you ask *(Candidate B)*, a question about his/her talk?

Candidates *Up to one minute.*

Interlocutor Thank you. Can I have the booklets, please?
Retrieve booklets.

* Note: In a live examination, there will be a range of tasks for the examiner to choose from.

Task 1A

Working for a large law firm

- the type of work on offer
- opportunities for advancement
- the type of support staff available

Task 1B

Anti-competitive agreements

- types of anti-competitive agreement
- consequences for companies if they breach regulations
- ways companies can achieve compliance with the law

Task 2A

Mediation

- the advantages of mediation
- occasions when mediation is not appropriate
- what to do if mediation fails

Task 2B

Corporate legal departments

- why companies need in-house lawyers
- the departments within a large in-house legal department
- the difference between working for a law firm and a corporation's legal department

ILEC SPEAKING | **Sample Paper** | **PARTS 3 and 4 (7 minutes)**

Leasing Property

Part 3

Interlocutor Now, in this part of the test, I'd like you to talk to each other. I'm going to describe a situation to you.

*Place **Part 3** booklet, open at **Task 24**, in front of the candidates.**

Your company is thinking of leasing some property. The Managing Director has asked the legal department for its recommendations.

There are some discussion points to help you.

You have about three minutes to discuss this.

Approximately five seconds

Please start your discussion now.

Candidates *Approximately three minutes*

Interlocutor Thank you. Can I have the booklet, please?

Retrieve booklet.

Part 4

Interlocutor *Select any of the following questions as appropriate:*

- What other issues must a commercial tenant consider before signing the lease?
- How should a lawyer advise a tenant that is struggling to pay the rent?
- What action can a landlord take if a tenant stops paying the rent?
- How might a flexible lease benefit both tenant and landlord?

Task 24

Leasing property

Your company is thinking of leasing some property. The Managing Director has asked the legal department for its recommendations.

Discussion points

- reasons why companies choose to lease rather than buy
- the different types of lease arrangements that are available
- clauses in leases that need particular attention

* Note: In a live examination, there will be a range of tasks for the examiner to choose from.

Audio transcripts

Unit 1

Listening A

Lawyer: Well, maybe I should start by explaining how things work. You say that a writ has been served on you, informing you that an action has been filed against you for breach of contract. Is that right?

Client: Yes, I got that yesterday.

Lawyer: OK. That means that a complaint against you has already been filed with the court. Our next step will be to draft an answer to this complaint.

Client: How does that work?

Lawyer: In order to be able to draft an answer, I'll need information from you – facts, documents and the like – so that I can begin preparing your defence. Of course, we'll then also have to start building up evidence to support your defence. For example, we may wish to get affidavits – sworn statements – from potential witnesses supporting the statements you've made in your defence.

Client: Right. What happens next?

Lawyer: Well, it depends on how we wish to proceed. We should try to have the case dismissed as soon as we can. This will require filing motions. We'll also have to draft briefs clarifying our legal position, which we'll then submit to the court.

Client: I see. Do you think there'll be a trial?

Lawyer: That's hard to say exactly.

Client: If there is a trial, when will it take place?

Lawyer: When the time comes, the court will issue a notice to inform us of the date and time of the hearing.

Listening B

Javier: Hey, Robert, I've got a question for you. Why are the lawyers in the text we read referred to as 'attorneys'? What's the difference between 'lawyer' and 'attorney'?

Robert: The text deals with US law. 'Attorney' is a common word for 'lawyer' in the States. A friend of mine who practises in Virginia has the words 'Attorney-at-Law' on the sign outside his office.

Javier: Oh, I see ... And now I understand why the authorisation to represent someone in their legal affairs is called 'power of attorney'.

Robert: That's right. And the Head of the Justice Department in the US is called the Attorney-General.

Javier: So they mean basically the same thing. But what about the words 'barrister' and 'solicitor'? Those are definitely not the same. I just can't remember which one means what ...

Robert: Those two terms are used mostly in the UK and other common-law jurisdictions, except the US. A barrister is a lawyer who has the right to represent clients in a higher court. Solicitors provide legal advice, do research and generally prepare cases for their clients. They can represent their clients in the lower courts as well.

Javier: That's it! But what about 'advocate'? We've got the word *abogado* in Spanish, but you almost never hear that word used in English to talk about a lawyer ...

Robert: Well, you do hear it sometimes, but not very often. It's used in Scottish law, for example. Also in a few other common-law jurisdictions, like the Channel Islands or the Isle of Man. 'Advocate' is a general term; he or she defends someone in court and gives legal counsel. But mostly 'advocate' is used to talk about someone who supports an idea, like in the phrase 'He's an advocate of free speech' or something like that. I guess the thing to remember about a these words is that knowing the definition is not enough – yc need to understand something about their usage, how and where they are used, for example...

Listening C

Studying law in Germany is quite different than in the US. In the US, you have to have completed an undergraduate degree before going to law school, which is at a post-graduate level. The only prerequisite for the German law student is the *Abitur*, which means they have graduated from the *Gymnasium*, a rough equivalent of high school.

The curriculum in the German system is divided into three types of course and deals with the following three subjects: civil law, administrative law and criminal law. The student needs to complete a cycle of courses for each subject twice, once at a beginner's level and once at an advanced level.

First, there are the basic lectures. Here, there is little interaction between teacher and student, unlike the Socratic method used in the first year of American law studies, when a professor asks a student at random to paraphrase and then defend the court's argument in a specific case. Attendance is not mandatory, so students attend those lectures which they feel are interesting or important for the practice of law.

The second type includes required courses in which students are given assignments and take tests. Tests are hypothetical cases which the students are asked to resolve in class using only the statutes themselves. This is certainly different from the US, where emphasis is placed on legal precedent and case law. Specifically, at an early stage, American law students are expected to understand the difference between law and fact, and be able to analyse why different judgments are rendered by the court based on very similar facts. This ability to analyse fact and see important distinctions in similar cases is invaluable to lawyers practising in an adversarial system.

The third type of course involves working in groups in which students go over the three subjects under the guidance of senior students (called *Referendare*) who have completed the law curriculum and have passed the first part of the German equivalent of the bar examination, which is called the *Erste Staatsexamen*.

Finally, the student takes the *Erste Staatsexamen*, which is administered by the State. The exam consists of seven five-hour written tests: four in civil law, two in administrative law and one in criminal law. It's pretty tough, but I guess you would say that about your bar examination, too.

After passing, the student has the title of *Referendar*. For a period of two years, the *Referendar* rotates between clerkships both with the state and private lawyers. (This is also different than in the US, where you don't have to do a clerkship as part of your education.) During this time, when doing the clerkships, the

Referendar takes the *Assesorexamen*, the second part of the bar exam. Passing this exam entitles you to practise law.

Listening D

Mr Nichols: So, at this point, I'd like to ask you if there is anything you'd like to ask me? About the firm, for example.

Linus Walker: Of course. I do have some questions. Um, I guess I'd like to know what it's like to work here. Er, I wonder if you could describe the firm's culture for me?

Mr Nichols: Well, as you certainly know, we're a relatively small commercial firm. We're what's known as a law boutique, since we specialise in two areas of the law: real property and debtor-creditor. Since we're specialists, we try to maintain high standards in our work. As for the firm's culture, I'd have to say we're pretty traditional. People dress quite formally, in suits, and we don't call the partners by their first names. All in all, it's a good place to work, definitely friendly, but people are serious and work very hard.

Linus Walker: Mm-hm. That sounds good to me. Perhaps you could tell me something about the structure of the firm.

Mr Nichols: Well, the firm is headed by the two senior partners, Mr Robertson and Mr Michaels. They founded the partnership 30 years ago. They're still quite active, especially with the older clients, but the day-to-day affairs and the finances of the firm are managed by the full partners, that's Ms Graham and myself. We also oversee the two departments. But a salaried partner is in charge of each of them.

Linus Walker: I see. And how are the departments structured?

Mr Nichols: Well, in the Real Property Department, there are three associates who report to the partner, and they're assisted by two paralegals. In the Debtor-Creditor Department, there are two associates and two paralegals. There is also one secretary for each department who basically assists the partner who heads the department, but who does on occasion do work for the associates as well, since they're responsible for all the clerical work that needs to be done. Of course, there are always summer associates or clerks working at the firm, on average four of them, not just during the summer, but also during the term breaks. Er, right, I guess that's all there is to say about structure. How does that sound to you?

Linus Walker: Very interesting. Er, actually, the size sounds ideal – not quite as small as the firm I worked for in Cambridge, where I did my summer clerkships, but not too big, either. And nowhere nearly as large as the European Commission where I worked last!

Listening E

1 I'm a newly qualified lawyer and I just landed a job as an associate at a mid-size law firm. The firm offers a wide range of commercial law services. Our lawyers provide advice on many different legal areas, including banking law, corporate law and corporate tax, employment law, commercial litigation, property law, to name a few. In the next few months, I'll be rotating through some of the departments to get an idea about the different practice areas. At present, I'm working in commercial litigation and am enjoying it. My duties include a good deal of client liaison, lots of research, and some writing of briefs and letters. While I'm at this firm, I intend to specialise in an area of the law that involves a lot of trial work, because I think I'd really like to be a litigator.

2 I'm a sole practitioner in the area of employment and labour law in a small city. Some of the legal issues I commonly deal with are wrongful termination, sexual harassment, and discrimination on the basis of gender, age, religion, disability, national origin or race. I also handle wage and overtime disputes, employment contracts, public-sector employee issues, and disability and workers' compensation issues. I counsel clients about their rights and options. I also provide advocacy for them, including representation in mediations, arbitrations and litigation. My clients are primarily individuals. They usually need advice in handling personnel matters and resolving disputes. Two paralegals assist me in my work at my office.

3 As an attorney, I protect the innovations and inventions of my clients. I represent both plaintiffs and defendants in trade-mark, trade-secret and copyright infringement suits in both state and federal courts. I have a good deal of experience in domain-name disputes. I carry out international trade-mark and service-mark registrations and do availability searches and clearances of marks, trade names and logos. My work also involves providing counselling to photographers, architects, graphic designers and creators of fine art. I try to give them an understanding of the laws and procedures that affect them and their businesses. I also serve as a trial consultant and expert witness in IP law. For bigger cases requiring additional staffing and resources, I have a good working relationship with a large IP firm and can arrange representation under this firm if a client requests it. However, this requires a separate retainer agreement.

4 I'm a senior partner in a large law firm. My main areas of expertise are competition law and international trade law. I advise domestic and international clients on all aspects of competition and international trade laws, including domestic and multi-jurisdictional merger transactions, criminal cartel cases, and trade and pricing practices. I also represent clients before the Competition Tribunal in merger transactions. I advise clients on a regular basis with respect to restrictive trade practices under the Competition Act. Some of the industries my clients come from include transportation, steel, pulp and paper, telecommunications, media and entertainment, financial services, electronic products and services, food services, and consumer products. On a regular basis I write papers and hold presentations for business and professional audiences on various topics dealing with competition and international trade law.

5 I'm a partner in my firm and am head of my firm's Litigation Division. I represent landlords, tenants, developers and contractors and have tried many cases (mostly to successful conclusion) in court or arbitration. I assist clients with all types of real-estate-related litigation, including lease and contract disputes, mortgage foreclosures, property-tax disputes and land-use disputes. My practice also involves all types of real-estate transactions. In addition to lecturing and writing about real-estate issues for professional groups, including lawyers, accountants, lenders and real-estate professionals, I teach courses on real-estate law for law students at the local university. I am an active member of several professional organisations, including the state and national bar associations, to name but two.

Listening F

Hi, for those of you who don't know me yet, my name's Richard Bailey. I'm here to tell you about my experience doing summer and winter clerkships. In law school, the professors will always tell you that it's important to do some sort of work experience because it'll improve your future job opportunities. Have you heard that yet? Well, it's definitely true. I'm now in my last year here, and I started doing summer and winter clerkships in my first year. It's been a tremendous learning experience.

Most of my clerkships have lasted for a period of four weeks. I've tried to vary the firms I work for, from a small two-man firm right through to a huge global firm. Each firm was

different. At smaller firms, I was expected to be more independent and was responsible for more things. I liked that a lot. Since I was usually the only clerk there at the time, I'd have to do whatever work needed to be done.

Working at the bigger firms was quite different. I was usually one among many clerks. The work I performed there tended to concern bigger cases that were quite important and so they had more 'prestige'. That was really interesting. At the larger firms, I usually had a chance to move between groups in different practice areas, helping out where needed. This allowed me to gain some insight into what was involved in the legal work carried out in these teams and in the different practice areas.

At the smaller firms, I wrote case briefs for the partners and associates, and all kinds of correspondence with clients from the first day on, which I liked doing. At the bigger firms, I was asked to do research and to help to maintain court books. That was a useful learning experience, too.

In my opinion, the main advantage of a clerkship at a large firm is that you meet a lot of new people. There is a big network of people, so many different lawyers and clients. There's also a greater emphasis on learning and developing the various skills a lawyer needs in courses and seminars.

I must say that both the larger and the smaller firms tried to give me a sense of being part of the company, as if I really belonged to their team. At the larger firms, I was even invited to some of their social events, and that was really fun. However, the smaller firms definitely made you feel more comfortable; everything was more friendly and relaxed. But in both types of firms I never felt that I was wasting my time.

My advice to you all is that it's really important to try to do clerkships, starting in your first year of law school. I also think it's valuable to get to know a variety of firms, with different practice areas and different sizes. I'm sure it'll help you decide what kind of law you want to practise later, and what kind of law firm you'd feel most comfortable in.

Unit 2

Listening A

Ms Norris: So, based on all the background information you've provided me with, my strongest recommendation is for you to incorporate for the reasons we discussed.

Mr Herzog: All right. Of course, I trust your judgment. But I'm completely new to this. How does it work exactly? I mean, I assume that the paperwork has to be drafted by you and filed with the state?

Ms Norris: Well, let me begin by telling you about how the process works in our state, in Delaware. You know, quite a few large corporations choose to incorporate here due to our highly developed corporate legal system.

Mr Herzog: Right. So what do we have to do first?

Ms Norris: The first thing you have to do is select a name – but the incorporator has to check whether that name is available in the state.

Mr Herzog: The incorporator?

Ms Norris: That's the person who prepares, files and signs the articles of incorporation and everything necessary for incorporation. Of course, that's something I could do for you.

Mr Herzog: Got it. Go on.

Ms Norris: Well, I mentioned the articles of incorporation: that's the first main document that needs to be filed. It includes information like the name of the corporation, the address of the corporation and of the corporation's registered office, and the name of the registered agent at that office – that's the person to be served if the corporation is sued.

Mr Herzog: OK, right. What else do the articles of incorporation include?

Ms Norris: They must state the purpose of the corporation and length of time that the corporation is to exist. The duration can be either perpetual or renewable. Another thing that you'd have to provide is information about the capital structure: how much common stock, how much preferred stock, and what are the rights and responsibilities of each. This would be stated in the stock ledger. The stock ledger and the stock certificates are kept with the company records. Any questions?

Mr Herzog: Could you explain what the stock ledger is?

Ms Norris: Sure, that's just a record of each shareholder's ownership in a corporation.

Mr Herzog: I understand. So, is that all? Are there any other documents we have to file?

Ms Norris: Of course, the other document necessary for the company to function as a corporation is the bylaws ...

Mr Herzog: Those are the rules of the corporation?

Ms Norris: Exactly: the bylaws are the rules and regulations adopted by a corporation for its internal governance. Oh, there's one more thing: you're also required to file the organisational board resolutions.

Mr Herzog: What are those?

Ms Norris: Well, they're drawn up after the articles of incorporation have been filed and the bylaws created. That's the time when the first organisational meeting of your corporation will take place. At this meeting, the bylaws are then approved and adopted, officers are elected, and directors are appointed, among other things. All of these decisions are made during this meeting and then set down in the organisational board resolutions, and these resolutions are then filed. Now the incorporation process is complete.

Listening B

Mr Larsen: Albert Larsen. Good morning.

Mr García: Good morning, Mr Larsen, this is Ernesto García speaking – we met last night at the reception at the museum.

Mr Larsen: Yes, of course, Mr García. Good to hear from you.

Mr García: You said I could give you a call. Am I disturbing you?

Mr Larsen: No, not at all, not at all. You're interested in forming a swimwear company, I recall. A private company limited by shares?

Mr Garcia: That's right. I have some experience with company formation, but so far only in the United States. I founded a C corporation with some business associates in Florida some years ago. You're familiar with C corporations?

Mr Larsen: Yes, of course. C corporations are similar to private limited companies in the UK in many ways, particularly in respect of liability, naturally. Shareholders are not personally liable for the debts of the corporation in both a C corporation and a private limited company.

Mr Garcia: That's right.

Mr Larsen: But if I'm not mistaken, a C corporation may become a public corporation, with its shares being bought and sold either through a stock market or 'over the counter'.

Mr Garcia: Uh-huh.

Mr Larsen: In this respect, a private limited company differs. Its shares are not available to the general public.

Mr Garcia: I see.

Mr Larsen: The two types of company are like each other in that both can be founded by persons of any nationality, who need not be a resident of the country. Perhaps this is relevant for you, Mr García.

Mr Garcia: Yes, it is.

Mr Larsen: And with the C corporation and our private limited company, there's no limit to the number of shareholders.

Mr Garcia: Oh, OK.

Mr Larsen: Actually, the old Companies Act stipulated that not more than 50 members could hold shares within the company. But the new Companies Act of 2006 changed this so that there is no longer any limit on the number of shareholders.

Mr Garcia: That's interesting. However, it's not an issue for me either way.

Mr Larsen: On the other hand, a limited company is comparatively easy to form. You have several options open to you, depending on how soon you want the company formed.

Mr Garcia: Well, I'd like to begin operations as soon as possible. Of course, I know I'll have to wait until the paperwork is completed. How long would that take? A couple of days?

Mr Larsen: Well, once you supply all the necessary documents to Companies House, it generally takes a couple of weeks for them to process the documents.

Mr Garcia: A couple of weeks! That's much too long. What other options do I have?

Mr Larsen: You could form the company through a company formation agent. The agent would fill in the required forms for you and then submit them to Companies House. It would take around five to eight days before the company may begin to trade.

Mr Garcia: That sounds better. Maybe you could tell me where I can find one of these agents ...

Unit 3

Listening A

Mr Young: ... so if there are any questions, I'd be happy to answer them now.

Ms Siebert: Mr Young, I've got a question, if you don't mind. In your talk, you mentioned a rights issue. Could you explain to me in detail what a rights issue is?

Mr Young: Well, a rights issue is an issue of new shares for cash to existing shareholders. The shares are issued proportionally, that is, in proportion to the number of shares the shareholders already hold. It's a good way of raising new cash from shareholders. For publicly quoted companies, it's a source of new equity funding.

Ms Siebert: I see. But why issue shares to existing shareholders?

Mr Young: From a legal standpoint, a rights issue must be made before making a new issue to the public, and the existing shareholders have what is referred to as the 'right of first refusal' on the newly issued shares. This right is also known as a 'pre-emption right'. Why is this important for the shareholder? Well, when a shareholder takes up these pre-emption rights, he can maintain his existing percentage holding in the company. However, shareholders sometimes waive these rights and sell them to others. Another thing a shareholder can do is to vote to cancel their pre-emption rights.

Ms Siebert: What about the price of these shares?

Mr Young: The price at which the new shares are issued is generally much lower than the market price for the shares. You often see discounts of up to 20 or 30 per cent.

Ms Siebert: That doesn't really make sense to me. Why would a business offer new shares at a price that's significantly lower than the current market price of the shares?

Mr Young: There are quite good reasons for doing this, actually. The main reason is to make the offer attractive to shareholders. Also, the aim is to encourage the shareholders either to take up their rights or sell them. The idea behind this is to ensure that the share issue is fully subscribed. That means, of course, that the new shares have all been sold. The price discount has another function, too: it serves as a kind of safeguard if the market price of the company's shares falls before the issue is completed. It makes sense if you think about it: if the market share price fell below the rights issue price, then it would be very unlikely that the issue would be successful. Naturally, in such a case, shareholders could buy the shares more cheaply on the stock market than by taking up their rights to buy through the new issue.

Ms Siebert: So, let me see if I understand you correctly. You said that existing shareholders don't have to take up their rights to buy new shares, is that right?

Mr Young: That's right. Shareholders who don't want to take up their rights are entitled to sell them on the stock market or by way of the company making the rights issue, either to other existing shareholders or new shareholders. In that case, the buyer has the right to take up the shares on the same basis as the seller.

Ms Siebert: Mmm, I see. Are there any other matters connected to rights issues that I should know about?

Mr Young: Just one more thing, perhaps – shareholder reactions. Shareholders may be unhappy about firms continually making rights issues and may have a negative reaction. They may not like being forced to do something – and rights issues force them either to take up their rights or sell them. As a result, they may sell their shares. And selling their shares can drive down the market price.

Ms Siebert: That makes sense. I think I've got it now. Well, thanks for the detailed answer.

Mr Young: My pleasure. Any more questions?

Listening B

Mr Mansfield: Have you got any other questions, Ms Saito? Is there anything else about capitalisation you'd like me to explain? Anything in the provisions, perhaps?

Ms Saito: Yes. Look at this: it says here 'consideration for shares'. What does that mean, 'consideration'? 'To consider' means 'to think about something', as far as I'm concerned.

Mr Mansfield: Mm, in this case, 'consideration' simply means 'payment'. It can also mean something that you promise to give or do when you make a contract, for example.

Ms Saito: You lawyers have a language all of your own! But, actually, I must say, I find this document relatively easy to make sense of otherwise. In my experience, company documents, or rather all of the legal documents in English I've worked with, have been particularly complicated, not like normal English at all, and I speak English all the time in my business, so ...

Mr Mansfield: Well, that's very gratifying to hear, Ms Saito. Actually, our firm is rather proud of the fact that the legal documents we write are clear and understandable for non-lawyers. We've been trained to avoid legalese.

Ms Saito: That's certainly a selling point for your services!

Mr Mansfield: You're quite right about that! Our clients definitely appreciate the transparency of the documents we draft for them. You know, the founder of our firm, Mr Guinness, was something of a pioneer. He was a strong supporter of the Plain Language Movement and instituted a rather revolutionary policy for our firm ...

Ms Saito: The Plain Language Movement? What's that?

Mr Mansfield: Well, that's a school of thought that believes that legal documents – actually, documents of all kinds – should be written so that you can understand them easily the first time you read them. The way they see it, when it comes to legal texts, people are entitled to understand the documents that bind them or state their rights.

Ms Saito: That certainly makes sense!

Mr Mansfield: It also makes good business sense – commercial clients of Australian law firms are happy to pay for legal

services that are in plain language. And when you think about it, the benefits of plain language are so obvious: writing plainly saves time for both the writer and the reader. If the central message of a text comes through quickly and clearly, the reader will grasp what is being said at the first reading instead of the third. It has a lot to do with the idea of accessibility – making legal texts accessible to the people who are affected by them. The Australian Federal Government has recognised the importance of this and has adopted a plain-language policy for official documents.

Ms Saito: But what about the courts? Don't judges expect a certain writing style? I think there might be a feeling that changing the style of a legal text will make it somehow less, um, authoritative, or less legally binding.

Mr Mansfield: To my mind, lawyers are conscious of the accuracy, certainty and precision of traditional legal language. But it's important to realise that writing in plain language does not involve abandoning legal concepts and legal terms and replacing them with colloquial expressions. Anyway, legal concepts and special legal terms form only a small percentage of any document – usually much less than 2 per cent. This leaves 98 per cent of the document available for improvement! Over the years, I've come to see that the fears expressed about plain language and the arguments raised against it are just myths. Even judges prefer plain language – as is shown both by surveys and in court.

Unit 4

Listening A, Exercises 3.1 and 4.1

Good evening, ladies and gentlemen. It's good to see that so many of you have been able to attend my presentation this evening. Some of you may know me already, but allow me to introduce myself. My name is Adrian Crawford. I'm with the Mergers and Acquisitions department of our firm. As you know, I'll be speaking about acquisitions this evening, specifically about a range of issues connected with acquisitions which are particularly relevant for business owners like yourselves. I'm going to tell you about the process you are about to begin and what awaits you. Please feel free to interrupt me at any time, should you have any questions.

Right, at this point, I'd like to give you a short overview of my presentation. I'm going to start with a few comments on how to decide if your business is ready to undertake an acquisition. Then I'll deal with the issue of making the right choice, that is, choosing a target. After that, I'll discuss the process of assessing the target business, which involves gathering financial information, like looking at trends in sales and profit margins, for example. I think we'll have time for a short break at that point. After the break, I'll move on to the legal aspects. At the end, I'll conclude with a look at how the deal itself is carried out and will provide you with an example of a case I handled, a rather interesting acquisition. There'll be time for discussion at the end of the session when we can deal with ...

Listening A, Exercise 3.2

OK, then. In this section of my presentation, I'll be addressing the main legal issues which arise at different stages of the acquisition process, which require separate and sequential treatment. That's to say, they have to be done in the proper order. First, I'll tell you about the due diligence stage, and then we'll look at the deal stage. Allow me to point out here that these are all matters that are best handled by a lawyer, which means of course that our firm can certainly handle these matters for you.

Right. Due diligence. What is due diligence? Generally, this term is used to refer to the careful professional scrutiny of the assets and liabilities of a company, usually in preparation for an acquisition. It's the process of uncovering all the liabilities associated with a firm. It's also the process of checking if the claims made by the seller of the target business are correct. You should know that directors of companies are answerable to their shareholders for ensuring that this process is properly carried out.

For legal purposes, there are several things that must be done in the course of due diligence. First, you have to obtain proof that the target business owns key assets such as property, equipment, intellectual property, copyright and patents. Another thing that you should do is to get the details of past, current or pending legal cases. Look at the contractual obligations that the business has with its employees (including pension obligations), as well as contractual obligations with customers and suppliers. Here, one has to think about any likely or future obligations. It's also important to consider the impact that a change in the ownership of the business may have on existing contracts. As I said, due diligence is routinely conducted by a lawyer.

Now, let me move on to the deal stage. When you're considering general terms of a potential deal, you'll probably look for certain confirmations and commitments from the seller of the target business. These will provide a level of comfort about the deal. They're also indications of the seller's own confidence in their business.

A written statement from the seller or buyer that provides assurance of a key fact relevant to the deal is known as a warranty. You may require warranties with respect to the business's assets, the order book, debtors and creditors, employees, legal claims and the business's audited accounts. A commitment from the seller to reimburse you in full in certain situations is known as an indemnity. You might seek indemnities for unreported tax liabilities. Here again, our firm can assist you in reviewing the content and adequacy of warranties and indemnities.

Listening B

Jack: Bob, do you think you could spare a minute and help me out with something?

Bob: Sure, what is it?

Jack: Well, I'm working on the Longfellow case – you know, the company that's planning to increase its share capital.

Bob: Right. What do you want to know?

Jack: I have to admit that this is the first time I've done this kind of thing. There certainly are a lot of steps that have to be followed, and I don't want to forget anything.

Bob: I understand. But it's really pretty straightforward, you'll see. Let me show you what we usually use when we take care of any kind of changes in company structure. We've got a checklist, you see, that tells you what has to be done and in what order. It also tells you what regulations to refer to in different cases, and what documents need to be filed, for example. Just a sec, I'll open it – ah, here it is.

Jack: Mm, looks good – I think this would help.

Bob: I'm sure it will. Let me talk you through it ...

Jack: Great.

Bob: Well, the first thing you have to do is to check the memorandum of association, to find out how much the company's share capital is.

Jack: OK.

Bob: Then you have to find out whether they've issued all their share capital already or not. The next step would be to determine the amount of increase of share capita

Jack: I know that already.

Bob: Good. Tell your client that they have to call a board meeting, but at reasonable notice. And a quorum of directors has to be present.

Jack: A quorum?

Bob: That's the minimum number of members required so that business can be carried out.
Jack: Uh-huh.
Bob: At this meeting, the directors have to pass a resolution that they'll hold an EGM where they'll vote on the increase of share capital.
Jack: An EGM is the extraordinary general meeting, right?
Bob: Right. But before the EGM can take place, the shareholders have to be informed by notice about the EGM. This notice must state the following things – you see them listed here on the checklist: date, time, place, proxy, ordinary resolution, consent to short notice.
Jack: What does 'consent to short notice' mean?
Bob: That just means that they agree to the meeting being held soon, without everyone knowing about it a long time in advance.
Jack: Ah, I see. And now what?
Bob: Well, the chairperson is required to preside at the EGM, and it's necessary that a quorum is present. Then the resolution has to be passed by a simple majority. That's all.
Jack: What about the paperwork that has to be done?
Bob: Right. Well, minutes of the two meetings – the board meeting and the EGM – have to be drawn up. Finally, within 15 days, the following documents have to be filed at Companies House: the ordinary resolution, the notice of increase of nominal capital and the amended memorandum. And you're finished.
Jack: Thanks, Bob. It'd be great if you could mail me that checklist.

Unit 5

Listening A, Exercise 6.1

Good morning. I'm very happy to have been invited here today to hold this talk on effective contract negotiations. Before we get started, I'd like to tell you something about the topics I intend to cover. My talk will be divided into two parts: the first, more informative part will be held as a kind of lecture, and the second, practical part will involve role-plays, to give you a chance to try out some of the techniques you'll be hearing about. In the informative part, I'll cover preparing for a negotiation, tips for using agreement templates and term sheets, as well as some general negotiating techniques. This'll be followed by ways to overcome objections from the other side and how to recognise a good deal. Then we'll break for coffee. The second half of our session will then be dedicated to role-plays.

Listening A, Exercise 6.2

Now I'd like to move on to the topic of using agreement templates and term sheets. It's common to start out with an existing contract template, which gives you a kind of blueprint of the things that are usually included in such an agreement. It's important to realise that negotiating with a contract template means that it's necessary to review the terms and conditions it contains carefully. Please note that you have to consider what is *not* in the agreement but should be, that is, what's missing and should be added. This is really just as important as carefully reviewing the language in the agreement. Here, I want to stress that it'd be wise to consult with a senior lawyer, preferably someone who has experience negotiating agreements of the kind that you're negotiating.

When using a term sheet as the basis of negotiations, it's imperative to keep good notes of all discussions or emails regarding the items on the sheet. Term sheets are usually used by lawyers to transfer the terms that have been agreed into an official agreement, so it's crucial that the information on these sheets is precisely what has been agreed on by all parties. Sometimes a lawyer will incorporate items from a term sheet onto an agreement template. In such a case, he should be careful not to include language originally in the template that isn't appropriate.

OK, now I'd like to turn to some general negotiating techniques. It's good practice to separate the issues at stake into different categories in your mind: things you can't possibly accept, major points, minor points and things you can easily live without. Then you can make trades with the other side, one item for another. This is also known as 'horse-trading'. It can go like this: 'I'll change this provision like you want if you agree to add a provision that I want'. When it comes to discussing numbers, if possible let the other side suggest the first number. In the case of a sales contract, for example, the first number the other side states is usually the least he expects to pay, whereas the seller's first number is the highest amount he thinks he might be able to get. My advice is to know the number you really want to end up with and try to suggest a starting number that'll force the other side to respond with a number that, when combined with your starting number, will average out to a number you'd be happy to accept. So what you do is propose meeting the other party in the middle by averaging the two numbers out.

My next point has to do with overcoming some of the objections you commonly hear in a negotiation. Sometimes the other party'll object to removing a clause that you don't want by saying something like: 'Don't worry, we won't hold you to that item, so we'll just leave it in'. In such a case, you should insist that the item's taken out. The best argument in this situation is to say that if they're not going to hold you to it, then why not just take it out of the agreement. It's important to be aware that the people involved in making the agreement can all one day lose their jobs or take employment with another company, and so their promise not to hold you to something is worthless, because they might not be around any more. Almost all agreements contain a merger clause, which states that anything that was said or written before the agreement was signed does not matter unless it's explicitly written in the agreement.

All right, there are some other objections that can be raised in the course of a negotiation. These include ...

Listening B

Arthur Johansson: If I may, I'd like to address another one of the clauses in the franchise agreement: the non-competition clause here, at the bottom of page three.
Ms Orvatz: Yes, the non-compete. Well, I'll just say upfront that that's standard, that's in all our agreements.
Arthur Johansson: Right. That may be so, but I'm afraid we can't go along with it in its present form.
Ms Orvatz: What do you object to? All our franchisees accept that. It's standard practice, like I said.
Arthur Johansson: Well, the clause in question states, and I quote: 'Franchisee shall not, for a continuous uninterrupted period and continuing for two years thereafter, own, operate, maintain, or engage in any business that: (a) offers products or services which are the same as or similar to the products and services offered by the Franchised Business under the System and (b) is, or is intended to be, located at or within a 25-mile radius of the Approved Location.' What this means is that in the event that the agreement between my client and your corporation should at one time no longer be in effect, my client wouldn't be able to operate a sandwich restaurant for two full years in his own neighbourhood. I'm afraid that's out of the question.

Ms Orvatz: Well, you must understand that my client has to protect itself – I mean, a former franchisee could just come along and set up a nearly identical sandwich restaurant right near one of our restaurants, and with all the know-how he got from us ...

Arthur Johansson: Yes, I fully understand the reasoning behind that provision, no need to explain. But my client also has skills and abilities of his own, proven skills relevant to the sandwich-making business. That's why your client is interested in concluding a franchise agreement with him in the first place. Let's face it: your client owns a young and upcoming franchise enterprise that may be promising, but it certainly isn't well known or well established yet – you need the skills and know-how of experienced franchisees as much as they need you. So I'll say it again: we simply could not accept any clause that would forbid my client from making a living through these skills independently for two whole years, if that should one day become necessary.

Ms Orvatz: What do you suggest? We're not in a position to remove the non-compete clause from the contract, let me be perfectly clear about that.

Arthur Johansson: Of course. Our proposal is to reduce the scope of the clause. If you could consider reducing the time period the non-compete covers, we'd be willing to be more flexible about the arbitration clause, for example.

Ms Orvatz: Well, all right. In that case, I think we could talk about a reduction.

Arthur Johansson: That's certainly a step in the right direction. How about this: we suggest reducing the time frame to six months.

Ms Orvatz: That would be difficult for us. We could only reduce it to eighteen months, and that's already very generous on our part.

Arthur Johansson: Let's agree on a year, shall we? After all, you and I both know that your client really wants to enter into this agreement with my client, as he's perfectly suited to run a franchise in that part of town, which, let's be honest, isn't exactly the safest neighbourhood. He knows the area, he has the necessary skills and experience ...

Ms Orvatz: OK, OK. I think we could live with that. A year it is.

Arthur Johansson: Very well.

Ms Orvatz: Now, what about the arbitration clause? You said you'd be willing to be a bit more flexible ...

Unit 6

Listening A, Exercise 5.1

I'd like to tell you something about the remedy of specific performance in my country, Denmark. As you know, specific performance is a remedy requiring a person who has breached a contract to perform specifically what he or she had agreed to do. Danish contract law provides that where one party breaches the contract, the non-breaching party may choose between specific performance and damages. However, there are a limited number of cases for which specific performance will actually be ordered. There are five types of cases where the remedy is specific performance. I'm going to tell you something about these specific cases in which specific performance is ordered.

The system works as follows: if the court orders the breaching party to perform as provided in the contract, there are two possibilities: compliance or non-compliance with the court order. Either the defaulting party performs or he doesn't. If he doesn't, the other party can decide to go to the judicial enforcement agent. This judicial enforcement agent is called the *foged* in Denmark. A *foged* is similar to the bailiff in common law. He basically fulfils the functions of a bailiff. The Code of Procedure 17 regulates what the *foged* has to do. This code stipulates that the *foged* can convert the plaintiff's claim into money damages. So, what usually happens is that the claim is turned into money damages.

Listening A, Exercise 5.2

However, there are five types of cases in which the plaintiff's claim is not converted into money damages and the defendant must perform his obligations under the contract. Let me briefly tell you what these five cases are.

First of all, there is the case where objects – such as goods that have already been produced – simply need to be handed over to the plaintiff. This also includes situations in which a person is to be put in possession of real estate.

The second type of case is where goods can be procured from a third party. The *foged* can allow for a third party to perform, and if the breaching party doesn't pay for this, the *foged* can seize his assets.

Third, we have the case where the only act that has to be performed is a signature on a document. All that is needed is the signature: in this case, the *foged* can sign for the defendant.

In the fourth type of case, the act to be performed is the transfer of a pledged security. The *foged* can seize assets from the breaching party and pass them on to the pledgee.

Finally, we have a fifth case, where the breaching party must be restrained from performing certain acts that are harmful to the other party.

So, generally speaking, the *foged* will convert a claim of specific performance into money, unless the acts which the defendant must perform can be performed by a third party, as in the five specific cases I've just explained to you.

Listening B, Exercises 9.1 and 9.3

Ms Hayes: As I understand the situation, Mr Anderson, Glaptech was to write a software program for you to incorporate into the website that you're designing for a ferry company.

Mr Anderson: That's right. They were supposed to write a program that would allow the visitor to book passage online, and I was to insert it into the website and deliver the product to my customer on May 15th.

Ms Hayes: Did they not deliver on time, or did they deliver something that didn't work?

Mr Anderson: It was on time, but the program they wrote was full of unnecessary code. Worse than that, it couldn't book tickets from customers with Macs, only PCs, and we were really clear in the contract that it had to work for all customers using modern home computers.

Ms Hayes: Well, 'modern home computers' isn't quite as clear a specification as one might like, but I can't imagine a jury not finding that both Macs and PCs fall within that definition. By the way, did you draft the contract yourselves or did you engage an attorney?

Mr Anderson: We did it ourselves.

Ms Hayes: OK. Were you able to deliver your website on time?

Mr Anderson: Not to the original deadline. The ferry line gave me an extra three weeks to deliver, but I had to give them a 10% discount and find someone else to clean up the mess that Glaptech made. Fortunately, I have a cousin in New York who could do it, but he charged New York prices, and I had to pay him to fix the program that I had already paid Glaptech to write. I actually lost money on the job. Plus, this is a small town, and it certainly didn't do my reputation any good to be late. I just hope that I don't lose a customer because of this.

Ms Hayes: Well, if you do lose the customer and they were a long-standing customer and Glaptech knew it, and if we can prove all of that at trial, you might be able to recover what are called 'consequential damages'.

Mr Anderson: OK.

Ms Hayes: I'll get back to that in a second. First of all, they breached the contract by not delivering the goods that you

had ordered, that is to say a program that would work on both PC and Mac.

Mr Anderson: OK.

Ms Hayes: You were able to fix the problem. Did you get in touch with anyone besides your cousin, say, another programmer here in town?

Mr Anderson: Nope, I had no time and I wasn't going to mess around.

Listening B, Exercises 9.2 and 9.3

Mr Anderson: Nope, I had no time and I wasn't going to mess around.

Ms Hayes: That could be a bit of a problem. You're supposed to mitigate your damages, which means that you had to make a reasonable effort to solve the problem as inexpensively as possible. You don't have to get the lowest possible price, but in the best-case scenario, you would have shopped around at least a little, preferably locally. If we can't show the court that another programmer would have charged more or less the same as your cousin and done the same quality work, you'll only be able to recover what a local programmer would have charged for the work.

Mr Anderson: That's not fair. I really want to make these guys pay. This whole thing really upset me. I couldn't sleep and I lost a lot of weight from the stress.

Ms Hayes: Well, since this is a contract case, you can't recover for your emotional injury – you're only entitled to get what you'd have gotten if the contract had been fulfilled. In the same way, you can't get punitive damages – you can't 'punish' someone for not fulfilling a contract, you can only get what is called the 'benefit of your bargain'. On the other hand, you may be able to get what I mentioned earlier, consequential damages, which are damages that flow from the result of the breach of contract. Did they know what your deadline was?

Mr Anderson: Yes, I told them on the phone a dozen times.

Ms Hayes: Good. There are two items here, assuming that the contract you entered into with them doesn't waive consequential damages. I need to look closely at the contract. If it doesn't, you should be able to recover the 10% discount that you had to give the ferry company. We just need to show that they could have foreseen that you would have to give your customer a discount if the program they designed was unsatisfactory and had to be fixed, thus forcing you to deliver the goods late. That shouldn't be hard. As I mentioned before, if you lose the customer, you may be able to recover damages for that as well. But I have to warn you that proving that they could have foreseen that you would lose a customer will be extremely difficult. So, how does this all sound to you?

Mr Anderson: Not as good as I would have liked, but good enough. Where do we go from here?

Ms Hayes: Let me go through the file and read through the contract. Then I'll prepare the complaint, which I should be able to file at the end of next week. I'll be in touch.

Mr Anderson: Great. Thanks for your help.

Unit 7

Listening A, Exercise 6.1

Sam: So, how do things look on the Keats case, Ron?

Ron: Well, Sam, let me fill you in on it.

Sam: OK. What's it all about?

Ron: Well, as you know, our client, Mr Keats, is a restaurant owner. He leased commercial space from the Jones Corporation. Last year, Keats decided to sell his restaurant business. So he wanted to assign his interest in the lease to a third party.

Sam: Does the lease permit this?

Ron: Yes, the lease expressly allows assignment.

Sam: So Keats is allowed to assign the lease to someone else ... but surely only with the prior written consent of Jones?

Ron: Yes, that's right. But the contract also stipulates that Jones cannot unreasonably withhold its consent to such an assignment.

Sam: OK, go on.

Ron: Well, then Keats sought approval for the assignment from Jones.

Sam: Did Jones give its approval?

Ron: First it asked for personal and financial information about the prospective buyer. Our client provided this information promptly. Then Jones asked for more detailed information.

Sam: Such as ... ?

Ron: Things like photocopies of his driver's licence, passport and 15 years of work history. And Keats provided all of that, too.

Sam: And did Jones give its approval then?

Ron: No. Jones deferred making a decision on the assignment. It just kept our client waiting and waiting.

Sam: What happened then?

Ron: As you can imagine, the prospective buyer of the restaurant got tired of waiting and withdrew his offer. So Keats is seeking damages from Jones for breach of contract and for intentional interference with a prospective business advantage ...

Sam: I see.

Ron: ... alleging that Jones Corporation deliberately withheld consent to the assignment.

Sam: For what reason?

Ron: Mr Keats believes that the reason is personal animosity between him and Jones.

Sam: So you're saying that Jones deliberately withheld consent to the assignment in order to sabotage the sale – because Mr Jones doesn't like Keats?

Ron: That's right.

Listening A, Exercise 6.3

Sam: And how do you plan to argue this case?

Ron: Well, the crucial point is the contract stipulation that Jones cannot 'unreasonably withhold its consent'. And I want to argue that Mr Jones essentially withheld consent for the assignment – *deliberately* withheld consent – because he doesn't like our client. And that's surely something that can be considered 'unreasonable'.

Sam: That sounds good to me. But how do you want to establish that the defendant acted unreasonably? How can you convince the court?

Ron: Well, I think the evidence is strong here. First of all, the prospective buyer of the restaurant has an excellent credit rating, so Jones can't have rejected him on that account.

Sam: Good. But Jones could still assert that it was intending to make a decision, but it needed more information, to which it's entitled.

Ron: I've got an expert on commercial lease transactions who will testify that Jones had sufficient information to make a decision.

Sam: That sounds good. But you still need to reinforce the idea that the withholding was somehow intentional or deliberate.

Ron: Yes, I'm working on that now. I'm collecting evidence that suggests the relationship between the men was not a good one.

Sam: Good. Keep me posted, Ron – and let me know if I can help at all.

Ron: Thanks, will do!

Listening B

In determining whether a landlord has unreasonably refused to consent to an assignment, the court should consider only those factors that relate to the landlord's interest in preserving the value of the property, and the court must evaluate whether a reasonably prudent person in the landlord's position would have also refused to consent.

Arbitrary considerations of personal taste, convenience or sensibility are not proper criteria for withholding consent under such a lease provision.

The court must determine the credibility of witnesses and the weight to be given to evidence and draw all justifiable inferences of fact from the evidence.

Here, when my client informed the defendants that he had a prospective buyer for his business, the defendants' attorney requested that he provide personal and financial information on the buyer, as well as a business plan and evidence of the buyer's experience in operating a restaurant. The defendants' attorney also provided my client with a commercial lease application for the buyer to complete. My client gave the defendants the completed application and information on the buyer and promptly responded to each of the defendants' requests for information.

As acknowledged by the defendants' attorney, the proposed buyer had a 'perfect credit rating'. If the credit rating was 'perfect', then on what grounds did the defendants withhold approval? Surely not on reasonable grounds. My client's expert on commercial lease transactions, whom the court must find persuasive, testified that my client provided enough information for the defendants to make a decision. If the amount of information provided was sufficient, then on what grounds did the defendants delay making a decision? Surely not on reasonable grounds. Furthermore, there was evidence that the defendants' delay in approving the assignment was not related to the buyer's qualifications, but was predicated on a dispute with my client involving a prior lawsuit between the parties. This evidence – a letter in which the defendants threaten to 'ruin' my client – makes it clear on which grounds the defendants withheld approval: on unreasonable grounds. The defendants lost the lawsuit and were required to pay high damages to my client – this is the explanation for their unreasonable withholding of approval.

Based on the evidence presented, the court must conclude that sufficient evidence supports a determination that the defendants unreasonably withheld consent to the assignment.

The defendants nevertheless assert that they did not refuse consent, but merely delayed giving my client an answer until additional information was obtained. We reject this argument. The terms of the lease provided that the defendants could not unreasonably withhold consent, but this is exactly what they did. As defined in Webster's *Third New International Dictionary*, 'withholding' means 'not giving', while 'refusing' on the other hand may require some affirmative act or statement. Jones Corporation did not refuse consent, it is true. But Jones Corporation's decision to delay consent amounted to a withholding of consent, especially given my client's indication in a letter to the defendants that time was of the essence. And, as noted above, the evidence supports the determination that this decision was unreasonable. Therefore, the defendants' attempt to distinguish between withholding consent and refusing consent is unavailing under the lease provision here.

Speaking B

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Unit 8

Listening A

Jane: Hello, Jane O'Connor speaking.

Gwen: Hi, Jane, this is Gwen Hill here from Ludco Ltd. I'm just about to go into a managers' meeting and I need to let everyone know what's going on in the Myers case.

Jane: Hello there ... yes, yes, um, I've had a quick look at the documents that we've got so far, and I can say that she does have a right to claim unfair dismissal. Of course, that doesn't mean she's necessarily going to win the case.

Gwen: I understand.

Jane: Now, we have to follow the prescribed procedure in order to defend it. I'd imagine that if it goes to trial – and I certainly hope it doesn't – then it'll be disposed of within, say, six to 12 months. But as I said, we have to follow the prescribed procedure.

Gwen: OK, so what is the prescribed procedure?

Jane: Well, we've already carried out the first step – I sent you a draft entry of appearance with your answers to the claim. As I understand it, Ms Myers was dismissed for stealing. Could you review what we've written about the reasons for dismissal and let me know if it's correct?

Gwen: Yes, I've read the draft and I just need to make a few minor changes. I can send you an email after my meeting. What's the next step?

Jane: The next step would be to make an application for a pre-hearing assessment. You use that when you feel that the claim has very little prospect of success, which is the case here. She was actually caught stealing documents, wasn't she, or rather taking them from the building? So of course our defence is extremely strong.

Gwen: So what do we need to do?

Jane: There are still a few things that we need to look at. The first thing is the confidentiality aspect: since there was a breach of the employee's duty of confidentiality and loyalty to the company, we need to explain what happened, exactly what she did. Who saw her taking documents out of the building? Were the documents in a briefcase? Were they photocopies? All the details really. We need to get everything watertight, as they say. Could you supply me all those details?

Gwen: Sure. I'll write it all up for you. What happens after that?

Jane: Well, we can make a written submission and ask the employment tribunal to actually dispose of the claim purely on the basis of the written submission. They'll decide whether to dispose of the claim or to support it at the pre-hearing assessment. I'm pretty sure they'll grant us a pre-hearing assessment, and then it's up to

us to convince them at the pre-hearing that the claim does not merit a full hearing. Considering the facts, I'd actually recommend that there would be some form of written presentation first, because firstly it costs less, and secondly you're not dragged out of the office, which of course would also incur costs. Actually, it would cost the company less, because I don't have to leave here and appear in court for the pre-hearing.

Gwen: OK. Costs are not really an issue for us. The issue for us is winning and getting this out of the way. Are you sure that doing this in writing is the best way to approach the problem?

Jane: On the basis of everything that I've read so far, I can see nothing whatsoever to be gained by anyone by actually allowing this to go to the full hearing. The defence is so strong. Although she does have the right to claim for wrongful dismissal, her conduct as an employee in removing confidential information from the building is clearly a breach of her employment duties. These are contracts of good faith between employer and employee. Of the utmost good faith. She really doesn't have ... let's put it this way, she doesn't have a legal leg to stand on, I don't think, at the end of the day.

Gwen: OK, very good, Jane. Thank you for your help and, as I said, I'll send you an email with the revised entry of appearance form, as well as all the details of the theft, right after my meeting. Talk to you later.

Jane: OK, thank you. Bye.

Listening B

Ms Brewer: Good morning, Mrs Howard, Mr Howard. Please come in.

Mrs Howard: Good morning, Ms Brewer.

Mr Howard: Hello.

Ms Brewer: Please have a seat. Coffee? Mineral water?

Mrs Howard: No, thanks, I'm fine.

Mr Howard: Not for me, thanks.

Ms Brewer: Right, then. Um, on the phone, you told me that you wanted to speak to me about drug testing at your company. Maybe you could tell me something about what's going on at your company at the moment. How's business?

Mrs Howard: Well, not bad, we can't complain, can we, John?

Mr Howard: No, business is fine. Actually the demand for cleaning services and facility management is growing in the region. But we're here to ask for your advice – we think we have a drug problem among our employees ...

Mrs Howard: ... and we're considering starting drug testing, some sort of programme that all the employees have to participate in. We just can't tolerate the current situation. There are at least three of the younger men, window cleaners, who we're sure, really sure, are taking drugs, even while they're on the job, and one of the supervisors, who we think is also ...

Mr Howard: It's just that we think it's dangerous.

Mrs Howard: ... and it's bad for our reputation.

Ms Brewer: Right. If I could just jump in here and summarise what you've been telling me. You suspect that several of your employees abuse drugs and so you're contemplating implementing a drug-testing programme, is that correct?

Mr and Mrs Howard: Yeah.

Ms Brewer: And you'd like me to inform you about the legality of such a course of action.

Mr Howard: Yes, that's right.

Ms Brewer: Well, first of all, I should say that the legal position on drug testing at work is not at all clear at present. There's no direct legislation, and important legal questions depend on the interpretation of numerous provisions in health and safety, employment, human rights and data-protection law. This is a very tricky area, and one would have to proceed very carefully.

Mrs Howard: What do you mean?

Ms Brewer: Well, if you were to subject your employees to drug testing, and you found out that a worker abused illegal substances and then terminated his employment, there's a good chance that you could be sued for violating the employee's right to privacy.

Mr Howard: But what about *my* rights? Such as my right as an employer to maintain a drug-free workplace?

Mrs Howard: Exactly!

Ms Brewer: I agree with you, Mr Howard, but we have to look at what the law says. Generally speaking, the courts in our jurisdiction have only tended to rule in favour of the employer in those cases where the dismissed employee has been engaged in safety-sensitive work. And where the employer has implemented a long-term workplace safety policy that included not only drug testing, but also the opportunity for the workers to get treatment for their drug problems.

Mr Howard: But that would take too long! I don't think we can risk waiting until they've had a chance to kick their drug habits!

Mrs Howard: John is right – we need to act on this now.

Ms Brewer: I'm afraid I have to disagree with you both. In my opinion, you risk more by acting hastily, by making a knee-jerk reaction to the problem. You risk costly litigation that you'd most likely lose.

Mrs Howard: That may be true, but we can't just sit back and do nothing.

Mr Howard: I couldn't agree more! There must be something we can do to respond to the situation right now. After all, these three workers are window cleaners, and there's most definitely a safety issue involved. We're responsible for the safety of our workers and for the safety of others ...

Ms Brewer: I see your point – you're absolutely right – you do bear responsibility for the safety of others. Let me suggest something you could do immediately: you could consider re-assigning the workers in question to different tasks, to jobs that are less safety-sensitive. And then you could launch a new workplace safety initiative, concentrating on drug and alcohol abuse, with employee meetings, memos and the like informing your workers of the new policy ...

Mrs Howard: Mm, that's not a bad idea ...

Unit 9

Listening A, Exercise 4.1

Now, I'd like to move on to the retention-of-title clause. Every supplier of goods should include a retention-of-title clause in their contract terms. As you know, this clause states that the buyer does not own the goods until payment is made. Thus if the buyer goes out of business before paying for the goods, the supplier can recover the goods.

If the clause is drafted badly, it may be treated as a charge. This means that, as a charge, it should be registered at Companies House. If the supplier fails to register a charge, it's generally void and can't be enforced. That's why lawyers drafting such clauses should do their best to ensure that the clause does not become a charge. If a supplier has a high-value contract, it's a good idea for him to make the effort to register the clause as a charge. It doesn't cost anything, and it's a very sensible thing to do. However, in most cases, where hundreds of sales of goods are made each day, registering each one under company law is just not feasible.

Well, now I'd like to give you five useful tips for drafting retention clauses.

Listening A, Exercise 4.2

Well, now I'd like to give you five useful tips for drafting retention clauses.

First of all, a good clause should be written clearly. It should explicitly state that ownership, or title, in the goods will not pass to the buyer until the goods have been paid for.

A second thing to keep in mind is the fact that the clause should also include the requirement that the buyer of the goods must store the goods separately from other goods. The goods should be clearly labelled as the property of the supplier until payment for them has been made. The reason for this is that liquidators ask for proof that those goods have not been paid for. So it's enormously helpful to make sure that the product serial number printed on the invoice is also written on the goods.

A third point: I'd recommend that the clause includes wording to the effect that the buyer agrees that he will not resell the goods until they have been paid for. Remember that there'll be a greater risk that the clause amounts to a charge if the buyer has the right to sell the goods before the seller has received payment for them.

I now come to my fourth point. Another thing to take into consideration is what the buyer will do with the goods. If the buyer intends to use the goods in a way that will result in their losing their form, this means they can't be recovered, and so the clause may be void. In one case, the product was a chemical, an ingredient used to make another product, and the court held that once it was used in the manufacturing process, a claim over the finished product under the retention-of-title clause was invalid because the original product no longer existed. So when the seller tried to claim rights over the resulting product, he was claiming rights over additional property. This, of course, meant the transaction was a charge. In another case, retrieving the product was possible – it was attached to the floor of a building, and so it could be retrieved by unscrewing. In that case, the clause was valid.

My fifth and final point is the issue of recovery of the goods. A well-written clause will say that the supplier has a right of entry to recover the goods. Allow me to give you another example. In one case, a supplier of computer equipment was able to walk right into an office and pick up and take away the goods under a retention-of-title clause. No one said anything or tried to stop him, and the clause allowed this.

Are there any questions? Not yet? Well, then I would suggest at this point that we have a look at a well-drafted retention-of-title clause.

Listening B

I'll be presenting a brief of the case ProCD, Inc. versus Matthew Zeidenberg and Silken Mountain Web Services from the year 1996. The jurisdiction is the US state of Wisconsin. It's a pretty important case in the US in the area of the sale of goods over the Internet. You could even say it's a landmark case.

First, I'll tell you the facts of the case and then something about the stages of litigation and the holdings of the courts. Finally, I'll explain the reasoning of the courts.

Here are the facts: the plaintiff, ProCD, produced the CD-ROM product Select Phone. It's a listing of over 95 million telephone numbers and addresses, combined with search and retrieval software. The defendant, Mr Zeidenberg, purchased copies of Select Phone, but decided to ignore the licence. He formed Silken Mountain Web Services, Inc. to resell the information in the Select Phone database. He copied the telephone listings from the CD-ROM onto his computer, created a software search engine and uploaded the data onto his website. The site was very successful.

ProCD sued, alleging breach of the express terms of the shrink-wrap licence agreement, among other things. The main issue raised by the case is whether a shrink-wrap licence constitutes an enforceable sales contract.

So, what's the procedural history of the case? The first instance, the District Court, decided in favour of the defendant. It held that because the terms of the licence agreement were inside the box instead of printed on the outside, Zeidenberg had no opportunity to disagree with or negotiate them when he paid for the product at a store.

Then the case went to appeal. The Court of Appeals reversed the District Court decision in favour of the vendor, ProCD. It remanded the case back to the District Court to determine damages and other legal relief. In its decision, the Appeals Court noted that the Select Phone box contained a clear statement that use of the product was subject to the licence terms contained inside.

What was the reasoning of the court? The Appeals Court made comparisons to other types of transactions where money is also exchanged before the detailed terms and conditions are communicated to the consumer. One example the court gave was buying airline tickets. When an airline ticket is purchased, the consumer reserves a seat, pays and gets a ticket, in that order. The ticket contains elaborate terms, which the traveller can reject by cancelling the reservation. To use the ticket is to accept the terms.

The Court also noted that the Uniform Commercial Code provides that a vendor may invite acceptance of an offer by conduct. The vendor may also put limitations on the kind of conduct that constitutes acceptance. A buyer may accept that offer by performing the acts the vendor will treat as acceptance. And that, concluded the Court, is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the licence at leisure. This Zeidenberg did. He had no choice, because the software displayed the licence on the screen. It wouldn't let him proceed without indicating acceptance. Zeidenberg also had the opportunity to reject the contract if he found the terms unacceptable by simply returning the software. Instead, he decided to use it. So, the court reasoned, he was bound by its terms.

Unit 10

Listening A

Now, I'd like to move on to another topic which you'll surely encounter in your work as estate agents. I'm going to tell you a bit about the principal types of easements in our jurisdiction. First, allow me to define the term: an easement is the legal right of another to use part of your property. An easement is recorded on the deed and survives any sale of the property.

Generally speaking, we distinguish between two fundamental types of easements: temporary and permanent. Temporary easements are granted for a definite period of time. The reason for this might be to allow access to property during construction, for example. The second kind of easement, a permanent easement, lasts for an indefinite period, as the name suggests. Permanent easements can be classified into three common types. These three are the easement in gross, the prescriptive easement and the easement appurtenant.

I'll begin with the first type, the easement in gross, which is also the most common. The easement in gross only involves one property, the property subject to the easement. This type includes those easements which are given to a quasi-public corporation, such as the electric or phone company. An easement in gross is usually recorded in the public records when a piece of land is sub-divided.

Let's move on to the second type of easement, the prescriptive easement. This refers to the right to use another's property that is acquired by what is known as an 'open, notorious and continuous' use. Open use means that the use is obvious and not secretive, while notorious means that the use has to be clearly visible. The use of the land also must have been continuous for the statutory period, which is 20 years in our jurisdiction.

Finally, I'll come to the third type, the easement appurtenant. When an easement benefits an adjoining property, such as for a driveway or walkway, we call it an easement appurtenant. This type of easement is usually recorded when a sub-division is created by dividing a property into two or more smaller lots. One important sub-type of an easement appurtenant is called an 'easement by necessity'. This is created to reach a landlocked property, which does not have access to a public road.

What are the legal issues connected with easements? What kinds of disputes can occur and how can they be avoided? Well, we can distinguish three types of dispute which often occur.

Listening B

Ms Blackwell: Hello, Mr Watson, very good to see you.
Mr Watson: Hello, good to see you, too, Ms Blackwell.
Ms Blackwell: Please have a seat. Er, some coffee?
Mr Watson: No, no, thank you, I'm fine.
Ms Blackwell: Great. Well, why don't we get down to business, then? I've prepared everything you asked me for – the house looks beautiful, by the way, I must say, I envy you.
Mr Watson: Yes, it's lovely, isn't it?
Ms Blackwell: It is indeed. Right. Um, why don't I talk you through the process, tell you what has to be done so you get an idea of the process as a whole and the costs you'll have, so you know what to expect.
Mr Watson: OK, fine.
Ms Blackwell: Well, buying a home in Spain is really not that complicated, especially if you have the help of a Spanish lawyer and you basically know what you're doing. Senor Martínez is very reliable, his English is very good and he's quite experienced in this kind of transaction. I've printed out an email from him – here you are – and as you can see, he's waiting for you to contact him.
Mr Watson: OK. What about his fee, if I might ask?
Ms Blackwell: He told me that he charges 1,000 euros for assistance throughout the entire process.
Mr Watson: That's fine – after all, I don't want any unpleasant surprises.
Ms Blackwell: Right. Well, first of all, Senor Martínez will draw up a power of attorney, which you'll have to have made official at the office of a notary. Senor Martínez will officially translate the document for you in front of the notary.
Mr Watson: Why do I need a power of attorney?
Ms Blackwell: That's so your solicitor can carry out any necessary steps when you're back in England.
Mr Watson: I see.
Ms Blackwell: Then the two of you will go to the National Police – which is called the *Policía Nacional* in Spanish, I believe – to get a fiscal number, referred to as an NIE. The next step is to set up a bank account for transferring all funds. You'll need to have 1% of the purchase price of the house in cash. And, of course, you'll want to talk about financing the house with the bank. I'm sure that Senor Martínez will be able to recommend a good local bank.
Mr Watson: Right. What about the contract?
Ms Blackwell: Senor Martínez will draw up a contract for you in both English and Spanish stating the terms of the sale. It'll also set forth the timeframe of the house purchase and include things like deposit payable, um, furniture included and so on. And then there'll be the official signing of this contract by you and the Seller, with both Senor Martínez and the estate agent present as well. At this point, you'll hand over the 1% to the Seller.
Mr Watson: OK. Could I send you a copy of the contract for your review?
Ms Blackwell: Of course – I was going to suggest that.
Mr Watson: Good. What's next?
Ms Blackwell: Well, I suggest you then return home and arrange for the rest of the deposit – that will be 9% of the purchase price – to be transferred to your bank account in Spain. Senor Martínez will be taking care of further paperwork, and when he's sure everything is in order, he'll withdraw the money from your account and hand it over to the Seller. Senor Martínez can then sign the relevant part of the contract. Once the rest of the money has been transferred to your Spanish account, the final documents will be signed on the completion date.
Mr Watson: Do I have to be there for the signing?
Ms Blackwell: No, Senor Martínez will represent you, and he, the Seller and the estate agent – as well as a representative from the bank if you've arranged a mortgage – will undertake the signing in the presence of a notary. Then the money and the keys will be exchanged, and the house is yours!
Mr Watson: Sounds great!

Unit 11

Listening A

Well, good morning, ladies and gentlemen. I'm going to be talking to you today about a hot topic in the area of intellectual property law. It's the topic of business-method patents. It's an area where a lot of change is occurring right now, and so it's quite exciting. One of the senior partners of the firm, Mr Whittaker, has told me that the firm has just landed an important new client with a case involving a business-method patent for an Internet sales application. I'm told it deals with a one-click ordering solution. I understand that you'll be shadowing the senior lawyer assigned to this case. And so I'll be covering the topic with you in detail.

I'll begin with the basics, and then we'll move on to look at a few landmark cases. Each of you will be assigned one case to research and then to present to the group – don't worry, you'll have plenty of time to do the research between sessions – and then you'll summarise the case for the others. Finally, I'll discuss the present situation and some recent holdings. Feel free to interrupt me at any time if you have any questions.

Right. Well, allow me to start by going over what happens when a person tries to get proprietary rights for their invention. Naturally, an application is submitted to the patent office. The examiners at the patent office decide whether an invention deserves to be awarded a patent on the basis of certain standards. These standards – also known as requirements – are set forth in the patent statutes, as you know. But what are these standards? What determines the patentability of an invention? Let's have a look at the requirements.

The first requirement is that the invention must be useful. This is also known as the 'utility requirement'. This requirement is met if the invention is operable and if the invention provides what is known as a 'tangible benefit'. Tangible in this case means

'substantial' or 'real', so that we can say the utility refers to a real benefit that the invention provides.

The second requirement is that the invention must be novel. Naturally, 'novel' means 'new', in the sense that the invention must not be anticipated by another patent which already has been granted or by knowledge which is already in the public domain.

The third requirement is called 'non-obviousness'. This word refers to the quality of something being not obvious to a person who has ordinary skill in the art.

OK, so much for the first three requirements of utility, novelty and non-obviousness. There is a fourth requirement as well, and this is the one that is particularly relevant for the issue of business methods. This requirement governs the issue of what constitutes patentable subject matter. Things which are generally considered patentable are processes, machines, a composition of matter (such as a synthesised chemical compound) and so on. These are rather broad categories, of course. But here's where it gets interesting – there have traditionally been exceptions to patentability in certain specific cases. This means that certain subject matters – such as business methods – have been barred from patentability. That's right: traditionally, business methods could *not* be patented. We can assume that the thinking behind this was that abstract ideas cannot be patented.

Recently, however, some important decisions have put an end to this practice. I'd like us to have a look at some landmark cases ...

Listening B

Patrick: Well, hello, Thomas, good to see you, come in.
Thomas: Hi, Patrick, thanks.
Patrick: Thomas, you know Rebecca Schneider, don't you? We're working on the distance-learning case together.
Rebecca: Sure, we've already met. Hi, Thomas.
Thomas: Hi, Rebecca.
Patrick: Right. Rebecca, Thomas will be shadowing us on this case. Well, let's get down to work, shall we? Maybe we should start by finding out what you know about distance learning, Thomas.
Thomas: OK. I only know that distance learning basically refers to a learning situation in which the teacher and the student are in separate locations. And so the teaching is done via technology, such as the Internet.
Patrick: Yes, that's right. And naturally, there are copyright issues involved.
Thomas: Yes, I imagine the concept of 'fair use' plays a role – when you're allowed to make limited use of copyrighted material without permission. If I'm not mistaken, you can use copyrighted material for educational purposes.
Rebecca: Well, generally speaking, that's true. Traditionally, the Copyright Act has allowed teachers to 'display and perform' the works of others in the classroom for educational purposes. So a teacher can read a poem aloud in class without permission or make photocopies of a text for classroom use.
Patrick: But with distance learning, things get a bit more complicated.
Thomas: In what way?
Patrick: Well, a teacher's rights to the fair use of copyrighted material for distance learning are much more limited. That's because distance learning usually involves materials being uploaded to websites. And that means that the materials – texts, images or music created by others – can be transmitted all over the world, potentially to millions of people. These materials could then theoretically be downloaded or altered by other users. Naturally, all of this activity threatens the interests of copyright owners.
Thomas: So, in other words, just because the use of a work is educational doesn't mean it is necessarily fair.
Patrick: That's right.
Thomas: Hm. This may sound naive, but isn't the freedom of access to information an important value, too? Isn't it something like the foundation of education?
Rebecca: Yes, you have a point there. It certainly is – or should be. It's ironic, isn't it, that just when technology has advanced and information can reach more people than ever, the use of materials for online courses is becoming more restricted!
Patrick: Well, yes, but you can look at it another way, too. The aim of copyright law has always been to find a balance between the rights of copyright owners and society's interest in ensuring the free flow of information. That hasn't changed.
Rebecca: That may well be true, Patrick, but you have to see the bigger picture. Things are changing. Important battles are being fought over digital copyright issues. And new federal statutes and judicial opinions are shifting the balance of power to copyright holders – at the expense of educators. The concept of fair use for education—
Patrick: Well, from a legal point of view, the debate is about—
Rebecca: Sorry, can I just finish my point? As I was saying, the concept of fair use for educational purposes is slowly but surely being narrowed by the law. And what's more, we're heading toward a situation where copyright owners will soon be arguing before the courts that activities which we've always considered normal and customary fair use are copyright infringements.
Patrick: Yes, but that's only one side of the problem, Rebecca. I think the important issue here is what the courts look at when they determine if the use of material is fair use or not.
Thomas: So, does the idea of fair use still exist in the context of distance learning?
Patrick: Yes, it does. There's a fair-use analysis, a way of analysing the use of copyrighted material. Teachers can apply it like a kind of test, when they want to decide whether the use of a work represents a copyright infringement or not.
Thomas: How does that work?
Patrick: You look at four factors. Let me give you an example. Let's say you are an instructor developing an online course and you want to use a copyrighted text. First, you would ask what is the purpose and character of the use – is it educational or commercial, for example? Then you look at the nature of the copyrighted work – is it factual or imaginative? And then at the amount of the work used in relation to the whole work – is it only a small amount? Finally, you have to consider the effect of the use of the material on the market for the work. The answers to these questions tell you if the use of the material is fair use or not.
Rebecca: But Patrick, you have to admit that your four-factor analysis can lead to different results; two people can review the same facts about a proposed use and come to different conclusions about its fairness. It seems to me that the real issue is how we find an objective way of judging fair use in the educational environment.

Unit 12

Listening A

Emily Benton: Hello, Emily Benton.
Max Carter: Hello, er, this is Max Carter speaking.
Emily Benton: Yes, hello, Mr Carter, how are you today?
Max Carter: I'm fine, thanks, Ms Benton.
Emily Benton: Great. What can I do for you?
Max Carter: Well, I'm calling about a financial matter. You see, I accepted a note endorsed to me by a long-time business

customer, Wilson Charles, in payment for services we provided. Wilson was short on cash, and the note had a face value of five thousand dollars. The amount outstanding on the services my firm provided was only about two thousand five hundred dollars, so I thought I was getting a pretty good deal. Especially, since I know the maker of the note, John Ellis. And I knew he was a decent guy.

Emily Benton: I see.

Max Carter: The note says that John is to pay monthly instalments, plus interest, as soon as he gets an inheritance from his uncle. I've notified John that I'm the holder of the note, but the problem is that several months have passed and he hasn't paid me anything – nothing whatsoever.

Emily Benton: Er, do you have the promissory note there with you?

Max Carter: Yes. I have it right here. I believe John wrote it up. Apparently he has some experience with this kind of thing.

Emily Benton: Right. Er, let me ask you a few questions. I need to check if the note is valid. You see, there are certain formal requirements that have to be met for it to be negotiable, that is, to be enforceable by you as a holder in due course.

Max Carter: OK, er, what would those be?

Emily Benton: The first one is simple: it has to be in writing.

Max Carter: Well, it certainly is!

Emily Benton: Yes, and it has to be signed by the maker, in this case John Ellis. Even an 'x' would be acceptable. And ideally, a witness to the signing should sign the note as well.

Max Carter: Well, this note has definitely been signed by Ellis.

Emily Benton: Fine. A third requirement is that the note has to use the language of negotiability. It should say 'payable to the order of Wilson Charles'. Charles should then have endorsed the note 'payable to the order of' you. That's what's referred to as order paper. Or the endorsement could be in blank by Charles, which would make it bearer paper.

Max Carter: Er, yes, it says it right here: 'payable to the order of Wilson Charles'. And then Charles endorsed it 'payable to the order of Max Carter'.

Emily Benton: OK, that's good. A further requirement is that the note has to mention what is known as a 'sum certain'. That is to say, an exact amount in a specific currency.

Max Carter: It says five thousand US dollars right here.

Emily Benton: Right. This is looking good. There are just two more requirements; if it meets those, you've got no problems. So, the next one is the requirement of an unconditional order or promise. Allow me to explain. Unconditional means that there are no strings attached, no conditions connected with repayment. Have a look at the note. Are there any conditions mentioned?

Max Carter: Yeah, well, here's one. It says that as soon as John is paid out his inheritance, he will start paying on the note. Er, I guess that's a condition, isn't it?

Emily Benton: Yes, it certainly is. Hmm. This may cause you problems, but let's just look at the final requirement. The note should state that the outstanding sum is either payable on demand or at a definite time. Is that written anywhere on the note?

Max Carter: No, nothing like that is written anywhere on it.

Emily Benton: Oh dear. Well, Mr Carter, it looks like out of six requirements for negotiability, your note only meets four.

Max Carter: I guess we now need to talk about whether I can get my money out of this whole mess ...

Listening B, Exercises 9.1 and 9.3

Ms Turner: So, how are things coming along with the Bifler real-estate deal?

Ms Wadman: Good, quite good, except for one thing. That's why I came over here to talk to you today. We've got a bit of a problem at the moment.

Ms Turner: Oh yes, what is it?

Ms Wadman: Well, the agent of the buyers group insists on signing the promissory note for the down payment on behalf of the entire group.

Ms Turner: Why's that?

Ms Wadman: Well, according to him, the other three principals in the deal aren't available for signing right now. And, as you know, our client is in a hurry to sell the property, so they'd also like to get the note and close the deal as soon as possible. The buyers seem to be in a hurry, too – they really want this property. They're planning to build a big shopping centre on it.

Listening B, Exercises 9.2 and 9.3

Ms Turner: Well, what do you mean by 'not available'?

Ms Wadman: One of the principals is in the hospital, another one is out on his boat somewhere in the Caribbean and the third is in prison.

Ms Turner: In prison?

Ms Wadman: On a tax-evasion charge, I'm told. He'll be out in a few months.

Ms Turner: Right. Doesn't sound like a very trustworthy business partner, does he? Well, even so, it's important that our client realises that he puts himself in an unfavourable position if only one person signs the promissory note for all of the principals. Even if all of the parties involved are in a hurry to complete the deal, it's important under the circumstances that all the principals sign the note.

Ms Wadman: Why's that?

Ms Turner: Are you familiar with *Ness versus Greater Arizona Realty, Inc.* and revisions to the UCC affecting that decision?

Ms Wadman: No, I'm afraid not. Could you explain?

Ms Turner: Well, basically, *Ness versus Greater Arizona* involved a situation which was very similar to this case. A promissory note was signed by only one principal who was acting as an agent on behalf of a group of principals who wanted to buy real estate. They were unable to pay the note and were sued by the drawee. However, the court ruled that no one is liable on an instrument unless he has signed it.

Ms Wadman: I see.

Ms Turner: However, after the revisions to the UCC, a principal signing as an agent on behalf of other principals can bind them, even if their signatures aren't on the note.

Ms Wadman: Well, there isn't a problem, then, is there?

Ms Turner: Well, yes, there could be. Our courts have not really addressed this issue since the revisions to the UCC. I don't want to put our client in the position of being a test case for this issue. It could get tricky if the other principals deny that the signing principal was acting on their behalf. The safest course is for our client to be able to sue on the note against all the principals as makers.

Ms Wadman: Right, I understand. So what do you think I should do?

Ms Turner: I suggest that you tell your client to refuse to accept the note until it's been signed by all of the principals. I also recommend that you inform the buyer that there are ways to get his business partners to sign the promissory note.

Ms Wadman: Such as?

Ms Turner: Well, as you may know, in our jurisdiction, scanned signatures are legally binding. Why don't you propose that option?

Ms Wadman: OK.

Ms Turner: I'd also advise you to look into e-signatures – that might work. Peter Walston in the intellectual property department can explain how that's done. Another way of getting the signatures of all of the principals would be to send the document by courier and have it signed.

Ms Wadman: But what about the guy on the boat out in the Caribbean?

Ms Turner: Well, that's a difficult one, but you'd be amazed what sort of technology you can get on boats these days ...

Unit 13

Listening A

John Kellogg: Well, I hope you all enjoyed your lunch. Now, I'd like to turn to the topic of creating security interests. I'd like to begin by giving you a general outline of seven steps that you need to follow when creating a security interest. Afterward, I'll discuss each of the steps in more detail. Please feel free to interrupt me at any time should you have a question.

Let's begin with step 1: identify the debtor. Take care to identify precisely which person or entity will be granting a security interest. A borrower may conduct its business through several entities. Let me give you an example. Your client might be a real-estate holding company that owns only the building where a subsidiary conducts its business using its own personal property. If the holding company owns only the real estate and not the personal property, it doesn't make sense to have that company grant a security interest in personal property that it doesn't own.

Step 2 is to identify the collateral. Counsel should consult with the client to determine precisely what property will serve as collateral. Some debtors will offer specific property, for example a '2003 Spellman Press, Serial No. 1425XCD', while other debtors may name certain categories of their property, for example 'all equipment and inventory'. Depending on the specific deal struck between the debtor and the secured party, counsel may use a categorical description of collateral.

Participant: Excuse me, Mr Kellogg, I have a question. Why not use a general description, such as 'all personal property of the debtor'? Wouldn't that be simpler?

John Kellogg: That's a good question. What you're referring to is known as a 'blanket lien'. This is problematic, because a blanket lien creates a roadblock to any further secured borrowing for the company.

Right. On to step 3: confirm that the debtor has rights in the collateral. Counsel should confirm that the debtor has, or will acquire, rights in the property. If in doubt, ask the debtor to provide documentation supporting its claim to ownership, such as bills of sale, invoices and the like. The debtor may also agree to subject its after-acquired property to the security interest. In such a case, counsel should include a phrase such as 'now owned or later acquired' to describe the property.

The next step is step 4: confirm that the secured party has given value. In the typical lending relationship, where the lender either agrees to make a loan or actually advances funds, the requirement of value is easily met.

OK. Now we have step 5: draft the security agreement. The UCC requires that it is in writing. It should identify the debtor and provide a signature block. Of course, there is quite a bit more to be said here. I'll be going into more detail on the subject of drafting later.

Step 6 is to 'authenticate' the security agreement. In most cases, this probably means that the debtor's authorised representative will put pen to paper and sign the security agreement. Note that the concept of authentication is designed to permit the debtor to 'sign' the agreement electronically as well, using email, for example.

The final step is step 7: perfect the security interest by filing a financing statement. After the security agreement is authenticated, it binds the debtor and the secured party. To make it fully effective against subsequent creditors, the secured party must perfect the security interest, typically by giving constructive notice to third parties.

Listening B

Matsuko: So, guys, how was it? Was it worth it?

Jack: Oh, definitely. Old Kellogg knows what he's talking about. What did you think, Peter?

Peter: Yeah, and he's funny, too. Kept it from being too dry. He had some good stories to tell about cases he worked on ...

Jack: On the whole, I'd have to say I learned a lot at that seminar. I'm glad I went. I thought that the IP stuff was the most interesting. That's where things are going, if you ask me. That's the future.

Matsuko: Can you fill me in on what he said?

Jack: Sure. What he did was to give us the big picture, telling us about what the situation is in different countries. And then he talked about how specific types of IP collateral are perfected here in the US under the revised UCC.

Peter: He started off by talking about the importance of intellectual property as an asset. He said that for many companies, their intellectual property is their greatest asset. It makes sense, if you think about it, since IP includes everything from patents to software copyrights to trade marks and trade secrets.

Matsuko: And what did he say about the situation internationally?

Peter: Right. Well, the main point he made was that the law is still anything but settled. All over the world, you see inconsistent rulings and unclear statutes.

Matsuko: Can you give me an example?

Jack: Er, let me think ... what was that he said about the UK? Oh, yeah, I remember. So, for example in the UK, charges against intellectual property have to be registered at Companies House, but the law is still unclear about whether this applies to a foreign company that has no presence in the UK.

Peter: Right. And take China and Hong Kong. There, you're not allowed to create a security interest in a trade mark.

Jack: So, his point was that perfecting security interests internationally is a tricky business. You need to have someone who knows what they're doing in the countries in question.

Matsuko: I see. And what did he have to say about perfecting security interests in the US?

Jack: Well, as you know, Article 9 has some new provisions about IP as collateral.

Matsuko: Yes, I know.

Jack: And all those different IP assets like copyright, trade marks, etc. are classified as 'general intangibles'. But they're not all perfected the same way as you might expect. Part of the problem is knowing where to file the security interest, whether on the state or the federal level. But there are other considerations, too. Very complicated.

Matsuko: I'm interested in copyrights. What can you tell me about those?

Peter: Well, Kellogg warned us that copyrights are a particularly dangerous area for lenders. The key issue here seems to be whether the copyright is

registered with the Copyright Office or not. If it is, then you would have to file a security agreement with the Copyright Office. If the work is unregistered, then you would file a UCC-1 to perfect a security interest.

Matsuko: Right. Where could I get more information on what was covered in the seminar?

Jack: You could borrow our seminar materials. Everything you want to know is in there.

Matsuko: Great, thanks. I promise I'll get them back to you quickly.

Unit 14

Listening A, Exercise 4.1

Well, I see that my time is running out and so I'd like to move to my final point. Clients often ask 'How can I limit the exposure of my business and personal assets to the risks of my business?' That's what I'd like to talk to you about – asset protection.

The most powerful weapon of a legal adversary is the ability to freeze your assets. When your bank account is frozen, you can't pay your bills or run your business or withdraw your money. Your residence, rental property or business can also be attached. You can't collect rents or income, and your property can't be sold or refinanced.

The plaintiff can attach your property during or after the lawsuit. An attachment during the case is known as a pre-judgment attachment. After the case is decided, it's called a judgment lien. A pre-judgment attachment is only granted in certain types of cases, generally those involving a contract dispute over a particular amount of money.

A judgment lien applies if the plaintiff receives an award in his favour. The judgment lien immediately attaches to all real estate in your name, all bank accounts and other assets. A lien acts like a mortgage or trust deed. You can't sell or refinance a property without paying off the creditor, and he can foreclose on the real estate and seize any accounts in your name. A creditor with a judgment lien clearly holds all of the cards. You have no room to negotiate. Certainly that isn't the position you want to be in when you deal with an adversary.

Listening A, Exercise 4.2

One of our clients, Ed, was a wealthy real-estate investor and owned five apartment buildings worth about $3 million. Although he was involved in a lawsuit concerning a property dispute at the time, he felt he had little exposure. We set up a plan for him using several limited liability companies to hold the properties. A year later, Ed told us that he'd lost the case and there was a judgment against him for $1.5 million. Had he not set up the plan, he'd have been in big trouble. The plaintiff would've had a lien on all of the client's real estate, worth $3 million, as security for the judgment. The property would've been frozen and then seized. The plaintiff wouldn't have taken a penny less than the full amount of the judgment. Nothing to talk about or discuss – just pay up. That's a bad position to be in.

But because Ed was a smart guy, he wasn't in a bad position. Since all of his assets had been transferred into the plan, the judgment lien didn't affect the properties. Ed was free to sell, refinance, collect rents and deal with his property just like he'd always done. Since the creditor had no security for his judgment and stood to collect nothing, Ed now had the leverage to negotiate a favourable settlement. He settled the case for $75,000 – clearly a better result than losing the 1.5 million. In this case, the proper asset-protection plan changed the relative bargaining power of each side. Ed could've been weak and vulnerable, but instead was able to negotiate from a position of strength.

Another client, an architect, had savings of about $80,000 which he'd inherited from his mother. Architects have a high lawsuit risk. Sure enough, within two years after setting up the plan, my client was served with a lawsuit. The plaintiff attempted to get a pre-judgment attachment of the savings, but the judge ruled that the assets were properly protected and couldn't be reached by a lien. Without any assurance of payment, the plaintiff's attorney quickly lost interest and the case was settled for under $2,000.

These examples illustrate the importance of protecting assets from pre-judgment attachments and judgment liens. I suggest you consider making an appointment with one of the members of our team to talk about how we can help you protect your own assets.

Listening B

Ms Hall: So, Mr Berger, perhaps we should get started.

Mr Berger: Of course.

Ms Hall: How did you find out about our firm, and about the position?

Mr Berger: Well, your firm is very well known – even in Austria. The merger was in the news, of course, as well.

Ms Hall: Right. So, why do you want to work for our firm? What is it that interests you about us?

Mr Berger: Well, I remember thinking at the time when I read about the merger that it would be fascinating to be part of such a large international organisation, to have clients all over the globe ... I've always wanted to work in an international context, to make use of my language skills, to work with people from different backgrounds. Also, ever since I started studying law, I've been intrigued by the differences in legal systems in different countries. How things are done differently, and how these different systems sometimes need to be co-ordinated. The work I've been doing up until now has been international, as well, but not enough for my taste. And then, when I saw your job advert on the Web, I knew I had to apply.

Ms Hall: I see. Mr Berger, as you're based in Austria, how would you feel about relocating to London? Would that be a problem for you?

Mr Berger: Not at all. But actually, that's another reason why I was interested in the position. I know London very well – you'll see on my CV that when I was a student, I spent a summer working as a clerk at a law firm in the City. I also studied law in London for a semester. So moving here would be absolutely no problem for me.

Ms Hall: Yes, I see. It also accounts for your excellent command of English, I suppose.

Mr Berger: Well, thank you. I'm still trying to improve my accent, though.

Ms Hall: So, let's move to your present position, to the work you've been doing. What can you tell me about your work experience?

Mr Berger: Well, for the past two-and-a-half years, I've been working for an Austrian commercial law firm in Vienna. Er, we have a few international corporations as clients, but mostly small and medium-sized Austrian enterprises. My work has included a good deal of corporate restructuring. I've worked on a few cross-border insolvency cases, too, and that was very interesting, a real challenge.

Ms Hall: In what sense?

Mr Berger: Well, the fact that the laws regarding insolvencies are not unified in Europe makes the work challenging. The courts

play a different role in the insolvency process in each country. Things can get very complicated, as I'm sure you know.

Ms Hall: Yes, Mr Berger. It's something we have to deal with all the time.

Mr Berger: Well, that's another reason why I've applied for this position.

Ms Hall: Right. I'm going to ask you a typical interview question, but actually I'm very interested in the answer: could you tell me something about yourself, Mr Berger?

Mr Berger: I was expecting that one, Ms Hall! Well, I think you should know that I am someone who loves his work; I think insolvency work is fascinating, like solving a puzzle, a very complex one, in which people's livelihoods are at stake. I love the combination of understanding the relevant laws, trying to understand the personalities and the interests involved, and finding the best possible solution for my clients.

Ms Hall: Sounds good. But why should we hire you? We do have other applicants, you know.

Mr Berger: I think you should hire me because I have the background you require: experience in insolvency work, an international perspective, knowledge of languages. I am also a member of the Insolvency Practitioners Association, which was one of the requirements in your advert.

Ms Hall: Good. Is there anything you would like to ask me?

Mr Berger: Yes. Could you tell me something about how lawyers are trained in the firm?

Ms Hall: Well, that's a very good question. First of all ...

Unit 15

Listening A

Mr Langston: So, Mr Greene, good to see you again. Please have a seat.

Mr Greene: Thank you, Mr Langston. Good to see you, too.

Mr Langston: How's business? I remember that the last time we met you'd just expanded your fleet, hadn't you?

Mr Greene: That's right. Business is OK at the moment, but not great, not great at all. The new cars aren't working out as well as I'd hoped, actually. Except the SUVs – people like those. People just don't seem to be taking as many cab rides as they used to – trying to cut down on their expenses, I guess. And the new subway connection to the airport hasn't helped us either.

Mr Langston: Right. So, er, what brings you to us today? What can I do for you, Mr Greene?

Mr Greene: Well, it's like this. Like I said, business isn't great at the moment. But we're surviving. The problem is, we've heard that a newcomer is planning to enter our market.

Mr Langston: I see. No one is ever happy about news like that.

Mr Greene: That's right. Well, these guys call themselves the Orange Team or something, and all their cars are orange, and they've been advertising all over the place ...

Mr Langston: I see.

Mr Greene: ... and some people are getting worried. Not just us. Our competitor, especially. You're familiar with our competitor, Belmont Cabs?

Mr Langston: Er, yes, of course.

Mr Greene: Well, here's what's going on. Don Belmont called me the other day and said he wanted to meet and have a beer. I thought it was a good idea to get together and talk things over – you know, how business is going and things like that. And then Don started talking about prices, and if there wasn't something we could do to make it harder for these Orange boys to get a foothold on our territory.

Mr Langston: Ah, I see, Mr Greene. That's why you're here – you're wondering about the legality of such a step.

Mr Greene: That's right, Mr Langston, I am. Belmont suggested we cool off our competition a little and agree on some things, like territory and prices. He said we should agree to lower our prices below those of the Orange Team, but also fix a certain lower limit that we both adhere to, so that our losses wouldn't be too great.

Mr Langston: Well, I'm glad you had the good sense to come to me, Mr Greene. Of course, you are aware that there are laws against this type of anti-competitive behaviour.

Mr Greene: Yes, I know. That's why I felt funny about his suggestions. I just wanted to know how serious a crime that is. I mean, there's no harm in talking about things over a beer, is there?

Mr Langston: Well, actually, according to the antitrust law, even if you only discuss the idea of dividing up territory or price-fixing with a competitor – that's what Mr Belmont's suggestion amounts to, you know – even if the suggestion is never put into practice, it is still an infringement of the law. It's what's known as a *per* se violation – it's a violation for competitors to talk about such matters. Of course, it's very hard from an evidentiary standpoint for the case to be proven, but it's still a violation.

Mr Greene: But we're just a taxi company. I mean, it's not like we're Microsoft or anything ...

Mr Langston: That's irrelevant, I'm afraid. The law still applies. And territorial allocation – which is what dividing up the territory between yourselves is called – is a serious breach of antitrust law.

Mr Greene: I see. Another suggestion he had was a discount on airport trips, a special price, really dirt cheap, that would help us to hold on to what's left of the airport business.

Mr Langston: Well, that's what's known as predatory pricing. It's trying to keep new businesses from entering a market by lowering prices below cost temporarily.

Mr Greene: I see they even have a name for it.

Mr Langston: Yes, they do. And they also have punishments for it. Let me caution you that the fines can be very high for this sort of activity, Mr Greene. I must warn you that in this jurisdiction, individuals directly involved in serious anti-competitive behaviour face the threat of criminal prosecution, which could lead to imprisonment. You should be aware that the risks of being a party to an anti-competitive agreement or abusing a dominant position are serious.

Mr Greene: Well, I can't say you haven't warned me.

Mr Langston: As your lawyer, I must strongly advise you to cease all communications with your competitor on the topics of territory and pricing. Furthermore, I recommend that your competitor be advised of the illegality of his behaviour. I also suggest you concentrate on other, legal means of improving your position in the taxi-service market.

Listening B

How are mergers evaluated? Section 16 of the Act lays out the criteria to be employed in the merger evaluation process. There are three key steps. First, the investigators, and, where appropriate, the Tribunal, must consider the impact of the merger on competition. This is not simply a matter of calculating present market shares and imputing future market shares. It's a sophisticated analysis in which a range of factors must be considered. The nature of the product, the state of international trade in the product, past inter-firm relations, the prospect that, in the absence of the merger, one of the firms may fail are some of the factors that have to be accounted for. Once this analysis is done, it's possible that a merger that leads to a large market share might be approved, whereas one that results in substantially smaller market shares might be rejected. One word of advice here: the definition of the market is a very important step in conducting the competition analysis. Predictably, the

parties tend to define their market very widely; competition authorities tend to have rather narrow definitions of the market. Taking clearly ridiculous views of market definition is not helpful to the evaluation process.

If the first question is answered in the affirmative – that is, if it's found that the merger will impede competition – the investigators and tribunal must ask whether there are not efficiency gains from the merger that may counter-balance the negative impact on competition. Here again, try and avoid presenting extreme ideas or analyses based on anecdotal evidence alone – don't exaggerate the efficiencies expected from the merger, and bear in mind that the evidence regarding the efficacy of mergers as a corporate strategy is sceptical at best. Or if, as appears inevitable, you're going to use the economies-of-scale argument for a merger, then present evidence, don't simply assert it, and don't simply claim that because there are significantly bigger firms in the same industry elsewhere in the world that this somehow means that the continued existence of your firm demands that you be permitted to merge. And related to this, if you're going to insist that turning down the merger will result in the death of one or even both parties to the merger, then again be prepared to support this with data and sound analysis. Assertions are cheap, and we've heard them all before. Your problem with efficiency defences is that they need to be evaluated up front before the merger has been consummated. This means that the claims are inherently speculative, as parties are not yet in a position to demonstrate their existence.

The final step is the assessment of the impact on public interest. An anti-competitive merger may be permitted in the face of strong public-interest reasons in favour of the merger; by the same token, a merger that's judged to have no negative impact on competition may be disallowed on public-interest grounds. This is a difficult and controversial step. It's eased somewhat by the fact that the Act specifies the public-interest grounds that may be considered, but it'll always be a difficult judgment call. Again, cynicism and vastly exaggerated claims don't help anyone's case or promote the effective administration of the law.

I want to end this by emphasising a point made at the beginning of my discussion of mergers. There is no public policy presumption against mergers. On the contrary, it's recognised that these transactions are frequently an aspect of corporate restructuring that's inevitable and productive. I'd expect the vast majority of mergers to be easily approved. And even those that do run into objections from the competition authorities are generally susceptible to a negotiated resolution that allows a form of the transaction to go through without offending competition requirements. But mergers that are devised for dominating markets will fall foul of the Act. Better to recognise this up front; in other words, factor this regulatory hurdle into your calculations right from the beginning. It'll save time and money and considerable frustration down the line.

Unit 16

Listening A, Exercise 5.2

The cornerstone of international commercial arbitration is its consensual nature. In the course of drafting their agreement to arbitrate, the parties to an international contract may – to an extent – design the manner in which the arbitral proceedings are conducted. In drafting the clause, there are a few mandatory requirements that must be met, and a few provisions that must be included. These provisions should be clear and unequivocal. In addition to these provisions, however, a clause may be supplemented with a wide variety of other provisions.

A word of caution is in order. There's no such thing as a single 'model', 'miracle' or 'all-purpose' clause appropriate for all occasions. Each clause should be carefully tailored to the exigencies of a given situation, taking into account the likely types of disputes, the needs of the parties' relationship and the applicable laws.

The International Chamber of Commerce (ICC) is the major arbitral institution in the world. When considering an institution to administer an arbitration proceeding, parties will often find it easier to negotiate an arbitration clause if the ICC is selected because of its brand name and quality advantages, such as its scrutiny of party-appointed arbitrators and arbitral awards.

The ICC suggests the following sample arbitration clause for inclusion in international contracts:
'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.'

This clause has been said to contain the three 'key expressions' for an arbitral clause – *All disputes*, *in connection with* and *finally settled*. The term *all disputes* encompasses all types of controversies, without exception. The phrase *in connection with* creates a broad form clause that will cover non-contractual claims such as tort and fraud in the inducement, while *finally settled* indicates the parties intend the arbitrator's ruling to be final, so a court will not try the case de novo.

Since the ICC has amended its arbitration rules from time to time, an issue may arise as to which version of the rules the parties intended to govern their arbitration – the version in effect at the time the parties signed their agreement or the version in effect when the arbitral proceeding was commenced. This can be an important issue, because the recent amendments to the rules of the ICC have been substantial.

The parties can decide this matter by providing in their clause either that the adopted rules 'then in force' on the date of their agreement or the rules 'as modified or amended from time to time' shall be applied. In this respect, the parties may wish to adopt the rules in existence at the time of contracting because these are the rules they know, and future rule changes may have unpredictable effects. On the other hand, the parties may wish to take advantage of future rule amendments, assuming the ICC will only adopt changes that will better the arbitral process.

While allowing the parties expressly to choose which version of the rules they prefer, the rules of the ICC contain a default provision stating that in the absence of an agreement to the contrary, the arbitration shall be conducted according to the rules in effect on the date of the commencement of the arbitral proceeding.

In drafting a detailed arbitration clause, the parties should consider whether they can modify the ICC rules. A few of the ICC rules explicitly allow the parties to agree otherwise, but in some cases the ICC has refused to administer an arbitration because of alterations made by the parties' agreement to particular rules deemed by the ICC to be fundamental to its arbitral procedure. The ICC has refused to set in motion arbitration proceedings when arbitral clauses provided that the ICC Court could not confirm arbitrators, handle challenges to arbitrators, replace arbitrators, determine arbitrators' fees or scrutinise the draft award.

If a party wishes to adopt the ICC rules but to alter them, it should consider including a clause providing that any alteration of the ICC rules may be disregarded if the ICC will otherwise refuse to administer the arbitration.

Listening A, Exercise 5.3

This clause has been said to contain the three 'key expressions' for an arbitral clause – *All disputes, in connection with* and *finally settled*. The term *all disputes* encompasses all types of controversies, without exception. The phrase *in connection with* creates a broad form clause that will cover non-contractual claims such as tort and fraud in the inducement, while *finally settled* indicates the parties intend the arbitrator's ruling to be final, so a court will not try the case de novo.

Listening B

Betje: OK, Thomas, we've got a lot to cover this morning, so let's move on to the next case. We've just got this letter from our clients, TransGerman Forwarding & Shipping. We've handled quite a few disputes for them in the last couple of years. They're a transport firm, a carrier, and they move things all over Europe. Have a look.

Thomas: OK ... I see they're based in Germany.

Betje: That's right.

Thomas: And the dispute is about goods that were transported from the Netherlands to France. Sportswear, it seems. It looks like quite a few things went wrong.

Betje: Exactly. Sounds like a bit of a mess, with a fire breaking out in the truck, then all that smoke damaging the goods ...

Thomas: Yeah. I wonder why the fire started in the first place?

Betje: Well, that's something I'd like you to find out. Actually, I'd like to hand this entire matter over to you, Thomas.

Thomas: Yeah, sure, I can handle it. I'd be happy to. But I guess I'd have to read up on the issues first, it's all a bit complicated.

Betje: The first thing you'd obviously have to do is to write to the client. There's actually quite a lot of important information missing from this letter, and you'd have to find that out.

Thomas: Like how the fire started ...

Betje: That's right, the first thing to find out from her would be what the police report about the incident says. You'd need that immediately. Why don't you take some notes, Thomas? Or are you going to be able to remember all of this without writing it down?

Thomas: No, no, I'll write it down, just a moment, I'll get a pen. OK – police report. Got it. What else?

Betje: We'd need to know more about TransGerman's customer, Lukas Sportswear. Where is Lukas Sportswear incorporated?

Thomas: Right, got it. And I guess any documents connected with the shipment would be necessary, too.

Betje: Of course: make a note of that, too: have them email you all contractual documents.

Thomas: Will do. What else should I include in the letter?

Betje: Well, since this is a transnational case, we'll need to consider all of the factors that play a role in determining where the dispute will be adjudicated.

Thomas: Oh, of course: I need to find out which country the damage to the goods occurred in.

Betje: That's right – make sure you write that down, too, Thomas.

Thomas: But what I'm wondering is why they want us to represent them and presumably to take legal action on their behalf? I mean, we're here in the Netherlands and they're a German firm ...

Betje: Well, as I said, we've represented TransGerman before, and they know that it's decidedly to their advantage to have this matter resolved in a Dutch court.

Thomas: Why's that?

Betje: Well, the CMR – the Convention on the Contract for the International Carriage of Goods by Road – gives the parties to a dispute a choice of jurisdictions in which to resolve their dispute. The choice is based on several factors ... Look it up and familiarise yourself with the relevant provisions – you'll find them in Article 31.

Thomas: Right. But does it really make such a difference in which country the case is tried?

Betje: It most certainly does. The choice of legal forum is extremely important – the courts of different countries often reach widely differing conclusions in their interpretation of the convention.

Thomas: And the Netherlands is the best forum for our client?

Betje: Exactly. Experience has shown that certain countries are more friendly towards carriers, and other countries more friendly towards cargo interests. The Netherlands is generally known as a 'carrier-friendly' jurisdiction.

Thomas: I see.

Betje: But there's another very important point – and this is definitely something you need to include in your letter to TransGerman. We can seek a so-called negative declaration – that's a declaration that the carrier has no (or only limited) liability in a case. In so doing, we're actively seeking to determine in which jurisdiction the dispute is to be resolved. The point is that the party that initiates proceedings first can benefit enormously from doing so, whether or not the case is actually tried or settled shortly thereafter. In the Netherlands – but not in Germany, for example – a declaratory action constitutes a pending action and prevents the plaintiff from initiating further proceedings.

Thomas: Now I understand.

Betje: So we need to advise TransGerman to act first and bring the case before a Dutch court to make a Dutch court formally declare that the carrier is not liable. This way, the carrier ensures that his case will be tried in a carrier-friendly jurisdiction. It's like a legal version of the 'pre-emptive strike'.

Thomas: Right, got that. I'll write and tell them we advise them to file an action in a Dutch court ...

Exam focus

Part 1

Extract 1

Lawyer: So, Ms Wilson, what can I do for you?

Ms Wilson: Well, I just bought a house last month. When I signed the contract, I didn't realise – and the seller didn't tell me – that my neighbour's driveway is entirely on my property. What I'd like to know is if I have any recourse against the former owner. Or do I have to fight it out with my new neighbour?

Lawyer: Well, first we would have to find out the facts. Is there an easement? How long has this situation existed? Things like that.

Ms Wilson: Well, I've already checked the deed – er, there's no mention of an easement. And I think it's probably been this way since his house was built. A friend told me that my neighbour may actually have a claim to the property! Is that possible?

Lawyer: Well, there is a concept called adverse possession. That's a situation where someone can acquire title to property under certain conditions. We'd have to find out if these conditions apply in your case. However, if the neighbour can claim adverse possession, you do have options. You may be able to negotiate an easement in return for him giving up his claim, for example.

Ms Wilson: I see.

Extract 2

Well, you know, I was in your shoes a year ago. When I began work here in the Corporate Division, I wasn't sure if I was going to be happy. And I didn't know much about the work at the time. But I can honestly say I learned something new on a day-to-day basis. I guess that's the best thing you can ever say about a job. And I had the opportunity to become involved as much as I liked in the life of the firm, both in terms of aspects of work and training, and the social life. It was really up to me. And everyone was very welcoming and friendly, right from day one. I'm sure you'll find it that way, too.

The work here is always varied. I got an excellent opportunity to try my hand at some business-development-related research and deliver a presentation on this. So I was able to keep up some of the academic side, too. And I was actively encouraged to liaise with clients, even from a very early stage. It's been a very rewarding year for me.

Extract 3

A: So how's the new associate working out?

B: Well, Marcus is definitely not lacking anything in the brains department, if you know what I mean – as sharp as a tack, I'd say. Which is just what we need right now with the Samuels case – very challenging stuff. But he's a bit of a lone wolf, and I'm not sure that the others will appreciate that in the long run. I'm thinking I might have to have a word with him, you know, try to foster some team spirit.

A: Well, at least he's up to the task. Unfortunately I can't say the same about our new addition in Banking and Finance. John doesn't seem to have much of a grasp of the fundamentals. I think we're going to have to remind him of some of the basics. I was thinking of a staff seminar for some of our newer people. Really just to brush up on things. But, to be fair, John does put his back into things – he's often one of the last to leave in the evening, and he's very conscientious about things like filing papers and meeting deadlines.

Part 2

Thomas: Mr Sanderson, I've really been enjoying my work here. You know, I'm even thinking of going into insolvency work later on.

Mr Sanderson: Well, I must say I've never regretted it myself. Of course, the work isn't for everyone – sometimes things can get quite complicated and tricky. You really need to use your head most of the time. But some people relish that; it's really ideal work for someone who doesn't shy away from a challenge.

Thomas: Is there any advice you can give me at this point in my career, Mr Sanderson?

Mr Sanderson: Well, if you're really that interested, then I'd advise you to join a professional organisation. You should consider applying for student membership in R3 – the main insolvency practitioner organisation representing the profession. They provide courses, hold conferences, publish journals and newsletters, and things like that. You can learn a good deal about the profession. And it's a great way to do some networking while you're still at university.

Thomas: Thanks for the tip. Sounds like a good idea. I've got another question, Mr Sanderson, if you don't mind. I know that insolvency practitioners have to be licensed. And to get licensed, you have to pass an exam, don't you? How difficult is the exam?

Mr Sanderson: Yes, the Joint Insolvency Examination. Not an easy exam, by any means. But there are preparation courses to help you get through all the material. I'd certainly recommend one of those. Things may have changed a bit since I took it, but from what I've been told, it's not as important to have a detailed knowledge of legislation as it is to know about practical matters, how cases are handled, what requirements and professional guidelines there are, and how these have an impact on insolvency in practice. So you should keep your eyes and ears open while on the job here. And naturally, the importance of strong communication skills shouldn't be underestimated.

Thomas: I see. What about the other qualifications you need to become licensed?

Mr Sanderson: Let me see ... Well, you need to have some years' experience doing insolvency work at a law firm. I believe you have to have a minimum of five years' full-time insolvency work experience. And not less than two of these five years must be spent doing higher insolvency work, that is, work involving the management or supervision of a case. And the IPA – that's the Insolvency Practitioners Association – requires that you're a member of the Association and that you hold a practising certificate.

Thomas: Pretty demanding.

Mr Sanderson: Quite. And the IPA also has some special requirements for students wanting to register with them. Certain academic qualifications, I believe. I'd certainly advise you to look into those.

Thomas: Thanks for the information, Mr Sanderson.

Mr Sanderson: My pleasure.

Part 3

OK, the next item on the agenda is a forthcoming seminar on e-commerce. This is a one-day event, which will be dealing with many aspects of doing business online, so it's obviously very relevant for us. Can you check the date, please? I know that last year this seminar took place in July, which caused some difficulties due to holidays, but this one's in August. The exact date is the 7th, a Tuesday I believe.

The course leaders, Rob Bateman and Helen Johns, are both excellent. They'll share the three morning sessions between them. First, there's a useful overview of the regulatory framework. When things are developing so quickly, it's essential for us to be up to date on this.

Now, there's a bit of time programmed for questions at the end, but this opening session is very much a lecture. However, the next session on harmonisation and trade facilitation will be in workshop format, so take along any regional or market-specific issues you'd like to raise.

The third and final session before lunch will be on websites, focusing primarily on privacy policies, and that session will include a short film on data protection, which looks particularly interesting. It's good they're covering so much ground in the morning, and there's great variety in terms of how the information is put across.

At lunch, you're bound to meet many other people who are dealing with e-commerce matters, so make the most of any opportunities to learn from those with more experience. During the lunch break, there'll be an extra 30-minute slot, which will deal with electronic signatures. It's described as a practical hands-on session, and numbers are limited, so you'll need to reserve a place for this immediately. I'd like at least one person to attend, please, and be ready to report back at a future staff meeting.

The afternoon will begin with a guest speaker, Sally Greenside, whose presentation is on disputes arising out of domain names. I know that over the last few years, Sally has advised both dot-com

start-ups and large corporations, so she really knows what she's talking about.

Rob Bateman has the session after Sally's, where he'll explain some of the contractual aspects of outsourcing, from an online perspective. Even if you're not working in this area yet, you almost certainly soon will be, so this is another important topic for everyone.

The last session, chaired by Helen Johns, will be a panel discussion on distance selling, a nice broad theme within which you can bring up any issues you feel haven't been addressed. There'll be opportunities to raise questions relating to the earlier sessions, too.

Now, the price. Well, the full conference fee with all materials is £450, but as CPE members, we qualify for a discount of 20% on this, so at £360, the day is very good value, in my opinion. Try to let me know as soon as possible who'll be attending.

Part 4

Speaker 1
I've just started a job as an associate here in the firm. I spend most of my time working on patent litigations, doing the legwork and preparing the cases for trial. By and large, it's interesting work, but it does have its downsides. I have to do a lot of digging around for information, visiting clients and looking together with them through boxes of documents. That can be incredibly tedious. I'm definitely looking forward to moving up – to managing cases on my own some day, rather than just assisting the other partners.

Speaker 2
My work at the firm primarily consists of opinion work. A client will want to know whether a product he is working on will infringe the patent rights of others. To write an opinion, it's necessary to be familiar with the patent or patents involved and with the client's technology. That usually means many hours spent reading up on something. I'm a bit of a loner, so that suits me fine, but at times, trying to get a handle on the subject matter can be extremely difficult, and that's sometimes frustrating. Still, I'm confident about the quality of the opinions I write. On the whole, I really enjoy it – wouldn't dream of doing anything else.

Speaker 3
As senior partner in the firm, I've got a lot on my plate. That can be stressful. I've got to make sure our clients are happy with the quality of representation and legal counsel they receive. And I've got to keep an eye on our costs, make sure things don't get out of hand, ensure value for money. That's the least satisfying aspect. I also have to keep my team focused and informed – make sure we're always on the ball. It's up to me to communicate a vision – where we're heading as a firm – and that's something I'd like to be able to do better in the coming years.

Speaker 4
I've been an associate at our firm – which handles some really high-profile IP cases – for two years now. Last year, I joined one of the teams of litigators, and I go to court regularly. I work with some pretty high-calibre people, some first-rate litigators at the firm, and that's a real plus: there's just so much to learn from them. One of my main duties right now is taking depositions and defending depositions. That means I have to deal with witnesses quite a lot – some of them can be quite unhelpful, and not always pleasant. That's something I don't usually enjoy. Someday I'd like to be in the limelight and present arguments myself.

Speaker 5
As a first-year associate at the firm, I work on patent-law cases. I must say I'm fortunate that my work is so varied. Some people might see that as a drawback, but I like it. I might spend a day or two writing a patent application, then perhaps devote a couple of days to studying the patents of a client's adversary. The next week, I might assist one of the partners in court. However, I don't have a say in choosing the things I work on – those are delegated to me, unfortunately. But there's never a dull moment. Still, I'm looking forward to next year, when I'll learn more about copyrights.

ILEC practice test

This is the Cambridge International Legal English Certificate Listening Test, Sample Paper. Look at the Information for Candidates on the front of your question paper. This paper requires you to listen to a selection of recorded material and answer the accompanying questions.

There are four parts to the test. You will hear each part twice.

There will be a pause before each part to allow you to look through the questions, and other pauses to let you think about your answers. At the end of every pause, you will hear this sound.

You should write your answers in the spaces provided on the *question* paper. You will have five minutes at the end to transfer your answers to the separate answer sheet.

There will now be a pause. You must ask any questions now, as you will not be allowed to speak during the test.

Now open your question paper and look at Part 1.

Part 1

Questions 1 to 6

You will hear three different extracts. For questions 1–6, choose the answer (A, B or C) which fits best according to what you hear. There are two questions for each extract.

You will hear each extract twice.

Extract 1
You will hear a lawyer talking to a client, John Roberts, who is interested in franchising. Now look at questions 1 and 2.

L: Well, John, I see that you're possibly interested in buying some franchises in some developing countries.
J: Yes, I just wanted to get your take on the idea before I do anything about it.
L: Well, franchising continues to be the preferred model for many businesses in developing countries. But whereas in developed countries its popularity is due to the low start-up costs and the fact that any risk is spread between the franchisor and the franchisee, in developing countries it's more because it's a way to extend a business's footprint across a country or even internationally. But it isn't all plain sailing.
J: Er, why do you say that?
L: Well, although many of the countries you have on your list don't have franchise-specific legislation, franchise arrangements may be covered by commercial agency laws, which essentially provide significant statutory protection to franchisees, so it's not that. But it's absolutely crucial for franchisors to conduct legal and commercial due diligence on prospective business partners and to ensure that the agreements are reviewed by lawyers familiar with local laws and their implementation. The legal rights you do have may take some time to assert, but they'll be respected.

Extract 2
You will hear a lawyer, Brigit Capper, announcing her firm's plans to merge with another law firm. Now look at questions 3 and 4.

The merger between our UK-based law firm, Hartley, and US-based firm Jessop and Walters will create a truly global legal practice. Effective from the 1st of January, the enlarged business will be among the top 25 global legal practices, with 37 offices in 17 countries. Both firms developed from similar roots: Jessop and Walters was established during Cleveland's manufacturing heyday, while Hartley began in the industrial heartland of England. Globalisation has pushed firms to look abroad as they expand. But signing up lawyers through lateral hires, one by one, can be risky and time-consuming – that's why we favour this partnership with a firm that's up and running. From our clients' perspective, it's business as usual, but with additional components. We'll be able to provide greater critical mass, practice expertise and industry expertise. There's an increasing number of larger clients who want to reduce the number of law firms on their panels and want to form global law-firm panels in order to streamline large, complicated deals, and when they discover that's a benefit this merger will bring about, they're sure to take advantage of that. And of course, practising in a greater number of markets where clients might do business is an obvious bonus.

Extract 3

You will hear two IP and IT resolution lawyers discussing a recent case involving an author and a publishing company. Now look at questions 5 and 6.

A: Have you seen this article? The case between the publishers Littleton and their literary agent Baker Richards has finally been resolved.

B: Oh, really? What was the judgment based on in the end – new laws that cover the copyright of e-books?

A: Well, the court ruled that contracts made with authors say 10, 15 years ago, that didn't specifically refer to e-books, do not mean that publishers automatically have the copyright of e-book versions of an author's work. The crux of the argument was that when the contract says *book*, this does not encompass e-books.

B: Hmm. Good news for authors, then? They can self-publish electronic versions of their work and get much higher royalties.

A: Ah, but they'd miss out on the publicity, marketing and distribution expertise that publishers have.

B: True, and anyway I guess most publishers have got rid of this loophole in their contacts by now. Still even a whiff of publishers losing control of copyright will mean a proliferation of illegal copies of works.

A: And both the author and publisher will lose out then.

B: Mmm.

Part 2

Questions 7 to 11

You will hear two lawyers, Jack Ward and Sarah Briggs, discussing a tender to be in the legal panel for a large supermarket chain. For questions 7–11, choose the best answer, A, B or C.

You will hear the recording twice. You now have 45 seconds to look at Part 2.

Sarah Briggs: Shall we work on the tender documents for the supermarket this afternoon?

Jack Ward: Yes, we need to. It's interesting that this supermarket is carrying out a review of its retail development legal panel, which incorporates the whole gamut of their property work.

Sarah Briggs: Yes, they reviewed their corporate and commerce panel last year, and the result was serious downsizing. The panel shrank from 14 to just three firms.

Jack Ward: Well, they have a reputation for buying things cheaply. If it replicates what it did on the commercial side, it'll downsize real estate, too, for the same reason. It's odd, though, because they're aiming to open more stores in Asia and South America in the near future, so they might well need some firms with experience of global companies.

Sarah Briggs: Exactly, and that's my major concern, really. We'll be up against some big players when we tender.

Jack Ward: But our creative approach to property development is unique, I'd say.

Sarah Briggs: True, and we've got a dedicated team working on the tender, so even though the date for submitting tenders is quite close, we should be able to meet it.

Jack Ward: And it'll mean quite a few changes if we do win the tender – well, for example, we'll need to take on more staff, and they'll have to have relevant experience.

Sarah Briggs: But there are plenty of young and keen lawyers out there who'd jump at the chance of working on this. The drawback as I see it is the supermarket's insistance that we don't do work for any comparable supermarket if we work for them. I can see where they're coming from – they don't want the work we do for them to be used for other companies – but ...

Jack Ward: And it could reduce our prospects of getting other work. And in this volatile market, there's no guarantee how long we'd be part of the panel for. I noticed that Shutter and Draper haven't been invited to tender again, and they've been on the panel since the beginning, I think.

Sarah Briggs: Yes, but I can see why. It all got a bit messy when that IP case was brought against the supermarket.

Jack Ward: I remember, yes, and one of Shutter and Draper's lawyers represented the website retailer ... and the findings went against the supermarket. And the irony of it is that that particular lawyer left Shutter and Draper very soon after that and is now working for a US law firm. But still I think we have a good chance of being successful with our tender.

Sarah Briggs: So do I. Everybody knows that we don't just get business and then sit on it. We go out there and look for new angles. Some other firms may have more lawyers and therefore a broader expertise base, but that's not everything. Clients' needs are changing, and all law firms need to be aware of that.

Jack Ward: Absolutely.

Part 3

Questions 12 to 20

You will hear a senior partner in a law firm giving information about a conference on mergers and acquisitions. For questions 12–20, complete the sentences.

You will hear the recording twice. You now have one minute to look at Part 3.

Now, before we go on to other business, I'd like to give you some information about next year's annual international mergers and acquisitions conference. It'll be interesting for several of you, as it's aimed at specialists from M&A businesses, and will interest accountants too. Erik Mayer, a leading US banker, will take the first session: 'A review of the worldwide M&A marketplace'. He'll be providing an insider's view of the economic and business factors affecting the M&A market.

After a short break, the next session, given the title 'Credit crunch' to reflect the current economic environment, will take a look at the implications for lawyers when dealing with private equity firms, including alternative forms of financing and investing alongside government financing.

Still on the first day, in the afternoon, there's a session that will be of particular interest to us. It's called 'Acquisition of a troubled

business'. There's a talk which examines companies both pre-bankruptcy and post-bankruptcy, followed by a debate on the role of creditors and how to handle them.

Day 2 starts off with an equally up-to-the-minute session which examines in detail recent regulatory issues when doing deals internationally. This is a short session of only one hour – it's called 'Cross-border deals' and is on at the same time as a session called 'Hostile deals'.

The last session, as you would imagine, looks to the future. One of the speakers is our own Brian Thompson, and he'll be joined by two other speakers and a moderator for a panel discussion. The topic was going to be on contracts, but in fact, it's going to be on antitrust instead – in relation to M&A deals, of course.

The conference is on the 23rd and 24th of June – still a long way ahead. However, I know that the temptation is to register for conferences at the last minute. But please make sure you sign up before May 15th in order to qualify for the 10% discount. That means getting approval here by May 8th, please. And as we're members, that's 10% off the member's rate.

There are also reduced rates for young lawyers; that's for those of you under 30. And Ted and Alice, you'll also qualify for a discount because you're categorised as academics for conferences such as these. This is the only non-legal category that an exception is made for. So, please check if you're entitled to further discounts on the fees.

The early registration fee for members is $1,300; registering less than one month beforehand takes it up to $1,445, and the special fee for young lawyers and so on is only $975. Please note that we will only pay a maximum of $1,300 for your attendance to encourage early registration.

One final thing to mention ... together with the conference programme, there was some information about a new website. I read a really interesting report on freedom of speech in a human-rights-law section. The focus of the site is global media law, and you'll find a flyer about it at the end of the conference information.

Part 4

Questions 21 to 30

Part 4 consists of two tasks.

You will hear five short extracts in which lawyers talk about the firm they work for. Look at Task 1. For questions 21–25, choose from the list A–F the type of law each speaker's firm specialises in. Now look at Task 2. For questions 26–30, choose from the list A–F the opportunity that each speaker has recently taken.

You will hear the recording twice. While you listen, you must complete both tasks.

You now have 40 seconds to look at Part 4.

Speaker 1
The bulk of the work we do in this firm is dealing with a range of legal proceedings and transactional matters in various areas, including construction, real estate and fiduciary obligations. I practise in state and federal courts in Ohio and other jurisdictions, and before arbitration tribunals. At the moment, I'm acting on behalf of an architect in a case where the subsequent owner of a hotel is claiming for alleged negligent design. In fact, as a result of this case, I was asked to become a columnist for the monthly publication, *Commercial Architect*. It's something I hadn't thought of doing, and I'm enjoying making new contacts through it.

Speaker 2
A lot of people in the practice come to me for advice on computer problems because of my background in the development and implementation of computer software systems, operating systems and printer technologies. But I don't think I'm any more knowledgeable than other lawyers here. As a firm, we do a lot of work counselling clients on, for example, the preparation of domestic and international patent applications, domestic trade-mark applications and licences, and non-disclosure agreements. Last year, I wrote and delivered a one-off presentation on open-source software and licensing, which led to an invitation to be an adjunct professor in law. It's very rewarding to be in touch with the new lawyers of the future.

Speaker 3
I'm just back from a weekend working on a project I recently set up, which involves getting adolescents actively involved in local schemes. First, we're tackling some environmental issues, such as the polluted state of the river here. Interestingly, lots of the kids, as they get to know me, ask about my work as a lawyer. And when I explain that I work with emerging technologies, in particular advising clients on privacy-related matters, including telemarketing, broadcast and cable television in Europe and the US, and the Internet, they think that's really cool. Perhaps some of them will go on to study law at Law School, and who knows, perhaps specialise in environmental law.

Speaker 4
As one of the younger lawyers in my firm, I've just had my first trial experience, and I'm happy to say there was a successful outcome. I acted for a client in an executive severance and retirement benefit dispute. And actually, because of the poor economic climate nowadays, my firm is really busy with this type of work. Despite the heavy workload, when one of the partners asked me to be on a committee which was writing a health and safety document, I jumped at the chance. I like the idea that I may be able to influence what goes into this and perhaps even future legislation.

Speaker 5
I've gained extensive experience advising companies on complex mergers, acquisitions, joint ventures and global-supply arrangements; that's what we concentrate on in this firm. Because it's such a big firm, I have the chance to work with trainees that we take on and guide them through their first couple of years. I work closely with senior management in resolving their most challenging legal issues. I've just finished advising a Fortune 200 public company in a $1.5 billion sale to ha private equity-backed buyer of a division that operated more than 33 manufacturing facilities in 13 countries with a huge workforce. I led the engagement, including an extensive auction process, and drafting and negotiating transaction documents.

That is the end of Part 4. There will now be a five-minute pause to allow you to transfer your answers to the separate answer sheet. Be sure to follow the numbering of all the questions. The question papers and answer sheets will then be collected by your supervisor. I'll remind you when there is one minute left, so that you're sure to finish in time.

You have one more minute left.

That is the end of the test.

Role cards

Student A

Unit 5, Exercise 11

Your client wants to buy five bottling machines, to be delivered immediately. The price is to include a five-year service plan and full guarantee. The budget is €1m, and your client wants to be able to spread the payments.

Unit 6, Exercise 11

CASE FILE 1
ROLE: Client (Allied Industries)

Parties to contract: Allied Industries (Buyer) & Bennet Construction Co. (Contractor)
Reason for consulting lawyer: Can Allied recover damages? What remedies are available?

Facts of the case:

- Allied contracted with Bennet Construction Co. to build a new factory.
- Contract duly signed.
- During construction, the building collapsed once due to unforeseen strong winds.
- Later, the building collapsed a second time due to what Bennet calls 'defects in the soil'.
- After second collapse, Bennet refused to rebuild.
- No liquidated-damages clause in contract.

CASE FILE 2
ROLE: Lawyer

Introduction: *greet client; explain what will happen in interview; discuss circumstances of interview*

Getting an overview of the case: What is the nature of the dispute?

Establishing facts and chronology of events: What happened? Signed agreement? Were there any obligations imposed upon Franklin in the letter of intent? What obligations were imposed? Do you have a copy of the letter?

Identifying issues, developing and supporting a theory:
Main issue: the intent of the parties to be bound based on the language in the letter of intent
Problem: letter of intent in broad terms only expresses an agreement to agree to further terms

Concluding the interview:
Assess the case: Court might hold that the letter of intent is binding. At the very least, it imposed an obligation upon Franklin to act in good faith*. This they failed to do. Final outcome will depend on the court's interpretation of the wording and whether the parties really did intend to be bound. There is little chance of forcing Franklin to sell. The loss incurred by BIBEC, if any, is very difficult to measure and highly speculative. If a court were to award damages, it would most likely be in the nature of expectancy damages, if any. From an economic perspective, it might be wise for BIBEC to learn from the experience and move on.

Conclusion: *describe next moves; refer to next contact; say goodbye*

* This applies only to the USA, where good faith is implied in every contract. The opposite is true in, inter alia, England.

Unit 15, Exercise 6

CASE 1: LAWYER
Information on anti-competitive activity

The formation of a cartel refers to the making of an agreement amongst competitors in the same industry to act together in order to limit competition and to maximise profits. This includes such activities as fixing prices, sharing markets and limiting production, among others. Discussing or exchanging information with actual or potential competitors regarding such matters should be strictly avoided. The formation of a cartel is considered one of the most serious offences under competition law.

CASE 2: CLIENT
Description of the situation

You are an executive of a construction company specialising in building residential housing estates. You have two main competitors in the market. Three large new housing estates are to be built next year in different locations in your region. Your two competitors have approached you to suggest that the three of you agree to share the three construction projects equally, so that each firm is certain to have work but does not overextend its capabilities by working on two or three big projects at once. The plan is for each construction company to take a turn at submitting the lowest-priced bid. You told your competitors that you would like to think about it first. You are worried that this plan is illegal and don't know what to do.

Student B

Unit 5, Exercise 11

Your client sells bottling machines which cost €250,000 each. They are guaranteed for a year and have a year's service plan included. Your client doesn't usually offer credit and can deliver them in two months' time.

Unit 6, Exercise 11

CASE FILE 1
ROLE: Lawyer

Introduction: *greet client; explain what will happen in interview; discuss circumstances of interview*

Getting an overview of the case: What is the nature of the dispute? Signed agreement? **Establishing facts and chronology of events:** What happened? Notice to terminate the contract – how? In writing? What were the reasons? Was there anything in the contract which might permit Bennet to terminate the agreement?

Identifying issues, developing and supporting a theory:
Recovery in general: Based on what has been described, Allied might have a chance at recovery, but it will depend on the evidentiary findings. Had there been a contractual provision requiring Bennet to conduct a site investigation before commencement of the work, the risk would have been shifted to Bennet. This is normally the case in construction contracts of this type. However, since the contract does not contain such a clause, the court could very well find that Allied is charged with knowledge of the conditions of its own premises. A decision concerning which party had this duty might very well come down to a factual determination at trial.

Possible damages: Liquidated-damages clause? The absence of a liquidated-damages clause makes the measure of damages very complex. Should the court rule in Allied's favour, the standard measure of damages would be the costs Allied incurs in replacing Bennet with another firm to complete the work, i.e. in the nature of compensatory damages (e.g. Bennet agreed to build for €1 million, replacement contractor costs €1.5 million, damages €0.5 million). Damages for lost time and delay would also have to be considered, but these might be difficult to determine. Damages might also be available for lost rental income, but this would depend on both the facts and the foreseeability of such damages. Since Allied could engage another firm to do the work, specific performance is most likely not an option. Besides, Allied would not want to compel performance even if the remedy was available, because an unwilling contractor, which Bennet will most likely be, will make a mess of things.

Concluding the interview:
Assess the case: Recovery far from certain. Importance of the financial aspects of pursuing the matter should be balanced with potential settlement.

Describe next moves; refer to next contact; say goodbye.

CASE FILE 2
ROLE: Client (BIBEC)

Parties to contract: BIBEC Corp (Buyer) and Franklin Auto Industries, Inc. (Seller)

Reason for consulting lawyer: Do we have a binding agreement? Can we force them to make the sale? If not, what can we recover?

Facts of the case:
- Long period of negotiations regarding the sale of Franklin to BIBEC.
- Parties sign a letter of intent stating only that each party would 'make every reasonable effort to agree upon and have drafted as soon as possible' a contract of sale.
- Soon thereafter, Franklin gets a better offer.
- Franklin terminates the agreement based on 'unforeseeable circumstances'.

Unit 15, Exercise 6

CASE 1: CLIENT
Description of the situation

You are the owner and managing director of a mid-sized language school in a small city. Your competitors are three companies of equal size and five considerably smaller companies. Until now, all of you have been able to co-exist relatively well. At a language-teaching conference held last month, you met with some of the owners of the other language schools informally. There was talk of working together and of agreeing to co-ordinate prices so that all of you could charge more and increase profits. One of the other language school owners mentioned that this was illegal, but you are not sure that a friendly co-operation of this kind would be breaking any laws. You would like to ask your lawyer if it is illegal or not.

CASE 2: LAWYER
Information on anti-competitive activity

Bid-rigging and collusive tendering is when competitors make agreements amongst themselves regarding the submission of bids for job contracts. Some forms of collusive tendering are:
- *bid suppression*: when a company refrains from submitting a bid so that the competitor is awarded the contract;
- *complementary bidding*: a company submits a bid that is intentionally too high so that the competitor receives the contract;
- *bid rotation*: companies agree to take turns submitting the lowest and best bid.

Answer key

Unit 1

1.1 1 A international students who will be studying at English universities
B students who are going to study law in a foreign university
2 A
3 B

1.2 1 b 2 c 3 a

1.3 1 based on 2 disputes 3 legislation 4 bound by 5 provisions 6 custom 7 precedents 8 rulings 9 codified 10 non-criminal

2.1 1 The adversarial system is characteristic of common-law countries.
2 In the adversarial system, the two opposing parties gather evidence to present to the judge and jury. In the inquisitorial system, the gathering of evidence is supervised by the judge.
3 In the adversarial system, the role of the attorney is to gather evidence and present arguments to the judge and jury; in the inquisitorial system, the attorney suggests routes of inquiry to the judge and follows the judge's questioning with their own questions.

2.2 1 evidence: gather, present
2 testimony: give
3 arguments: present
- dismiss, gather, hear, present, provide, reject, uncover **evidence**
- dismiss, give, hear, present, provide, recant, reject, support **testimony**
- dismiss, hear, present, provide, reject, support **arguments**

2.3 *Suggested answers*
The role of the judge in the inquisitorial system: The judge gathers evidence. The judge uncovers evidence. The judge hears testimony. The judge dismisses arguments.
The role of the attorney in the adversarial system: The attorney gathers evidence. The attorney presents testimony. The attorney presents arguments. The attorney rejects arguments.

3.1 1 c 2 a 3 b 4 e 5 d

3.2 1 regulations 2 ordinance/by-law 3 bill 4 directive 5 statute

3.3 1 ordinance 2 regulations 3 bill 4 statutes 5 directive

5 1 e 2 g 3 i 4 a 5 b 6 c 7 d 8 f 9 h

7 1 c 2 f 3 a 4 b 5 d 6 e

8.1 1 an action for breach of contract
2 The lawyer says he needs information and documents from the client.
3 The lawyer is unable to say whether the case will go to trial or not.

8.2 1 e 2 i 3 b 4 h 5 g 6 f 7 c 8 d 9 a

8.3 1, 2, 3, 4, 6, 7, 9

8.4 1 b 2 e 3 d 4 a 5 c

8.5 1 draft: an answer, a brief, a complaint, a motion, a pleading
2 issue: an injunction, a notice, a writ
3 file: an affidavit, an answer, a brief, a complaint, a motion, a notice, a pleading (with)
4 serve: a complaint, an injunction, a notice, a pleading, a writ (on someone)
5 submit: an affidavit, an answer, a brief, a complaint, a motion, a notice, a pleading, a writ

9.1 inter alia, sic, e.g., v.

9.2 1 c 2 e 3 f 4 b 5 h 6 g 7 a 8 d

9.3 1 d 2 g 3 a 4 b 5 h 6 f 7 c 8 e 9 j 10 i

10.1 1 advocate a, e 2 attorney a, d 3 barrister c, f 4 lawyer a, d 5 solicitor b, f

10.3 1 performs 2 drafting 3 authenticating 4 serving 5 administer 6 take 7 verify 8 executes

10.5 1 advise: clients, corporations, defendants
2 draft: contracts, decisions, legislation
3 litigate: cases, disputes
4 practise: law
5 represent: clients, corporations, defendants
6 research: cases, decisions, law, legislation

10.7 corporate lawyer, defence lawyer, government lawyer, patent lawyer, public-sector lawyer, tax lawyer, trial lawyer

11.1 1 False 2 False 3 True 4 True

11.2 2 The Socratic method refers to a method of instruction common in law schools in the US. It involves the practice of posing questions to encourage students to think critically. Typically, students are called on at random and asked to paraphrase the argument of the court in an assigned case. The student is then asked to defend the argument, refuting objections raised by the professor.

13.1 1 He says that the firm is traditional, and people are hard-working, serious, but friendly.
2 The full partners are responsible for the day-to-day affairs and the finances of the firm, and oversee the two departments.
3 He says that the size sounds ideal, that it is not as small as the firm he worked for in Cambridge, but not too big either (unlike the EU Commission).

13.2 1 Mr Robertson 2 Full partners 3 Real Property 4 Salaried Lawyer 5 Associate 6 Paralegal

14.1 Department/Company: *is/are headed by*
Person: *is/are assisted by, is/are responsible for, is/are in charge of, is/are assigned to, report to*
Both: *is/are managed by*

15.1 Speaker 1: 2, 3, 4, 5
Speaker 2: 1, 2, 3, 4
Speaker 3: 2, 3, 4
Speaker 4: 2, 4, 5
Speaker 5: 1, 2, 3

16.2 1 Because it will improve future job opportunities, be a good learning experience, will enable students to meet new people.
2 Four weeks
3 At the larger firms, Richard worked on bigger cases, moving between groups in the different practice areas and helping out where needed.
4 He advises the students to do clerkships and to get to know as many different law firms as possible.

16.3

Advantages	Small firms	Large firms
more autonomy and responsibility	✔	
opportunity to work on prestigious cases		✔
chance to rotate through different practice areas		✔
asked to write briefs and letters	✔	
allowed to conduct research and manage court books		✔
opportunity to make many contacts		✔
more training offered		✔
made to feel part of a team	✔	✔
invited to participate in social events		✔
family-like atmosphere	✔	
made good use of time	✔	✔

Unit 2

1 a 5 b 4 c 1 d 6 e 2 f 3

2.1 officers, partners, directors, managers, company secretary, auditor

2.2 1 e 2 f 3 c 4 j 5 b 6 h 7 d 8 a 9 i 10 g

3.1 2, 3, 5, 7, 8

3.2 1 The advantage of incorporating in Delaware is that the state has a highly developed corporate legal system.
2 The articles of incorporation include the name of the corporation, the address of the corporation and of the corporation's registered office, and the name of the registered agent at that office. They also include the purpose of the corporation and the length of time that the corporation is to exist, which can be either perpetual or renewable. Finally, they provide information about the capital structure of the corporation.
3 At the first organisational meeting of a corporation, the bylaws are approved and adopted, officers are elected, and directors are appointed.

3.3 C corporation

3.4 1 e 2 a 3 c 4 b 5 d

4.1 2, 4

4.2 1 True 2 False 3 False 4 True

4.3 1 expired 2 entitled to 3 in lieu thereof 4 provided 5 repealed 6 amended 7 vested in 8 such

5 1 a: lines 1, 6
b: lines 8, 11, 12
2 It can be deleted without changing the meaning of the sentence.
3 a

6.1 1 False 2 False 3 False 4 True 5 True 6 False 7 False

6.2 1 b 2 d 3 c 4 a 5 f 6 e

8.1 joint venture, representative office, WFOE

8.2 1 False 2 True 3 True 4 True 5 True

9.1 The dispute involves whether the directors were acting lawfully when they called the annual shareholders' meeting early.

9.2 1 b 2 c 3 d 4 b

9.3 1 b 2 a 3 c 4 b 5 a 6 b

9.4 1 They stipulate a deadline before which the directors must, at their discretion, determine when to hold the shareholders' meeting for elections of the board.
2 The shareholders claim that the board held the annual shareholders' meeting early to strategically circumvent an anticipated proxy fight in order to perpetuate their control of the company.
3 It might be used to define the board's duty to act and, depending upon the severity of the potential breach of such duty, the court might step in and overturn the board's decision.

9.6 1 state 2 requires 3 precludes

10.1 1 The purpose of the letter is to provide the lawyer's client with an understanding of the legal aspects of the case in which the client is involved.
2 It was probably written at the shareholders' request so that they could make an informed decision about how to proceed regarding the matter.
3 Paragraph 1: Referring to the subject matter
Paragraph 2: Summarising facts
Paragraph 3: Summarising facts; Identifying legal issue
Paragraph 4: Referring to relevant legislation/ regulations; (Referring to previous court decisions)
Paragraph 5: Summarising facts; Referring to previous court decisions; Drawing conclusions

10.2 1 I have now had an opportunity to research the law on this point and I can provide you with the following advice.
2 To summarise the facts of the case, ...
3 The issue in this case is whether the ...
4 The bylaws of the company state that ...
5 The law in this jurisdiction requires ...
6 The statutes give wide leeway ...
7 It is possible that the court will take this into consideration and hold that ...
8 The court might then hold that ...
9 Courts are usually reluctant to ...
10 The facts in this case simply do not justify ...
11 I therefore conclude that ...

11 *Suggested answer*

Dear Mr Rodríguez

Subject: Establishing a business presence in Russia

Thank you for instructing us in relation to the above matter. You have requested advice concerning establishing a business presence in Russia. In the following, I would like to outline the present situation in Russia and to indicate your options.

Based on the information provided to us, we understand that your company is seeking to introduce its product, the chocolate-flavoured energy drink Xocoatl, into the Russian market next year and to conduct the full range of commercial activities throughout Russia. You are considering whether to establish a representative office in Moscow or to form a legal entity, and would like to know which option would be the most advantageous for your firm.

I have now had an opportunity to research the law on this point and I can provide you with the following advice. Due to a recent change in legislation, Russia now allows the formation of Wholly Foreign-Owned Entities (WFOEs), which would have significant advantages over a representative office.

The two options can be compared as follows:

- **Formation:** A representative office in Russia can be opened and closed with relatively little formality; a WFOE must adhere to the more extensive procedures prescribed for company formation.
- **Liability:** The foreign entity is liable for acts of its representative office done pursuant to the power of attorney, while the WFOE is liable for its own obligations.
- **Tax and reporting requirements:** Since a representative office is not a Russian legal person, it is not subject to many of the regulations that apply to legally established Russian companies, such as tax and reporting requirements, which are more extensive and burdensome.
- **Ability to conduct business:** A representative office is not allowed to conduct commercial activity; it is limited to negotiating contracts, marketing or conducting other supporting activities for the foreign entity it represents. A WFOE, in contrast, possesses all the rights of a Russian company.

Based on these considerations, and the instructions you have provided regarding the goals of your company in Russia, we therefore believe that, although a WFOE is subject to the same taxation, reporting and company regulation requirements of any Russian company, it enjoys both the rights and obligations of any other Russian company, and thus would be better suited to your company's needs.

I await further instructions at your earliest convenience.

Yours sincerely

Bruno Martenson

Language focus

1 2 elapsing 3 discretion 4 prerequisite 5 interpretation 6 permit

2 2 states 3 provisions 4 to 5 make 6 on behalf of

3

Verb	Abstract noun	Personal noun
administrate	administration	administrator
audit	audit	auditor
liquidate	liquidation	liquidator
perpetrate	perpetration	perpetrator
appoint	appointment	
assume	assumption	
authorise	authorisation	
form	formation	
issue	issuance/issuing	issuer
omit	omission	
provide	provision	provider
redeem	redemption	redeemer
require	requirement	
resolve	resolution	
transmit	transmission	transmitter

4 2 d 3 a 4 b

5 2 in the course of / by way of 3 by way of 4 in terms of 5 in response to 6 in response to 7 in terms of 8 by way of

6 2 c 3 d 4 b 5 a

7 an action, an amendment, an appeal, a brief, charges, a claim, a complaint, a defence, a document, an injunction, a motion, a suit

Unit 3

1 1 False 2 True 3 True 4 True

2.1 1 e 2 h 3 f 4 c 5 d 6 g 7 b 8 a

2.2 1 c 2 e 3 b 4 a 5 d

3 *Suggested answers*

Ordinary shares have the potential to give the highest financial gains, as they give a pro-rata right to dividends, as opposed to preference shares, which have a fixed dividend and do not give an increased return in relation to the business's profits.

In contrast to ordinary shares, preference shares are relatively low risk, as the shareholder has the right to a dividend ahead of ordinary shareholders.

Ordinary shareholders are the last to be paid if the company is wound up, as opposed to preference shareholders, who are repaid the par value of their shares first.

4.1 Ms Siebert asks about 1, 3, 5, 6, 7

4.2 1 The new shares are offered in proportion to the number of shares the shareholders already hold.

2 The speaker says that shareholders want to take up their pre-emption right to maintain the proportion of shares they own.

3 New shares are issued at a price that is lower than the market price to increase the likelihood that the issue is fully subscribed.

4 A share issue is said to be fully subscribed when all of the shares have been agreed to be purchased.

5 They can be unhappy about having to decide whether to buy shares or sell rights.

5.1 1 The right to receive the residual income based on shares owned in the company, and the right to transfer ownership of the shares to others.

2 Shareholders can express their disappointment with the company's performance by either getting rid of their shares or in some way exercising their voice by communicating their concerns to the company's board.

3 The one-tier board consists of directors, executive as well as non-executive, who are appointed by the controlling shareholders and who must answer to the annual meeting. A two-tier board consists of an executive board and a supervisory board. The executive board includes the top-level management team, whereas the supervisory board is made up of outside experts, such as bankers, executives from other corporations, along with employee-related representatives.

5.2 1 F 2 E, F, (G) 3 C, D 4 B 5 G 6 C 7 A 8 E

5.3 *Suggested answers*

1 the division of investments among various assets such that the failure of or loss in one investment will not necessarily financially devastate the company, since other investments remain viable

2 questions which the respondent would prefer not to answer. Simply asking them may cause the respondent some embarrassment. For example, How can you justify the award of a 15% pay rise for the CEO when dividends have fallen by 50%?

3 the communication or sharing of knowledge between parties

4 encounter negative factors that prevent or hinder one from obtaining one's goal
5 the well-known philosophical problem that there are some things which may be in everybody's collective interest, but which are not worth anybody's individual effort. For example, I might benefit from the construction of a new bridge, but not enough to justify building it by myself. Even if I could assemble a large team of friends to help me build it, there would still be some potential beneficiaries who have not contributed (free-riders). The problem is how to persuade individuals to be contributors rather than free-riders.
6 If I don't like the way I am treated in a shop, I can 'vote with my feet' by leaving the shop and not returning. If enough 'voters' do the same, either the service will have to improve or the shop will fail. In this context, it means showing your dissatisfaction by selling your shares and leaving the company.
7 be accountable for one's actions to the shareholders at the yearly shareholders' general meeting
8 collaborating or working together to resolve any disputes or disagreements
9 a regulatory framework or structure in which the employees are granted the right to participate in the management of the company
10 in the public eye, subject to public scrutiny, for example by the media

6.1 1 c 2 d 3 b 4 a

6.2 1 exercise: authority, caution, control, force, influence, power, pressure, restraint, rights
2 restrict: access, authority, benefits, capital, control, freedom, power, rights, sales, spending
3 accrue: benefits, capital, interest, profits, revenue
4 dismiss: a case, a charge, a claim, an employee

6.3 1 dismiss 2 exercise 3 exercise 4 restrict 5 accrue(d) 6 exercise 7 restrict 8 dismiss

7 *Suggested answer*

Dear Mr Fraser

Thank you for your email of 26 September, in which you request information concerning the two-tier corporate management system found in German-speaking countries. I understand you are interested in investing in a German company and would therefore like to have a clearer idea about how this system differs from the one you are familiar with here in England.

Allow me to provide a brief explanation of how the two systems differ. In the German two-tier system, in contrast to the Anglo-Saxon one-tier system, there is an executive board and a supervisory board. The executive board consists of the top management, and the supervisory board includes outside experts and executives from other corporations, as well as employee-related representatives. The supervisory board serves to oversee the management and resolve conflicts between shareholders, managers and employees. Unlike in Anglo-Saxon countries, employees of large corporations in Germanic countries are entitled to elect half of the members of the supervisory board, and so employees have greater representation on the board.

I hope these remarks are of use to you. Please do not hesitate to contact me should you have any further questions.

Yours sincerely

Max Appleby

8.2 1 False 2 True 3 True 4 False

8.3 1 A school of thought that believes that (legal) documents should be written so that they can be understood the first time they are read.
2 Because the language of law is conservative and text based, and has a tendency to stick to tradition.
3 Mr Mansfield says that writing in plain language does not involve abandoning legal concepts and legal terms and replacing them with colloquial expressions, and points out that such terms only form a small percentage of any legal document.

9.1 Passive verbs: may be issued; received; may be transferred; shall be divided; shall be entitled; declared; shall be paid; (shall be) set apart; shall first have been paid; (shall first have been) declared; (shall first have been) set apart; shall be distributed
Archaic words and expressions: thereto; thereon; per annum; thereof

9.2 such amounts: those amounts *or* any amounts
such dividends: these dividends *or* dividends of this kind
such payment dates: these payment dates *or* the payment dates mentioned

9.3 1 c 2 b 3 a 4 e 5 d 6 f

9.4 1 thereto 2 therein 3 therewith 4 therefor; thereof 5 thereon 6 thereof

10.2 as far as I'm concerned, The way they see it, I think, To my mind

10.3 1 opinion 2 see 3 mind 4 my 5 ask 6 point 7 concerned 8 think 9 seems 10 firmly 11 me 12 would

11.1 1 The new law specifies that limited companies only need to have a minimum share capital of BGN 2 (approx. EUR 1).
2 It applies only to limited companies.

11.2 1 True 2 False 3 False 4 True 5 True

11.4 1 measure of creditworthiness: an indicator of a person's (or in this case, a company's) suitability to borrow money
2 pecuniary benefits: monetary benefits
3 is something of an anachronism: in some way seems to belong to another time
4 the prohibition was relaxed: the prohibition was made less severe or strict
5 a going concern: a business that is not in danger of going into liquidation in the near future, which is usually considered to be within the next year.

11.5 1 to 2 from, to 3 by; under 4 in 5 on 6 by 7 on

Language focus

1 2 conversely 3 discretionary 4 suggest 5 therefor 6 postpone

2 2 of; from 3 for; under 4 in; with 5 on; by; to 6 into

3 2 unlikely 3 irrespective 4 illegal 5 abnormal 6 unlimited 7 unrestricted 8 indirect 9 informal 10 incomparable

4 2 f pre-emption 3 i refusal 4 d consolidation 5 g division 6 c resolution 7 a diversification 8 b amendment 9 h reliance

5 We wish you a Merry Christmas and a Happy New Year!

Unit 4

1 1 d 2 b 3 e 4 c 5 f 6 g 7 a

2.1 1 acquired company 2 friendly takeover 3 target 4 voluntary liquidation 5 insolvent

3.1 1 c 2 c 3 b

3.2 1 False 2 True 3 True 4 False 5 True 6 True

3.3 2 Warranties save time during the negotiation and acquisition, as (to some extent) buyers can base their decisions on the promises made by the sellers, and therefore do not need to check, for example, every asset or employee. If a discrepancy appears after the acquisition, the buyer has solid grounds to sue the seller. Of course, it is better to identify problems beforehand, in order to avoid conflicts later. Furthermore, the seller may

be out of business by the time the problems become known. Also, the warranties need to be very carefully worded for them to be of value.

4.1 1 to introduce myself 2 I'm with the
3 be speaking about 4 going to tell 5 interrupt me
6 overview of 7 few comments on 8 deal with
9 discuss 10 have time for 11 move on to
12 conclude with 13 discussion

4.2 a: 1, 2
b: 3, 4, 6, 7, 8, 9, 11, 12
c: 5, 10, 13

5.1 A spin-off is any distribution by a corporation to its shareholders of one of its two or more businesses (paragraph 1).

5.2 a 4 b 3 c 1 d 2

5.3 1 When two businesses have become incompatible; when investors and lenders only want to provide capital to one business operation, not all; when owner-managers have different philosophies; in the case of publicly held companies when the stock market would value the separate parts more highly than combined operations; when the separation of business operations could lead to a greater drive for success.
2 Code Section 355 permits a spin-off to be accomplished without tax to either the distributing corporation or the receiving shareholder.

7.1 1 They are discussing an increase in a company's share capital.
2 A board meeting and an EGM
3 Three: the ordinary resolution, the notice of increase of nominal capital and the amended memorandum

7.2 1 share capital 2 Determine the amount
3 a board meeting 4 directors 5 pass a resolution
6 short notice 7 chairperson 8 a simple majority
9 within 15 10 nominal capital

9.1 1 The company secretary usually writes the minutes of a meeting.
2 In his or her role as corporate counsel, a lawyer often has to read such texts to make sure everything has been carried out in accordance with the relevant statutes.

9.2 1 The board meeting was called to vote on the allotment of shares (increase authorised share capital).
2 The EGM was convened to authorise the directors to increase the company capital, allot the shares and disapply the requirements of s89 Companies Act 1985.

9.3 1 It was resolved that the applications for the allotment of shares be approved subject to the approval of the extraordinary general meeting; that the notice be approved to hold an EGM at which the proposals to increase the Company's share capital, to authorise directors to allot the new shares and to disapply the requirements of s89 Companies Act 1985 would be voted on; that the application by the members for additional shares be accepted and that the capital of the Company be allotted to the applicants on the terms of the application.
2 Entering the names of the applicants in the register of members of the Company as the holders of the shares allotted; preparing share certificates in respect of the shares allotted; arranging for the common seal to be affixed to them and for the share certificates to be delivered to the applicants; preparing and filing with the Registrar of Companies Form 88(2) (return of allotments) in respect of the allotment just made; Form 123 (increase of capital); and the special and ordinary resolutions in connection with raising capital for the Company.

9.4 confirmed, resolved, noted, declared, proposed, reported, informed, agreed, instructed

10.1
- O to give notice of a meeting (*notice of the meeting had been given*) (s1)
- O to be present at a meeting (*was present at the meeting*) (s1)
- O to present something to a meeting (*Applications were presented to the meeting / There was presented to the meeting*) (ss2, 7)
- O to propose a resolution (*resolutions would be proposed*) (s7)
- O to hold a meeting (*the meeting be held immediately / to enable the extraordinary general meeting to be held*) (ss7, 8)
- O to adjourn a meeting (*The meeting was adjourned*) (s8)
- O to resume (*meeting* = subject) (*The meeting resumed at 8 p.m.*) (s9)
- O to set out a resolution (*the resolutions [which had been] set out*) (s9)
- O to pass a resolution (*the resolutions ... had been duly passed*) (s9)
- O to prepare a resolution (*The Secretary was instructed to prepare ... the special and ordinary resolutions*) (s13)
- O to file a resolution (*The Secretary was instructed to ... file ... the special and ordinary resolutions*) (s13)
- O to close a meeting (*the meeting was closed*) (s14)

10.2 meeting: arrange, attend, call, cancel, convene, preside at, schedule, summon
resolution: adopt, authorise, draft, endorse, introduce, oppose, pass, table

11.1 1 It is a letter of advice.
2 The query it responds to is whether it would be possible to set aside the transaction described in the letter on the basis of the shareholder's rights.

11.2 1 False 2 False 3 True 4 True

11.3 1 e 2 a 3 d 4 c 5 b

12.1 1 You have requested advice regarding your rights as stockholder in Alca Corporation (the "Target Corporation") which entered into a stock-for-assets agreement with Losal Corporation (the "Purchasing Corporation").
2 The advice and statements set forth below are based on the facts you presented to me in our telephone conference of January 27.
3 As always, I remain at your disposal should you wish to discuss your options. I look forward to hearing from you and answering any further questions you may have.

12.2 *Suggested answer*
Dear Mr Louis
I am writing in response to your query of 12 September in which you request information regarding the board meeting and extraordinary general meeting of Longfellow Ltd which were held on 10 September. I will summarise the circumstances under which the meetings were convened, as well as the resolutions passed. As you may know, a board meeting was held to determine whether new shares could be issued to certain existing shareholders in the company. The proposal, which would raise the share capital of the company by 50,000, was presented to the board. However, as the charter of the company did not grant authority to raise share capital in this manner, a notice of an extraordinary general meeting was presented, containing the details of the proposed increase in share capital. The board approved the notice, and it was forwarded to all of the members, including yourself, for consent to the short notice of the extraordinary general meeting. The board meeting then adjourned to allow for consents to the short notice to be obtained and to hold the extraordinary general meeting. The extraordinary meeting was then held after

consents to the short notice were obtained from all the members, and the meeting approved all of the resolutions in the notice. Based on the authority provided by the approval of the extraordinary general meeting, the board raised the share capital of the company through the issuance of the 50,000 new shares. The company secretary was then instructed to take care of all the administrative matters related to the increase and the meeting was closed. I hope that the information I have provided meets your requirements. Should you have any further questions, do not hesitate to contact me.
Yours sincerely
Ann Walsh

Language focus

1 2 related to 3 liable 4 contend 5 add on 6 relevant
2 2 d 3 a 4 b 5 g 6 e 7 f 8 c
3

Verb	Abstract noun
distribute, distribute	distribution
merge	merger
regulate	regulation
submit	submission
approve	approval
consolidate	consolidation
acquire	acquisition
liquidate	liquidation
cancel	cancellation
alter	alteration

4 2 preside at 3 dispose of 4 complied with 5 entered into
5 reduce share capital, pass ordinary resolution, follow proper procedures
6 2 undertaking(s) 3 merger 4 transformations 5 reconstructions 6 alteration 7 amalgamation 8 union/uniting
7 2 f 3 h 4 d 5 g 6 b 7 c 8 a

Case study 1

Model answer
Dear Mr Kim,
Re. Greenview minority shareholders v. Kim and Sanders
In accordance with your instructions, I have reviewed the above referenced file and can advise as follows. Please note that all the advice stated in this letter is conditional and subject to further investigation.
Based on the available facts, it appears that there is one fundamental issue of law involved in this case. Specifically, the issue involved is whether you and Mr Sanders breached your fiduciary duty of loyalty as directors in Greenview ("Company") by personally taking advantage of a business opportunity of the Company. Based on my review of the law and facts, there is good reason to find that you and Mr Sanders have indeed breached this duty of loyalty. I clarify below.
The relevant law regarding corporate directors' duty of loyalty in Westland is contained in two separate legal provisions. The first is Section 202 of the Westland Corporations Act, which states in principle that directors must act honestly and in good faith in accordance with the best interests of the company. The second provision, Section 5.05 of the Westland Principles of Corporate Law, is a guideline for interpreting the Corporations Act and states in relevant part that acting in the best interest of the company includes a duty of loyalty to refrain from taking advantage of business opportunities belonging to the company. When applying these two provisions, the court looks first at whether the "opportunity" actually existed. In other words, there is a determination of whether the opportunity was within the area of business of the Company. If the court concludes that there is an actual business opportunity involved, it then moves on to determining whether the relevant director was in some way justified in taking advantage of the opportunity which was in the Company's line of business.
Applying the facts involved to the first part of the stated test logically leads to the conclusion that the purchase of the land adjoining Greenview's golf course was within the line of business of Greenview. In fact, you learned of the availability of the adjoining land through your duties on Greenview's board, and the purchase of the property was discussed at the highest levels within Greenview. Under the second part of the test, you might be able to justify your actions. In some cases, for example, the courts have found justification based on the fact that the company is incapable of taking advantage of the opportunity. However, there do not appear to be any facts which would support this justification or, for that matter, any other justification. The fact that the Company was aware of your purchase of the land and agreed to sell the property with you as a package is significant. However, in my opinion, it does not justify the purchase in and of itself, particularly in light of the fact that you and Mr Sanders made a considerable profit on the sale. Of course, if you wish we can take this to trial. However, my recommendation at this stage is to approach the shareholders with a settlement offer (with this approach, you and Mr Sanders may be able to salvage part of your profits). Please provide me with instructions at your earliest convenience.
Sincerely
Astrid L. Newton
Attorney-at-Law

Unit 5

1 a 3 b 5 c 4 d 1 e 2
2 1 c 2 d 3 b 4 a
3.1 1 e 2 i 3 d 4 g 5 b 6 h 7 a 8 j 9 c 10 f
3.3 1 Liquidated Damages 2 Acceleration
3 Force Majeure 4 Assignment 5 Termination
6 Entire Agreement / Merger / Parol Evidence
3.4 *Suggested answers*
1 responsibility to pay compensation
2 the party alone can decide
3 carry out later or not at all
4 agreement given before in writing
5 If Operator defaults in performance ...
6 do nothing
7 attachments
8 considered
4.1 1 A non-competition agreement.
2 Because it is an agreement template.
4.2 2b: Confidentiality
3: Consideration
5: Severability
6: Payment of Costs
4.3 1 to comply with 2 shall be stricken 3 ascribed to
4 commencing 5 has acquired 6 contemplated by
7 shall expend
6.1 1, 3, 5, 6, 8, 9
6.2 1 The speaker says it is necessary to review the terms and conditions it contains carefully, as well as to consider what is not in the agreement but should be.

2 The categories he suggests are: things you can't possibly accept, major points, minor points, and things you can easily live without.
3 While bargaining, it means giving up some items in order to get other ones from the other party.
4 The speaker says that negotiators should insist on having such clauses removed. He also says that including a merger clause in an agreement ensures that only what is written in the contract is legally binding.

7 Now I'd like to move on to the topic of using agreement templates and term sheets. It's common to start out with an existing contract template, which gives you a kind of blueprint of the things that are usually included in such an agreement. It's important to realise that negotiating with a contract template means that it's necessary to review the terms and conditions it contains carefully. Please note that you have to consider what is *not* in the agreement but should be, that is, what's missing and should be added. This is really just as important as carefully reviewing the language in the agreement. Here, I want to stress that it'd be wise to consult with a senior attorney, preferably someone who has experience negotiating agreements of the kind that you are negotiating. When using a term sheet as the basis of negotiations, it's imperative to keep good notes of all discussions or emails regarding the items on the sheet. Term sheets are usually used by lawyers to transfer the terms that have been agreed into an official agreement, so it's crucial that the information on these sheets is precisely what's been agreed on by all parties. Sometimes a lawyer will incorporate items from a term sheet onto an agreement template. In such a case, he should be careful not to include language originally in the template that isn't appropriate.
Adverbs can be added to:
It is (particularly) important to realise ...
Please note (especially) that ...
Here, I (particularly) want to stress that ...

8.1 1 d 2 e 3 a 4 b 5 c

8.2 1 The To, From and Date lines 2 Subject: In-company seminar on contract negotiations 3 Paragraph 1 4 Paragraphs 2 and 3 5 Paragraph 4

8.4 *Suggested answer*
Memorandum

To: All non-senior members of the legal staff of the Mergers & Acquisitions department
From: Lydia Brown
Date. 18 February 2011
Subject: Summary of important points made in the seminar on contract negotiations

I have been asked to summarise the most important points made in the seminar on Successful Contract Negotiations held last week at the firm by Mr Tom Boland for those who were unable to attend. I would particularly like to call your attention to three suggestions made by the speaker regarding the careful use of contract templates and term sheets in negotiations:

- It is especially important to review the existing terms and conditions in the contract template carefully; don't leave any language in the agreement which was originally in the template and which is not appropriate. At the same time it is necessary to think about what is missing from the agreement and should be included.
- It is advisable to ask a senior attorney who has experience with the type of agreement you are negotiating to look at your agreement and offer any advice, if needed.
- It is particularly important to keep good notes of all communications about the points in the agreement. The only information on the term sheets should be what the parties have all agreed on.
- I hope this summary was of interest to you and I would be happy to answer any questions you may have about the seminar.

Best wishes
Lydia Brown

9.1 1 They are talking about a franchise agreement.
2 The business they are discussing is a sandwich-making restaurant.
3 The two clauses they mention are the non-competition clause and the arbitration clause.
4 The franchisee is unwilling to accept a non-competition clause that would prohibit him from operating a similar sandwich-making restaurant in a certain area for the period of three years if the franchise agreement should be terminated.

9.2 1 False 2 True 3 True 4 False

9.3 One of the techniques Arthur Johansson used was horse-trading, i.e. trading one item (in this case, offering to be flexible on the arbitration clause) for another (getting the other party to reduce the scope of the non-competition clause). The second technique he used was to suggest a number that he knew the other party would not accept (in this case, he suggested reducing the length of the non-competition clause to one year) in the expectation that the other party would suggest a number that he in turn couldn't accept (the other party suggested two years), with the hope that they would agree to meet halfway at a number Mr Johansson actually wanted originally.

10.1 1, 2, 3, 4, 5, 6, 9

10.2 a Our proposal is to ...
We suggest ...
We'd like ...
What we're looking for is ...
b That's certainly a step in the right direction.
I think we could live with that.
We'd be happy with that.
c I'm afraid we can't go along with ...
I'm afraid that's out of the question.
That would be difficult for us.
We're not entirely happy with that.
The most forceful phrase for rejecting a proposal is *I'm afraid that's out of the question.*

12.1 1 He wants Arthur to make the changes he has suggested to the clause and then to send it to the client in a mail in which he also explains what the clause means in a way the client can easily understand.
2 To 'walk someone through something' means to explain something to somebody step by step (if it is a procedure) or to explain something complicated slowly and carefully.
3 'COB' stands for 'close of business' and refers to the end of the working day.

12.2 See sample email in 12.3.

12.3 *Suggested answer*
Dear Mr Heslop
I am writing to inform you of the changes that have been negotiated with regard to the non-competition clause of the franchise agreement you wish to enter into. As you will see from the attached document containing the reworked version of the clause in question, I was able to achieve our primary goals in the negotiation held last week.
If I may, I will briefly explain what the clause means and indicate where changes have been made to the original version.

The clause states that you, as the Franchisee, agree that you will not, for the period of one year from the time when the agreement ends, own or operate a business which is similar to the sandwich-making business which is the subject of the contract. Please note that the time period during which this restriction applies has been reduced from two years to one year. According to the clause, you also agree not to be employed by or provide assistance to such a sandwich-making business for this one-year period. However, the clause also expressly states that you have the right to invest in such a business during this time period if you wish. Note that while this was prohibited in the original clause, we have managed to have this restriction removed. Finally, the clause stipulates the size of the geographical area in which you may not own or operate a similar sandwich-making business for this period. The radius around the location of your business has been changed from 25 miles to 10 miles. I hope that the clause in its present form conforms to your wishes and expectations. Should you require further information, please do not hesitate to contact me. I await your further instructions in this matter.
Yours sincerely
Arthur Johansson

Language focus

1 2 whereas 3 injunction 4 breach 5 unwarranted 6 contention 7 efficacious

2 To form or make a contract valid: enter into, execute, sign
To make a contract partly or wholly invalid: cancel, rescind, terminate
To change or add to a contract: amend, modify, supplement

3 2 signed 3 (had) breached 4 is terminated / terminates 5 to be renewed 6 modify

4

Verb	Abstract noun
renew	renewal
draft	draft
include	inclusion
omit	omission
terminate	termination
encrypt	encryption
adopt	adoption
negotiate	negotiation
propose	proposal
transact	transaction

5 2 express 3 non-binding 4 invalid

6 2 by 3 in 4 for 5 herein 6 hereby 7 by
It is an example of a merger / entire agreement / parol evidence clause.

Unit 6

1.1 Pecuniary compensation

1.2 1 True 2 False 3 True

2.1 1 d 2 e 3 a 4 g 5 b 6 c 7 f

3.1 Liquidated damages are defined as 'provisions in a contract stipulating the amount required to compensate an injured party in the event of a breach'.

3.2 1 d 2 a 3 c 4 b

3.3 1 False 2 False 3 True 4 True

3.5 1 breach of contract 2 compensate an injured party 3 bargaining power 4 clause at issue

4.1 Section 2: In many jurisdictions, the courts will sever ... The result is that the non-breaching party is forced to prove ...
Section 3: The recent tendency of the courts is to give less or no weight to ...
... the courts take into consideration ...
As such, the court must assess whether ...
Section 4: The courts generally look to ...
In rare cases, ... the courts will not enforce ...

4.2 *Suggested answers*
1 The court overturned/reversed the decision. (opposite meaning to *upheld*)
2 The court rejected the suit on the grounds that ... (same meaning)
3 The court agrees/rules that ... (same meaning)
4 The court is hesitant to / is unwilling to ... (same meaning)

5.1 1 True 2 False 3 False 4 True

5.2 1 produced 2 a third party 3 signature 4 transfer 5 harmful

6 The whole system works like this: the court must first determine whether an order for specific performance should be granted. Of course, the breaching party can do two things: either comply or not comply with the order. In other words, the defaulting party either takes the action necessary to perform the contract or he doesn't. If he doesn't, the other party can decide to go to the judicial enforcement agent. This judicial enforcement agent is called the *foged* in Denmark. A *foged* is similar to the bailiff in common law. He basically fulfils the functions of a bailiff. The Danish Code of Procedure 17 regulates what the *foged* has to do. This code stipulates that the *foged* can convert the plaintiff's claim into money damages. So, in reality, most claims for which specific performance is granted are converted into money damages.

8.1 1 Because on-time performance of the various parts of a construction agreement is crucial. If the foundation of a building is not performed on time, then the next step, and the workers involved, must wait. This may result in workers being paid to wait and, in turn, losses being incurred which must be compensated by the party who has failed to perform on time.
2 *Time is of the essence* means that it is essential to the parties that performance takes place in accordance with the times specified in the agreement. Failure to perform by the time specified is a breach of contract by the non-performing party.
3 $10,000
4 If money is due the Contractor, the amount of damages will be deducted from this, or if no money is due the Contractor, he will pay the amount to the Owner.

8.2 1 by way of 2 prescribed 3 in excess of 4 mutually 5 is due 6 inclusive of 7 as aforesaid 8 deducted from

9.1 1 The program written by the software company contained unnecessary code and did not function with Macintosh computers, so the client had to have it rewritten.
2 The client was forced to find another programmer who could fix the program written by Glaptech.

9.2 1 The lawyer says that the client should have mitigated his damages by making a reasonable effort to solve the problem as inexpensively as possible. This would have meant shopping around locally to find the best price for a programmer to do the work.
2 Read through the contract.

9.3 1, 3, 4, 5, 7

9.4 1 c 2 c 3 b

10 1 e 2 c 3 a 4 d 5 b

12.1 1 The email provides a written record of the meeting. This avoids any confusion or misunderstandings later on and gives the client the opportunity to query any of the points mentioned.

2 Factual mistake: Client gave a 10% discount. Additional information: The lawyer does not know whether the contract with Glaptech waives consequential damages or not. She still has to look at the contract.

3 At this stage in the matter, it would be helpful if you could give me any documents or information which relate to the dispute.
Naturally we will require a copy of the contract concluded with Glaptech.
In addition, it would be extremely useful if you could provide documents indicating the nature and extent of your previous business relationship with the ferry company, as well as anything that would bear witness to the poor quality of the faulty software program provided by Glaptech.

4 The courts in our jurisdiction tend to strictly construe contracts between commercial parties and are generally hesitant to award consequential damages unless the plaintiff can clearly demonstrate that the loss was foreseeable to the defendant. The court will look at the course of dealings between you and Glaptech, as well as any documentation you can produce which indicates that Glaptech could have reasonably foreseen the loss.

12.2 a 2 b 6 c 3 d 7 e 1 f 5 g 4

12.3 1 As a follow-up to our meeting on June 24, ...
2 According to the facts as I understand them, ...
3 At this stage in the matter, it would be helpful if you could give me ...
4 While I believe your chances of recovering some damages are good, ...
1 e 2 a 3 f 4 g

12.4 Use the email on page 87 as a model.

13.1 I will outline the law in this jurisdiction as it applies to the facts in the instant case.

13.2 *Suggested answers*

1 The issue in the instant case is whether a seller may sue a buyer for anticipatory breach of contract when the buyer tells the seller that he will not accept the goods, even though the seller was not yet obligated under the contract to deliver the goods.

2 The non-breaching party in this case has two options: firstly, he may trust what the buyer has said and conclude that, legally, he no longer has to do the things he promised to do under the contract. Secondly, he could continue to act as if the contract was still in force, as long as this does not cause any harm to the buyer.

3 Under the reliance principle, if one party to a contract tells the other party to the contract that it will not abide by what they agreed to in the contract, then this other party (non-breaching party) can legally rely on this verbal notice of intent to breach and take action accordingly. This principle relates to the case at hand because the seller has attempted to make deliveries under a long-term contract with the buyer, but the buyer refused to accept the goods on the first delivery date. Since the contract was for deliveries over a number of years, the reliance principle can apply if the buyer has informed the seller that it will continue to refuse the goods for the remaining term of the contract.

13.3 The courts here have reasoned that ...
Admittedly, there is a precedent stating that ...
In a leading case on this point, Judge Hand stated that ...
This seems to be the majority position in this jurisdiction.

13.4 *Suggested answer*

Dear Aidan

I have been informed that you will be taking over the Robillard case from Susan Whiteman during her illness and am therefore writing to fill you in on the nature of the case itself, as well as on its current status.

As you will see from the attached letter from Ms. Whiteman to our client, Dr. Robillard, the case involves a contract for the sale of hops to the Pat Turner Breweries. Our colleague's interpretation of the relevant law with regard to the facts of the case has led her to advise Dr. Robillard to sue the opposing party in order to recover damages for anticipatory breach of contract. Ms. Whiteman is convinced that the prospects for a successful outcome are very good. Ms. Whiteman has asked Dr. Robillard to contact her secretary for an appointment to discuss further steps in the case. I suggest you write to him and inform him that you have been entrusted with the matter in her absence. Should you require any further assistance, please do not hesitate to contact me.

Best wishes

Melanie Tang

Language focus

1 2 intensify 3 injury 4 occasion 5 curious
6 the Court argued

2 2 held that / ruled that 3 dismissed/rejected; finding that

3

Verb	Abstract noun
remedy	remedy
breach	breach
intend	intent / intention
rely	reliance
violate	violation
enforce	enforcement
reverse	reversal
anticipate	anticipation
compute	computation
perform	performance

4 2 a 3 e 4 b 5 d 6 h 7 f 8 i 9 g

5 1 award, claim, collect, mitigate, seek, sue for
2 contain, exclude, interpret, perform, strike, violate

6 2 result from 3 thereof 4 ascertain
5 on 6 herein 7 shall

7 2 b 3 f 4 c 5 a 6 d

8 2 specified 3 expressly 4 breaching 5 repudiating
6 termination

Case study 2

Model answer

Dear Managing Director,

Re. *Capable v. Newton Construction Co.*

In accordance with your instructions, I have reviewed the above-referenced file and can advise as follows. Please note that all the advice stated in this letter is conditional and subject to further investigation.

Initially, there is one primary issue of law which arises based on the facts which you have supplied me. Specifically, whether Newton Construction can be held liable as an "arranger" under the Complete Environmental Reimbursement and Liability Act (CERLA). If we can convince a court that Newton Construction qualifies as an arranger under this Act, there is a possibility that Capable could recover all of the costs expended in cleaning up the methyl alcohol. From my review of the relevant CERLA provisions, i.e. Section 320, Sub-section 3, the primary issue above is, in turn, dependent on whether the facts support a conclusion that Newton Construction "otherwise arranged for disposal or treatment" of the methyl

alcohol (a hazardous substance). Unfortunately, this issue is not well settled in this jurisdiction.
The two most important decisions regarding this issue appear to have two different approaches. One court has focused on both the terms "arranged" and "disposal", leaving room for broad interpretation of both terms. Of course, this decision might permit us to rely on the fact that Newton Construction had an "obligation to control" the methyl alcohol (which it failed to do), thus relieving us from the burden of proving intent to dispose of the hazardous substances. The other decision is, unfortunately, not in our favor, as it narrows the interpretation of both "arrange" and "dispose" by focusing on the requirement of intent by the "arranger." As I understand it from the facts you have provided, proving intent is not likely, since Newton Construction maintains that it was completely unaware of the damage which caused the leak.
I would suggest that the best course at this juncture would be to commence discussions with Newton Construction in order to 'feel them out' regarding settlement. I am uncomfortable with our chances in court due to the conflicting legal decisions regarding the issues at hand. At this stage, I think it would be wiser to play the moral hand, as certainly Newton Construction has caused considerable contamination, with Capable bearing the costs.
I look forward to your instructions on how you wish to proceed. Please contact me if you would like further clarification of any of the points I've raised.
Truly yours
John R. Moore
Attorney-at-Law

Unit 7

1 1 True 2 True 3 False 4 False
2.1 1 Novation 2 benefits 3 third party 4 novation 5 novation 6 assignment 7 Assignment 8 parties 9 assignment 10 novation
2.2 2 impose duties: This means to place obligations on someone in a contract.
3 enforce contractual provisions: This means to make someone do or not do something as stated in a contract.
4 render performance: This means to do or not do something as stated in a contract.
5 delegate duties: This means to give duties to someone else to do on your behalf.
6 assign rights: This means to transfer the rights to a third party so that they have them.
3 2 delegator; delegate(e) 3 obligor; obligee 4 assignor; assignee
5.1 The non-assigning party has the right to elect to refuse and avail himself of or consent to the assignment, transfer or sale of interest in the shares, except for the transfer to the party's heirs, personal representatives or conservators in the case of death or legal incapacity.
5.2 1 In the case of a transfer of one party's interest in the Agreement to the party's heirs, personal representatives or conservators in the case of death or legal incapacity.
2 The written notice must set forth all of the terms and conditions of the proposed assignment and all available information concerning the proposed assignee, including but not limited to information concerning the proposed assignee's employment history, financial condition, credit history, skill and qualifications, and in the case of a partnership or corporate assignee, of its partners or shareholders.
3 Within ten days after receiving the notice (or, if additional information is requested, within ten days after receiving the additional information), the non-assigning party may either consent or withhold its consent to the assignment, or accept the assignment to itself or to its nominee upon the terms and conditions specified in the notice. The non-assigning party may substitute an equivalent sum of cash for any consideration other than cash specified in the notice.
5.3 1 g 2 c 3 e 4 a 5 f 6 d 7 b
6.1 2, 4, 6
6.3 The three points of evidence Ron will use are:
- excellent credit rating of prospective buyer;
- expert witness on commercial lease transactions who will testify that Jones had sufficient information to make a decision;
- evidence that suggests the relationship between the men was not a good one.

7 1 The purposes of the email are to inform his colleague about the progress of the case and to get feedback on his closing argument.
2 He would like to get suggestions for improving his argument from his colleague.
8.1 mind looking ... letting; appreciate getting; look forward to hearing (NB the latter is a phrasal verb (look forward to) followed by an *–ing* form)
8.2 1 a 2 b 3 a 4 a 5 a 6 b 7 a 8 a
8.3 1 suing 2 giving 3 breaching 4 to re-draft 5 gathering 6 hearing 7 to tell 8 arguing
9.1 3, 4, 6
9.2 1 True 2 False 3 False
9.3 1 c 2 d 3 e 4 b 5 a
10 a 2 b 5 c 6 d 4 e 1 f 3
11 *Suggested answer*
Dear Ron
In response to your email this morning, let me first say that I enjoyed reading your closing argument – well done! You asked me to give you some feedback, which you will find in the margins of the attached document. For the most part, the changes which I think should be made involve giving more emphasis to important points and generally being more explicit.
I suggest emphasising that the delay was clearly unreasonable (due to perfect credit rating and sufficient information being provided). I don't think the importance of this point can be stressed enough. I would even repeat the word 'unreasonable' a few times! You also need to be more explicit about the evidence showing that the delay was based on personal animosity. I also recommend explicitly stating the reason why Mr Jones dislikes your client – that there was a lawsuit is not enough. It is imperative that you point out that Mr Jones lost the suit and had to pay high damages to your client and therefore dislikes him.
Finally, I suggest emphasising that your client informed the defendants that time was of the essence in the matter of the assignment – this makes the delay appear more like an intentional attempt to harm your client. Hope that these comments are of use to you. Feel free to contact me again if you have any questions.
Best
Sam
12 1 Ron says that the defendants' withholding of approval of the proposed buyer was unreasonable because the defendants' lawyer acknowledged that the proposed buyer had a 'perfect credit rating'.
2 Ron suggests that the defendants' real reason for withholding approval was that Mr Jones and his client had been engaged in a previous lawsuit which Mr Jones lost and which led to his having to pay high damages to Ron's client.
13.1 1 Monday, not any other day 2 the new client, not the new boss or the new cleaner 3 the new client, not an existing one 4 meeting, not phoning or emailing 5 We're attending the meeting, not anyone else

13.2 *Suggested answers*

Don't worry if you underlined other words as well as those shown. It is sometimes difficult to distinguish between words given emphatic stress and those with normal sentence stress.

Based on the evidence presented, the court must conclude that sufficient evidence supports a determination that the defendant unreasonably withheld consent to the assignment. The defendant nevertheless asserts that it did not refuse consent, but merely delayed giving my client an answer until additional information was obtained. We reject this argument. The terms of the lease provided that the defendant could not unreasonably withhold consent, but this is exactly what it did. As defined in Webster's Third New International Dictionary, 'withholding' means 'not giving', while 'refusing' on the other hand may require some affirmative act or statement. Jones Corporation did not refuse consent, it is true. But Jones Corporation's decision to delay consent amounted to a withholding of consent, especially given my client's indication in a letter to the defendant that time was of the essence. And, as noted above, the evidence supports the determination that this decision was unreasonable. Therefore, the defendant's attempt to distinguish between withholding consent and refusing consent is unavailing under the lease provision here.

13.4 *Suggested answers*

As we have clearly demonstrated here today, the contract concluded between my client and the defendant, the software design company Glaptech, unambiguously stipulates that the defendant agrees to create a computer program enabling all customers to book a ferry passage online. Specifically, the contract expressly reads that the program must work for "all customers using modern home computers." We heard today, in the testimony of a recognized computer expert, that the concept of "modern home computers" can reasonably be construed to include Apple Macintosh computers. Therefore we must conclude that the creation of a program which does not function on this very type of computer system constitutes a clear breach of the contract concluded between my client and the defendant.

14.1 1 c 2 a 3 b

14.2 *Suggested answers*

The court's determination that the withholding of consent was unreasonable was supported by the evidence.

The court gave weight to the evidence provided by the expert witness.

In reaching its decision, the court drew inferences of fact from the evidence submitted.

15.1 1 The text is about a new law in England, Wales and Northern Ireland which came into force in 1999 and which gives third parties to a contract additional rights.

2 The intended reader of the text is someone who is interested in third-party rights and contract drafting, who would most likely be a lawyer.

3 The blogger's primary purpose is to inform, yet he also has a secondary purpose: to persuade readers that the relevant Scots law is in need of reform.

15.2 1 The solution he suggests is that all of the companies in the group are given the right to enforce the contract against the supplier (third-party rights).

2 In English law agreements, it has become easier to give third-party rights to someone who has not signed the contract.

3 He means that he would draft contracts such that Scottish law was agreed to be the law of the contract.

4 Because it requires the laws of two different jurisdictions to be applied to the same contract.

5 He thinks that Scottish law should be updated so that it resembles the English Act with regard to creating third-party rights.

15.4 loss

16.1 Examples of spoken language style in the text:

- The reader is addressed as *you*: 'Imagine you are ...'
- The writer uses *I* to refer to himself: 'I say "easy" ...'
- There are some very short sentences: 'So you sue the supplier.' 'This is a fairly valid legal argument.'
- Some colourful and slangy words and expressions are used instead of more neutral ones: 'Scots law stuck in the 17th century', 'so each of them can "kick" the supplier', 'with my "cover-your-back" head on'
- Contractions: 'isn't liable', 'didn't "sign"'
- Subjective, personal statements of opinion: 'You can tell it's really old because it has a Latin name!', 'Very ugly'
- Use of emotionally coloured adverbs as modifiers of adjectives: 'fairly valid', 'fairly easy to do'
- Use of question and answer words that simulate dialogue: 'Why? Well, ...'

16.2 Examples of words or phrases used to express dissatisfaction:

massively inflexible, very difficult, very ugly

Language focus

1 2 intensity 3 enlist 4 propose 5 appeal

2 1 contrary; shall; to 2 withhold; thereof; conditions 3 have; approval 4 to; entity

3 2 to 3 under 4 from 5 to 6 against 7 to 8 upon

4 1 to; under; to 2 to; to; under 3 to; on 4 of; against

5 2 lessor/lessee, a 3 mortgagor/mortgagee, c 4 transferor/transferee, b

6

Verb	Abstract noun	Person
delegate	delegation	delegator, delegate, delegatee
assign	assignment	assignor, assignee
oblige	obligation	obligor, obligee
imply	implication	
intend	intention/intent	
consult	consultation	
enact	enactment	
rebut	rebuttal	
construe	construction	
determine	determination	
draft	draft	
transfer (UK) transfer (US)	transfer	

Unit 8

1 a 5 b 6 c 4 d 1 e 7 f 3 g 2

2.1 1 c 2 a 3 d 4 b

2.2 *Suggested answers*

1 This means 'interpreted or understood to be discriminatory'.

2 This refers to adjustments which are fitting and appropriate, and not excessively costly.

3 This refers to damages awarded for feelings of disappointment, frustration, grief, humiliation, etc. arising out of the manner, and possibly the fact, of dismissal.

2.3 1 c 2 d 3 a 4 e 5 b

3.1 1, 3, 4, 6

3.2 1 b 2 c 3 a 4 b

4.1 Documents attached: revised entry of appearance and document providing complete factual account of circumstances of theft

Phrases in the email for referring to attachments:

I attach the revised entry of appearance form which you requested.

please find attached a document providing ...

4.2 See phrases 1–10 in Exercise 4.3.

4.3 1 d 2 e 3 i 4 h 5 j 6 b 7 a 8 f 9 c 10 g

4.4 *Suggested answer*

Dear Gwen

Further to our phone conversation on Monday, I would like to inform you of the steps I have taken in the Myers case since we spoke.

I have submitted the completed entry of appearance you sent me, along with an application for a pre-hearing assessment of the case. I have also drafted a written submission of the case and forwarded this to the tribunal. These two documents have been attached to this mail for your perusal.

I am now awaiting the response of the tribunal and will naturally inform you as soon as I hear anything. I am quite confident that the tribunal will decide to handle this case solely on the basis of the written submission, and that the outcome will be positive for your firm.

Please do not hesitate to contact me in the meantime if you require any further information or assistance.

Yours sincerely

Jane

5.1 Headline 2

5.2 1 Texts such as these, which summarise the outcome of cases heard by an employment tribunal, are commonly read by employers and lawyers.

2 The case deals with sex discrimination: two female employees of a law firm (the claimants) claimed they were not promoted to higher positions by their employers (the defendants) on the basis of their sex.

3 A landmark case generally deals with an important issue and marks a stage in the development of the law in a specific area. Such a case often shows how courts will rule on similar cases in the future.

4 The women alleged that the firm had an overall 'culture' of discrimination against women.

5 The court ruled that one of the partners of the law firm behaved badly during the proceedings and that he had attempted to damage the reputation of one of the claimants.

6 The high award is expected to lead attorneys to be more cautious about their behaviour when defending cases before the tribunal.

7 A discriminatory culture is an environment in which certain people or groups are favoured over others, often based on characteristics such as age, religion, sexual orientation, gender or disability.

6 1 False 2 True 3 True 4 True 5 False

7.1 1 A 2 A+D 3 O 4 A 5 D 6 O 7 A+D 8 A 9 A 10 A 11 A

7.2 Expressing agreement strongly: 1, 8, 10

7.3 *Suggested answers*: 2, 3, 4, 6

9.1 1 *Derogatory* means showing strong disapproval and not showing respect.

3 The dismissal is referred to as justified because the arbitration board upheld it.

9.2 1 The grievor is an employee who was dismissed for misconduct.

2 The grievor was dismissed because she had written derogatory comments about her co-workers on her blog.

3 The grievor's union challenged the dismissal because it felt that the employer had overreacted to the situation, because the employee had tried to apologise but the management had made this attempt unsuccessful, and because the employee had had a clean record for six years.

4 The employer believed that the employment relationship was irreparably undermined, not only due to the content of the blog but also because of the employee's lack of remorse and lack of understanding as to why the blog had been so offensive.

5 The reasons the Board gave for upholding the dismissal included the view that publicly displaying one's negative opinions about co-workers can affect one's employment relationship. Furthermore, the Board concluded that the employee had engaged in serious misconduct that irreparably severed the employment relationship and justified the dismissal. The Board also noted that while a person is free to express his or her opinion about co-workers, doing so publicly may have negative consequence.

9.3 1 unrepentant 2 thereby 3 irreparably 4 discharge 5 unflattering 6 unblemished

9.4 1 engaged in 2 denigrated 3 terminated 4 undermined 5 challenged 6 sought 7 denied 8 upheld 9 invoke

10.1 a) ... the Grievor, in expressing contempt for her managers, ...

b) ... thereby justifying discharge.

The position of the participle clauses in the two sentences is:

a) in the middle of the sentence (after the subject and set off with commas);

b) at the end of the sentence.

10.2 *Suggested answers*

1 In showing a lack of remorse about the content of her blog, the employee was deemed to have irreparably undermined the employment relationship.

Showing a lack of remorse about the content of her blog, the employee was deemed to have irreparably undermined the employment relationship.

2 Arguing on behalf of the employee, the Grievor's union pointed out that she had had a clean record for six years.

While arguing on behalf of the employee, the Grievor's union pointed out that she had had a clean record for six years.

The Grievor's union argued on behalf of the employee, pointing out that she had had a clean record for six years.

3 Invoking freedom of speech in defence of her actions, the employee argued that she had the right to express her opinions about her colleagues.

The employee invoked freedom of speech in defence of her actions, thereby arguing that she had the right to express her opinions about her colleagues.

The employee, in invoking freedom of speech in defence of her actions, argued that she had the right to express her opinions about her colleagues.

4 The Arbitration Board denied the grievance, thereby upholding the termination of employment.

Denying the grievance, the Arbitration Board upheld the termination of employment.

In denying the grievance, the Arbitration Board upheld the termination of employment.

11.1 The Commentary section

11.2 Explanation of how employment tribunals work: ... a public hearing in front of a three-member employment tribunal

with a legally qualified chairperson, involving the cross-examination of witnesses and, in the vast majority of cases, the involvement of legal representatives ...
Four adjectives: speedy, informal, confidential, non-legalistic.

11.3 The opinions of lawyers on the new arbitration scheme.
The irony of the new arbitration scheme lies in the fact that employment tribunals were themselves originally intended to be an 'easily accessible, informal, speedy and inexpensive' alternative to the ordinary courts for dealing with individual employment disputes.

11.4 1 True 2 True 3 False 4 True 5 False 6 False

11.5 1 e 2 d 3 a 4 c 5 b

11.6 1 c 2 f 3 b 4 d 5 a 6 e

11.7 1 to hear a case
2 to waive rights
3 to plead a case
4 to apply a law
5 to appeal a case, an award
6 to challenge a case, an award, a law

12.1 Factual errors in email:
Speed: The new arbitration procedure usually only takes half a day.
Appeals: While the decisions of an employment tribunal can be appealed, challenging the award of the new arbitration scheme is much more difficult – the arbitrator's decision is considered binding.
The new arbitration scheme only deals with unfair dismissal cases.

12.2 1 B
2 The following summary presents a selection of key features of both the new arbitration scheme and the existing employment tribunal process.
3 Unlike, In contrast to, Both ... and ...
4 This is clearly advantageous, A further advantage of confidentiality is ..., this can be regarded as a significant advantage

12.3 *Suggested answer*
Dear Mr Mason
In your email of 9 April, you asked for information concerning the new arbitration procedure. You specifically requested my judgment concerning the advantages and disadvantages of arbitration from the point of view of an employer. I will first explain some of the features of the existing employment tribunal process and then look at the new arbitration scheme.
Employment tribunals hear the full range of employment-related disputes. They are public hearings held in front of a panel of three people. The fact that they are public can be a disadvantage for employers, since well-publicised employee disputes can lead to unwanted bad publicity. As a result, there is also the drawback of a greater tendency to reach out-of-court settlements which are favourable to employees. A further disadvantage of employment tribunals is the fact that they typically take longer than the new arbitration process. However, employment tribunals have the important advantage that decisions reached by them can be appealed.
In contrast, the new arbitration procedure only deals with unfair dismissal cases. The proceedings are held in a private setting, such as a hotel. Another difference is the relative speed of the proceedings, which typically last only a half a day. This is clearly advantageous for an employer, as it would save a great deal of time and money. However, the new arbitration scheme does have a significant drawback: the decisions reached by the arbitrators are considered binding, and so appealing or challenging a decision is very difficult.
On balance, I would say that the new arbitration scheme is attractive from the point of view of an employer, and I recommend that you consider making use of this new process to deal with unfair dismissal disputes. Please do not hesitate to contact me if you would like further information. I have attached an article about this topic to this mail which may be of interest to you.
Yours sincerely
Elisabeth Stephens

Language focus

1 2 reduce 3 primarily 4 certain 5 conventional 6 vast

2 2 uncertain 3 non-confidential 4 unconventional, non-conventional 5 non-discriminatory 6 unfair 7 unlawful 8 unnecessary 9 unreasonable 10 unspecific, non-specific 11 involuntary

3 1 intends; notice 2 complying with; entitled to 3 under

4 *Suggested answer*
Dear Mr and Ms Howard
Further to our phone conversation this morning, I attach the summary of current workplace safety regulations that you requested. In addition, I attach our firm's brochure on legal issues connected with drug testing.
Kindly let me know if anything is unclear or if you require further information.
Sincerely
Irina Brewer

5 2 under 3 to; to; via 4 to; against 5 of; from 6 in; in 7 for; to

6 2 file 3 heard 4 resembles 5 goes 6 includes 7 decide 8 awarded 9 issue 10 pay 11 incurred

Unit 9

1 1 transfer; title 2 warranties 3 exclusions/ disclaimers; disclaimers/exclusions 4 contracts

2.1 1 d 2 g 3 a 4 f 5 b 6 c 7 e

2.2 1 to purchase
2 to deal in, to offer for sale
3 consumer, customer, purchaser
4 merchant, retailer, supplier, vendor
5 commodity, merchandise, wares

2.3 1 c, d, g

3.1 1 f 2 j 3 e 4 i 5 h 6 d 7 a 8 c 9 b 10 g

3.2 1 Title and risk 2 Orders 3 Warranties
4 Indemnification of vendor 5 Changes or cancellation
(Paraphrases will vary.)

4.1 1 If an ROT clause is interpreted as a charge and has not been registered, it is void.
2 In cases in which hundreds of sales of goods are made each day by a seller it is not practically feasible to register each one.

4.2 1 A good clause will be clear. It will state that ownership or title in the goods sold will not pass to the buyer until payment is made.
2 The clause should require that the buyer keeps the goods separate from other goods. The goods should be marked as the supplier's property until payment is made. Make sure that a serial number which is on the outstanding invoice is also on the goods.
3 The clause should state that the buyer will not resell the goods until payment is made.
4 Take into consideration what the buyer will do with the goods. If the goods will be used by the buyer, and they lose their form and can't be recovered, the clause may be void.

5 A well-written clause will say that the supplier has a right of entry to recover the goods.

4.3 1 b 2 c 3 a 4 c

4.4 1 supplied 2 seller 3 in full 4 buyer 5 value 6 recover 7 premises 8 due 9 solvency

4.5 The clause does contain a clear statement that titles shall not pass until the buyer has paid in full for the goods. It also contains a provision giving the seller the right to enter the buyer's premises to take advantage of them. Unfortunately, the clause fails to include the other points addressed by the speaker. The clause does not make any mention of requiring the buyer to keep the goods separate from other goods, nor is there mention of serial-number markings on the goods corresponding to invoices. No provisions have been made for a prohibition on further sale until the goods are paid for in full. In fact, the wording appears to state the direct opposite. Finally, no wording exists to deal with the problem of changing or incorporating the goods into other goods.

5.1 1 The product is a software program containing millions of telephone numbers and addresses, as well as a retrieval program.
2 The central legal issue is whether a shrink-wrap licence constitutes an enforceable contract.
3 According to the Court of Appeals, buying shrink-wrapped software is like buying an airline ticket as both involve payment before the terms of sale are fully known to the consumer.

5.2 1 False 2 True 3 False 4 True

6.1 The facts of the case, the stages of litigation, the holdings of the courts, the reasoning of the courts

6.2 The technique used by the speaker is to pose rhetorical questions to signal a move to a new topic.
The examples are *So, what is the procedural history of the case?* and *What was the reasoning of the court?*

6.3 1/2 b; h 3/4 c; g 5/6/7 d; f; i 8/9 a; e

8.1 a 3 b 7 c 1 d 6 e 2 f 4 g 5

8.2 *Suggested answers*
1 The clause involved had an effect such that the income in question was held by the buyer for the benefit of the seller rather than having the effect of causing the buyer to have some type of security in the goods.
2 It means that the Court could not ignore the legal relationship actually created (a trust) by the wording of the ROT clause.
3 On an evidential ground for not having shown a connection between the goods it supplied and what was eventually paid for the finished product.
4 Sellers may use this decision to draft similar clauses in their contracts in order to ensure payment, even where the buyer is in insolvent liquidation.

8.3 1 into 2 to 3 of 4 in 5 over 6 in 7 for 8 between 9 in 10 into

8.4 a the Court has upheld ... (paragraph 1); The Judge at first instance, and the Court of Appeal, had held that ...; The majority in the High Court rejected that reasoning. In the majority's view, ... (paragraph 4); ... the Court dismissed ... (paragraph 6)
b The critical provision in the clause stated ... (paragraph 2)
c The question for the Court to consider was whether ... (paragraph 3)
d In the case of ... (paragraph 2)
e In drawing the distinction in relation to the particular clause in question, the Court noted that ...; On that basis, the Court held that ... (paragraph 5)

8.5 1 void for non-registration 2 the proceeds of such manufacturing or construction process 3 adduced evidence 4 held in trust 5 proprietary interest 6 on an evidential ground 7 by virtue of

Language focus

1 2 distinct 3 defendant 4 decide 5 non-arbitrary 6 material 7 lead to

2

Verb	Noun
disclaim	disclaimer
exclude	exclusion
indemnify	indemnification
tolerate	tolerance
specify	specifications
retain	retention
postpone	postponement

Verb	Adjective
suit	suitable
accept	acceptable
imply	implied
bind	binding
ascertain	ascertainable

3 2 of 3 in 4 with 5 by 6 under

4 2 in respect of 3 fit 4 vendor 5 merchandise 6 entitled 7 reasonable 8 deemed 9 claim

5 2 c 3 a 4 f 5 g 6 d 7 b

6 b 8 c 4 d 5 e 2 f 3 g 9 h 6 i 1

Case study 3

Model answer

Memorandum

To: Samuel Clemmens, Senior Legal Counsel Colonial Incorporated
From: John D. Rockway, Associate Counsel Conway & Conway
Date: September 15
Subject: Legal argument regarding the Best Produce Corporation v. Colonial Incorporated v. Lehigh Steel Incorporated case

Pursuant to your request, please find below my proposal for our legal argument regarding the above-referenced matter.

As I understand the facts of the case, Colonial's potential liability to Best Produce hinges on whether Lehigh's disclaimer of liability for consequential damages is valid. This is a classic battle of forms situation.

In this jurisdiction, Section 2-207 of the Uniform Commercial Code applies to this case. As you are aware, this section provides rules of contract formation when, as in this case, the forms involved do not correspond. Section 2-207 (1) converts a counteroffer (i.e. Lehigh's acknowledgement form) into acceptance unless expressly made conditional on its full acceptance. Since Lehigh has done exactly this, 2-207 (1) does not apply.

In cases where acceptance is made conditional on assent to additional terms, the original offeror can rely on Section 2-207 (3). This section provides for contract formation based on the conduct of the parties. The terms of such contract are those terms which correspond in the writings between the parties. Hence, our argument should be that the parties acted as if there was a contract and, as a result, the terms of such contract are those on which the parties' forms agree. In addition, the disclaimer provisions of Lehigh's acknowledgement cannot form part of the contract because no assent whatsoever to limit liability was expressed by Colonial in its conduct. This conclusion is supported by the provisions of Section 2-207 (1), which require a "definite and seasonable expression of acceptance."

That's really it in a nutshell. I imagine Lehigh will argue that our client accepted the liability waiver by virtue of the fact that it continued to pay for and accept Lehigh's tubing. However, in my opinion, this argument is bound to fail because it would in essence require the court to accept the old common-law "last shot" rule. This rule is inherently unfair and the very reason that Section 2-207 (3) was enacted. Certainly, you should have no difficulty in convincing the court of this fact.
Please get back to me if you have any questions. I'll be very happy to meet or telephone conference with you to iron out the details of the argument. I am very positive regarding our chances of recovery against Lehigh.

Unit 10

1 1 True 2 True 3 False 4 False
2 1 c 2 a 3 b
3 *Suggested answers*
1 Whereas a freehold estate refers to an estate in which ownership is for an indeterminate length of time, a leasehold is the term for the right to possession and use of land for a fixed period of time.
2 A lease is an agreement by which a lessor gives the right of possession of real property to a lessee for a specified term and for a specified consideration, whereas a licence is only the right to use without having exclusive possession.
3 An easement is a right to make limited use of another's real property, while usufruct refers to the right to use and derive profit from property belonging to someone else, provided that the property itself is not harmed in any way.
4.1 1 distinguish 2 is a general term for 3 refers to /includes; fall under the heading of 4 categorised 5 include
4.2 *Suggested answers*
Real property encompasses land and anything affixed to the land, and residential and commercial leases.
Real property refers to land and anything affixed to the land, and residential and commercial leases.
Real property is a general term for land and anything affixed to the land, and residential and commercial leases.
Real property includes land and anything affixed to the land, and residential and commercial leases.
5.1 Some other legal issues an estate agent might need to be informed about include (among many possibilities):
- covenants running with land which may be binding against or enforceable by the buyer;
- zoning restrictions on the property potentially limiting the right of use to the property;
- historical and environmental preservation issues;
- environmental law and liability upon discovery of ground or water pollutants;
- compulsory purchase (US eminent domain) orders or procedures.

5.2 1 The purpose of a temporary easement is to allow access to property so that, for example, work can be carried out.
2 'Open' use means that the use is obvious and not secretive, while 'notorious' means that the use is clearly visible. 'Continuous' means that the use must have occurred for the statutory period.
3 This is a type of easement appurtenant which is created to reach a landlocked property in order to give it access to a public road.
5.3 1 we distinguish between 2 classified into 3 type includes 4 One important sub-type
6 Now, I'd like to move on to another topic. I'll begin with the first type, ...
Let's move on to the second type. Finally, I'll come to the third type, ...
8.1 1 The firm also handles Natural Resources.
2 The two types of disputes named are property boundary disputes and ownership disputes.
8.2 1 yes 2 no 3 yes 4 no
8.3 1 The phrases are used to express what the firm has experience in doing.
2 The present perfect tense (*have represented, has dealt with*, etc.) is used most frequently. It refers to past actions with present relevance, when the timeframe of the action is understood to continue up to the present (*For the past ten years ... , Since last year ...*). This puts the emphasis on the firm's recent achievements.
3 matter, issue
4 Due to our comprehensive natural resource and property capabilities, our firm can provide experienced counsel for all environmental and natural resource matters affecting property owners.
9 See Reading B for a model practice areas statement.
10.1 Parties, Term, Statutory conditions, Rent amount and payments, Method of payment, Deposit
Other clauses you would expect to find in a lease (among many possibilities): Description of the leased premises, Use of premises, Quiet enjoyment, Repairs and maintenance, Alterations or additions, Damage or destruction, Waiver, Defaults and remedies, Entire lease, Amendment and modification, Assignment, Notices, Termination and surrender
10.2 1 Statutory conditions are the conditions imposed by law.
2 For an example of statutory conditions, see the list in Exercise 10.3.
10.3 1 e 2(a) f 2(b) g 3 h 4 b 5 a 6 c 7 d
10.4 1 2b 2 2a 3 5 4 1 5 3 6 7 7 4 8 6a
10.5 1 h 2 g 3 i 4 b 5 e 6 c 7 d 8 k 9 f 10 a 11 j
10.6/7 1 c, premises 2 a, tenancy 3 d, law 4 b, consent
11.1 1 The business sector is the restaurant business. The case could be relevant for any type of business that requires uninterrupted use of easily accessible, well-lit and clean premises for its customers.
2 Quiet enjoyment refers to the right of an owner or tenant to use property without interference.
11.2 1 covenant of quiet enjoyment 2 precaution 3 contractor 4 estimate 5 postpone
13.2 1 Senor Martínez is the Spanish solicitor contacted by Ms Blackwell on behalf of her client.
2 a, c, e, f, h, i, j, k
13.3 1 False 2 True 3 True 4 False 5 False
14 1 Sr Martínez's specific area of expertise is negotiating terms of sale of a property.
2 His credentials include:
15 years' experience in assisting buyers from the UK in purchasing homes;
successful completion of hundreds of transactions;
expertise in negotiating the terms of sale;
studied law in both Spain and England;
speaks English fluently.
15.1 I would appreciate it very much if you would inform Mr Watson that I would be happy to assist him in purchasing a home.
Please could you forward this email to him and ask him to contact me at his convenience.

15.2 *Suggested answer*

Dear Sr Martínez

Thank you very much for your email of 17 May, in which you offer to provide your services in assisting my client, Mr Edward Watson, in purchasing a house in the Costa del Sol region of Spain. I had a meeting with Mr Watson this morning, and I would like to inform you of the matters we discussed in connection with the sale. First of all, Mr Watson stated that he would gladly make use of your services for the transaction, and has agreed to the flat fee of 1,000 euros you have requested. I also informed Mr Watson about the steps involved in the process, from the initial drawing up of a power of attorney, to setting up a bank account and arranging financing, through to the final signing of documents. Mr Watson now knows what to expect.

I have one request: could you please provide me with copies of all documents you draw up in connection with the house purchase?

Please do not hesitate to contact me if I can be of any assistance.

Thank you for your efforts on Mr Watson's behalf.

Yours sincerely

Teresa Blackwell

15.3 *Suggested answer*

Dear Ms Armstrong

Thank you for your email of 11 June in which you requested information about my experience and areas of expertise as a real-estate lawyer. As a sole practitioner specialising in the sale of real estate, my work involves helping individuals and businesses negotiate fair deals in both the residential and the commercial real-estate markets. I have ten years' experience in drafting landlord–tenant agreements and other documents related to the purchase of multiple-family dwellings or single-family homes. During this time, I have also negotiated the terms of leases, sales and purchases of commercial properties. Furthermore, I have extensive experience in real-property litigation, having successfully represented clients in a number of court cases involving easements and property boundaries.

I hope this information was of interest to you. I would welcome the opportunity to provide any legal assistance you may require.

Yours sincerely

Matthew Wright

Language focus

1 2 heir 3 to set forth 4 opportunity

2

Noun	Adjective
statute	statutory
reason	reasonable
negligence	negligent
capability	capable
inheritance	inheritable
prospect	prospective
necessity	necessary
safety	safe

3 1 reasonable; Premises; thereon; deemed
2 liable; Lessee; harmless
3 herein; rules; quietly

4 2 won 3 have handled 4 has advised 5 was involved

5 1 abandon: premises, site
2 comply with: contract, lease, regulation, requirement, statute
3 terminate: contract, lease, tenancy

6 2 comply with 3 terminate 4 terminate 5 comply with

7 2 well- 3 actually 4 specific
5 continually 6 persistently 7 temporary 8 essential

Unit 11

1 1 copyright 2 patent 3 trade mark 4 injunction

2.1 1 c 2 a 3 e 4 b 5 d

2.2 *Suggested answers*
1 another term for intellectual property rights or rights to assets which lack physical existence
2 a privilege afforded to third parties to use a copyrighted work without the consent of the copyright holder
3 use of an intellectual property right without authorisation from the holder of the right

3.1 1 Business-method patents
2 It involves an Internet sales application featuring a one-click ordering solution.
3 The examiners at a patent office base their decision to award a patent to an inventor on the following four requirements: utility, novelty, non-obviousness, and patentability.

3.2 1 landmark cases 2 utility 3 tangible benefit 4 non-obviousness requirement 5 subject matter 6 barred from

3.3 1 False 2 True 3 False 4 True

4.1 1 It has extended patent protection to a large number of previously unpatentable areas.
2 It involves a data-processing system for managing mutual funds.

4.2 1 On the grounds that it was unpatentable subject matter.
2 The court reasoned that the software used in a machine constituted a useful, concrete and tangible result, warranting patentability.
3 Because it establishes, in contrast to cases preceding it, that business methods are not per se unpatentable due to their subject matter.

4.3 1 patentability 2 patent 3 unpatentable 4 patent
5 patentable 6 patented

5 *Suggested answer*

Facts of the case

State Street Bank & Trust Co. vs. Signature Financial Group (1998) (known as the 'State Street' case) involved the patentability of a data-processing system for managing mutual funds.

Legal issue in question

The legal issue was whether a patented data-processing system fell within two exceptions to patentability – mathematical algorithms and methods of doing business – and the issued patent was thus invalid.

Holdings and reasoning of the courts

The lower court held that the software patent involved was invalid on the grounds that it entailed two exceptions to patentability. However, the United States Court of Appeals for the Federal Circuit affirmed the patentability of business method-related software and rejected both exceptions to patentability. The court held that since the claims of the patent-at-issue were directed to a machine programmed with software, and such a machine produced a useful, concrete and tangible result, the software constituted patentable subject matter.

General legal significance of the case

As a result of the ruling, business-method software may now be patented.

6.1 1 C 2 G
6.2 1 d 2 e 3 a 4 c 5 b
6.3 1 c 2 a 3 d 4 b
7.1

Function	Examples
Establishing a sequence	As a next step, Finally, First of all, Secondly, To begin with, To conclude
Expanding on a point	Besides, In addition, *Furthermore*, *Moreover*
Contrasting	In contrast, On the other hand, *However*, *Alternatively*
Referring to the past	Formerly, Previously, *Traditionally*, *Historically*
Drawing a conclusion or inference through reasoning	As a consequence, Therefore, Thus, *Accordingly*, *Consequently*, *As a result*
Emphasising	In fact, In particular, *Of course*, *Clearly*, *Notably*, *Ultimately*
Giving an example	For example, For instance, Specifically
Summarising	In short, Summing up, *In other words*, *Briefly*

7.2 See words in italics in table above.
8.1 The Trade Mark Office informs the owner of the trade mark when that trade mark is about to expire.
8.2 1 e 2 d 3 f 4 g 5 b 6 a 7 c
8.3 1 expiry 2 request; renewal 3 fees 4 trade mark
9.1 The long sentence has been broken down into shorter sentences; passive sentences have been made into active ones; *shall* constructions have been replaced with other verbs; formal vocabulary has been replaced with more common, everyday words.
9.2 *Suggested answers*
Paragraph 2: The Office will tell the owner of the Community trade mark, and anyone who has a registered right in it, when the registration will run out, in good time before it runs out. If the Office doesn't give this information, it will not be the fault of the Office.
Paragraph 3: The owner has to send in the request for renewal within a period of six months ending on the last day of the month in which protection ends. He also has to pay the fees within this period. If this has not been done, he can submit the request and pay the fees within a further period of six months following the day referred to in the first sentence, as long as he pays additional fees within this further period.
Paragraph 4: If the owner submits the request or pays the fees in respect of only some of the goods or services for which the Community trade mark is registered, the Office will only renew registration for those goods or services.
9.3 She is asking for information about renewing a Community Trade Mark.
9.4 *Suggested answer*
Dear Ms Fox
In response to your request of 18 December for information concerning the renewal of registration of a Community trade mark, allow me to answer the three questions you posed.
First of all, the Office for Harmonisation in the Internal Market (OHIM) informs the owner of the Community trade mark (as well as any person having a registered right in it) when the registration will expire in good time before it expires. However, even if you don't get notice of expiry, you still have to renew your registration, so you should be aware of the date of expiry.
Secondly, as the owner of the trade mark, you can renew the registration of the trade mark yourself. Alternatively, another person can renew the registration if you, the owner, have authorised this person to do so. Naturally, this means that I can do it for you if you wish.
Finally, in response to your third question, you must submit the request for renewal six months before the last day of the month in which protection ends. Furthermore, you must pay the renewal fees within this six-month period. If you don't pay the fees within this period, you can submit the request and pay the fees within a further period of six months, but you would then have to pay additional fees.
I hope that the information I have provided is of use to you. If you would like further assistance in this matter, please do not hesitate to contact me.
Yours sincerely
Estella Walters
10.1 1 They say that fair use is when you're allowed to make limited use of copyright material without permission. The Copyright Act allows teachers to display and perform the works of others in the classroom for educational purposes.
2 It is to strike a balance between the rights of copyright owners and society's interest in ensuring the free flow of information.
3 Copyright holders
4 The four factors which need to be taken into account when assessing the fair use of copyrighted materials online include the purpose and character of the use, the nature of the copyrighted work, the amount of the work used in relation to the whole, and the effect of the use of the material on the market for the work.
10.2 1 False 2 True 3 True 4 True 5 True
11.1 1 In what way?
2/3/4 Well, from a legal point of view, the debate is about ...
I think the important issue here is ...
It seems to me that the real issue is ...
5/6/7 So, in other words, ...
And what's more, ...
Let me give you an example.
8/9/10/11 That may well be true, but you have to see the bigger picture.
Yes, but you can look at it another way, too.
Yes, but that's only one side of the problem.
Yes, you have a point there.
12 Sorry, can I just finish my point?
13 As I was saying, ...
11.2 1 point 2 view 3 point 4 view 5 point
6 point 7 point/view 8 point

Language focus

1 2 in addition 3 review 4 issuer 5 suggestion
6 moreover
2 b dismissed c would be liable for d filed e settle
Order of the actions: 2 d 3 e 4 b 5 a
3 1 apply for, enforce, file, grant
2 misappropriate, patent, register
3 apply for, enforce, file, grant, infringe, register
4 2 to 3 on 4 to 5 for 6 against
5 2 non-obvious 3 dissimilar 4 unauthorised 5 invalid
6 non-patentable, unpatentable 7 unsuitable
8 non-commonplace 9 non-exclusive
6 2 has been registered 3 enforce 4 had ruled
5 to be determined 6 be infringed 7 to issue; alleged

7 *Suggested answers*

1 If you only want to transfer the registration of some of the things protected by the trade mark, you have to say which ones these are on the application.

2 You have to divide up the things that are protected by the remaining registration and the new registration and make sure they don't overlap.

3 The Office will set up a separate file for the new registration which will include the original registration as well as the application for partial transfer. They will put a copy of the partial transfer application in the file of the remaining registration. They will also give the new registration a new number.

Case study 4

Model answers

1 3 **Development of software**

Linxus hereby agrees to develop computer software for Fleming with respect to an Internet-based database to be used in conjunction with Fleming's business (the 'Developed Software').

5 **Licensing**

Linxus hereby grants a perpetual license to Fleming for the Developed Software for the purposes of its business, which includes the right to prepare, maintain and upgrade it for the purposes of Fleming's business, as well as to sub-license the Developed Software to contractors retained by Fleming for purposes connected to the Immigrant Assistance Project.

2 Dear Ms Fleming,

We have now reviewed the contract with Linxus, as well as the relevant case law and sections of the Copyrights Act. As we discuss in detail below, we do not believe that Fleming Co. would prevail in a copyright claim against Linxus.

The primary issue presented is whether Fleming Co. is entitled to sub-license the software which Linxus developed for the Immigrant Assistance Project. This raises several subsidiary issues: (1) who owns the copyright in the software; (2) if Linxus owns the copyright, whether that would change as a result of any upgrades made by Fleming Co.; and (3) if Linxus originally owned the copyright, whether, by virtue of the contract, the copyright has been assigned to Fleming Co.

Section 11 of the Copyrights Act of Bloomland provides that the author of a work is the first owner of any copyright in it, unless it is a literary, dramatic, musical or artistic work made by an employee in the course of employment, in which case the employer owns the copyright. This section does not confer ownership in Fleming Co., firstly because software is not a literary, dramatic, musical or artistic work and, secondly, because Linxus developed the software in its capacity as a contractor and not as an employee.

Section 91 of the Copyrights Act provides that the prospective owner of a future copyright may assign that copyright by way of a written, signed agreement. To the extent that Fleming Co. makes any upgrades of the software, it will not be deemed an 'author of the work', since any upgrade (under Section 5 of the agreement) is made by Fleming Co. as licensee and not Fleming Co. as copyright owner. Accordingly, Section 91 of the Act would not entitle Fleming Co. to assign the copyright to a third party. Moreover, there was no written, signed agreement assigning copyright in this case.

The contract is clearly a licensing agreement. By its nature, a licensing agreement is an agreement whereby a party holding an exclusive right allows another party to utilise the benefits of that right. By framing the agreement as a licensing agreement, it is clear that Linxus did not intend to assign copyright to Fleming Co. and, pursuant to the case of *Bangarth Management v. Business Linx plc* (discussed in detail below), the court would probably not read the contract as an implied assignment of copyright on the grounds that it would be unreasonable to do so.

The Bangarth case involved facts somewhat similar to those involved here. A software designer was commissioned to design software for the plaintiff. After the job was completed, he was contacted by the plaintiff's key competitor and sold them software, using much of the same code, which performed most of the same functions as the original software. The issue before the court was whether the contract governing the design and delivery of the software contained an implied term that copyright would be transferred to the plaintiff upon completion of the job. The court found that a term can be implied into the contract where the term: (1) is reasonable and fair; (2) is necessary to give the contract business efficacy; (3) is completely obvious; (4) can be expressed clearly; and (5) does not contradict any express term of the contract. The court focused on the question of business efficacy. Since the plaintiff was engaged in a highly competitive business, the sale of the software sold to its competitor destroyed any advantage that the plaintiff had gained in commissioning the (rather expensive) software, rendering the contract useless. Accordingly, the agreement had no business efficacy unless it was deemed to include assignment of copyright.

Unfortunately, the Bangarth case is likely to be inapplicable here. First, this agreement is clearly a licensing agreement and to interpret it as an assignment of copyright would contradict an express term of the agreement. Second, Fleming Co. suffers no disadvantage by virtue of the agreement being a licensing agreement and not an assignment of copyright. Finally, it does not 'go without saying' that a licensing agreement assigns copyright; in fact, the opposite is true.

Please do not hesitate to contact me if you have any questions.

Yours sincerely,

Prudence Beresford

Unit 12

1 1 True 2 True 3 False 4 False 5 True

2.1 1 certificate of deposit 2 debenture 3 cheque/check 4 promissory note 5 bill of exchange; draft

2.2 1 c 2 d 3 f 4 g 5 b 6 a 7 e

3.1 1 When the bank demands payment or on April 1st 2013

2 On or before the 1st day of each month

3 The whole sum of principal and interest will become immediately due and payable at the option of the holder of the note.

3.2 *Suggested answers*

1 for money or other performance received

2 the party who has signed the promissory note and has thus agreed to repay the debt under the terms laid out in the promissory note

3 to be paid when requested

4 to fail to fulfil the obligations or abide by what was agreed; to breach the agreement

3.3 1 interest 2 principal 3 outstanding 4 due 5 accrue 6 Maturity 7 instalment

5.1 1, 2, 3, 4, 7, 8

5.2 1 Max Carter was given the promissory note by a customer of his, Wilson Charles, who owed him approximately $2,500. The note, which had a value of $5,000, had been made by another person Max Carter knew, John Ellis.

2 Requirements 7 and 8 (the requirement that the note makes an unconditional order or promise and the

requirement that the note states that the outstanding sum is payable either on demand or at a definite time).

3 The borrower made the condition that as soon as he is paid out his inheritance, he will start paying the debt back.

6 Problems with the promissory note which the lawyer should recognise:

- Unconditional? No, because the language appears to make it conditional upon consideration to be received under a separate agreement.
- An order? The 'to the order' language is missing, so this would be non-negotiable under US law.
- A sum certain? The sum is uncertain. Is the sum 30,000, 3,000 or 30, and is the denomination US dollars or something else?
- A sum certain? The interest to be paid must be stated on the note, otherwise any subsequent holder has no idea of what the total amount due is.
- Signed by the drawer? Who is the drawer? Can you tell just from the signature? The drawer must be identified, and the note should preferably be signed by a witness.

7 *Suggested answer*

Dear Mr West

I am writing to you in response to your letter of 21 September in which you request a written explanation of the six requirements which a promissory note must meet in order for it to be negotiable. The requirements, which we discussed at our meeting last Thursday, are as follows:

- The note must be in writing.
- The note must be signed by the maker.
- The note must contain an unconditional order or promise to pay what is called a 'sum certain' in money. What this actually means is the amount must be certain, or capable of being made certain by calculation.
- The note must say that it is either 'payable on demand' (that is, whenever the person for whom the instrument was made wants to be paid) or at a definite time. Put simply, this means that a date or a fixed time after a date must be stated (e.g. '90 days after the date of this instrument').
- The note must say that it is payable to order or to bearer. In other words, the words 'pay to the order of' or 'payable to bearer' should appear on the note.
- The note must not contain any other order or promise. This means that no conditions, such as 'if I get my raise' or the like, should be stated in the note.

I hope that the information I have provided meets your expectations.

Please feel free to contact me should you have any questions.

Yours sincerely

Christine Chang

8.1 It is called a 'transferable record'.

8.2 1 c 2 e 3 b 4 a 5 d

8.3 1 defines 2 applies to 3 provide 4 contains 5 creates

8.4 1 exempt 2 application 3 enforceable contracts

9.1 1 The agent of the buyers group wants to sign the note on behalf of the group because the other three principals are not available to sign it now and they are in a hurry to buy the property.

2 The seller is willing to agree to this because he wants to sell the property quickly.

3 It could be a problem because of recent changes to the law which may result in the position of the client being uncertain in the event that all the principals fail to sign the note.

9.2 1 False 2 False 3 True 4 True 5 False 6 True

9.3 1 c 2 b 3 b

10.1 1 F, I 2 I, F 3 F, I

10.3 The sentences are listed in order from least emphatic to most emphatic. They are formal.

10.4 *Suggested answers*

1 I strongly advise you against signing the promissory note for all of the principals. / I suggest not signing the promissory note for all of the principals.

2 I would advise against making a business deal with a man serving a prison sentence for tax evasion. / I strongly suggest you not to make a business deal with a man serving a prison sentence for tax evasion.

3 I would advise you against putting our clients in the position of being a test case for this issue. / I would strongly suggest you not to put our clients in the position of being a test case for this issue.

4 I advise you not to risk being sued by the drawee. / I strongly suggest not risking being sued by the drawee.

11 *Suggested answer*

Dear Mr. Lawson,

I am writing to you in respect of the promissory note which the prospective buyers of your property intend to give you for a down payment. I would like to advise you not to accept this note in its present form for the following reasons:

The safest way to bind all the principals is to have all of them sign the note as makers.

As you know, one of the principals is currently serving a jail sentence on a financial charge. I do not recommend entering into a business transaction with a person whose financial trustworthiness is questionable.

I propose that you refuse to accept the note unless it has been signed by all of the principals. I also suggest that I contact the agent on your behalf and inform him of this fact. I can recommend ways for him to obtain the signatures of the other principals quickly (fax, e-signature, courier), as all of the parties involved are interested in concluding the deal as soon as possible.

I look forward to receiving further instructions from you in this matter.

Yours truly

J.P. Wadman

Language focus

1 2 monetary 3 principle 4 incur 5 make a requirement 6 impose

2 1 e.g.; e.g. 2 i.e. 3 per annum 4 inter alia

3

Adjective	Adverb
basic	basically
electronic	electronically
principal	principally
reliable	reliably
specific	specifically
strict	strictly
uniform	uniformly, uniformly

4 2 in 3 of 4 for 5 to 6 in 7 of 8 in

5 2 due 3 maturity 4 principal 5 per annum 6 Maker 7 lawful

Unit 13

1 1 loan 2 mortgage 3 pledge 4 lien

2.1 1 seize 2 sell 3 defaults 4 owns 5 has 6 attaches 7 attaches 8 crystallises 9 make

2.2 However, in the case of quasi-security, ... while the debtor only ...
While a fixed charge ...

2.3 1 collateral, payment, a security interest
2 a security interest
3 collateral
4 credit, indebtedness, a loan, payment, performance
5 collateral, credit, a loan, payment, performance
6 a loan, payment performance, a security interest

3.1 1 all inventory, equipment, appliances, furnishings, and fixtures now or hereafter placed upon the premises [...] or used in connection therewith and in which Debtor now has or hereafter acquires any right and the proceeds therefrom ... right, title and interest to any trade marks, trade names and contract rights which Debtor now has or hereafter acquires.
2 All obligations become immediately payable.

3.2 1 Upon the 'Premises' (at 99 Appleby Road, Baltimore, MD) and anywhere else used in connection with it.
2 Financial difficulty would be given in any of the following circumstances:
- an assignment for the benefit of creditors
- an attachment or receivership of assets not dissolved within 30 days
- the institution of bankruptcy proceedings, whether voluntary or involuntary, which is not dismissed within 30 days from the date on which it is filed.

3 The remedies of a Secured Party under the Uniform Commercial Code are available.

3.3 1 e 2 d 3 b 4 a 5 c

4.1 *Suggested answers*
Note that these only refer to liabilities. Similar distinctions may be made for obligations.
- Direct liability is liability for one's own actions; indirect liability is liability for someone else's actions (e.g. a parent may be liable for the actions of a child; an employer may be liable for the actions of an employee; a website owner for the actions of a user).
- An absolute liability is one which exists; a contingent liability may or may not exist, depending on other factors.
- If a liability is due, it must be paid immediately; if it is to become due, it must be paid at a later date.
- If a liability is now existing, it has already been agreed; if it is hereafter arising, it will be agreed at some point in the future.

4.2 ... now or hereafter placed upon the premises ...
... in which Debtor now has or hereafter acquires any right ...
... contract rights which Debtor now has or hereafter acquires.
... bankruptcy proceedings, whether voluntary or involuntary ...
Upon default and at any time thereafter ...

5.1 1 An advertisement like this would probably appear in a law journal or other publication read by practising lawyers.
2 Understanding Revised Article 9 of the UCC.

5.2 1 True 2 False 3 False 4 False 5 False 6 True

6.1 1 It was sent by a superior to the secured transactions team which reports to her.
2 Because there are two new junior members on the team and because they will soon be dealing with several new cases in the area.

6.2 1 It is respectful, distanced and formal.
2 See the table in Exercise 7.1.
3 When addressing someone you don't know, or don't know well; when addressing someone in a senior position to you; when addressing someone in a junior position with whom you wish to preserve a sense of professional authority.

7.1 1 The seminar will be held ...
2 ... there are two young newcomers ...
3 it may be necessary ...
4 I ... would strongly advise that ...
5 I firmly believe that ...
6 Sincerely
7 I look forward to your response in this matter.
8 ... and participate in the seminar ...
9 ... which commences on Thursday morning.

7.2 strongly advise, firmly believe, sincerely hope

7.3 *Suggested answers*
1 deeply: believe, hope, regret, understand
2 firmly: believe, object to, support
3 fully: agree, recommend, support, understand
4 sincerely: believe, hope, regret
5 strongly: advise, agree, object to, recommend, suggest, support
6 wholeheartedly: agree, believe, recommend, support

8.1 *Suggested answer*
Dear Ms Sampson
In response to your email concerning the upcoming seminar on Revised Article 9, I am writing to inform you that I will unfortunately be unable to attend. The Balboni case is going to trial, and I am scheduled to appear in court on the days the seminar takes place. I am sure you will agree that this court appearance takes precedence over the seminar.
I would like to add that I fully support the initiative you have taken to provide more training opportunities for the secured transactions team. I firmly believe that both my experienced colleagues and the junior members of the team will profit from the chance to learn more about the changes in the law that directly affect our work. However, I am afraid that a few of my colleagues will also be unable to attend. Therefore, I strongly recommend that we arrange for the seminar to be held on another date. To my knowledge, the Shuttleworth Institute also carries out in-company training courses upon request. Might that be a solution for our team as well? If you would like me to make arrangements for such a seminar I would be happy to do so. Best regards
Chiara Lawson

8.2 *Suggested answer*
Dear All
I know this comes at really short notice, but there's going to be an interesting seminar at the Shuttleworth Institute in Boston next Thursday and Friday. I really think that all the members of the secured transactions team should attend. Have a look at the attached flyer – John Kellogg will be holding the seminar and he's a real expert on Revised Article 9. Since two of you are newcomers and also since you've got some big cases coming up, I think a seminar like this is just what we need right now. You may need to rearrange your schedules a bit to be able to take part. It's probably a good idea to fly to Boston on Wednesday, since the seminar starts on Thursday morning.
I think this is a good opportunity for us. Let me know what you are going to do.
Best wishes
Jennifer Sampson

9.1 5, 1, 7, 4, 2, 3, 6

9.3 1 Since a borrower may conduct its business through several entities, it is necessary to make sure that the property in which the security interest is granted is owned by the borrower.
2 A blanket lien refers to a situation in which 'all of the personal property of the debtor' is named as the collateral for a debt. The speaker says that this is problematic because the debtor would not be able to acquire any more secured borrowing.

3 This would happen when the debtor agrees to subject its after-acquired property to the security interest.
4 According to the speaker, the requirement of value is easily met in the typical lending relationship because the lender either agrees to make a loan or actually advances funds to the debtor.
5 This means signing the agreement, either by hand or electronically.

10.1 1 The issue involved is whether it is possible to have a fixed charge on the book debts of a company.
2 The issue affects company directors, bankers, other lenders and creditors.

10.2 1 c 2 e 3 a 4 d 5 b

10.3 1 Book debts 2 floating charge 3 bank guarantee 4 preferential

11.1 1 c 2 b 3 c 4 a

11.2 1 True 2 False 3 True 4 False

12 *Suggested answers*
Could you fill me in on what he said? I wonder / was wondering if you could fill me in ... Would you mind filling me in ...?
Could you tell me what he said about the situation internationally? I wonder / was wondering if you could tell me ... Would you mind telling me ...?
Could you give me an example? I wonder / was wondering if you could give me ... Would you mind giving me ...?
Could you tell me what he had to say about perfecting security interests in the US? I wonder / was wondering if you could tell me ... Would you mind telling me ...?
What could you tell me about copyrights? I wonder / was wondering if you could tell me something about copyrights. Would you mind telling me something about copyrights?
I wonder / was wondering if you could tell me where I could get more information on what was covered in the seminar. Would you mind telling me where ...?

Language focus

1 2 instalment 3 to attach 4 unconditional 5 hereby

2 1 on; of 2 of 3 upon 4 within 5 from; on 6 upon; at

3 2 d 3 e 4 b 5 a

4 2 place 3 charge 4 part 5 precedence 6 care

5 2 g 3 o 4 j 5 b 6 l 7 c 8 n 9 d 10 e 11 i 12 f 13 h 14 a 15 k

6 *Suggested answer*
Dear colleagues
Several of our corporate clients possess the rights to valuable intellectual property assets, and they have enquired if we could assist them with matters concerning secured transactions and these assets. For this reason, I firmly believe it is important that we ensure that our knowledge in this area is up-to-date. Therefore I am writing to inform you that I have arranged an in-company seminar on perfecting IP assets as security interests. The seminar will be held by a highly respected expert in the field on Monday, October 26 from 9 a.m. to 5 p.m. Please note that the seminar commences at 9 a.m. I have attached a list of topics to be covered in the seminar which I would ask you to peruse. I strongly advise you to take part in the seminar. Thus I suggest that you ensure you have no other appointments that day. I sincerely hope you can come. Please inform me whether you will attend by the close of business today.
Yours sincerely
Martin Black

Unit 14

1 1 b 2 a 3 c

2 1 f 2 g 3 e 4 b 5 d 6 c 7 h 8 a

3.1 1 Writ of attachment
2 Reasons (in this context)
3 Creditor = plaintiff; debtor = defendant
4 Section 61.001: all four points
Section 61.002: one of the nine

3.2 *Suggested answers*
1 to annoy or upset the defendant through a persistent, unwanted action
2 to deliver legal documents to someone
3 to get rid of property so that it is not possible to repay a debt owed to creditors
4 to acquire property dishonestly, with the intent to defraud

3.3 1 2 2 1 3 9 4 3

4.1 1, 4, 5, 6, 7

4.2 1 They set up a plan for him using several limited liability companies to hold the properties.
2 Since the creditor had no security for his judgment and stood to collect nothing, Ed was in a position to negotiate a favourable settlement.
3 The judge in the case ruled that the assets were properly protected and could not be reached by a lien.

5.1 1 In the course of insolvency proceedings or the restructuring and rescuing of a business, an insolvency practitioner does not only deal with financial matters. He or she must also be able to work with a wide range of people with conflicting interests – from creditors to directors to employees – many of whom may be in highly emotional states.
2 Recognised professional bodies are responsible for licensing insolvency practitioners.

5.2 1 False 2 True 3 False

5.3 1 secured; benefit 2 with; legally 3 proposed 4 up

7.1 PQE = post-qualification experience;
NQ = newly qualified

7.2 1 A 2 B 3 B 4 A 5 A

7.3 *Suggested answer*
1 The firm behind the first advert is a very large international firm with offices all over the world. The firm behind the second advert is considerably smaller and operates domestically, although it does have some international clients.

8 a: 4, 5, 6 b: 2 c: 10 d: 1 e: 9 f: 3, 7, 8

9 See model letter on page 199.

10.2 1 Job A, an associate in the restructuring and insolvency team of the international law firm
2 Mr Berger says that he likes working on cross-border insolvency cases because the fact that the laws on insolvency aren't unified in Europe means that the work is challenging. He also says that the work is like a puzzle in which people's livelihoods are at stake, and which involves understanding the relevant laws, the personalities involved, and finding the best solution for his clients.

10.3 1, 8, 9, 11

10.4 1 Mr Berger knew of the firm already because it is very well known, and he also heard about the merger in the news. He saw the job advert on the firm's website.
2 He wants to be a part of a large international organisation and to have clients all over the globe. He would like to work in an international context, to make use of his language skills and to work with people from different backgrounds.

3 When he was a student, he spent a summer working as a clerk at a law firm in the City. He also studied law in London for a semester.
4 Regarding his own English skills, Mr Berger says that he is working on improving his pronunciation.
5 He does corporate restructuring in an Austrian. commercial law firm in Vienna and has worked on a few cross-border insolvency cases.
6 He says that he has the background required for the position (experience in insolvency work, an international perspective, knowledge of languages), as well as the required membership in the Insolvency Practitioners Association.
7 He'd like to know how attorneys are trained in the firm.

12.1 1 d 2 b 3 c 4 a 5 e

12.2 1 I especially enjoyed hearing about your firm's plans for expansion.
2 As I mentioned during our conversation, the experience I gathered in my previous employment has prepared me well for corporate insolvency work.
3 The purpose is to state in concise form what the applicant believes she can offer to the firm; it is also her final opportunity to present a strong reason why the firm should hire her.
4 I look forward to hearing from you.

12.3 *Suggested answer*

Dear Ms Hall

Thank you again for the opportunity to interview for the position of Associate Lawyer in your firm. I appreciated your hospitality and enjoyed meeting you and members of your staff. I especially enjoyed hearing about your firm's mentoring programme.

The interview convinced me that my background as a commercial lawyer, my interest in different legal systems, and my foreign language skills are compatible with the goals of your firm. As I mentioned during our conversation, the experience I gathered in my previous employment has prepared me well for corporate restructuring work. I am confident that my ability to deal with complex cross-border insolvency cases will be of value to your firm.

I look forward to hearing from you.

Yours sincerely

Franz Berger

13.1 In this context, a set of statements arguing for a standpoint. A synonym would be *argument*.

13.2 1 The weakness they point to is the fact that Europe does not have any legal regime to support court-supervised restructuring, as opposed to bankruptcies or liquidations.
2 The system they propose as a model for reform is the US Bankruptcy Code's Chapter 11.

13.3 1 True 2 True 3 False 4 True 5 False

13.4 1 d 2 e 3 a 4 b 5 c

Language focus

1 2 relinquish 3 urgent 4 judicial review

2

Verb	Abstract noun
seize	seizure
proceed	proceedings, procedure
execute	execution
secure	security
liquidate	liquidation
restructure	restructuring

3 2 perfected 3 paid 4 pledged 5 incurred

4 2 B 3 A, B 4 A 5 A 6 A, B 7 B 8 A 9 A, B

5 1 appointed; vests 2 seizure; ownership 3 insolvent; abandon 4 pledged; trust

6 1 against; by 2 in; as 3 to 4 on 5 over

Case study 5

Model answer

Dear Managing Director

Re. Payme Bank v. BlissCosmetics

You have asked me to provide my opinion as to what will be the main arguments from opposing counsel in respect of negotiations regarding the above-referenced matter. You have also asked what my strategy will be to meet these arguments. After researching the law and the facts of this case, I provide hereafter my advice in respect to your requests.

In my opinion, the opposing party's position in the underlying legal proceedings is relatively weak. In light of this, it is difficult to foresee all the arguments which might be presented at negotiations. However, I have identified some arguments that opposing counsel must address in order to succeed in the legal proceedings. These arguments are outlined below:

1 The appointment of an interim liquidator and commencement of compulsory liquidation do not rise to the level of a "judgment opening insolvency proceedings" as required by Section 18 of the UCS Regulation on Insolvency. Hence, the City Court in Atlantia should be deemed to have issued the "judgment opening insolvency proceedings"; and
2 Pursuant to Section 5 of the UCS Regulation on Insolvency, Bliss's centre of main interest cannot be located in Nirvania (despite the presumption of such because Bliss's registered office is located there) because the factual elements of the case lead to the determination that Bliss was not an autonomous entity and Revon controlled all of the decisions made by Bliss. The foregoing provides sufficient evidence to rebut the presumption that the location of the registered office is the centre of the main interests of Bliss.

The first argument is, at best, weak. It has already been rejected by the High Court of Parken and has no support in case law or statute. It relies on semantic distinctions rather than legal precedent or sound reasoning. I find it unlikely that Mr. Doright will attempt to maintain this argument if made. It simply does not hold water.

The second argument has more merit. It relies on the UCS Supreme Court finding that the presumption contained in Section 5 is rebutted based on the fact that Bliss was not autonomous and was completely controlled by the parent company, Revon. My argument in response will be that there is case law which runs contrary to this interpretation. In the leading case on this issue, it was held that the presumption is difficult to rebut. Specifically, it was held that "Section 5's presumption can be rebutted by factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect". In short, the law favors Section 5's presumption because it provides legal certainty to creditors. In this case, whilst arguably there might be objective facts pointing to another company's control, these facts are not readily ascertainable by third parties. And, consequently, the facts on the whole do not rise to a level necessary to rebut Section 5's presumption.

If you require further clarification or would like to make any comments in respect of my advice contained in this letter, please notify me in due time before the scheduled negotiations.

Truly yours

C.S. Kirtley

Unit 15

1 1 oligopoly 2 monopoly 3 cartel 4 merger

2 1 c 2 b 3 d 4 a

3.1 1 Competition lawyers; senior management of companies doing business in the EU or affected by EU policy; lawyers at competition authorities in the EU or in countries affected by EU policy
2 To make it easy for the reader to identify at a glance what countries are affected and the measures taken in the particular country.
3 *NCA* stands for National Competition Authority.

3.2 Yes, as the entries for Bulgaria, Ireland and Germany all relate to the waste-management sector.

3.3 1 Bulgaria
2 €17.3m
3 In the waste-disposal services sector
4 Ten
5 They were fined for forming a cartel.

3.4 1 Bulgarian Competition Authority
2 cleared a merger
3 formation of cartel
4 fined
5 telecommunications
6 abuse of dominant position
7 Polish Competition Authority
8 vertical price collusion

3.5 1 d 2 e 3 b 4 a 5 c

4.2 *Suggested answer*
Dear Mr Nazarenko
In your email of 8 November, you enquired about recent anti competitive activities in the waste-management sector in the EU and the measures taken against them.
I would like to provide information about four cases from the past month.In Bulgaria, the holder of a trade mark was found to have abused its dominant position, while local authorities in Dublin were found by the Irish High Court to have breached competition law. In Germany, a merger in the waste-management market was cleared, although this clearance is subject to remedies which include the divestiture of an asset/share package. Finally, a waste-glass joint-purchasing cartel between container-glass manufacturers was prohibited by the German Federal Cartel Office.
I hope that this information is of use to you. Should you require any further assistance please feel free to contact me.
Yours sincerely
Marie Delapre

5.1 1, 3, 4, 6, 7, 9

5.2 1 True 2 False 3 True 4 False

7.1 1 The client's problem is a sharp drop in the number of contracts his construction company has been awarded in the last year.
2 The lawyer proposes that his law firm look into the possibility that anti-competitive agreements have been made by the competition.

7.2 a 4 b 6 c 3 d 1 e 5 f 2

7.3 (paragraph 1) ... *I would like to make a few recommendations*. (polite expression of inclination)
(paragraph 3) ... *I have come to the conclusion that it would be wise* ... (polite expression of opinion)
(paragraph 4) *In the event that your competitors are found to have been engaging in activities of this kind, the benefits for your own company would be considerable.* (*Would* is used to express a possible outcome; *In the event* is used with the same meaning as *if*.)
(paragraph 4) *These benefits would range* ... (*Would* is used to express a possible outcome; *If* is understood.)
(paragraph 5) *Should you be [illegible] pursuing this course of action, David Fisher would be [illegible]* (*Would* is used to express a poss[illegible] used with the same meaning as *if*.
(paragraph 5) *At your request, he could begin [illegible] this matter, which, in its early stages, would involve information-gathering in the broadest sense [illegible]* is used to express a possible outcome; *At your request* means *if you request*.)
(paragraph 6) *Please let David Fisher or me know if you would be interested* ... (polite request)

8 *Suggested answer*
Dear Mr Rodriguez
As a follow-up to our telephone conversation yesterday in which we discussed a case of anti-competitive behaviour in your market sector, I would like to propose that your firm establish anti-competitive guidelines as a preventive measure against such behaviour.
As I am sure you are aware, the recent case of price-fixing in your industry is not unusual; several cases of cartel formation and price-fixing have occurred in recent years. You should also be aware that such behaviour does not always originate at the level of top management, and that employees at all levels are at risk for such activities. Practices such as exclusive dealing arrangements with suppliers or even unintentionally misleading advertising – to name but two examples – can harm competition and may be considered to represent an infringement of antitrust law. Employees at all levels of the firm need to be informed of the wide range of possible anti-competitive activities, as well as of their potential legal consequences. I must warn you that individuals directly involved in serious anti-competitive behaviour face high fines as well as, under certain circumstances, the threat of criminal prosecution. I propose that we draw up a comprehensive set of guidelines for preventing anti-competitive behaviour by your firm. Initially, these guidelines could be presented to all employees in informative workshop sessions, and later reinforced through regular anti-competitive internal memos.
The benefits for your company are clear: an increased awareness of the risks of anti-competitive behaviour at all levels of your enterprise would greatly lessen your risk of exposure to antitrust lawsuits and actions.
The implementation of this proposal could be carried out in a four-stage process: 1) assessment of anti-competitive behaviour risks; 2) drawing up of guidelines; 3) holding workshops for employees; and 4) follow-up reinforcement.
Should you be interested in pursuing this course of action, the Competition Department of our firm could begin work immediately.
If you would like to discuss this proposal and the details of its implementation, please do not hesitate to contact me.
I look forward to hearing from you.
Yours sincerely
Andrew Chase

9.1 1 The text is a case summary appearing in a law firm's newsletter providing updates on competition-law news. It was written for lawyers and possibly for clients.
2 The companies involved are agricultural companies who are distributors of mung beans in China. They are in the food sector.
3 The companies were involved in a cartel, which included price-fixing, and producing and circulating fraudulent information.

9.2 1 The distributors met to collude on prices and act as a cartel. They fabricated a report stating that mung-bean production had fallen, thus justifying an agreed-on rise in prices. Then they reached a consensus on price.

2 It is the highest amount a company has been fined for anti-competitive activities since the Anti-Monopoly Law was passed in China.
3 It shows that the anti-competition authorities in China are willing to crack down on offenders against the Anti-Monopoly Law.

9.3 1 down 2 in 3 on 4 to 5 behind 6 up; under

9.4 The phrasal verbs are *clamp down*, *lag behind*, *step up*.

10.1 1 c 2 b

10.2 1 b 2 a 3 a

11.1 1 *One-stop shop* is usually used to refer to a store where different kinds of product can be bought: one convenient location where various needs can be met at once. Here, the term is used to indicate that many procedures that formerly were carried out in several different places are now taken care of centrally by the European Commission.
2 *Turnover threshold* refers to the combined turnover of the parties to a merger for purposes of EC merger control. If the combined turnover of the companies exceeds the amount stated in the EC Merger Regulations, then the merger is said to have a community dimension and the merger is subject to the competence of the European Commission, as opposed to the Member States.

11.2 1 The first purpose of a pre-notification request is to have the Commission take over the case from the national authorities in cases when the combined turnover of the parties to a merger falls below the existing thresholds, and where notification would otherwise have been required in at least three Member States. The second purpose is to have the case be examined by a national competition authority rather than by the Commission when it can be shown that a distinct market exists in that Member State which would be affected by the proposed merger.
2 Advantages: a single filing (less paperwork and expense); disadvantages: uncertainty of the outcome and a longer clearance process.

11.3 1 d 2 c 3 a 4 b

12 *Suggested answer*

Dear Mr Easton

I am writing to inform you of a change in the pre-notification procedure for mergers in the EU, as I believe it is relevant for the merger which your company is considering. According to this new procedure, in cases where the combined turnover of the parties to a merger falls below prescribed thresholds and notification would have previously been required in at least three Member States, a company can now submit a pre-notification request to the Commission, which under certain circumstances would then take over the case from the national authorities. Alternatively, if the merger in question would affect a distinct market in a particular Member State, a company may submit a pre-notification request that the case be examined by that Member State's national competition authority rather than by the Commission. The clear advantage of these two options is that they result in less paperwork and expense, as only a single filing is required in each case. However, there are disadvantages to the new procedure, including uncertainty concerning the allocation of the case and a likely increase in the length of the clearance process. I hope that this information was of interest to you. Should you have any questions in this matter I would be happy to provide assistance.

Yours sincerely

Samuel Lee

Language focus

1 2 dimension 3 offences 4 oligopoly 5 to breach

2

Verb	Abstract noun	Adjective
monopolise	monopoly	monopolistic
collude	collusion	collusive
abuse	abuse	abusive
compete	competition	competitive
discriminate	discrimination	discriminating. discriminatory
restrict	restriction	restrictive
regulate	regulation	regulatory
allocate	allocation	
fine	fine	
notify	notification	

3 2 practices 3 position 4 bids 5 cartel 6 petition 7 access 8 fines 9 complaint

4 2 abusive 3 dominant 4 imposed 5 collusion 6 lodge

5 approve, evaluate, investigate, reject

6 2 b 3 a/b 4 b 5 a/b 6 a 7 a/b 8 a/b 9 a/b 10 a 11 b 12 b

7 2 of 3 in 4 by 5 against 6 in 7 to 8 on 9 for

Unit 16

1.1 A 2 B 4 C 5 D 1 E 6 F 3

1.3 1 False 2 True 3 False 4 True

2.1 1 b 2 d 3 f 4 c 5 h 6 a 7 i 8 n 9 k 10 g 11 m 12 e 13 l 14 j 15 o

2.2 1 harmonisation; member states 2 comity; jurisdictions 3 course of dealing; arbitration clause 4 forum; lex mercatoria

3.1 1 Subjects would depend upon the focus of the programme or student but might include some of the following:
- Intellectual Property Law
- International Business Transactions
- International Law on Foreign Investment
- International Commercial Arbitration
- International Trade Law and the Environment
- World Trade Organisation Law and Practice
- International Consumer Law
- Commercial Credit
- International Competition Law
- Private International Law
- Corporate Governance

3.2 1 domicile 2 choice of law 3 forum shopping 4 forum non conveniens 5 reciprocity

3.3 1 jurisdiction, choice of law, judgment recognition
2 The jurisdictional question focuses on the relationship between the defendant and the forum state to decide whether the relationship is close enough to justify litigation being carried out there. The choice-of-law question, in contrast, focuses on both parties to the dispute, and looks at the relationship of the dispute to the forum state or another state with regard to the choice of the law that most appropriately applies to the dispute.
3 Procedural law refers to the rules for conducting litigation in a jurisdiction and thus applies to the proceedings in a case, whereas substantive law is the term for the legal principles which apply to the subject matter of the case and which define the rights and obligations of the individual.
4 Recognition of foreign judgments can depend on whether the recognising court would have applied the law that was

chosen by the rendering court or whether the recognising court would have reached a comparable result. It can also depend on whether the award of damages in a case is perceived to be excessive, in which case the judgment may not be enforced. Another factor is the question of whether reciprocity exists between the two states, as some countries refuse to recognise judgments when there is no reciprocity agreement.

3.4 1 a dispute (to pass judgment on a disagreement)
2 a dispute (to cause a disagreement)
3 a judgment (to make a party obey a final decision of the court)
4 a judgment (to make a judgment)
5 a dispute (to solve a disagreement)
6 a judgment (to accept a judgment)

4 *These elements* (lexical cohesion, refers back to their constituent elements)
... that give rise to the dispute (lexical cohesion, refers back to disputes)
The jurisdictional question and the choice-of-law question (lexical cohesion, refers back to these phrases in the preceding paragraph)
The jurisdictional question focuses on ... (lexical cohesion, refers back to this phrase in the preceding paragraph)
... the relationship between the defendant and the forum state, and asks whether that relationship (lexical cohesion, refers back to the relationship in the same sentence)
... in that state and to justify utilising that state's (both lexical cohesion, refer back to the forum state in the same sentence)
The choice-of-law question (lexical cohesion, refers back to this phrase in the preceding paragraph)
... focuses on both parties and their dispute and seeks to identify that state, be it the forum state or another state, whose relationship to the dispute is such as to render most appropriate the application of its law to the merits of the dispute (lexical cohesion, both refer back to *and their dispute* in the same sentence)
In such a case (substitution, refers back to the idea of *the courts of more than one state may have concurrent jurisdiction to adjudicate the same dispute*)
a technique (substitution, refers back to the idea *may shop for the most advantageous forum*)
... to discourage this technique (lexical cohesion, refers back to a *technique*)
With regard to the merits of the case (conjunction and lexical cohesion, refers back to a case *with foreign elements*)
This (reference, refers back to the idea *may or may not apply its own substantive law*)
These rules (substitution, refers back to *which may be answered legislatively, as in most civil-law systems, or through judicial precedent ...*)
Regarding the recognition question (conjunction and lexical cohesion, refers back to *judgment recognition* in the second paragraph)
recognition (lexical cohesion, used several times in the last paragraph to refer back to the main idea of the paragraph)

5.1 See audio transcript, page 295

5.2 1, 3, 4, 5

5.3 The three key expressions the speaker mentions are *All disputes, in connection with* and *finally settled*.

5.4 1 The speaker advises against relying on an all-purpose' arbitration clause for all situations, and believes that parties should always draft a clause to suit the situation at hand, one which takes into account the likely types of dispute, the needs of the parties and the applicable laws.
2 The speaker recommends the ICC because it is the major arbitral institution in the world. Furthermore, it is a brand name and offers certain quality advantages, such as scrutiny of party-appointed arbitrators and arbitral awards.
3 According to the speaker, the advantage of adopting the rules that are in existence at the time of contracting is that these are the rules they know, and future rule changes may have unpredictable effects. The advantage of opting to have the amended or modified rules apply is that the parties can take advantage of future rule amendments, assuming the ICC will only adopt changes that will better the arbitral process.
4 With regard to altering the ICC rules, the speaker advises that parties include a clause providing that any alteration of the ICC rules may be disregarded if the ICC will otherwise refuse to administer the arbitration.

5.5 proceeding(s), institution, award, process, clause(s)
Other possible collocations: *arbitral tribunal, arbitral decision*

7.1 1 The parties are TransGerman, a carrier firm, and Lukas Sportswear, a sportswear company.
2 Goods were transported by trucks from the Netherlands to France. A fire broke out en route in one of the trucks, and the goods were damaged.
3 The senior lawyer recommends that the client seek a so-called negative declaration, which is a declaration that the carrier has no (or only limited) liability in this case. In this way, they seek to determine in which jurisdiction the dispute is to be resolved and can prevent the plaintiff from initiating further proceedings.

7.2 *Suggested answer*
We recently contracted with one of our customers, Lukas Sportswear, to transport a consignment of clothing from the Netherlands to France. Unfortunately, some of the good were damaged in transit, and Lukas Sportswear now wants compensation for the damaged goods and a refund of customs duties.
What actually happened is still not completely clear. However, as I understand it, the goods were picked up in Rotterdam and loaded onto two trucks bound for Lyon, France. During the transport of the goods, the two drivers stopped at a petrol station to refuel and eat dinner. When they left the station restaurant, they discovered that a fire had started in one of the truck trailers. The second truck was damaged by smoke.
I received a letter yesterday from Lukas Sportswear demanding €675,000, representing the loss of all of the consignment in the fire-destroyed container. They are also claiming loss for smoke damage to the remaining part of the goods plus German duties owed on the goods.
Could you please inform me what our options are and how we should proceed? I have a meeting scheduled next week with representatives of Lukas Sportswear and would therefore appreciate a quick written response.
Sincerely
Sabina Belling
Assistant Managing Director
TransGerman Forwarding & Shipping, GmbH

8 *Suggested answer*
1 Possible content points
a Referring to the subject matter: thanking client for letter
b Stating reason for writing
c (Briefly) summarising the facts as presented in the client's letter
d Requesting further information and documents from the client: police report about the incident, information about TransGerman's client (e.g. where they are incorporated), all contractual documents
e Suggesting further course of action: inform about the advantages TransGerman would have from seeking a negative declaration and suggesting that they initiate proceedings in a Dutch court
f A suitable closing

2 Possible sentence openers for the content points above:
   a With reference to your letter of ...
   b My colleague Ms van Bruggen has asked me to write to you ...
   c Based on the information provided to us, we understand that ...
   d Could you please provide me with ... / Could you please inform us ... / I would require information concerning ... / Would you mind sending me ...
   e In light of the aforesaid, we recommend that ...
   f I look forward to your reply.

3 The letter could be structured in four parts: the first three content points could be grouped together in an introductory paragraph, while content points 4 and 5 could each be discussed in separate paragraphs. The letter could end with a final paragraph in which the writer refers to future contact with the client.

9.1 The article deals primarily with the conflicts-of-laws issues of jurisdiction (paragraph 1) and enforcement of judgments (paragraph 2).
This article is particularly relevant to the TransGerman case because it allows for TransGerman to file an action in the Netherlands, since the goods were taken over by them in the Netherlands (paragraph 1(b)). Thus, Lukas will be precluded from filing in Germany, a jurisdiction less friendly to carriers than the Netherlands (paragraph 2).

9.2 1 a court or tribunal, which is located in a signatory State of the convention, stated in the contract between the parties
2 location of the head office of a business
3 a suit is presently in the process of being adjudicated by a court
4 new and separate legal process brought in jurisdiction in which the first action is unenforceable
5 the substantive legal issues of the matter

9.3 1 Assuming the Convention applies, a party may commence legal proceedings in any court or tribunal:
   a in the state of a contracting country stipulated in the agreement between the parties and;
   in addition:
   b where the defendant is ordinarily a resident, or
   c where the defendant has his principal place of business, branch or agency, if the contract was made through such entity, or
   d the place where the goods were taken over by the carrier, or
   e the place designated for delivery.
2 It is not permissible to bring a new action while a dispute is pending. It is permissible to bring a new action in respect of a dispute for which a judgment has been entered when the judgment of the first action is unenforceable in the country in which the new proceedings are brought.
3 as soon as the formalities required in the country concerned have been complied with

10.2 The writer of the letter has to carry out the following kinds of textual transformation:
- changing speech into writing (taking notes during discussion with senior lawyer)
- changing informal style (incomplete sentences and individual words of notes) into formal style (written questions in the letter)
- changing highly specialised language into less specialised language, changing the order and the choice of words used (explaining the information in the Article to the client).

10.4 *Suggested answer*
Dear Ms Belling
With reference to your letter of 9th May regarding the Lukas Sportswear matter, my colleague Ms Van Bruggen has asked me to write to you.
Based on the information provided to us, we understand the overall nature of the dispute. However, as you mentioned in the letter, what actually happened is not clear, and we will require some additional information in order to take the matter forward.
Initially, could you please inform us of where Lukas is incorporated? In addition, I would require information concerning where and, in detail, how this unfortunate event took place. Specifically, could you please provide any police reports which have been filed regarding the damage? And, of course, it is of particular importance for us to learn what country the trailers were in when the damage occurred.
Once we have the requested information, we will be better able to advise you regarding all your possible options. At this stage, I can advise that we should bring an action in the Netherlands as soon as possible. This will assist in ensuring that you are in the best possible position to protect your interests. In light of the aforesaid, we recommend that we file suit in the Netherlands.
Could you please confirm at your earliest convenience your authorisation to pursue this course of action?
I look forward to your reply.
Sincerely
Thomas Stormer

Language focus

1 2 norm 3 member state 4 litigation 5 render

2

Noun	Verb
adjudication	adjudicate
designation	designate
enforcement	enforce
reciprocity, reciprocation	reciprocate
recognition	recognise
resolution	resolve

3 2 by which 3 in which 4 under which 5 to which

4 2 settlements 3 wholly 4 proceedings 5 contracting 6 resident/residing

5 2 e 3 d 4 a 5 c 6 g 7 h 8 j 9 f 10 i

6 2 conflict of laws 3 domestic law 4 to incorporate a convention into national law 5 to have the force of law 6 choice of law 7 procedural law

7 Being an inexpensive, speedy and amicable method of settling disputes, arbitration – along with mediation, conciliation and negotiation – is encouraged by the Supreme Court. Aside from unclogging judicial dockets, arbitration **[refers back to *arbitration* in preceding sentence]** also hastens the resolution of disputes, especially of the commercial kind. It **[refers back to *arbitration*]** is thus regarded as the 'wave of the future' in international civil and commercial disputes. Brushing aside a contractual agreement calling for arbitration between the parties would be a step backward.
Consistent with the above-mentioned policy **[refers back to *is encouraged by the Supreme Court*]** of encouraging alternative dispute resolution methods, courts should liberally construe arbitration clauses. Provided such clause **[refers back to *arbitration clauses* in previous sentence]** is susceptible of an interpretation that covers the asserted dispute, an order to arbitrate should be granted. Any doubt should be resolved in favour of arbitration.

Case study 6

Model answer

Dear Managing Director,

Re. *Gumlex, Inc. v. Lynx Distributors Co.*

In accordance with your instructions, I have reviewed the above-referenced case and can advise as follows. Please note that all the advice stated in this letter is provisional and subject to further investigation.

Initially, there is the issue of what law is applicable to this case. Based on the facts that you have provided, I am of the opinion that the provisions of U.N. Convention on Contracts for the International Sale of Goods Act (CISG) apply pursuant to Article 1(1)(a) of the CISG. Specifically, both Pennonia and Disperia are Contracting States to the CISG, the subject matter of the contract involved the sale of goods, and there are no provisions regarding choice of law in the contract that would supersede application of the CISG.

The next issue is whether there was an enforceable contract of sale between you and Lynx. Based on the information I have received regarding the oral negotiations and the subsequent purchase order and conduct of Lynx, my opinion is that there was a valid contract of sale based on the provisions of Article 18(1) of the CISG. This provision states that "a statement made by or other conduct of the offeree indicating assent ... is an acceptance".

Naturally, the most important issues are those raised by the defendant's claims that it duly avoided or cancelled the agreement based on either: (1) delay in delivery; or (2) cancellation of the contract of sale by mutual agreement.

In respect of the first issue, in my view the law is on our side. Specifically, although it is clear that delivery was delayed, there is no indication that Lynx, pursuant to Article 47(1) of the CISG, provided Gumlex notice of an additional, reasonable time in which to supply the goods, nor did Gumlex declare that it would not deliver pursuant to Article 47(2) of the CISG. Consequently, in my view, Lynx cannot claim avoidance of the contract of sale under Article 49(1)(b) because it did not first grant Gumlex a reasonable period of time to complete the delivery.

In respect of the second issue, it is my view that, based on the facts provided, Gumlex will be denied the purchase price of the goods. This is essentially a factual issue. As such, it is subject to different interpretations. However, it appears to me that a proper notice of defect was rendered by Lynx and accepted (albeit with some reservation). What is important is what happened after that. It is clear from the facts that Gumlex offered, without reservation, to take back and remarket the rubber. In return to this offer, Lynx did not object and, more importantly, it failed to demand replacement goods free of defects. An offer to cancel is expressly permitted under Article 29(1) of the CISG. Under Article 18(1) "silence does not *in itself* amount to acceptance". However, together with other circumstances, silence may be interpreted as an acceptance of an offer. Logically, Gumlex's offer to market was an offer to terminate the agreement, since it would be unreasonable in this circumstance to assume that Gumlex was merely going to assist while leaving primary marketing responsibility to Lynx. Furthermore, it is completely consistent with this reasoning that Lynx would accept this offer by doing nothing, as it believed that the agreement was terminated.

Of course, we can pursue this matter further. The language of Article 18(1) could be used to our advantage. However, I would recommend that Gumlex save time and potential litigation costs and retrieve the goods and resell them.

Sincerely

Renee Byrd

Attorney-at-Law

Exam focus

Reading

Part 1

1 C 2 C 3 D 4 B 5 A 6 D
7 C 8 B 9 D 10 C 11 B 12 A

Part 2

13 OUT 14 IF 15 AT 16 AS 17 UP 18 EXCEPT
19 BY/UNDER 20 FOR 21 IN 22 SO 23 NOT 24 AND

Part 3

25 RESTRICTION 26 SPECIFICALLY 27 COMPETITIVE
28 ACCEPTANCE 29 SUPPLEMENTARY 30 COMMERCIAL
31 CONTRACTING/CONTRACTUAL 32 ENFORCEABLE
33 OUTSOURCERS 34 STRENGTHENS 35 OBLIGATIONS
36 PROVIDER / PROVIDERS

Part 4

37 A 38 D 39 A 40 B 41 C 42 D

Part 5

43 F 44 A 45 G 46 E 47 C 48 B

Part 6

49 B 50 C 51 D 52 A 53 C 54 B

Writing

Task 1

Dear Sirs

Thank you for your letter regarding the dispute between my client, Lumber Products, Inc., and your firm. I will respond to the points raised.

Firstly, you claim that my client voiced no objections regarding the delayed implementation of the computer system. However, in an email to your firm dated November 17, 2011, my client expressly stated that a later implementation date was unacceptable.

Secondly, the system remains flawed in operational terms and requires further work by Computer Analysts, Inc. For example, my client is still experiencing difficulties in receiving orders. Thirdly, I strongly disagree with your assertion that my client has waived his right to claim breach of contract due to delay. Since he was not given formal written notice of the delay, he was not required to invoke delay as a contractual breach. It is also incorrect that no other breach has been committed. Clearly, your failure to provide a fully functioning system constitutes a breach of warranty in itself. I propose that we meet at your earliest convenience and look forward to hearing from you shortly.

(178 words)

Task 2

TO:	Zoe Parsons, Director of Human Resources
FROM:	Liam Bengtsson, Associate, Real Estate Department
DATE:	6 February
SUBJECT:	Training

The purpose of this memorandum is to indicate how the training programme of the Real Estate Department could be improved.

The present training focuses on the laws related to the types of transaction in which our clients are involved. Seminars are held periodically by senior members of the department to inform our lawyers about recent transactions and changes in laws affecting our clients' international business.

To improve the quality of our training programme, I propose that we do the following:

Introduce a case-study approach: The use of this method would make our lawyers more aware of the practical matters connected with the transactions which our clients carry out.

Expand cross-border scope: Courses focusing on the issues involved in cross-border transactions should be offered,

presented by lawyers who have worked on deals in the jurisdictions involved. In this way, our lawyers would be better able to serve our international clients.
Offer language training: The common language of our international clients and the companies with which they do business is English. By supplying instruction in English, our lawyers will be better equipped to provide legal advice worldwide.
If we wish to be at the forefront of international transactions, investment in ongoing training such as this is essential. The advantages to us, as outlined above, would be considerable.
I look forward to discussing these proposed changes with you.
Yours sincerely
Liam Bengtsson
(228 words (not including opening and closing phrases))

Listening

Part1
1 B 2 A 3 B 4 C 5 A 6 B
Part 2
7 C 8 B 9 B 10 C 11 A
Part 3
12 August 13 regulatory framework 14 workshop 15 data protection 16 electronic signature(s) 17 domain name 18 outsourcing 19 distance selling 20 (£)360
Part 4
21 D 22 C 23 F 24 E 25 A
26 C 27 B 28 F 29 A 30 E

ILEC practice test

Test of Reading

Part 1
1 C 2 B 3 A 4 C 5 D 6 D
7 B 8 D 9 A 10 C 11 B 12 A

Part 2
13 THEM 14 OF 15 SO/SUCH 16 AS 17 HOWEVER
18 WHICH 19 UNLESS 20 WITH 21 WHERE 22 A
23 ARE 24 WHETHER

Part 3
25 BINDING 26 BASIS 27 EXPERTISE 28 PRECISION
29 UNNECESSARILY 30 FRAUDULENT
31 IMPROPERLY 32 MINIMISE/MINIMIZE 33 ENACTED
34 SPECIFICALLY 35 REQUIREMENTS 36 EXEMPTION

Part 4
37 D 38 A 39 C 40 A 41 B 42 D

Part 5
43 C 44 F 45 A 46 G 47 E 48 B

Part 6
49 C 50 D 51 A 52 D 53 C 54 B

Test of Writing

Part 1
Suggested answer
Dear Mr Shelton
Thank you for your letter regarding your role in setting up the data room on the Oxcel website and your subsequent suspension.
Firstly, you claim that you were not informed of the change of date on which the data room was to be made available on the website. However, the minutes of the meeting on 1st May, at which you were present, record the new date being given.
Secondly, the information which you made available to potential purchasers in Stage 1 of the data room, does include information which was only to be given to potential purchases who were shortlisted to go on to Stage 2. There is documented proof of this.
Thirdly, it is only possible to find the non-disclosure agreement, which should have been easily accessible to potential purchasers, by clicking on several links which are not clearly signposted.
I propose that we meet before the end of this month in order to further discuss your position. Please suggest a date convenient to you between the 15th and 30th of this month.
Yours sincerely
(174 words)

Part 2
Suggested answer
To: Max Grunseld
From: Karen Hunter,
Date: 23 November
Subject: Fulcher's
The purpose of this memorandum is to familiarise you with the Fulcher's case, which I am handing over to you.
The background to the case is as follows. In December, Fulcher's took delivery of a large furniture order from a supplier they have used for ten years. However, the delivery contained approximately 30% damaged items, mainly chairs and tables.
This order had been made to stock stores prior to Fulcher's main trading period, the January sales. The supplier was unable to replace the damaged goods in time for this critical period. This resulted in a 15% reduction in estimated profits for Fulcher's for January. It also meant that customers normally loyal to Fulcher's, who were unable to buy the goods they needed, may have gone to competitors.
We need to advise Fulcher's of the possible remedies. If it can be shown that Fulcher's lost long-standing customers, we may be able to recover consequential damages but this is difficult to prove in the case of a retailer and its customers. However, there has been a breach of contract, and Fulcher's will be entitled to restitution damages to compensate for the reduction in projected profits.
Fulcher's will need to provide us with monthly sales and profits figures for the last five years and projected sales and profits for the January in question. Depending on the scale of estimated loss of profits, the client should be able to claim proportional compensation. However, it is unlikely that any other compensation would be awarded.
(249 words)

Test of Listening

1 A 2 B 3 C 4 C 5 B 6 A
7 A 8 C 9 B 10 A 11 B
12 banker
13 private equity
14 creditors
15 cross border
16 antitrust
17 15th May
18 academics
19 $1,445
20 Global media
21 A 22 D 23 F 24 E 25 C
26 E 27 B 28 D 29 A 30 F

International Legal English

SECOND EDITION

Glossary

abuse of a dominant position /ə'bjuːs əv ə 'dɒmɪnənt pə'zɪʃən/ (UK) situation that occurs when one firm is in a position to be able to act completely independently of its competitors, customers or consumers, remaining profitable and engaging in conduct that is likely to impede effective competition in that market. It is this last part, the hindrance of effective competition, which is prohibited in most jurisdictions rather than the mere situation of dominance. Some examples of abusive behaviour include the refusal to grant licences, geographical price discrimination, unjustified refusal to supply or predatory pricing. (US *abuse of monopoly power*)

acquired company /ə'kwaɪəd 'kʌmpənɪ/ (UK) company that has been merged into another company and is therefore no longer in existence (US *transferor*)

acquirer /ə'kwaɪərə^r/ company that gains control over another company

acquiring company /ə'kwaɪərɪŋ 'kʌmpənɪ/ (UK) company that has gained control over another company through a merger and remains in existence after the merger (US *survivor*)

acquisition of controlling shares /ækwɪ'zɪʃən əv kən'trəʊlɪŋ 'ʃeəz/ purchase of shares owned by shareholders who have a controlling interest

actual damages /'æktʃəl 'dæmɪdʒɪz/ see *general damages*

ad hoc /æd 'hɒk/ (Latin) for this purpose

adjudicate /ə'dʒʊdɪkeɪt/ to make a formal decision about something; to act as judge in a dispute

admit someone to the Bar /əd'mɪt 'sʌmwən tə ðə'bɑː^r/ (US) to grant a person permission (from a Bar association) to practise law (UK *call someone to the Bar*)

adopt into law /ə'dɒpt ɪntʊ 'lɔː/ to accept as part of a greater system of laws through legislative process

adversarial system /ædvɔː'seərɪəl 'sɪstəm/ system where two sides disagree with and oppose each other

advocate /'ædvəkət/ person who pleads in court

affidavit /æfɪ'deɪvɪt/ written statement which might be used as proof in court that somebody makes after they have sworn officially to tell the truth

alienability /eɪlɪənə'bɪlɪtɪ/ possibility to be transferred

annual general meeting (AGM) /'ænjəl 'dʒenrəl 'miːtɪŋ, 'eɪ 'dʒiː 'em/ yearly meeting of shareholders of a company where various company actions may be presented and voted upon

answer /'ɑːnsə^r/ principal pleading by the defendant in response to a complaint

anticipatory breach /æntɪsɪ'peɪtərɪ 'briːtʃ/ breach of contract committed before performance is due. The non-breaching party may regard this as an immediate breach and sue for damages.

anti-competitive /ˌæntɪkəm'petɪtɪv/ (UK) describes conduct that harms the market or limits competition among businesses (US *restraint of trade*)

antitrust /æntɪ'trʌstə'/ (US) body of law that regulates business activities and markets, especially agreements and practices that limit competition (UK competition law)

apparent authority /ə'pærənt ɔː'θɒrɪtɪ/ power which an agent appears to have, or holds himself out as having, and which a third party reasonably believes actually exists, though not formally granted by its principal/employer

appellant /ə'pelənt/ person who appeals a decision to a higher court (US) see *petitioner*

appellate court /'æpəleɪt 'kɔːt/ (also court of *appeal, appeals court*) court which reviews judgments held by lower courts

arbitral award /'ɑːbɪtrəl ə'wɔːd/ decision of a panel of one or more people who officially decide how an argument between two disputing parties should be settled. It is the arbitral equivalent of a judgment in a court of law.

arbitration /ɑːbɪ'treɪʃən/ reference of a dispute to an impartial person or panel chosen by the parties who agree in advance to abide by the arbitration award issued after the hearing at which both parties have an opportunity to be heard

arbitration clause /ɑːbɪ'treɪʃən 'klɔːz/ clause in a contract that, among other things, requires the parties to arbitrate disputes arising under the contract

articles of association /'ɑːtɪkəlz əv əsəʊsɪ'eɪʃən/ (UK) document that defines a company's internal organisation (US *bylaws*)

asset /'æset/ any property that is owned and has value

asset protection /'æset prə'tekʃən/ method of minimising the risk of loss of one's property from business and personal liabilities

assign /ə'saɪn/ to transfer (rights) to another

assignee /əsaɪ'niː/ person who receives an assignment

assignment of contract /ə'saɪnmənt əv 'kɒntrækt/ transfer of a contract to another person

assignment of rights /ə'saɪnmənt əv 'raɪts/ transfer of rights to another person such that the person to whom the rights have been transferred receives full benefits under the contract

assignor /ə'saɪnə^r/ person who transfers his/her rights or duties to another

associate /ə'səʊsɪət/ junior lawyer in a law firm

attachment /ə'tætʃmənt/ seizure or taking into custody by virtue of a legal process

attachment lien /ə'tætʃmənt 'liːn/ prejudgment lien, provisional in nature, created in assets seized in accordance with a court order or a writ of attachment

authorised share capital /'ɔːθəraɪzd 'ʃeə 'kæpɪtəl/ total amount of stock a company may offer to its shareholders. It is also known as *nominal capital*. (US *authorized shares*)

bailiff /'beɪlɪf/ (UK) an officer of the sheriff who makes arrests and serves writs; (US) a court officer who keeps order during court proceedings

balance sheet /'bæləns 'ʃiːt/ financial statement showing a company's assets, liabilities and equity on a given date

the Bar /ðə 'bɑː^r/ (US) legal profession; (UK) the profession of barristers

bar association /'bɑːr əsəʊsɪ'eɪʃən/ organisation of lawyers which may regulate the profession

bar examination /'bɑːr ɪgzæmɪ'neɪʃən/ (US) written examination taken by prospective lawyers in order to qualify to practise law

Bar Vocational Course /'bɑː vəˌkeɪʃənəl 'kɔːs/ (UK) required course to be taken by law graduates wishing to practise law as a barrister. This is followed by a period of pupillage.

barriers to entry /'bærɪəz tə 'entrɪ/ obstacles which make it difficult for a business to enter into a market. Some examples include patents, customer loyalty, research and development, distributor or supplier agreements, and government regulations.

barrister /'bærɪstə^r/ (UK) lawyer admitted to plead at the bar and in superior courts; a member of one of the Inns of Court

barristers' chambers /'bærɪstəz 'tʃeɪmbəz/ offices of barristers or a group of barristers

beneficiary /benə'fɪʃərɪ/ person entitled to draw payment

'benefit of the bargain' damages /'benəfɪt əv ðə 'bɑːgɪn 'dæmɪdʒɪz/ see *expectation damages*

bill /bɪl/ formal proposal for legislation

bill of exchange /'bɪl əv ɪks'tʃeɪndʒ/ (UK) negotiable instrument for a specified sum of money which is written and names three parties: the drawer (the person paying), the drawee (the person who will conduct payment) and the payee (the person who receives the payment)

board of directors /'bɔːd əv daɪ'rektəz/ group of individuals elected by shareholders to make the major decisions of the company

bona-fide purchaser for value /'bəʊnə 'faɪdɪ 'pɜːtʃəsə fə 'væljuː/ someone who holds a negotiable instrument in good faith

bonus /'bəʊnəs/ payment above what was due or expected

boutique firm /buː'tiːk 'fɜːm/ law firm that specialises in a specific area of law

breach of contract /'bri:tʃ əv 'kɒntrækt/ failure to perform a contractual obligation or interference with another party's performance which incurs a right for the other party to claim damages

brief /bri:f/ document or set of documents containing the details of a court case

by-law /'baɪlɔ:/ (UK) municipal law (US *ordinance*)

bylaws /'baɪlɔ:z/ (US) document that defines a company's internal organisation (UK *articles of association*)

call to the Bar /'kɔ:l tə ðə 'bɑ:ʳ/ (UK) granting of permission to practise law as a barrister (US *admission to the Bar*)

capital structure /'kæpɪtəl 'strʌktʃəʳ/ distribution of a company's debt and stock

capitalisation /kæpɪtəlaɪ'zeɪʃən/ act of providing capital for a company through the issuance of securities

capitalisation issue /kæpɪtəlaɪ'zeɪʃən 'ɪʃu:/ process whereby a company's money is converted into capital and then distributed to shareholders as new shares

cartel /kɑ:'tel/ group of similar independent companies who agree to join together to control prices and limit competition

case law /'keɪs 'lɔ:/ (also *common law, judge-made law*) body of law formed through judicial/court decisions, as opposed to law formed through statutes or written legislation

certificate of deposit /sə'tɪfɪkət əv dɪ'pɒzɪt/ certificate issued by the bank acknowledging receipt of money and promising to pay it back; a promissory note issued by a bank

certificate of incorporation /sə'tɪfɪkət əv ɪŋkɔ:pə'reɪʃən/ document issued by a governmental authority granting a company status as a legal entity

Certificate of Incorporation on Change of Name /sə'tɪfɪkət əv ɪŋkɔ:pə'reɪʃən ɒn 'tʃeɪndʒ əv 'neɪm/ (UK) certificate issued by Companies House when a company wishes to change its name. A copy of the special resolution of the company authorising a change of name must be submitted to Companies House along with a fee.

cheque /tʃek/ (UK) a signed written order by its maker directing a bank to pay a specified sum to a named person or to that person's order on demand (US *check*)

choice of law /'tʃɔɪs əv 'lɔ:/ determination of which jurisdiction's law applies

civil law /'sɪvɪl 'lɔ:/ 1) legal system developed from Roman codified law, established by a state for its regulation; 2) area of the law concerned with non-criminal matters, rights and remedies

claimant /'kleɪmənt/ (UK) person who brings a civil action (US) plaintiff

clerk /klɑ:k/ (UK) court employee who takes records, files papers and issues processes; /klɜ:rk/ (US) also a law student who assists a lawyer or a judge with legal work such as research or writing

collateral /kə'lætərəl/ property pledged as security for repayment of a debt obligation

collective bargaining /kə'lektɪv 'bɑ:gənɪŋ/ process of negotiation between trade unions (or labor unions) and employers, usually regarding the terms and conditions of employment

comity /'kɒmɪtɪ/ principle that one country or jurisdiction will recognise the laws, decisions and legislation of another country or jurisdiction as a matter of courtesy and respect to that country

commercial lease /kə'mɜ:ʃəl 'li:s/ lease entered into for business purposes, e.g. to sell products from, as opposed to private purposes, e.g. residential lease

common law /'kɒmən 'lɔ:/ (also *case law, judge-made law*) body of law formed through judicial/court decisions, as opposed to law formed through statutes or written legislation

Companies House /'kʌmpənɪz 'haʊs/ (UK) institution where all limited companies in the UK must be registered. It is an Executive Agency of the UK government Department of Trade and Industries (DTI).

competition law /kɒmpə'tɪʃən 'lɔ:/ (UK) body of law that regulates business activities and markets, especially agreements and practices that limit competition (US *antitrust law*)

complaint /kəm'pleɪnt/ first pleading filed on behalf of a plaintiff which initiates a lawsuit, setting forth the facts on which the claim is based (civil law)

compulsory winding-up /kəm'pʌlsərɪ 'waɪndɪŋ 'ʌp/ (UK) liquidation of a company after a petition to the court, usually by a creditor (US *involuntary bankruptcy*)

conciliation /kənsɪlɪt'eɪʃən/ process of bringing together the two sides in a dispute, often employment related, to discuss the problem and reach a settlement

confer /kən'fɜ:ʳ/ to grant, to bestow

conflict of interest /'kɒnflɪkt əv 'ɪntrəst/ clash between a person's personal interests and their public or fiduciary responsibilities

conflict of laws /'kɒnflɪkt əv 'lɔ:z/ (US) private international law

consensual /kən'sensjʊəl/ agreed to by all parties

consensual lien /kən'sensjʊəl 'li:n/ security interest created by agreement between the debtor and creditor

consequential damages /'kɒnsɪkwenʃəl 'dæmɪdʒɪz/ see *special damages*

consideration /kənsɪdə'reɪʃən/ something of value given by one party to another in order to induce the other to contract. In common law, consideration is a necessary element for an enforceable contract.

consolidation /kənsɒlɪ'deɪʃən/ combining of two companies to form an entirely new company

constitutional amendment /kɒnstɪ'tju:ʃənəl ə'mendmənt/ change in a company's name, capital or objects

Contract of Sale /'kɒntrækt əv 'seɪl/ written contract expressing the terms and conditions of the sale of land agreed to between the buyer and seller

contract template /'kɒntrækt 'templeɪt/ model agreement with particular items to be filled in

conveyance /kən'veɪəns/ transfer of property rights in land from one person to another; an instrument used to transfer title to property

copyright /'kɒpiraɪt/ exclusive right to reproduce and control an original work of art (music, visual art, film, literature, etc.)

corporate veil /'kɔ:pərət 'veɪl/ separation between the corporation and its shareholders such that the shareholders will not be held personally liable for corporate debts

counsel /'kaʊnsəl/ lawyer, attorney, attorney-at-law, counsellor, solicitor, barrister, advocate or other individual licensed to practise law

counsellor /'kaʊnsələʳ/ see *counsel*

counter offer /'kaʊntər 'ɒfəʳ/ new offer with new terms made as a reply to an offer received

course of dealing /'kɔ:s əv 'di:lɪŋ/ pattern of conduct commercial traders exhibit in relation to each other during their business relationship

court of first instance /'kɔ:t əv 'fɜ:st 'ɪnstəns/ see *lower court*

creditor /'kredɪtəʳ/ person or company who is owed a financial obligation

criminal law /'krɪmɪnəl 'lɔ:/ (also *penal law*) area of law that deals with crime, punishment or penalties

cross-border /'krɒs,bɔ:.dəʳ/ between different countries; taking place over a border(s).

Crown Court /'kraʊn 'kɔ:t/ (UK) higher court of first instance for criminal cases in England and Wales. Together with the High Court of Justice and the Court of Appeal, it forms the Supreme Court of Judicature. Appeals from the Crown Court go to the criminal division of the Court of Appeal and then to the House of Lords.

custom and usage /'kʌstəm ən 'ju:sɪdʒ/ practice which has become so common through long-term use that it has become recognised as mandatory in respect of its subject matter

cybersquatting /'saɪbə,skwɒtɪŋ/ practice of registering Internet domain names that are associated with another company and then demanding payment from that company through the sale or licensing of that domain name

damage /'dæmɪdʒ/ loss or harm as a result of injury

damages /'dæmɪdʒɪz/ money awarded by a court in compensation for loss or injury

date of employment /'deɪt əv ɪm'plɔɪmənt/ day on which a person's employment begins

de facto /deɪ 'fæktəʊ/ (Latin) in fact

debenture /də'bentʃəʳ/ (UK) instrument issued under seal which evidences a debt or security for a loan of a fixed sum of money; a long-term debt not secured by any particular asset, but rather by the general earning capacity of the company (US *secured debt instrument*); (US) unsecured debt

debtor /'detəʳ/ someone who owes a financial obligation to another

default /dɪ'fɔ:lt/ failure to perform a duty, whether legal or contractual; failure to pay a sum that is due

defendant /dɪ'fendənt/ (also *respondent*) person against whom an action is brought in court. Defendant is generally used when

referring to the answering party to a civil complaint; *respondent* is generally used when referring to the answering party to a petition for a court order.

delegate /'deləgeɪt/ to give (duties) to another, to entrust another (with duties)

delegate /'deləgət/ (UK) third party in a delegation to whom the duties have been transferred (US *delegatee*)

delegation of duties /'deləgeɪʃən əv 'dju:tiːz/ transfer of responsibilities to be performed under a contract to another

delegator /'deləgeɪtə'/ person who transfers his duties to another

delivery /dɪ'lɪvəri/ action of taking something to a specific place or address, especially a letter, a document or goods, etc.

design right /dɪ'zaɪn 'raɪt/ legally protected interest in the form of appearance, style or texture of a particular item

directive /daɪ'rektɪv/ order from a central authority, for example, the European Community. A European Community Directive is binding as to the result, but each Member State may choose how to implement it.

disability /dɪsə'bɪlɪti/ condition of being unable to do something due to a physical or mental impairment

disbar /dɪs'bɑː'/ (US) to declare a person unable to practise law. In the UK, the barrister is expelled from his or her Inn of Court and is no longer allowed to represent in court.

discharge /dɪs'tʃɑːdʒ/ to release a person from an obligation

disclaimer /dɪs'kleɪmə'/ repudiation or denial of a legal right or claim

disclaimer of warranties /dɪs'kleɪmər əv 'wɒrəntiːz/ statement which limits the liability of the seller for any defects of their goods

discriminatory dismissal /dɪskrɪmɪ'neɪtəri dɪs'mɪsəl/ termination of an employee's employment contract based on a prejudice or bias

dividend /'dɪvɪdənd/ distribution of company profits to its shareholders

domestic law /də'mestɪk 'lɔː/ 1) national or internal law of a country, as opposed to international law; 2) another term used for *family law*

domiciled (**to be** ~) /'dɒmɪsaɪld/ to live somewhere on a permanent basis or, if a legal person, to have a registered office somewhere

draft /drɑːft/ to produce a piece of writing or a plan that you intend to change later

drawee /drɔː'iː/ person in a bill of exchange who conducts payment or is directed, or ordered to make payment; often a bank

drawer /'drɔːə'/ person in a bill of exchange who orders payment

duress /dʒʊ'res/ unlawful threat or coercion used to force someone to enter into a contract

duty /'dju:ti:/ obligation owed or due to another by law

duty of care /'dju:ti: əv 'keə'/ obligation of a person to act with reasonable caution or prudence, the violation of which results in liability at law

easement /'i:zmənt/ right enjoyed by a person other than the owner of a piece of land to use or control that land, or a part of that land. No property rights are conferred upon the person using the land of another. An example of an easement is crossing a part of another's land in order to access a public road.

economic efficiency /ekə'nɒmɪk ɪ'fɪʃənsi/ economics term that refers to the optimal production and consumption of goods and services

employment tribunal /ɪm'plɔɪmənt traɪ'bju:nəl/ judicial body that resolves disputes between employers and employees

endorsement /ɪn'dɔːsmənt/ (UK) writing, including signature, on the back of a document which allows for the transfer of the instrument (US *indorsement*)

enforceable /ɪn'fɔːsəbəl/ capable of being made effective. In the case of an agreement, it is one in which one party can legally compel the performance of the other party.

enforceable right /ɪn'fɔːsəbəl 'raɪt/ interest the law gives effect or force to

entry of appearance /'entri əv ə'pɪərəns/ written notice of appearance during a hearing which provides the respondent's full name and contact details, as well as a statement of opposition to the claim, including the grounds upon which it is opposed

escheat /ɪs'tʃiːt/ reversion of land to the state if the land owner dies without a will or without any heirs

essential term /ɪ'senʃəl 'tɜːm/ provision required for a contract to exist

et alii (et al.) /et 'æliaɪ, et 'æl/ (Latin) and others

et cetera (etc.) /et'setərə/ (Latin) and other things of the same kind

exclusions /ɪks'kluːʒənz/ a provision which eliminates coverage of specified items

exclusive possession /ɪks'kluːsɪv pə'seʃən/ sole use and benefit of a property

exclusive right /ɪks'kluːsɪv 'raɪt/ sole power or privilege under the law

execution lien /ˌeksɪ'kjuːʃən 'liːn/ lien created when a debtor's assets are seized for the purposes of enforcing a judgment

exempli gratia (e.g.) /eg'zemplɪ 'grɑːʃə, 'iː 'dʒiː/ (Latin) for example

exemplary damages /eg'zemplərɪ 'dæmɪdʒɪz/ see *punitive damages*

expectation damages /ekspek'teɪʃən 'dæmɪdʒɪz/ (also *benefit of the bargain* damages) compensation for the loss of benefits that a person would have received had the contract been performed

expert witness /'ekspɜːt 'wɪtnəs/ person who the court considers to possess specialised knowledge or skill and who is allowed to offer an opinion as testimony in court

express contract /ɪk'spres 'kɒntrækt/ contract whose terms have been specifically outlined, either in writing or orally

express warranty /ɪk'spres 'wɒrənti/ guarantee that is created by the seller, whether oral or written

extraordinary general meeting (EGM) /eks'trɔːdɪnəri 'dʒenrəl 'miːtɪŋ, 'iː 'dʒiː 'em/ (UK) any meeting of the shareholders of a company other than the annual general meeting which is called to discuss certain special issues of a company (US *special meeting*)

fair dealing /'feə 'diːlɪŋ/ (UK) see *right of fair use*; (US) duty of full disclosure imposed on corporate directors, officers and parties to a contract

fair use /'feə 'juːs/ (US) see *right of fair use*

fee simple /'fiː 'sɪmpəl/ whole interest in a piece of real property: the broadest interest in property allowed by common law

fee tail /'fiː 'teɪl/ estate which lasts as long as the original grantee or any of his descendants live

fiduciary duty /fɪ'djuːsəri 'djuːti/ obligation to act solely in the best interests of another

file with /'faɪl wɪð/ to officially record (e.g. in a court of law)

financing measures /'faɪnænsɪŋ 'meθədz/ methods of securing funds or money

first-in-time /'fɜːst ɪn 'taɪm/ rule which distinguishes which creditor has first claim over a debtor's assets

fitness for a particular purpose /'fɪtnəs fər ə pə'tɪkjʊlə pɜːpəs/ if a buyer is buying property for a certain reason and the seller knows this, then this warranty exists by law to guarantee that the property is suitable for that certain reason. Sometimes referred to as *warranty of fitness.*

fixed charge /'fɪkst 'tʃɑːdʒ/ (UK) grant of security for a loan on a specific asset or on specific assets whereby the creditor has first claim to recover upon default by the debtor (US security interest in *specific assets*; (prior to UCC) *chattel mortgage*)

floating charge /'fləʊtɪŋ 'tʃɑːdʒ/ (UK) form of security interest over the debtor's assets which may change on a daily basis, such as stock; a grant of security for a loan on the company's assets in general, and not on any specific asset (US *floating lien*)

force of law /'fɔːs əv 'lɔː/ refers to provisions or actions which may be enforced as law in the relevant jurisdiction; such provisions and actions have the force of law

foreseeability /fɔːsiːə'bɪlɪti/ reasonable anticipation of possible results of an action

foreseeability rule /fɔsiːə'bɪlɪti 'ruːl/ rule that states that damages are only recoverable when it can be established that the damage was reasonably anticipated by the breaching party at the time the contract was entered into

form /fɔːm/ model document or agreement with blank spaces to be filled in

formation /fɔː'meɪʃən/ act of bringing a contract into existence

forum /'fɔːrəm/ place, situation or meeting in which people can discuss a particular matter (especially one of public interest)

forum non conveniens /'fɔːrəm nɒn kɒn'veniənz (Latin) rule regarding the discretionary power of a court to decline to accept a case where it believes it is inconvenient for the parties and would be properly tried somewhere else

forum shopping /'fɔːrəm 'ʃɒpɪŋ/ filing a lawsuit in the jurisdiction (of several available) most likely to bring a favourable outcome for the claimant

fraud /frɔːd/ deliberate misrepresentation or concealment of a material fact to gain an advantage

fraud in the inducement /'frɔːd ɪn ðɪ ɪn'djuːsmənt act of misrepresenting or misleading someone so as to entice to enter into a contract or agreement

freehold estate /'fri:həʊld ɪs'teɪt/ property whose duration of ownership or occupation is not determined
friendly takeover /'frendlɪ 'teɪkəʊvəʳ/ situation where a company attempts to buy another company with approval of the board of directors of the company that is being bought

gain control /'geɪn kən'trəʊl/ to obtain the power to direct or have influence over the management of a company
garnishment /'gɑ:nɪʃmənt/ 1) claim or interest resulting from a legal proceeding in which party A (creditor) requests a court to issue an order or writ against party B (garnishee) holding property of or owing money (e.g. bank account or wages) to party C (debtor) to release the relevant property or money to the creditor; 2) the whole process involved in the legal proceedings described in 1) above
general creditor /'dʒenrəl 'kredɪtəʳ/ creditor who has no lien or security for payment against the debtor's assets (also known as an *unsecured creditor*)
general damages /'dʒenrəl 'dæmɪdʒɪz/ (also *actual damages*) compensation for proven injury or loss
genuine occupational qualification /'dʒenjʊɪn ɒkjʊ'peɪʃənəl kwɒlɪfɪ'keɪʃən/ limited circumstances where sex or marital status may be used as a job requirement
global firm /'gləʊbəl 'fɜ:m/ law firm that employs hundreds of attorneys from all over the world
good faith /'gʊd 'feɪθ/ state of mind whereby a person has an honest conviction that they are observing reasonable commercial standards of fair dealing
good title /'gʊd 'taɪtəl/ title that is valid and free from defects such as liens, litigation or other encumbrances
goods /gʊdz/ items of personal property other than money (US good can be used in the singular)
grantee /grɑ:n'ti:/ person to whom a grant of property is made
grantor /grɑ:n'tɔ:ʳ/ person who transfers a property right or other benefit to a recipient (grantee)

hard norms /'hɑ:d 'nɔ:mz/ informal term referring to binding international treaty provisions
harmonisation /hɑ:mənaɪ'zeɪʃən/ act of bringing the laws of multiple jurisdictions in line with each other
hereditament /hɪ'redɪtəmənt/ property which can be inherited; also refers to land in general
high court /'haɪ 'kɔ:t/ (UK) court which hears serious civil cases and appeals from county courts; (US *supreme court*)
holder /'həʊldəʳ/ person that has legal possession of a trade mark
holder in due course (HDC) /'həʊldər ɪn 'dju: 'kɔ:s, 'eɪtʃ 'di: 'si:/ person who acquires a negotiable instrument in good faith
holder of title /'həʊldər əv 'taɪtəl/ person who owns the right to control and dispose of a particular piece of property
holiday entitlement /'hɒlɪdeɪ ɪn'taɪtəlmənt/ right of an employee to take paid time off from his/her employment
horizontal merger /hɒrɪ'zɒntəl 'mɜ:dʒəʳ/ combining of two or more firms which are at the same level in the economic supply chain
hostile takeover /'hɒstaɪl 'teɪkəʊvəʳ/ situation where a company attempts to buy another company against its wishes

id est (i.e.) /'ɪd 'est, 'aɪ 'i:/ (Latin) that is
illegality of the subject matter /ɪlɪ'gælɪtɪ əv ðə 'sʌbjekt 'mætəʳ/ when the matter under consideration in the contract is unlawful and therefore unenforceable in a court of law
immaterial breach /ɪmə'tɪərɪəl 'bri:tʃ/ breach of contract after which the non-breaching party is still required to perform its contractual obligations and may be entitled to damages
immovable property /ɪ'mu:vəbəl 'prɒpəti/ land, buildings or other permanent objects fixed to land
implied contract /ɪm'plaɪd 'kɒntrækt/ contract whose terms have not been specifically outlined, but rather are presumed
implied warranty /ɪm'plaɪd 'wɒrənti/ guarantee that is implied by law rather than promised by the seller
impose /ɪm'pəʊz/ to introduce a rule, tax, punishment, etc. that must be obeyed, paid or accepted; to give someone a task or a duty, especially an unpleasant one or one that they do not want to do
in rem /'ɪn 'rem/ (Latin) against a piece of property (rather than a person)
in the course of business /ɪn ðə 'kɔ:s əv 'bɪznəs/ regular mode of conduct or routine of a trade
incidental beneficiary /ɪnsɪ'dentəl benɪ'fɪʃəri/ person who was not planned to benefit from a contract and is also not party to that contract. This person does not gain any rights under the contract
incorporate /ɪŋ'kɔ:pəreɪt/ to include the provisions of something (e.g. a convention) as a part of something larger, such as a system (e.g. national legislation)
incoterms /'ɪŋkəʊ,tɜ:mz/ set of international sales terms used as a standard between buyers and sellers to apportion costs and risk between them
indefinite /ɪn'defɪnɪt/ vague, not certain, not determined
infringement /ɪn'frɪndʒmənt/ unauthorised use of material protected by copyright, patent or trademark law
inheritance /ɪn'herɪtəns/ property which is transferred upon death to a person designated as an heir
injunction /ɪn'dʒʌŋkʃən/ official order from a court for a person to do or stop doing something
injured party /'ɪndʒəd 'pɑ:ti/ party that has suffered a violation of its legal rights
Inn of Court /'ɪn əv 'kɔ:t/ (UK) one of four institutions that barristers must join in order to practise law as a barrister
insolvent /ɪn'sɒlvənt/ unable to pay one's debts
instrument /'ɪnstrəmənt/ written formal legal document
intangible property rights /ɪn'tændʒəbəl 'prɒpəti 'raɪts/ legal interest or claim in things which cannot be touched or felt
intended beneficiary /ɪn'tendɪd benə'fɪʃəri/ person who was planned to benefit from a contract but is not party to that contract. As a result of this, this person obtains rights to enforce the contract.
intent /ɪn'tent/ mental desire/willingness to act in a certain way
inter alia /'ɪntər 'ɑ:lɪə/ (Latin) among other things
international convention /ɪntə'næʃənəl kən'venʃən/ an agreement between nations, similar to a treaty but usually relating to non-political or non-commercial matters; written agreement between states or nations governed by international laws
international law /ɪntə'næʃənəl 'lɔ:/ laws that concern relations between countries (= *public international law*) and laws that concern private transactions and disputes between parties from different nations (= *private international law / conflict of laws*)
invoke /ɪn'vəʊk/ to rely upon a certain law, principle or rule in order to support an argument or position
ipso facto /'ɪpsəʊ 'fæktəʊ/ (Latin) by that very fact itself
inquisitorial system /ɪŋkwɪzə'tɔ:rɪəl 'sɪstəm/ a judicial system in which the judge(s) conducting the trial decides the questions to be asked and the scope of the case
issue /'ɪʃu:, 'ɪsju:/ to produce or provide something official
issued share capital /'ɪʃu:d 'ʃeə 'kæpɪtəl/ shares of a company that are held by shareholders
ius quaesitum tertio (IQT) /'ɪəs 'kwæzɪtəm 'tɜ:ʃɪəʊ, 'aɪ 'kju: 'ti: right acquired by a third party to a contract between two other contractual parties (also *jus quaesitum tertio*)

judge /dʒʌdʒ/ public official who hears and decides cases in court
judge-made law /'dʒʌdʒ meɪd 'lɔ:/ (also *case law, common law*) body of law formed through judicial/court decisions, as opposed to law formed through statutes or written legislation
judgment lien /'dʒʌdʒmənt 'li:n/ lien imposed on a person against whom a judgment has been entered but remains unsatisfied
judicial lien /dʒʊ'dɪʃəl 'li:n/ security interests arising as a result of court proceedings brought by the creditor to secure an interest in the debtor's property
juris doctor (JD) /'dʒʊrɪs 'dɒktəʳ, 'dʒeɪ 'di:/ (US) law degree (UK *LLB*)
jurisdiction /dʒʊrɪs'dɪkʃən/ 1) power of a court, authority or other official body to decide a legal case or to make an order; 2) extent of this power; 3) territory in which this power exists; 4) area in which a particular legal system operates; 5) system of law courts that make up a particular legal system
juvenile court /'dʒu:vənaɪl 'kɔ:t/ court that hears cases involving children under a certain age

lack of legal capacity /'læk əv 'li:gəl kə'pæsɪti/ absence of ability of a person to enter into contractual relations, sue or be sued
Land Registry /'lænd 'redʒɪstri/ a government agency responsible for the registration of title to land
landlord /'lændlɔ:d/ person who owns property and either rents or leases it to a *tenant* for profit. The female form is *landlady*.

law school /'lɔ: 'sku:l/ (US) graduate school offering courses in law leading to a law degree

lease /li:s/ contract for which the use and occupation of a property is conveyed to another, usually in exchange for a sum of money (rent)

leased premises /'li:st 'premɪsɪz/ land, building or space in a building which is stated in the relevant lease and occupied by the tenant

leasehold /'li:shəʊld/ property whose duration of ownership or occupation is fixed or capable of being fixed

legal entity /'li:gəl 'entɪti/ individual or organisation that can enter into contracts, is responsible for its actions and can be sued for damages

legal opinion /'li:gəl ə'pɪnjən/ document outlining a lawyer's understanding of the law regarding a particular situation

legal person /'li:gəl 'pɜ:sən/ artificial entity created by law and given legal rights and duties, for example a corporation

Legal Practice Course (LPC) /'li:gəl 'præktɪs 'kɔ:s, 'el 'pi: 'si:/ (UK) course that must be completed before a person can be qualified as a solicitor. It is the first step to becoming a solicitor (the second being working as a trainee solicitor, and the last being successful completion of the Professional Skills Course).

letter of credit /'letər əv 'kredɪt/ financial instrument, often issued by the buyer's bank, through which the bank agrees to make payment up to a specified amount for a particular period for goods when delivered

lex causae /'leks 'kaʊsaɪ/ (Latin) law or laws the forum court decides should apply to a case from the relevant legal systems available for determination of an international case

lex domicilii /'leks dɒmɪ'sɪlɪaɪ/ (Latin) refers to the law of a party's domicile as applied in a choice of law situation

lex fori /'leks 'fɔ:ri/ (Latin) law of the forum in which the matter is pending

lex loci actus /'leks 'ləʊki 'æktəs/ (Latin) law of the place where the act involved in the case was carried out

lex loci arbitri /'leks 'ləʊki 'ɑ:bɪtri/ (Latin) law of the place where arbitration is to take place (in conflict-of-laws context)

lex loci contractus /'leks 'ləʊki kən'træktəs/ (Latin) law of the place where the contract is made

lex loci delicti /'leks 'ləʊki də'lɪkti/ (Latin) law of the place where the wrong was done

lex loci solutionis /'leks 'ləʊki səlu:ʃɪ'əʊnɪʃ/ (Latin) law of the place at which payment or performance of a contract is to take place

lex mercatoria /'leks mɜkə'təʊrɪə/ (Latin) refers to a set of trading principles used by merchants in Europe during the Middle Ages; today refers to a system of laws which is adopted by all commercial nations

lex patriae /'leks 'pætrɪə/ (Latin) national law

licence /'laɪsəns/ (UK) permission or authority to do something which would otherwise be illegal. No interest is transferred in this case. (US *license*)

lien /li:n/ interest or attachment in another's property as security for payment of an obligation

lien creditor /'li:n 'kredɪtəʳ/ creditor whose claim is secured by a lien

life estate /'laɪf ɪs'teɪt/ estate granted only for the life of the grantee

life tenant /'laɪf 'tenənt/ person who holds a life estate or an estate *pur autre vie*, or for the benefit of another

liquidated damages /'lɪkwɪdeɪtɪd 'dæmɪdʒɪz/ (also *stipulated damages*) compensation that is agreed to in the contract

liquidation /lɪkwɪ'deɪʃən/ dissolution of a company whereby all assets are sold and the proceeds used to pay off debts

lis alibi pendens /'lɪs 'ælɪbaɪ 'pendenz/ (Latin) refers to when a dispute is pending elsewhere and can be pleaded by a party to avoid duplication of judgments in different jurisdictions

LLB (Legum Baccalaureus) /'el 'el 'bi:, 'leɪgəm bækə'laʊrɪəs/ (UK) Bachelor of Laws, law degree (US *JD (juris doctor)*)

loan capital /'ləʊn 'kæpɪtəl/ form of long-term borrowing

lockout /'lɒkaʊt/ preventing people from entering a building by locking it, such that employees cannot work

lower court /'ləʊə 'kɔ:t/ (also *court of first instance*) court whose decisions may be appealed to a higher court

magistrates' court /'mædʒɪstreɪts 'kɔ:t/ (UK) court that has very limited powers

maker /'meɪkəʳ/ person who makes a promissory note

market economy /'mɑ:kɪt ɪ'kɒnəmi/ economic system which permits the open exchange of goods and services between producers and consumers. In a market economy, prices and production are largely determined by supply and demand. The contrasting model to a market economy is central planning and a non-market economy.

material breach /mə'tɪərɪəl 'bri:tʃ/ breach of contract which is so fundamental or significant that the non-breaching party is excused from its contractual obligations and may recover damages

mechanic lien /mə'kænɪk 'li:n/ (also *mechanic's lien*) lien to secure payment for labour or materials used in constructing or repairing buildings or other structures

member state /'membə 'steɪt/ term used to refer to states which are members of a certain international organisation (e.g. the European Union)

memorandum of association /memə'rændʌm əv əsəʊsɪ'eɪʃən/ (UK) legal document that sets out the important elements of the corporation, including its name, address, objects and powers. It is one of the two fundamental documents upon which registration of a company is based. (US *articles of incorporation*)

merchant /'mɜ:tʃənt/ person who is engaged in the buying and selling of goods for profit

merchantability /mɜ:tʃəntə'bɪlɪti/ warranty implied by law that something is fit for the ordinary purposes for which it is used

merger /'mɜ:dʒəʳ/ the joining of two companies resulting in the dissolution of one company and the survival of the other

merger regulation /'mɜ:dʒə regjʊ'leɪʃən/ legislation aimed at limiting anticompetitive concentration of market power. Law that seeks to ensure that the combination of companies will not have any anticompetitive effects.

minority shareholder /maɪ'nɒrɪti 'ʃeəhəʊldəʳ/ shareholder who holds less than half the total shares outstanding and is therefore unable to control the business of the company

minutes /'mɪnɪts/ notes or records of business conducted at a meeting

model law /'mɒdəl 'lɔ:/ statement of norms intended to be adopted by nations with the intent of harmonising rules at an international level

monopoly /mə'nɒpəli/ organisation or group that has complete control of an area of business so that others have no share

monopoly right /mə'nɒpəli 'raɪt/ exclusive right to make, use or sell an invention

moot court /'mu:t 'kɔ:t/ fictitious court where law students argue hypothetical cases

mortgage /'mɔ:gɪdʒ/ transfer of legal title of a property, often land, to another as security for payment of a debt

motion /'məʊʃən/ application to a court to obtain an order, ruling, or decision

movable property /'mu:vəbəl 'prɒpəti/ see *personalty*

multi-jurisdictional /'mʌltɪdʒʊrɪs'dɪkʃənəl/ extending over more than one jurisdiction

naked debenture /'neɪkɪd də'bentʃəʳ/ (UK) unsecured debt (US *debenture*)

negotiable /nɪ'gəʊʃɪəbəl/ able to be transferred by endorsement or delivery

negotiable instruments /nɪ'gəʊʃɪəbəl 'ɪnstrʌmənts/ (UK) written and signed documents which represent an intangible right of payment for a specified sum of money on demand or at a defined time. Some examples are bills of exchange, promissory notes, bank cheques or certificates of deposit. (US *commercial paper*)

***nemo dat* rule** /'ni:məʊ 'dæt 'ru:l/ principle that states that one cannot give away more than one possesses. If one does not possess title to something, then one cannot transfer title of that thing to another.

nominal capital /'nɒmɪnəl 'kæpɪtəl/ (also *authorised capital*) total amount of stock a company may offer to its shareholders

non-breaching party /'nɒnbri:tʃɪŋ 'pɑ:ti/ party to the contract that has not violated its contractual obligations

non-consensual /'nɒn kən'sensjʊəl/ not agreed to or formed by agreement of all parties

non-governmental organisation (NGO) /'nɒn gʌvə'mentəl ɔ:gə naɪ'zeɪʃən, 'en 'dzi: 'əʊ/ not-for-profit organisation which is not part of the government, with its activities directed to the benefit of members or of other members of the population

non-monetary relief /'nɒn 'mʌnətri rɪ'liːf/ remedy that is not money, but rather something else such as an injunction, a declaratory judgment, specific performance or modification of a contract

non-obvious /'nɒn 'ɒbvɪəs/ quality of an invention being unexpected or surprising or sufficiently different from other existing things. It is often a requirement for obtaining a patent.

non-possessory /'nɒn pə'zesəri/ type of security interest whereby the debtor retains control over the property but is limited in what he or she may do with it

notary (or **notary public**) /'nəʊtəri, 'nəʊtəri 'pʌblɪk/ person authorised by the state to conduct limited legal functions, such as authenticating signatures and certifying documents

notice /'nəʊtɪs/ document providing notification of a fact, claim, or proceeding

novation /nə'veɪʃən/ substitution of an obligation with a new one, thereby cancelling the old obligation

objects /'ɒbdʒekts/ goals or purposes of a company

objects clause /'ɒbdʒekts 'klɔːz/ section of a company's memorandum of association that outlines the company's objects

obligee /ɒblɪ'giː/ person to whom a right is owed

obligor /ɒblɪ'gɔːr/ person who owes a right

offer /'ɒfər/ indication of willingness to enter into a contract on specified terms, whereby, if accepted by the other person, a binding contract would result

offeree /ɒfə'riː/ party to whom an offer is made

offeror /ɒfə'rɔːr/ party that displays a willingness to enter into a contract on specified terms

oligopoly /ɒlɪ'gɒpəli/ market situation in which only a small number of firms compete with each other

on notice of the security interest /ɒn 'nəʊtɪs əv ðə sɪ'kjʊrɪti 'ɪntrəst/ where a security interest exists between a certain creditor and debtor. It occurs on perfection of a security interest.

ordinance /'ɔːdɪnəns/ (US) municipal law (UK *by-law*)

ordinary course of business /'ɔːdɪnəri 'kɔːs əv 'bɪznəs/ regular mode of conduct or routine of a trade

ordinary resolution /'ɔːdɪnəri rezə'luːʃən/ (UK) resolution passed by a simple majority of members at the annual general meeting

ordinary shares /'ɔːdɪnəri 'ʃeəz/ (UK) shares that carry voting rights and dividend entitlements and which are the most common form of shares (US *common shares*)

paralegal /pærə'liːgəl/ non-lawyer, often with some form of specialised legal training, who helps lawyers in their legal work

parallel behaviour /'pærəlel bɪ'heɪvjər/ acting in a similar way to another; for example, setting prices at the same level as a competitor or producing a similar level of output as another in the same business

Parol Evidence /pə'rəʊl 'evɪdəns/ the rule that evidence, apart from the actual contract itself, cannot modify, explain, vary or contradict the written terms of a contract

party /'pɑːti/ person or entity involved in an agreement

passage of title /'pæsɪdʒ əv 'taɪtəl/ exchange of ownership in a property

passing of risk /'pɑːsɪŋ əv 'rɪsk/ the point at which the risk (e.g. of damage) passes from one party to another (and therefore also the responsibility, for example, for insuring goods)

passing off /'pɑːsɪŋ 'ɒf/ illegal type of unfair competition whereby a business does something that the public would reasonably believe to be related to the activities of a different business such that this second business suffers damages as a result

patent /'peɪtənt, 'pætənt/ grant from the government giving exclusive rights to an inventor to make, use or sell an invention for a specified period of time

payee /'peɪ'iː/ person who is being paid in a bill of exchange

pecuniary compensation /pɪ'kjuːnjəri kɒmpen'seɪʃən/ remedy that involves compensating through money

penal law /'piːnəl 'lɔː/ (also *criminal law*) area of law that deals with crime, punishment or penalties

penetrate the market /'penətreɪt ðə 'mɑːkɪt/ to enter into a market

per annum /'pɜːr 'ænəm/ (Latin) per year

per se /'pɜː 'seɪ/ (Latin) by itself

perfected /pə'fektɪd/ when the appropriate filing or registering or other formal action of a security interest has been done to protect one's security interest in another's property against all other creditors

perfection /pə'fekʃən/ appropriate filing or registering or other formal action of a security interest in order to protect one's security interest in another's property against all other creditors

performance /pə'fɔːməns/ completion of obligations required by contract

personal liability /'pɜːsənəl laɪə'bɪlɪti/ state of being legally obliged out of one's own personal assets

personal property /'pɜːsənəl 'prɒpəti/ (also *chattels* in common law) things that are moveable (as opposed to real property) and capable of being owned

personalty /'pɜːsənəlti/ personal property (as opposed real property)

petitioner /pə'tɪʃənər/ (US) person who brings a petition to a court, especially on appeal

picketing /'pɪkətɪŋ/ demonstration outside a place of work in which people congregate to dissuade others from entering the building, usually done in attempt to persuade another party to meet certain demands. It is often done during a strike.

pleading /'pliːdɪŋ/ formal written statement setting forth the cause of action or the defence in a case

pledge /pledʒ/ property which is security for a debt or obligation

pledgee /pledʒ'iː/ person who receives a pledge, or the creditor in a secured transaction

pledgor /pledʒ'ɔːr/ person who gives a pledge, or the debtor in a secured transaction

possessory /pə'sesəri/ type of security interest whereby the creditor has the right to control the property

predatory pricing /'predətəri 'praɪsɪŋ/ pricing a product so low – for example, below its production cost – as to eliminate competition

pre-emption rights /priː'emʃən 'raɪts/ (UK) rights of shareholders to maintain their proportionate ownership in a company by purchasing newly issued stock before it is offered to the public (US *preemptive rights*)

preference shares /'prefərəns 'ʃeəz/ (UK) shares that are given preference in dividend entitlements over ordinary shares, but usually do not carry any voting rights (US *preferred shares*)

price fixing /'praɪs,fɪksɪŋ/ conduct of setting a price for a product which is contrary to workings of supply and demand, and therefore contrary to the free market

priority /praɪ'ɒrɪti/ right to enforce a claim before others

priority creditor /praɪ'ɒrɪti 'kreditər/ creditor who is given priority over other creditors, or has first claim over the debtor's assets

private international law /'praɪvət ɪntə'næʃənəl 'lɔː/ body of law dealing with disputes between private persons living in different nations and governing such things as applicable law, jurisdiction and enforcement of judgments

privity of contract /'prɪvətɪ əv 'kɒntrækt/ relationship between parties to a contract

pro forma /prəʊ 'fɔːmə/ (Latin) as a matter of form

pro rata /prəʊ 'rɑːtə/ (Latin) proportionally

profit-and-loss account /'prɒfɪt ən 'lɒs ə'kaʊnt/ (UK) statement summarising a company's revenues and expenses over a period of time (US *profit-and-loss statement* or *income statement*)

promisee /prɒmɪ'siː/ person to whom a promise, or an assurance that something will or will not be done, is made

promisor /prɒmɪ'sɔːr/ person who makes a promise or an assurance that they will or will not do something

promissory note /'prɒmɪsəri 'nəʊt/ formal unconditional written note made and signed by a person obligating him or her to pay a specified sum of money to another specified person or to the bearer of the document

public international law /'pʌblɪk ɪntə'næʃənəl 'lɔː/ body of laws governing relationships between nations

punitive damages /'pjuːnətɪv 'dæmɪdʒɪz/ (also *exemplary damages*) compensation designed to punish the breaching party for conduct found to be reprehensible, e.g. fraud

pupillage /'pjuːpəlɪdʒ/ (UK) one year of apprenticeship to become a barrister, which follows the completion of the Bar Vocational Course

pur autre vie /pʊr 'ɔːtrə 'viː/ estate granted only for the life of someone other than the grantee

quasi-security /'kwɒzi sɪ'kjʊrɪti/ similar to security, except the creditor has actual ownership over the property while the debtor

only has possession. In case of default, the creditor can simply take back possession of the property. Serves the same purpose as security, but is not recognised by the law as such.

quorum /'kwɔ:rəm/ number of shareholders or directors who have to be present at a board meeting so that it can be validly conducted

race relations /'reɪs rɪ'leɪʃənz/ social, political or personal connections with and between people with different distinguishing physical characteristics

real estate /'ri:l ɪs'teit/ land and any permanent things attached to it

real property /'ri:l 'prɒpəti/ land, including anything attached to it

reasonable reliance /'ri:zənəbəl rɪ'laɪəns/ dependence on a contract which is considered fair, sound thinking or common sense

reasonably prudent person /'ri:zənəbli 'pru:dənt 'pɜ:sən/ (also *reasonable person*) fictitious person used as a standard for legal reasoning in negligence cases

reciprocity /resɪ'prɒsɪti/ refers to the practice of a country extending privileges to subjects of another country if its own subjects are extended the same privileges

redundancy dismissal /rɪ'dʌndənsi dɪs'mɪsəl/ (UK) termination of an employee's employment contract because their position ceases to exist (US *layoff*)

Registrar of Companies /'redʒɪstrɑ:r əv 'kʌmpəni:z/ (UK) officer in charge of keeping the list of limited companies registered at the Companies House

regulation /regjʊ'leɪʃən/ order controlling through rules or restrictions

rejection /rɪ'dʒekʃən/ refusal to accept an offer

release /rɪ'li:s/ to discharge a person from an obligation

relevant market /'reləvənt 'mɑ:kɪt/ area in which effective competitive constraints may be imposed. There may be two relevant markets in anti-competitive analyses: the product market and the geographic market. It is determined by examining in which market an undertaking can raise prices above the competitive level without being unprofitable.

reliance damages /rɪ'laɪəns 'dæmɪdʒɪz/ compensation for losses incurred by the plaintiff due to his dependence on the contract being performed

remaindermen /rɪ'meɪndəmən/ person who is entitled to what is left of an estate after the life tenant dies and the parts of the estate that are handed down in his will are carved out

remedy /'remədi/ means of preventing, redressing or compensating a violation of a right

rent /rent/ payment made by a tenant to a landlord or landlady for the use of property

respondent /rɪs'pɒndənt/ see *defendant*

restitution damages /restɪ'tju:ʃən 'dæmɪdʒɪz/ compensation which is equal to the amount of money the breaching party received under the breached contract

right /raɪt/ interest that is recognised and protected by law

right of fair use /'raɪt əv 'feə 'ju:s/ (US) defence to a claim of copyright infringement whereby permission from the artist is not required so long as usage of that artist's work is reasonable and limited (UK The concept of *fair dealing* is the closest equivalent; however, fair dealing is more restrictive than the US doctrine of fair use and in order to be protected, the use has to fall in one of several categories.)

rights issue /'raɪts 'ɪʃu:, 'raɪts 'ɪsju:/ offer to existing shareholders to purchase additional new shares in the company

salaried partner /'sælərɪ:d 'pɑ:tnəʳ/ person who is a member of the law firm partnership and is paid by regular salary payments

Sale of Goods Act /'seɪl əv 'gʊdz 'ækt/ (UK) Act governing the sale of goods in the United Kingdom

sale of substantially all assets /'seɪl əv sʌb'stænʃəlɪ 'ɔ:l 'æsets/ form of acquisition whereby all or almost all assets and liabilities of a company are sold

sale by sample /'seɪl bai 'sɑ:mpəl/ sale by which the seller provides an example of the goods to the buyer which then leads to an understanding that the rest of the goods will be of the same standard as the example

security /sɪ'kjʊrɪti/ property pledged in order to secure the fulfilment of a promise or loan

security agreement /sɪ'kjʊrɪti ə'gri:mənt/ agreement whereby a person grants interest in his or her property to another as collateral in order to guarantee performance of an obligation

security interest /sɪ'kjʊrɪti 'ɪntrəst/ any interest in property acquired by agreement or operation of law for the purpose of securing payment or performance of an obligation

senior partner /'si:njə 'pɑ:tnəʳ/ person who has been a partner of a law firm for many years (the exact number of years may differ in each firm); in some law firms, an official title given to some partners

serve (a document on someone) /sɜ:v/ to deliver a legal document to someone (which usually demands they go to a court of law or obey an order)

sex discrimination /'seks dɪskrɪmɪ'neɪʃən/ different treatment, usually awarding privileges to some and denying privileges to others, based on gender

share consolidation /'ʃeə kənsɒlɪ'deɪʃən/ (UK) proportional exchange of existing shares in the corporation for a fewer number of shares, each with greater value (US *reverse stock split*)

share subdivision /'ʃeə 'sʌbdɪˌvɪʒən/ (UK) exchange of a multiple of new shares for each old share such that shareholdings are in the same proportion afterwards (US *stock split*)

Sherman Act /'ʃɜ:mən 'ækt/ (US) US federal statute which was passed in 1890 and which prohibits interference with free competition and aims to limit monopolies and trusts. Any agreement or combination which has the effect of restraining trade is prohibited under this statute.

shrink-wrap contract /'ʃrɪŋkræp 'kɒntrækt/ licence agreement or contractual terms and conditions that appear on the outside packaging of an item. Acceptance by the consumer is confirmed by the opening of the package. Often used in the software industry.

sic /sɪk/ (Latin) thus

single European market /'sɪŋgəl jʊrə'pi:ən 'mɑ:kɪt/ established under the Single European Act, came into effect on 1 January 1993; the core of the process of European economic integration, involving the removal of obstacles to the free movement of goods, services, people and capital between member states of the European Union

small-claims court /'smɔ:l 'kleɪmz 'kɔ:t/ court that handles civil claims for limited amounts of money

soft norms /'sɒft 'nɔ:mz/ informal term referring to the many interpretative and non-binding statements, for example by treaty monitoring bodies, that can contribute to an understanding and greater compliance with the law

sole practitioner /'səʊl præk'tɪʃənəʳ/ lawyer who practises on his/her own

solicitor /sə'lɪsɪtəʳ/ (UK) lawyer who is qualified to give legal advice and prepare legal documents

solo practice /'səʊləʊ 'præktɪs/ law practice with only one lawyer

solvent /'sɒlvənt/ able to pay one's debts

special damages /'speʃəl 'dæmɪdʒɪz/ (also *consequential damages*) damages that are awarded due to a particular wrong or particular circumstances

special resolution /'speʃəl rezə'lu:ʃən/ resolution on major decisions of a company (such as changing the company's articles or reducing its share capital) at a general meeting that must be passed by a certain majority, usually 75%

specific performance /spə'sɪfɪk pə'fɔ:məns/ when a court orders the breaching party to perform its part of a contract

spin-off /'spɪnɒf/ distribution to shareholders of the shares of a subsidiary held by a parent company

statute /'stætju:t/ formal written law created by a legislative body such as a parliament, as opposed to a law created through the courts

Statute of Frauds /'stætju:t əv 'frɔ:dz/ piece of legislation which declares that certain kinds of contracts, for example those regarding land, pending marriage and the sale of goods worth over a certain amount of money, will be invalid unless put into writing and signed by both parties. The original statute was enacted in England in 1677 and serves as a basis for the US statutes.

statutory forms /'stætju:təri 'fɔ:mz/ forms required by law

statutory lien /'stætju:təri 'li:n/ security interest created by legislation due to the economic relationship between the debtor and the creditor

stipulated damages /'stɪpjəleɪtɪd 'dæmɪdʒɪz/ see *liquidated damages*

strike /straɪk/ collective action by workers in which they stop working as a protest against management actions

subject matter /ˈsʌbjekt ˈmætəʳ/ thing under consideration in a contract
submit /səbˈmɪt/ to deliver a document formally for a decision to be made by others
subscriber /səbˈskraɪbəʳ/ person who has purchased stock in the company by an agreement
sui juris /ˈsuːiː ˈdʒʊrɪs/ (Latin) of one's own right; able to exercise one's own legal rights
supranational /ˈsuːprəˈnæʃənəl/ going beyond or being superior to established borders or spheres of influence held by separate nations

takeover bid /ˈteɪkəʊvə ˈbɪd/ (UK) offer by one company to purchase at minimum a controlling number of voting shares of another company (US *tender offer*)
tangible chattel /ˈtændʒɪbəl ˈtʃætəl/ property other than land that is capable of being touched or felt
target /ˈtɑːgɪt/ company that is the object of a takeover attempt
tax lien /ˈtæks liːn/ lien on property arising from unpaid taxes
tenant /ˈtenənt/ person who has the right to use a particular property or piece of land to live in or for work, usually in return for paying rent
tenement /ˈtenəmənt/ property which is the subject of tenure (a mode of occupying land whereby possession is held by a tenant, but absolute ownership lies in another person), i.e. land
term of years /ˈtɜːm əv ˈjɪəz/ fixed period of time for which an estate is granted
termination of employment /tɜːmɪˈneɪʃən əv ɪmˈplɔɪmənt/ end of the work term or employment
terms and conditions of employment /tɜːmz ən kənˈdɪʃənz əv ɪmˈplɔɪmənt/ fixed period of time for which one is employed and the provisions under which employment is held
third-party beneficiary /θɜːd ˈpɑːti benəˈfɪʃəri/ person who is not party to a contract, but still benefits from it and has legal rights to enforce it
third-party beneficiary contract /ˈθɜːd ˈpɑːti benəˈfɪʃəri ˈkɒntrækt/ contract that provides for rights and duties to be conferred on a person who is not party to the contract
tie-in arrangement /ˈtaɪ ɪn əˈreɪndʒmənt/ (also *tying arrangement*, *tied arrangement*) agreement which forces the buyer to purchase a second product when the buyer purchases the first product. The product that the buyer originally wants to purchase is called a *tying product* and the second product he or she is forced to purchase with the first is called a *tied product*. These arrangements may also be applied to services.
title /ˈtaɪtəl/ right to control and dispose of property or the right to ownership in property
to the bearer of /tə ðə ˈbeərər əv/ expression designating that the sum of money of a note or cheque is payable to whomever holds the document
to the order of /tə ðə ˈɔːdər əv/ expression designating the person to whom the sum of money on a note/cheque is payable
tort /tɔːt/ wrong committed between private individuals for which the law provides a remedy
trade mark /ˈtreɪd mɑːk/ (UK) word, phrase or symbol used by a manufacturer, seller or dealer to distinguish their goods apart from the goods of others (US *trademark*)
trade secret /ˈtreɪd ˈsiːkrət/ formula, technique, process or the like which is kept confidential and used by only one business in attempt to maintain a competitive advantage
trade union /ˈtreɪd ˈjuːnɪən/ (UK) association of employees formed to further their mutual interests with respect to their employment, for example working hours, wages, conditions, etc. (US *labor union*)
trainee solicitor /ˈtreɪniː səˈlɪsɪtəʳ/ (UK) position of one who is completing the practical apprenticeship required for a person to qualify as a solicitor. It is the second step to becoming a solicitor (follows the completion of the Legal Practice Course and is followed by the Professional Skills Course).
transfer /trɑːnsˈfɜːʳ/ to convey or to pass property or a right to another by any method
transnational /ˈtrænsnæʃənəl/ reaching beyond national boundaries; relating to or involving more than one nation.
transnational commercial law /ˈtrænsnæʃənəl kəˈmɜːʃəl ˈlɔː/ term used to refer to a set of international conventions, model laws, uniform rules and uniform trade terms which governs international commercial transactions common to a significant number of legal systems
tribunal /traɪˈbjuːnəl/ body with either judicial or quasi-judicial functions
trust /trʌst/ legal device used to set aside money or property of one person or company for the benefit of another person or company. In the US, trusts are business combinations with the aims of a monopoly.
trustee /trʌsˈtiː/ person who holds something in trust for someone else
trustee in bankruptcy /trʌsˈtiː ɪn ˈbæŋkrʌpsi/ person appointed to handle the affairs of a bankrupt party
trustee in sequestration /trʌsˈtiː ɪn sekwəˈstreɪʃən/ person appointed to handle the property of another person until the court determines the ownership of that property
trustee under a deed of arrangement /trʌsˈtiː ˈʌndər ə ˈdiːd əv əˈreɪndʒmənt/ person determined by contract to handle the property and affairs of an insolvent person while debts are being paid and creditors' claims are being settled
trustee under a trust of deed /trʌsˈtiː ˈʌndər ə ˈtrʌst əv ˈdiːd/ person who holds legal title for real property of another person who has pledged that property as collateral for a loan
trustbuster /ˈtrʌstbʌstəʳ/ (US) person who fights against anticompetitive trusts, often a federal officer

ultra vires /ˈʌltrə ˈvɪərɪs/ (Latin) unauthorised, beyond a person's legal power
unauthorised use /ʌnˈɔːθəraɪzd ˈjuːs/ sale, licensing or otherwise dealing, especially with a view to profit, of a copyright that is done without the authority of the person who possesses the copyright
undertakings /ˈʌndəteɪkɪŋz/ (UK) enterprise, a company or a group of companies (US *business, firm* or *enterprise*)
unfair dismissal /ˈʌnfeə dɪsˈmɪsəl/ unjust termination of an employee's employment contract. The question is whether the employer acted reasonably in dismissing the employee.
Uniform Commercial Code (UCC) /ˈjuːnɪfɔːm kəˈmɜːʃəl ˈkəʊd, ˈjuː ˈsiː ˈsiː/ (US) act harmonising the law of sales and commercial transactions in all states in the US
uniform rules /ˈjuːnɪfɔːm ˈruːlz/ sets of rules created by recognised organisations aimed at harmonising international practices in different areas of the law (e.g. Uniform Rules For Demand Guarantees (URDG))
uniform trade terms /ˈjuːnɪfɔːm ˈtreɪd ˈtɜːmz/ set of terms created by a recognised organisation such as the International Chamber of Commerce (ICC) in order to harmonise trade practices across international borders
United Nations Convention on the Contracts for the International Sale of Goods Act (CISG) /juːˈnaɪtɪd ˈneɪʃənz kənˈvenʃən ɒn ðə ˈkɒntrækts fə ðɪ ɪntəˈnæʃənəl ˈseɪl əv ˈgʊdz ˈækt, ˈsiː ˈaɪ ˈes ˈdʒiː/ convention of the United Nations which sets forth rules governing contracts for the international sale of goods
usufruct /ˈjuːzʊfrʌkt/ right to use another person's property for a period of time, to be later restored to the owner with only ordinary wear and tear

versus (**vs.** or **v.**) /ˈvɜːsəs, ˈviː/ (Latin) against
vertical merger /ˈvɜːtɪkəl ˈmɜːdʒəʳ/ combining of two or more firms who are at different levels in the economic supply chain, for example producer and distributor
vest /vest/ 1) to give full title to a property to a person; 2) to give a person an immediate fixed right
videlicet (viz.) /vɪdəˈlɪsɪt, vɪz/ (Latin) as follows
voluntary liquidation /ˈvɒləntri lɪkwɪˈdeɪʃən/ (UK) termination of a company's business that is supported by company shareholders (US *dissolution* or *winding-up*)

warranty of title /ˈwɒrənti əv ˈtaɪtəl/ guarantee that the seller has title to the property being sold, that there are no liens or encumbrances on the property other than those that have been disclosed, and that the transfer of property is valid
winding-up /ˈwaɪndɪŋ ˈʌp/ process of ending the carrying on of a business through the settlement of liabilities and the distribution or liquidation of assets
writ /rɪt/ document informing someone that they will be involved in a legal process and instructing them what they must do
written resolution /ˈrɪtən rezəˈluːʃən/ written expression of an intention or opinion decided at a meeting