

The practice of law. 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 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

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.
- 2.** When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be.
- 3.** The purpose of this Ordinance is to regulate traffic upon the Streets and Public Places in the Town of Hanville, New Hampshire, for the promotion of the safety and welfare of the public.
- 4.** These workplace safety and health regulations are designed to prevent personal injuries and illnesses from occurring in the workplace.
- 5.** Mr. Speaker, I am pleased to have the opportunity to present the Dog Control Amendment **Bill** to the House. It is a further milestone in meeting the changing expectations we have about what is responsible dog ownership.

Note: Ordinance – (UK) by-law/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.

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

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

bill directive ordinance regulations statutes

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

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 higher court (or supreme court)	c This is where small crimes are tried in the UK.
4 juvenile court	d This is where law students argue hypothetical cases.
5 lower court (or court of first instance)	e This is where a case is reviewed which has already been heard in a lower court
6 magistrates' court	f This is where cases involving a limited amount of money are handled.
7 moot court	g This is where serious criminal cases are heard by a judge and a jury in the UK.
8 small-claims court	h This is where a group of specially chosen people examine legal problems of a particular type, such as employment disputes.
9 tribunal	i This is usually the highest court in a jurisdiction, the court of last resort.

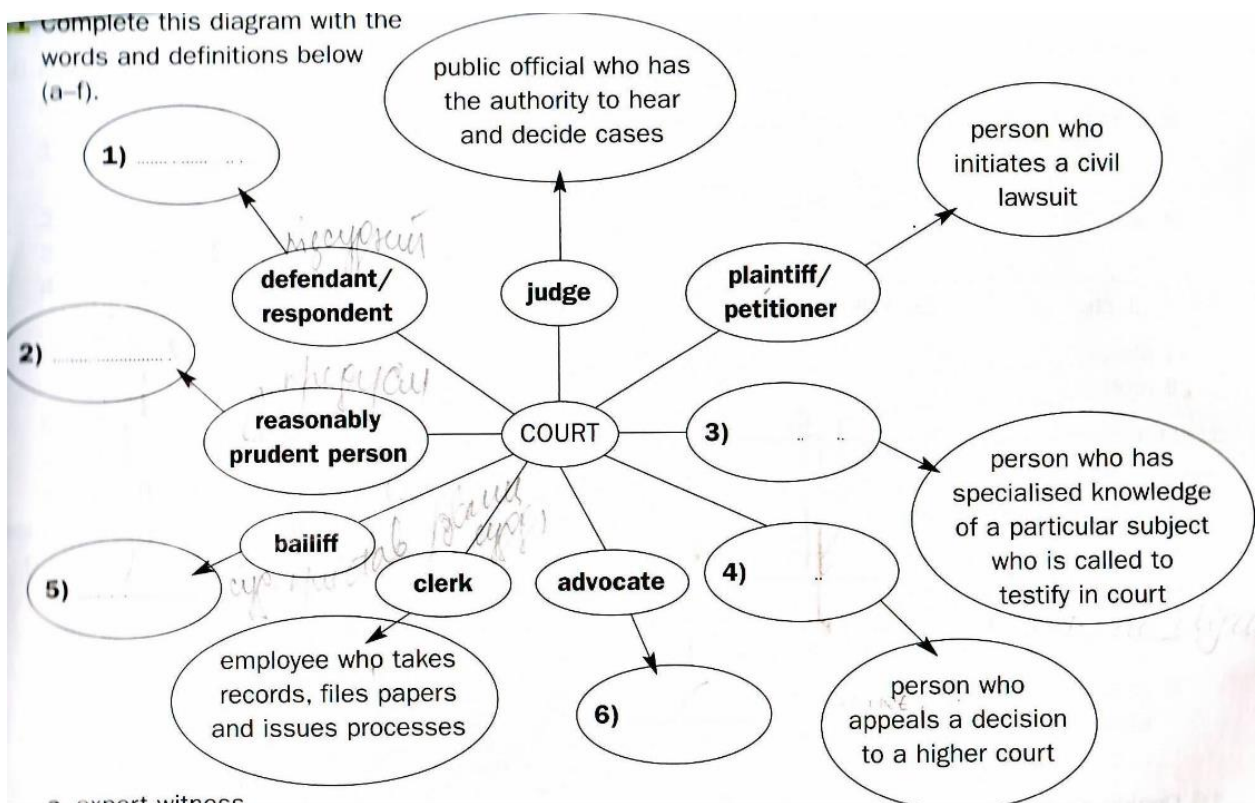
Speaking 2: Civil court systems

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. appellant

c. person who is sued in a civil lawsuit

d. officer of the court whose duties include keeping order and assisting

e. person who pleads cases in court

f. hypothetical person who uses good judgment or common sense in handling practical matters; such as person's actions are the guide in determining whether an individual's actions are reasonable

12. Read about documents in court and answer these questions. A lawyer tells a client about some of the documents involved in his case.

1. What claim has been filed against the client?

2. Will the case go to trial?

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 motions 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.

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. Look through 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

Company law: capitalisation

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.

Part A. Read the text and match the two parts of the sentences, then replace the underlined words and phrases with alternative words and phrases from the text.

Raising capital by share sale

Share capital

How companies raise capital

A company limited by shares may raise capital by borrowing money and through the sale of shares. A company's **balance sheet** – a statement of the financial position of a company at a specific time, for example at the end of the financial year – shows how the company is **capitalised**, or financed, by providing details of debt and share funding. 'Capital' refers to the **liability of** the company **to** the people who have provided it with finance on a long-term basis. A company is obliged to maintain its **share capital** in order to protect its creditors, and funds may only be taken from the capital following complex procedural rules. The Articles of Association provide the power to **issue shares**. The Memorandum sets out the **nominal capital** – the total of the **face value**, printed on each share, of all of the shares which the company is allowed to issue. When

new shares are created by the company they are issued, or **allotted, to shareholders** – that is, they are **allocated** among applicants who **subscribe for shares**. A shareholder is a **member of the company** and holds a **share certificate**.

Share value

All shares have a **nominal value**, generally of £1, also known as the **par value**. This value is set out in the capital clause of the Memorandum. Shares can be issued **at a premium** – for a sum greater than their nominal value – but they cannot be issued **at a discount** – less than nominal value. Contracts for the sale of shares may provide for **deferred payment**, that is, part may be left outstanding until the company **makes a call for**, or requests, the unpaid amount. The **market value** of a share depends upon the profitability of the company and the sum of its assets. The legal nature for the shareholder will depend upon the contractual rights attached to the share, which is a **chose in action** – a personal right which can be enforced or claimed as if it were property.

Rights attaching to shares

A company may issue different **classes** of shares, which have different rights attached to them. The usual rights include:

- A **right to dividend**, that is, a share in the profits. A company may only **declare a dividend** if it has made a profit.
- A right to **vote on resolutions**, for example proposals on matters relating to the approval of directors' contracts, at the company's **annual general meeting (AGM)** – a meeting of all the shareholders with the directors.
- A right to repayment of the investment in the event that the company is **wound up**, or closed.

Other rights are given as a matter of law by the Companies Act 1985. These rights are generally only given to shareholders with voting rights at company meetings. The Act provides that shares must first be offered to shareholders in proportion to the existing **shareholding** on terms at least as favourable as those offered to potential new shareholders. This is the right of **pre-emption**. Members of the company have 21 days in which to **exercise the right**. It does not apply if shares are issued for a **non-cash consideration**, that is, the price, not necessarily money, paid in exchange for the shares.

1. Shares can only be issued	a. the company can <u>divide out</u> the shares.
2. The company Articles may allow directors	b. known as a <u>shareholder</u> .
3. If more shares are applied for than the company can offer,	c. to equal the <u>total face value of all shares</u> of the company, as set out in the Memorandum of Association.
4. Someone who owns shares is	d. generally evidenced by a <u>receipt</u> .
5. The ownership of shares is	e. to raise capital by <u>selling</u> shares.

Part B. 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**. The **authorised share capital**, 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** and **preference shares**. 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 a possibility of **share subdivision**, 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**.

Shares in British companies are subject to **pre-emption rights**, 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**.

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

Notes: 1. (UK) memorandum of association - (US) articles of incorporation

2. (UK) authorised share capital - (US) authorized shares
3. (UK) ordinary shares - (US) common shares
4. (UK) preference shares - (US) preferred shares
5. (UK) share subdivision - (US) stock split
6. (UK) share consolidation - (US) reverse (stock) split
7. (UK) pre-emption rights - (US) pre-emptive rights
8. (UK) fixed charge - (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	a someone who agrees to buy shares or other securities
2. dividend	b offer of additional shares to existing shareholders, in proportion to their holdings, to raise money for the company
3. issued share capital	c type of share in a company that entitles the shareholder to voting rights and dividends
4. ordinary share	d entitlement entailing that, when new shares are issued, these must first be offered to existing shareholders in proportion to their existing holdings
5. pre-emption rights	e maximum number of shares that a company can issue, as specified in the firm's memorandum of association
6. preference share	f proportion of authorised capital which has been issued to shareholders in the form of shares
7. rights issue	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
8. subscriber	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 2 (Part B) 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, **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

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. Read 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?

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: 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?

7. Look through the dialogue 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 37-38 deals with the topics of shareholders' rights and the role of the supervisory board. It is part of the required reading in a comparative law course dealing with European and Anglo-American company management structures.

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

Language use 2: Common collocations (verb plus noun)

Look at the following verb-noun collocations from the text.

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.....
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 control over the company's bankruptcy plan.
4. The company is expected to.....its spending while its markets remain weak.
5. Financial benefitsto 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..... freedom of directors to grant options without shareholder approval.

8. The annual general meeting has authority to draw up or amend constitution and to elect ormember 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.

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.

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 read, 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?

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!

16. 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. Read 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

Note the difference: 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. *Complete the phrases below, which express an opinion, 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 ...

24. *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.

25. *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 only applies 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 do 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 also brings 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 do not carry any voting rights or are entitled to a dividend.

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

27. *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?

<https://www.library.uc.edu.kh/userfiles/pdf/27.International%20legal%20English%20%20a%20course%20for%20classroom%20or%20self-study%20use.pdf>

Unit 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 law, 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.

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	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
2 fraud in the inducement	b when one party induces another into entering into a contract by use or threat of force, violence, economic pressure or other similar means
3 duress	c when either the subject matter (e.g. the sale of illegal drugs) or the consideration of a contract is illegal
4 lack of legal capacity	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 AND SELLER IN CONNECTION WITH SALE OF ASSETS

COVENANT NOT TO COMPETE

This COVENANT NOT TO COMPETE (this "Covenant"), dated as of _____, 20____ is made and entered into by and between _____ ("Shareholder")

and _____, a _____ corporation ("Purchaser"), with reference to the following facts:

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

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

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

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

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

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

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

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

2. Additionally, Shareholder shall:

a. not refer prospective purchasers or lessees of _____ in _____, other than the Business; and

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

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

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

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

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

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

Shareholder

"PURCHASER"

By _____

Its _____

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

<i>To paraphrase</i> 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. Explain the contents of the clauses as if you were speaking to a client with little knowledge of the law.

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. Read 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.

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.

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

12. Read 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?

Part II

.. 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 ...

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 Exercises 11-12 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 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 text of the presentation (Part II) 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	e states the main idea of the memo in less than ten words.

close	
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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 2009

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, 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 again before you prepare the memo.

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 text below, you will read about 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. Read the dialogue. What kind of agreement are they talking about? Which clauses do they mention?

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....

18. Read 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. Read the dialogue again and tick the expressions you hear the lawyers use.

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

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: 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.

Student B: 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.

Reading 3: Forming a contract

23. Read the text about forming a contract then complete the conversation with the correct agreement from the text. Be ready to speak about the formation of a contract.

Basic principles

The basic principles of contract law in the English system arise from established custom and rules and are fundamental to all areas of law in practice. Reference is made to these principles in **drafting** and **interpreting the provisions** of any **legal agreement**, such as a **lease**, a **loan agreement**, a **sales agreement**, a **consultancy agreement**, a **hire purchase agreement**, a **hire contract**, or a , etc. The principles of contract law

will determine whether and what point a **binding agreement** has been **made** between the **parties concerned**.

Note: The words **contract** and **agreement** are interchangeable in the examples above. For example, a **loan agreement** / **loan contract**.

Formation of a contract

- **Offer**

The contract must contain the **basic terms of the agreement** and be **capable of acceptance** without further negotiations. This does not mean that the initial communication between parties will in itself **constitute an offer**. For example, in an **auction** situation, the seller, known as a vendor, may **make an invitation to treat** – invite an offer – by setting out the **conditions of sale** (for example when payment will be made) with the exception of the price. The **offer** is **submitted** by the purchaser, who offers to purchase at a specific price and will usually **incorporate the terms** of the invitation to treat into his/her offer.

- **Acceptance**

There must be an **unqualified agreement** to proceed on the basis set out in the offer and it must be **communicated to the offeror** – the person making the offer – in order to be effective. If the **offeree** – the person receiving the offer – states that he or she **accepts the offer subject to contract**, that is, some variation of the terms, then **no contract is formed**. This would be **qualified acceptance**, which constitutes a **counter offer**.

Issues may arise as to whether the **acceptance** has been **communicated**. Two rules determine this:

- The **reception rule** applies to instantaneous forms of communication, for example telephone calls. The contract is said to be formed when the **acceptance is received by the offeror**.
- The **postal acceptance rule**, where there is a delay between the communication being sent and received, for example by post. The contract is formed when the **acceptance is sent by the offeree**.

To **avoid uncertainty**, the offeror may specify the method and timing of acceptance. Agreement on **essential terms**, for example price and delivery, must be certain and not **vague**.

- **Consideration**

For a contract to be **enforceable** something of value to be given, for example a price, even if it is of normal value, say £1.

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