

International Legal English

A course for classroom or self-study use

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and

TransLegal[®]



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Introduction

Who is ILE for?

International Legal English (ILE) is an upper-intermediate to advanced level course for learners who need to be able to use English in the legal profession. The course is intended for law students and practising lawyers alike. The book has been written to prepare candidates for the new International Legal English Certificate (ILEC) examination developed by Cambridge ESOL and TransLegal, but it can also be used effectively in legal English courses of all kinds. *ILE* is suitable for both self-study and classroom use.

What kind of legal English does it deal with?

Since the vast majority of practising lawyers in the world deal with commercial law, *ILE* focuses on the use of English for this purpose. Within the field of commercial law, a number of important topics (such as company law, contract law, intellectual property, real property law, employment law and sale of goods, to name a few) have been selected as the legal subject matter of the units. Particular emphasis is placed on the areas of company law and contracts – with three units dedicated to each – as the majority of commercial lawyers practise in these areas.

The authors of *ILE* are well aware that most students using the book need to be able to provide advice regarding their own legal system in English as opposed to mastering US or UK legal concepts. Thus, while the legal concepts introduced in this book are those found in the legal systems of the UK and the USA, it also includes texts about legal matters in other countries and legal systems. It is important to emphasise that nearly all of the legal concepts covered are found in legal systems and jurisdictions the world over. Since many of the tasks encourage you to compare aspects of the law in your own jurisdiction with those presented in the book, an international perspective is fostered.

Law vs. language

It is important to bear in mind that *ILE* is intended to help law students and lawyers learn English in a legal context and to prepare for the ILEC exam. Therefore, *ILE* should only be used for the purpose of learning legal English and should not be relied upon for legal advice or assistance in the practice of law.

How is ILE organised?

ILE consists of 15 units.

Unit 1 gives you an introduction to basic legal concepts in English, with a focus on general aspects of the legal system as well as specific matters connected with a career in the law.

Units 2–15 deal with a different area of commercial law.

Each unit begins with a reading text which provides you with an overview of the topic area in question. These overview texts introduce crucial legal concepts while presenting a variety of relevant vocabulary in the topic area. The main concepts covered in this text appear in bold, meaning that they appear in

the glossary at the back of the book. In the main body of each unit, there are various types of authentic text material of the kind commonly encountered by practising lawyers in their work. These texts, both written and spoken, are accompanied by a wide range of tasks, all designed to build the core skills of reading, writing, listening and speaking.

At the end of each unit, there is a link to an online task which is intended to improve your online legal English research skills. Each of the 15 tasks presents an authentic language problem that a commercial lawyer may encounter while at work. You are then shown a research strategy, using the Internet, that leads you to a solution to the problem.

The final part of each unit is the Language Focus section, which contains exercises on the vocabulary and language topics covered in the unit. This section offers an opportunity to consolidate the language work done in the unit.

Interspersed at intervals through the book, there are three legal case studies based on actual cases, featuring text material of the kind lawyers need to consult when preparing a case. The purpose of these case studies is to provide an opportunity to apply the language skills developed in the main units to authentic communicative tasks.

Following the main units, there is an Exam Focus section which explains what kind of tasks appear in the ILEC exam. (See **How does the course help you to prepare for ILEC?**, below.)

At the back of the book, you will find the Audio transcripts of all the listening exercises, as well as the Answer key to the exercises. There is also an extensive glossary of all the legal terms which appear in bold in the units and an index to help you find your way around the book.

What are the aims of the course?

- To improve your ability to write common legal text types in English, such as letters or memoranda.
- To improve your ability to read and understand legal texts, such as legal periodicals, commercial legislation, legal correspondence and other commercial law documents.
- To increase your comprehension of spoken English when it is used to speak about legal topics in meetings, presentations, interviews, discussions, etc.
- To strengthen your speaking skills and to enable you to engage more effectively in a range of speaking situations typical of legal practice, such as client interviews, discussions with colleagues and contract negotiations.
- To familiarise you with the kinds of tasks you will encounter on the ILEC examination and improve your performance on these tasks.
- To introduce you to some of the language-related aspects of the work of a commercial lawyer.

How does the course achieve these aims?

To achieve these aims, the course focuses on several aspects of legal English at the same time. These aspects include 1) the analysis and production of authentic legal texts, 2) language functions common to legal texts, and 3) vocabulary learning that goes beyond mere terminology acquisition, and which takes larger chunks of language into account.

The written and spoken texts in each unit have been chosen to represent a wide range of text types in use in legal contexts. These include texts which lawyers have to produce, read or listen to, such as letters of advice, proposals, client interviews or presentations. In each unit, the typical structure of a text type is analysed and the text type broken down into its constituent parts. You are encouraged to identify these parts, and to recognise the language functions typically used in each of these parts of a text. (The term 'language function' refers to phrases which express a specific meaning in a text, for example, the language function of 'suggesting' can be expressed with phrases like *I'd recommend ...* or *Why don't you ...*?) The result is a kind of template of a common legal text type. Equipped with this template and with useful language functions, you are then given the opportunity to produce such a text, either by writing a letter or email, by taking part in a role-play interview, or by discussing a legal issue, for example.

While a selection of legal terminology in each legal topic area is presented in every unit, mastering legal English requires more than simply improving your knowledge of specialised vocabulary. For this reason, every unit includes exercises that focus on larger chunks of language, common phrases and word combinations that are not specialised legal terms, but which are necessary for successful communication.

What is the ILEC exam?

The International Legal English Certificate Examination (ILEC) is the world's first and only internationally recognised test of legal English. ILEC has been developed to test the ability of lawyers to use English for professional purposes. It is a test of language, and not a test of legal knowledge. The examination is a product of the collaboration of TransLegal, Europe's leading firm of lawyer-linguists, and Cambridge ESOL, producer of the world's leading certificates in English.

The ILEC examination is primarily intended for law students and young lawyers at the beginning of their legal careers. It provides legal employers with an accurate means of assessing the legal English skills of job applicants, while offering law students and young lawyers a means of proving their legal English skills to prospective employers. The ILEC certificate is recognised by leading law firms, university law faculties, language centres, lawyer associations and government employers.

For more information about the ILEC exam, visit www.legalenglishtest.org

For more information about TransLegal, visit www.translegal.com

How does the course help you to prepare for ILEC?

ILE offers thorough and systematic preparation for the ILEC exam. The topic areas in commercial law featured in the units are all topic areas to be found on the ILEC exam. Thus you are given the opportunity to become familiar with important subject-specific vocabulary. As the texts in the book represent the kinds of texts that are found in the exam, you will be well prepared to deal with the texts in the actual exam.

Furthermore, since some of the exercises in the book are modelled on the tasks found on the ILEC exam, you can become familiar with these tasks. Beyond this, all of the exercises in the book are intended to strengthen the fundamental language skills you need to succeed in the exam.

The Exam Focus section of the book is specifically intended to prepare you for the exam. This section covers each of the four parts of the ILEC examination – Reading, Listening, Writing and Speaking – and introduces the individual exam tasks in detail. An example of each task is provided, along with a complete

explanation of what the candidate is expected to do, what skills the task in question is designed to test, as well as what the candidate should bear in mind while working on each task. These tips are intended to help you avoid common pitfalls and improve your performance in the exam.

Finally, the book includes an ILEC practice test. This sample paper offers you the opportunity to test your Legal English skills and to prepare for the exam by simulating the test experience.

How can ILE be used for self-study?

If you are using the book for self-study, how you proceed through the book will depend on your goals and the amount of time and effort you wish to devote to the study of legal English.

If you wish to improve your command of legal English for general work or study-related purposes and are willing to devote several weeks of concentrated study to the task, it is recommended that you proceed through the book from beginning to end.

However, if you are planning to take the ILEC examination and would like to improve your legal English more quickly, you should work through the Exam Focus section first in order to get an idea of the requirements of the exam. You can then consult the contents pages at the beginning of the book to locate the topics, tasks and skills you need to work on.

Whatever your goals might be, bear in mind that the glossary and the answer key are provided to help make your self-study easier. Note that sample answers for all of the writing tasks are provided and that legal terms found in the glossary appear in **bold** throughout the book.

Naturally, the speaking tasks will be more difficult to carry out when you are working through the course on your own. However, when given the task of preparing a presentation, it is a good idea to prepare and to hold the presentation. You may be able to find an audience to listen to you and offer constructive criticism. If possible, record yourself giving the presentation and listen back to it, noting areas for improvement. Discussion activities and role-plays pose an even greater challenge when you are working on the course on your own. However, you should not miss them out altogether. Look at the discussion activity and decide what you would say in this discussion. Say your ideas aloud. Then try to think what an opposing view might be and say this aloud as well. Pay close attention when listening to the discussions on the CD to how people offer opinions, agree and disagree. Practise these phrases aloud. Of course, the ideal solution is to ask a friend or colleague to discuss these questions with you.

Above all, enjoy using ILE!

About the authors

TransLegal®

www.translegal.com

TransLegal is Europe's leading firm of lawyer-linguists, providing the legal community with:

- online legal English courses;
- online legal language resources;
- live legal English courses and seminars;
- translations of legal and commercial documents;
- legal language consultancy services.

TransLegal has collaborated with Cambridge ESOL, a division of the University of Cambridge, in the development of the Cambridge ILEC examination, the world's only internationally recognised test of legal English.

For more information about TransLegal and for online legal language resources, visit www.translegal.com

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Amy Krois-Lindner has taught language competence at the University of Vienna for over ten years. She teaches Business English and academic writing and is also a teacher-trainer. In addition, she has played a role in the development of a departmental ESP module with certification and has been involved in the curriculum development of several ESP courses at the Vienna University of Applied Technology.

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This book is dedicated to our parents, June and George Lindner, who inspired us with their love of the English language.

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PART I: THE LEGAL SYSTEM

Bodies of law

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.

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) |

- 3 Complete the text below 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.

- 4 Which body of law, civil law or common law, is the basis of the legal system of your jurisdiction?

Types of laws

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

- 5 Read the following short texts, which each contain a word used to talk about types of laws. In which kind of document do you think each appeared? Match each text (1–5) with its source (a–e).

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

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.

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.

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) bye-law

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

- 6 Find words in Exercise 5 which match these definitions. Consult the glossary if necessary.
- 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
 - law enacted by a town, city or county government
 - draft document before it is made into law
 - legal device used by the European Union to establish policies at the European level to be incorporated into the laws of the Member States
 - formal written law enacted by a legislative body
- 7 Complete the sentences below using the words in the box.

bill directive ordinance regulations statutes

- The Town Council will conduct a public hearing regarding a proposed concerning property tax.
- 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.
- Early this year, the government introduced a new on electronic commerce to Parliament.
- A number of changes have been made to the federal governing the seizing of computers and the gathering of electronic evidence.
- The European Union on Data Protection established legal principles aimed at protecting personal data privacy and the free flow of data.

Speaking 1: Explaining what a law says

There are several ways to refer to what a law says. Look at the following 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 ...**

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

Types of courts

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

- 9 Match each of the following types of court (1–9) with the explanation of what happens there (a–i).
- | | |
|---|--|
| 1 appellate court (or court of appeals, appeals court) | a This is where a person under the age of 18 would be tried. |
| 2 crown court | b This is the court of primary jurisdiction, where a case is heard for the first time. |
| 3 high court (or supreme court) | c This is where small crimes are tried in the UK. |
| | d This is where law students argue hypothetical cases. |

- 4 **juvenile court**
- 5 **lower court** (or court of first instance)
- 6 **magistrates' court**
- 7 **moot court**
- 8 **small-claims court**
- 9 **tribunal**

- 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.

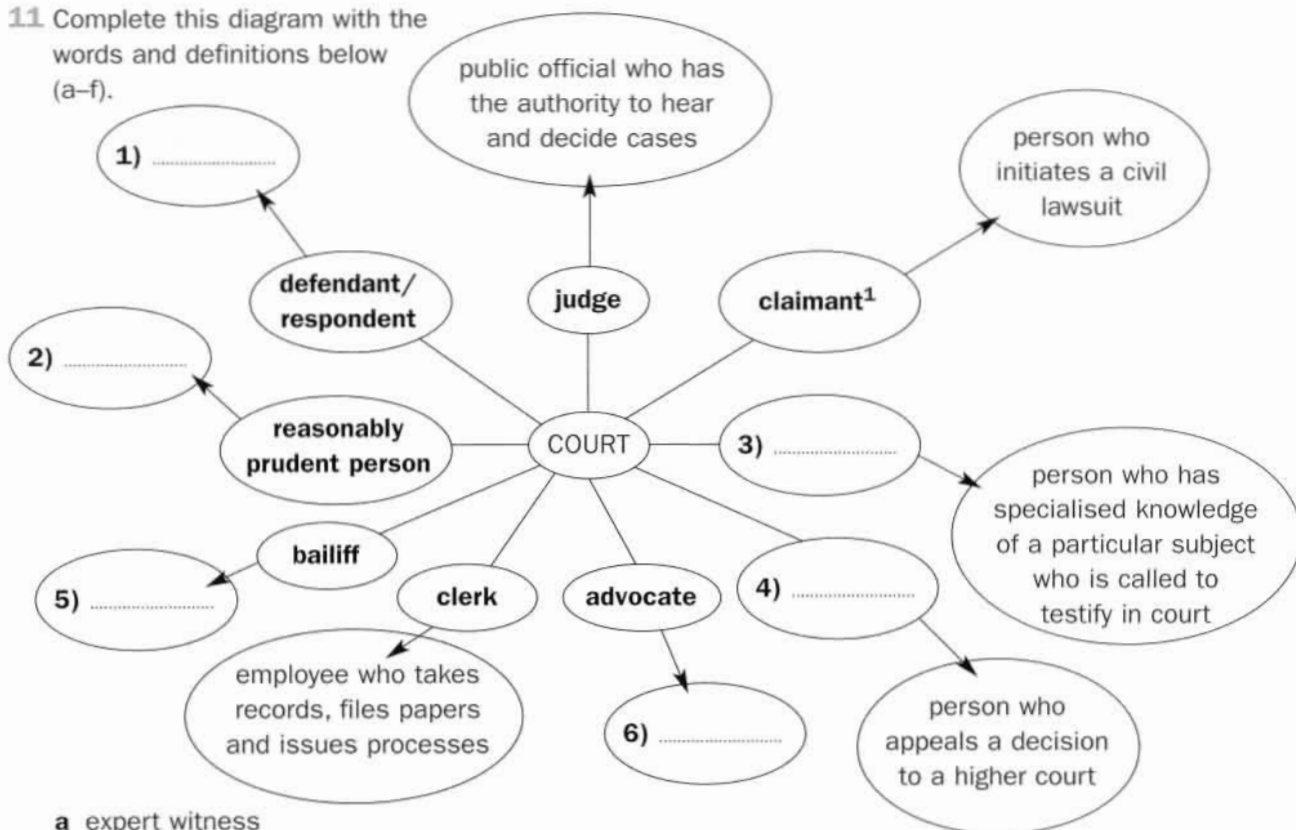
Speaking 2: Civil court systems

10 Work in small groups.

- 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 cases it deals with.

Persons in court


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



- a expert witness
- b appellant²
- 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) plaintiff
² (US) also petitioner

Listening 1: Documents in court

12  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 Will the case go to trial?

13 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 the 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 | i the principal pleading by the defendant in response to a complaint |

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

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

15 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 |

16 Decide which of the nouns in Exercise 13 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

Legal Latin

Lawyers use Latin words and expressions when writing legal texts of every kind, from statutes to emails.

The following excerpt is from the legal document known as an 'answer'. It was submitted to the court by the defendant from Listening 1.

- 17 Underline the common Latin words and phrases in the text. 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).

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

- 19 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

Listening 2: Lawyers

20  Several different words can be used to refer to a lawyer. Listen to three law students in the UK talking about the kind of work they would like to do when they have completed their law studies. Write the correct word for *lawyer* in the gaps.

Anna: So, what are you two planning to do later, when you've completed your degree?

Daniel: Well, right now, I'm planning to become a **1)**, because I'd really like to plead cases in court.

Anna: You've been watching too many of those American films, when the handsome young **2)** wins the case against the big, bad corporation!

Daniel: Very funny. I just like the idea of arguing a case. I think it'd be exciting. What about you?

Anna: Actually, I'd like to work for a big corporation and advise them on their legal affairs, as **3)**

Jacob: I'm thinking about becoming a **4)** I'm not that interested in pleading cases in court. I'd rather do research and give legal advice – I think that'd suit me better.

21 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 above? 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?

22 a Combine the nouns in the box with the verbs below 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

b Choose three 'verb + noun' pairs from above and write sentences using them.

23 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		

Legal education: A call to the Bar

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**; on the other hand, to **disbar** a lawyer is to make him or her unable to practise law.

The following text is an excerpt from a guide written for school leavers about courses of study in English-speaking countries. This section of the guide deals with the study of law and the requirements for entering the legal profession in the UK and the USA.

24 Read the text and say whether legal education in your country is more similar to the UK or the US model.

Studying law in the UK

In the UK, a legal education usually begins with the completion of a bachelor degree in law, known as an **LLB**, which usually takes three years. In the subsequent vocational stage, a person who wishes to become a **barrister** joins one of the **Inns of Court** before beginning the **Bar Vocational Course**. The completion of this stage is marked by a ceremony referred to as the **call to the Bar**. A third stage, known as **pupillage**, is a year-long apprenticeship, usually at a set of **barristers' chambers**, which customarily consists of groups of 20–60 barristers. Similarly, a person wishing to become a **solicitor** must also complete three stages: the first stage involves gaining a law degree; the second stage requires passing a one-year **Legal Practice Course (LPC)**; and the final stage entails working for two years as a **trainee solicitor** with a firm of solicitors or in the legal department of a local authority or large company.

Studying law in the USA

In the USA, a legal education comprises four years of undergraduate study followed by three years of **law school**. A law-school graduate receives the degree of **juris doctor (J.D.)**. In order to qualify as a lawyer, a law-school graduate must pass the **bar examination**.

25 Find terms with the word *bar* in the introduction to this section and in the text above which match these definitions.

- 1 a lawyer who is qualified to plead on behalf of clients
- 2 in the UK, a training course which enables people who wish to become barristers and who have registered with the Inns of Court to acquire the skills and knowledge to prepare them for the specialised training of the pupillage
- 3 a ceremony held at the end of this training course, when a candidate enters the profession
- 4 organisation regulating the legal profession
- 5 in the USA, an important test taken by law-school graduates which, when passed, qualifies a person to practise law
- 6 granted entrance to the legal profession
- 7 to compel a lawyer to stop practising law due to an offence committed

A lawyer's curriculum vitae

26 Read the following CV (curriculum vitae)¹ of a young British lawyer and answer these questions.

- 1 Where did he work in summer 2002?
- 2 What languages does he speak?
- 3 Where did he complete his first degree?
- 4 What was his main duty at the European Commission?
- 5 What is he doing now?

Linus Walker

Address: Frejg 17, SE-118 25, Stockholm, Sweden

Email address: linuswalker@eli.se

Nationality: British

Date of birth: 12 May 1982

EDUCATION

2005 – present **University of Stockholm, Sweden**

Master's Programme in Law and Information Technology

Course covers the legal aspects of Information Technology and the legal implications of the use of the Internet

2000–2004 **University of Essex, Colchester, United Kingdom**

LLB (English & French law degree)

Course included all the core legal subjects, with a focus on contract law, company law, common law, property law and European law

2002–2003 **Université Paris X, Paris, France**

DEUG (French law degree), Nanterre

Part of the degree programme at University of Essex included an intensive course in French. Among subjects studied: European Community Law, Information Law, Civil Law and Penal Law

LEGAL WORK EXPERIENCE

June 2004– **European Commission, Brussels, Belgium**

February 2005 Legal Assistant within the Legal Department of the Service Commune Relex (SCR). Drafting opinions in English and French dealing with contracts awarded for projects

Summers **G. R. Foster & Co. Solicitors, Cambridge, UK**

2001–2004 Liaison with clients; conducting research into multiple legal areas, including family law, tort law and contracts; assisting with trial preparation

Summer 2000 **Westlake Chambers, Bath, UK**

Mini-pupillage, involving shadowing a number of counsel; assisted in daily activities

SKILLS AND QUALIFICATIONS

Languages: Native English speaker; fluent in French (written and spoken); upper-intermediate Swedish

Computing: Proficient in Word, Windows, email

Membership: The Law Society

Strong researching and writing skills

INTERESTS

Skiing, French history, chess

References available upon request

¹ (US) *résumé* or *resume*

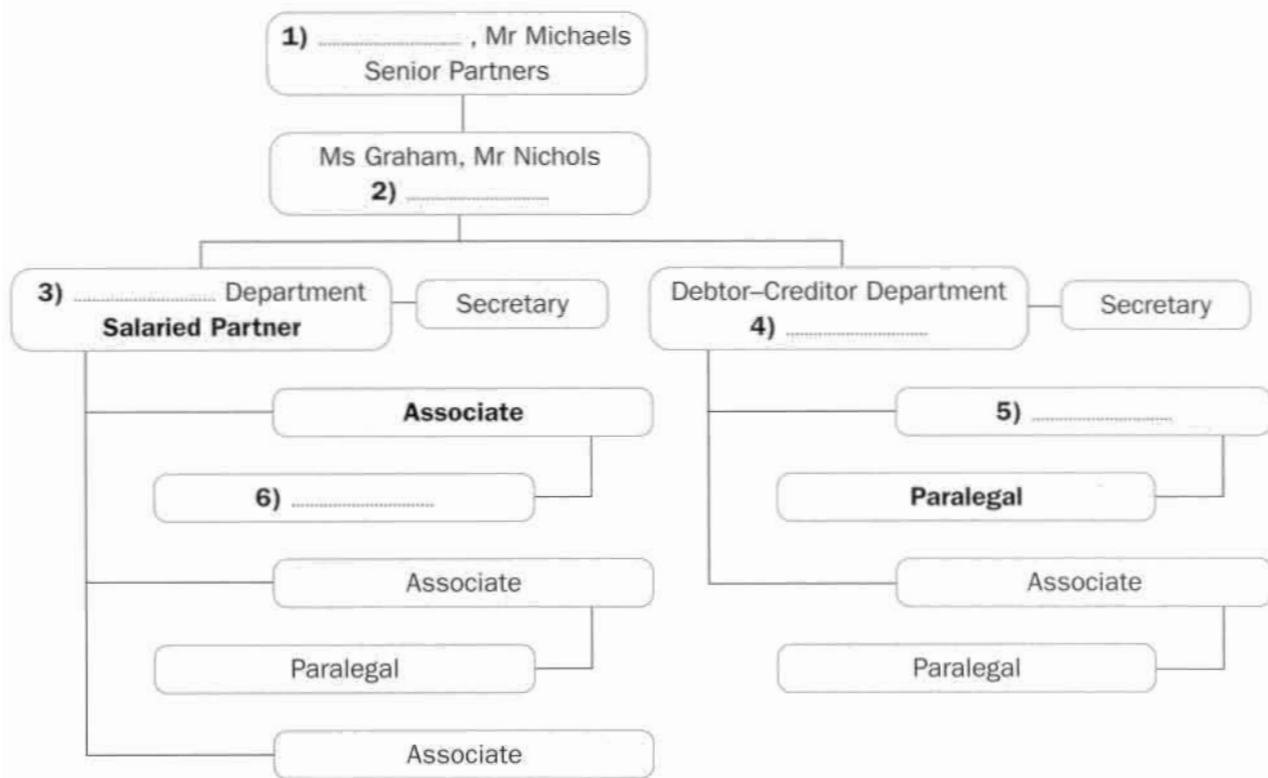
Listening 3: Law firm structure

27 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 does Linus say about the size of the firm?

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

Associate Full Partners Mr Robertson Paralegal Real Property Salaried Partner



Speaking 3: Describing a law firm

29 Look at the following phrases used by Mr Nichols to describe the firm. 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 ...

30 Using the phrases in Exercise 29, describe the structure of a law firm with which you are familiar or the one just described in Listening 3. Refer to the positions and duties of the personnel.

Listening 4: Practice areas

31 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.

32 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?

Listening 5: Law firm culture

33 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.
---	---	--	---

34 ◀◀ Listen to Richard, 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. 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 is Richard's final piece of advice?

35 ◀◀ 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		

36 Discuss these questions.

- 1** Do you have any experience working as a clerk in a law firm? In what ways was it similar 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/legalenglish, click on Research Tasks and choose Task 1.

Reading 1: 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.

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

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

- 1 A company¹ 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 'lift² 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 upon a change in ownership, for example, when one of the partners dies.
- 3 A company is formed upon the issuance of a **certificate of incorporation**³ by the appropriate governmental authority. A certificate of incorporation is issued upon the filing of the constitutional documents of the company, together with **statutory forms** and the payment of a filing fee. 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 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. Every company must have a company secretary, who cannot also be the sole director of

¹ (US) corporation

² (US) pierce

³ (US) generally no official certificate is issued; companies are formed upon the filing of the articles/certificate of incorporation (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

the company. This requirement is not applicable if there is more than one director. 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 accounts⁸, including its **balance sheet** and **profit-and-loss account**⁹. Healthy profits might lead to a **bonus**¹⁰ or **capitalisation issue**¹¹ to the shareholders. On the other hand, continuous losses may result in insolvency and the company going into **liquidation**.

⁸ (US) financial statements

⁹ (US) profit-and-loss statement or income statement

¹⁰ (US) stock dividend

¹¹ (US) cash dividend

Key terms: Roles in company management


- 2 Some of the important roles in company management are discussed in Reading 1 above. Which roles are mentioned?
- 3 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 company 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 in a company |
| 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 |

Listening 1: 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 O'Hara. The lawyer describes how a specific type of corporation is formed in the state of Delaware.

- 4  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 & State S Corporation election
- 7 bylaws
- 8 organisational board resolutions

- 5 **Company types (USA)** Look at the following 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 4, 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 & State S corporation election

- 6 **Company types (UK)** The table on page 23 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.

Reading 2: 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.

7 Below is an extract from the articles of incorporation of a US company. Read through the text 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.

8 Read the text 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.

9 For each of these words or phrases, find the italicised word(s) in the text 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 | |

proscribe
= prohibit, ban
prescribe
= stipulate

Language use: *Shall and may*

10 Read through the text on page 23 again, noting how *shall* and *may* are used.

- 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 7?
- 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 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*).

Listening 2: Forming a business in the UK

You will hear a dialogue in which a lawyer, Mr Larsen, discusses some of the characteristics of two business entities with Mr Wiseberg, a client who is interested in forming a company in the UK.

- 11  Listen to the phone conversation and tick the two company types the men are discussing.

- | | |
|---|--------------------------|
| 1 sole proprietor | <input type="checkbox"/> |
| 2 UK limited partnership | <input type="checkbox"/> |
| 3 UK private company limited by shares | <input type="checkbox"/> |
| 4 UK private company limited by guarantee | <input type="checkbox"/> |
| 5 UK public limited company | <input type="checkbox"/> |
| 6 US C corporation | <input type="checkbox"/> |
| 7 US S corporation | <input type="checkbox"/> |

- 12  Listen again 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.

- 13 In the dialogue, the lawyer compares and contrasts two company types. Complete the sentences below using the phrases in the box.

a are like each other b are similar to c differs d in both
e that's not the case with f there is one big difference between

- 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.
- 5 And a C corporation in the US and our private limited company: that's the limit on the number of shares.
- 6 But a private limited company. The Companies Act stipulates that not more than 50 members can hold shares within the company.

Speaking: 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.

Similarly, the main points are best limited to three, as this is easy for the speaker to remember and for the listener to follow.

Notes for a response to Exercise 14 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.

- 14 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.

Reading 3: Limited Liability Partnership Bill

New legislation is often proposed in order to improve a situation which many people feel is unsatisfactory. The article on page 27 comes from a legal journal and deals with a bill introduced to the House of Commons which creates a new type of company.

- 15 Read the first paragraph of the article. What situation is the bill trying to improve?
- 16 Read through the entire article and match these headings (a–f) with the paragraphs (1–6).
- a Limitations of limited liability
 - b Drawback: accounting requirements
 - c Despite imperfections, long awaited
 - d The need for a new form of partnership
 - e Benefits of the new company form
 - f Drawback: management liability

Draft Limited Liability Partnership Bill

- 1 The Limited Liability Partnership Bill was introduced into the House of Commons in July this year in response to the growing concerns surrounding large accountancy firms moving their business operations offshore. Large accountancy practices had expressed their unhappiness about organising their affairs by way of partnership, especially since a partner is liable under the Partnership Act 1890 for his own acts as well as for those of his colleagues. It is unrealistic to assume that each partner can stay informed about his fellow partners' actions, let alone control them.
- 2 Thus, the Bill sets out to create a new institution, the limited liability partnership (LLP), in which obligations accrue to the name of the partnership rather than the joint names of its individual members. The only personal liability that an individual partner has will be in respect of his pre-determined contributions to partnership funds. This is somewhat similar to a shareholder in a limited liability company. However, unlike a company, the LLP will be more flexible in terms of decision-making, and board meetings, minutes books, and annual or extraordinary general meetings are not required. In addition, the LLP will enjoy the tax status of a partnership and limited liability of its members.
- 3 The Bill is not without its weaknesses, however. One weakness which has been observed is the fact that the accounting requirements contained in Part VII of the Companies Act 1985 are proposed to apply to the LLP. Not only are these rules some of the most demanding in Europe, they will also prove expensive to comply with for small and medium-sized LLPs. For example, the LLP must submit an annual return to Companies House and maintain a list of accounts according to Companies Act formulae. Annual accounts must be prepared, and if the turnover of the LLP exceeds £350,000 annually, the accounts must be professionally audited.
- 4 These additional requirements have made a further restriction on the management freedom of LLPs necessary. Each LLP will have to appoint a 'designated member' who will be responsible for administrative obligations and may incur criminal liability in certain circumstances. On the subject of liability, it is worth noting that an LLP member will enjoy less limited liability than a company director. In the ordinary course of events, a company director is not liable to a third party for his negligent acts or omissions in the course of his duties. His liability is to the company of which he is a director. The position is reversed in relation to an LLP member. The claw-back provisions of the Insolvency Act 1986 will also apply to LLPs. Thus, a liquidator will be able to set aside any transactions (drawings of salary or repayment of money owed) within two years prior to insolvency where the member knew, or had reasonable grounds for believing, that the LLP was or would thereby become insolvent.
- 5 Indeed, limited liability is often highly illusory or perhaps even over-rated, especially when one considers that banks often require personal investment guarantees from directors in order to lift the corporate veil which protects company officers. The same will undoubtedly apply to LLPs.
- 6 In conclusion, the value of this new institution has been weakened by the proposed incorporation of the accounting requirements. That is its single most noticeable weakness; otherwise, it could be said that the Bill is long overdue and will hopefully have the effect of appeasing those businesses which are considering moving their operations overseas.

17 Decide whether these statements are true or false.

- 1 The writer maintains that it is unrealistic to expect a partner to be fully informed at all times about the activities of the other partners in the company.
- 2 The writer states that in an LLP, a company director is not liable for breaches of duty or mistakes made when carrying out his responsibilities.
- 3 The writer implies that large LLPs will be exempt from the more complicated accounting requirements set forth in the Companies Act of 1985.
- 4 The writer claims that it is likely that the limited liability provided by an LLP will be restricted.

18 Do you agree that the LLP is long overdue? In your view, is there also a need for such an institution in your jurisdiction?

Reading 4: Corporate governance

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

19 Read the first three paragraphs. 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.

5 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.

10 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 2001, the meeting was held on July 18th. At the discretion of the board, in 2002 the meeting was held on March 20th. 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.

15 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.

20 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
25 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
30 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.

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

- On which grounds did the shareholders file the action?
 - on the grounds of their rights as shareholders
 - on the grounds of a violation of the bylaws
 - on the grounds of an ongoing proxy fight
 - on the grounds of their lack of faith in the board of directors
- What does the writer identify as the issue in the case?
 - whether the annual shareholders' meeting determines the term of the board of directors
 - whether the election of the board of directors requires a quorum
 - whether the annual shareholders' meeting must be held a full year after the last one
 - whether the bylaws define the term 'full year'
- What does the writer say regarding earlier cases related to this one?
 - They provide for an analysis in favour of the shareholders.
 - They give the board of directors the freedom to run the company as they see fit.
 - They have merely provided an interpretation of the legislative intent.
 - They do not address the issue involved.
- What reason does the writer give for his conclusion?
 - It is dubious that the shareholders will prevail.
 - The facts of the case do not support judicial intervention.
 - A court of appeal will only look at the facts of the case.
 - The board of directors has a duty to act in good faith.

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

- | | |
|---|--|
| 1 on the grounds that (line 5) <ol style="list-style-type: none">in the area ofon the basis of the fact thatdespite the fact that | 4 statutes give wide leeway (line 17) <ol style="list-style-type: none">statutes can easily be avoidedstatutes allow considerable freedomstatutes restrict extensively |
| 2 at the discretion of (line 10) <ol style="list-style-type: none">according to the decision ofthrough the tact ofdue to the secrecy of | 5 alleging (line 21) <ol style="list-style-type: none">stating without proofmaking reference toproposing |
| 3 the ensuing year (lines 11–12) <ol style="list-style-type: none">the next yearthe present yearthe past year | 6 to act in good faith (line 28) <ol style="list-style-type: none">to act from a religious beliefto do something with honest intentionto plan for the future carefully |

22 Answer these questions.

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

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

24 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 ...

Text analysis: A letter of advice

25 Look at Reading 4 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 4 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.

26 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 legislation/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)
Indicating 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.

Writing: A letter of advice

27 A client who is the managing partner at a small European accountancy firm has asked you for information concerning LLPs. He would also like your advice regarding the founding of such an LLP.

SAMPLE ANSWER
» p. 285

Write a letter of advice in which you should:

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

Before you write, consider the function, the expected contents and the standard structure of a letter of advice. Refer back to Reading 3 for information about LLPs and make use of signalling phrases from the table above to help structure the information in your text.



Unit 2

To improve your web-based research skills, visit www.cambridge.org/elt/legalenglish, 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	<u>administration</u>	<u>administrator</u>
	audit	
	liquidation	
perpetrate		
	appointment	
assume		
authorise		
	formation	
issue		
omit		
provide		
	redemption	
require		
	resolution	
transmit		

¹ (US) administer

4 **Vocabulary: prepositional phrases** The following prepositional phrases, which are common in legal texts, can all be found in Reading 3. 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.

- In the course of choosing the name of the company, a number of matters must be considered.
- Confidential information acquired one's directorship shall not be used for personal advantage.
- I would advise that members of your project group formalise your relationship a partnership agreement, incorporation or limited liability company.
- This form of corporation is often considered to be the most flexible body corporate structure.
- 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.
- 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.
- Shareholders and other investors in corporations tend to view corporate governance the corporation's increasing value over time.
- Regular and extraordinary board meetings may be held by telephone, video-telephone and written resolutions.

6 **Verb-noun collocations** Match each verb (1–5) with the noun it collocates with (a–e) in Reading 4. 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 the following words and phrases can go with the verb *to file*. You may need to consult a dictionary.

- an action an AGM an appeal an amendment 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

Reading 1: Introduction to company capitalisation

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

- 1 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 rights

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**⁸. Companies may also borrow money secured by the company's assets, such as stock in trade. This arrangement is known as a **floating charge**.

⁸ (US) security interest in specific assets (also *chattel mortgage* prior to the Uniform Commercial Code)

Key terms: Shares

2 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

3 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 |

4 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?

Language use 1: Contrasting information

Look at this sentence from Reading 1 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 is already familiar with, using the preposition *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 prepositions 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.*

These prepositions 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.*

- 5 Read the information in the table below about the two basic classes of shares: ordinary shares and preference shares. Using the prepositions 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

Listening 1: 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 (Mrs Whiteman) is asking a corporate finance expert (Mr Young) to explain a rights issue, one of the key terms in Reading 1.

6 ◀◀ Listen to the dialogue and answer these questions.

- 1 What is the purpose of a rights issue?
- 2 What options do the shareholders have if they do not wish to buy the newly issued shares?

7 ◀◀ Listen again and choose the correct answer to each of these questions.

- 1 According to Mr Young, one reason why shareholders would want to take up their pre-emption right is
 - a to help the company raise cash.
 - b to maintain the proportion of shares they own.
 - c to be able to waive this right later, if desired.
- 2 Why are the new shares offered to shareholders at a discount?
 - a so the shareholders do not sell their rights to non-shareholders
 - b to keep the market price of the shares from falling
 - c to increase the likelihood that the issue is fully subscribed
- 3 A share issue is said to be 'fully subscribed' when
 - a all of the shareholders have been duly informed of the share issue.
 - b all of the shareholders have sold their rights to the newly issued shares.
 - c all of the newly issued shares have been agreed to be purchased.
- 4 What does Mr Young say about shareholders' reactions to rights issues?
 - a They can be unhappy about having to decide whether to buy shares or sell rights.
 - b They fear that discounts may make the market price of the shares decrease.
 - c They are concerned about outsiders gaining influence in the company.

Reading 2: Shareholders and supervisory boards

The excerpt on pages 38–39 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.

8 Read through the text 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.

9 Read the text again carefully. In which paragraph (A–G) are the following mentioned? Some of the items 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

10 In your own words, explain to a partner the meaning of the following expressions (in italics in the text).

- 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

Language use 2: Common collocations (verb plus noun)

Look at the following verb–noun collocations from the text on pages 38–39.

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, ...

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

- | | |
|----------------------|--|
| 1 exercise (control) | 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 |
| 2 restrict (powers) | b to increase in number or amount over a period of time, especially in a financial sense |
| 3 accrue (benefits) | c to make use of / apply something |
| 4 dismiss (members) | d to limit someone or something |

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

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

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

13 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.

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 ideas.
- Express those key points or distinctions in your own words.

- 14** 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 2 for information.

SAMPLE ANSWER
P. 286

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.

Listening 2: Plain language

Lawyers often have to explain the meaning of a legal document to a client in plain language. This is a conversation between a lawyer, Mr Mansfield, and his client, Mr Thorpe, about provisions concerning capitalisation.

- 15** 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?

- 16** Listen and decide whether these statements are true or false.

- 1 The client says that the subject of law is very complex.
- 2 'Legalese' refers to the process of enacting a law.
- 3 The client believes that legal texts are too difficult for most people to read.

- 17** Listen again and answer these questions.

- 1 What is the Plain Language Movement?
- 2 Why is there some opposition to it?
- 3 What is Mr Thorpe implying when he says legalese makes people need lawyers more?

Text analysis: Understanding legalese

Legalese 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 the following:

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.

- 18 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.

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

20 Match these words beginning with *there-* (1–6) with their equivalents (a–f). The first three occur in the text on page 42.

- | | |
|-------------|--|
| 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

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

therewith thereof (x2) 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.

Speaking: Paraphrasing and expressing opinions

22 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.

23 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 2 on page 265 and underline the phrases the speakers use to signal an opinion.

24 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, ... | 7 As far as I'm, ... |
| 2 The way I, it, ... | 8 I |
| 3 To my, ... | 9 It to me that ... |
| 4 In view, ... | 10 I believe ... |
| 5 If you me, ... | 11 For, ... |
| 6 From my of view, ... | 12 I argue that ... |

25 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?

Reading 3: New legislation

The text below is from the website of a large accountancy firm offering corporate finance services. It deals with a change in UK legislation concerning treasury shares from a few years ago.

26 Read through the text quickly. What does the new law specify? Why has it been enacted?

Treasury shares (acquisition of own shares)

Under current company legislation, companies that have used surplus cash reserves to buy back their own shares are required to cancel those shares and not hold them in treasury to be resold at a later date.

On 22 December 1999, Dr Kim Howells, then Parliamentary Under Secretary of State for Competition and Consumer Affairs at the Department of Trade and Industry (DTI), announced that the law prohibiting companies to hold their own shares in treasury was to be deregulated.

Following the publication of a draft document detailing likely amendments to the regulations in 2001, it was announced that a new company law will come into force in December 2003 that will permit companies to buy back their own shares and hold them in treasury rather than having to cancel them.

This new legislation will only apply to company shares that are listed on the London Stock Exchange's official list, the Alternative Investment Market (AIM) or a comparable European Economic Area (EEA) market, and will therefore not include the shares of other public companies or private companies. Qualifying shares will be held in treasury until they are either resold or transferred to an appropriate employee share scheme.

This change to company law has been made to assist companies amend their share capital without incurring the costs of cancelling and re-issuing shares that exist under current legislation. The new law will also bring the UK into line with other EEA countries.

Companies must buy back shares out of distributable reserves, and these shares must not at any time exceed 10% of their issued share capital (surplus treasury shares must be disposed of within 12 months). Whilst held in treasury, these shares will not carry any voting rights or be entitled to a dividend.

27 List the six limits on the buying back of shares mentioned in the text.

28 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?

29 Which noun collocates with these verbs in the text?

buy back cancel hold in treasury transfer re-issue

30 Complete the following phrases from the text using the prepositions in the box.

into (x2) to (x3) under with

- 1 current company legislation ...
- 2 ... amendments the regulations ...
- 3 ... a new company law will come force ...
- 4 This new legislation will only apply company shares that are listed on the London Stock Exchange's official list, ...
- 5 This change company law ...
- 6 The new law will also bring the UK line other EEA countries.



Unit 3

To improve your web-based research skills, visit www.cambridge.org/elt/legalenglish, 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 1–3. 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 the following 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

Reading 1: 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.

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

Key terms: Opposing concepts in company law

- 2 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
- 3 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.



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.

Listening 1: 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 the following listening exercise, you will hear a lawyer speaking to a group of business owners. Each of these business owners is considering acquiring another business.

- 4  Listen to the first part of the presentation and choose the correct answer to each of these questions.
- Which of these is the most likely entry for the talk in the programme?
 - Mr A. Crawford of Corporate Restructuring (evening session)
 - Mr A. Cranford of Mergers and Acquisitions (evening session)
 - Mr A. Crawford of Mergers and Acquisitions (evening session)
 - Mr A. Crawford of Mergers and Acquisitions (morning session)
 - What is the speaker's aim?
 - to provide the business owners with an overview of the law of mergers and acquisitions
 - to persuade the business owners that they should use this opportunity for their businesses to grow
 - to inform the business owners what they can expect if they decide to carry out an acquisition
 - to tell the business owners about the process of making their businesses more attractive as potential targets
 - Which of the following topics will *not* be included in the presentation?
 - factors involved in deciding on a company to acquire
 - staffing issues after an acquisition
 - evaluating the prospective acquired company
 - details of one specific deal the speaker has carried out
- 5  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.
- The important legal steps that must be carried out in the course of the acquisition process can be completed in any sequence.
 - 'Due diligence' refers to the process of gathering and analysing financial information and other relevant information about a business before it is acquired.
 - One aspect of due diligence is verifying ownership of intellectual property.
 - In the course of due diligence, the acquirer should terminate all of the target company's contracts with suppliers.
 - A warranty is written statement by a party attesting that a fact relevant to the deal is true.
 - The target may provide indemnities to protect the acquirer against future liabilities.

Text analysis: Beginning a presentation

In Listening 1, 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 part 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.

- 6  The following 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.

- 7 Match the phrases from Exercise 6 (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

Reading 2: 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?

- 8 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?

- 9 Decide which of these phrases (a–d) best expresses the topic of each paragraph (1–4).

- a Advantages of IRS Code Section 355
- b Reasons for creating spin-offs
- c Definition of the term *spin-off*
- d Various types of spin-offs

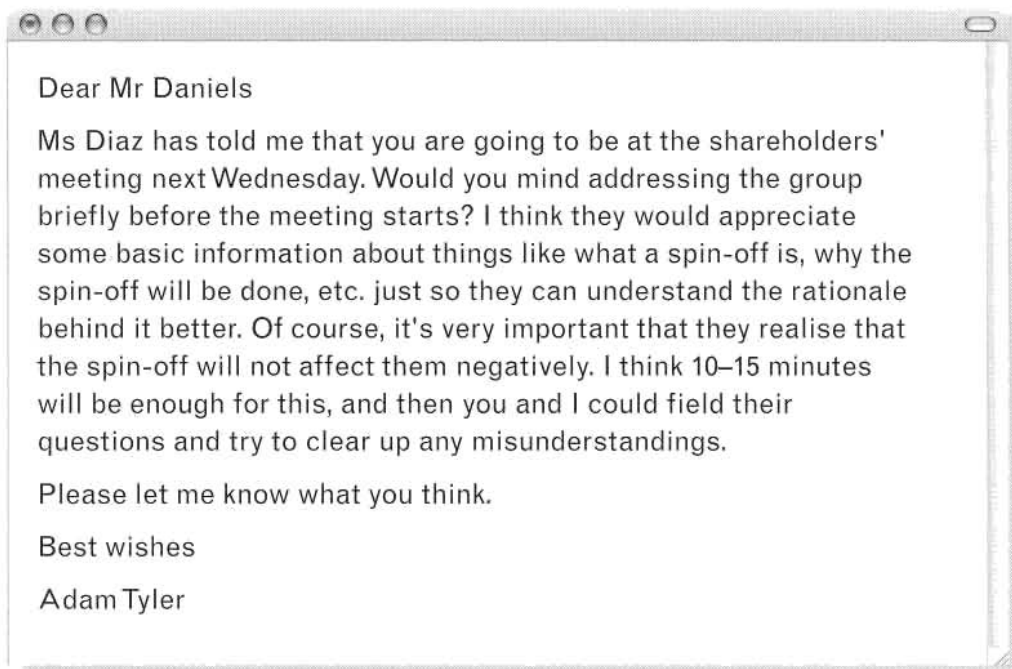
- 1** The term 'spin-off' refers to any distribution by a corporation to its shareholders of one of its two or more businesses. Sometimes the spun-off business is transferred first to a newly formed subsidiary corporation. The stock of that subsidiary is then distributed to the shareholders of the distributing 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. Non-pro-rata spin-offs are sometimes referred to as 'split-offs'. A non-pro-rata spin-off that results in one group of shareholders holding all the stock of the distributing corporation and a second group holding all the stock of the former subsidiary corporation is referred to as a 'split-up'.
- 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.

10 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?

Speaking: Presenting a spin-off

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





- 11 Using the presentation in Listening 1 as a model and the information from Reading 2, prepare the beginning of such a presentation.
- 12 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.)

Listening 2: 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 will hear two lawyers discussing such a checklist. A more experienced lawyer guides his younger colleague through the list of actions to be taken and documents to be filed.

- 13  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?

14  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
<ul style="list-style-type: none"> • Check the memorandum of association to identify the company's 1) See also <i>authority to increase capital</i> under Articles. Consider whether creation of new shares will involve variation of class rights. If so, appropriate consents may be required. 	
<ul style="list-style-type: none"> • Has the company issued all its share capital? 	
<ul style="list-style-type: none"> • 2) of increase of share capital. 	
<ul style="list-style-type: none"> • Convene 3) at reasonable notice: Normal procedure or consider using written resolution procedure. 	
<ul style="list-style-type: none"> • Ensure a quorum of 4) is present at the board meeting. 	
<ul style="list-style-type: none"> • Directors have to 5) that they will put the increase of share capital to vote at an extraordinary general meeting (EGM). 	
<ul style="list-style-type: none"> • Convene an EGM by notice or use written resolution procedure. 	
<ul style="list-style-type: none"> • If written resolution procedure is not used, notice to shareholders must state: <ul style="list-style-type: none"> a date b time c place d proxy e ordinary resolution f consent to 6) 	
<ul style="list-style-type: none"> • Ensure the 7) presides at the EGM and that a quorum of shareholders is present. 	
<ul style="list-style-type: none"> • Pass the ordinary resolution by 8) on a show of hands or by poll. 	
<ul style="list-style-type: none"> • Draw up board and EGM minutes. 	
<ul style="list-style-type: none"> • Lodge at Companies House 9) days: <ul style="list-style-type: none"> a ordinary resolution; b notice of increase of 10) (Form 123); c amended memorandum and (if necessary) articles of association. 	

Language use 1: 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 the following examples from the listening text:

Well, **the first thing** you have to do is 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.*

- 15** 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.

Reading 3: 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**.

- 16** Discuss these questions.

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

- 17** The text on page 56 is the minutes of a meeting held by board members of a small company. Read through the minutes quickly. Why was the board meeting called? 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, 2005, 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

18 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?

19 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?

Language use 2: Collocations

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

21 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

Reading 4: Shareholder rights

The letter on page 58 has been written by an American lawyer in response to a query concerning the rights of a shareholder.

22 Read the letter and discuss these questions.

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

23 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 550,000 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

- 24 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 |

- 25 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.

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.*

- 26 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?

- 27 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 3 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.

SAMPLE
ANSWER
» p. 288



Unit 4

To improve your web-based research skills, visit www.cambridge.org/elt/legalenglish, 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 <i>pro-rata</i> distribution | a before |
| 2 <i>under</i> Internal Revenue Code Section 355 | b enter into |
| 3 <i>prior to</i> distribution | c determining |
| 4 <i>become a party to</i> a transaction | d according to |
| 5 <i>no consideration</i> is paid | e actual |
| 6 <i>de facto</i> merger | f relevant |
| 7 <i>applicable</i> statutes | g payment |
| 8 provisions <i>governing</i> merger | 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, <u>d</u> istribute	<i>distribution</i>
	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 and 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 **1takeover (to take over) by one company of another, the transfer of a whole or part of a company's **2345** (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 **678****

- 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: Speaking

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
- act honestly and in good faith with a view to the best interests of the corporation; and
 - 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 director or senior officer becomes aware of in his or her corporate capacity;
 - a director or senior executive should know the outside party is offering to the corporation;
 - a director or senior executive, who became aware of it through the use of corporate information, should know the corporation would be interested in;
 - 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

Reading 1: 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.

- 1 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 Upon which 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 Under the common law¹, a promise becomes an **enforceable** contract when there is an **offer** by one **party (offeror)** that is **accepted** by the other party (**offeree**) with the 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 general 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. (See Unit 7 for a more detailed look at assignment and third-party rights.)

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.

Key terms: Defences to contract formation

2 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

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

- | | |
|---------------------------------|---|
| 1 Acceleration | 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 |
| 2 Assignment | 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 |
| 3 Confidentiality | c clause outlining when and under which circumstances the contract may be terminated |
| 4 Consideration | 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 |
| 5 Force Majeure | 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 |
| 6 Liquidated Damages | f clause setting out which party is responsible for payment of costs related to preparation of the agreement and ancillary documents |
| 7 Entire Agreement ² | g clause expressing the cause, motive, price or impelling motive which induces one party to enter into an agreement |
| 8 Severability | 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 |
| 9 Termination | i clause prohibiting or permitting assignment under certain conditions |
| 10 Payment of Costs | 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 |

² (US) also Merger (The term **Parol Evidence** is used in both the UK and the USA.)

- 4 Add the name of each clause type (or its nearest equivalent) in your language to the list in Exercise 3.
- 5 Identify the type of clause listed in Exercise 3 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.
- 6 In your own words, explain the following words and expressions in italics from the clauses in Exercise 5.
- 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 *deemed* (clause 6)

Reading 2: A covenant

The text on this page and the next 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.

7 Briefly scan the agreement and answer these questions.

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

8 Read the text 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.

cont./

- 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 _____

9 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

Speaking 1: 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 ...

10 Working with a partner, take turns paraphrasing the contents of each of the clauses (1–6) in the agreement on pages 67–68. Explain the contents of the clauses as if you were speaking to a client with little knowledge of the law.

Listening 1: 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 2, and term sheets.

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.

11 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 | <input type="checkbox"/> |
| 2 phrases and expressions for negotiators | <input type="checkbox"/> |
| 3 using agreement templates and term sheets | <input type="checkbox"/> |
| 4 classic 'tricks' used by negotiators | <input type="checkbox"/> |
| 5 general negotiating techniques | <input type="checkbox"/> |
| 6 dealing with objections from the other side | <input type="checkbox"/> |
| 7 different types of agreements usually encountered | <input type="checkbox"/> |
| 8 recognising a good deal | <input type="checkbox"/> |
| 9 role-plays | <input type="checkbox"/> |

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

- 1 What do you think the speaker means by *horse-trading*?
- 2 What does the speaker say about the purpose of a merger clause?

Language use 1: 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 1 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 listening text contains several other examples of phrases that can be used to give emphasis to a point, in speaking as well as in writing.

13 Look at the first two paragraphs of the transcript of the presentation (Part II) on page 267 and underline the phrases used for giving emphasis to a point. Which of them can be made stronger by adding the adverbs mentioned above?

Writing: 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.

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

- | | |
|------------------------|--|
| 1 A heading | 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). |
| 2 The subject line | b individual points should be organised in descending order of importance, i.e. most important ones first, subordinate or supporting points later. |
| 3 The context | c is a clear call to action – an explanation of what should be done in what way, by whom and by what date. |
| 4 In the main message, | d includes the components <i>Date</i> , <i>To</i> , <i>From</i> and <i>Subject</i> . |
| 5 The action close | e states the main idea of the memo in less than ten words. |

15 Identify the elements from Exercise 14 in this internal memo.

Memorandum

To: All members of the legal staff of the Mergers & Acquisitions department
From: John Thornton
Date: 10 February 2006
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, 13 February by email (j.thornton@lawfirm.com) whether you can attend.

J. Thornton


16 Having attended the in-company seminar on effective contract negotiations (Listening 1), you have been asked by your superior to draft a memo for some of the junior colleagues who were not present at the talk. Your superior is particularly interested in the points made in connection with the careful use of contract templates and term sheets. He would like you to write a memo summarising the three most important points raised by the speaker. You should include:

- a subject line;
- an introductory statement of the reason for writing;
- a brief discussion of the context or relevant background information;
- a short explanation of each of the three points;
- a concluding remark pointing to the future;
- and an offer to provide further information or assistance as needed.

Include some of the phrases for giving emphasis to points as discussed in Language use 1. Read the transcript on pages 266–267 again before you prepare the memo.

Listening 2: Contract negotiation

Lawyers are commonly requested to conduct contract negotiations on behalf of clients, particularly in matters in which strong negotiating skills are required. In Listening 2, you will 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.

17  Listen to the negotiation. What kind of agreement are they talking about? Which clauses do they mention?

18  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.

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

Language use 2: 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 20 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.]

20  Listen to the negotiation in Listening 2 again and tick the expressions you hear the lawyers use.

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

21 Decide whether the phrases in Exercise 20 are used to a) make a proposal, b) respond favourably, or c) reject a proposal. Which phrase is the most forceful for rejecting a proposal?

Speaking 2: Negotiating an agreement

22 Role-play this situation with a partner. Use as many of the phrases for negotiating from Exercise 20 as you can.

Student A: Turn to page 305.

Student B: Turn to page 306.

Reading 3: E-contracts

The text on pages 73–74 appears on the website of an American company whose stated mission is 'to make legal information more accessible'. The text deals with electronic contracts, or 'e-contracts'.

23 What do you know about e-contracts? Are they used often in your jurisdiction? What other words do you know that begin with *e-* (meaning *electronic*)?

24 Read through the text quickly and complete the spaces (1–5) using these sentences (a–e).

- a Consumer advocates are concerned because the federal electronic signature law does not define an electronic signature or stipulate what technologies can or should be used to create an electronic signature.
- b An electronic contract is an agreement created and "signed" in electronic form.
- c The law also benefits business-to-business websites who need enforceable agreements for ordering supplies and services. For all of these companies, the new law is essential legislation because it helps them conduct business entirely on the Internet.
- d Security experts currently favour the cryptographic signature method known as Public Key Infrastructure (PKI) as the most secure and reliable method of signing contracts online.
- e The notice must also indicate whether your consent applies only to the particular transaction at hand, or whether the business has to get consent to use e-documents/signatures for each transaction.

New law makes e-signatures valid

Contracts created online are now as legal as those on paper

While contract basics *generally* apply to any contract, regardless of form, there are some new and emerging rules that apply *specifically* to contracts created online. Thanks to federal legislation *recently* signed into law, electronic contracts and electronic signatures are just as legal and enforceable as traditional paper contracts signed in ink. The law, known as the Electronic Signatures in Global and International Commerce Act, removes the uncertainty that *previously* accompanied e-contracts. However, consumer groups worry that the law doesn't *adequately* protect against online fraud and may create disadvantages and penalties for consumers who prefer printed agreements.

What are electronic contracts and electronic signatures?

1) An e-contract can also be a "Click to Agree" contract, *commonly* used with downloaded software; the user clicks an "I Agree" button on a page containing the terms of the software license before the transaction can be completed.

One of the more difficult electronic contract issues has been whether agreements made in a *purely* online environment were "signed" and therefore *legally* binding. Since a traditional ink signature isn't possible on an electronic contract, people have used several different ways to indicate their electronic signatures, including typing the signer's name into the signature area, pasting in a scanned version of the signer's signature, clicking an "I Accept" button, or using cryptographic "scrambling" technology. While the term "digital signature" is used for any of these methods, it is becoming standard to reserve the term for cryptographic signature methods, and to use "electronic signature" for other paperless signature methods.

Are e-signatures secure?

2) PKI uses an algorithm to encrypt online documents so that they will be accessible only to authorized parties. The parties have "keys" to read and sign the document, thus ensuring that no one else will be able to sign *fraudulently*. Though its standards are still evolving, it is expected that PKI technology will become *widely* accepted.

No paper needed

The most significant legal effect of the new e-signature law is to make electronic contracts and signatures as *legally* valid as paper contracts. The fact that electronic contracts have been given solid legal support is great news for companies that conduct business online. Under the law, consumers can now buy almost any goods or services—from cars to home mortgages—without placing pen to paper. 3)

Federal law versus state law

The federal electronic signature law won't override any state laws on electronic transactions provided the state law is "*substantially* similar" to the federal law or the state has adopted the Uniform Electronic Transactions Act (UETA). This ensures that electronic contracts and electronic signatures will be valid in all states, regardless of where the parties live or where the contract is executed.

Do you want paper or electronic?

If you prefer paper, the law provides a means for you to opt out of using electronic contracts. An online company must provide a notice indicating whether paper contracts are available

and informing you that if you give your consent to use electronic documents, you can later change your mind. If you withdraw consent to use electronic contracts, the notice must explain what fees or penalties might apply if the company must use paper agreements for the transaction. 4)

Prior to obtaining your consent, the business must also provide a statement outlining the hardware and software requirements to read and save the business's electronic documents. If the hardware or software requirements change while you have a contractual relationship with the business, the business must notify you of the change and give you the option to revoke your consent to using electronic documents.

Although the e-signature law doesn't force consumers to accept electronic documents from businesses, it poses a potential disadvantage for low-tech citizens by allowing businesses to collect additional fees from those who opt for paper.

Consumer concerns

5) The law establishes only that electronic signatures in all their forms qualify as signatures in the legal sense, and leaves it up to software companies and the free market to establish which electronic signature methods will be used.

Since electronic-signature technology is still evolving, many kinds of e-signatures offer little, if any, security. If a consumer uses an insecure signature method, identity thieves could intercept it online and use it for fraudulent purposes. It is expected that secure methods of electronic signatures will be adopted and become as commonplace as credit cards. However, stolen electronic signatures have the potential to become as widespread a problem for e-commerce as credit-card scams and stolen passwords. Consumer-protection groups suggest caution before signing anything online.

25 Read the text again and answer these questions.

- 1 What is the difference between a digital signature and an electronic signature?
- 2 What is the most important result of the new law?
- 3 Why do business-to-business websites welcome the new law?
- 4 What does the new law stipulate concerning the use of paper contracts?
- 5 According to the law, which kinds of electronic signatures are to be regarded as legal signatures?

26 Read through the text once more, noting the advantages of the new law and any (possible) disadvantages that could arise as a result of the new legislation.

Advantages of new law	(Possible) disadvantages of new law

Discuss these advantages and disadvantages with a partner. Do you think the disadvantages outweigh the advantages?

27 Answer these questions.

- 1 Why do you think the drafters of the law left 'electronic signature' undefined? Is this an advantage or disadvantage?
- 2 What is the status of electronic contracts in your own jurisdiction?

Language use 3: Adverbs

Adverbs often serve to modify (or describe) verbs, but they are also used to modify adjectives or other adverbs.

28 The text on pages 73–74 has several examples of adverb + verb (and a few adverb + adjective) combinations. Write them in the table below (the adverbs are indicated in the text in italics).

Adverb + verb	Adverb + adjective

29 Which noun in the sixth section of the text (*Do you want paper or electronic?*) collocates with the following verbs?

to obtain, to withdraw, to rescind, to get, to give

30 Match these words from the text (1–6) with their synonyms (a–f).

- | | |
|---------------|-------------------|
| 1 revoke | a additional fees |
| 2 prefer | b inform |
| 3 enforceable | c get |
| 4 penalties | d opt for |
| 5 obtain | e valid |
| 6 notify | f withdraw |



Unit 5

To improve your web-based research skills, visit www.cambridge.org/elt/legalenglish, 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.

- enforceable / unenforceable contract
- implied / contract
- binding / contract
- valid / contract

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

between by (x2) 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.

Reading 1: 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 Read the first two paragraphs of the text. Which of the key terms in the second paragraph is a synonym for *damages*?
- 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 two parties enter into a real-estate contract and the seller decides to sell to a third party, 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; for example, if there has been a **default** by one party, the other party may rescind or cancel the contract. 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.

Key terms: Types of damages

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

- | | |
|--|---|
| 1 expectation damages / 'benefit of the bargain' 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 |
| 2 general/actual damages | b compensation determined by the amount of benefit unjustly received by the breaching party |
| 3 liquidated/stipulated damages | c compensation for losses which are as a result of special facts and circumstances relating to a particular transaction which were foreseeable by the breaching party at the time of contract |
| 4 reliance damages | d compensation which seeks to put the non-breaching party in the position he would have been had the contract been performed |
| 5 restitution damages | e compensation for a loss that is the natural and logical result of the breach of contract |
| 6 special/consequential damages | f compensation which is imposed by the court to deter malicious conduct in the future |
| 7 punitive/exemplary damages | 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 |

4 What types of damages are distinguished in your jurisdiction? Write the equivalent names in the list in Exercise 3.

Reading 2: Liquidated damages

The following text 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.

- 5 Read the first paragraph. How are liquidated damages clauses defined?
- 6 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

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

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.

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.

7 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 whether the stipulated damages are intended as a penalty or not depends largely on the reasonableness of the amount.

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

9 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.....

Language use 1: 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 ...

- 10 Underline phrases referring to the actions and rulings of the court in the text on pages 80–81.
- 11 Decide which of these verbs can be used in place of the underlined words in the box on page 81. Is the meaning the same as the original phrase or does it change?
- agrees is hesitant to overturned rejected reversed rules
is unwilling to
- 12 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.

Listening 1: 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.

- 13  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 There are four types of cases where specific performance can be applied.
- 14  Listen to the rest of the talk and complete the 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 on non-breaching party

Language use 2: Using repetition to aid understanding

The speaker in the previous listening exercise uses 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.

- 15 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.

Speaking 1: Contract remedies

- 16 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.

Reading 3: Understanding contract clauses

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

- 17 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*.


18 For each of these words, find the italicised word or expression in the clause on page 83 that most closely matches its meaning.


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

Listening 2: Remedies

In the following dialogue, an attorney, Mrs 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.

19  Listen to the first part of the lawyer–client interview. Why couldn't the client deliver the website to the customer on time?

20  Listen to the second part of the interview. What is the lawyer going to do next?

21  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? | <input type="checkbox"/> |
| 2 What are some of the features of the website you designed? | <input type="checkbox"/> |
| 3 Did you draft the contract yourselves or did you engage an attorney? | <input type="checkbox"/> |
| 4 Were you able to deliver your website on time? | <input type="checkbox"/> |
| 5 Did you get in touch with anyone besides your cousin, say, another programmer here in town? | <input type="checkbox"/> |
| 6 How much do programmers get paid per hour in New York? | <input type="checkbox"/> |
| 7 Did they know what your deadline was? | <input type="checkbox"/> |
| 8 Do you expect to lose the customer as a result of this? | <input type="checkbox"/> |

22 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 According to the lawyer, what should her client have done to mitigate his damages?
 - a He should have offered his customer less than a 10% discount.
 - b He should have looked for a cheaper local programmer.
 - c He should have had an attorney draw up the contract.
- 3 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
- 4 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.

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

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.

24 Complete the spaces (1–5) in the table 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	<i>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?</i>
Explaining what will happen in the interview	<i>I'll be asking you some questions about the situation ... We'll be spending the next hour discussing the facts of your case ...</i>
Discussing circumstances	<i>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 ...</i>
2)	
Identifying the nature of the dispute	<i>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.</i>
Summarising the nature of the dispute	<i>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, ...</i>
3)	
Asking open questions to gather information	<i>What happened next? What did you do then?</i>
Avoiding digressions	<i>Let's return to the course of events. Please tell me more about what happened.</i>
4)	
Establishing facts to support or negate a theory	<i>(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?</i>
Asking about detail	<i>I need to know more about ... Allow me to ask you more about ... Can you explain why ...</i>

5)	
Assessing the case	<i>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 ...</i>
Describing next moves	(examples from listening text) <i>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.</i>
Referring to next contact	<i>I'll call you next week and let you know how things look. You'll hear from me in a few days.</i>
Saying goodbye	<i>It was good seeing you. Thank you for entrusting me with this matter. Goodbye!</i>

Speaking 2: Initial interview with a client

25 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 in the role of lawyer, follow the outline of a lawyer–client interview in the table above 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 305.

Student B: Turn to page 306.

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.

26 Read the follow-up email on page 87, which was written after the interview you heard in Listening 2, 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 page 268 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.

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

27 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 will likely be in court

28 Using the notes you have taken and the information included on your role card in Exercise 25, write an email to the client you interviewed.

Reading 4: Types of breach

Different types of breach of contract can be distinguished, among them **anticipatory breach**, **material breach** and **immaterial breach**.

29 This letter of advice deals with a case of anticipatory breach. 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 contracts 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

30 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 above letter by completing the following 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 the following 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, ...

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



Unit 6

To improve your web-based research skills, visit www.cambridge.org/elt/legalenglish, 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
<u>remedy</u>	<u>remedy</u>
	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 2.

verb + *damages*

- | | |
|-----------------------------|-------------|
| 1 <i>incur</i> damages | a agree on |
| 2 <i>stipulate</i> damages | b get back |
| 3 <i>ascertain</i> damages | c bring on |
| 4 <i>recover</i> damages | d expect |
| 5 <i>anticipate</i> damages | e determine |

verb + *a clause*

- | | |
|---------------------------|-------------------|
| 6 <i>insert</i> a clause | f disapply |
| 7 <i>sever</i> a clause | g put into effect |
| 8 <i>draft</i> a clause | h add |
| 9 <i>enforce</i> a clause | i write |

- 5 **Collocations with *damages* and *a clause*** 2 The verbs in the box commonly collocate with either *damages* or *a clause*. Match the verbs 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 / of / 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 the following adjective–noun combinations from Reading 4 (1–6). Match each of the adjectives (in italics) with its synonym (a–f).

- | | |
|----------------------------------|--------------------|
| 1 <i>instant</i> case | a profitable |
| 2 <i>contractual</i> obligations | b in the agreement |
| 3 <i>categorical</i> refusal | c useless |
| 4 <i>futile</i> preparations | d sound |
| 5 <i>lucrative</i> prospects | e present |
| 6 <i>solid</i> grounds | f complete |

Reading 1: 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.

- 1 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 in the contract, 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

Key terms: Contracts

- 2 Distinguishing assignment from novation** 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)**

- 3 Collocations** Complete these verb–noun collocations as they appear in Reading 1. 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)

Language use 1: 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).

- 4 Complete these pairs of *-or/-ee* words from Reading 1. Can you think of any others?

1 p^{romisor}..... p^{romisee}.....

2 d..... d.....

3 o..... o.....

4 a..... a.....

Speaking 1: Explaining third-party rights

Paragraphs 1 and 3 of Reading 1 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.

- 5 How is this question handled in your jurisdiction? Tick the sentence that applies to your jurisdiction and discuss with a partner.
- Third-party rights arise immediately at the time the contract is made.
 - Third-party rights do not arise until the third party acquires knowledge of the rights and agrees to accept the benefits.
 - Third-party rights do not arise until the third-party beneficiary has changed his position in reliance upon the contract.
 - Third-party rights as described above are not recognised.

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.

Reading 2: Understanding contract clauses

Reading 1 introduced assignment clauses, which govern the contracting parties' rights to assign rights and delegate duties to others. The passage below looks at a right of first refusal clause.

- 6 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'?

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.

- 7 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?

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

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



Listening 1: 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.

The following dialogue deals with a lawyer's preparation of a contract-related lawsuit. In the first part of the dialogue, you will hear Ron, the lawyer preparing the case, talking with Sam, a senior partner in Ron's law firm, about the facts of the case.

- 9  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.
- 10 Discuss the case with a partner. What kind of argument would you make in this case? What would you have to prove in court?
- 11  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?

Reading 3: Follow-up email

The email on page 97 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.

- 12 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?

Subject: Keats case: update and closing argument
Attached: Draft version of closing argument: Keats v. Jones Corp

Hi Sam

Haven't been around for the last couple of days – I've been in court on the Keats case. You asked me to keep you posted on how things are going – I have to say, it's going pretty well. I've finished drafting my closing argument for tomorrow. Would you mind looking at the draft and letting me know what you think of it? I'm basically quite satisfied with it, but I would still appreciate getting some input from you.

It would be great if you could give me some feedback on this. Can I ask you to send it to me by 5 p.m.? That way I'll be able to make any changes that you think are necessary.

I look forward to hearing your suggestions.

Best

Ron

Language use 2: 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 above 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.

13 Look at the email again and underline other examples of verbs + *-ing* form.

14 Read the following pairs of sentences and decide which one is correct.

- 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 contact 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 defendant delayed responding to the plaintiff's request.
b The defendant delayed to respond to the plaintiff's request.

15 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 defendant 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 defendant's attorney suggested that his client needed more information before he could agree to the assignment.

Reading 4: A closing argument

The draft of Ron's closing argument appears on page 99. Sam's comments on the text are written in the margin.

16 Read the closing argument and tick which kinds of information about the prospective buyer the defendant's lawyer requested.

- | | |
|---|--------------------------|
| 1 birth certificate | <input type="checkbox"/> |
| 2 university diploma | <input type="checkbox"/> |
| 3 documents proving experience in the restaurant business | <input type="checkbox"/> |
| 4 a business plan | <input type="checkbox"/> |
| 5 letter of recommendation | <input type="checkbox"/> |
| 6 completed commercial lease application | <input type="checkbox"/> |
| 7 CV | <input type="checkbox"/> |

17 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.

18 Match the words in italics (1–5) with their definitions (a–e).

- | | |
|-----------------------------------|-------------------------------|
| 1 <i>arbitrary</i> considerations | a unsuccessful |
| 2 <i>credibility</i> of witnesses | b state something is true |
| 3 <i>predicated on</i> a dispute | c not based on reason, random |
| 4 defendant <i>asserts</i> | d can be believed |
| 5 attempt is <i>unavailing</i> | e based on |

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 defendant that he had a prospective buyer for his business, the defendant's 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 defendant's lawyer also provided my client with a commercial lease application for the buyer to complete. My client gave the defendant the completed application and information on the buyer and promptly responded to each of the defendant's requests for information.
- 4 As acknowledged by the defendant's 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 defendant to make a decision and that its delay was unreasonable. Furthermore, there was evidence that the defendant's 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.
- 5 Based on the evidence presented, the court must conclude that sufficient evidence supports a determination that the defendant unreasonably withheld consent to the assignment.
- 6 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 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.

If it was perfect, then no justifiable reason for withholding! Jones had nothing to lose if he approved assignment.

Key point, needs to be stressed more: expert says enough information was provided. Again, no reasonable reason for withholding.

What kind of evidence?

This point needs more emphasis! Jones lost a suit to Keats five years ago - that's the reason for the animosity!

Did your client expressly inform his landlord of this? In writing? If so, then say so.

Text analysis: Persuasive writing and speaking

The closing argument presented above 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.

19 Read Ron's closing argument in Reading 4 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

Writing: Memo giving advice

20 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:


SAMPLE
ANSWER
»p.292

- 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.

Listening 2: 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.

21  Listen and discuss Ron's closing argument with a partner. Do you think it's convincing?

Speaking 2: 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.

- 22 Practise saying the following 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.
- 23 ◀ Listen again to the last section of Ron's closing argument (from *Based on the evidence ...*) and read the transcript on page 270. As you listen, underline the words or phrases which are given emphatic stress.
- 24 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 ...
- 25 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.

Language use 3: Phrases referring to evidence

- 26 Match these phrases from Reading 4 (1–3) with their paraphrases (a–c).
- | | |
|---|--|
| 1 to <i>give weight to</i> evidence | a to arrive at conclusions about facts based on the evidence |
| 2 to <i>draw inferences of fact from</i> evidence | b the evidence provides a basis for a judicial decision |
| 3 <i>the evidence supports</i> a determination | c to consider evidence important |
- 27 Ron wins the case against the Jones Corporation on behalf of his client. Using the phrases referring to evidence in Exercise 26, write three sentences about the outcome of *Keats v. Jones Corp.*

Reading 5: 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 below is an excerpt from a capital markets report published periodically by a large law firm. The aim of this newsletter is to 'help our clients and friends understand trends and legal developments in various areas of the law'.

28 Read the text quickly. What is its subject?

29 Read the text again, then match each of these headings (a–e) with the paragraph it summarises (1–5).

- a** Other means of granting rights remain effective
- b** Extending third-party rights under certain circumstances
- c** The new law and when it takes effect
- d** A change in the principle related to contractual relationships
- e** Contract writers must consider third-party rights

UK enacts third-party rights statute

1)

On 11 November, 1999, the Contracts (Rights of Third Parties) Act 1999 became law in England, Wales and Northern Ireland. The act applies to contracts governed by English law or the law of Northern Ireland entered into beginning 11 May, 2000. It also applies to each English law contract entered into beginning 11 November, 1999 which expressly provides for its application.

2)

The new statute has a significant effect on a variety of contracts, and, as contracts are at the heart of business transactions, on business in general. It fundamentally alters the English law principle of privity of contract that permits only parties to a contract to enforce its terms, even if the contract clearly purports to confer a benefit on a third party.

3)

The statute enables a person that is not a party to a contract to enforce its terms if the contract expressly provides that the non-party may do so, or if one or more terms of the

contract purport to confer a benefit on the non-party, unless on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the non-party.

4)

Therefore it becomes important that contract drafters take into account whether any third party has been given rights under a contract. The parties may agree in the contract to exclude the application of the statute. If this is not done, one or more of the parties may be exposed to unexpected claims by third parties who were not intended to be beneficiaries of the contract.

5)

The new act does not affect rights granted to third parties by means other than the act itself. Therefore, if the parties to a contract wish to grant third-party rights under it, they may continue to do so through the use of collateral contracts, novations, assignments, deed polls, trust relationships and other established English law mechanisms.

30 Answer these questions.

- 1 Which contracts does the new law apply to?
- 2 According to the new law, under which circumstances may a person who is not a party to a contract enforce its terms?
- 3 What advice is given in the article to drafters of contracts?

31 Match these words from the text (1–5) with their definitions (a–e).

- | | |
|---------------------|------------------|
| 1 enacts | a writers |
| 2 construction | b leave out |
| 3 drafters | c interpretation |
| 4 take into account | d makes into law |
| 5 exclude | e think about |

32 How does this new statute compare to the laws governing third-party rights in your own jurisdiction?

Speaking 3: Discussing and evaluating sources of information

33 The newsletter on page 102 appeared on a website which supplies information to lawyers and their clients.

- 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.

- In-house seminars
- Legal publications (in paper form)
- Online legal journals
- Law conferences
- Internal company memos or reports
- University courses
- Colleagues
- Government websites
- Law firm websites
- Other



Unit 7

To improve your web-based research skills, visit www.cambridge.org/elt/legalenglish, 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 (x4) 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 (x5) under (x2)

- 1 A party to a contract may transfer the rights arising under the contract to another.
 - 2 Privity of contract refers to the fact that only the actual parties to a contract should have rights and liabilities under the contract.
 - 3 A third-party beneficiary contract is formed when the parties intend to confer a benefit on a third party.
 - 4 The benefit under a contract is an enforceable right against 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, franchisee* d 3 mortgage
2 lease 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
<u>de</u> legate	<u>de</u> legation	<u>de</u> legator, <u>de</u> legate, <u>de</u> legatee
assign		
	obligation	
imply		
	intention/intent	
consult		
	enactment	
	rebuttal	
construe		
determine		
	draft	
transfer		

Reading 1: 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.

1 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 | e Labour law |
| b Employment tribunals | f Protecting the disabled |
| c Terms of employment | g Recruitment |
| d Employment legislation | |

- 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 **redundancy¹ 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 union²**.

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 law³ 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.

³ (US) labor law

Key terms: Employment

2 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.

3 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 situations do you think could result in such a claim for compensation?

4 Match the words to form collocations as they appear in Reading 1.

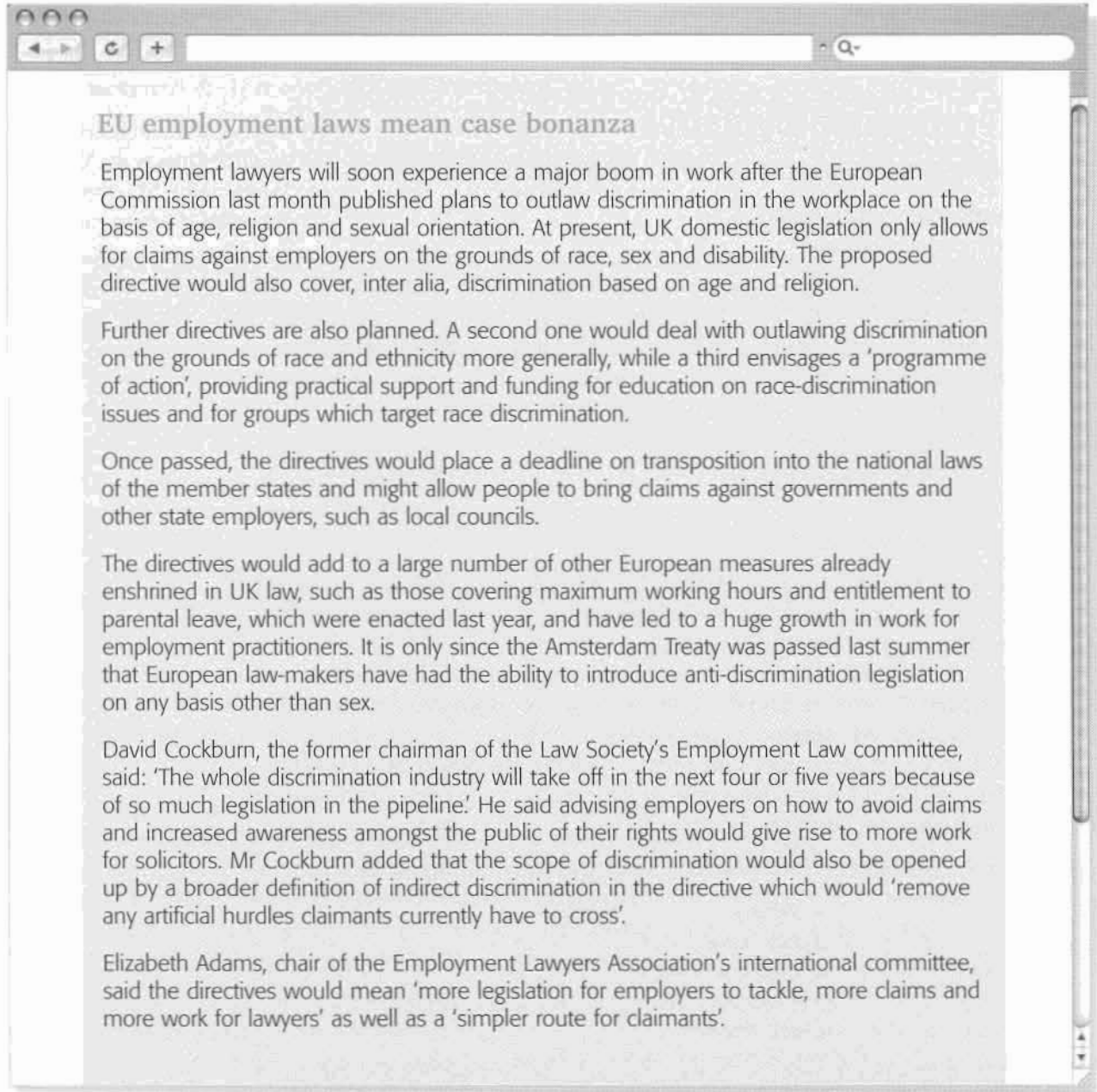
- | | |
|-----------|------------------|
| 1 sex | a origins |
| 2 marital | b dismissal |
| 3 ethnic | c discrimination |
| 4 holiday | d status |
| 5 unfair | e entitlement |

5 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?

Reading 2: EU directives on employment

The following text, which appeared in an online gazette for lawyers, deals with changes that would likely result from the implementation of planned EU directives on employment.

- 6 Look at the title and read the first paragraph of the text. What do you think *case bonanza* means? Why will there be a case bonanza?
- 7 Read the first two paragraphs. What does each of the three planned directives deal with?



The screenshot shows a web browser window with a title bar containing three window icons, navigation buttons (back, forward, refresh, home), and a search bar. The main content area displays an article with the following text:

EU employment laws mean case bonanza

Employment lawyers will soon experience a major boom in work after the European Commission last month published plans to outlaw discrimination in the workplace on the basis of age, religion and sexual orientation. At present, UK domestic legislation only allows for claims against employers on the grounds of race, sex and disability. The proposed directive would also cover, inter alia, discrimination based on age and religion.

Further directives are also planned. A second one would deal with outlawing discrimination on the grounds of race and ethnicity more generally, while a third envisages a 'programme of action', providing practical support and funding for education on race-discrimination issues and for groups which target race discrimination.

Once passed, the directives would place a deadline on transposition into the national laws of the member states and might allow people to bring claims against governments and other state employers, such as local councils.

The directives would add to a large number of other European measures already enshrined in UK law, such as those covering maximum working hours and entitlement to parental leave, which were enacted last year, and have led to a huge growth in work for employment practitioners. It is only since the Amsterdam Treaty was passed last summer that European law-makers have had the ability to introduce anti-discrimination legislation on any basis other than sex.

David Cockburn, the former chairman of the Law Society's Employment Law committee, said: 'The whole discrimination industry will take off in the next four or five years because of so much legislation in the pipeline.' He said advising employers on how to avoid claims and increased awareness amongst the public of their rights would give rise to more work for solicitors. Mr Cockburn added that the scope of discrimination would also be opened up by a broader definition of indirect discrimination in the directive which would 'remove any artificial hurdles claimants currently have to cross'.

Elizabeth Adams, chair of the Employment Lawyers Association's international committee, said the directives would mean 'more legislation for employers to tackle, more claims and more work for lawyers' as well as a 'simpler route for claimants'.

8 Read the whole text and decide whether these statements are true or false.

- 1 A directive concerning entitlement to parental leave will soon be made into law in the UK.
- 2 David Cockburn thinks the discrimination industry will expand over the next few years because so many new laws have been passed.
- 3 Once passed, EU directives apply immediately to member states.
- 4 Elizabeth Adams thinks that the directives will make it easier for employees to file a complaint against an employer.

9 Match these words or phrases from the text (1–4) with their synonyms (a–d).


- | | |
|------------------------------------|--|
| 1 to outlaw something | a a person asserting a legal right which has been violated |
| 2 to bring a claim against someone | b a right to benefits specified by law or contract |
| 3 entitlement | c to make something illegal |
| 4 claimant | d to assert a legal right alleged to have been violated |

Listening 1: 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.

The following telephone conversation is 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.

10  Listen and tick the actions that Gwen will take following the phone conversation.

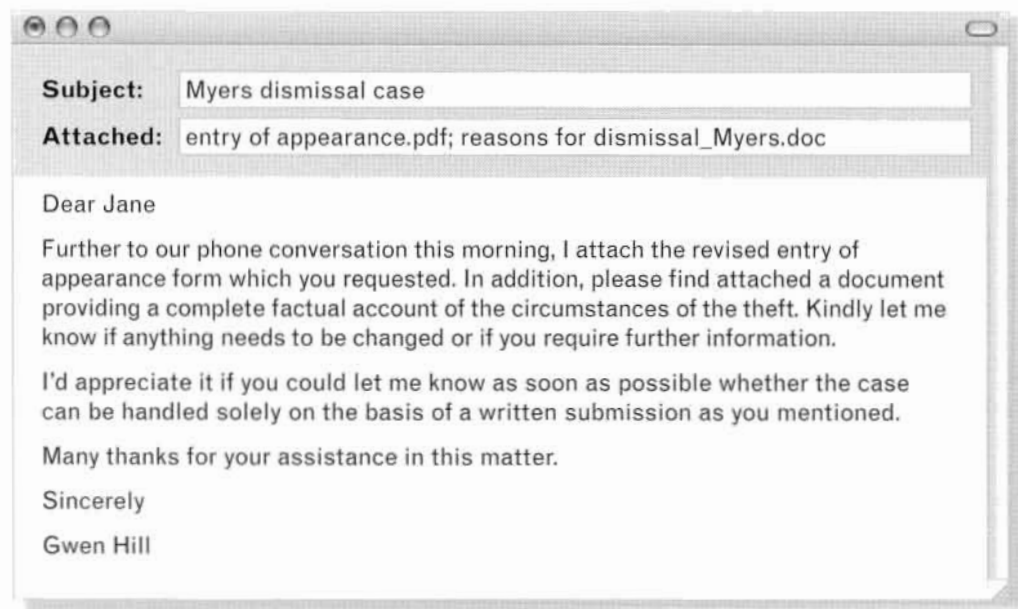
- | | |
|--|--------------------------|
| 1 attend a managers' meeting | <input type="checkbox"/> |
| 2 contact the employment tribunal personally | <input type="checkbox"/> |
| 3 inform the management about the status of the case | <input type="checkbox"/> |
| 4 send an email with the requested document | <input type="checkbox"/> |
| 5 discuss the case with the dismissed employee | <input type="checkbox"/> |
| 6 write an exact account of the circumstances leading to the dismissal | <input type="checkbox"/> |

11 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 believes the claimant's case is weak
 - b when the defendant wants to present all of the evidence at the full hearing
 - c when the defendant wishes to inform the court who will be representing him/her
- 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

Writing 1: Attachments and formality

12 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.



13 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?

14 Match these formal expressions (1–10) from the email on page 110 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 |

15 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.

Reading 3: 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 on page 112 provides information about the outcome of a case heard by an employment tribunal.

16 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**

17 Read through the article more carefully and answer the questions below.

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.

- 1 Who do you think the text was written for?
- 2 What was the case about? Who were the claimants, and who were the defendants?
- 3 What is a 'landmark case'?
- 4 According to the claimants, what prevented them from becoming senior partners at their firm?
- 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.

Listening 2: Liability risks

Lawyers often advise their clients how to avoid claims arising from work-related disputes, such as the one discussed in Reading 3, 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.

18  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.

Language use: Expressing an opinion, agreeing and disagreeing

19 In the course of the interview in Exercise 18, 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
- A expressing agreement
- D expressing disagreement
- 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 have 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 ...*

20 Which phrases in Exercise 19 do you think express agreement strongly?

21 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.

Speaking: Agreeing and disagreeing

22 Using the phrases for agreeing and disagreeing presented above, 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.

Reading 4: Unfair dismissal

The article below and on page 115 presents an alternative means of dealing with employment rights disputes. It appeared on a website offering news and analysis on European industrial relations.

- 23 The article is divided into three parts. Read the three headings. Which of the three sections do you think primarily contains opinions and attitudes?
- 24 Look at the first section of the text. Underline the explanation of how employment tribunals work, as well as the four adjectives describing the new arbitration scheme.
- 25 Read the whole text. Whose opinions of the arbitration procedure are reported? Why does the writer describe the introduction of the new scheme as ironic?

Determining unfair dismissal cases by arbitration

Since 21 May 2001, a voluntary arbitration procedure in unfair dismissal cases has been available to employers and employees in England and Wales as an alternative to the traditional way of resolving such cases via employment tribunals.

Compared with 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, the new arbitration scheme, administered by the Advisory, Conciliation and Arbitration Service (ACAS), is intended to be 'speedy, informal, confidential [and] non-legalistic'.

Key features of the scheme

There are significant differences between the new arbitration scheme and the conventional employment-tribunal process. The key features of the ACAS arbitration scheme are as follows:

- The scheme is entirely voluntary and is available only in respect of unfair dismissal claims. It can be used only where both parties agree to it and *waive* certain rights they would have at an employment tribunal.
- Hearings will be held in private in such places as an ACAS office or a hotel and will normally be completed within half a day. Written statements of their case may be submitted by the parties in advance.
- The case will be *heard* by an experienced arbitrator, chosen by ACAS, not the parties themselves. Legal representatives may be used by the parties.
- There is no set format for the hearing. Arbitrators have a general duty to act fairly and impartially between the parties, giving each party a reasonable opportunity to *plead* his or her case and respond to that of the other party. The process is intended to be 'inquisitorial' or 'investigative', rather than adversarial as in tribunal hearings – no cross-examination will take place.
- Each party covers their own costs in attending the hearing. However, if a dismissal is found to be unfair, the arbitrator can include in the calculation of any compensation a sum to cover the costs incurred by the employee in attending the hearing.
- Arbitrators are required to *apply* EC law and the Human Rights Acts 1998 (on which a legal adviser may be appointed to provide guidance), but otherwise, instead of applying strict legal tests and case law, the arbitrator's decision will have regard to 'general principles of fairness and good conduct in employment relations'.
- As with unfair dismissal cases determined by an employment tribunal, reinstatement, re-engagement and compensation are the available remedies if the dismissal is not upheld. Unlike tribunal cases, however, the award is confidential to ACAS and the parties, and the arbitrator's decision will be final and binding.
- There is only very limited scope for *appealing* or *challenging* the arbitrator's award.

Commentary

It remains to be seen what impact the new arrangements will have. Lawyers and other commentators are uncertain about the merits and likely attractiveness of the new scheme. Some have expressed concern that, because the criteria for arbitrators' decisions ('general principles of fairness and good conduct in employment relations') differ from the statutory tests applied by the tribunals, a 'two-tier' system of justice may develop. It has also been suggested that the arbitration scheme offers employers and employees less certainty of outcome, and that the confidentiality of awards may mask variable standards within the arbitration scheme.

Some lawyers think that the confidentiality of proceedings under the arbitration scheme may be a significant attraction to employers who want to avoid the damaging publicity sometimes associated with tribunal cases. Conversely, however, some lawyers predict that the fact that the process is private may make arbitration less attractive to dismissed employees. According to this view, arbitration lacks the 'embarrassment value' of public tribunal hearings which may lead to favourable out-of-court settlements for dismissed employees. The limited grounds for appealing against an arbitrator's decision are considered a disadvantage for employers.

The irony of the new arbitration scheme is that employment tribunals were themselves intended as an 'easily accessible, informal, speedy and inexpensive' alternative to the ordinary courts for dealing with individual employment disputes when the UK's unfair dismissals legislation was first introduced 30 years ago.

26 Read the article again and decide whether these statements are true or false.

- 1 Arbitration is intended to be faster and less formal than the traditional process of resolving employment disputes.
- 2 In the arbitration scheme, parties will not be questioned by the other party's representative.
- 3 In reaching a decision, an arbitrator is obliged to apply case law and legal tests.
- 4 Some lawyers fear that arbitration will lead to double standards in the resolution of employment disputes.
- 5 The confidentiality of arbitration appeals to those who have been dismissed from work, as it causes less embarrassment.
- 6 Employers regard the fact that it is difficult to appeal a decision made by an arbitrator to be a considerable advantage of the arbitration system.

27 Match these adjectives from the text (1–5) with their synonyms (a–e).

- | | |
|----------------|---------------|
| 1 voluntary | a huge |
| 2 key | b traditional |
| 3 vast | c private |
| 4 confidential | d important |
| 5 conventional | e optional |

28 Match these verbs (1–6) with their definitions (a–f). The verbs are in italics in the article.

- | | |
|----------------|---|
| 1 to waive | a to formally request that a decision of an inferior body be reviewed by a superior one |
| 2 to hear | b to argue a case in court |
| 3 to plead | c to give something up |
| 4 to apply | d to make use of something (when deciding a case) |
| 5 to appeal | e to question something |
| 6 to challenge | f to listen to a case at a relatively formal proceeding |

29 Match the verbs (1–6) with the nouns in the box that they collocate with in the article. Some of the nouns go with more than one verb.

an award a law a case rights

- | | |
|------------|----------------|
| 1 to hear | 4 to apply |
| 2 to waive | 5 to appeal |
| 3 to plead | 6 to challenge |

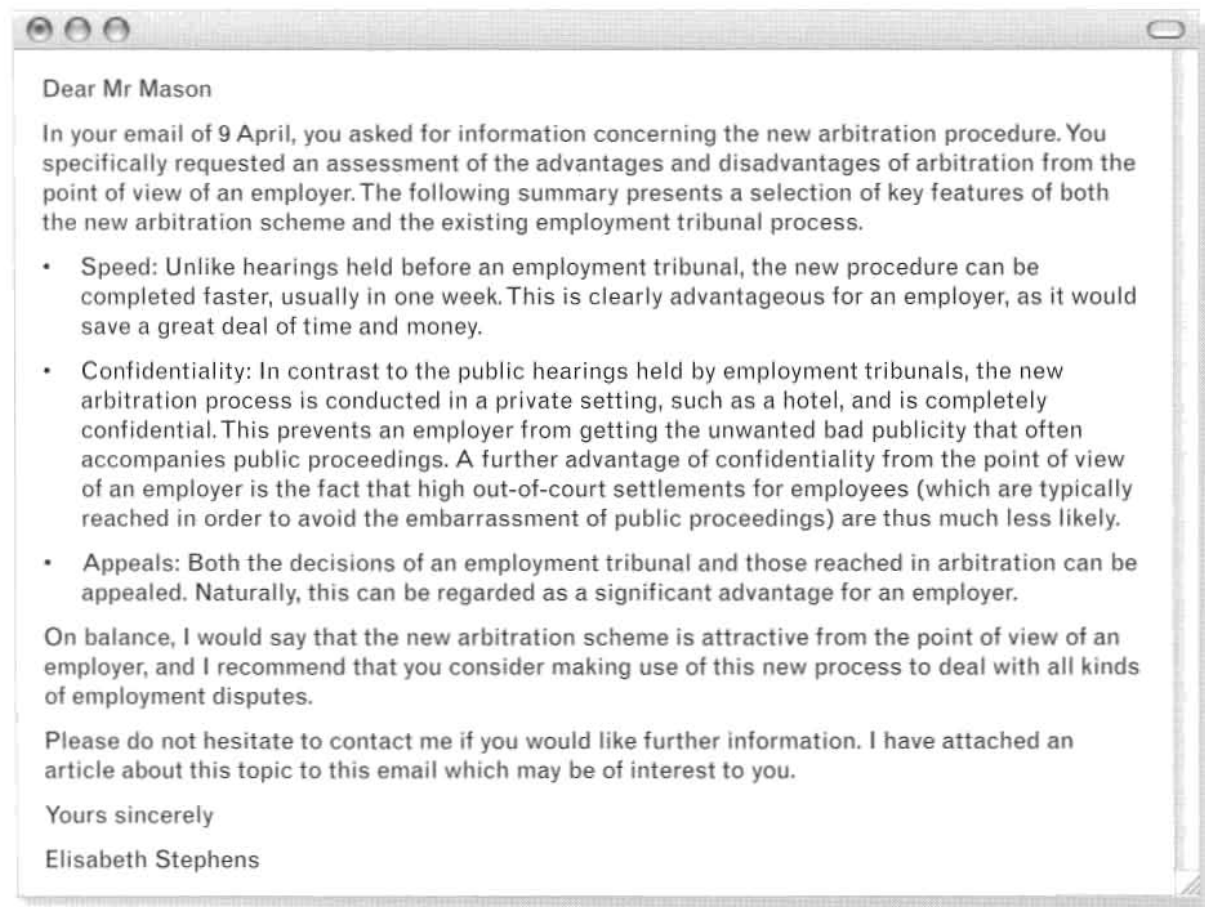
Can you add any more?

30 How does the arbitration procedure described in the text compare with the arbitration system used for handling employment disputes in your jurisdiction?

Writing 2: Advising on advantages and disadvantages in an email

A lawyer has received a request from a client who employs a large number of people and has to deal with employment rights disputes on a regular basis. The client has asked for general information about the arbitration process described in Reading 4 in a short, easy-to-understand memo. He wants to know how it compares with employment tribunals, and what the advantages and disadvantages are of arbitration from the point of view of an employer.

31 Read this email, written in response to the above request. Some of the information it contains is incorrect. Find three factual mistakes and correct them.



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 disputes.

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

- 32 When comparing complex ideas in a clear and simple way, it is advisable to decide on an overall organising principle. Generally speaking, two approaches to organising ideas are available to the writer:
- A Listing and explaining the advantages and disadvantages of one system and then the other;
 - B Choosing key points – such as confidentiality – and discussing each system in respect of these criteria.
- 1 Which method of organising a comparison 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?
- 33 Rewrite the email on page 116 using method A to organise the information. Correct the factual mistakes and make use of some of the following phrases for comparing and indicating advantages/disadvantages:

SAMPLE
ANSWER
»P.294

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/legalenglish, 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 **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 from from in of off on on to
to under via with

- 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 whole discrimination industry will take in the next four or five years because of so much legislation the pipeline.
 - 7 One directive would deal with outlawing discrimination the grounds of race and ethnicity.
 - 8 Once passed, the directives would immediately become binding EU member states.
- 5 **Verbs** Complete this text, 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 complaints 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.'

Reading 1: 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.

1. 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 often 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 warranties would include warranties of title, **fitness for a particular purpose**, and **quality** or

¹ (US) *good* can be used in the singular in US English

merchantability. Many times the application of the latter two 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.

Key terms: Sale of goods

2 Warranties Match these types of warranties and concepts related to warranties (1–7) with their definitions (a–g).

- | | |
|-------------------------------|--|
| 1 express warranty | a a warranty that the goods being sold are suitable for the purpose for which the buyer is purchasing them |
| 2 implied warranty | 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) |
| 3 warranty of fitness | 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 |
| 4 warranty of merchantability | 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 |
| 5 warranty of title | e a negation or restriction of the rights under a warranty given by a seller to a buyer |
| 6 breach of warranty | 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 |
| 7 disclaimer of warranty | g a warranty which is not explicitly stated but that is imposed by the law due to the nature of the transaction |

3 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 pay for	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	

- 4 Most of the words in the right-hand column of the table in Exercise 3 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.

word	definition	sample sentence	collocations/usage
wares	<u>small items for selling</u> in a market or on the street, but not usually in a shop; or, a <u>company's products</u>	<i>The company must do more to promote their wares overseas.</i>	<i>to promote / to peddle (= sell) wares</i> word ending: -ware <i>hardware, tableware, kitchenware</i> Also: <i>warehouse</i>
merchandise	(formal style) <u>goods</u> that are bought and sold	<i>Being allowed to return or exchange merchandise is a privilege, not a legal right.</i>	<i>used / damaged / retail / wholesale merchandise</i> <i>merchandising: products tied in to popular film, etc.</i>

- 1 What do you think of the way vocabulary is recorded in the excerpt above?
- 2 How do you record vocabulary?
- 5 Choose one section of the table in Exercise 3, 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.

Language use 1: 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.

- 6 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).
- | | |
|-----------------------------|--|
| 1 claims and credit | 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. |
| 2 changes or cancellation | b Contains, among other things, provisions governing the ownership of the goods and exactly when the peril of loss is shifted from the vendor. |
| 3 delivery | 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. |
| 4 indemnification of vendor | d Contains provisions governing the manner in which orders for goods are submitted by the buyer and accepted by the vendor. |
| 5 limitation of remedies | 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. |
| 6 orders | f Contains provisions governing the time and manner of any complaints by the purchaser regarding the goods. |

- | | |
|-----------------------------|--|
| 7 prices and payment | 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. |
| 8 retention of title | 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. |
| 9 title and risk | 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. |
| 10 warranties | 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. |

7 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.

Listening 1: 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. The following listening text is 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.

- 8 Listen to the first part of the presentation. According to the speaker, why is it a problem if the ROT clause is interpreted as a charge?
- 9 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.
- 10 Choose the best answer to each of these questions.

- 1 What is the main purpose of a retention of title clause?
- to prevent the liquidation of the buyer
 - to protect the seller in the event of the insolvency of the buyer
 - to enable the seller to profit from the manufacture of the goods sold to the buyer
- 2 Why don't sellers register every ROT clause as a charge?
- It would be too expensive to register every one.
 - It is not permitted to register every one.
 - 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?
- so the seller can prove to a liquidator which goods belong to him
 - so the seller can keep a record of which buyer has bought his goods
 - 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?
- so that the buyer will not claim additional property that does not belong to him
 - so that the goods are not used to produce a product, thus becoming impossible to recover
 - so that the buyer will have access to the place where the goods are stored

- 11 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.

- 12 Does the clause above have the five characteristics of a well-drafted ROT clause mentioned by the speaker?


charge¹ =
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

Listening 2: 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'.

- 13**  Listen to the case brief. What exactly is the product involved in the dispute? What is the central legal issue in the case?
- 14** 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 Court compared buying shrink-wrapped software with buying an airline ticket, as both involve payment before the terms of sale are fully known to the consumer.
 - 4** The UCC states that a vendor may not propose limitations on the kind of conduct that constitutes acceptance of the terms of a contract.
 - 5** According to the Court, the respondent had to acknowledge the terms of sale, since he could not use the software without doing so.

Text analysis: A case brief

- 15** Read the transcript on pages 271–272 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?
- 16** 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.
- 17** Complete the spaces (1–9) in the explanation on page 126 of how to prepare a case briefing using phrases in the box (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

plaintiff: 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)

² (US) also petitioner

³ (US) also appellee

Writing and Speaking: A case brief

- 18** Following the guidelines for presenting a case brief given on page 126, prepare a case brief dealing with an issue related to the sale of goods. (You will have to research this issue first.)
- 19** Make an oral presentation of the brief.

Reading 2: Retention of title

The law-journal article on page 128 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?

- 20** Read the text, 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
- 21** Read the text 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.
- 22** Complete these phrases and collocations from the text 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

Retention of title clause created a trust, not a charge

- 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 a 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.

23 Underline the phrases in the text used to introduce these components.

EXAMPLE: **a** The ruling or holding of a 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

24 Find the phrases in italics in the text 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

Language use 2: Talking about corresponding laws and institutions

The first paragraph of Reading 2 contains the sentence *The fact 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 ...*

25 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/legalenglish, 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 plaintiff 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	<u>disclaimer</u>
	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)** of 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)** in accordance **4)** with and governed **5)** by and enforced **6)** under 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 | <input type="checkbox"/> |
| b told about | <input type="checkbox"/> |
| c suitability | <input type="checkbox"/> |
| d resulting from | <input type="checkbox"/> |
| e denies | <input type="checkbox"/> |
| f acceptable quality | <input type="checkbox"/> |
| g restriction | <input type="checkbox"/> |
| h for no reason | <input type="checkbox"/> |
| i in the present condition | <input type="checkbox"/> |

Case Study 2:

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 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: Speaking

Work with a partner. Follow steps 1–3 below for each role-play.

Role-play 1

Student A: You are the client, a representative from Lehigh Steel.

Student B: You are the lawyer.

Role-play 2

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 do you think your client should 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 willingness or unwillingness 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.

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.

Reading 1: 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.

- 1 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 The term *reversion* refers to the passing of real property to the State when the owner of the property has died and has no legal heirs.
 - 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** and **personal property**. Real property is a general term for land, **tenements** and **hereditaments**. On the other hand, personal property refers to everything which does not fall under the heading of real property. This brief summary addresses key terms in relation to real property.
 - 2 Real property can be divided into **freehold estates** and **leaseholds**. Freehold estates are those whose duration is not determined. By contrast, the duration of a leasehold is fixed or capable of being fixed. Essentially, there are four types of freehold estate: the **fee simple**, the **fee tail**, the **life estate** and the estate *pur autre vie*.
 - 3 As its name suggests, a fee simple refers to a whole interest in a piece of real property and may pass through sale, **inheritance** or reversion, i.e. when the owner dies and there are no persons alive who have the right of inheritance, the property reverts to the State. Reversion is also referred to as an **escheat**. A fee tail is an inheritable estate which lasts as long as the original **grantee** or any of his descendants live. A life estate is an estate granted only for the life of the grantee. When the **life tenant** dies, the **remaindermen** take possession, or the land reverts (see above). An estate *pur autre vie* is similar to a life estate, except that the estate is granted for the life of someone other than the grantee.
 - 4 A leasehold is generally created through what is referred to as a **lease**, which is a contract for **exclusive possession**, generally for a **term of years**, usually for a specified **rent** or compensation. 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.
 - 5 Generally speaking, 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. For land sales, the Statute of Frauds requires a formal writing.
 - 6 There are numerous other areas of real property law which commercial lawyers deal with on a day-to-day basis. Real property law includes such things as **easements**, **usufructs**, **mortgages** and other **financing measures**.

Key terms: Parties referred to in real property law

- 2 The key terms *heir*, *grantee* and *tenant* all appear in the text on page 134. 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 | a a person who transfers property / a person to whom property is transferred (in real property law synonymous with <i>assignor/assignee</i>) |
| 2 grantor/grantee | 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 <i>lessor/lessee</i>) |
| 3 landlord/tenant | c a person who has died / a person who is entitled to inherit property |

Language use 1: Contrasting ideas

Two ideas can be contrasted with each other using the words *whereas* and *while*:

*Real property refers to land and anything permanently attached to the land, **whereas/while** personal property refers to all other property.*

Both *whereas* and *while* can appear at the beginning of the sentence as well:

Whereas/While *real property refers to land and anything permanently attached to the land, personal property refers to all other 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 ...*

- 3 Contrast these key terms using *whereas* or *while*. You may need to consult the glossary.
- | | |
|-------------------------------|-----------------------|
| 1 freehold estate / leasehold | 3 lease / licence |
| 2 fee simple / fee tail | 4 easement / usufruct |

Language use 2: Classifying and distinguishing types or categories

Classification is an effective way to structure complex information so that it can be more easily understood by listeners. Paragraphs 1, 2 and 6 of the text on page 134 contain verbs and phrases for classifying ideas and distinguishing categories:

distinguish, divided, fall under the heading of, includes, is a general term for, refers to, types

- 4 Complete these sentences using the classification words and phrases in the second box on page 135.
- 1 English-speaking jurisdictions generally / *make a distinction* between real and personal property.
 - 2 Real property land, tenements and hereditaments which, upon the death of the owner, pass to his heirs.
 - 3 Personal property everything which does not real property.
 - 4 Real property can be / *classified / categorised / grouped* into freehold estates and leaseholds.
 - 5 Essentially, there are four / *kinds / classes / categories* of freehold estate: the fee simple, the fee tail, the life estate and the estate *pur autre vie*.
 - 6 Real property law / *encompasses* such things as easements, usufructs, mortgages and other financing measures.
- 5 Rewrite sentence 4 from Exercise 4 in four different ways, each using a different classifying phrase. Make changes in sentence structure or add words as necessary.

EXAMPLE: *Real property includes such things as freehold estates and leaseholds.*

Listening 1: 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. In the following listening exercise, you will 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.

- 6 Before you listen, discuss this question.

What other legal issues might an estate agent need to be informed about?

- 7  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?

- 8 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*.

Language use 3: 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, ...

- 9  Listen again or read the transcript on page 272. How does the speaker indicate a change to a new point? Add the signals to the list above.

Speaking 1: An aspect of real property law

- 10 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.

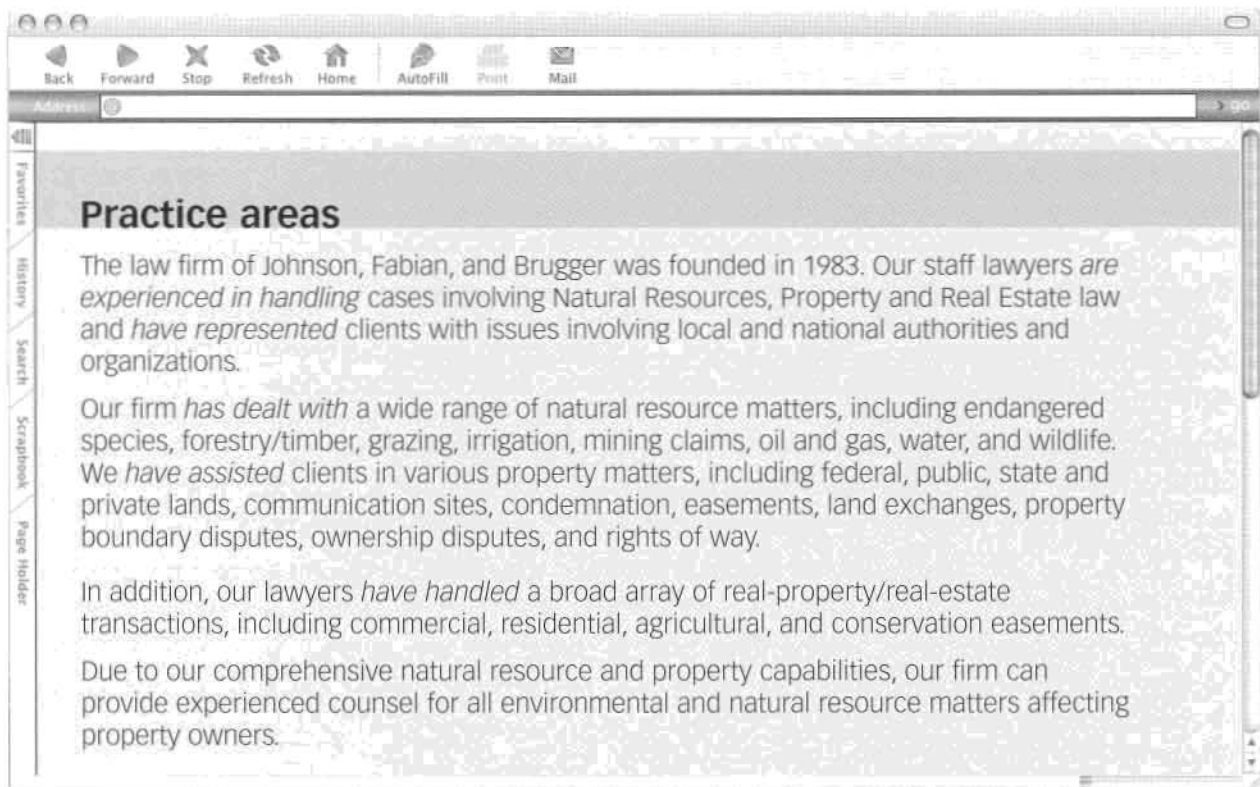
Some possible topics are:

- Types of tenancy agreements
- Types of concurrent ownership of property
- Types of estates
- Tenant's rights
- Landlord's rights

Reading 2: 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.

- 11 Read the competency statement of a large American law firm on page 138. What area of the law does the firm handle in addition to real property? What two types of disputes are *explicitly* named in the text?



12 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' property to Mr Simmons' 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.

13 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?

Writing 1: Describing a firm's practice areas

- 14 Using the phrases in italics in the text, 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.

Reading 3: 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.

- 15 Tick the sections or clauses you would expect to find in a lease tenancy.

Parties	<input type="checkbox"/>
Term	<input type="checkbox"/>
Non-competition	<input type="checkbox"/>
Statutory conditions	<input type="checkbox"/>
Confidentiality	<input type="checkbox"/>
Rent amount and payments	<input type="checkbox"/>
Acceleration	<input type="checkbox"/>
Method of payment	<input type="checkbox"/>
Force majeure	<input type="checkbox"/>
Deposit	<input type="checkbox"/>

Can you think of any other clauses and sections that are generally included in a lease?

- 16 Look at the title of the text on page 140. What are *statutory conditions*? Can you think of the kinds of thing that might come under statutory conditions in a lease agreement?
- 17 The text is an excerpt from a lease, setting forth the statutory conditions applying to the lease. Read it and complete the spaces (1–7) using these sub-headings.
- a** Abandonment and termination
 - b** Sub-letting premises
 - c** Entry of 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.

2 (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.

18 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.

19 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 or based on reason |
| 11 arbitrarily | k leaving and no longer using a property |

20 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 |

Now match the same verbs (1–4) with the nouns in the box they collocate with in the text.

consent law premises tenancy

Reading 4: 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 following account of a case was published in a law firm newsletter.

21. 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 landlord's 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.

22 Find words or phrases in the above 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 _____

Speaking 2: Case discussion

23 Discuss these questions in small groups.


- 1 What is the difference between reasonable precautions and possible precautions in the present case?
- 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?

Listening 2: 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.

24 What documents are required for the sale of real property in your country? Do many foreigners buy property in your country?

25  Listen to the following interview between a lawyer (Ms Blackwell) and her client (Mr Watson), who intends to buy a house in Spain.

- 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

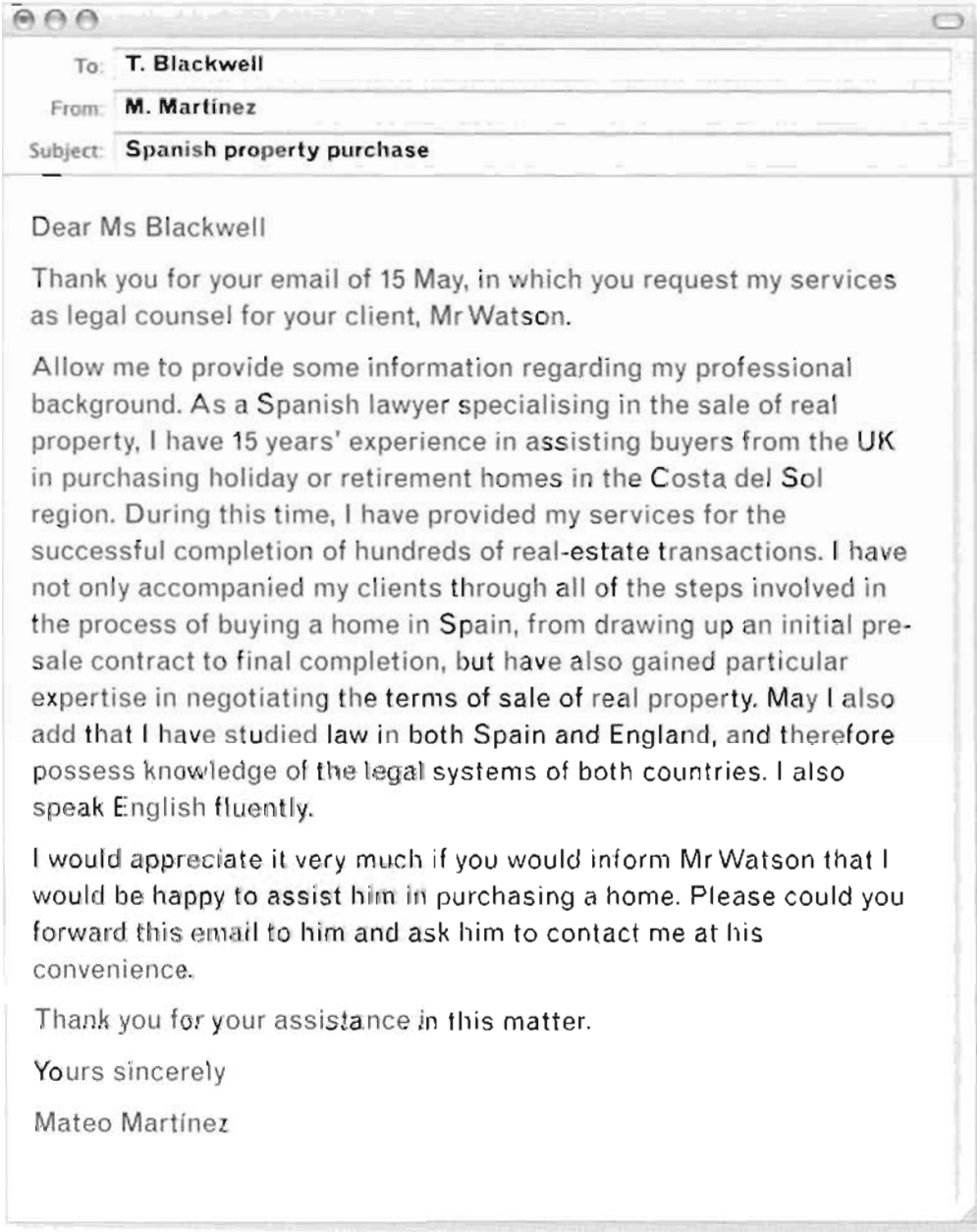
26 Decide whether these statements are true or false.

- 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 Señor 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.

Reading 5: Reference email

In the previous listening exercise, Ms Blackwell discusses the steps to be taken by Mr Watson and his Spanish solicitor, Señor Martínez, when purchasing a house in Spain. The following email, written by Señor Martínez, is referred to by Ms Blackwell in the dialogue. In the email, Señor Martínez provides an account of his professional experience as a lawyer.

- 27 According to the email, what is Señor Martínez's specific area of expertise? What else qualifies Señor Martínez to help Mr Watson?



To: T. Blackwell
From: M. Martinez
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 Martínez

Writing 2: Summarising and requesting

28 The following 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 Señor Martínez's email again and find two more phrases to add to the list.

29 The English lawyer, Ms Blackwell, wants to respond to the email and to inform Señor Martínez of the matters she has discussed with their mutual client.

SAMPLE
ANSWER
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Write her email to Señor 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 pages 272–273);
- request copies of all documents Señor 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 these phrases from Exercise 28.

30 Using Señor Martínez's email as a model, write a brief account of your own professional experience as a lawyer to send to a prospective client.

SAMPLE
ANSWER
»p.297



Unit 10

To improve your web-based research skills, visit www.cambridge.org/elt/legalenglish, 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	<u>statutory</u>
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 liable Lessee 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 2004, 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 the list in 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.

Reading 1: 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.

- 1 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 of years, 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 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,

¹ (US) trademarks

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 States².

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.

² (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.)

Key terms: Intellectual property

2 Match the two halves of these definitions of key terms from the text. Consult the glossary 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.

3 Explain what is meant by these terms related to intellectual property rights in your own words. Use the sentences in Exercise 2 as models.

- 1 intangible rights
- 2 right of fair use
- 3 infringement of rights

Listening 1: 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.

The following listening exercise presents an extract from a seminar held for junior lawyers at a US law firm.

4 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 How many requirements does the speaker mention?

5 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 space.

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 synthesised chemical compound]
- Subject matters traditionally 6) patentability: abstract ideas
[in particular: business methods]

6 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.

Reading 2: 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 151.

7 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.

8 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?

9 Add the correct forms of the word *patent* to these phrases.

- 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

Writing: Notes for a case brief

SAMPLE
ANSWER
»P.297

10 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 151, 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

Reading 3: Business method patents

The legal opinion on page 153 was written by a senior lawyer in the law firm in which the seminar on business method patents was held.

11 Read the text and answer these questions. Ignore the missing sentences (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?

12 Read the text again and complete the spaces (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.

13 Match these words or phrases (1–4) with their definitions (a–d).

- | | |
|---|--|
| 1 to state unequivocally | a to be freely available to all and to not be protected by intellectual property rights |
| 2 to be within the public domain | b taking something from someone else and using it for your own benefit |
| 3 to review a decision | c to say clearly, without any doubt |
| 4 misappropriation | 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

Text analysis: Discourse markers as sentence openers

The text on page 153 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 3, 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*.

- 14 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	<i>As a consequence,</i>
Emphasising	
Giving an example	
Summarising	

- 15 Go back to Reading 1 and Reading 3. Look for any discourse markers used at the beginning of a sentence and add these to the table above.

Reading 4: 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.

- 16 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.

- 17 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 |

- 18 Complete this simplified account 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

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:

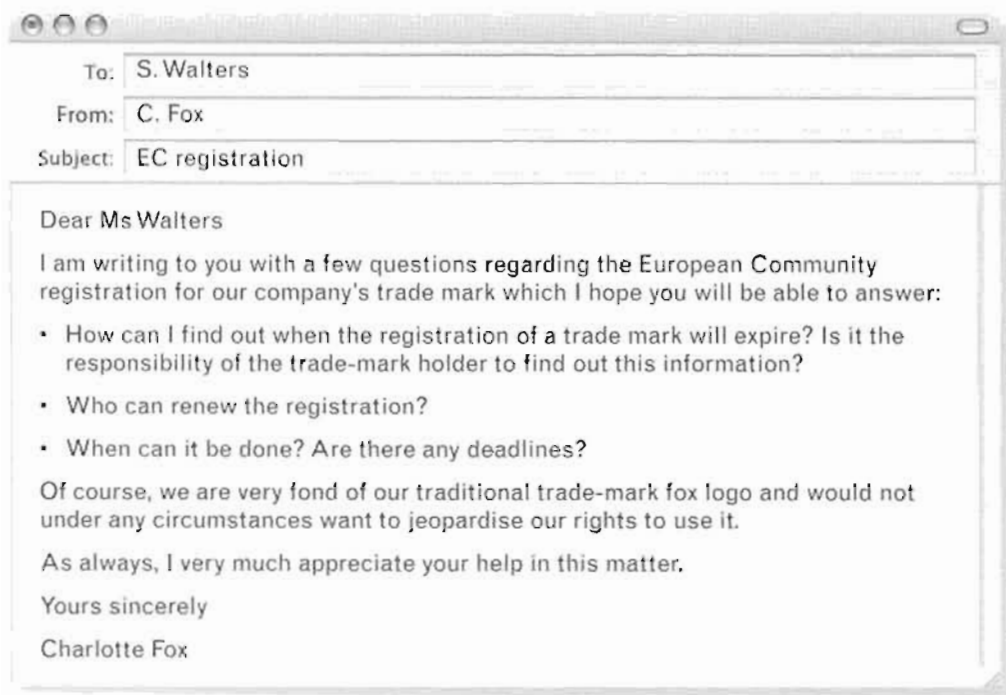
- Break long sentences down into shorter sentences.
- Make passive sentences into active ones:
The request may be submitted → *You can submit the request*
- Replace *shall* constructions with other verbs, depending on the meaning:
 - future forms: *Registration shall be renewed for those goods or services 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.

- 19 Read this paraphrase of paragraph 1 of Reading 4. What kinds of changes 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.

Paraphrase paragraphs 2–4 in plain language. Write down your paraphrase first and then read it aloud. Does it sound natural?

- 20 Read this email from a client of yours. What information is she requesting?



The screenshot shows an email client window with the following details:

- To: S. Walters
- From: C. Fox
- Subject: EC registration

The email body contains the following text:

Dear Ms Walters

I am writing to you with a few questions regarding the European Community registration for our company's trade mark which I hope you will be able to answer:

- How can I find out when the registration of a trade mark will expire? Is it the responsibility of the trade-mark holder to find out this information?
- Who can renew the registration?
- When can it be done? Are there any deadlines?

Of course, we are very fond of our traditional trade-mark fox logo and would not under any circumstances want to jeopardise our rights to use it.

As always, I very much appreciate your help in this matter.

Yours sincerely
Charlotte Fox

Write a response to Ms Fox's email using the information in Reading 4.

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.

Listening 2: 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. In the following listening exercise, you will 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.

21 Listen to the discussion and answer these questions.

- 1 How do Thomas and Rebecca describe 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, how many factors need to be taken into account when assessing fair use?

22 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.

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 158 provides further useful phrases for presenting and responding to ideas.

23 Complete the table below using these phrases, taken from Listening 2.

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 ...

<p>Asking for clarification</p>	<p>I'm not sure I follow you. Did you say that ...? Are you saying that ...? 1) Sorry, I'm not sure I understand.</p>
<p>Clarifying the issue</p>	<p>As far as I can see, the main issue is ... 2) 3) 4)</p>
<p>Restating your point</p>	<p>The point I'm trying to make is ... What I mean to say is ... 5) To put it another way ...</p>
<p>Adding a point</p>	<p>Let me add that ... Another point worth mentioning is ... 6) 7) And another thing to remember is ...</p>
<p>Expressing reservations about another speaker's opinion</p>	<p>Possibly, but ... 8) 9) 10) 11) I'm not sure about that. Don't you think ...?</p>
<p>Keeping your turn</p>	<p>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)</p>
<p>Continuing after an interruption</p>	<p>Going back to what I was saying, ... 13) To go back to my last point, ...</p>

24 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.

25 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/legalenglish, 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 3 using the prepositions in the box.

against for on to (x2)

- 1 to be eligible for something
 - 2 to be subject to the requirements of the Patent Act
 - 3 to bring litigation against someone
 - 4 to confer rights on someone
 - 5 to submit a patent application to the Patent and Trademark Office
- 5 **Adjective formation** Add the prefixes *dis-*, *in-*, *non-*, *un-* to each of the following 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 had been registered.
- 3 The court held that because two former business partners both behaved badly in the course of a trade-mark dispute, it would not enforce the trade-mark rights held by one party.
- 4 The appeals court upheld the decision of the trial court which ruled 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 infringed 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 be determined.
- 7 The court denied a request to issue an injunction against the sale of a book which the plaintiff alleged contained infringed copyrighted material.

Case Study 3:

Intellectual property law

The facts of the case

Your law firm has asked you to review the following intellectual property 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 are the legal issues here?

Fleming Co. ('Fleming') was a company responsible for assisting new immigrants entering the State of Bloomland. One of its responsibilities was to report certain information, such as dates of arrival and departure. In order to carry this out, Fleming contracted with Linxus Co. ('Linxus'), a software development company, to develop a system that would provide Fleming with access to a database over the Internet. In developing the software, Linxus used some software codes that it had previously designed and used to support website-based databases for other companies.

The contract between Fleming and Linxus to develop this software did not contain any express provision regarding ownership of copyright in the new database. When Fleming attempted to sub-license the software to another company, Linxus objected, and a dispute arose regarding what copyright rights Fleming had in the software, if any. Although not expressly written in the contract, Fleming argued that a term should be implied whereby Linxus assigns the copyright to Fleming, thereby granting Fleming the ability to sub-license the software to third parties.

Task 1: Speaking

Divide into two groups, with one group representing Fleming and one group representing Linxus.

- 1 Prepare for negotiations with the other party. 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 attempt to negotiate a settlement.
- 3 Report the results of your negotiations to the class.

Task 2: Writing

- 1 Rewrite the contract between Fleming and Linxus with your partner from the other side in order to incorporate your negotiated outcome.
- 2 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 or related cases and provide your opinion as to the likely outcome of the case.

Relevant legal documents

Text 1: excerpts from the contract between Fleming and Linxus

3 Development of software

Linxus hereby agrees to develop computer software for Fleming regarding an Internet-based database with respect to 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 repair, maintain and upgrade it for the purposes of Fleming's business.

8 Confidentiality

Fleming has released certain confidential information about its business practices and procedures to Linxus in order for Linxus to develop the Developed Software. Linxus agrees to keep all such information confidential, including the Developed Software and information regarding the Developed Software, and Linxus further agrees that it will not make use of the information on Fleming's operating procedures, other than what is strictly necessary for the development of the Developed Software.

Text 2: Copyrights Act of Bloomland, sections 11 and 91

- 11 (1) The author of a work is the first owner of any copyright in it, subject to the following provisions.
(2) Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.

- 91 (1) Where by an agreement made in relation to future copyright, and signed by or on behalf of the prospective owner of the copyright, the prospective owner purports to assign the future copyright (wholly or partially) to another person, then if, on the copyright coming into existence, the assignee or another person claiming under him would be entitled as against all other persons to require the copyright to be vested in him, the copyright shall vest in the assignee or his successor in title by virtue of this subsection.
(2) In this Part, "future copyright" means copyright which will or may come into existence in respect of a future work or class of works or on the occurrence of a future event; and "prospective owner" shall be construed accordingly, and includes a person who is prospectively entitled to copyright by virtue of such an agreement as is mentioned in subsection (1).

Text 3: excerpt from a case brief in the State of Bloomland

Bongarth Management v. Business Linx plc

In order for an implied term to be read into a contract if it has not been expressly included in the contract, it must:

- 1 be reasonable and equitable;
- 2 be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- 3 be so obvious that "it goes without saying";

- 4 be capable of clear expression; and
 - 5 not contradict any express term of the contract.
- The necessity (for business efficacy purposes) for an assignment of copyright would only be likely to arise in circumstances where the commissioner of the work requires the right to exclude the contractor from using the work and the ability to enforce the copyright against third parties.

Reading 1: 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.

- 1 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 instruments¹ 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 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**⁴.

¹ (US) *also* commercial paper

² (US) checks

³ (US) indorsement

⁴ (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.

A certificate of deposit is a bank's written acknowledgment 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**⁵.

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.

⁵ (US) also drafts

Key terms: Negotiable instruments

2 Complete these sentences using terms from Reading 1.

- 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.

3 These parties are all involved in the use of negotiable instruments. Match these parties (1–7) with their definitions (a–g).

- | | |
|------------|--|
| 1 bearer | a party who signs a note, cheque or other negotiable instrument and who promises to pay an obligation when due |
| 2 drawer | b party who has acquired possession of a negotiable instrument through proper negotiation for value, in good faith, and without notice of any defences to it |
| 3 drawee | c party who is in possession of a negotiable instrument payable to bearer or endorsed in blank |
| 4 endorsee | d party who issues or signs a bill of exchange or draft as a party ordering payment |

- 5** holder in due course **e** party to whom a cheque, draft or note is payable. The payee's name follows the words: 'Pay to the order of'.
- 6** maker **f** party on whom a bill of exchange or draft is drawn, and thus who is required to make payment
- 7** payee **g** party to whom a negotiable instrument is transferred by the act of endorsement

Reading 2: Promissory note

The following text is an excerpt from a US promissory note, which is a written promise to repay a debt at a certain time through a series of payments or on demand. Generally, a promissory note states the parties involved, the amount to be repaid and the terms of repayment [when the payments are to be made and how much interest is charged]. Additionally, some promissory notes include a kind of 'acceleration clause', stating under which circumstances the entire amount will become due.

DEMAND PROMISSORY NOTE

Principal: \$10,000

Date issued: March 31, 2006

Interest rate: 6% per annum

Maturity date: April 1, 2008
Soderton, New York

For value received, the undersigned ("Maker") promises to pay on demand to the order of Soderton National Bank ("Payee") at its offices at 99 Hartsdale Avenue, Soderton, New York, the principal sum of ten thousand dollars (\$10,000), together with interest at the rate and in the manner hereinafter provided for on the outstanding principal hereof from time to time until paid in full.

Interest shall accrue on the outstanding principal balance of this note commencing on the date hereof and continuing until repayment of this note in full at a rate per annum equal to 6%. Interest-only payments shall be made by Maker to Payee on or before the 1st day of each month.

Maker shall make all payments hereunder to Payee in US dollars.

The maturity of this note may be accelerated by Payee in the event Maker is in breach or default of any of the terms, conditions, or covenants of any other agreement with Payee or its affiliates. In the event of default in payment of any interest payments when due hereunder, the whole sum of principal and interest shall become immediately due and payable.

- 4 Read the note and answer these questions.
 - 1 When does the maker of this promissory note have to repay the principal?
 - 2 When are interest-only payments due?
 - 3 What happens in the event that the maker defaults on the payment of an instalment?
- 5 Explain these phrases from the note in your own words.
 - 1 for value received
 - 2 the undersigned
 - 3 on demand
 - 4 to be in default of the terms of an agreement

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

accrue due instalment interest maturity outstanding
principal

- 1 The cost paid by a borrower for the use of the money borrowed is known as
- 2 The is the amount borrowed from the lender, excluding interest.
- 3 An amount of money which has not yet been repaid is said to be
- 4 A debt is when the date is reached when it must be repaid.
- 5 When interest accumulates or increases, it is said to
- 6 is the date on which a debt becomes due for payment.
- 7 One of a series of payments made at intervals over a period of time is referred to as an

principal =

1) amount of money borrowed from a lender;

2) main or most important;

3) one of the parties to a transaction.

principle =

basic idea

explaining how

something

happens or

works

Speaking 1: Describing the legal situation: usury

In some jurisdictions, private individuals are required to charge a lower interest rate than financial institutions. The charging of an unlawfully high interest rate is known as usury. In most jurisdictions, usury is a criminal offence.

- 7 What is the situation in your jurisdiction? What is the limit on interest rates for private loans? What are the penalties for usury?

Listening 1: Drafting a promissory note

Lawyers sometimes assist their clients in drawing up negotiable instruments or in dealing with legal problems that arise in connection with their use. The following dialogue between a lawyer, Ms Benton, and her client, Mr Carter, concerns a poorly drafted promissory note.

- 8 Listen to the conversation and tick which of these formal requirements for the negotiability of an instrument Ms Benton mentions.
 - 1 The instrument must be in written form.
 - 2 The instrument must be signed.
 - 3 The instrument must state that it is 'payable to ...'.
 - 4 The instrument must state a sum certain in money.
 - 5 The instrument must state under which conditions it does not apply.
 - 6 The instrument must provide the name of a financial institution.
 - 7 The instrument must contain an unconditional order or promise to pay.
 - 8 The instrument must state that it is payable on demand or at a definite time.
- 9 Answer these questions.
 - 1 What are the two requirements which the client's promissory note does not meet?
 - 2 What condition did the borrower make regarding repayment?

Speaking 2: 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 ...

- 10 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 following promissory note meets all of the six requirements for negotiability referred to in Exercise 8, 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

March 31, 2006

Collegeville, Pennsylvania

\$30 00

FOR VALUE RECEIVED, and which must be received pursuant to agreement between the parties dated February 17, 2006, 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: *[Signature]*

Writing 1: Summarising requirements

- 11 Following their interview about the poorly drafted promissory note, the lawyer, Ms Chang, receives the following letter from her client Mr West.

SAMPLE
ANSWER
>> p. 299

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.

Reading 3: 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 170 deals with US legislation governing electronic negotiable instruments and looks specifically at a newly created form of electronic negotiable instrument.

- 12 Skim the text quickly. What is this instrument called?

- 13 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.

- 14 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'.
- 15** 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)
- 16** 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.

Listening 2: 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.

The following dialogue between two lawyers [Ms Turner and Ms Wadman] involves a real-estate transaction and a promissory note.

- 17** Listen to the first part of the dialogue. What is the problem? Why do you think this is a problem?
- 18** Listen to the second part of the dialogue and decide whether these statements are true or false.
- 1 The senior partner suggests that the document could be signed by fax.
 - 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.

19  Listen to both parts of the dialogue again and choose the best answer to each of these questions.

- 1 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 does not have to bother locating all of the principals
- 2 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
- 3 What does the senior lawyer say about signatures by fax?
 - a That they are legal in their jurisdiction
 - b That the junior lawyer should ask a colleague how they work
 - c That they cannot be used for real-estate deals

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.

One other 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 ...

- 20 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 who 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 would advise you to ...

1 I propose that you ...

Why not ...?

2 Try ...

Perhaps you could ...

3 I recommend that ...

How about ... ?

- 21 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.

Writing 2: Providing advice and making suggestions

- 22 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 only been signed by 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/legalenglish, click on Research Tasks and choose Task 12.

Language Focus

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. (x2) 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 10 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	<u>basically</u>
	electronically
principal	
reliable	
	specifically
strict	
uniform	

- 4 **Prepositions** The text below is an excerpt from the Uniform Electronic Transactions Act discussed in Reading 3. Complete it using prepositions in the box.

for in (x3) of (x2) 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, 2008.

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 percent (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.

Reading 1: 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].

- 1 Read the text, then choose the correct word to complete each of these definitions. You may need to consult the glossary.
 - 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 arrangements 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.

Key terms: Comparing and contrasting concepts

2 Complete the comparisons of key concepts below using the verbs in the box.

attaches (x2)	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.

3 Underline the words and expressions in the paragraphs in Exercise 2 which are typically used to compare and contrast ideas.

4 Match the nouns in the box with the verbs (1–4) 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 2: 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.

- 5 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, 2005, between Appleby Designs Ltd (“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.

6 Read the text 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?

7 Match these words and phrases from the text (1–5) with their definitions (a–e).

- | | |
|---------------------|--|
| 1 of even date | a failure or refusal to fulfil contractually agreed upon terms or actions |
| 2 misrepresentation | b depending on something else in the future in order to happen |
| 3 contingent | 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. |
| 4 non-performance | d a false statement, often in order to obtain an advantage |
| 5 receivership | e written on the same date |

Language use 1: Anticipating events and planning contingencies

When legal agreements like the one on page 178 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.

- 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 178.

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*.

- 9 Look for other word pairs of this kind in the security agreement. Explain them to a partner.

Reading 3: 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 following advertisement 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.

10 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.

11 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.

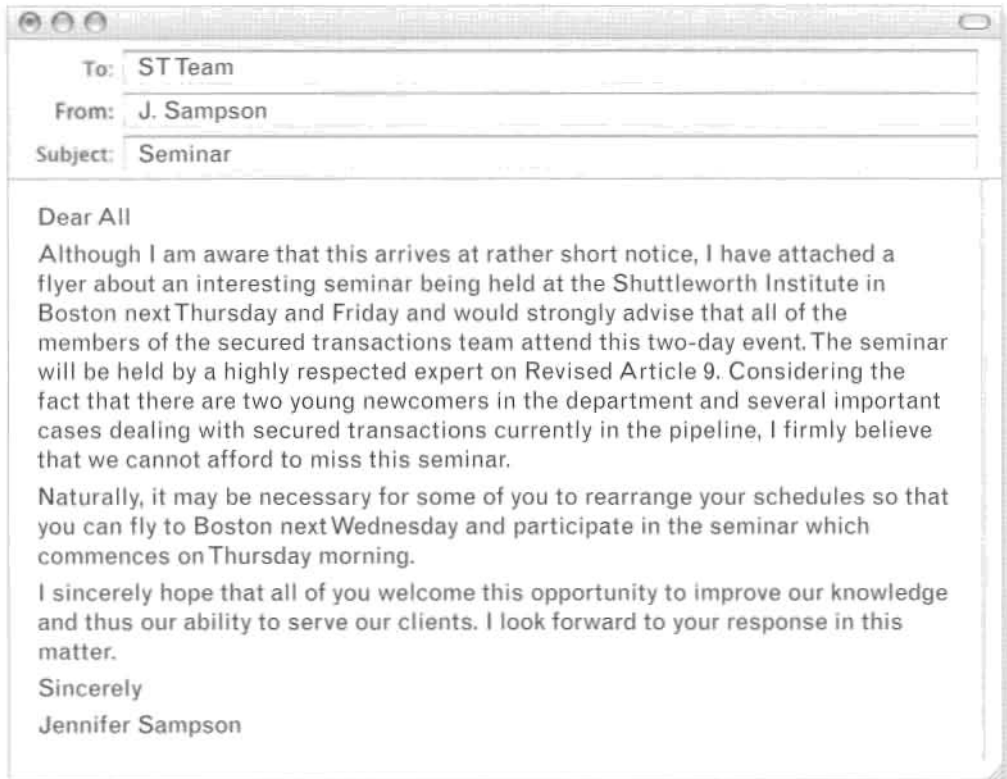
12 Have you attended any continuing legal education seminars of the type advertised? If so, what was the topic of the seminar? Do you think it is an effective way to learn about legal matters?

Reading 4: Internal email

The seminar advertisement [Reading 3] was sent as an attachment to the following email.

13 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?



14 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?

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.

15 Complete this table using the more formal equivalents from the email.

Feature	Formal style	Neutral/informal style
contractions	Avoids using contractions: <i>I am, I have, do not, will not, cannot, etc.</i>	Uses contractions: <i>I'm, I've, don't, won't, can't, etc.</i>
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 <i>while, because, although</i>)	Tends to use co-ordination (joining independent clauses with words such as <i>and, or, but</i>)
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 <i>A highly respected expert will hold ...</i> <i>Two of you are newcomers ...</i> <i>You may need to ...</i>
vocabulary and fixed expressions	Uses formal words: 4) 5)	Uses neutral or informal words <i>I really think you should ...</i> <i>I really think that ...</i>
	Uses formal fixed expressions: 6) 7)	Uses informal fixed expressions: <i>Best wishes</i> <i>Let me know what you are going to do.</i>
	Uses formal verbs, often polysyllabic, often of Latinate origin 8) 9)	Uses phrasal verbs / neutral verbs: <i>... and take part in the seminar ...</i> <i>... which starts on Thursday morning.</i>

16 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.

- 17 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 | 4 sincerely |
| 2 firmly | 5 strongly |
| 3 fully | 6 wholeheartedly |

Writing: A polite refusal

- 18 You receive Jennifer Sampson's email and would like to respond and tell 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 transaction team have important appointments.) In your email, you should:

- SAMPLE ANSWER**
»p.300
- 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.

- 19 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.

Listening 1: Creating a security interest

One of the topics covered in the continuing education seminar advertised in the flyer on page 180 is that of creating a security interest. You will hear an excerpt from the seminar, in which the speaker outlines seven steps in creating a security interest in the USA.

- 20 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.

- 21  Listen and check your answers.

22 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 When would a security agreement describe property with the phrase *now owned or later acquired*?
- 3 What is meant by *authenticating* a security agreement?

23 How is a security interest created in your jurisdiction? What are the most common problems or issues arising from a security interest?

Reading 5: 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 185 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.

- 24 Read the first paragraph. What is the issue in question? Who is affected by this issue?
- 25 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.

26 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 creditor. (paragraph 5)

27 Which unsettled areas of the law in your jurisdiction are you aware of?

The last word on book debts¹?


- 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 to 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.

¹ (US) accounts receivable

Listening 2: 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 1 included a presentation called 'Intellectual property as collateral'. You will hear two lawyers who attended the session, Peter and Jack, telling a colleague, Tina, about it.

28  Listen to the discussion and choose the correct answer to each of these questions.

- 1 What did Peter like about Mr Kellogg's presentation style?
 - a It was professional and factual.
 - b It was funny and personal.
 - c It was complex and international.
- 2 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
- 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 Tina ask to be told more about?
 - a perfecting security interests in copyrights
 - b trade marks in Hong Kong specifically
 - c the Revised Article 9

29  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 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.
- 3 Only registered copyrights are considered 'general intangibles' under the revised law.
- 4 Jack tells Tina to look on the Web for more information on what was covered in the seminar.

Language use 2: Requesting information

In the previous listening exercise, Tina asks her colleagues Jack and Peter to tell her about the seminar which she was unable to attend. These are the phrases she uses 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 Tina'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?

30 Rewrite Tina's requests for information so that they are more formal.

Speaking: Requesting and presenting information

31 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 above.

- 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/legalenglish, 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 possession 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 Latin 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, ensure, enquired, inform (x2), peruse, possess
discourse markers: therefore, thus
adverb-verb collocations: strongly advise, firmly believe, highly respected, sincerely hope

Hi everyone!

Several of our corporate clients hold the rights to valuable intellectual property assets, and they have asked if we could help them with matters concerning secured transactions and these assets. That's why I really think it's important that we make sure that our knowledge in this area is up-to-date.

So I'm writing to tell you that I've arranged an in-company seminar on perfecting IP assets as security interests. We'll have the seminar on Monday, October 26 from 9 a.m. to 5 p.m. A very important expert will hold the seminar. Please note: it starts at 9 a.m. sharp!

I've attached a list of topics for the seminar. Please look through it.

I really think you should take part in the seminar. So I suggest that you make sure you have no other appointments that day. I really hope you can come. Let me know!

Best

Martin Black

Reading 1: Introduction to debtor-creditor

The following text introduces the area of debt and the remedies available to creditors.

- 1 Read the text, then match the three main types of liens (1–3) with their explanations (a–c).
- | | |
|-------------------|--|
| 1 consensual lien | a a lien created as the result of a legal process |
| 2 judicial lien | b a lien created by agreement between the parties |
| 3 statutory lien | 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 liens: 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 liens 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 liquidation¹ 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. 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.

¹ (US) involuntary bankruptcy

The majority of creditors will not have any favoured status, either by 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**.

Key terms: Types of liens

2 Match these types of liens (1–8) mentioned in the text with their explanations (a–h). You may need to consult the glossary.

- | | |
|---------------------|--|
| 1 attachment lien | a a claim against property which secures payment for taxes owed to the government |
| 2 execution lien | b a claim imposed on a person against whom a judgment has been entered but remains unsatisfied |
| 3 garnishment | c a legal instrument which creates a claim upon real estate in order to secure the payment of a debt |
| 4 judgment lien | d a claim against real property which secures payment for work or services carried out on that property |
| 5 mechanic's lien | 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 |
| 6 mortgage | f a prejudgment interest in assets resulting from a court order or writ to seize such assets |
| 7 security interest | g a right created by a court order or writ directing the seizure of assets of a debtor in order to enforce a judgment |
| 8 tax lien | 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 |

Reading 2: 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 192, 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 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?

4 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 pretences

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*.

- 5 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.

Listening 1: 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 will hear a lawyer speaking to a group of clients who are interested in learning about asset protection.


- 6  Listen to first part of the presentation, in which the speaker explains two types of liens, 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 cases
- 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

- 7  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?

Reading 3: 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 194 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.

- 8 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?

- 9 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 license 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, both because of 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.

10 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.

Speaking 1: Discussing insolvency work

11 Working with a partner, explain these phrases (italicised in 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

12 Have you considered practising in this area of the law? Why / Why not?

Reading 4: 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?

13 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 196. What do you think these abbreviations stand for?

14 Quickly scan the two advertisements and decide for which job (A or B):

- 1** you will have the opportunity to travel.
- 2** you need no previous experience.
- 3** you will have a chance to specialise in information technology law.
- 4** you need to speak more than one language.
- 5** you need to belong to a particular association.

15 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 **Location: based in London**
Practice Areas: Banking/Finance, Insolvency **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 **Location: south-west UK**
Practice Areas: Company/Commercial, **PQE: NQ-1 year**
Insolvency

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

Text analysis: A covering letter

A covering letter¹ is an important part of a job application. Submitted along with a CV², 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:

- 1 an introductory paragraph stating the purpose of the letter;
- 2 a main part [one or more paragraphs] with the most important information;
- 3 a concluding paragraph bringing the letter to a close and a final sentence inviting further contact.

16 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)** I am especially interested in the position you are offering, since I have relevant work experience in the field of insolvency. **5)** I spent three summers working 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)** 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.

Sincerely

Fabio Scataloni

¹ (US) cover letter

² (US) *résumé* or *resume*

Writing 1: A covering letter

- 17 Write an application letter of your own in response to one of the job advertisements on page 196 or to one you have found. You should:
- structure your letter in three parts;
 - include the functions listed in Exercise 16;
 - 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.

Listening 2: 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.

- 18 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? | <input type="checkbox"/> |
| 2 What are your greatest strengths/weaknesses? | <input type="checkbox"/> |
| 3 Why did you decide to study law? | <input type="checkbox"/> |
| 4 What was the most valuable experience you had in law school? | <input type="checkbox"/> |
| 5 What qualities do you think a good lawyer needs to have? | <input type="checkbox"/> |
| 6 Which accomplishment are you most proud of? | <input type="checkbox"/> |
| 7 What do you know about this firm? | <input type="checkbox"/> |
| 8 Why do you want to work for this firm? | <input type="checkbox"/> |
| 9 Why should we hire you? | <input type="checkbox"/> |
| 10 How would you describe your ideal job / boss / law firm? | <input type="checkbox"/> |
| 11 What can you tell me about your work experience? | <input type="checkbox"/> |

- 19  You will hear a candidate, Mr Berger, being interviewed for one of the positions described in the job adverts on page 196. Listen to the interview. Which position has he applied for?

- 20  Listen again and tick the questions in Exercise 18 the interviewer asks.

- 21 Answer these questions.

- 1 Why does Mr Berger want to work for the firm?
- 2 Why is Mr Berger already familiar with London?
- 3 What kind of work does Mr Berger do in his present job?
- 4 What does Mr Berger ask the interviewer about the firm?

Speaking 2: A job interview

- 22 Using one of the job advertisements on page 196 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 18. 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.

Writing 2: 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.

23 Read the thank-you 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

24 Answer these questions.

- 1 Which sentence in the note refers to a topic discussed in the interview?
- 2 Which sentence serves to reinforce points mentioned by the applicant during the interview?
- 3 What is the purpose of the final sentence of the second paragraph of the note?
- 4 Which part of the thank-you note refers to future contact?

25 Write a thank-you note from Franz Berger to Ms Hall as a follow-up to the interview in the listening exercise. 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.

SAMPLE
ANSWER
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Reading 5: Making a case

In the job interview in Listening 2, 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.

- 26 Look at the title of the article. What is meant by the word *case* in this context?
- 27 Read the first two paragraphs of the excerpt. What is the weakness the writers point to? 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.

28 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.

29 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 |

Speaking 3: Discussion on restructuring

30 Look at these counter-arguments to the standpoint presented in the article 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/legalenglish, 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	<u>seizure</u>
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 trustees** Reading 3 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 trustees 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.

Reading 1: 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.

- 1 Read the text 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 law¹ 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

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*.

terms, a monopoly is an undertaking or inter-related group of undertakings which either control the supply (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**⁴ 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.

⁴ (US) abuse of monopoly power

Key terms: Anti-competitive activity

2 Match these terms (1–4) with the examples of anti-competitive activity they describe (a–d).

- | | |
|----------------------|--|
| 1 barriers to entry | a A manufacturer of computer components requires that consumers purchase other equipment made by the firm in order to keep the warranty valid. |
| 2 price-fixing | b The major petroleum corporations in a country all agree to raise the prices of petrol and petroleum products. |
| 3 predatory pricing | 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. |
| 4 tie-in arrangement | d A new Internet provider enters the market, and the main provider in the region temporarily lowers the cost of its services dramatically. |

Reading 2: Anti-competitive activities and antitrust measures in the EU

One of the main areas of the competition policy of the European Union is antitrust and cartels. Its aim is to eliminate agreements restricting competition, as well as abuses by firms who hold a dominant position on the market.

Table 1 on page 206 is an excerpt from an antitrust newsletter published by a large law firm providing regular updates on antitrust measures taken in EU member states.

3 Look at Table 1 quickly and answer these questions.

- 1 Who do you think would be interested in reading such information?
- 2 Why do you think the table is set up the way it is?
- 3 A lawyer writing a report comparing anti-competitive activities in the telecommunications sector with other sectors in the EU is looking for information. Will this table be of use to him?

Table 1: Member States and Measures Taken

Member State	Measure
Germany	In December 2004, the German Cartel Office initiated proceedings against five gas utility companies suspected of abusive pricing practices.
Italy	On 16 November 2004, the Italian Competition Council fined Telecom Italia €152 million for an abuse of its dominant position on the market for fixed network telecommunications services for business customers.
Poland	Poland's Office for Protection of Competition and Consumers fined PKP Cargo, the largest Polish railway carrier, PLN 20 million for abusing its dominant position by applying dissimilar conditions to equivalent transactions with other trading parties.
Portugal	On 11 January 2005, the Portuguese Competition Authority fined Abbott, Bayer, Johnson & Johnson, Menarini, and Roche €658,413.22 per company for colluding on bidding prices.
Czech Republic	On 21 December 2004, the Supreme Administrative Court of the Czech Republic upheld a decision by the Competition Office finding that the GSM operator Eurotel Praha (Eurotel) had abused its dominant position in the mobile telecommunication services market by charging discriminatory prices for connection to the network of Cesky Mobil.
Latvia	The Latvian Competition Council has fined members of a price-fixing and information-exchange cartel in the market for chickens' eggs.
The Netherlands	The Netherlands Competition Authority has confirmed that 11 parties in the shrimp-fishing industry participated in an illegal cartel.
Sweden	The Competition Authority filed a fine petition at Stockholm City Court on 15 December 2004 accusing Nynäs of having abused its dominant position on the bitumen market by applying business conditions that discriminated against other companies in order to limit their access to the market. The Competition Authority demanded that several oil companies be fined a total sum of SEK 394 million.
Slovak Republic	In December 2004, the Anti-monopoly Office of the Slovak Republic imposed fines on the telecommunications companies Orange Slovensko (Orange) and SAPEKO for concluding a vertical agreement restricting competition.

Skim through the table quickly and answer these questions.

- 1 What product was at the centre of a price-fixing cartel in Latvia?
 - 2 How much did the Competition Authority fine oil companies in Sweden?
 - 3 In what year did the Italian Competition Council fine Telecom Italia 152 million euros?
 - 4 How many parties were involved in an illegal shrimp-fishing cartel in the Netherlands?
 - 5 Why were proceedings taken against five gas utility companies in Germany in 2004?
- 5 The lawyer writing the report mentioned in Exercise 3 has decided to reorganise the information on the basis of industry rather than country. Use the information from Table 1 on page 206 to complete the spaces in Table 2 below.

Table 2: Sector, Country, Measure Taken, Violation, Authority

Sector	Country	Measure taken	Violation	Authority
gas	Germany	1)	abusive pricing practices	German Cartel Office
telecommunications	Italy	fined	abuse of dominant position	2)
	Czech Republic	Court upheld decision (of Competition Office)	abuse of dominant position by charging	Supreme Administrative Court of the Czech Republic
	Slovak Republic	fined	conclusion of a vertical agreement restricting competition	4)
5)	Poland	fined	abuse of dominant position by applying dissimilar conditions to equivalent transactions	Poland's Office for Protection of Competition and Consumers
pharmaceutical	Portugal	fined	6)	Portuguese Competition Authority
food	Latvia	fined	7)	Latvian Competition Council
fishing	The Netherlands	confirmed participation	8)	Netherlands Competition Authority
bitumen oil	Sweden	9)	abuse of dominant position; limiting access of other companies to the market	Swedish Competition Authority

- 6 Match these verbs (1–5) with the nouns (a–e) they collocate with in Table 1.

- | | |
|--------------|------------------|
| 1 abuse | a access |
| 2 initiate | b prices |
| 3 collude on | c a fine |
| 4 limit | d one's position |
| 5 impose | e proceedings |

Writing 1: Using passive constructions

SAMPLE
ANSWER
»» P. 302

- 7 A client has asked you to inform him of recent anti-competitive activities in the telecommunications sector in the EU and the measures taken against the offending companies. Look at the relevant three cases in Table 2 on page 207. Have similar violations been committed in each case? In what way do the violations differ? Using the information in Table 2, write a short email to your client in which you compare the anti-competitive activities in the three telecommunications cases. Where appropriate, use passive constructions to focus on the receiver of the action and the action taken.

EXAMPLES: Egg producers in Latvia were fined for price-fixing and the formation of information exchange cartel.

A petition was filed against petroleum companies in Sweden for abuse of a dominant position and for limiting the access of other companies to the market.

Listening 1: 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. The following dialogue takes place between a US lawyer, Mr Langston, and his client, Mr Greene, the owner of a taxi company.

- 8  Listen to the discussion and tick the terms mentioned by the lawyer.

- | | |
|-------------------------------|--------------------------|
| 1 anti-competitive behaviour | <input type="checkbox"/> |
| 2 bid-rigging | <input type="checkbox"/> |
| 3 price-fixing | <input type="checkbox"/> |
| 4 per se violation | <input type="checkbox"/> |
| 5 tie-in arrangement | <input type="checkbox"/> |
| 6 territorial allocation | <input type="checkbox"/> |
| 7 predatory pricing | <input type="checkbox"/> |
| 8 vertical agreement | <input type="checkbox"/> |
| 9 abusing a dominant position | <input type="checkbox"/> |

- 9  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.

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 in this jurisdiction the fines can be very high for this sort of activity.

I must warn you that 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 ...

- 10 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.

Case 1

Student A: You are the lawyer. Look at the notes on page 305.

Student B: You are the client. Look at the notes on page 306.

Case 2

Student A: You are the client. Look at the notes on page 305.

Student B: You are the lawyer. Look at the notes on page 306.

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 210 was sent by a lawyer who works in a large law firm to one of his clients, the managing director of a construction company.

11 Read the letter. What is the client's problem? What solution does the lawyer propose?

12 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

July 29, 2005

Dear Mr Richardson

- 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

Writing 2: A proposal

13 Using the letter on page 210 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:

SAMPLE ANSWER
pp. 302

- 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;
- offer to provide further help, if necessary.

Reading 3: A high-profile antitrust case

14 Read the title and the first paragraph of the text, 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?

Sotheby's fined £12.9m by EU over illegal price-fixing cartel

SOTHEBY'S auction house was fined £12.9m by the European Commission yesterday for colluding with Christie's to cheat wealthy players in the international art market.

The fine represents 6 per cent of the company's annual turnover and comes after a court case in America which saw its former chairman Alfred Taubman, 68, fined £4.7m and jailed for a year for the fraud, which cost sellers £290m. Christie's escaped a fine because it provided the evidence that proved the operation of a cartel between the world's two leading art houses.

Mario Monti, the European commissioner in charge of competition policy, said: 'This case shows that illegal cartels can appear in any sector, from basic industries to high-profile service markets.' He said Sotheby's and Christie's, which hold 90 per cent of the market, had

breached EU competition rules.

After fierce competition in the 1980s and early 1990s, a price-fixing agreement was struck in 1993 at the highest level in the two companies, the commission said. The key aspect of the illegal agreement was an increase in the commission paid by sellers at auctions. But it also involved advances paid to sellers.

The commission said Taubman and his Christie's counterpart, Sir Anthony Tennant, 'entered into secretive discussions at their respective private residences in London and/or New York'. The meetings were followed by regular meetings between the companies' chief executives at the time, Dee Dee Brooks of Sotheby's and Christopher Davidge of Christie's. Sir Anthony refused to go to America to stand trial for the collusion. He cannot be extradited from Britain on

the antitrust charges he faces.

The European Commission began investigating in January 2000 when Christie's approached the American Department of Justice and Brussels offering evidence in the hope of gaining leniency.

Bill Ruprecht, president and chief executive of Sotheby's Holdings, said it had anticipated the fine, which would be reflected as a special charge in its financial statements.

'Sotheby's co-operated fully with the Commission throughout, and as the fine is materially less than it could have been, we are pleased to have the investigation behind us,' he said. 'No current employee of the company was involved in, or aware of, the anti-competitive practices.'

A Christie's spokeswoman said: 'We're pleased that it brings this chapter in the history of the art market closer to a conclusion.'

15 Read the whole text and answer these questions.

- 1 Why wasn't a fine imposed on the second auction house involved in the illegal activity?
- 2 What did the collusive agreement between the auction houses entail?
- 3 What was the attitude of the firm towards the fine it had to pay as expressed in the official statement of the chief executive?

16 Complete these phrases from the text using prepositions. Then explain what each phrase means in your own words.

- 1 to stand trial collusion
- 2 to be jailed fraud
- 3 to be extradited antitrust charges


17 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 This text first appeared in a daily newspaper written for a non-specialist audience. Which features of the text helped you to recognise its source? In what ways would a text about this case written solely for lawyers differ from this text?
- 3 Think about how you would tell another lawyer who is not familiar with this case about it. Reduce the information to a few key points. Then present the information to another student. Do you agree on what the most important points are?

Listening 2: 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 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.

18  Listen to the excerpt and decide 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

19  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.

20 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?

Reading 4: 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 214 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.

21 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.

22 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?

23 Match these words (1–4), italicised in the text, with their definitions (a–d).

- | | |
|--|------------------------|
| 1 <i>to notify</i> to the Commission | a while awaiting |
| 2 <i>to object</i> to a request | b directing |
| 3 <i>pending</i> the final case allocation | c to oppose |
| 4 <i>referral</i> 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.

Writing 3: An informative email

24 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.

SAMPLE
ANSWER
»P-303

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.

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).*

- 25 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/legalenglish, 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 <u>addenda</u> |
| 2 analysis | a analyses | 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 in in of for on on to

The Competition Authority filed a fine petition **1)** ^{on} 1 February 2005 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.

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 page 219.

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 items 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.

<p>The Rights of Third Parties Act 1999</p> <p>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.</p> <p>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.</p>	<p>31 CONTRACT</p> <p>32 ENFORCE</p> <p>33 SOURCE</p> <p>34 STRONG</p> <p>35 OBLIGE</p> <p>36 PROVIDE</p>
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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 following extract 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).

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.

- 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.

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 page 227 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 a 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-Aquitaine 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-Aquitaine. 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 provisions 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 Vollbrecht, has now sent a letter to your client's president.

Read the letter from the Mr Vollbrecht, on which you have made some notes. Then, **using all the information in the notes**, write a letter to Mr Vollbrecht on behalf of your client.

Yes, we did!

What about breach of warranty? – reasons

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. 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. 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 Vollbrecht
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 both for main points and specific details. They also test how well you are able to recognise the function or topic of a text, 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
A to report to one of the senior partners about her first year at the firm.
B to tell junior colleagues what they can expect in their first year at the department.
C to inform her supervisor at the department why she would like to remain there.
- 4 She feels that her first year was a valuable experience because
A she was able to make many social contacts.
B she learned how to carry out research.
C she 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 cases
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). 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 which each speaker mentions.

TASK TWO

For questions **26–30**, choose from the list **A–F** the future aim which each speaker talks about.

The recording will be played **twice**. While you listen, you must complete both tasks.

A not being able to select projects	Speaker 1 (21)	A to argue cases in court	Speaker 1 (26)
B not having much contact with clients	Speaker 2 (22)	B to remain in present position	Speaker 2 (27)
C having to research complex matters	Speaker 3 (23)	C to have sole responsibility for a case	Speaker 3 (28)
D having to conduct searches for clients' papers	Speaker 4 (24)	D to assist a partner in court	Speaker 4 (29)
E having to get testimonies from difficult people	Speaker 5 (25)	E to be involved with another area of IP law	Speaker 5 (30)
F bearing financial responsibility		F to improve own leadership qualities	

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 three 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 four 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?

Test of Reading

TIME 1 hour 15 minutes

Part 1

Questions 1–6

Read the following extract from a reference book on contracts.

Choose the best word or phrase 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)**.

4.2 Incapacity in General Even though individuals differ markedly in their ability to represent their own interests in the bargaining process, a person is generally **(0)** to have full power to bind himself contractually. Only in extreme **(1)** is one's power regarded as impaired because of an inability to participate meaningfully in the bargaining process. One whose power is so impaired is said to lack capacity to contract and is **(2)** to special rules that allow him to avoid the contracts that he makes in order to protect him from his own improvident acts.

Two principal kinds of defects are today **(3)** as impairing the power to contract: immaturity and mental infirmity. In the past, the common law regarded a woman's marriage as **(4)** her of her separate legal identity, including the capacity to contract, during the life of her husband.

(5) , this disability was largely removed by statutes **(6)** in the nineteenth century.

Example: **A** concluded **B** surmised **C** assumed **D** implied

0	A <input type="checkbox"/>	B <input type="checkbox"/>	C <input type="checkbox"/>	D <input type="checkbox"/>
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- | | | | | | | | | | | | | | | | | | | | | | | | |
|-------------------|--------------------|--------------------|----------------------|------------------------|---------------------|----------------------|------------------------|-----------------------|----------------------|--------------------------|------------------|----------------------|-------------------|---------------------|-----------------------|--------------------|-----------------------|--------------------------|-----------------|------------------------|-----------------------|-------------------------|--------------------|
| 1 A stages | 2 A subject | 3 A granted | 4 A depriving | 5 A For example | 6 A realized | 1 B junctures | 2 B conditional | 3 B recognized | 4 B debarring | 5 B In particular | 6 B ruled | 1 C occasions | 2 C liable | 3 C conceded | 4 C dissolving | 5 C However | 6 C legislated | 1 D circumstances | 2 D open | 3 D appreciated | 4 D dismissing | 5 D Consequently | 6 D enacted |
|-------------------|--------------------|--------------------|----------------------|------------------------|---------------------|----------------------|------------------------|-----------------------|----------------------|--------------------------|------------------|----------------------|-------------------|---------------------|-----------------------|--------------------|-----------------------|--------------------------|-----------------|------------------------|-----------------------|-------------------------|--------------------|

Questions 7–12

Read the following extract from a rental contract.

Choose the best word 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.

PROVISION FOR LATE CHARGES UNDER LEASE

Tenant acknowledges that late payment of rent will cause Landlord to (7) costs not contemplated by this Lease, the exact amount of which will be extremely difficult to (8) These costs include, but are not (9) to, processing and accounting charges, and late charges which may be (10) on Landlord by the terms of any Superior Leases and Mortgages. Accordingly, if any instalment of Monthly Rent or payment of additional rent is not received by Landlord or Landlord's designee within fourteen days after the amount is (11) , Tenant shall pay to Landlord a late charge equal to ten per cent of said amount. Acceptance of late charges by Landlord shall not constitute a waiver of Tenant's default with respect to said amount, nor prevent Landlord from (12) any of the other rights and remedies granted hereunder or at law or in equity.

- | | | | | |
|----|--------------|--------------|--------------|---------------|
| 7 | A derive | B acquire | C collect | D incur |
| 8 | A affirm | B classify | C ascertain | D locate |
| 9 | A contained | B limited | C held | D bound |
| 10 | A imposed | B dictated | C obliged | D required |
| 11 | A owing | B scheduled | C due | D unpaid |
| 12 | A practising | B exercising | C commanding | D undertaking |

Part 2

Questions 13–24

Read the following extract from a journal article about competition.

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 T H E R E

PRINCIPLES OF COMPETITION

Invariably in every law (0) _____ are provisions which tend to be overlooked. The Commercial Agents Regulations are no exception. Ten cases concerning the Regulations have reached the UK courts since 1994, but (13) _____ of them has concerned the provisions which deal with an agent competing against his or her principal. (14) _____ part this can be attributed (15) _____ the fact that the other provisions of the Regulations have had (16) _____ a great effect on agency law that the non-compete provisions may seem to pale into insignificance. But principals who overlook these regulations (17) _____ so at their peril.

It has always (18) _____ open to a principal to include a non-compete provision in an agency contract. The most important consideration here is whether a provision of this nature might be void (19) _____ a result of infringing the common law doctrine of restraint of trade. (20) _____ it is fairly easy to determine the legality of restrictions which are either extremely harsh in terms (21) _____ their geographical extent and duration (22) _____ quite lenient, the question of (23) _____ to treat a moderate non-compete provision can be hard to resolve. In practice, (24) _____ that can be said with certainty is that the narrower the restriction, the greater the chance of enforceability.

Part 3

Questions 25–30

Read the following description of the World Trade Organization, taken from its 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. 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	P	R	E	D	I	C	T	A	B	L	Y				
---	---	---	---	---	---	---	---	---	---	---	---	--	--	--	--

World Trade Organization

The World Trade Organization (WTO) exists to create the conditions in which trade between nations flows as smoothly, **(0)** and freely as possible. To achieve this, the WTO provides and regulates the legal **(25)** which governs world trade. The legal documents of the WTO spell out the various **(26)** of member countries. The result is assurance. Producers and exporters know that foreign markets will remain open to them, which in turn leads to a more **(27)** , peaceful and **(28)** economic world. **(29)** all decisions in the WTO are taken by consensus among all member countries and are then ratified by member parliaments. Trade friction is channelled into the WTO's dispute **(30)** process, where the focus is on interpreting agreements and commitments and ensuring that countries' trade policies operate in conformity with them.

- 0** PREDICT
- 25** FRAME
- 26** OBLIGE
- 27** PROSPER
- 28** ACCOUNT
- 29** VIRTUAL
- 30** SETTLE

Questions 31–36

Read the following news item from a legal journal.

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.

Ruling on Proceeds of Crime Act

The Court of Appeal has ruled that lawyers do not have to report their clients under the money-laundering rules if they suspect them of tax (31) or even the most minor financial (32)

Uncertainty had arisen because Section 328 of the Proceeds of Crime Act 2002 makes it an (33) for a person to be involved in an arrangement which he knows or suspects would (34) (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

Lawyers had been taking the view that to avoid (35) proceedings or prosecution when in receipt of suspicious information from clients under circumstances of legal privilege, they had to make a (36) to the National Criminal Intelligence Service and obtain consent to continue.

31 EVADE

32 REGULAR

33 OFFEND

34 FACILE

35 DISCIPLINE

36 DISCLOSE

Part 4

Questions 37–42

Read the questions below and the extract on the opposite page from a journal article about client selection.

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 It is important for a firm to follow an existing procedure.

0	<input type="checkbox"/> A	<input type="checkbox"/> B	<input checked="" type="checkbox"/> C	<input type="checkbox"/> D
----------	-----------------------------------	-----------------------------------	--	-----------------------------------

- 37** A firm may act with undue haste if it has failed to anticipate adverse economic conditions.
- 38** A financial outcome for a firm may be the reverse of that intended.
- 39** It can be prudent for a firm to move into a specialty that is less affected by fluctuations in the economy.
- 40** A bad decision may result in a drain on a firm's resources.
- 41** It is undesirable for commercial pressures to determine the continuation or otherwise of representation.
- 42** A firm may underestimate the requirements of an aspect of law in which it lacks experience.

The Prudent Course

Ethical and Practical Considerations in Client Selection

- A Like many other segments of society, law firms keenly feel the effects of an economic downturn. Corporations carefully examine their bottom line, and ask lawyers to deliver more for less. In such circumstances a law firm has several options to increase its profitability. Seeking to enhance or establish a practice in an area of law that seems impervious to economic swings, or in an emerging area with a high demand for legal services, is one logical response. In fact, it is a most judicious response if a firm is willing to expend the resources – time and money – to become immersed in the area.
- B Law firms with a long-range plan are generally better positioned to weather an economic downturn. A problem arises, however, when a firm, without a plan for survival, reacts precipitously when its client base and/or income begin to decrease dramatically. For example, a response of this nature may cause a firm that focuses on regulatory or transactional work – confident of its attorneys’ analytical, research, and writing abilities – to decide that it is competent to begin litigation practice. Such a firm is not likely to appreciate the nuances of the practice area, the importance of being familiar with how the court systems work, and the in-depth knowledge required of the procedural and evidentiary rules.
- C A second reaction to a weakened economy that results in fewer new clients is to keep existing clients when prudence and objectivity counsel withdrawal from a case. Another option is to become less discriminating when accepting clients. But feeling the effects of a weakened economy should not cause a firm to panic and resort to accepting clients indiscriminately. On the contrary, a firm needs to remain vigilant and adhere to its established client selection process. Likewise, if ethical or practical concerns dictate that a firm should no longer act for a client, the firm should not allow the amount of revenue it receives from the client to cloud its judgment.
- D Failure to maintain rigorous standards for client selection can jeopardize an attorney’s reputation, increase stress and decrease morale within the firm, and ultimately have a negative impact on the firm, rather than provide the remuneration the firm envisioned in entering into a relationship with an improperly screened client. If a firm has to assign lawyers to represent it in charges of malpractice, or has to retain outside counsel for that purpose, its bottom line is being adversely affected. Potentially, these lawyers will have to spend several hours each day documenting every detail of every conversation with in-house counsel, and a substantial amount of time apprising management of evolving issues and discussing how to resolve them.

Part 5

Questions 43–48

Read the following extract from a letter of advice from a lawyer to a client. Choose the best sentence from the opposite page to fill each of the gaps. For each question **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**).

You have requested advice regarding your legal position in a suit filed against you by Jermain Equipment Co. (the “Claimant”) related to an equipment rental agreement. You have been sued for damages based on an alleged breach of contract.

The statements expressed herein should not be construed in any way as conclusive or indicative of our future opinions and views. (**0**) _____

A summary of the facts as you have provided them are as follows. You are a shareholder in Richardson (the “Company”). Some time in November, the Company’s managing director entered into an equipment rental agreement with the Claimant. (**43**) _____ You have been sued personally based on the allegation that the company was improperly formed.

In such situations, the law is not completely clear as to the issues concerning the Company’s legal status and your personal liability. I have reviewed the Articles of Incorporation of the Company and, in my opinion, pursuant to the laws of this jurisdiction, the Company might be considered as no company at all. This is because its purported formation was deficient as the Articles did not comply with the relevant statutes and no certificate of incorporation had been issued at the time of contract. (**44**) _____

The issue of your personal liability primarily hinges on whether the court accepts this view. In the case that the Company is deemed a company in fact, you will, of course, be insulated from liability. (**45**) _____

However, it might be efficacious to argue another modern development in the law. The traditional view in this jurisdiction is that all of the “shareholders” in a would-be company may be held personally liable for debts incurred in the name of the company. (**46**) _____ In this context, the idea is that passive “shareholders” should not incur liability due to the failure of the managing “shareholders” to act competently. On the other hand, the traditional view seems to prevail perhaps due to the ease of its application. (**47**) _____ Judges tend to support the traditional approach as, in practice, they are likely to spend less time in court. I would therefore anticipate an argument endorsing the modern approach will not be warmly received by the court.

There is one final argument you could raise. It is based on the concept that a party cannot argue that a would-be company was improperly formed when at all times it dealt with the undertaking as if it were validly formed. (**48**) _____ In my opinion this argument represents the best possibility for you to avoid personal liability. However, its success depends on the evidence presented, which means that a more detailed investigation of the facts is required.

Example:

0	A	B	C	D	E	F	G	H
----------	----------	----------	----------	----------	----------	----------	----------	----------

- A** Specifically, it obviates the need for an in-depth factual analysis of the shareholder's participation.
- B** As a result of this action, the interpretation of the clause of the original agreement relating to rental payments became a matter of dispute.
- C** However, there is an argument, increasingly supported by judges and prominent legal scholars, that provided the inadequacy is later cured, as it was in this case, the would-be company should be given the status of a company in fact at the time of contract.
- D** In a case of this nature, it would operate as an injustice to permit such a contention to be advanced.
- E** If not, your chances of avoiding liability are greatly diminished.
- F** The Company has failed to make contractual payments despite receiving and using the equipment.
- G** However, there is a significant development in the law towards allowing claims only against those who actively participated in the management of such a company.
- H** That is to say, facts and circumstances may come to light which would require us to significantly modify our advice.

Questions 49–54

Read the following extract from a reference book on contracts 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.

9.2 Types of Mistake

The word *mistake* is generally used in the law of contracts to refer to an erroneous belief – ‘a belief that is not in accord with the facts.’ To avoid confusion, it should not be used, as it sometimes is in common speech, to refer to an improvident act, such as the making of a contract, that results from such an erroneous belief. Nor should it be used, as it occasionally is by courts and writers, to refer to a situation in which two parties attach different meanings to their language.

An erroneous belief is not a mistake unless it relates to the facts as they exist at the time the contract is made. A poor prediction of events that are expected to occur after the contract is made is not a mistake. The law of mistake deals only with the risk of error relating to the factual basis of agreement – the state of affairs at the time of agreement. It does not deal with the risk of error as to future matters. Cases of poor prediction are dealt with by the doctrines of impracticability and frustration, which are thought to be more suited to adjusting the relationship between the parties under their agreement.

In some cases, however, the line between a mistake as to an existing fact and a poor prediction as to a future event is hard to draw, especially when the parties have extrapolated from existing facts to set their expectations as to future use. *Leasco v. Taussig* is an example. In February 1971, Taussig, who had been an officer at Leasco’s subsidiary MKI, made a contract with Leasco to buy MKI. In May, however, he sought to avoid the contract on the ground that the parties had erred in estimating MKI’s pre-tax earnings for the period ending with September 1971 as \$200,000. In fact the company lost \$12,000, and Taussig argued the parties had shared a mistake as to the existing fact ‘that they were dealing with a company which would earn \$200,000 in the fiscal year ending September 30, 1971.’ The court,

however, held that this was merely a poor prediction as to a future event. Therefore, each party bore a risk that the earnings might not be as estimated, and each was bound even though, ‘as it turned out, one party got a better bargain than anticipated.’

A similar issue was presented by *Aluminum Co. of America v. Essex Group*. Under a 16-year contract made in 1967, ALCOA was to convert alumina supplied by Essex into molten aluminum. The contract price provisions contained an escalation formula, one portion of which was based on the Wholesale Price Index – Industrial Commodities (WPI). By 1979, it had become apparent that the WPI was not keeping pace with the sharp rise in the cost of energy to ALCOA, and the company stood to lose some \$60 million over the contract term. ALCOA sought relief for mutual mistake. The trial court found that the parties had chosen the WPI to reflect changes in ALCOA’s non-labor costs after a careful investigation showed that the WPI had, over a period of years, tracked ALCOA’s non-labor cost fluctuations without marked deviations. In this, the judge concluded, the parties had made an error ‘of fact rather than one of simple prediction of future events.’ He distinguished the Taussig case on the ground that there the ‘parties bottomed their agreement on a naked prediction,’ while in *ALCOA* the capacity of the WPI ‘to work as the parties expected it to work was a matter of fact, existing at the time they made the contract.’ The judge felt that justice required him to find a mistake of fact. ‘At stake in this suit is the future of a commercially important device – the long-term contract. If the law refused an appropriate remedy when a prudently drafted long-term contract goes badly awry, prudent business people would avoid using this sensible business device.’

line 45

- 49 What is the writer doing in the first paragraph?
- A explaining why a word is misused
 - B identifying the appropriate legal usage of a term
 - C giving examples of common legal errors
 - D suggesting a wider interpretation of a particular term
- 50 In the second paragraph, what does the writer say about cases involving poor prediction?
- A They occur more often than cases involving a mistake of fact.
 - B They do not normally result from a breakdown in relationships.
 - C They are not dealt with under the law of mistake.
 - D They can be more difficult to resolve than mistakes of fact.
- 51 Taussig argued that he was not held by his contract with Leasco because
- A Leasco's anticipated takeover of MKI had failed.
 - B MKI's financial record was worse than he thought.
 - C MKI's projected income had been miscalculated.
 - D Leasco had underestimated the value of MKI's stock.
- 52 What does the word 'bargain' in line 45 refer to?
- A the expectation that MKI's turnover would rise
 - B the terms of the contract working in Leasco's favour
 - C a high degree of competence on the part of Leasco's lawyers
 - D an attempt by Taussig to enforce the terms of the contract
- 53 A factor in ALCOA's decision to go to court was that
- A Essex was not keeping to the terms of the contract.
 - B energy was rapidly becoming its biggest single cost.
 - C the wholesale price of alumina was fluctuating considerably.
 - D a contract price was linked to an inappropriate predictor.
- 54 According to the judge, his decision in *ALCOA v Essex Group* was influenced by the need to
- A maintain the viability of an important business tool.
 - B reduce the impact energy costs have on a range of businesses.
 - C safeguard prudent businesses from unforeseen events
 - D allow financial recompense for an unethical contract.

Test of Writing

TIME 1 hour 15 minutes

Part 1

You **must** answer this question.

You are a lawyer representing Ms Sandra Meyer. Ms Meyer is the subject of a disciplinary investigation by her employer, Scansoft. Robert Woodly, Director of Human Resources at Scansoft, has written to you with a statement of Scansoft's position.

Read the letter from Mr Woodly, on which you have already made some handwritten notes. Then, **using all the information in your handwritten notes**, write a letter to Mr Woodly on behalf of your client Ms Meyer.

I have been informed that you are acting on behalf of Ms S. Meyer.

Ms Meyer is the subject of a disciplinary investigation, following the discovery of confidential documents in her briefcase as she was leaving the premises on 1st June.

She claimed she was taking them home to work on them overnight. This is contrary to company policy.

She was stopped by a security guard at the gate, and she was asked to present her briefcase for inspection. When she did so, the confidential documents were found.

The company takes a very serious view of such behaviour and, if the investigation confirms the circumstances outlined above, this will lead to termination of employment.

While the investigation is in progress, Ms Meyer will be suspended without pay.

Yours sincerely,
Robert Woodly

Director of Human Resources
Scansoft

Handwritten notes:

- She says everyone's doing it. (points to the paragraph about taking documents home)
- Why? Discrimination? (points to the paragraph about being stopped by a security guard)
- A meeting - suggest time and place. (points to the signature)
- Staff not told. (points to the paragraph about company policy)
- Unusual! Normal company procedures? (points to the paragraph about suspension)

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 leaving on an extended course of study and are transferring your case load to a colleague. A client, a major supermarket, is involved in a dispute concerning the quality of fruit delivered by a long-time supplier.

Write a **memorandum** to your colleague to brief him on the case, and include the following points:

- some information on the client
- what the client has done to try to find a solution
- the options available to the client
- possible results of legal action.

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 will hear a trainee lawyer who works for an international law firm talking about his six-month placement in the firm's Milan office.

- 1 He feels that the Milan office was a good choice for the placement because
- A he had already had contact with some of the people there.
 - B it provided a contrast to his usual working environment.
 - C it gave him the chance to work in new areas of the law.
- 2 He believes that as a result of his placement he is now
- A more accurate in his work generally.
 - B more able to delegate work effectively.
 - C more aware of the value of some of his usual work.

Extract Two

You will hear a conversation between a lawyer and her client.

- 3 What problem does the client have?
- A A neighbour is suing him for damages.
 - B He's unable to continue with certain aspects of his business.
 - C The local authority is accusing him of contravening its zoning laws.
- 4 How does the lawyer feel about the forthcoming hearing?
- A unsure whether it will finally resolve the matter or not.
 - B concerned about the evidence the opposition will bring to it.
 - C worried that it will rely on the understanding of technical detail.

Extract Three

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 Claudia?
- A her ability to work independently
 - B her commitment to the cases she works on
 - C her willingness to work closely with her colleagues
- 6 The female partner feels that the lawyer called Pedro
- A should spend more time analysing his clients' needs.
 - B needs to refer more of his queries to her.
 - C would benefit from further training.

Part 2

Questions 7–11

You hear part of a consultation between a lawyer and a new client, Anna Krupa who is planning to set up her own business. For questions 7–11, choose the best answer (A, B or C).

You will hear the recording **twice**.

- 7 The law firm has previously represented Anna's husband in
- A a dispute involving his inheritance.
 - B setting up his own commercial venture.
 - C an insurance claim regarding his company.
- 8 What does Anna tell the lawyer about her current situation?
- A She is in full-time employment at present.
 - B She is completing a course of further study.
 - C She is putting resources into ideas of her own.
- 9 What made Anna decide to leave her last employer?
- A She was unable to get on with her new boss.
 - B She felt she was not making sufficient progress in her career.
 - C She was dissatisfied with a change to her employee benefits package.
- 10 Anna thinks that the restrictive covenant in her previous employment agreement
- A is no longer binding on her.
 - B imposes limits on where she can work.
 - C prevents her from disclosing company policy.
- 11 What is Anna's next priority for her proposed business venture?
- A ensuring that her new invention is protected by a patent
 - B establishing the most economic way of moving forward
 - C finding the right employees and appropriate office space

Part 3

Questions 12–20

You will hear an announcement at a seminar about a future conference on the subject of taxation law in South America. For questions 12–20, complete the sentences.

You will hear the recording **twice**.

Conference on tax incentives in Latin America
17th–18th March

The conference will be useful for

_____ *and* _____ (12) as well as corporate lawyers.

Early registration allows young lawyers, university teachers

_____ *and* _____ (13) to pay a lower fee.

IBA members registering after 18th February pay a conference fee of

\$ _____ (14)

Delegates get materials in advance plus a week's access

_____ to the association's _____ (15)

Part of the conference is being organised as a

_____ (16) for young lawyers.

On day one, sessions will focus on tax issues in sectors such as

_____ financial services and the _____ *and* _____ (17) industries.

On day two, the sectors focused on include ecotourism,

_____ utilities and _____ (18)

Each session will include both a presentation and a

_____ (19) on a particular issue.

Once fees are paid, the organisers will provide documentation

_____ for delegates who need to obtain a _____ (20)

Part 4

Questions 21–30

You will hear five short extracts in which various employees of a law firm called Haddiscoe are talking about working for the company.

TASK ONE

For questions 21–25, choose from the list A–F the thing that impressed each speaker about the firm initially.

TASK TWO

For questions 26–30, choose from the list A–F what each speaker regards as the most valuable experience they have gained whilst with the firm.

You will hear the recording twice. While you listen you must complete both tasks.

A the firm's recruitment procedures

B the attitude of immediate colleagues

C the firm's ambitious plans for the future

D the range of work available to junior staff

E the flexible working arrangements on offer

F the image projected by the firm's literature

Speaker 1 (21)

Speaker 2 (22)

Speaker 3 (23)

Speaker 4 (24)

Speaker 5 (25)

A getting involved in staff training

B learning to choose which projects to work on

C being involved with high-profile clients

D working with the firm's other branches

E being given responsibility for whole projects

F working with highly knowledgeable colleagues

Speaker 1 (26)

Speaker 2 (27)

Speaker 3 (28)

Speaker 4 (29)

Speaker 5 (30)

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.

- 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 select one of the topics and give a short talk on it for about a minute.
- You will have a minute to choose and prepare your topic. After you have finished your talk, your partner will ask you a question.
- All right? (*Candidate A*), it's your turn first. Here are your topics and some ideas to use if you wish.
- Place **Part 2** booklets, open at **Task 1A/B**, in front of each candidate.*
- ⌚ Approximately one minute of preparation time.
- All right? Now, (*Candidate A*), which topic have you chosen, A or B?
- Candidate A Confirms 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 talking about [*state chosen topic*] now please?
- 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 will have a minute to choose and prepare your topic. After you have finished your talk, your partner will ask you a question.
- All right? Here are your topics and some ideas to use if you wish.
- Place **Part 2** booklets, open at **Task 2A/B**, in front of each candidate.*
- ⌚ Approximately one minute of preparation time.
- All right? Now, (*Candidate B*), which topic have you chosen, A or B?
- Candidate B Confirms 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 talking about [*state chosen topic*] now please?
- 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

English Use in International Business Law

- the effect of the increased use of the English language in business transactions
- the level of English needed
- the importance of language in law

Task 1B

Intellectual Property Law

- an example of what is copyrightable in your country
- the rights that copyright provides
- the differences between intellectual property protection from one country to another

Task 2A

Contract Law

- the most important points of a contract
- what effect an oral contract has
- what happens if a contract is broken

Task 2B

The Legal Profession

- the legal training system in your country
- the types of work opportunities for lawyers
- the functions of professional bodies governing lawyers

Investing In Another Country**PART 3**

Interlocutor Now, in this part of the test you are going to discuss something together, but please speak so that we can hear you.

*Place Part 3 booklet, open at Task 24, in front of the candidates.**

Your company is thinking of investing in another country. The Managing Director has asked the legal department for some recommendations.

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.

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 important issues should people consider when they are thinking of investing in another country?
- Do investors from other countries have to worry about restrictions when buying real estate in your country?
- How important is Government and currency stability when considering investing in another country?
- What can investors do to protect their investments in another country?
- Thank you. That is the end of the test.

* Note: In a live examination there will be a range of tasks for the examiner to choose from.

Task 24

Investing In Another Country

Your company is thinking of investing in another country. The Managing Director has asked the legal department for some recommendations.

Discussion points

- what 'investing in another country' means
- the types of regulations your company might be subjected to in another country
- the possible results of not complying with local regulations

Audio transcripts

Unit 1

Listening 1

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'll 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: Um, if there is a trial, when will it take place?

Lawyer: When the time comes, the court'll issue a notice to inform us of the date and time of the hearing.

Listening 2

Anna: So, what are you two planning to do later, when you've completed your degree?

Daniel: Well, right now, I'm planning to become a barrister, because I'd really like to plead cases in court.

Anna: You've been watching too many of those American films, when the handsome young attorney wins the case against the big, bad corporation!

Daniel: Very funny. I just like the idea of arguing a case. I think it'd be exciting. What about you?

Anna: Actually, I'd like to work for a big corporation and advise them on their legal affairs, as in-house counsel. I've heard the work can be very challenging. What are your plans, Jacob?

Jacob: I'm thinking about becoming a solicitor. I'm not that interested in pleading cases in court. I'd rather do research and give legal advice – I think that'd suit me better.

Listening 3

Mr Nichols: So, at this point, I'd like to ask you if there's anything you'd like to ask me? About the firm, for example.

Linus: Of course. I do have some questions. I guess I'd like to know what it's like to work here. Um, I wonder if you could you 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 partners by their first names. It's a good place to work, definitely friendly, but people are serious and work very hard.

Linus: 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: 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's 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. Right. I guess that's all there is to say about the structure. How does that sound to you?

Linus: Very interesting. 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 4

1 I'm a newly qualified lawyer and I've 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 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. Um, 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.

- 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.
- 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. This requires a separate retainer agreement.
- 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 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.
- I'm a shareholder 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'm an active member of several professional organisations, including the state and national bar associations, to name but two.

Listening 5

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's 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 a 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 will 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 1

Ms Norris: So, based on all the background information you provided me with, my strongest recommendation is for you to incorporate for the reasons we discussed.

Mr O'Hara: 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, um, 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 O'Hara: 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 O'Hara: 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 O'Hara: 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 – um, that's the person to be served if the corporation is sued.

Mr O'Hara: OK, right. Er, 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 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 O'Hara: Er, could you explain what a stock ledger is?

Ms Norris: Sure, that's just a record of each shareholder's ownership in a corporation.

Mr O'Hara: 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 O'Hara: 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. There's one more thing; you're also required to file the organisational board resolutions.

Mr O'Hara: 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. Then the incorporation process is complete.

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 Wiseberg: Mm-hm.

Mr Larsen: In this respect, a private limited company differs. Its shares are not available to the general public.

Mr Wiseberg: 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 Wiseberg.

Mr Wiseberg: Yes, it is.

Mr Larsen: And there is one big difference between a C corporation in the US and our private limited company: that's the limit on the number of shares. As I recall, there's no limit on the number of shareholders of a C corporation.

Mr Wiseberg: That's right.

Mr Larsen: But that's not the case with a private limited company. The Companies Act stipulates that not more than 50 members can hold shares within the company.

Mr Wiseberg: I see. I didn't know that. But that's not a problem for me.

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 Wiseberg: 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 Wiseberg: 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 Wiseberg: That sounds better. Maybe you could tell me where I can find one of these agents. Perhaps you have ...

Listening 2

Mr Larsen: Albert Larsen. Good morning.

Mr Wiseberg: Good morning, Mr Larsen, this is Ernest Wiseberg speaking – we met last night at the reception at the museum.

Mr Larsen: Yes, of course, Mr Wiseberg. Good to hear from you.

Mr Wiseberg: 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 Wiseberg: 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, 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 Wiseberg: That's right.

Unit 3

Listening 1

Mr Young: ... so if there are any questions, I'd be happy to answer them now.

Mrs Whiteman: 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.

Mrs Whiteman: 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.

Mrs Whiteman: 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.

Mrs Whiteman: Mm, 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'd 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.

Mrs Whiteman: 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.

Mrs Whiteman: 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.

Mrs Whiteman: Mm, that makes sense now. Thanks.

Mr Young: My pleasure. Any more questions?

Listening 2

Mr Mansfield: Have you got any other questions, Mr Thorpe? Is there anything else about capitalisation you'd like me to explain? Anything in the provisions, perhaps?

Mr Thorpe: Yes. Look at this: here it says 'consideration for shares'. What does that mean, 'consideration'? 'To consider' means to think about something, as far as I'm concerned.

Mr Mansfield: 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.

Mr Thorpe: You lawyers have a language all of your own!

Mr Mansfield: Yes, it can be confusing. Any other questions?

Mr Thorpe: Well, yes, there is. Um, there's something I've always wanted to know – could you explain why these provisions are so incredibly difficult to understand? I mean, the subject matter itself isn't too difficult. It's fairly logical, after all. But the way it's written ... That's another story.

Mr Mansfield: Well, that's what's known as 'legalese', the special style of language used in legal documents. It can be pretty hard to penetrate, I'm afraid.

Mr Thorpe: But I'm reasonably well educated and I'm an experienced businessman. You'd think I'd be able to understand something written for the purpose of conducting business without difficulty, wouldn't you? In my opinion, there's something wrong when texts are too difficult for the majority of people who have to deal with them to understand.

Mr Mansfield: Then you'd agree with the Plain Language Movement.

Mr Thorpe: What's that?

Mr Mansfield: 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.

Mr Thorpe: As far as I'm concerned, that's very sensible.

Mr Mansfield: It is, I agree. And I think the idea is becoming increasingly popular. Many organisations and jurisdictions already recommend plain-language principles. And many legal writing courses at universities stress the merits of plain language.

Mr Thorpe: But there's still a long way to go ...

Mr Mansfield: There are always those who resist change. And the language of law is, by its very nature, inherently conservative. In the law, texts have authority, language has authority, and there's often a long tradition behind them. So you can understand a certain tendency to want to preserve old habits of speaking and writing.

Mr Thorpe: Yes, that may be true. To my mind, the fact that the language of the law is so difficult for non-lawyers makes us all need the services of lawyers more – as interpreters!

Unit 4 Listening 1

Part 1

Good evening, everyone. It's good to see that so many of you were able to attend my presentation this evening. Some of you may know me already, but allow me to introduce myself. My name's Adrian Crawford. I'm with the Mergers and Acquisitions department of our firm, Right. 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're 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 ...

Part II

There'll be time for discussion at the end. 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's 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 are considering general terms of a potential deal, you'll probably look for certain confirmations and commitments from the seller of the target business. These'll 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 2

Jack: Rob, do you think you could spare a minute and help me out with something?

Rob: 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.

Rob: 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.

Rob: 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 these checklists, you see, that tell 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. Have a look.

Jack: Looks good – I think this would help.

Rob: I'm sure it will. Let me talk you through it ...

Jack: Great.

Rob: Well, the first thing you have to do is check the memorandum of association, to find out how much the company's share capital is.

Jack: OK.

Rob: 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.

Jack: Ah, I know that already.

Rob: 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?

Rob: That's the minimum number of members required so that business can be carried out.

Jack: Ah-hah.

Rob: At this meeting, the directors have to pass a resolution that they'll hold an EGM where they will vote on the increase of share capital.

Jack: An EGM is the extraordinary general meeting, right?

Rob: 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?

Rob: That just means that they agree to the meeting being held soon, without everyone knowing about it a long time in advance.

Jack: I see. And now what?

Rob: 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?

Rob: 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, Rob. I'll just take a copy of that checklist.

Unit 5 Listening 1

Part I

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.

... session will then be dedicated to role-plays. 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 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.

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 to what 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'll 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 could 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 2

Mr 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.

Mr 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.

Mr Johansson: Well, the clause in question states, and I quote: 'In the event the franchise is terminated through the default or a breach of this agreement by one of the parties the franchisee and the principals hereinafter named shall not, for a period of three years have any direct or indirect interest in any sandwich restaurant business located or operating within five miles of the franchised business if the franchised business is located in a metropolitan area.' 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 three 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 ...

Mr 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 three 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.

Mr 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.

Mr Johansson: Well, that's certainly a step in the right direction. How about this: we suggest reducing the time frame to one year.

Ms Orvatz: Mm, that would be difficult for us. We could only reduce the number of years to two, and that's already very generous on our part.

Mr Johansson: Let's agree on a year and a half, 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 and a half it is.

Mr 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 1

Part I

I'd like to tell you something about the remedy of specific performance in Denmark. As you know, specific performance is a remedy requiring a person who's 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 basically has two options: to claim either specific performance or damages. However, while the court *may* order the breaching party to perform under the contract, it only has limited power to enforce this. As a result, the Danish Procedural Code only requires specific performance in a limited number of cases – five types of cases, to be exact.

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.

Part II

... granted are converted into money damages. However, there are five types of cases in which the plaintiff's claim is not converted into money damages and the defendant must actually perform his obligations under the contract in accordance with the specific performance ordered by the court. Let me briefly tell you what these five cases are.

First of all, there's the case where objects – such as goods which have already been produced – simply need to be handed over to the plaintiff. This also includes where 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 when the only act that has to be performed is a signature on a document. All that's 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 the 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 2

Part I

Mrs 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.

Mrs Hayes: Um, 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.

Mrs 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.

Mrs 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.

Mrs 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'. 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. 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.

Part II

Mr Anderson: Nope, I had no time and I wasn't going to mess around.

Mrs Hayes: Ah, 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'd 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.

Mrs Hayes: Well, since this is a contract case, you can't recover for your emotional injury – you're only entitled to get what you would 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's 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.

Mrs Hayes: Good. I need to look closely at the contract. If it doesn't waive consequential damages, 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'd 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'd have liked, but good enough. Where do we go from here?

Mrs 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 1

Part I

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 can't 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 they 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 driving 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 my 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 Jones doesn't like Keats?

Ron: That's right.

Part II

Sam: ... because Jones doesn't like Keats.

Ron: That's right.

Sam: And how do you plan to argue this case?

Ron: Well, the crucial point is the contract stipulation that Jones can't 'unreasonably withhold its consent'. And I want to argue that Jones essentially withheld consent for the assignment – *deliberately* withheld consent – because he doesn't like my 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 they were intending to make a decision, but they needed more information, to which they're entitled.

Ron: I've got an expert on commercial lease transactions who'll 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 wasn't a good one.

Sam: Good. Keep me posted, Ron – and let me know if I can help at all.

Ron: Thanks, will do!

Listening 2

Ron: 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 defendant that he had a prospective buyer for his business, the defendant's 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 defendant's lawyer also provided my client with a commercial lease application for the buyer to complete. My client gave the defendant the completed application and information on the buyer and promptly responded to each of the defendant's requests for information.

As acknowledged by the defendant's lawyer, the proposed buyer had a 'perfect credit rating'. If the credit rating was 'perfect', then on what grounds did the defendant 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 defendant to make a decision. If the amount of information provided was sufficient, then on what grounds did the defendant delay making a decision? Surely not on reasonable grounds. Furthermore, there was evidence that the defendant's 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 defendant threatens to 'ruin' my client – makes it clear on which grounds the defendant withheld approval: on unreasonable grounds. The defendant lost the lawsuit and was required to pay high damages to my client – this is the explanation for its unreasonable withholding of approval.

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 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 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.

Unit 8

Listening 1

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, yeah, yeah, I've had a quick look at the documents that we've got so far, and I can say that she does have the 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'd 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'd cost the company less, because I don't have to leave here and appear in court for the pre-hearing.

Gwen: OK. Costs aren't 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 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 ... well, 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, thanks. Bye.

Listening 2

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. Can I get you something to drink?

Mrs Howard: No, thanks, I'm fine.

Mr Howard: Not for me, thanks.

Ms Brewer: Right, then. 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: Not bad, we can't complain, can we, John?

Mr Howard: No, no, business is fine. Actually the demand for cleaning services and facility management is growing in the area. But we're here to ask for your advice – we think we've got 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 ... 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? And you'd like me to inform you about the legality of such a course of action.

Mr Howard: Yeah, that's right.

Ms Brewer: Well, first of all, I should say that the legal position on drug testing at work isn't 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 had 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 could take ages! We can't risk waiting until they've had a chance to kick their drug habits!

Mrs Howard: John's 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, and 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: That's not a bad idea ...

Unit 9

Listening 1

Part I

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 doesn't 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 doesn't 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.

Part II

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 won't 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 would recommend that the clause includes wording to the effect that the buyer agrees that he won't resell the goods until they've 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's 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'll 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'd suggest at this point that we have a look at a well-drafted retention of title clause.

Listening 2

I'll be presenting a brief of the case ProCD Incorporated v 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 Incorporated 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 1

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.

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. Permanent easements are always recorded on the deeds and survive any sale of the property.

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 2

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. Coffee, tea?

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.

Mr Watson: Yes, it's lovely, isn't it?

Ms Blackwell: Right. 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. Señor 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, Señor Martínez will draw up a power of attorney, which you'll have to have made official at the office of a notary. Señor 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: Ah, I see.

Ms Blackwell: Then the two of you'll 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 Señor Martínez will be able to recommend a good local bank.

Mr Watson: Right. What about the contract?

Ms Blackwell: Señor 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, furniture included and so on. Then there'll be the official signing of this contract by you and the Seller, with both Señor 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. Señor 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. Señor Martínez can then sign the relevant part of the contract. Once the rest of the money's 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, Señor Martínez will represent you, and he, the Seller and the estate agent – as well as a representative of 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 1

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's 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'll 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's known as a 'tangible benefit'. 'Tangible' in this case means 'substantial' or 'real', so that we can say that 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 mustn't be anticipated by another patent which has already been granted or by knowledge which is already in the public domain.

The third requirement's 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's a fourth requirement as well, and this is the one that's 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 can't 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 2

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 already met. Hi, Thomas.

Thomas: Hi, Rebecca.

Patrick: Right, Rebecca, Thomas'll 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 does not mean it's 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. Isn't it ironic that just when technology's 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 is ...

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 – for example, is it educational or commercial? 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. You know, 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 1

Ms Benton: Hello, Miranda Benton.

Mr Carter: Hello, this is Max Carter speaking.

Ms Benton: Yes, hello, Mr Carter. How are you today?

Mr Carter: I'm fine, thanks, Ms Benton.

Ms Benton: Great. What can I do for you?

Mr 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.

Ms Benton: I see.

Mr 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.

Ms Benton: Do you have the promissory note there with you?

Mr Carter: Yes, I have it right here. I believe John wrote it up. Apparently he has some experience with this kind of thing.

Ms Benton: Right. 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.

Mr Carter: OK, what would those be?

Ms Benton: The first one is simple: it has to be in writing.

Mr Carter: Well, it certainly is!

Ms 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.

Mr Carter: Well, this note has definitely been signed by Ellis.

Ms 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'.

Mr Carter: 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'.

Ms Benton: OK, that's good. A further requirement is that the note has to mention what's known as a 'sum certain'. That is to say, an exact amount in a specific currency.

Mr Carter: It says '5,000 US dollars' right here.

Ms Benton: Right. This is looking good. There are just two more requirements; if it meets those, you have no problems. Let's see. 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?

Mr Carter: Yeah, well, here's one. It says that as soon as John is paid out his inheritance, he'll start paying on the note. I guess that's a condition, isn't it?

Ms Benton: Yes, it certainly is. Hmm. Er, 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?

Mr Carter: No, nothing like that's written anywhere on it.

- Ms Benton:** Oh dear. Well, Mr Carter, it looks like out of six requirements for negotiability, your note only meets four.
- Mr Carter:** I guess we now need to talk about whether I can get my money out of this whole mess ...

Listening 2

Part I

- 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 have a bit of a problem at the moment.
- Ms Turner:** Oh? 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's in a hurry to sell the property, so he'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 mall on it.

Part II

- Ms Wadman:** They're planning to build a big shopping mall on it.
- 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's in jail.
- Ms Turner:** In jail?
- 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 the principals. Even if all 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 not. Could you explain?
- Ms Turner:** Well, er, 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's liable on an instrument unless he's 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 haven't 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, um, as you may know, in our jurisdiction, signatures by fax are legally binding. Why don't you propose that option?
- Ms Wadman:** OK.
- Ms Turner:** I would 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 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:** Hmm, well, that's a difficult one, but I'm sure we'll find a way around it!

Unit 13

Listening 1

- 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: identifying 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 are 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's in writing. It should identify the debtor and provide a signature block. Of course, there's 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 2

Tina: 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 the 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.

Tina: 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.

Tina: 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.

Tina: 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 in the countries in question who knows what they're doing.

Tina: 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.

Tina: 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.

Tina: 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.

Tina: Right. Um, 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.

Tina: Great, thanks. I promise I'll get them back to you quickly.

Unit 14 Listening 1

Part I

Well, I see that my time's 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 a 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.

Part II

... that isn't the position you want to be in when you deal with an adversary. 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 cent 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 of setting up a protection plan with us, 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 2

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 Germany. 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'd 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 in the web, I knew I had to apply.

Ms Hall: I see. Mr Berger, how would you feel about relocating from Germany to London? Would that be a problem for you?

Mr Berger: Not at all. 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 a German commercial law firm in Munich. We have a few international corporations as clients, but mostly small and medium-sized German enterprises. My work's

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 aren't 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: Well, I think you should know that I'm 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: Hmm. But why should we hire you over all our other applicants?

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'm also a member of the Insolvency Practitioners Association, which was one of the requirements in your advert.

Ms Hall: Good. Perhaps I should ask you if you'd like to ask me anything?

Mr Berger: Yes. Could you tell me something about how attorneys are trained in the firm?

Ms Hall: Well, that's a very good question. First of all, we have a training scheme which ...

Unit 15

Listening 1

Mr Langston: So, Mr Greene, good to see you again. Please have a seat.

Mr Greene: Thank you.

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. 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, what brings you here today?

Mr Greene: Well, like I said, business isn't great at the moment. But we're surviving. The problem is, we've heard that a newcomer's planning to enter our market.

Mr Langston: I see. No one's 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: 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 in 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. 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'm here. 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 could still be an infringement of the law. The infringements in this case would be for conspiracy to allocate territories and fix prices. 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'd 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 monopoly power 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.

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 rather narrow definitions of the market. Taking clearly ridiculous views of market definition isn't 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 aren't 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's 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.

Listening 2

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

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 – 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 has been a very rewarding year for me.

Extract 3

Woman: So how's the new associate working out?

Man: 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, to try and foster some team spirit.

Woman: 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: Ah, 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, um, 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 will 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

- 1 I've just started a job as an associate here in the firm. I spend most of my time working on patent litigation, 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 partners.
- 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.

- 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.
- 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 bit – 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.
- 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

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

The six months I spent in Milan were amazing. It wasn't just that I was part of a smaller team, it was also that I had to work with other local firms. I'd worked with the Italian office before, during a banking deal, but being on the spot meant that I could really grasp how things work out there. That experience helps a lot when you get home. I think that the firm's smaller European offices are different from, say, Hong Kong or Singapore – which are much more what I would be used to back home – so it was a good choice for me.

I think sometimes as a trainee it can be difficult to see the significance of some of the work you do. It took me a while to appreciate the fact that without the routine elements, transactions simply can't complete successfully. Working in the firm's Milan office was an eye-opener for me, as it's a smaller outfit than back home and there's less in the way of practical support, so it made me realise the importance of getting every detail right and still being efficient about it. Even as a trainee, there's a need to manage effectively and delegate.

Now you will hear the recording again.

Extract 2

Lawyer: Robert, good morning. Thank you for coming. I just wanted to update you on where we are concerning your case.

Client: Oh, yes, that would be really useful.

Lawyer: Basically, what's happened is that some neighbouring homeowners have been granted a Temporary Restraining Order, preventing your company from carrying out any further chemical operations on your property. What happened was that their lawyers were able to convince a judge that your chemical operations are contrary to your zoning status. They've also got some evidence that chemicals may be leaking onto their land. That's how they met the requirements necessary to get an order, and they've posted a bond to cover any loss you might incur.

Client: So when do I get any say in the matter? It seems ridiculous that they're complaining about the chemical operations when the local authority has no problems with it.

We've been doing it for six years.

Lawyer: Yes, I know, Robert ... and with the local authorities on our side, I wouldn't be overly worried. However, apparently the homeowners do have some photographs to submit which may well support their argument. A hearing is scheduled for next week to determine whether cause exists to continue the order or not pending a full trial. At the hearing, you'll need to testify and provide the technical background.

Client: I see.

Now you will hear the recording again.

Extract 3

Woman: Your new recruit called me about the Thwaite case the other day. How's she getting on?

Man: Claudia? She's not doing badly, actually. She certainly keeps the paperwork moving – which is more than can be said for her predecessor, I must say. I'm already able to leave most routine aspects of cases to her without feeling I need to look over her shoulder every two minutes to make sure she's coping OK. My only reservation would be that I feel she's got a little too involved in this Thwaite case; that she's not quite embraced the firm's team approach completely. I'll have to find a way of broaching the issue with her. What about your chap, Pedro?

Woman: Oh, Pedro's doing fine, too – just a few rough edges. I got a bit worried about his interpretation of one client's needs, though. He hadn't quite realised that some of the work he was undertaking, though appropriate enough in itself, was rather time-hungry in ways that weren't moving things forward – I had to explain the cost specifics. He took what I said very well and probably just needs to attend a session on research techniques, you know, something on targeting the answerable questions.

Now you will hear the recording again.

That is the end of Part 1.

Part 2

You will hear part of a consultation between a lawyer and a new client, Anna Krupa, who is planning to set up her own business. 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.

Lawyer: Good morning. I'm Malcolm Travis.

Anna: Good morning, Anna Krupa.

Lawyer: Pleased to meet you. First of all, I have to ask you, has the firm acted on your behalf in any other matter?

Anna: Not exactly. My husband was a client of your firm some years ago. He works in the insurance sector, but it wasn't a commercial matter – his siblings were contesting the contents of their parents' will – so it's of no relevance to what we're dealing with now. But he was happy with the firm, so that's why I'm here.

Lawyer: And I understand you're interested in setting up your own business?

Anna: That's right. It's time to capitalise on my experience and training. I've been lucky; soon after graduating, I got work with an innovative software company and was involved in a highly successful project. Then I was head-hunted by a larger company, where I stayed for 1.2 years. That was my last job. I got quite a generous severance package from them, which I've put to good use. I've taken time out to develop some research projects of my own, free from the pressure of having to look for another post.

Lawyer: Why did you leave them, may I ask?

Anna: Well, I had some minor differences with my line manager. You know, little things like I wanted to upgrade the medical insurance plan that was part of the salary package, and they refused to pay. But although it was a combination of factors, the main trigger was getting passed over for a promotion. That's when I decided that I'd rather work for myself – so I quit. It was quite amicable, but I'm still a little bitter about not getting the credit I felt I deserved.

Lawyer: And do you have a copy of the employment agreement? The reason I ask is because often they contain a restrictive covenant.

Anna: I do remember that there was something that prevented me from taking their customers, but I don't think it said anything about not competing with them in a more general sense – you know, geographical location, confidentiality, those sorts of things. In any case, if memory serves me correctly, it was only operative for one year after leaving, and that's passed now – but I'll check it out. I've still got the agreement somewhere – would you take a look at it for me to make certain?

Lawyer: Absolutely, I would need to. So what are your priorities at the moment?

Anna: Well, I've come up with what is basically a new kind of software package – an invention if you like. I've already applied for a patent, so that's all in hand, but I need to be thinking about a business plan before I approach the bank for a loan to cover the start-up costs. You know, I have to conduct live trials, think about business premises, even staff eventually. But I want to keep my overheads down, so I'm looking for ways of doing that which allow me to maximise any investment I make. Could you advise me on such things?

Lawyer: Indeed we could. Let's talk about the business plan first.

Now you will hear the recording again.

That is the end of Part 2.

Part 3

You will hear an announcement at a seminar about a future conference on the subject of taxation law in South America. For questions 12–20, complete the sentences.

You will hear the recording twice. You now have one minute to look at Part 3.

We've got a few minutes before our next session, so there's just time to give you some information about an upcoming conference on the topic of tax incentives in Latin America. The two-day conference will be held in Miami, Florida, on the 17th and 18th of March and is being presented by the taxation section of the International Bar Association.

Delegates will have the opportunity to update their legal knowledge and meet leading international tax lawyers and industry experts. The conference should appeal to accountants, economists and corporate lawyers dealing with international tax issues in Latin America.

If you register now, conference fees can be as little as \$485, even for non-IBA members who fall into certain categories; for example, lawyers under 30, full-time academics and judges. To get these reductions, however, you must register before the 18th of February. After that, fees increase to \$845 for non-members and \$745 for IBA members. If you wish to attend the conference dinner, there is an additional charge of \$120.

Otherwise, fees cover attendance at all working sessions. These will be in English, and English–Spanish interpreting will

be provided. You will also receive, in advance, all conference materials, including any speakers' papers submitted before the 11th of February, and you'll be able to get on to the IBA website in the seven days prior to the conference. During the conference itself, lunches, light refreshments and evening receptions are also included in the fee.

A key feature of this conference is that it will be run partly as a competition for selected young lawyers who will each present papers on a particular incentive or disincentive in a Latin American jurisdiction. The best speaker amongst them will be presented with an award at the Closing Reception. If you'd like to take part, you need first of all to be under 40 years of age and be ready to do a 15-minute presentation. The topics of the six sessions are as follows: on the first day, sessions will focus on tax incentives in oil and mining activities and in the financial services sector. If none of those topics appeals, then the following day's programme might hold more interest for you. That's when the emphasis will be on tax incentives in utilities, in ecotourism and in the real-estate sector. Each speaker needs to present a particular incentive or disincentive in a local Latin American jurisdiction, together with the reasons for implementing it. The effectiveness of local tax arrangements for attracting foreign investment should also be addressed. Each presentation will be followed by a panel discussion which further investigates the issues raised.

Finally, if you're hoping to attend the conference – whether as a speaker or a delegate – and you live outside the USA, you may need to think about a visa. The conference organisers would like to stress, though, that they are unable to issue a letter in support of any application until they have received a completed registration form and the full fees.

So, if you'd like more information about the conference ...

Now you will hear the recording again.

That is the end of Part 3.

Part 4

Now look at the fourth and last part of the test. Part 4 consists of two tasks.

You will hear five short extracts in which various employees of a law firm called Haddiscoe are talking about working for the company. Look at Task 1. For questions 21–25, choose from the list A–F the thing that impressed each speaker about the firm initially. Now look at Task 2. For questions 26–30, choose from the list A–F what each speaker regards as the most valuable experience they have gained whilst with the firm.

You will hear the recording twice. While you listen, you must complete both tasks.

You now have 40 seconds to look at Part 4.

- 1 I'd applied to various law firms and been put off by the very traditional image you get from all the paperwork they send you. Haddiscoe stood out as different, they dispensed with all that; just invited me in for a fairly laid-back interview, which really suited me. Once I'd settled in, I realised not everything was quite as flexible and friendly as the recruitment staff had suggested. But never mind; I got the chance to work with people who really know their stuff in fairly specialist areas of the law. They could be difficult at times, and it was a steep learning curve for me, but brilliant training – giving me a future as a specialist in those areas, too.
- 2 I'd trained with another firm where working conditions were excellent, but I was fairly ambitious, and could tell from the interview that at Haddiscoe I'd be able to branch out into all

sorts of areas that interested me for the future – particularly the regulation of financial markets. I couldn't have got that anywhere else so early on in my career. You couldn't pick and choose, of course, but I was lucky, getting taken on as assistant to a partner on a multi-million-dollar financing deal. I got to work directly with the financiers, drafting a whole document from scratch. It was only one aspect of the project, but that direct contact gave me real insights into that branch of the law.

- 3** At first, I wasn't sure that I fitted Haddiscoe's image, having trained in a more traditional firm, but I did eventually find I had lots in common with my colleagues. What actually attracted me was the firm's willingness to experiment with different ways of working, even for more junior staff; staggered hours, the option of working at home sometimes – it was all refreshingly forward-looking. Once there, the most beneficial thing for me personally was working as part of a team on complex international projects where we'd liaise closely with various overseas offices. It wouldn't have been my choice, because nothing in my previous training had prepared me for that, but I gradually acquired the necessary expertise.
- 4** I'd read a very positive article about Haddiscoe in the press, but it was only at the interview that I sensed how intent they were on expansion. I reckoned that would mean training opportunities, interesting work with high-profile clients, etc., so I didn't even apply to any other firms. In actual fact, I've mostly been involved with fairly routine work with little opportunity to branch out. It wouldn't have been my choice, but it has meant that I'm trusted to do more things on my own. Like when the partner takes me along to meetings and then leaves all the follow-up to me – drafting the documents, preparing for the signing, etc. Some colleagues recruited more recently don't really get that.
- 5** Friends working at Haddiscoe seemed quite enthusiastic, but colleagues aren't everything, so I got hold of a copy of the firm's mission statement. It might not be the best way to choose an employer, but I found myself in sympathy with their general approach and so applied. I was pleasantly surprised by the variety and the scale of the litigation projects I got involved in, though I have to be flexible. But the real plus for me is the chance I get to pass my knowledge and experience on to newer recruits. Devoting time to the induction course means less contact with clients, which might mean less higher-level work in the future, but the rewards far outweigh any drawbacks.

Now you will hear the recording again.

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.

Answer key

Unit 1

- 1** 1 A international students who will be studying at English universities
B students who are going to study law in a European university
2 A
3 B
- 2** 1 b 2 c 3 a
- 3** 1 based on 2 disputes 3 legislation 4 bound by
5 provisions 6 custom 7 precedents 8 rulings
9 codified 10 non-criminal
- 5** 1 c 2 a 3 b 4 e 5 d
- 6** 1 regulations 2 ordinance/by-law 3 bill 4 directive
5 statute
- 7** 1 ordinance 2 regulations 3 bill 4 statutes
5 directive
- 9** 1 e 2 g 3 i 4 a 5 b 6 c 7 d 8 f 9 h
- 11** 1 c 2 f 3 a 4 b 5 d 6 e
- 12** 1 breach of contract
2 The lawyer thinks it's hard to say.
- 13** 1 e 2 i 3 b 4 h 5 g 6 f 7 c 8 d 9 a
- 14** 1, 2, 3, 4, 6, 7, 9
- 15** 1 b 2 e 3 d 4 a 5 c
- 16** 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
4 serve: a complaint, an injunction, a notice, a pleading, a writ
5 submit: an affidavit, an answer, a brief, a complaint, a motion, a notice, a pleading, a writ
- 17** inter alia, sic, e.g., v.
- 18** 1 c 2 e 3 f 4 b 5 h 6 g 7 a 8 d
- 19** 1 d 2 g 3 a 4 b 5 h 6 f 7 c 8 e 9 j
10 i
- 20** 1 barrister 2 attorney 3 in-house counsel
4 solicitor
- 22a** 1 advise: clients, corporations, defendants
2 draft: contracts, decisions, law, legislation
3 litigate: cases, disputes
4 practise: law
5 represent: clients, corporations, defendants
6 research: cases, decisions, law, legislation
- 23** corporate lawyer, defence lawyer, government lawyer, patent lawyer, public-sector lawyer, tax lawyer, trial lawyer
- 25** 1 barrister 2 Bar Vocational Course 3 call to the Bar
4 bar association 5 bar examination
6 admitted to the Bar 7 to disbar
- 26** 1 He worked at G.R. Foster & Co. Solicitors, Cambridge, UK.
2 He speaks English, French and Swedish.
3 He did his first degree at the University of Essex, Colchester, UK.
4 His main duty at the European Commission was drafting opinions in English and French dealing with contracts awarded for projects.
5 He is presently enrolled in a Master's Programme in Law and Information Technology at the University of Stockholm, Sweden.
- 27** 1 He says that the firm is traditional, and people are hard-working and serious, but friendly.
2 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).
- 28** 1 Mr Robertson 2 Full Partners 3 Real Property
4 Salaried Partner 5 Associate 6 Paralegal
- 29** Department/Company: *is/are headed by, (is/are in charge of)*
Person: *is/are assisted by, is/are responsible for, is/are in charge of, report to*
Both: *is/are managed by*
- 31** Speaker 1: 3, 4, 5
Speaker 2: 1, 2, 3, 4
Speaker 3: 2, 3, 4
Speaker 4: 2, 4, 5
Speaker 5: 1, 2, 3
- 34** 1 Will improve future job opportunities
2 Four weeks
3 Do clerkships starting in first year of law school, in a variety of firms
- 35**

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 officers, partners, directors, managers,
company secretary, auditor
- 3 1 e 2 f 3 c 4 j 5 b 6 h 7 d 8 a 9 i
10 g
4 2, 3, 5, 7, 8
5 C corporation
6 1 e 2 a 3 c 4 b 5 d
7 2, 4
8 1 True 2 False 3 False 4 True
9 1 expired 2 entitled to 3 in lieu thereof 4 provided
5 repealed 6 amended 7 vested in
- 10 1 a: lines 1, 7
b: lines 8, 12 (both)
2 It can be deleted without changing the meaning of the sentence.
3 a
11 3, 6
12 1 False 2 False 3 False 4 True 5 True 6 True
7 False
- 13 1 b 2 d 3 c 4 a 5 f 6 e
- 15 The Bill is intended to stop businesses (particularly accountancy firms) moving abroad because of the current rules governing the liability of partnerships.
- 16 1 d 2 e 3 b 4 f 5 a 6 c
- 17 1 True 2 False 3 False 4 True
- 19 The dispute involves whether the directors were acting lawfully when they called the annual shareholders' meeting early.
- 20 1 b 2 c 3 d 4 b
- 21 1 b 2 a 3 a 4 b 5 a 6 b
- 22 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.
- 24 1 state 2 requires 3 precludes
- 25 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
- 26 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 ...

27 Suggested answer

Dear Mr Carpenter

You have requested advice concerning the founding of a Limited Liability Partnership (LLP) and whether this form of company would be advantageous for your accounting firm. I have now had an opportunity to research the matter and can provide you with the following advice.

First, allow me to outline the features and some advantages of an LLP. In an LLP, obligations accrue to the name of the partnership rather than to the joint names of its individual members. Similar to a shareholder in a limited liability company, an individual partner is only personally liable for his pre-determined contributions to partnership funds. Unlike a limited liability company, however, the LLP is more flexible in terms of decision-making. Furthermore, board meetings, minutes books and annual or extraordinary general meetings are not required. In addition, the LLP enjoys the tax status of a partnership and the limited liability of its members.

However, an LLP also has some significant disadvantages. The accounting requirements are very demanding and are expensive to comply with for small and medium-sized LLPs, as accounts must be professionally audited. It should also be mentioned that there is a restriction on the management freedom of an LLP. Each LLP must appoint a member who is responsible for administrative obligations. This member may incur criminal liability in certain circumstances. Moreover, an LLP member enjoys less limited liability toward third parties for negligent acts or omissions in the course of his duties than a company director. Finally, in the case of insolvency, stricter provisions apply to an LLP.

Weighing the above considerations carefully, I firmly believe that it would be a wise decision for your firm to form an LLP. As an accountancy firm, you should have no difficulty complying with the stricter accounting procedures.

Please contact us if you have any questions about the matters here discussed, or any other issues.

Yours sincerely

Paul R. Sutherland

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

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 appeal, an amendment, 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 e 2 h 3 f 4 c 5 d 6 g 7 b 8 a

3 1 c 2 e 3 b 4 a 5 d

5 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.
- The purpose of a rights issue is to raise cash from shareholders.
- If they do not wish to buy the newly issued shares, they have the option to waive their pre-emption rights or to vote to cancel them; the shares may then be issued by the company to third parties.
- 1 b 2 c 3 c 4 a
- 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.

- 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.
- 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.

9 1 F 2 E, F, (G) 3 C, D 4 B 5 G 6 C 7 A 8 E

10 Suggested answers

- 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
- 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%?*
- the communication or sharing of knowledge between parties
- encounter negative factors that prevent or hinder one from obtaining one's goal
- 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.
- 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.
- be accountable for one's actions to the shareholders at the yearly shareholder's general meeting
- collaborating or working together to resolve any disputes or disagreements
- a regulatory framework or structure in which the employees are granted the right to participate in the management of the company
- in the public eye, subject to public scrutiny, for example by the media
- 1 c 2 d 3 b 4 a
- 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
- 1 dismiss 2 exercise 3 exercise 4 restrict
5 accrue(d) 6 exercise 7 restrict 8 dismiss
- 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

- 16 1 False 2 False 3 True
- 17 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 That lawyers deliberately keep the language difficult to understand so that there is more need for their services.
- 18 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*
- 19 *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
- 20 1 c 2 b 3 a 4 e 5 d 6 f
- 21 1 thereto 2 therein 3 therewith 4 therefor; thereof 5 thereon 6 thereof
- 23 as far as I'm concerned, In my opinion, The way they see it, I think, To my mind
- 24 1 opinion 2 see 3 mind 4 my 5 ask 6 point 7 concerned 8 think 9 seems 10 firmly 11 me 12 would
- 26 The new law specifies that companies are permitted to *buy back their own shares and hold them in treasury rather than having to cancel them.* (Paragraph 3).
It has been enacted to *assist companies amend their share capital without incurring the costs of cancelling and re-issuing shares that exist under current legislation. The new law will also bring the UK into line with other EEA countries.* (Paragraph 5).
- 27 The six limits are:
- It only applies to shares listed on London Stock Exchange's official list, AIM or comparable EEA market.
 - Shares must be held in treasury until they are resold or transferred to an employee share scheme.
 - Companies must buy back shares out of distributable reserves.
 - Bought-back shares must not at any time exceed 10% of issued share capital.
 - Surplus shares must be disposed of within 12 months.
 - While in treasury, shares have no voting rights and are not entitled to dividends.

29 share(s)

30 1 Under 2 to 3 into 4 to 5 to 6 into; with

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 acquired company 2 friendly takeover 3 target 4 voluntary liquidation 5 insolvent
- 4 1 c 2 c 3 b
- 5 1 False 2 True 3 True 4 False 5 True 6 True
- 6 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
- 7 a: 1, 2
b: 3, 4, 6, 7, 8, 9, 11, 12
c: 5, 10, 13
- 8 A spin-off is *any distribution by a corporation to its shareholders of one of its two or more businesses* (paragraph 1).
- 9 a 4 b 3 c 1 d 2
- 10 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.
- 13 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
- 14 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
- 16 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.
- 17 The board meeting was called to vote on the allotment of shares (increase authorised share capital).
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.

- 18** 1 It was resolved that the applications for the allotment of shares be approved subject to their 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.
- 19** to confirm, to resolve, to note, to report, to propose, to declare, to inform, to instruct
- 20** to give notice of a meeting (*notice of the meeting had been given*), to be present at a meeting (*was present at the meeting*), to present X to a meeting (*Applications were presented to the meeting*), *There was presented to the meeting*, to propose a resolution (*resolutions would be proposed*), to hold a meeting (*the meeting be held immediately*), to adjourn a meeting (*The meeting was adjourned*), to resume a meeting (*The meeting resumed at 8 p.m.*), to set out a resolution (*the resolutions [which had been] set out*), to pass a resolution (*the resolutions ... had been duly passed*), to file a resolution (*to prepare and file ... the special and ordinary resolutions*), to close a meeting (*the meeting was closed*)
- 21** meeting: arrange, attend, call, cancel, convene, preside at, schedule, summon
resolution: adopt, authorise, draft, endorse, introduce, oppose, pass, table
- 22** 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.
- 23** 1 False 2 False 3 True 4 True
- 24** 1 e 2 a 3 d 4 c 5 b
- 26** 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.
- 27** *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

Unit 5

- 1 a 3 b 5 c 4 d 1 e 2
2 1 c 2 d 3 b 4 a
3 1 e 2 i 3 d 4 g 5 b 6 h 7 a 8 j 9 c
10 f
5 1 Liquidated Damages 2 Acceleration
3 Force Majeure 4 Assignment 5 Termination
6 Entire Agreement / Merger / Parol Evidence

- 6 *Suggested answers*
- responsibility to pay compensation
 - the party alone can decide
 - carry out later or not at all
 - agreement given before in writing
 - If Operator defaults in performance ...
 - do nothing
 - attachments
 - considered
- 7 1 A non-competition agreement.
2 Because it is an agreement template.
- 8 2b: Confidentiality
3: Consideration
5: Severability
6: Payment of Costs
- 9 1. to comply with 2 shall be stricken 3 ascribed to
4 commencing 5 has acquired 6 contemplated by
7 shall expend
- 11 1, 3, 5, 6, 8, 9
- 12 1 While bargaining, it means giving up some items in order to get other ones from the other party.
2 The purpose of a merger clause is to ensure that anything that was said or written before the agreement is not admissible in proceedings unless it is explicitly written in the agreement.
- 13 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 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 ...
- 14 1 d 2 e 3 a 4 b 5 c
- 15 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
- 17 They are talking about a franchise agreement.
The two clauses they mention are the non-competition clause and the arbitration clause.
- 18 1 False 2 True 3 True 4 False
- 19 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.
- 20 1, 2, 3, 4, 5, 6, 9
- 21 a Our proposal is to ...
We suggest ...
We'd like ...
What we're looking for is ...
b I think we could live with that.
That's certainly a step in the right direction.
I'm afraid that's out of the question.
We'd be happy with that.
c I'm afraid we can't go along with ...
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.*
- 23 *Suggested answers*
email, e-signature, e-cash, e-commerce, e-evidence, e-law
- 24 1 b 2 d 3 c 4 e 5 a
- 25 1 The term 'digital signature' has been used for various methods of indicating an electronic signature, such as typing the signer's name into the signature area, pasting in a scanned version of the signer's signature, clicking an 'I Accept' button or using cryptographic 'scrambling' technology. However, it is now becoming standard to reserve the term 'digital signature' only for cryptographic signature methods, and to use 'electronic signature' for the other paperless signature methods mentioned above.
2 The most significant legal effect of the new e-signature law is to make electronic contracts and signatures as legally valid as paper contracts.
3 These websites need enforceable agreements for ordering supplies and services. For them, the new law is essential legislation because it helps them conduct business entirely on the Internet.
4 An online company must provide a notice indicating whether paper contracts are available and inform customers that if they give their consent to use electronic documents, they can later change their minds. The notice must also explain what fees or penalties might apply if the company must use paper agreements for the transaction. Furthermore, the notice must also indicate whether the customer's consent applies only to the particular transaction at hand, or whether the business has to get consent to use e-documents/signatures for each transaction. Prior to obtaining consent, the business must also provide a statement outlining the hardware and software requirements to read and save the business's electronic documents. If the hardware or software requirements change, the business must notify customers of the change and give them the option to revoke their consent to using electronic documents.
5 The law does not define an electronic signature, or stipulate what technologies can or should be used to create an electronic signature. The law establishes only that electronic signatures in all their forms qualify as signatures in the legal sense.

Advantages of new law

- Adds to the certainty of the binding nature of e-contracts
- Facilitates online trade
- Provides some assurance against fraud
- Promotes e-commerce by increasing consumer confidence
- Provides a basis for the free market to develop common procedures to avoid fraud

(Possible) disadvantages of new law

- Might actually add to the uncertainty of uninformed consumers
- Could be disadvantageous to the low-tech consumer
- Could discriminate against those who want to use printed agreements
- Could raise conflicts of laws issues between state and federal law
- Could lead to difficulties in interpretation due to the lack of definition of electronic signature

28

Adverb + verb	Adverb + adjective
generally apply	purely online
apply specifically	legally binding
recently signed*	legally valid
previously accompanied	substantially similar
adequately protect	
commonly used	
sign fraudulently	
widely accepted*	

* These could also be thought of as 'adverb + adjective' combinations.

29 consent

30 1 f 2 d 3 e 4 a 5 c 6 b

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 Pecuniary compensation

2 1 True 2 False 3 True

3 1 d 2 e 3 a 4 g 5 b 6 c 7 f

5 Liquidated damages are defined as 'provisions in a
contract stipulating the amount required to compensate
an injured party in the event of a breach'.

6 1 d 2 a 3 c 4 b

7 1 False 2 False 3 True 4 True

9 1 breach of contract 2 compensate an injured party
3 bargaining power 4 clause at issue

10 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 ...

11 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)

13 1 True 2 False 3 False

14 1 produced 2 a third party 3 signature 4 transfer
5 harmful

15 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.

- 17 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.
- 18 1 by way of 2 prescribed 3 in excess of
4 mutually 5 is due 6 inclusive of 7 as aforesaid
8 deducted from
- 19 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.
- 20 Read through the contract.
- 21 1, 3, 4, 5, 7
- 22 1 c 2 b 3 c 4 b
- 24 1 e 2 c 3 a 4 d 5 b
- 26 1 The memo 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 mistakes: 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.
- 27 a 2 b 6 c 3 d 7 e 1 f 5 g 4
- 28 Use the email on page 87 as a model.
- 29 I will outline the law in this jurisdiction as it applies to the facts in the instant case.
- 30 *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.
- 31 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.

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	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

Unit 7

- 1 1 True 2 True 3 False 4 False
- 2 1 Novation 2 benefits 3 third party 4 novation
5 novation 6 assignment 7 Assignment
8 parties 9 assignment 10 novation
- 3 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.

- 4 2 delegator; delegate(e) 3 obligor; obligee
4 assignor; assignee
- 6 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.
- 7 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.
- 8 1 g 2 c 3 e 4 a 5 f 6 d 7 b
9 2, 4, 6
- 11 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.
- 12 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.
- 13 mind looking ... letting; appreciate getting; look forward to hearing (NB the latter is a phrasal verb (*look forward to*) followed by an *-ing* form)
- 14 1 a 2 b 3 a 4 a 5 a 6 b 7 a 8 a
- 15 1 suing 2 giving 3 breaching 4 to re-draft
5 gathering 6 hearing 7 to tell 8 arguing
- 16 3, 4, 6
- 17 1 True 2 False 3 False
- 18 1 c 2 d 3 e 4 b 5 a
- 19 a 2 b 5 c 6 d 4 e 1 f 3
- 20 *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 the defendant dislikes your client – that there was a lawsuit is not enough. It is imperative that you point out that the defendant 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 defendant 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

- 22 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
- 23 *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 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 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.

- 25 *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.

- 26 1 c 2 a 3 b

- 27 *Suggested answers*
The court gave weight to the evidence provided by the expert witness.
The court's determination that the withholding of consent was unreasonable was supported by the evidence.
In reaching its decision, the court drew inferences of fact from the evidence submitted.

- 28 The text is about a new law in England, Wales and Northern Ireland which came into force in 2000 and which gives third parties to a contract additional rights.
- 29 1 c 2 d 3 b 4 e 5 a
- 30 1 The act applies to contracts governed by English law or the law of Northern Ireland entered into beginning May 11, 2000, as well as to each English law contract entered into beginning November 11, 1999, which expressly provides for its application.
- 2 A person that is not a party to a contract will be permitted to enforce its terms if the contract expressly provides that the non-party may do so, or if one or more terms of the contract purport to confer a benefit on the non-party, unless on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the non-party.
- 3 The advice is given that contract drafters should consider whether any third party has been given rights under a contract. The parties may agree in the contract to exclude the application of the statute to prevent one or more of the parties from being exposed to unexpected claims by third parties who were not intended to be beneficiaries of the contract.
- 31 1 d 2 c 3 a 4 e 5 b

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 c 2 a 3 d 4 b

3 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.

4 1 c 2 d 3 a 4 e 5 b

6 Both a *case bonanza* and a *boom in work* mean an extremely large amount of cases to work on.

7 One directive would outlaw discrimination on the basis of age and religion.

The second deals with discrimination based on race and ethnicity more generally.

The third will provide support for education on race discrimination issues and for groups which target race discrimination.

8 1 False 2 False 3 False 4 True

9 1 c 2 d 3 b 4 a

10 1, 3, 4, 6

11 1 b 2 a 3 a 4 b

12 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 ...

13 See phrases a-j in Exercise 14.

14 1 d 2 e 3 i 4 h 5 j 6 b 7 a 8 f 9 c 10 g

15 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

16 Headline 2

- 17 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.
- 18 1 False 2 True 3 True 4 True 5 False
- 19 1 A 2 A+D 3 O 4 A 5 D 6 O 7 A+D 8 A 9 A 10 A 11 A
- 20 Expressing agreement strongly: 1, 8, 10
- 21 *Suggested answers*
2, 3, 4, 6
- 22 The Commentary section.
- 24 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.*
- 25 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.
- 26 1 True 2 True 3 False 4 True 5 False 6 False
- 27 1 e 2 d 3 a 4 c 5 b
- 28 1 c 2 f 3 b 4 d 5 a 6 e
- 29 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
- 31 Factual errors in memo:
1 Speed: The new arbitration procedure usually only takes half a day.
2 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.
3 The new arbitration scheme only deals with unfair dismissal cases.
- 32 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*
- 33 *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 2 under 3 to; to; via 4 to; against 5 of; from
6 off; in 7 on 8 on
- 5 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 d 2 g 3 a 4 f 5 b 6 c 7 e
- 3 1 to pay for, to purchase
2 to deal in, to offer for sale
3 consumer, customer, purchaser
4 merchant, retailer, supplier, vendor
5 commodity, merchandise, wares
- 6 1 f 2 j 3 e 4 i 5 h 6 d 7 a 8 c 9 b
10 g
- 7 1 Title and risk 2 Orders 3 Warranties
4 Indemnification of vendor 5 Changes or cancellation
(Paraphrases will vary.)
- 8 If an ROT clause is interpreted as a charge and has not been registered, it is void.
- 9 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.

10 1 b 2 c 3 a 4 c

11 1 supplied 2 seller 3 in full 4 buyer 5 value 6 recover 7 premises 8 due 9 solvency

12 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.

13 The product is a software program containing millions of telephone numbers and addresses, as well as a retrieval program.

The central legal issue is whether a shrink-wrap licence constitutes an enforceable contract.

14 1 False 2 True 3 True 4 False 5 True

15 The facts of the case, the stages of litigation, the holdings of the courts, the reasoning of the courts

16 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?*

17 1/2 b; h 3/4 c; g 5/6/7 d; f; i 8/9 a; e

20 a 3 b 7 c 1 d 6 e 2 f 4 g 5

21 *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.

22 1 into 2 to 3 of 4 in 5 over 6 in 7 for 8 between 9 in 10 into

23 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 5)

- 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)*

24 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 a 7 b 8 c 4 d 5 e 2 f 3 g 9 h 6

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 While fee simple is the expression for the absolute ownership of real property, fee tail refers to an estate that may be inherited only by a limited class of heirs.
- 3 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.
- 4 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 distinguish 2 is a general term for
3 refers to/includes; fall under the heading of 4 divided
5 types 6 includes
- 5 **Suggested answers**
Real property is a general term for freehold estates and leaseholds.
In real property, a distinction is made between freehold estates and leaseholds.
Freehold estates and leaseholds fall under the heading of real property.
There are two types of real property, freehold estates and leaseholds.
- 6 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.
- 7 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.
- 8 1 we distinguish between 2 classified into
3 type includes 4 One important sub-type
- 9 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, ...
- 11 The firm also handles Natural Resources.
The two types of disputes named are property boundary disputes and ownership disputes.
- 12 1 yes 2 no 3 yes 4 no
- 13 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.
- 14 See Reading 2 for a model practice areas statement.
- 15 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
- 16 Statutory conditions are the conditions imposed by law.
- 17 1 e 2(a) f 2(b) g 3 h 4 b 5 a 6 c 7 d
- 18 1 2b 2 2a 3 5 4 1 5 3 6 7 7 4 8 6a
- 19 1 h 2 g 3 i 4 b 5 e 6 c 7 d 8 k 9 f
10 a 11 j
- 20 1 c, premises 2 a, tenancy 3 d, law 4 b, consent
- 21 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.
- 22 1 covenant of quiet enjoyment 2 precaution
3 contractor 4 estimate 5 postpone
- 25 1 Sr Martínez is the Spanish solicitor contacted by Ms Blackwell on behalf of her client.
2 a, c, e, f, h, i, j, k
- 26 1 False 2 True 3 True 4 False 5 False
- 27 Sr Martínez's specific area of expertise is negotiating terms of sale of a property. 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.
- 28 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.
- 29 **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
- 30 **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 c 2 a 3 e 4 b 5 d
- 3 **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
- 4 1 Business-method patents.
2 It involves an Internet sales application featuring a one-click ordering solution.
3 Four requirements
- 5 1 landmark cases 2 utility 3 tangible benefit
4 non-obviousness requirement 5 subject matter
6 barred from
- 6 1 False 2 True 3 False 4 True
- 7 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.

- 8 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.
- 9 1 patentability 2 patent 3 unpatentable 4 patent
5 patentable 6 patented
- 10 **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.

- 11 1 C 2 G
12 1 d 2 e 3 a 4 c 5 b
13 1 c 2 a 3 d 4 b
14

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

- 15 See words in italics in table above.
- 16 The Trade Mark Office informs the owner of the trade mark when that trade mark is about to expire.
- 17 1 e 2 d 3 f 4 g 5 b 6 a 7 c
- 18 1 expiry 2 request; renewal 3 fees 4 trade mark
- 19 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.

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.

- 20 She is asking for information about reviewing a Community Trade Mark.

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 and 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

- 21 1 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 Four factors

- 22 1 False 2 True 3 True 4 True 5 True

- 23 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 So, in other words, ...

6/7 And what's more, ...

Let me just 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, ...

- 24 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 against 4 on 5 to

- 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

Unit 12

- 1 1 True 2 True 3 False 4 False 5 True

- 2 1 certificate of deposit 2 debenture 3 cheque/check

4 promissory note 5 bill of exchange; draft

- 3 1 c 2 d 3 f 4 g 5 b 6 a 7 e

- 4 1 When the bank demands payment or on April 1st 2008

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.

- 5 *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.

- 6 1 interest 2 principal 3 outstanding 4 due

5 accrue 6 Maturity 7 instalment

- 8 1, 2, 3, 4, 7, 8

- 9 1 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 either payable on demand or at a definite time).

2 The borrower made the condition that as soon as he is paid out his inheritance, he will start paying the debt back.

- 10 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.

11 *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

- 12 It is called a 'transferable record'.
- 13 1 c 2 e 3 b 4 a 5 d
- 14 1 defines 2 applies to 3 provide 4 contains 5 creates.
- 15 1 exempt 2 application 3 enforceable contracts
- 17 The problem with the promissory note is that only one of the principals is available to sign it.
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.
- 18 1 True 2 False 3 True 4 True 5 False 6 True
- 19 1 b 2 c 3 a
- 20 1 F, I 2 I, F 3 F, I

22 *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 seize 2 sell 3 defaults 4 owns 5 has
6 attaches 7 attaches 8 crystallises 9 make
- 3 **However**, in the case of quasi-security, ... **while** the debtor only ...
While a fixed charge ...
- 4 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 performance, a security interest, payment, a loan
- 5 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 in which Debtor now has or hereafter acquires.
- 2 All obligations become immediately payable.

- 6 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.

7 1 e 2 d 3 b 4 a 5 c

8 **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; an 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.

9 ... **now or hereafter** placed upon the premises ...

... in which Debtor **now has or hereafter acquires** any right ...

... contract rights in which Debtor **now has or hereafter acquires**.

... bankruptcy proceedings, whether **voluntary or involuntary**, ...

Upon default and at any time thereafter ...

10 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.

11 1 True 2 False 3 False 4 False 5 False 6 True

13 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.

14 1 It is respectful, distanced and formal.

2 See the table in Exercise 15.

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.

15 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.

16 strongly advise, firmly believe, sincerely hope

17 **Suggested answers**

1 deeply: believe, hope, regret

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

18 **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

19 **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

20/21 5, 1, 7, 4, 2, 3, 6

22 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 This would happen when the debtor agrees to subject its after-acquired property to the security interest.

3 This means signing the agreement, either by hand or electronically.

24 The issue involved is whether it is possible to have a fixed charge on the book debts of a company.

The issue affects company directors, bankers, other lenders and creditors.

25 1 c 2 e 3 a 4 d 5 b

26 1 Book debts 2 floating charge 3 bank guarantee 4 preferential

28 1 b 2 c 3 c 4 a

29 1 True 2 False 3 False 4 False

30 **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 make sure 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 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

4 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
- 5 1 2 2 1 3 9 4 3

- 6 1, 4, 5, 6, 7

- 7 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.
- 8 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.

- 9 1 False 2 True 3 False

- 10 1 secured; benefit 2 with; legally 3 proposed 4 up

- 13 PQE = post-qualification experience; NQ = newly qualified

- 14 1 A 2 B 3 B 4 A 5 A

15 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.

- 16 a: 4, 5, 6 b: 2 c: 10 d: 1 e: 9 f: 3, 7, 8

- 17 See model letter on page 197.

- 19 Job A, an associate in the restructuring and insolvency team of the international law firm

- 20 1, 8, 9, 11

- 21 1 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.
2 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.
3 He does corporate restructuring in a German commercial law firm in Munich and has worked on a few cross-border insolvency cases.
4 He'd like to know how attorneys are trained in the firm.

- 23 1 d 2 b 3 c 4 a 5 e

- 24 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 he can offer to the firm; it is also his final opportunity to present a strong reason why the firm should hire him.
4 I look forward to hearing from you.

25 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

- 26** In this context, a set of statements *arguing* for a standpoint. A synonym would be *argument*.
- 27** 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. The system they propose as a model for reform is the US Bankruptcy Code's Chapter 11.
- 28** 1 True 2 True 3 False 4 True 5 False
- 29** 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

Unit 15

- 1 1 oligopoly 2 monopoly 3 cartel 4 merger
2 1 c 2 b 3 d 4 a
3 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 Yes, as the entries for Italy, the Czech Republic and the Slovak Republic all relate to the telecommunications sector.
- 4 1 (chickens') eggs 2 SEK 394 million 3 2004 4 11
5 They were suspected of abusive pricing practices.
- 5 1 initiated proceedings against 2 Italian Competition Council 3 discriminatory prices 4 Anti-monopoly Office of the Slovak Republic 5 railway carrier
6 collusion on bidding prices 7 price-fixing; formation of information exchange cartel 8 formation of cartel
9 filed petition; fined
- 6 1 d 2 e 3 b 4 a 5 c
7 *Suggested answer*
Dear Mr Nazarenko

In your email of 8 November, you enquired about recent anti-competitive activities in the telecommunications sector in the EU and the measures taken against them. I would like to provide information about three cases from the past month. A telecommunications corporation in Italy was fined for abuse of a dominant position, while a group of

telecommunications companies in Slovakia were fined for concluding a vertical agreement which restricted competition. In the Czech Republic, the decision of the Office for the Protection of Competition, which had found that a telecommunications company had abused its dominant position by charging discriminatory prices, was upheld by the Supreme Administrative Court.

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

- 8 1, 3, 6, 7
9 1 True 2 False 3 True 4 False
11 The client's problem is a sharp drop in the number of contracts his construction company has been awarded in the last year.
The lawyer proposes that his law firm look into the possibility that anti-competitive agreements have been made by the competition.
- 12 a 4 b 6 c 3 d 1 e 5 f 2
13 *Suggested answer*

Dear Mr Rodríguez

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

- 14 1 This is a journalistic text from a newspaper written for a non-specialist audience.
2 The companies involved are Sotheby's and Christie's, two art auction houses in the service sector.
3 They formed an illegal price-fixing cartel.

- 15 1 Christie's escaped a fine because it provided the evidence that proved the operation of a cartel between the art houses.
 2 The illegal collusive agreement concerned an increase in the commissions paid by sellers at auctions and it also involved advances paid to sellers.
 3 The president and chief executive of Sotheby's said he was relieved that the fine was less than it could have been and was pleased that the investigation was over.
- 16 1 for 2 for 3 on
- 18 c
- 19 1 b 2 a 3 a
- 21 1 *One-stop shop* is usually used to refer to a store where different kinds of products 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.
- 22 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.

23 1 d 2 c 3 a 4 b

24 *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

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, 2005, 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 transactions in which are 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

Part 1

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

Reading

1 D 2 A 3 B 4 A 5 C 6 D 7 D 8 C 9 B
10 A 11 C 12 B
13 NONE 14 IN 15 TO 16 SUCH 17 DO 18 BEEN
19 AS 20 ALTHOUGH/THOUGH/WHILE/WHILST 21 OF
22 OR 23 HOW 24 ALL 25 FRAMEWORK
26 OBLIGATIONS 27 PROSPEROUS 28 ACCOUNTABLE
29 VIRTUALLY 30 SETTLEMENT 31 EVASION
32 IRREGULARITY/IRREGULARITIES 33 OFFENCE/OFFENSE
34 FACILITATE 35 DISCIPLINARY 36 DISCLOSURE
37 B 38 D 39 A 40 D 41 C 42 B 43 F 44 C
45 E 46 G 47 A 48 D 49 B 50 C 51 C 52 B
53 D 54 A

Listening

1 B 2 C 3 B 4 B 5 A 6 C 7 A 8 C 9 B
10 A 11 C
12 ACCOUNTANTS/ECONOMISTS 13 (FULL-TIME) JUDGES
14 745/SEVEN-HUNDRED AND FORTY-FIVE (DOLLARS)
15 WEBSITE 16 COMPETITION 17 OIL/MINING
18 REAL ESTATE 19 (PANEL) DISCUSSION 20 VISA
21 A 22 D 23 E 24 C 25 F 26 F 27 C 28 D
29 E 30 A

Role cards

Student A

Unit 5, Exercise 22

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 25

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 10

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 22

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 25

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 10

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 coordinate 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

Glossary

- abuse of a dominant position (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 (UK)** company that has been merged into another company and is therefore no longer in existence (US *transferor*)
- acquirer company** company that gains control over another company
- acquiring company (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** purchase of shares owned by shareholders who have a controlling interest
- actual damages** see *general damages*
- ad hoc (Latin)** for this purpose
- admit someone to the Bar (US)** to grant a person permission (from a Bar association) to practise law (UK *call someone to the Bar*)
- advocate** person who pleads in court
- affidavit** written statement which might be used as proof in court that somebody makes after they have sworn officially to tell the truth
- alienability** possibility to be transferred
- annual general meeting (AGM)** yearly meeting of shareholders of a company where various company actions may be presented and voted upon
- answer** principal pleading by the defendant in response to a complaint
- anticipatory breach** 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 (UK)** describes conduct that harms the market or limits competition among businesses (US *restraint of trade*)
- antitrust (US)** body of law that regulates business activities and markets, especially agreements and practices that limit competition (UK *competition law*)
- apparent authority** 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** person who appeals a decision to a higher court (US) see *petitioner*
- appellate court (also court of appeal, appeals court)** court which reviews judgments held by lower courts
- arbitration** 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
- articles of association (UK)** document that defines a company's internal organisation (US *bylaws*)
- asset** any property that is owned and has value
- asset protection** method of minimising the risk of loss of one's property from business and personal liabilities
- assign to transfer (rights) to another**
- assignee** person who receives an assignment
- assignment of contract** transfer of a contract to another person
- assignment of rights** transfer of rights to another person such that the person to whom the rights have been transferred receives full benefits under the contract
- assignor** person who transfers his/her rights or duties to another
- associate** junior lawyer in a law firm
- attachment** seizure or taking into custody by virtue of a legal process
- attachment lien** prejudgment lien, provisional in nature, created in assets seized in accordance with a court order or a writ of attachment
- authorised share capital** total amount of stock a company may offer to its shareholders. It is also known as nominal capital. (US *authorized shares*)
- bailiff (UK)** an officer of the sheriff who makes arrests and serves writs; (US) a court officer who keeps order during court proceedings
- balance sheet** financial statement showing a company's assets, liabilities and equity on a given date
- the Bar (US)** legal profession; (UK) the profession of barristers
- bar association** organisation of lawyers which may regulate the profession
- bar examination (US)** written examination taken by prospective lawyers in order to qualify to practise law
- Bar Vocational Course (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** 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 (UK)** lawyer admitted to plead at the bar and in superior courts; a member of one of the Inns of Court
- barristers' chambers** offices of barristers or a group of barristers
- beneficiary** person entitled to draw payment
- 'benefit of the bargain' damages** see *expectation damages*
- bill** formal proposal for legislation
- bill of exchange (UK)** negotiable instrument for a specified sum of money which is written and signed by 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** group of individuals elected by shareholders to make the major decisions of the company
- bona-fide purchaser for value** someone who holds a negotiable instrument in good faith
- bonus** payment above what was due or expected
- boutique firm** law firm that specialises in a specific area of law
- breach of contract** 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** document or set of documents containing the details of a court case
- by-law (UK)** municipal law (US *ordinance*)
- bylaws (US)** document that defines a company's internal organisation (UK *articles of association*)
- call to the Bar (UK)** granting of permission to practise law as a barrister (US *admission to the Bar*)
- capital structure** distribution of a company's debt and stock
- capitalisation** act of providing capital for a company through the issuance of securities
- capitalisation issue** process whereby a company's money is converted into capital and then distributed to shareholders as new shares
- cartel** group of similar independent companies who agree to join together to control prices and limit competition
- case law (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** 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** document issued by a governmental authority granting a company status as a legal entity
- Certificate of Incorporation on Change of Name (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.
- civil law** 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 (UK)** person who brings a civil action (US *plaintiff*)
- clerk (UK)** court employee who takes records, files papers and issues processes; (US) also a law student who assists a lawyer or a judge with legal work such as research or writing
- collateral property** pledged as security for repayment of a debt obligation
- collective bargaining** process of negotiation between trade unions (or labor unions) and employers, usually regarding the terms and conditions of employment
- common law (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 (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 (UK)** body of law that regulates business activities and markets, especially agreements and practices that limit competition (US *antitrust law*)
- complaint** 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 (UK)** liquidation of a company after a petition to the court, usually by a creditor (US *involuntary bankruptcy*)
- confer to grant, to bestow**
- conflict of interest** clash between a person's personal interests and their public or fiduciary responsibilities
- consensual** agreed to by all parties
- consensual lien** security interest created by agreement between the debtor and creditor
- consequential damages** see *special damages*
- consideration** 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** combining of two companies to form an entirely new company
- constitutional amendment** change in a company's name, capital or objects
- contract template** model agreement with particular items to be filled in
- copyright** exclusive right to reproduce and control an original work of art (music, visual art, film, literature, etc.)
- corporate veil** separation between the corporation and its shareholders such that the shareholders will not be held personally liable for corporate debts
- counter offer** new offer with new terms made as a reply to an offer received
- court of first instance** see *lower court*
- creditor** person or company who is owed a financial obligation
- criminal law (also *penal law*)** area of law that deals with crime, punishment or penalties
- crown court (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.
- cybersquatting** 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 loss or harm** as a result of injury
- damages** money awarded by a court in compensation for loss or injury
- date of employment** day on which a person's employment begins
- de facto (Latin)** in fact
- debenture (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** someone who owes a financial obligation to another

- default failure to perform a duty, whether legal or contractual; failure to pay a sum that is due
- defendant** (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** to give (duties) to another, to entrust another (with duties)
- delegate** (UK) third party in a delegation to whom the duties have been transferred (US *delegatee*)
- delegation of duties** transfer of responsibilities to be performed under a contract to another
- delegator** person who transfers his duties to another
- delivery** formal act of transferring something or passing possession on to someone else
- design right** legally protected interest in the form of appearance, style or texture of a particular item
- directive** 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** condition of being unable to do something due to a physical or mental impairment
- disbar** (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** to release a person from an obligation
- disclaimer** repudiation or denial of a legal right or claim
- disclaimer of warranties** statement which limits the liability of the seller for any defects of their goods
- discriminatory dismissal** termination of an employee's employment contract based on a prejudice or bias
- dividend** distribution of company profits to its shareholders
- draft** to produce a piece of writing or a plan that you intend to change later
- drawee** person in a bill of exchange who conducts payment or is directed to make payment; often a bank
- drawer** person in a bill of exchange who pays the sum of money
- duress** unlawful threat or coercion used to force someone to enter into a contract
- duty** obligation owed or due to another by law
- duty of care** obligation of a person to act with reasonable caution or prudence, the violation of which results in liability at law
- easement** 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** economics term that refers to the optimal production and consumption of goods and services
- employment tribunal** judicial body that resolves disputes between employers and employees
- endorsement** (UK) writing, including signature, on the back of a document which allows for the transfer of the instrument (US *indorsement*)
- enforceable** 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** interest the law gives effect or force to
- entry of appearance** 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** reversion of land to the state if the land owner dies without a will or without any heirs
- essential term** provision required for a contract to exist
- et alii** (et al.) (Latin) and others
- et cetera** (etc.) (Latin) and other things of the same kind
- exclusive possession** sole use and benefit of a property
- exclusive right** sole power or privilege under the law
- execution lien** lien created when a debtor's assets are seized for the purposes of enforcing a judgment
- exempli gratia** (e.g.) (Latin) for example
- exemplary damages** see *punitive damages*
- expectation damages** (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** 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** contract whose terms have been specifically outlined, either in writing or orally
- express warranty** guarantee that is created by the seller, whether oral or written
- extraordinary general meeting** (EGM) (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** (UK) see *right of fair use*; (US) duty of full disclosure imposed on corporate directors, officers and parties to a contract
- fair use** (US) see *right of fair use*
- fee simple** whole interest in a piece of real property; the broadest interest in property allowed by common law
- fee tail** estate which lasts as long as the original grantee or any of his descendants live
- fiduciary duty** obligation to act solely in the best interests of another
- file with** to officially record (e.g. in a court of law)
- financing** measures methods of securing funds or money
- first-in-time rule** which distinguishes which creditor has first claim over a debtor's assets
- fitness** for a particular purpose 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** (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** (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*)
- foreseeability** reasonable anticipation of possible results of an action

foreseeability rule 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 model document or agreement with blank spaces to be filled in

formation act act of bringing a contract into existence

fraud deliberate misrepresentation or concealment of a material fact to gain an advantage

fraud in the inducement act of misrepresenting or misleading someone so as to entice them to enter into a contract or agreement

freehold estate property whose duration of ownership or occupation is not determined

friendly takeover 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 to obtain the power to direct or have influence over the management of a company

garnishment 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 creditor who has no lien or security for payment against the debtor's assets (also known as an *unsecured creditor*)

general damages (also *actual damages*) compensation for proven injury or loss

genuine occupational qualification limited circumstances where sex or marital status may be used as a job requirement

global firm law firm that employs hundreds of attorneys from all over the world

good faith state of mind whereby a person has an honest conviction that they are observing reasonable commercial standards of fair dealing

good title title that is valid and free from defects such as liens, litigation or other encumbrances

goods items of personal property other than money (US *good* can be used in the singular)

grantee person to whom a grant of property is made

hereditament property which can be inherited; also refers to land in general

high court (UK) court which hears serious civil cases and appeals from county courts; (US *supreme court*)

holder person that has legal possession of a trade mark

holder in due course (HDC) person who acquires a negotiable instrument in good faith

holder of title person who owns the right to control and dispose of a particular piece of property

holiday entitlement right of an employee to take paid time off from his/her employment

horizontal merger combining of two or more firms which are at the same level in the economic supply chain

hostile takeover situation where a company attempts to buy another company against its wishes

id est (i.e.) (Latin) that is

illegality of the subject matter when the matter under consideration in the contract is unlawful and therefore unenforceable in a court of law

immaterial breach breach of contract after which the non-breaching party is still required to perform its contractual obligations and may be entitled to damages

implied contract contract whose terms have not been specifically outlined, but rather are presumed

implied warranty guarantee that is implied by law rather than promised by the seller

in rem (Latin) against a piece of property (rather than a person)

in the course of business regular mode of conduct or routine of a trade

incidental beneficiary 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.

indefinite vague, not certain, not determined

infringement unauthorised use of material protected by copyright, patent or trademark law

inheritance property which is transferred upon death to a person designated as an heir

injunction official order from a court for a person to do or stop doing something

injured party party that has suffered a violation of its legal rights

Inn of Court (UK) one of four institutions that barristers must join in order to practise law as a barrister

insolvent unable to pay one's debts

instrument written formal legal document

intangible property rights legal interest or claim in things which cannot be touched or felt

intended beneficiary 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 mental desire/willingness to act in a certain way

inter alia (Latin) among other things

ipso facto (Latin) by that very fact itself

issue to produce or provide something official

issued share capital shares of a company that are held by shareholders

judge public official who hears and decides cases in court

judge-made law (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 lien imposed on a person against whom a judgment has been entered but remains unsatisfied

judicial lien 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) (US) law degree (UK *LLB*)

juvenile court court that hears cases involving children under a certain age

lack of legal capacity absence of ability of a person to enter into contractual relations, sue or be sued

law school (US) graduate school offering courses in law leading to a law degree

lease contract for which the use and occupation of a property is conveyed to another, usually in exchange for a sum of money (rent)

leasehold property whose duration of ownership or occupation is fixed or capable of being fixed

- legal entity** individual or organisation that can enter into contracts, is responsible for its actions and can be sued for damages
- legal opinion** document outlining a lawyer's understanding of the law regarding a particular situation
- legal person** artificial entity created by law and given legal rights and duties, for example a corporation
- Legal Practice Course (LPC)** (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).
- licence** (UK) permission or authority to do something which would otherwise be illegal. No interest is transferred in this case. (US *license*)
- lien** interest or attachment in another's property as security for payment of an obligation
- lien creditor** creditor whose claim is secured by a lien
- life estate** estate granted only for the life of the grantee
- life tenant** person who holds a life estate or an estate *pur autre vie*, or for the benefit of another
- liquidated damages** (also *stipulated damages*) compensation that is agreed to in the contract
- liquidation** dissolution of a company whereby all assets are sold and the proceeds used to pay off debts
- LLB (Legum Baccalaureus)** (UK) Bachelor of Laws, law degree (US *JD (juris doctor)*)
- loan capital** form of long-term borrowing
- lockout** preventing people from entering a building by locking it, such that employees cannot work
- lower court** (also *court of first instance*) court whose decisions may be appealed to a higher court
- magistrates' court** (UK) court that has very limited powers
- maker** person who makes a promissory note
- market economy** 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** 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** (also *mechanic's lien*) lien to secure payment for labour or materials used in constructing or repairing buildings or other structures
- memorandum of association** (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** person who is engaged in the buying and selling of goods for profit
- merchantability warranty** implied by law that something is fit for the ordinary purposes for which it is used
- merger** acquisition of one company by another resulting in dissolution of one and survival of the other
- merger regulation** 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** shareholder who holds less than half the total shares outstanding and is therefore unable to control the business of the company
- minutes** notes or records of business conducted at a meeting
- monopoly** organisation or group that has complete control of an area of business so that others have no share
- monopoly right** exclusive right to make, use or sell an invention
- moot court** fictitious court where law students argue hypothetical cases
- mortgage** transfer of legal title of a property, often land, to another as security for payment of a debt
- motion** application to a court to obtain an order, ruling, or decision
- naked debenture** (UK) unsecured debt (US *debenture*)
- negotiable** able to be transferred by endorsement or delivery
- negotiable instruments** (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** 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** (also *authorised capital*) total amount of stock a company may offer to its shareholders
- non-breaching party** party to the contract that has not violated its contractual obligations
- non-consensual** not agreed to or formed by agreement of all parties
- non-monetary relief** 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** 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** type of security interest whereby the debtor retains control over the property but is limited in what he or she may do with it
- notice** document providing notification of a fact, claim, or proceeding
- novation** substitution of an obligation with a new one, thereby cancelling the old obligation
- objects** goals or purposes of a company
- objects clause** section of a company's memorandum of association that outlines the company's objects
- obligee** person to whom a right is owed
- obligor** person who owes a right
- offer** indication of willingness to enter into a contract on specified terms, whereby, if accepted by the other person, a binding contract would result
- offeree** party to whom an offer is made
- offeror** party that displays a willingness to enter into a contract on specified terms
- oligopoly** market situation in which only a small number of firms compete with each other

- on notice of the security interest where a security interest exists between a certain creditor and debtor.
It occurs on perfection of a security interest.
- ordinance (US) municipal law (UK *by-law*)
- ordinary course of business regular mode of conduct or routine of a trade
- ordinary resolution (UK) resolution passed by a simple majority of members at the annual general meeting
- ordinary shares (UK) shares that carry voting rights and dividend entitlements and which are the most common form of shares (US *common shares*)
- paralegal person who assists a lawyer with legal work, but is not a lawyer
- parallel behaviour 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 the rule that evidence, apart from the actual contract itself, cannot modify, explain, vary or contradict the written terms of a contract
- party person or entity involved in an agreement
- passage of title exchange of ownership in a property
- passing of risk 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 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 grant from the government giving exclusive rights to an inventor to make, use or sell an invention for a specified period of time
- payee person who is being paid in a bill of exchange
- pecuniary compensation remedy that involves compensating through money
- penal law (also *criminal law*) area of law that deals with crime, punishment or penalties
- penetrate the market to enter into a market
- per annum (Latin) per year
- per se (Latin) by itself
- perfected 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 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 completion of obligations required by contract
- personal liability state of being legally obliged out of one's own personal assets
- personal property (also *chattels* in common law) things that are moveable (as opposed to real property) and capable of being owned
- petitioner (US) person who brings a petition to a court, especially on appeal
- picketing 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 formal written statement setting forth the cause of action or the defence in a case
- pledge property which is security for a debt or obligation
- pledgee person who receives a pledge, or the creditor in a secured transaction
- pledgor person who gives a pledge, or the debtor in a secured transaction
- possessory type of security interest whereby the creditor has the right to control the property
- predatory pricing pricing a product so low – for example, below its production cost – as to eliminate competition
- pre-emption rights (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 (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 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 right to enforce a claim before others
- priority creditor creditor who is given priority over other creditors, or has first claim over the debtor's assets
- privity of contract relationship between parties to a contract
- pro forma (Latin) as a matter of form
- pro rata (Latin) proportionally
- profit-and-loss account (UK) statement summarising a company's revenues and expenses over a period of time (US *profit-and-loss statement* or *income statement*)
- promisee person to whom a promise, or an assurance that something will or will not be done, is made
- promisor person who makes a promise or an assurance that they will or will not do something
- promissory note 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
- punitive damages (also *exemplary damages*) compensation designed to punish the breaching party for conduct found to be reprehensible, e.g. fraud
- pupillage (UK) one year of apprenticeship to become a barrister, which follows the completion of the Bar Vocational Course
- pur autre vie estate granted only for the life of someone other than the grantee
- quasi-security 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 number of shareholders or directors who have to be present at a board meeting so that it can be validly conducted
- race relations social, political or personal connections with and between people with different distinguishing physical characteristics
- real property land, including anything attached to it
- reasonable reliance dependence on a contract which is considered fair, sound thinking or common sense
- reasonably prudent person (also *reasonable person*) fictitious person used as a standard for legal reasoning in negligence cases

- redundancy dismissal (UK)** termination of an employee's employment contract because their position ceases to exist (US *layoff*)
- Registrar of Companies (UK)** officer in charge of keeping the list of limited companies registered at the Companies House
- regulation order** controlling through rules or restrictions
- rejection refusal** to accept an offer
- release** to discharge a person from an obligation
- relevant market area** in which effective competitive constraints may be imposed. There may be two relevant markets in anticompetitive 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** compensation for losses incurred by the plaintiff due to his dependence on the contract being performed
- remaindermen** 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** means of preventing, redressing or compensating a violation of a right
- respondent** see *defendant*
- restitution damages** compensation which is equal to the amount of money the breaching party received under the breached contract
- right interest** that is recognised and protected by law
- right of fair use (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** offer to existing shareholders to purchase additional new shares in the company
- salaried partner** person who is a member of the law firm partnership and is paid by regular salary payments
- Sale of Goods Act (UK)** Act governing the sale of goods in the United Kingdom
- sale of substantially all assets** form of acquisition whereby all or almost all assets and liabilities of a company are sold
- sale by sample** 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 property** pledged in order to secure the fulfilment of a promise or loan
- security agreement** 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** any interest in property acquired by agreement or operation of law for the purpose of securing payment or performance of an obligation
- senior partner** 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)** to deliver a legal document to someone (which usually demands they go to a court of law or obey an order)
- sex discrimination** different treatment, usually awarding privileges to some and denying privileges to others, based on gender
- share consolidation (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 (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 (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** 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 (Latin)** thus
- single European market** 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** court that handles civil claims for limited amounts of money
- sole practitioner** lawyer who practises on his/her own
- solicitor (UK)** lawyer who is qualified to give legal advice and prepare legal documents
- solo practice** law practice with only one lawyer
- solvent** able to pay one's debts
- special damages** (also *consequential damages*) damages that are awarded due to a particular wrong or particular circumstances
- special resolution** 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** when a court orders the breaching party to perform its part of a contract
- statute** formal written law created by a legislative body such as a parliament, as opposed to a law created through the courts
- Statute of Frauds** piece of legislation which declares that certain kinds of contracts, for example those regarding land, 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** forms required by law
- statutory lien** security interest created by legislation due to the economic relationship between the debtor and the creditor
- stipulated damages** see *liquidated damages*
- subject matter** thing under consideration in a contract
- submit** to deliver a document formally for a decision to be made by others
- subscriber** person who has purchased stock in the company by an agreement
- sul juris (Latin)** of one's own right; able to exercise one's own legal rights

- takeover bid (UK)** offer by one company to purchase at minimum a controlling number of voting shares of another company (US *tender offer*)
- tangible chattel property** other than land that is capable of being touched or felt
- target company** that is the object of a takeover attempt
- tax lien** lien on property arising from unpaid taxes
- tenement 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** fixed period of time for which an estate is granted
- termination of employment** end of the work term or employment
- terms and conditions of employment** fixed period of time for which one is employed and the provisions under which employment is held
- third-party beneficiary** person who is not party to a contract, but still benefits from it and has legal rights to enforce it
- third-party beneficiary contract** contract that provides for rights and duties to be conferred on a person who is not party to the contract
- tie-in arrangement** (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 right** to control and dispose of property or the right to ownership in property
- to the bearer** of expression designating that the sum of money of a note or cheque is payable to whomever holds the document
- to the order** of expression designating the person to whom the sum of money on a note/cheque is payable
- tort** wrong committed between private individuals for which the law provides a remedy
- trade mark (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** 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 (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 (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** to convey or to pass property or a right to another by any method
- tribunal** body with either judicial or quasi-judicial functions
- trust** 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** person who holds something in trust for someone else
- trustee in bankruptcy** person appointed to handle the affairs of a bankrupt party
- trustee in sequestration** person appointed to handle the property of another person until the court determines the ownership of that property
- trustee under a deed of arrangement** 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** person who holds legal title for real property of another person who has pledged that property as collateral for a loan
- trustbuster (US)** person who fights against anticompetitive trusts, often a federal officer
- ultra vires** (Latin) unauthorised, beyond a person's legal power
- unauthorised use** 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 (UK)** enterprise, a company or a group of companies (US *business, firm or enterprise*)
- unfair dismissal** unjust termination of an employee's employment contract. The question is whether the employer acted reasonably in dismissing the employee.
- Uniform Commercial Code (UCC)** (US) act harmonising the law of sales and commercial transactions in all states in the US
- United Nations Convention on the Contracts for the International Sale of Goods Act (CISG)** convention of the United Nations which sets forth rules governing contracts for the international sale of goods
- usufruct 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.)** (Latin) against
- vertical merger** combining of two or more firms who are at different levels in the economic supply chain, for example producer and distributor
- vest 1)** to give full title to a property to a person; 2) to give a person an immediate fixed right
- videlicet (viz.)** (Latin) as follows
- voluntary liquidation (UK)** termination of a company's business that is supported by company shareholders (US *dissolution or winding-up*)
- warranty of title** 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** process of ending the carrying on of a business through the settlement of liabilities and the distribution or liquidation of assets
- writ** document informing someone that they will be involved in a legal process and instructing them what they must do
- written resolution** written expression of an intention or opinion decided at a meeting

Note: Documents and document excerpts are indicated by the use of **bold**.

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