

TRANSNATIONAL BUSINESS LAW

Exams – 1 hr per module (two modules)

- Exams will be written (no oral exams)
- Mostly open questions requiring detailed written responses or multiple-choice
- May be a case study question requiring identification of issues and application of legal principles (We will do some in class)

What is **Transnational Business law**?

A set of rules, from whatever source, which governs international commercial transactions and is common to a number of legal systems, in an increasingly global economic environment.

“Transnational” - extending across national boundaries

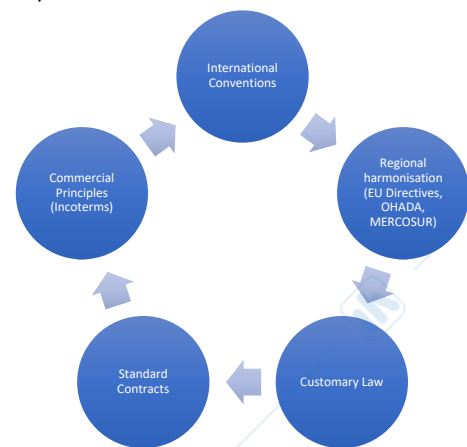
Focus on private law and transactions between companies

Distinguish from international economic law /public international law dealing with states and resolution of inter-state disputes by organs of WTO (world trade organization)

Uniform rules serving uniform needs – “lex mercatoria” – (“the law merchant”)

International sources of law

- International Conventions (national signatories)
- Regional harmonisation (EU directives, OHADA, MERCOSUR)
- Customary law (historical through the years)
- Standard contracts
- Commercial principles (Incoterms) “short cut to understand”



LESSON 1

Part 1: Contract Law overview

- Key elements of an enforceable contract
- Formation
- The content of a contract (specific clauses)
- Governing law and jurisdiction
- Variation and Force majeure
- Disputes and Remedies

Part 2: Governing law and jurisdiction of the Courts

- Choice of law which governs the contract:
 - Are parties free to choose the law of any country to govern their contract?
 - EU: Rome I Regulation
 - Conflict of laws
- Choice of Jurisdiction in case of disputes:
 - EU: Brussels Regulations
 - “Forum shopping”
 - Concurrent litigation
 - Enforcement of foreign judgments

OVERVIEW OF CONTRACT LAW

Contract is the building block, the foundation of business

What is a Contract?

It's a legally enforceable promise or undertaking that something will or will not occur.

legally enforceable → key word

something will occur → sell a bike for a sum of money

something will not occur → non disclosure eg. not to work for a competitor for 6 months

It's often between more parties

Consequences of a Poorly Drafted Contract

- Loss of management time
- Loss of business opportunity/time to market (lose a supply)
- Reputational damage (problem with the supplier the customer is mad at you)
- Administration costs
- Loss of customers
- Legal fees and potentially payment of damages
- Impact on your career???

Basic Questions:

- Does it have to involve businesses? it can but it's not necessary. can be BTB or BTC
- Does it have to be in writing? not but there is the question of proof. Some don't need to be written some do
- Does it have to have a termination date? no because there are rolling contracts that renovate automatically
- Is payment necessary? no but there needs to be a change of something with value

Key Elements

1. Offer
2. Acceptance
3. Intention to create binding agreement
4. Capacity
5. Consideration
6. Writing (or oral agreement + part performance)



Offer

What is an "offer" in the legal sense?

"The act of presenting something, such as a bargain, with the understanding that should the other party agree, that a bargain will be complete"

the offer needs to be with intent

- Can an offer be changed? yes but before the other party accept the offer
- Counter offers (before acceptance)
- "Invitation to treat"/ "invitation to make an offer" (advertisement/window display/web page) it's an invitation for you to make an offer to buy which need to be accepted by the owner

How long does an offer last?

- An offer is valid until its accepted or terminated:
 - Offer Accepted
 - Offer lapses (specified time or reasonable time)
 - Operation of law (death/insanity of offeror, destruction of subject matter etc) the offer die with the offeror or the object
 - Offer is revoked by offeror (special rules, estoppel)
 - Offer rejected or counter offer and the parties switch roles

Acceptance

What is acceptance in the legal sense?

"The final and unequivocal expression of assent to another's offer to contract"

- Time limit to accept? generally is in the offer
- How should it be communicated?
- Generally should mirror the offer.
- What would a "reasonable person" conclude? (objective not subjective test)

Offer and Acceptance

offeror: shows intent to enter into a contract, makes a definitive offer, communicates the offer to the offeree.

"I'll pay you 55£ an hour to edit my book on sewing technique"

offeree: shows intent to accept the offer, communicates intent to accept by proper ..., states acceptance that minors the terms of the offer.

"I'll take the editing job"

METHOD OF ACCEPTANCE



counter-offer=

Intention to create legally binding agreement

- Necessary that both parties intended to be bound
- Usually inferred from circumstances
- Social setting (friends, family) – no presumption of intention
- Commercial setting = presumption of intention
- “*Subject to contract*” – if no intention to be legally bound

Consideration

→ exchange of something with value with reciprocity otherwise is a donation

Money or something else

Must have value even if small (eg: \$1)

Reciprocal undertakings – each party exchanges something of value

No consideration, no contract (c/f deed)

Contrast with “gift” (ie: unilateral action, not enforceable)

Concept of “reciprocity” otherwise is a donation

It can take the form of a right, interest or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given suffered or undertaking by the other.

“The act or promise of one party is, as it were, ‘bought’ or ‘bargained for’ by the act or promise of the other.”

Requirement of Writing?

Most contracts are in writing for clarity (real estate contracts generally must be in writing)

Oral agreements can be enforceable if you can show part performance of an obligation made in reliance of the agreement

Formation of a Contract

- Authority: lawful ability to enter contract?
- Capacity: age, mental state, language? legal capacity if it’s in an other language
- Duress and Undue influence? gun to my head, put under stress, not freely
- Formation (offer, acceptance, capacity, consideration)?
- Correct execution of deeds and documents? (signed and dated, witnessed, registered) locazione → need to be registred

The Content of a Contract

Telling a “story” in 3 parts-

1. Recitals: Setting the scene (general information)
2. Enforceable Terms: Content (the body)
3. Schedules and Annexures: commercial information - price, service description, service credits, technical specs etc

Services Agreement (Recitals)

PARTIES:

(1) ABC is a company registered in Italy whose registered office is at Corso Magenta, 1 Milan (“**Supplier**”)

(2) XYZ is a company registered in France whose registered office is at Rue Chamonix, Paris (“**Customer**”)

RECITAL:

SUPPLIER is a well known consultancy firm in Europe. CUSTOMER wishes to obtain from SUPPLIER and SUPPLIER is willing to supply to CUSTOMER, marketing consultancy services relating to the launch of CUSTOMER's new "Lino" brand, from time to time, subject to the terms and conditions of this Agreement.

The Content of a Contract (Enforceable terms)

- Conditions, warranties, intermediary terms
- Entire Agreement Clause
- Liability
- Governing law and jurisdiction
- Variation and assignment
- Force Majeure

Conditions and warranties

A condition is a major term which goes to the root of the contract. Breach can lead the innocent party to end the contract and claim damages. eg. the main supply is missing

A warranty is a minor term which does not go to the essence of the contract. Breach can allow the innocent party to claim damages (but not end the contract). eg. different type of wood

Entire Agreement clause!!!!

States that the written contract is the complete and final statement of the parties' agreement.

Any pre-contractual material or representation which the parties wish to be incorporated into the contract must be explicitly included in the contractual documentation (Sales "puff", representations during negotiations etc NOT included)

example: "This Agreement, along with any exhibits, appendices, addenda schedules and amendments hereto, encompasses the entire agreement of the parties, and supersedes all previous understandings and agreements between the parties, whether oral or written."

Liability: what is it?--> what will I be responsible for?

- Transfer of risk
 - Contract determines:
 - which party pays in the case of loss or damage
 - To what extent will that party be held *liable*? (all damage? Some? None?) need to quantify the risk, up to what level?
1. Example 1: Exclusion of Liability → not expecting any liability
"Contractor shall not be liable for any and all claims, action, liabilities, losses, damages and expenses (including legal expenses) ("Losses") incurred by Customer which arise out of or in connection with, *directly or indirectly*, the Contractor's performance, delayed performance or non-performance of the Services..."
 2. Example 2: Limitation of liability → up to a limit level
"The maximum aggregate liability of SUPPLIER to CUSTOMER under or in connection with this Agreement, or any collateral contract, whether arising in or caused by breach of contract, tort, breach of statutory duty or otherwise, shall in no circumstances exceed 100% of fees payable by CUSTOMER to SUPPLIER for the Services under this Agreement."
 3. Example 3: Unlimited Liability → covers all the risks
"Nothing in this clause 9 shall exclude or in any way limit either party's liability to the other party for (i) fraud, (ii) death or personal injury caused by its *negligence*, or (iii) any liability to the extent the same may not be excluded or limited as a matter of law." eg. when someone die the law doesn't let limit it

Usually is the worth of the contact, good is a little bit more than 100%

Governing law and Jurisdiction

- Governing law: Which law will govern the contract?
- Jurisdiction of courts/arbitration: where will the parties take legal action against the other in the case of disputes?

Variation and Assignment

“Except as may be expressly provided elsewhere in this Agreement, neither party may assign, transfer, novate or vary this Agreement or any of its rights or obligations hereunder without the prior written consent of the other party (not to be unreasonably withheld or delayed)”.

Force Majeure !!!!!

- A party will be excused from non performance *for the duration of an event beyond its reasonable control* provided it (a) notifies the other party within a reasonable time and (b) takes steps to minimize disruption. (suspend contract rather than terminate it!)
- Interpreted strictly (narrowly by court)
- Cannot be result of negligence/omission of party seeking to rely on term.

Eg: Act of God, fire, flood, earthquake, terrorism, war, riot. Outside the reasonable
If parties wish to include economic events/hardship must specifically draft it

So you have your contract drafted – now what? Let’s look at contract performance and disputes....

Performance and Discharge

- Discharge of obligations (completed)
- Breach (someone did not do his part)
- Force Majeure (Act of God) the contract is suspended
- Frustration (contract rendered impossible)

Disputes

- Is your governing law clause effective?
- Joint and/or several liability – other parties? don’t sue a party that is not able to pay you back
- Limitation of liability?

Alternative Dispute Resolution

- Escalation (bumping up)
- Mediation (involve a third party)
- Arbitration (involve a third party of or not the court)
- Settlement or termination by agreement (and stay out of the courts!)

Invalidating Factors

- Mistake – an erroneous belief that some facts are true
- Misrepresentation – false assurances, lies, fraud
- Death – promise dies with promisor for services agreements
- Consumer Contracts restrictions (protecting consumers in complex transactions) special category
- Frustration – narrower concept than Force Majeure. Event must not only prevent performance but must make performance impossible, illegal or radically different from that intended at time contract was entered. eg. I can’t sell you my burned down house
Contract is terminated and parties released from obligations.

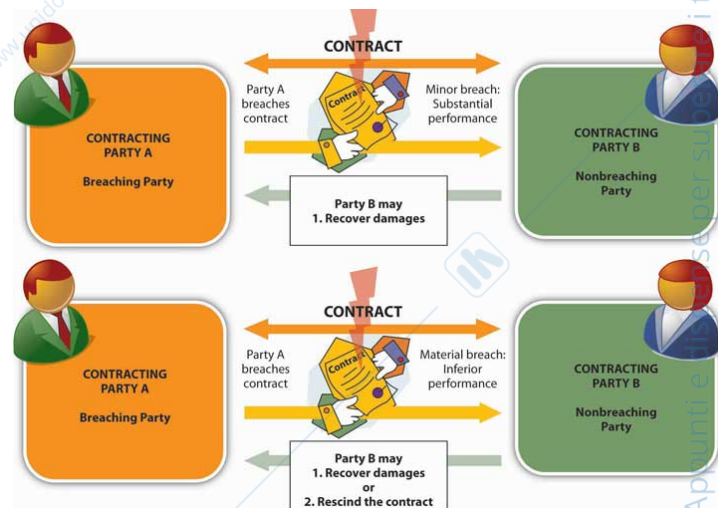
Remedies to Disputes

- Damages and agreed remedies (Liquidated damages vs penalties) → money
- Equitable remedies (injunction, specific performance) → not money
- Restitution (give up gains)
- Rectification and other ways to correct mistakes (rewrite contract term – rare!)

Schedules

Are at the back of a contract

- Contains detailed commercial or technical information
- “The devil is in the detail”
- Common examples of contracts being “undone” by sloppy schedule drafting
need to be checked by the lawyer



Type of Schedules

- Description of Services
- Description of Products
- Key Personnel
- Fees and formulae
- Payment Terms and timeframes
- Technical Specifications

Case Study 1

Chester is a young man recently immigrated to the USA from Korea three years ago to attend University. He had been living with his grandparents who recently passed away, leaving him a large sum of money. Chester only speaks basic English, he has few friends and has recently been prescribed anti-depressant medication to deal with the loss of his grandparents. He has limited business experience.

Chester is unsure of what to do with the money and approaches his best friend and neighbor Julie, who has known him since he moved to USA. Julie runs a fashion outlet called "Bella Blue". Julie wants to start a bigger store in LA but lacks the money. She offers to sell the business to Chester for \$400,000 and assures him that she will run the business for another year. Chester remains skeptical and during negotiations Julie says:

"There is no risk in you buying the business. We have consistently made \$15,000 a month and with summer coming you could start a swimwear range and make at least \$20,000 a month – I have studied the trends..."

Chester enters a contract to buy the business and shortly after Chester sees that the earnings are nothing like what Julie indicated in negotiations.

Chester wants out of the contract and wants his money back. What can he do?

language, anti-depressant medication and suffers a loss → Luch of legal capacity? no. if he's at university he can understand enough, none private him to consult an expert and anti-depressant isn't a drug, it's a common thing. was he pressured by Julie to sign?

even if the numbers don't match, it doesn't mean that the information given were false. something may have been change plus it was oral → entire agreement clause

Answer Q. 1:

A number of issues arise in this case –

- Breach of contract
- Misrepresentation
- Undue influence

Breach of Contract

- To make a successful claim for breach of contract, Chester would have to show that the oral statements made by Julie should be incorporated into the contract. This would be difficult in the event that the whole contract was in writing (and certainly not if there is an entire agreement clause). It may be possible to argue that the oral statements amount to a collateral contract – although this would be hard to prove in the absence of some further consideration.

Misrepresentation

- Julie's comments could also be argued to be pre-misrepresentation which could if proven amount to a way to terminate and claim damages.

Undue Influence

- The fact that Chester did not speak English well and that Julie was one of few friends he knew and trusted could amount to undue influence, particularly as he had limited business experience.
- Did Julie exert more influence than a person in an "arms length" (just business) transaction?

Set Aside Contract for lack of capacity

- Also consider whether Chester had adequate capacity to enter into the contract given the fact he was taking anti depressant medication and his poor English skills- did he understand what he was getting into?

LESSON 2

CHOICE OF GOVERNING LAW AND CHOICE OF JURISDICTION

- Choice of law which governs the contract:
 - Are parties free to choose the law of any country to govern their contract?
 - EU: Rome I Regulation
 - Conflict of laws
- Choice of Jurisdiction in case of disputes:
 - EU: Brussels Regulations
 - "Forum shopping"
 - Concurrent litigation
 - Enforcement of foreign judgments

Contract Choice of Law issues

Contract choice of law issues arise in three contexts:

- Validity
- Interpretation of the terms
- Mode of performance

Does a party have unfettered autonomy regarding the choice of applicable law in that they are free to choose any law or are they limited to selecting one which has a connection with the transaction? The party can freely choose the governing law, because it's a point of negotiation.

Governing law clause example

"This Agreement and all non-contractual obligations arising from or connected with this Agreement shall be governed by and construed in accordance with the laws of Hong Kong".

- Parties' freedom to choose the law governing their contract is widely accepted and forms the basis of most modern bodies of conflict rules
- Some common law jurisdictions (eg: US and Latin America) were slower in adopting the rule
- Brings certainty and predictability to transnational agreements

***The Bremen v Zapata off-Shore Co* 407 US 1, 92 S.Ct 1907 (1972)**

Landmark US case in which the Supreme Court gave effect to a contractual choice of forum provision in a maritime towage agreement (Louisiana to Italy)

Contract stipulated English courts jurisdiction

US Owner of damaged rig brought legal action in US courts

US Court upheld English choice of law unless it could be shown that enforcement would be unreasonable and unjust or that the clause was invalid as fraud

***Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC)**

It was argued that choice of English law to govern a bill of lading was not valid because the transaction contained nothing to connect it with England

Court upheld choice of law clause

"Connection with English law is not as a matter of principle essential"

"Governing law" in Americas

Article 7 of 1994 Inter-American Convention of Law Applicable to International Contracts also grants freedom to choose even where no objective link exists (5 Latin American countries ratified it. Not USA)

"The contract shall be governed by the law chosen by the parties"

"Governing law" in Europe: Rome Regulations

Rome I Regulations: govern choice of law for contractual obligations

Rome II Regulations: govern choice of law for non-contractual obligation

non-contractual → if a contract is not valid or a negligence of a party

- Combined effect of Rome 1 Regulation

Articles (1) & (3) is that there is almost unlimited freedom to choose the law of any country, irrespective of any connection with that country, subject to mandatory rules (EU)

Free choice subject to application of Mandatory Rules

- Simple mandatory rules: a given law would not be allowed to be excluded by contract if that law were the applicable law but which could be avoided by choice of a different law
- Internationally mandatory rules: apply regardless of the otherwise applicable law

Examples of International Mandatory Rules !!

- Application of some domestic consumer protection law for individual customers regardless of choice of law
- Principles of European Contract Law (PECL) and UNIDROIT Principles
 - good faith
 - Curbs on exclusion/limitation of liability
 - Restricting excessive remedies for non-performance

Apple Corps Ltd v Apple Computer Inc [2004] EWHC 768 (Ch).

"The evidence before me showed that each of the parties was overtly adamant that it did not wish to accept the other's jurisdiction or governing law, and could reach no agreement on any other jurisdiction or governing law. As a result, [the relevant agreement] contains no governing law clause and no jurisdiction clause. In addition, neither party wanted to give the other an advantage in terms of where the agreement was finalised. If their intention in doing so was to create obscurity and difficulty for lawyers to debate in future years, they have succeeded handsomely."

- Conclusion: It is much better to clearly state which country's laws govern the contract, than to leave it to the Courts to decide!

Must be law of a "country"

- Rome I Regulation requires the law of a "country" to be chosen
- In Beximco Pharmaceuticals Ltd -v- Shamil Bank of Bahrain EC, [2004] EWCA Civ 19; the governing law clause provided that:

"Subject to the principles of the Glorious Sharia'a, this Agreement shall be governed by and construed in accordance with the laws of England".

The Court of Appeal held that the only relevant governing law was the law of England

- In Halpern -v- Halpern, there was no express choice of law, but one of the parties argued that the agreement was governed by Jewish law. Rejected by English Court of Appeal [2007] EWCA Civ 291;
- Some flexibility in arbitration to widen choice of law other than law of a "country". Therefore, if parties want to be governed by a law other than of a country, they should choose arbitration.
- arbitration-> if any party don't want to choose a national court

Absent a Governing law clause

- If parties do not specify a governing law or if their choice is invalidated, the governing law will be determined on the basis of some "objective connecting factor" (depends on type of contract) (Art. 4, Rome I Regulations)
- The law of the State which has the most significant relationship with the transaction will govern
- Usually a contract for the sale of goods shall be governed by the law of the country where the seller has their 'habitual residence'. (also distribution, franchise and services agreements)
- Other contracts - 'by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence' (Article 4(2), Rome I).

Art 4 Rome I Regulation

(1) To the extent that the law applicable to the contract has not been chosen in accordance with Art. 3 and without prejudice to Art 5-8, the law governing the contract shall be determined as follows:

(a) A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence,

(b) a contract for the provision of service shall be governed by the law of the country where the service provider has his habitual residence,

© a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated.

(e) A franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) A distribution contractlaw of the country where the distributor has his habitual residence.

“Habitual Residence” (Art. 19(1))

- Companies: ‘the place of central administration’
- a natural person/individual acting in the course of their business activity: ‘principal point of business’

“Significant relationship” with transaction?

- Contract – the place of “habitual residence” of the party whose performance is characteristic of the contract (e.g: place of business of service supplier, distributor)
- Torts (a civil “wrongful act”) – the law of the place of the wrongdoing or where damage occurs (torts: a wrong doing)
- Real Property – place where property is situated “*in situ*”

Conflict of laws

- If the law chosen is that of a country other than that relating most closely to the contract, the provisions of the latter law need to be respected
- If the contract relates to one or more EU States, the applicable law chosen (other than that of a Member State (e.g. Indian law)), must not contradict the provisions of Community law

Other factors to consider

- Habitual residence/nationalities of parties
- Language in which contract is written
- Currency of payment
- Flag of carrier ship
- The place where the contract was made
- Pattern of doing business between parties

Location of insurance provider

Jurisdiction of Courts

Which country’s Courts will decide a dispute in relation to a contract?

Example

“Each party irrevocably submits to the [exclusive/non-exclusive] jurisdiction of the courts of England over any claim or matter arising under or in connection with this Agreement and the legal relationships established by this Agreement.”

Further (bad) Examples

“Any disputes between the parties about any breach of this contract shall be decided by the courts of Africa”
→ Africa is a continent

“The parties agree that their disputes will be heard by the Australian courts” → Australia is a federal system, it needs to be a state

“Any conflict in this contract will be resolved by the UK courts” → UK is a union not a country

“This Agreement shall be subject to and governed by the laws of the United States of America, excluding any conflicts-of-law rule or principle that might refer the construction or interpretation of this Agreement to the laws of another state”. → federal system

Jurisdiction of civil and commercial disputes in Europe

- Brussels I Regulations (Art. 25): If the parties agree jurisdiction to settle disputes those courts have in principle, exclusive jurisdiction. unless you say non-exclusive, then it’s exclusive.
- Brussels I Regulation (Article 5): individuals should only be sued in their member state of domicile (a person’s habitual or ordinary residence). Because it must be the place where you speak well the language, know the laws and understand the court decision etc
- Some exceptions apply

Exceptions to Brussels Regime

- Family law
- Bankruptcy or insolvency
- Social security
- Arbitration matters

General Rule under Brussels Regulations

- Article 4(1): 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State
- "Domiciled": person's habitual or ordinary residence (Note: not necessarily state of residence at the time)

Exceptions to the Rule re Domicile

- Ownership/rights in land – jurisdiction is where the land is situated
- Validity of entries in public registers – jurisdiction is where the register is kept
- In disputes concerning the registration or validity of IP rights - where registered
- Enforcement of judgments - the courts of the member state in which the judgment is to be enforced

Differing governing law and jurisdiction clauses (Art 24)

- Example: Italian governing law with English courts jurisdiction:
 - English courts will resolve dispute
 - parties will need to produce expert evidence on Italian law for the English Court to determine the relevant issues
 - Risks: Increased costs of litigation/incorrect application of the foreign law
 - If outside the EU, there is no guarantee that the particular court chosen will recognise an express choice of law clause

What is "Forum shopping"?

- A tactical practice pursued by some litigants to commence legal action in "plaintiff friendly" jurisdiction even where no connection with claim
- Objective is to have their legal case heard in the court most likely to produce a favourable judgment

Why "forum shop"?

- Convenience to pursue action in home country or where witnesses are
- Reduced costs or availability of special payment schemes
- Favourable court procedures (incl. discovery)
- Favourable remedies/damages awards
- Language
- Pace of proceedings (fast or stalled)
- Quality of judiciary (competence, corruption)

"Forum shopping" → A plaintiff might have selected one forum on the following grounds:

- The forum is not convenient to the defendant or his witnesses (eg: expense of travel, health, or visa or entry permit)
- The court, the judge, or the law is most likely to favour the plaintiff's case

A defendant may take the following actions to obtain a change of venue:

- petition the forum court that it should reject the jurisdiction and petition to transfer the case to a more convenient forum; or
- If a case has been filed in another jurisdiction, the defendant may seek injunction against the plaintiff to discontinue action in first forum and submit to more convenient one

Contexts in which Forum shopping can occur

- Some contractual disputes
- Family court matters – Divorce, Child custody
- Criminal cases
- Product liability claims
- Tortious actions

A Court will decide

- court decides whether it has personal and subject matter jurisdiction, and if so, whether it is the most appropriate forum

- “*Forum non conveniens*” – tool available at court’s discretion to transfer case if the court selected is not the most convenient one:
 - Fairness
 - Other court better equipped
 - Preventing excessive forum shopping where wide choice available
 - Desire not to waste scarce judicial resources
- If two states could accept civil jurisdiction, the plaintiff must show that justice requires that the case be heard in his/her chosen forum

Concurrent litigation

- “Race to judgment” (2 courts working at the same time)
- “Italian torpedo” – tactical legal action where a prospective defendant in a jurisdiction with swift relief (e.g., Germany) would file a suit for declaratory judgment in a jurisdiction with slow relief (e.g. Italy) to stall the proceedings against him (sometimes for years ..)
E.g: in IP infringement case, this would extend the time in which to exploit the other party’s IP

What makes some jurisdictions attractive?

- US: generous damages awards, alimony, extensive discovery rule (you can ask more documents), contingency fee system (“no win-no pay”), product liability laws
- England: stricter defamation laws, generous divorce settlements
- Philippines: Forum shopping is prohibited by law

Different Rules of Evidence

Rules of evidence can also influence which forum plaintiffs choose-

- Inquisitorial system: court is actively involved in exploring the facts
- Adversarial system (common law): judge is impartial referee re procedural questions and questions of law
- Jury trials: jury decide questions of fact

Enforcement of foreign judgments

- Even where a conflict of laws exists, most courts will recognize the validity of a foreign judgment in most cases (although this is not guaranteed)
- Under international law a court will apply comity (reciprocity) by discretion, taking into account the following:

- did the foreign court have jurisdiction?

- were fair procedures used?

- The Brussels I Regulations (recast) (Art. 36 & 37) ensures that judgments given in a member State are recognised and enforced in all other Member states without special procedure
- The European Enforcement Order permits enforcement of foreign judgments within EU without need for intermediate proceedings- (only relevant to uncontested claims)
- Under U.S. law, this authority is part of the Full Faith and Credit Clause of the U.S. Constitution

More broadly, a court may not enforce a foreign judgement where:

- The judgment:
 - Was obtained by fraud
 - Is against public policy
 - Conflicts with another final judgment
 - Seeks to enforce the tax laws of a foreign jurisdiction
 - the defendant was not served with the document in sufficient time to arrange a defence
- The foreign court:
 - Was not an impartial tribunal with compatible procedures
 - Did not have personal jurisdiction over defendant/ subject matter
 - The foreign court proceeding was in conflict with a settlement agreement signed by parties

Case Study 2

Eva is a young businesswoman who has just graduated University. She has decided to start up a business providing translation services – seeing an opportunity working with the international community in Brussels. Eva approaches Dustin's Lending Corporation ("Dustin's Lending") to secure a loan for office premises and equipment. Dustin is impressed by her business plan, but given her age and inexperience agrees to loan her Euro 100.000, only if the loan is guaranteed.

One day Eva and a representative of Dustin's Lending go to visit Eva's elderly grandmother in a retirement home. Maria is seventy-three years old and has been in the retirement home for nine years, after a car accident in which her husband was killed. As a result of the accident she suffered a brain injury and lost most of the memories of her life and has some language difficulties. She is very passive as she was heavily reliant on her husband for emotional and financial support. She is now heavily dependent on Eva for emotional support. Eva shows her grandmother the contract and says –

"The bank just wants to make sure everything will be ok with my new business. They just want to make sure someone will pay if the business fails, but I'm sure it won't come to that. Can you just sign here..."

After a year, Eva's business is suffering from the financial crisis and she is unable to keep up with her loan repayments. Can Dustin's Lending enforce the guarantee against Maria?

formation of contract → it's an enforceable agreement not just a paper with 2 signatures
issues: capacity, Dustin's Lending was also there, undue influence

Answer Q.2:

It is possible that the guarantee may not be enforceable on the grounds of lack of capacity and undue influence.

Lack of Capacity

- A contract may be voidable if a party is suffering from a recognized mental illness and is incapable of understanding the effect of signing a contract and the other party was aware of it. Remember a representative of Dustin's Lending saw her at the retirement home.
- On the facts of the case it is obvious that Eva's grandmother was mentally impaired. If she was not capable of giving effective consent to the contract a court would set aside the contract and it would not be legally enforceable. Although it should be noted if Maria was judged to be lucid at the time the contract would be enforceable. However given that she also has some language difficulties it is more likely that she would be judged to be incapable of effective consent.

Undue Influence

- The other aspect to consider is whether Eva exerted undue influence on her mother given the passing of Maria's husband and the trust between grandmother and granddaughter. This would also weigh towards setting the contract aside.

LESSON 3

INTERNATIONAL SALE OF GOODS

- Background to international sales law
- Hague Convention
- Vienna Convention on Contracts for International Sale of Goods ("CISG")
- Regional laws – Africa, EU
- Incoterms (transport and delivery)
- National laws on sale of goods
- Implied terms and Trade custom

Hierarchy of laws and regulations !!

1. Specific Contract Terms/purchase order
2. IncoTerms (transport and delivery)
3. CISG/Vienna Convention (if applicable)
4. Other Regional laws (eg: EU Regulations)
5. Other Domestic (National) laws

Background to International Sales Law

1920's Austrian jurist, Prof Ernst Rabel began work on the creation of an international uniform sales law
 Rabel's work was taken and developed by UNIDROIT (International Institute for the Unification of Private Law)
 1939 draft document approved but work was suspended due to WWII
 At the end of war, work resumed resulting in 2 Hague Conventions

What is an International Convention?

A multilateral treaty or agreement between states in written form which is governed by international law
 Parties can become "signatories" showing an agreement to be bound by the terms

Hague Conventions

1. Uniform Law on the International Sale of Goods
 2. Uniform Law on the Formation of Contracts for the International Sale of Goods
- Agreed in 1964
 - Came into force in 1972 by ratification

Limitations of Hague Conventions

- Only ratified by 9 States (mostly EU)
- It failed to get backing of developing nations
- formulated on a "Opt-in" basis- therefore many States which ratified it still chose law of nation state
- Technical weaknesses

UN Convention on Contracts for International Sale of Goods (CISG)- Vienna convention

CISG is considered "*The most successful commercial law treaty in history!*"

(Commonly known as the Vienna Convention)

- Uniform International Sales law
- Unlike the Hague Conventions, UNICITRAL (UN Commission on International Trade Law) conducted a wide consultation process including US, Soviet Union, China

What is the purpose of CISG?

- Modern: uniform and fair regime for contracts for the international sale of goods
- Introduces certainty: & reduces costs (to provide a framework)
- It is fair- provides a balance between the interests of the buyer and of the seller
- It helps small and medium-sized businesses: and traders in developing countries which have limited access to legal advice when negotiating a contract

CISG Summary

- Convention adopted in April 1980
- Came into force in 1 January 1988
- Ratified by 83 states
- Commonly known as "Vienna Convention"
- Not ratified by UK, Ireland, Portugal, Hong Kong, India, Taiwan, Sth Africa
- African involvement was slow

Why did UK not ratify?

- Unfamiliarity with some concepts and rights introduced (such as fundamental breach)
- Popularity of UK Sales of Goods Act 1979
- Doubts of producing uniformity due to various interpretations
- Incomprehensive – does not cover validity of contract and passing of property

goods: physical items (technology, car)

real property: lands

services: consultation

Application of CISG

- Applies to contract with where Parties' places of business are in different states (not domestic sales)
- Applies to "contracts of sale" between businesses
- Where goods to be manufactured or produced
- Excludes consumer contracts, sale of services
- Excludes contracts for "services" (i.e: work and materials)
- Excludes contracts where the buyer supplies a "substantial part" of the materials necessary for production (ie: it becomes "services" contract)
Note: sometimes difficult to distinguish sale of "services" in electronic goods and computing in modern world (eg: software provided on physical disk ("good") v downloaded ("service"))

What Effect does it have on transnational contracts?

Unless expressly excluded by contract, CISG is deemed to be incorporated into (and supplant) applicable domestic laws relating to the sale of goods between parties from different Contracting States

Signatories to CISG

Albania	Argentina	Armenia	Australia	Austria	Bahrain	Belarus
Belgium	Benin	Bosnia- Hertz	Brazil	Bulgaria	Burundi	Canada
Chile	China	Colombia	Croatia	Cuba	Cyprus	Czech Rep
Denmark	Dom. Rep	Ecuador	Egypt	El Salvador	Estonia	Finland
France	Gabon	Georgia	Germany	Greece	Guinea	Guyana
Honduras	Hungary	Iceland	Iraq	Israel	Italy	Japan
Sth Korea	Kyrgyzstan	Latvia	Lebanon	Lesotho	Liberia	Lithuania
Luxembou	Macedonia	Madagascar	Mauritania	Mexico	Moldova	Mongolia
Montenegr	Netherlds	N. Zealand	Norway	Paraguay	Peru	Poland
Rep Congo	Romania	Russia	St Vincent	San Marino	Serbia	Singapore
Slovakia	Slovenia	Spain	Sweden	Switzerland	Syria	Turkey
Uganda	Ukraine	United States	Uruguay	Uzbekistan	Vietnam	Zambia

What does CISG cover?

- Formation of sales contract
- Contractual rights and obligations of parties
- The passing of *risk* of goods
- *Remedies* for non-performance

exception of a bridge → force major (notify, communicate)

What CISG doesn't cover?

- "passing of title" – CISG does not specify when title passes in the goods (too difficult to unify different nation states laws on this)
- Liability of seller for death/personal injury caused by death
- Validity of contract
- Contract re sale of Real property

Key elements for CISG to apply

1. Type of contract (Sale of goods)
2. International (parties place of business must be in different states)
3. Connecting factor – both parties should be from a State which has ratified CISG (BUT CISG can also apply even if one party is not from a State which ratified CISG, if the governing law is that of a ratifying State)

1. Type of Contract

- Sale of Goods
- No definition in the Convention
- Understood to mean – "*seller has to deliver the goods, hand over documents and transfer any property in the goods, whereas the buyer is bound to pay the price and take delivery*"
- Does not apply to barter (exchange, no payment) or Agency agreements

2. International

- Not necessary that the goods move from one state to another.
- However:
 - Contracting parties must be in different states
 - Both states have ratified the Convention*, and
 - Both parties know they have places of business in different states for the purpose of contract.
 - (* OR where choice of law is a contracting State)

Rights and Duties of Parties

1. Obligations of Seller:

- Deliver the goods to place specified (under contract) or under the Convention (depends on whether or not the contract includes carriage or goods specifically identifiable in contract)
- To ensure conformity of goods
- Ensure goods free of undisclosed 3rd party claims/rights (eg. if the seller previously sold the item to someone else or the item propriety isn't of the seller...)
- Where necessary, preserve the goods

Buyer's remedies in event of non-performance by Seller:

- Require performance
- Have contract avoided: terminate
- Repair and/or replace defective goods
- Extension of time
- Price reduction for non-conformity
- Claim damages (but must mitigate loss)

2. Obligations of Buyer:

- Check conformity of goods
- take delivery of goods
- pay the price
- where necessary, preserve the goods

Sellers remedies for non-performance by buyer:

- Require acceptance and payment of goods
- Avoid the contract
- Claim damages (must mitigate loss)

• Fundamental Breach (Art.25)

"a breach is fundamental if it results in such detriment to the other party as to substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee (or reasonable person would not have foreseen) such a result".

- Remedies for fundamental breach
 - Buyer can demand substitute goods if not in conformity with contract
 - Effected party can Terminate for non-performance
 - Buyer can terminate for partial delivery of goods
- Remedies for fundamental breach
 - Buyer can demand substitute goods if not in conformity with contract
 - Effected party can Terminate for non-performance
 - Buyer can terminate for partial delivery of goods

Interest (Article 78)

- If a party fails to pay the price or another sum due, the other party is entitled to interest on the outstanding sum
- No need to show “damage” for late payment (the injured party may also have a claim in damages)
- BUT CISG does not specify rate of interest or date from which it is payable (problematic!)

Force Majeure and Exemptions for non-performance (Article 79)

- “A party is not liable for failure to perform his obligations due to “an impediment” beyond his control and that he could not reasonably be expected to have taken it account at the time of conclusion of the contract or avoided its consequences”
- Very similar to “force majeure” clause in most contracts
- Excuse for non-performance has effect during the “impediment” event
- Must give notice within reasonable time
- Only protects against a claim of damages (not other remedies e.g. specific performance)
- Potentially includes “non-physical” impediment for example, “economic” difficulty

Risk (Chapter IV)

- “risk” – which party will bear the loss if goods are accidentally damaged or destroyed without the fault of either party to the contract?
- Default Rule: risk passes with control/custody
- Risk passes to buyer when he takes over the goods or a “reasonable time” after goods are placed at his disposal and he fails to take delivery
- For contract involving transport of goods – risk passes to buyer when goods are handed over to the first carrier
- Buyer’s claim for damaged goods would be against the carrier not the seller (unless seller knew of loss/damage and did not disclose it)
- When goods already in transit when sold – risk passes “at time of conclusion of contract”

Transportation documentation

- A “bill of lading” is document showing goods have been passed to carrier for transport
- It is a receipt for:
 - The quantity of goods received
 - The condition of goods received
 - Leading marks (marks necessary for identification)
- Types of lading:
 - Inland
 - ocean
 - Through (mix of overland and ocean)
 - airway

Payment

- International bill of exchange (bank will honour payment before goods leave)
- International bank transfer (transfer through banking system)
- Letter of credit (provide seller with guarantee of payment. Contrast with letter of comfort from parent co.)

Exclusions to CISG

- Parties can expressly “contract out” of CISG – but if contract is silent, CISG applies (provided governing law’s state has ratified CISG)
- Some scope to implicitly exclude but it is uncommon
- If you want to avoid CISG choose governing law of a State which has not ratified it (e.g:English, Irish law)
- Must expressly exclude CISG if do not want it to apply
- Exclusion is usually included in the governing law clause of the contract:
“The provisions of the United Nations Convention on the International Sale of Goods shall not apply to this Agreement.”

REGIONAL LAWS

Regional Laws – Africa

- OHADA- Organisation for the Harmonisation of Commercial Law in Africa
 - New law for commercial sales contracts (came into force 1998)
 - Unifies domestic and international rules re commercial sales within African states

Regional Laws – EU

- EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees [1999]
- Provides inroads into the law of consumer sales in domestic law of member states

LESSON 4

InternationalCommercialTerms

- Standard International Commercial Terms (transport and delivery)
- Internationally recognised pre-determined trade terms used in sales contracts
- For example –
 - who is responsible for cost of transporting goods (incl. insurance, taxes and duties)?
 - Where goods will be picked up and transported to?
 - Who is responsible for goods at each step of transportation?
- In case of conflict with CISG, IncoTerms prevail
- Originally drafted in 1936 – International Chamber of Commerce (ICC)
- Updated every 10 years to accommodate new modes of transport
- Underlines the level of risk taken by Seller
- Eg: ExWorks=lowest risk for Seller (goods to be collected from Sellers factory/warehouse)

INCOTERMS



■ COSTS
 ■ RISK
 ■ INSURANCE
 ALL MODES OF TRANSPORT
 SEA AND INLAND WATERWAYS

DESCRIPTION	FREIGHT/RISK		MORE DETAILS
EXW Ex Works	SELLER	BUYER	Freight Seller's premises. Risk Seller's premises.
FCA Free Carrier	SELLER	BUYER	Freight Freight handler. Risk Freight handler.
CPT Carriage Paid to	SELLER	BUYER	Freight Destination. Risk First freight handler.
CIP Carriage and Insurance Paid to	SELLER	BUYER	Freight Destination. Risk First freight handler.
DAT Delivered at Terminal	SELLER	BUYER	Freight Destination. Risk Destination.
DAP Delivered at Place	SELLER	BUYER	Freight Place of destination. Risk Arriving means of transport at destination.
DDP Delivered Duty Paid	SELLER	BUYER	Freight Destination. Risk Destination.
FAS Free Alongside Ship	SELLER	BUYER	Freight Shipside in port of departure. Risk Shipside in port of departure.
FOB Free on Board	SELLER	BUYER	Freight On board ship. Risk On board ship.
CFR Cost and Freight	SELLER	BUYER	Freight Port of destination. Risk On board ship.
CIF Cost Insurance	SELLER	BUYER	Freight Port of destination. Risk Port of destination.

Defintions of IncoTerms

- ✓ EXW: ex works (collection from sellers factory)
- ✓ FCA: free carrier (delivery to carrier)
- ✓ CPT: carriage paid to (agreed delivery place)
- ✓ CIP: carriage and insurance paid to (agreed delivery place)
- ✓ DAT: delivered at terminal (goods unloaded at port)
- ✓ DDP: delivered, duty paid
- ✓ FAS: free alongside ship
- ✓ FOB: free on board (delivery to named ship)
- ✓ CFR: cost and freight (delivery on board ship at port)
- ✓ CIF: cost, insurance and freight (delivery at port)

DOMESTIC LEGISLATION

Domestic (national) Sale of Goods Legislation

- Italy – Italian Civil Code (regulates most commercial relations)
- UK - Sale of Goods Act (1979), Sale of Goods and Services Act
- US - the Uniform Commercial Code (“UCC”)

“Implied Terms” in Sale of Goods Contracts

- Under English law – Sale of Goods Act (1979)
 - Good title: That the seller has the right to sell the goods in question
 - Quiet Possession: That the goods are free from undisclosed charges or encumbrances, and that the buyer will enjoy quiet possession of the goods
 - Correspondence with description: where goods are sold by description they will comply with that description (consumer contracts for up to 6 months from delivery)
 - Satisfactory quality: relative to price and description (free of defects, durable, safe!) otherwise sell “as is”, “with defects”
 - Fitness for purpose for which it was bought
 - Complies with sample (quality can’t be different from sample)
 - “cooling off” period for on-line purchases

Remedies for breach of implied terms

- Reject goods and request full refund of price (if goods not yet accepted)
- Claim costs for repair of defective goods
- Claim damages (and possibly terminate contract)
- Consumers also have the right to request seller to “repair or replace” damaged or defective goods

Trade Custom

- Parties can be bounds by established “customs” of a particular industry or trade
- The parties often assume that their contract will be subject to such customs and therefore do not deal specifically with the matter in their contract

In the “course of trade”

- If two parties have regularly conducted business on certain terms, the terms may be assumed to be same for each contract made
- The parties must have dealt with each other on numerous occasions and been aware of the term(s) meant to be implied.

“Battle of the forms”

- each party wants to contract on the basis of its own commercial terms
- A offer to buy goods from B on its (A's) standard terms and B purports to accept the offer on the basis of its own standard terms
- the battle is often won by the party who fired the “last shot” (the last set of terms that were not explicitly rejected by the recipient)
- See link for example: <https://www.youtube.com/watch?v=YtSXS4iqK8s>

Remember- Hierarchy of laws and regulations!

1. Specific Contract Terms/purchase order
2. IncoTerms (transport and delivery)
3. CISG (if applicable)
4. Other Regional laws
5. Other Domestic (National) laws

Case Study Exercise – Sale of Goods

Snell Inc is a Canadian company which produces engineering machinery used to dig large tunnels. Tollgard PLC. is an English company which has recently won an infrastructure contract to build a set of roads outside of Manchester, but they are under pressure as they have a very tight deadline to complete the works by end of 2018.

Tommy Tollgard (CEO) is interested in purchasing 3 large diggers and asks Sally Sneddon (Commercial director of Snell) to meet him for lunch in Toronto to discuss the deal. Over lunch, Sneddon writes the main terms on the back of a napkin including the type of machinery, the price (Euro 33,000) and the delivery date of 30 June 2018. They shake hands and when Sally gets back to the office that afternoon she writes the terms on an invoice and faxes it to Tollgard. The next day, Snell begins manufacturing the machinery in order to meet the tight deadline. At the end of the week, Tollgard returns to the UK and asks his operations officer to send a purchase order to Snell for the equipment, requesting that one of the diggers be customised for wetlands as the new road will be routed along the coast of the Lake District which could mean they need to dig in low wet territory. Delivery is specified to be made to Tollgard headquarters. All other terms were in keeping with their standard terms.

The Canadian winter this year is particularly cold with record snow falls which has effected industries across the country. Unfortunately some of Snell's machinery iced over and was out of production for three weeks which meant that it missed the delivery deadline for the Tollgard order. The machinery was delivered two months late which meant that Tollgard was not able to fulfil its infrastructure contract resulting in a law suit of £800,000. In addition, one of the diggers was damaged during shipping.

Snell's standard terms are governed by Canadian law and limit its liability to 100% of the price payable under the contract. Delivery terms are FAS. Tollgard's terms, instead, are governing by English law and limit liability of both parties to \$1 million. Tollgard wants to sue Snell for the delay/damage to the machinery and refuses to pay anything. What can each of the parties do?

Snell Inc

1. **Battle of the forms:** Snell will want to claim that a valid contract was formed and it is on its standard terms (agreement at lunch, faxed terms and commence manufacturing before Tollgard's counter offer was received). Even if counter offer was received it is unlikely it was accepted (note, the wetlands customisation of the equipment was not manufactured showing Snell did not rely on the Tollgard's amended requirements).
2. **Force majeure:** Snell could argue that it was effected by an "act of god" force majeure due to the snow storm and so it is not liable for the delay. (Query was it not foreseeable? Did it notify the other party and take steps to mitigate damage?)
3. **IncoTerms:** provided Snell's terms constitute the contract, FAS apply to delivery so that the buyer carries liability from the quay alongside the ship, and therefore Snell is not liable for the damage sustained during shipping.
4. **CISG:** Does it apply? (Interest on late payment?)
5. **Limitation of liability:** Even if Snell is liable for the above, its limitation of liability clause should stand at a maximum of euro 33,000.

Tollgard PLC

1. **Battle of the forms**—"last shot" rule. Tollgard will want to argue that its terms were the last ones sent to Snell and that Snell did not reject them, therefore their terms apply. However, it is possible due to the change in specification it would probably amount to a counter-offer which would then need to be accepted by Snell. Absent any indication of acceptance, it is unlikely Tollgard's terms would apply. Could Tollgard argue that no

contract had been formed as there was no final acceptance? If Tollgard's terms apply then Snell could be sued for breach of contract.

2. **IncoTerms**-If Snell terms and IncoTerms apply, Tollgard would have to pursue their insurers, as FAS under IncoTerms shows that the buyer carries the risk in shipping. Tollgard should have insured the risk and claim against its own insurers for the damage. If Tollgard terms apply and delivery was to be made to its headquarters, the shipping damage would have to be covered by Snell.
3. **CISG**- does it apply? (Probably not, if Tollgard's terms apply they would be governed by English law – UK party + UK not a signatory to the CISG.) Was it also specifically excluded?
4. **Limitation of liability**: Tollgard would want its limitation of liability clause to apply so that the full £800K could be recouped to cover its losses.

Part 2: International Trade Agreements



Transatlantic Trade and Investment Partnership (TTIP)

- Free trade agreement between EU and US to “promote multilateral economic growth”
- Claims could boost trade up to 50%
- European Commission launched a public consultation and published parts of an overview in January 2015
- Agreement was due to be finalised in 2016 but Pres. Trump pulled USA out
- Would have effected 1/3 global trade in goods

Current situation US-EU trade

- There are already various trade agreements in place EU-US
- Disputes currently resolved by World Trade Organisation (WTO)
- Tariff barriers are already low (under 3%)
- Trump has now quietly reopened negotiations on a revised trade deal (excluding agriculture....)

Stated benefits of TTIP

- Likely benefits to come from reducing the conflicts of duplication between EU and U.S. rules and regulatory issues
- Create “standards” between two regions which will create “global standards” on issues ranging from food safety to automobile parts
- “standardise” regulations between regions -> lower costs for business -> more trade!

Sectors covered by TTIP

- Food safety law
- Environmental legislation
- Banking rules
- Employment
- privacy

TTIP Controversy

- Secret negotiations – lack of transparency, limited consultation therefore we don't know the details!
- "Stop TTIP" attracted 3.2 million signatures within a year
- Corporations can sue governments in special tribunals rather than national courts if policies led to loss of profits (eg phasing out nuclear energy on public safety grounds)
- Could Dilute important EU regulations on food safety and environment
- Could lead to privatisation of health services, and other public services by US companies (eg: water)
- May reduce IP protections for designated products ("parma ham)

Trans-Pacific Partnership (TPP)

- Trade agreement among 12 Pacific Rim countries
- Australia, New Zealand, Singapore, Brunei, Chile, Peru, Vietnam, Malaysia, Mexico, Canada, Japan, USA
- Agreed October 2015 (after 7 years of negotiations)
- USA pulled out of agreement after Pres. Trump elected
- In March 2018 the other 11 countries signed Comprehensive and Progressive Agreement for Trans-Pacific Partnership
- Lower trade barriers (tariffs and dispute settlement mechanism)

TPP Stated Goal

"To promote economic growth, creation and retention of jobs, enhance innovation, productivity and competitiveness, raise living standards, reduce poverty, promote transparency good governance, labour and environmental protections"

TPP

- TPP would have had a geopolitical purpose by reducing China's influence and pulling signatory countries closing to the USA

Opinions...

- likely to benefit US agriculture producers
- Made to neutralize China's power in global trading and make American companies more competitive
- Potential negative impact on EU agriculture producers exporting to TPP countries

Controversy

- secrecy of negotiations/ lack of transparency and consultation, "undemocratic"
- Increased power to corporations
- Increase costs of medicines
- Reduced workers rights and reduced global labour wages
- Corporations could sue governments in special tribunals not national courts (ISDS)

USMCA/NAFTA 2.0

- New trade deal between USA, Mexico and Canada
- \$1.2 trillion in trade in one of the world's largest free trade zone
- Very similar to NAFTA with some changes:
 - Country of origin rules (auto makers)
 - Labour provisions (\$16 p/h labour for 45% auto parts)
 - US farmers get more access to Canadian market
 - IP and digital trade (extend copyright and no duties on music/e-books)
 - Sunset clause after 16 years

CROSS-BORDER COMMERCE“COMMERCIAL CONTRACTS”

What Are Commercial Contracts?

Commercial contracts are fundamental to business — they are the basis on which businesses buy the supplies and services they need to keep their operations running and on which they sell their goods and services to their customers to generate revenues.

Examples of Commercial Contracts

- Supply and services agreements (find employee, cleaners...) what we need to run the company
- Licensing agreements (some software, brand...)
- Distribution and agency (sales)
- Outsourcing (a 3rd party provide a service that was provide inside the companybefore)
- Sponsorship
- Franchising
- Joint ventures
- E-commerce
- Marketing/advertising
- Consumer contracts
- Technology contracts

What we will cover today

1. Supply and Services agreements
2. Licencing Agreement
3. Distribution agreements
4. Agency agreements
5. Outsourcing
6. Franchising
7. Top Negotiation Tips

1. Supply and Services agreements

- All businesses will require agreements with third parties for products and services necessary to run their businesses.
- All businesses will need to buy in goods and services (procurement) and sell goods and/or services to make revenues (sales) in order to generate revenue

Examples of Supply and Services Agreements

- employment agreements with staff,
- office supplies and furniture,
- manufacturing,
- packaging,
- transport,
- IT services,
- legal, tax, financial,
- security, catering etc

Key contractual provisions

- Parties
- Description and scope of products/services
- Fees and payment
- Warranties (promesses)
- Liabilities (3 tipes of responsability)
- IP and confidentiality (intellectual property= IP)
- Termination
- Dispute resolution (better before then when there's a problem eg. prenup)
- Governing law and jurisdiction

2. Licencing Agreement

- Use of another party's Intellectual Property for payment of a fee (“ownership of the mind” protecte by a contract)
- Examples: merchandising agreements (perfume, fashion, entertainment, games), software licence agreements, technology/patents

Licensing types and strategies

- Technology and R&D licensing: exploitation of industrial and technology developments (eg: patents: brevetto, it refers to inventions)
- Merchandise and character licensing: license a recognized trademark/copyright to a third party in a market not currently served by

eg. Disney, all the kids gadgets with cartoons

Other Licensing Types

- **Merchandising:** the brand or image from one product or service is used to sell another (an image of someone, Ronaldo)
- **Co-branding:** increase the premium consumers are willing to pay by combining the strength of two brands, make the product or service more resistant to copying, or to combine the different perceived properties associated with the brands with a single product
- **Franchising:** license of IPRs and business format

Licensing Examples: Justin Beiber → sells perfume which will cost more

Co-branding: Angry Birds and Star Wars

Key Contractual Provisions

- Parties
- Intellectual property rights – use and restrictions
- Warranties
- Liabilities
- Governing law and jurisdiction

3. Distribution agreements & 4. Agency agreements

distribution → it buys goods, owning them (network)

agency → it acts in their behalf, it doesn't own goods



Sales Agent Wanted

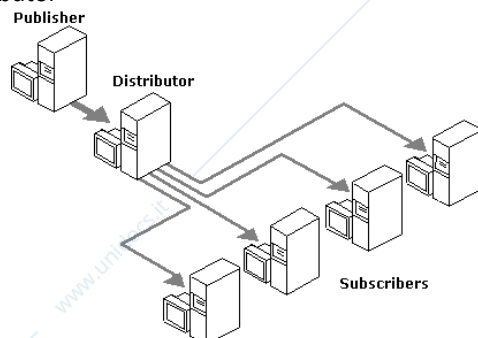
Distribution and Agency

- Building relationships with customers can take a long time and lack of capital can slow your growth.
- Many businesses sell to distributors, or work with agents who market on their behalf to build market share quickly.
- Effectively outsourcing sales and marketing activities to third party.
- Alternatively, set up a joint venture (JV) or franchise your business allowing other businesses to operate under your brand name

Distribution Agreements

- Distributors buy products from Company, and then sell them on at a profit.
- often used as a route to market for lower-value, relatively straightforward products → commodities, of the shelves products
- Title to goods passes to Distributor.
- Distributor has direct relationship with customer. Company → Distributor → Customer (ownership passes gaining a profit margin)
- if there's a problem with the product, the customer goes directly to the distributor not the company

Distributor



Key elements in Distribution Agreement

- Define distributor's territory (National, regional, zone?) Specific territory
- do they have exclusivity in the territory?
- Are they prevented from selling competing products?
- practical issues such as delivery and payment arrangements

Appointment clause

"Company hereby appoints Distributor as Company's non-exclusive distributor of Products in the Territory and Distributor accepts that position. It is understood that Company cannot lawfully prevent its Distributor located elsewhere from supplying Products for sale/use within the Territory and that it has no obligation to do so."

Appointment restriction

"Distributor shall not solicit sales of Products or promote the sale of Products outside of the Territory."

Agency

- An agent acts on behalf of a principal and is subject to the control of the principal
- Has authority to enter into agreements on behalf of principal as if was the principal
- Big responsibility!
- Sales agents negotiate sales on Company's behalf, usually for a commission.
- Preferable for high-value, complex or bespoke products.
- Company keeps direct relationship with customer - agent only *acts on Company's behalf*.
- Title to goods and credit risk remains with Company not agent.

eg. luxury yacht market, you can't buy the boat

Key elements in Agency Agreement

- Define scope of agent's power to act on Company's behalf
- Determine rate of commission payment
- Intellectual Property rights (consent to use logo & trademark, proprietary material)
- there is no margin profit

Company → Agency
→ Customer

Appointment clause

"The Company appoints Agent to act on its behalf in the sale and promotion of Products in the Territory and the Parties agree that Agent shall devote his time exclusively to the same."

"Agent shall be reimbursed for reasonable expenses incurred in performance of its obligations pursuant to this Agreement."

"The Company agrees to pay Agent a commission for sales made, shipped or distributed in the Territory, in accordance with the commission rates set out in Schedule 2."

Commissions shall be paid on the 15th of each month in arrears."

Key elements in both

- Both deal with complex legal and commercial issues
- What rights has agent to use Intellectual Property Rights? (logo, trademarks, confidential information)
- Termination rights (*termination for self employed agents may need special attention to avoid unexpected liabilities) The company CANNOT determinate the price for the distributor, meanwhile, the company CAN determine the final price for the customer to the agency
- Consider also complex rules on price competition.
- For example, requiring your distributors to charge a set price could constitute illegal price fixing.

Advantages	Disadvantages
Pass on a large degree of any risk associated with the products	Less control over the activities of the distributor than over an agent
A distributor should be highly motivated to sell the products it purchases	More likely to be at risk from competition law problems than an agency agreement
May be Tax effective and more simple administratively	

Distribution Model

Advantages	Disadvantages
More control over agent than distributor	The agent may have a right to lump sum payments on termination of the agency agreement
Can fix resale prices without contravening EU competition law	Greater risk as the agent's actions are attributed to principal

Agency Model

5. Outsourcing

What is outsourcing and why do businesses outsource parts of their business?

- Outsourcing is the contracting out of an internal business process to a third party organization ("Service Provider"). (eg: payroll processing, call center, manufacturing, facility management)
- It sometimes includes "offshoring" – locating a business function to another country to get cost savings from lower international labor rates.
- !!! we talk about outsourcing only of an activity that was internally made before if it wasn't internal that it's not outsourcing (it's procurement)

Consider....

- process is "invisible" to the end customer therefore the provision of the service will be perceived as the Company's service
- Effect on brand may be positive or negative therefore choose Service Provider carefully!!
- **Outside resourcing = "Outsourcing"**
- compare with SERVICES AGREEMENT
- May involve the transfer of employees
- May involve transfer of and assets from one firm to another
 - Plant and equipment (employees)
 - Intellectual Property
 - Data/contracts

Outsourcing Quote

"Do what you do best and outsource the rest"

Key Considerations

- What is being outsourced? (whole business division, physical/technical infrastructure; specific services)
- Why outsourcing? (reduce costs/ increase service levels/ both; protect against IT becoming obsolete, focus on core activity)
- Where? (a subsidiary; third party; off-shore; how well do you know the SP?)
- When? Determine optimum period - long or short term. Break clause

Top Reasons to Outsource



FIVE STEPS TO A SUCCESSFUL OUTSOURCING PARTNERSHIP

Best Practice Suggestions Based upon Diebold's Integrated Services Outsourcing

- 15 + years in delivering Managed and Integrated Services
- Good planning = Success
- Process and Best Practices are available to model



Key Contractual Issues Outsourcing

- **Employees (TUPE):** who will “transfer” over with the services to new provider? Key personnel. Contractual provisions to rehire at end of outsourcing term.
- **Price and Payment:** different price during different phases? Depends on performance? Do service credits apply?
- **Services during Transition:** who deals with what part of services during transfer period?
 - Delicate period in contract
- **Service Levels during Term (schedule):**
 - Monitoring service levels -> application of service credits/reduce price for poor service provision
 - Right to remedy/right to terminate?
- **Liability:** who pays for what when things go wrong? Are there limitations/exclusions?
- **Audit:** right to audit performance and results/records. Right to physically inspect premises?
- **Termination and Remedies:** when can Company terminate contract if SP under-performs? Is there a remedy period? What is an appropriate remedy other than termination?
- **Governing law and jurisdiction:** which laws and courts?
- **Dispute management:** set out clear process in the event of disputes. (application of service credits, Escalation, mediation, arbitration, litigation)
- **Exit:** specify what the SP must do to “transition back” the service to Company/ third party. Often drafted by SP (eg: train 3rd party employees, transfer back employees/assets/contracts, who to pay?). Should be schedule to contract

Example: Outsourcing Exit Schedule

CLAUSE TITLE	DESCRIPTION
Exit Plan	Require Service provider to draw up exit plan at end of outsourcing
Knowledge Transfer	Require SP to train new providers
Additional costs	Who will pay for training and transfer?
Third party contracts	Obtain consents for assignment/transfer of <u>third party</u> contracts
Transfer of Assets	Oblige SP to sell assets needed to provide the service back to Customer at end of outsourcing. Transfer IP

Outsourcing Trends

- Business trends are now moving away from outsourcing because:
 - Supply and demand salary rises
 - Differences in language and culture
 - Some outsourced jobs have been replaced by technological advances
 - Loss of control/quality control
 - Public opinion against (domestic job losses)

“Insourcing”

- Reversing outsourcing process by bringing jobs back in-house
- Trend in last decade
- Companies are driven by desire to:
 - execute strategy
 - gain transparency & control
 - step out of burdensome contracts
 - manage hidden costs

Case Study 1

Barry Baker is the Chief Operating Officer of Gaget Information Systems, Inc. (GIS). GIS is a large multinational corporation with over \$90 billion in revenues in 2020. Similar to many large multinationals, GIS has decided to outsource a small fraction of its computer-programming workforce overseas, some 300 positions, using the monetary reduction in salaries as a way to increase its profit margins. GIS is typical of many US based corporations, with a focus towards leveraging technology vendors in various developing nations in order to become more competitive domestically in its primary markets.

GIS is considering outsourcing its programming to a third party company – all of which are currently being provided in-house. It has received a positive bid from an Indian company called Putti & Co.

Putti & Co is a large Indian service provider with an educated workforce. It already provides similar services for similar technology companies. Putti & Co has asked for the contract to be drafted in the English language but be subject to Indian law. It has also said it can provide IT Helpdesk support for the code it would develop under the contract.

As part of the outsourcing process, GIS will license some of its existing proprietary software that will need to be integrated with the new computer code in addition to some other hardware assets to Putti & Co, for use in the provision of the programming services.

Putti & Co state that they would be ready to start within 6 weeks of their appointment.

Questions:

- What issues would Barry Baker need to consider before appointing Putti & Co.?
- What provisions would GIS want to ensure are included in the Outsourcing contract in the event Putti & Co's bid is accepted?
- What information or documentation would GIS require from Putti & Co as part of the contracting process?

Answer

1. What issues would Barry need to consider before entering into an Outsourcing contract with Putti & Co.?

- Due diligence on service already being provided to similar companies – ask for references!
- Can they provide the same service for less? I.e: Can GIS realize its cost savings or is it just reducing the standard of programming? How would pricing be agreed?
- Can they provide an adequate level of service? Are there language barriers and proper organizational structures?
- What is their financial viability?
- Push to get price reduction if transferred assets were used for their other customers.
- To what extent would employment law apply and how costly would it be (ie: would the outsourcing cost more in redundancies than it is saving in lower wages?)
- Are the necessary assets transferable? (If not it may be a deal breaker at the outset!)

2. What provisions would GIS want to ensure are in the Outsourcing contract if they decide to go with Putti & Co?

- GIS as the Customer would not want to agree to Indian law but would push for local law or at a minimum a neutral 3rd country (eg: English law, Swiss law).
- Choose jurisdiction carefully – would a court order be enforceable in India in the event of a dispute? Consider arbitration?
- Strong IP protection important – ensure transfer of ownership of IPR in code upon termination and strict confidentiality clauses so they are not leaked to a competitor.
- Think about provisions for escrow of new code during term of contract so GIS can get access in the event of termination.
- Clear description of services and service levels in the contract and agree service credits in event of failure to perform
- Rights to audit
- TUPE – employment law provisions
- Obligation to give back assets on termination
- Obligation to hand over source code on termination
- Obligation to train GIS staff/new provider after termination

3. What information /documentation would GIS require from Putti & Co as part of the contract process?

- Transition Plan – how would they manage hand over
- Exit plan – how would they manage transfer to 3rd party on termination
- Disaster recovery plan

6. Franchising

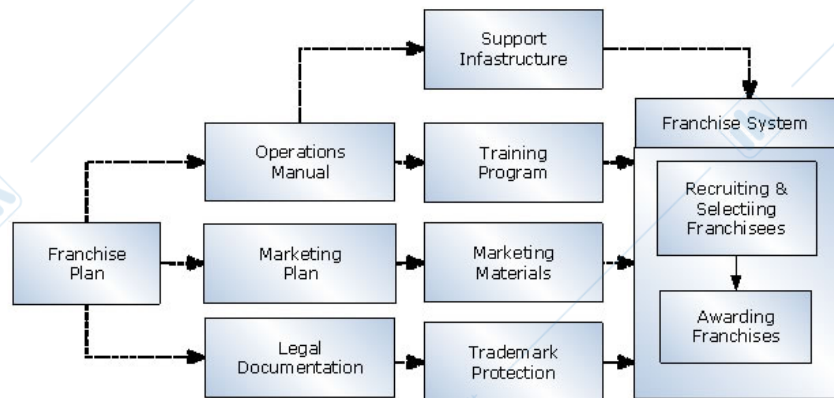
- The practice of using entrepreneurs to use a company's strategies and trademarks
- Franchisee pays an initial fee and royalties based on revenues
- Company also provides support including advertising and training

Examples of Franchises

- McDonalds
- Burger King
- 7 Eleven stores
- Avis car rentals
- Hilton Hotels
- H&R block (tax advisors)
- Great clips (hair salons)
- Franchising is a faster, cheaper form of expansion as there is less capital expenditure in setting up stores in new territories
- Limited potential for revenue growth -Company will only get a percentage of earning from each new store.
- Big Business - Sector earns more than \$1.5 trillion in revenues each year



Steps To Becoming A Franchisor



Advantages of Franchise

- immediate name recognition
- tried and tested products
- standard building design and décor
- detailed techniques in running and promoting the business
- training of employees, and
- on-going help in promoting and upgrading of the products

Franchise Contract Provisions

- Property
- Advertising
- Intellectual property rights (IPR)
- Scope of franchise
- Payment of fees
- Audit
- Parties' obligations
- Products
- Restrictive covenants
- Termination

Franchise IPR

- Licence to use trademark
- Licence to use signage and logo
- Licence to use "trade secrets"/special recipe
- Business processes and techniques

- Training “best practice”

Franchise Rights Include:

- McDonald's trademarks
- restaurant decor designs
- signage and equipment layout
- formula and specifications for menu items
- use of McDonald's method of operation
- inventory control
- accounting and marketing.



Some interesting facts:

- McDonald's brand is in 122 countries around the world.
- Every 4 hours the new restaurant is being opened.
- McDonald's feeds more than 46 million people a day - more than the entire population of Spain.
- McDonald's has sold well over 100 billion hamburgers.
- Antarctica is the only continent that does not have a McDonald's restaurant - yet.
- The busiest international McDonald's restaurant is located on Pushkin Square in Moscow
- McDonald's restaurants in India are our only restaurants in the world where you cannot buy beef.
- McDonalds in the Germany and Spain sell beer.
- In the Philippines they have spaghetti on the menu and
- In Hong Kong they have rice burgers.



7. Top Negotiation Tips

My Top Six Negotiation Tips in Cross border contracts:

1. Understand the Drivers of the other party (profits, value for money, reputation?)
2. Preparation is Key – know what you want to “walk away” with, ensure you have a mandate to act
3. Build Trust – start with easier issues to feel a sense of success
4. Keep a “helicopter view” – focus on the big picture and move on from contentious issues
5. Trade don't “give”
6. Keep it professional not personal

Case Study 1

Hugo lives in Cortona, a medieval hill top town in Tuscany, who over many years has developed the “Super Scooper”, an ice-cream scooper that has an uniquely developed metal compound that heats up on contact, melting the ice-cream into the perfect “scoop” effortlessly.

Hugo has been selling the “super scooper” for three years from his Gelateria in Cortona (“Hugo’s Heaven”) and has a strong following.

One day, his nephew Alberto comes to visit from Milan. Alberto, has just finished a Masters in International Business, and seeing the business potential in the “Super Scooper” encourages his uncle to “think big” and expand sales throughout Italy and eventually throughout Europe.

With Alberto’s help, Hugo starts working on a business plan.

He has been making the metal “super scooper” out of his brother’s hardware store on weekends but recognizes that if the quantity of orders exceeds 10 a week he will not be able to continue producing the scoopers himself.

In the meantime, his gelateria is booming especially with the creation of his new “children’s party packages” in which he sends one of his employees to children’s parties with three giant containers of his delicious gelato. The employee uses the unique “Super Scooper” to “sculpt” the gelato into well known Disney characters, much to the children’s’ delight!

Due to his local popularity, Hugo has been featured on the nightly news channel TG24 and reported in Corriera della Sera. He has been interviewed for some glossy magazines as well, which is boosting his reputation nationally.

Question:

Which contracts will Hugo need to enter to realize his dream of expanding his business and which important issues must he consider in each one of them?

Answer

1. Services (Manufacturing) Agreement

For the manufacture of the “super scooper” on a large scale – possibly in another country to minimize costs. This is a kind of outsourcing or “off-shoring”.

Issues to consider in Contract–

- IPR – patent protection for “metal component” in the super scooper
- Confidentiality provisions preventing manufacturer from divulging secret “metal compound” to a competitor or other third parties
- Specifications re manufacturing quality of the product
- Product warranty re safety and “merchantability” of the super scooper
- Delivery terms – how, when and where?
- Fees and payment

2. Distribution Agreement

Hugo could appoint a distributor to gain market share without expending too much capital expense. He would appoint a distributor (not an agent) because the item will be mass produced and is not too complex or bespoke. Distributor would buy the items and then resell. He could target supermarkets, other gelaterias or children’s stores as distributors.

Issues to consider in Contract –

- Define the territory of Distributor
- Is it exclusive or non exclusive?
- IPR – use of logo and marketing materials?
- Advertising
- Termination rights
- Remember don’t set price (potential anti trust issue re “price fixing”)

3. Franchise Agreement

Hugo could decide to franchise his whole “Hugo’s Heaven” business as it already has a national reputation with all the recent press reports and an increasing customer following. The business could include the brand “Hugo’s Heaven”, the use of the super scooper and the party packages.

He would need to have a defined market strategy and training program to offer franchisees.

Issues to consider in Contract –

- Fees/royalty payments
- Training and support
- IPR – license use of logo “Hugo’s Heaven”
- Set out clearly each party’s obligations
- Audit terms
- Advertising/media plan

4. E-commerce Agreements

Hugo could decide to expand his business on-line by providing sales of the super scooper and potentially the party packages and gelato (although as it is a perishable good he would need a complex distribution network). This would provide a cheaper way to sell his goods using ecommerce but would probably take more time to build his brand without an established retail distribution network. He could also enter ecommerce agreements with another established on-line retailer like Amazon.

5. Sponsorship

Consider whether Hugo could enter a sponsorship agreement with a third party to provide extra capital to expand his business on his own organically?

INTELLECTUAL PROPERTY RIGHTS

What we will cover this week:

- Categories of IP
 - Trademarks
 - Copyright
 - Design Rights
 - Patents
- Exploitation of IP
- IPR contracts (Assignment, Licencing)
- Counterfeiting
- Case Study – NTP v Blackberry

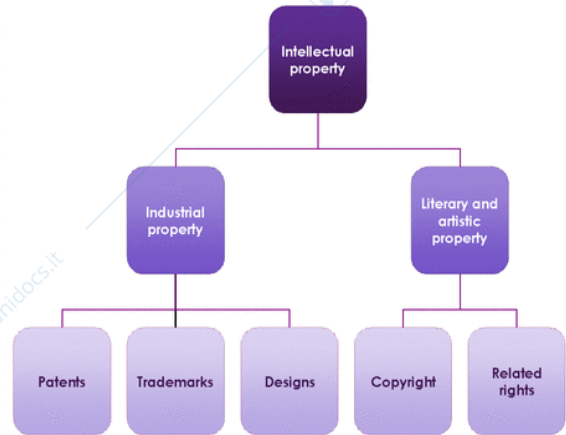
What is Intellectual Property? Creations of the mind

Intellectual Property → Intangible Asset

- No physical substance
- Rights to exclude other from using
- Significant economic value

Types of IP

- Trademarks (brand, name, logo)
- Copyright (text, books, songs)
- Patents (inventions, industrial process)
- Design rights (fashion, design)
- Know how and Confidential information
- Plant breeders rights (new varieties of plants)



World IP Organization (WIPO)

- Based in Switzerland
- provides a global policy forum, where governments, intergovernmental organizations, industry groups and civil society come together to address evolving IP issues
- Members meet regularly to negotiate new rules needed to ensure international IP system moves with a changing world

Trademarks

- A graphical sign which can be used to distinguish goods/services from those of competitors

Functions:

- indicates the trade source from which the good comes from;
 - symbolises qualities associated by consumers with certain goods;
 - represents a value deserving protection as such
- Registered trademarks afford the highest protection

European Trade Mark Directive

- Signs cannot be registered in EU if they are:
 - Devoid of distinctive character (not original)
 - Indicate the kind, quality or characteristic of the goods/services
 - Customary signs in the trade
 - Contrary to public policy
- Protection lasts 10 years and can be renewed

Trademark Infringement

- Violation of the exclusive rights attached to a Trademark
- Without authorisation of owner/licensee
- Use of trademark which is identical or confusingly similar
- In relation to products/services identical or similar

New EU Trade Mark Regulation 2015/2424

- Some changes to EU Trade Mark laws as part of the “European Union trademark reform package” came into effect in October 2017

Main changes

- A graphical representation is no longer required: “what you see is what you get”.
- TM representation must be clear, precise, self-contained, easily accessible, intelligible, durable and objective.
- Non-traditional TM may include multimedia sound or olfactive trademarks- sound, motion through jpg or mp3 file without a description

Trademark Infringement



Who else has trademarked their name?
Meryl Streep applies for trademark

Case Study

Gucci vs Guess (2009-2015)

- 2009: Gucci sues Guess claiming trademark infringement for Guess' attempts to “Gucci-fy” its product lines
- Claimed \$129 million in damages

(red stripe)



(interlocking G pattern)



(Diamond motif)



(Stylised G design mark)



(design mark)



- In 2012 US court awarded \$4.66 million to Gucci representing Guess' profit from sales of interlocking G pattern and red stripe motif

Gucci v Guess: different courts different outcomes

- 2013: Milan court rules in favour of Guess -Rejected all infringement claims brought by Gucci
- 2013: Chinese Court found Guess guilty of copyright infringement -> Guess appealed
- 2015: French court finds no trademark infringement and ordered Gucci to pay \$30,000 to Guess. Also nullified Gucci's three 'G' logo.

(France, 2015)

- Key findings in favour of Guess:
 - Gucci's delay in bringing action notwithstanding the designs were on the market for years
 - Guess only "Diluted" Gucci's logos, no counterfeit because entire product was not copied "stitch for stitch"

Copyright

The types of work eligible for copyright protection include:

- literary works (including computer programs)
- dramatic, artistic or musical work
- the typographical arrangement of a published edition
- a sound recording
- a film/ broadcast
- software program
- "the right to copy"
- Exclusive rights vest in creator of original works (except in employment)
- Duration of right for whole life plus 50-100 years (depending on the category of work)
- No formal registration required

The Rights cover broadcast and public performance, copying, adapting, issuing, renting and lending copies to the public.

The creator will also have the right to be identified as the author and to object to distortions of his work.

Copyright infringement

- "Fair Use" or "Fair dealing" is a defence in common law systems:
 - Criticism, comment, news reporting
 - Teaching, scholarship, research
 - making a braille copy of a book for blind people
- Depends on purpose of copying (commercial or non profit?), the amount copied, effect on potential market value of copyrighted work
- (*NB: Exception not available under Italian law)

Piracy

- *The unauthorized use of another's production, invention or conception especially in infringement of a copyright*
- Eg: Illegal downloading, streaming, hacking

Copyright Infringement

- Case Study: Associated Press v Fairey (2008)



- Case Study: Marvin Gaye v Ed Sheeran (2018) (“Thinking out Loud” v “Let’s Get in On”)
- Case Study: David Bowie v Vanilla Ice (1991) David Bowie & Queen: “Under Pressure”



Proposed New EU Copyright Law

- Will require website owners to pay for displaying snippets of content - “link tax”
 - Exceptions for search engine listings
 - Necessary to protect artists whose work is pirated on-line as well as newspapers who risk having their business model undermined by social media giants.
- Traditionally internet users are liable for the content they post on Facebook and YouTube
- Platforms are currently not liable if they remove infringing content quickly once notified
- The new law holds platforms directly accountable for the content they host, with few exceptions.

Design Rights

- Different overall impression with respect to any other design available on the market
- No protection for functional products
- No protection for hidden parts of a product

- Registered design – exclusive rights up to 25 years (EU), includes 2 and 3 dimensional shapes and designs
- Design right – automatic right to 3 dimensional shape (but not 2 dimensional shape), protection for 10-15 years
- Covers lines, contours, colours, shape, texture/materials and ornamentation
- Must be “novel”
- Must have “individual character” (ie: overall impression must be different from others in the public domain).



MDF ITALIA Srl design n. 000280607-0003 of 17.1.2005



Roberto Cavalli design n. 000066717-0005 of 22.8.2003

Patents

- Rights granted to protect an invention or industrial process in exchange for public disclosure of invention
- Must be able to define the invention and must be novel and “not obvious”
- Prevents others from making, using, selling, distributing without permission (or pay licence fee!) – temporary monopoly to encourage research and innovation
- Patents must be applied for and granted by national government
- Different approaches/Treaties
- Applications typically take 2-3 years to process
- Expense particularly for multi jurisdictional protection
- Protection lasts 20 years from date of grant (EU)

Patentability Requirements

- Novelty
- Inventive step and non-obviousness
- Inventorship
- Industrial applicability
- Patentable subject matter

- Person skilled in the art (tests “inventiveness”)
- Prior art
- Utility (is it useful?)
- Sufficiency of disclosure

Patents in Research

- Used mostly in the fields of chemistry, engineering and medicine
- Reading Patent literature can have Competitive Advantages. Why?
 - avoids duplication of R&D efforts and spending
 - Can find technical solution to problems
 - Gather business intelligence on competitors at an early stage

Patents in Academia

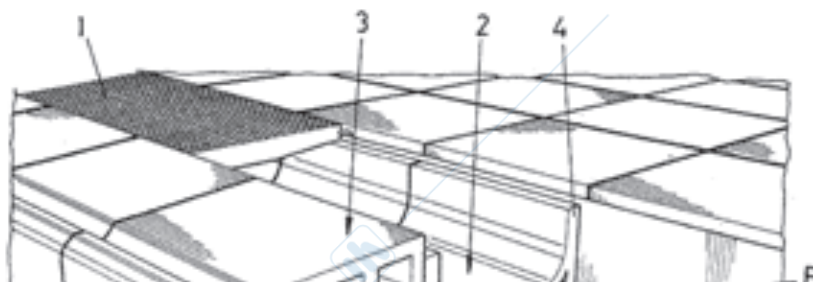
- Patents can be licenced or used to help create or finance an academic “spin off”
- May be valuable even to bodies without manufacturing capabilities (eg University)
- Respecting third party rights (request consent from owner of preexisting patented inventions)

<p>(84) Designated Contracting States: AT BE BG CH CY CZ DE DK EE ES FI FR GB GR HU IE IS IT LI LT LU LV MC NL PL PT RO SE SI SK TR Designated Extension States: AL BA HR MK YU</p> <p>(30) Priority: 14.09.2005 ES 200502237</p> <p>(71) Applicant: Cañada, S.A. 44600 Alcañiz (Teruel) (ES)</p>	<p>(72) Inventors: • Molinos, Fidel Ferrando 44600 Alcañiz (Teruel) (ES) • Orta Sorribas, Juan Carlos 44600 Alcañiz (Teruel) (ES)</p> <p>(74) Representative: Ungria Lopez, Javier et al Avda. Ramon y Cajal, 78 28043 Madrid (ES)</p>
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(54) System for construction of swimming pool edges

(57) System for construction of swimming pool edges, being of use in the construction of swimming pools, both those which are overflowing and non-overflowing with skimmers (figure 5 of the designs), the top of which is finished in accordance with any of the known systems, in such a manner that the system comprises at least two backed pieces (A) and (B) of porcelain material, a first piece (A) of porcelain material of parallelepiped general

shape defining the perimetric end of the swimming pool and the second piece (B) of porcelain material and of U-shaped cross-section defining the outlet channel (2), such that the first piece (A) has its upper exposed surface (3) grooved, while the flanges (4) of the second piece (B) with a U-shaped cross-section display a lower height on the internal side of the backed piece, the pieces (A) and (B) constituting with their exposed surfaces, preferably enamelled, the frame and the lining.



Focus on Patents

- Patent litigation can be very complex and expensive
- Many operators in the technology and life sciences sectors may claim breach of patent because of nature of development on top of others innovation
- Eg: Apple/Samsung “smart phone wars”

Patents Cross-Licensing

- Companies in the same sector can cross-licence their patents to gain access to each other’s patent portfolios
- Covers different essential component of a given commercial product

- Emphasis is on cooperation to drive innovation
- Reduces costly patent litigation
- Usually no exchange of money
- Examples in technology sector

Compare with -Open Source

- Open source software is software in which the owner of the copyright in the source code (human readable code) is made available to the public in an open licence (no fees)
- Helps fosters open, collaborative development
- Further code must then be made "open source"
- Saves consumers \$60 billion per year (eg: Linux, python)

Case Study: NTP v Blackberry (RIM) (2006)
 (Please see file posted on electronic blackboard)



NTP v Blackberry (RIM) (2006)

- letter sent to Blackberry in 2000 requesting payment of licensing fees (ignored)
- 2001 legal suit. Blackberry used "prior art" defence. Judgment for NTP for \$53 million
- 8 million Blackberry users, injunction shut down service for millions of US Government workers
- 2006 settlement agreed for \$612 million

1995, May	Thomas Campana files the first of his patents that are litigated
1996	Rollout of the first generation wireless device from RIM
1999	Rollout of BlackBerry
1999, December	Thomas Campana files the last of his patents that are litigated
2001, November	NTP files an infringement suit against RIM. RIM requests the USPTO reexamine the patents
2002, November	NTP wins the jury trial against RIM. RIM appeals
2003, March	USPTO considers prior art concerns during reexamination
2003, May	Appeals court rules on enhanced compensatory damages against RIM
2004, June	Thomas Campana dies
2005, March	RIM and NTP reach first settlement
2005, November	The settlement is determined to be unenforceable. RIM appeals to US Supreme Court

Points to note

- Never ignore a legal letter!
- Better to settle early
- Huge company growth from 1999 to 2007 (8 million users)-> higher damages

ECONOMIC EXPLOITATION OF IP IN COMMERCIAL CONTRACTS

Economic Exploitation of IP

Intellectual property strategies are formulated from a broad perspective to support business and R&D strategies.



Common forms of IP Commercialisation

1. Internal product development
2. IP Assignment
3. Knowledge Transfer:
 - Licences
 - Joint venture and spin off
 - Franchise
 - Material transfer agreement

Strategic Use of IP

- Essential in a knowledge based economy
- To preserve competitive advantage
- Maximise capability to earn revenue
- Increase corporate value

Three Golden Rules in IP

- Protect (patents, registrations, contracts)
- Monitor (know how your IP is being used)
- Enforce (Be prepared to take action!)

How to maximise the protection of your IP portfolio

- Identify a potentially appealing brand
- Identify jurisdictions (manufacturing & distribution)
- Priority researches
- Register (also as domain name / use)
- Monitor the market (third parties & commercial partners)

IPR Contracts:

License Vs Assignment

License Agreement	Assignment
No transfer of ownership. The IP ownership is kept by the licensor. Generally a long-term agreement.	Permanent transfer (sale) of the IP ownership from one party (the assignor) to another party (the assignee). One-time agreement.

IPR Assignments

- Definitive transfer of the exclusive right to 3° party
- Perpetual – No term
- Consideration: fixed amount

Licence Vs Distribution Agreement

License	Distribution Agreement
It gives permission to use IP within certain limits.	The holder of the technology gives permission to another organization to distribute or sell it in a predetermined market. Commonly, a trade-mark license must be part of the contract.

Licensing types and strategies

- **Technology and R&D licensing:** exploitation of industrial and technology developments (eg: patents)
- **Merchandise and character licensing:** a recognized trademark/brand from one product or service is used to sell another

Other Licensing Types

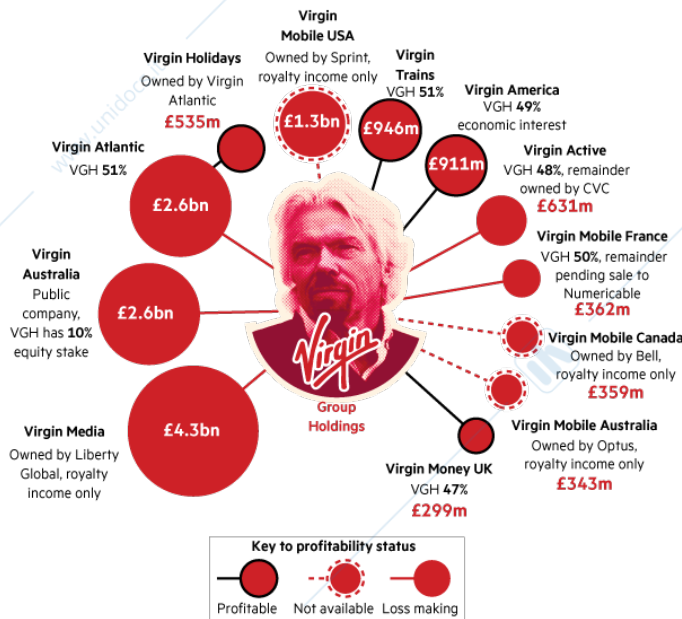
- **Co-branding:** increase the premium consumers are willing to pay by combining the strength of two brands, make the product or service more resistant to copying, or to combine the different perceived properties associated with the brands with a single product
- **Franchising:** license of IPRs and business format

Richard Branson – licencing the “Brand”



Top 12 Virgin companies

By annual revenues for the latest financial year



Sources: Virgin Group; FT research

Photo: Steve Parsons/PA Wire

FT graphic: Ian Bott

Co-branding

Benefits of licensing

- Preserving the capital that would otherwise be required for internal growth and expansion
- Avoiding or settling litigation regarding a dispute over ownership
- Tax benefits

Benefits of Licensing

- Spreading the risk and cost of development and distribution
- Achieving more rapid market penetration
- Differentiating from competitors
- Earning initial license fees and ongoing royalty income for Licensor
- Enhancing consumer loyalty and goodwill

Grant of License

"Licensor hereby grants to Licensee a [exclusive/non-exclusive] licence in the Licensed Territory to make use and sell any Licensed Products in the Licensed Field of Use".

Type of License Grant

- Exclusive: only Licensee has right to use the IP
- Sole: Licensee and Licensor (owner) have right to use the IP
- Non-exclusive: there may be multiple Licensees

Risks in Licencing

- Diminished ability to enforce quality control standards and specifications
- Greater risk of another party infringing upon the licensor's intellectual property
- Dependence on the skills, abilities, and resources of the licensee as a source of revenue

Quality Control

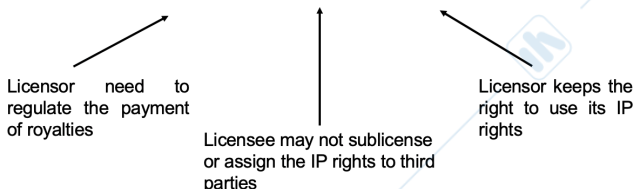
- determine importance of quality to your brand (quality vs revenue)
- due diligence on licensee (reputation, solvency?)
- integrate quality standards into schedules
- tie in with termination right
- financial penalties/loss of exclusivity

Risks in Licencing

- Difficulty in recruiting, motivating, and retaining qualified and competent licensees
- Risk that reputation and goodwill may be damaged or destroyed by the act or omission of a single licensee
- Administrative burden of monitoring and supporting the operations of the network of licensees

Example – Grant of License

Subject to the terms and conditions set forth in this Agreement, Licensor hereby grants Licensee a personal, royalty-bearing, non-exclusive, non-transferable and non-assignable license to use the Licensed Rights in the Territory.



Representations and Warranties

- Licensor warrants that it [is the sole unencumbered legal owner of/has the right to license/sub-license the use of] the Trade Marks
- Licensor warrants that the Trade Marks are not [to Licensor's knowledge] [as at the Effective Date/during the term of this Agreement] the subject of any current actual or threatened challenge, claim or proceedings, including for opposition, cancellation, revocation or rectification.]

- [Licensor [warrants/does not warrant] that the exercise by Licensee of the rights granted to it under this Agreement does not infringe the intellectual property rights of any third party in the Territory

Audit and Inspection

- tie to quality controls
- rights to audit books (royalties)
- rights to enter premises (inspect product)

Sample Inspection Clause

The Licensee shall during the term of this Agreement permit Licensor from time to time on prior written notice to enter upon any premises where the Goods are being manufactured, packaged or stored and to have access to (including the right to review and take copies of) all relevant books, records, accounts and other information necessary or appropriate to enable Licensor to verify that Licensee (and its sub-licensees) are in due compliance with its obligations under this Agreement, and comply promptly with all instructions and directions issued by Licensor on the basis of such inspection to ensure compliance.

Third Party Infringers

- Require Licensee to notify Licensor
- Specify if Licensee can take action
- Is Licensee required to participate in litigation?
- Indemnity

What happens if things go wrong?

- Accounting
- Representations and warranties
- Indemnification
- Third Party Infringers
- Insurance
- Termination
- Dispute Resolution

Termination

- Who has the right to terminate?
- Without cause
- With cause – specify grounds
- Cure period
- No further use of mark
- Phase-out period
- Return of materials

Dispute Resolution

Escalation strategy:

- Negotiation
- Mediation and ADR
- Litigation - Arbitration

Other key clauses

- Confidentiality
- Change of control
- Assignability and sub-licensing
- Notices and communications
- Force majeure
- Governing law
- Arbitration / Jurisdiction

Counterfeiting

- “look alike”, “smell alike”
- brand damage

- enforcement responsibilities
- funding
- examples Louis Vuitton and Burberry

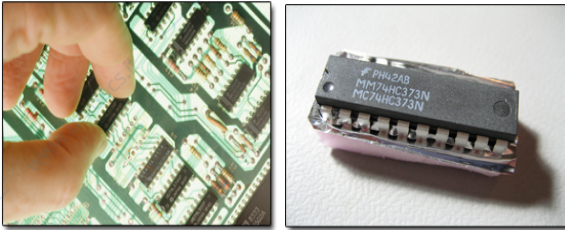
Counterfeiting Examples



Counterfeiting Examples: Fake Apple Store in China



Counterfeiting Examples: US Department of Defence



Chinese Military Counterfeits

- In 2011 - Senate Armed Services Committee discovered that 1 million parts ordered for DOD, such as thermal weapon sights, missile computer components and electronics for military planes were counterfeit.
- Discarded electronic parts were taken from other nations, removed identifying marks, washed and refurbished them. Resold as brand-new
- In 2010, the U.S. military unknowingly purchased 59,000 counterfeit Chinese microchips that could have been hacked and used to shut down the country's missile defense system.

Confidentiality

- control your licensee
- risk re counterfeiting – “need to know”
- hidden signs of genuine article (example Levi)

Enforcement

- exclusive or non-exclusive licensee
- whose job is it to enforce? (Licensor/Licensee?)
- the question of funding
- may depend on size of licensee

Conclusions

- what you should know: your licensee!
- where problems arise: quality and stock controls, effect on brand
- how to protect contractually: audit, enforcement and termination rights

Case Study

Susie and Sally are two sisters living in Sydney, Australia. They both graduated from University in Economics five years ago and are now pursuing their professional lives as entrepreneurs.

Susie is a fashion designer and has built up a small business from her home. She makes light, colorful dresses perfect for the hot Australian summer in original screen-printed silk, based on a well-known aboriginal artist's paintings from the 1940's. There is nothing else similar on the market and her clientele has grown through word of mouth. Recently she rented a small retail store and has employed a sales assistant and back office manager to help in the growth of her business. She has also added a line of “quick dry” swimming costumes in similar Aboriginal inspired fabrics and has just developed the “Sand Wedge” which is a beach chair with a difference. Compact and lightweight, it's a backpack, beach bag, beach seat and sun lounge all in one.

Susie is looking into setting up a website and wants to start selling on-line to other customers throughout Australia and beyond. She also has a fashion blog and is dying to tell her followers about the new product lines she will soon launch.

Sally, instead, is passionate about food and coffee. Throughout her time at University she worked part-time as a waitress and barista in a coffee shop close to the University campus to earn money. After graduating, Sally took a loan from the bank and set up a small coffee house in a beachside suburb of Sydney called "Green Harbor café". The café has become a favorite for local surfers and families for its wonderful freshly baked cakes and biscuits, its freshly brewed coffee that is ethically sourced from Malaysia and for its strong emphasis on sustainability. Ninety-two per cent of packaging in the store is recycled; they run half their energy needs through solar panels on the roof and they encourage their customers to come to the store with their own coffee mugs so that they reduce waste in disposable cups. Her healthy snack range is also very popular as there are no preservatives added and they include a secret papaya extract, which is a proven anti-oxidant famous for its anti age qualities. All the staff at the Green Harbor café are young and good looking (many part time actors and models looking for work) and are recognizable by their uniform of green board shorts and caps marked with a darker green logo of a coffee cup on a surfboard riding a wave.

Year on year Sally has seen revenue growth of 54% and she has big plans for her business in other Australia and Asian markets. She is currently negotiating a lease for the café next door so she can expand the Green Harbor café.

Question: What would Susie and Sally need to do to protect and exploit the intellectual property in their respective businesses as they grow?

Answer: Susie

Copyright protection in the original aboriginal paintings would last for the term of the life of the aboriginal artist's life plus 50-100 years after death depending on the category of work. Therefore, Susie may need to ask permission to use the artist's work and pay for a royalty fee to incorporate the painting design in her clothes if it is a sufficiently close "copy" of the painting and if the original painting is still protected.

Patent protection The second is the "Sand Wedge" invention. First, she should research the market and see if there is anything else like the Sand Wedge that is already protected in Australia. If not, and provided it is unique, she should file a provisional patent application which will give her 12 months to research the product's viability on the market. Patent registration is expensive if done in multiple territories. Obviously she should not talk about the invention on her fashion blog or release them on her website until it she has patent protection!!

Registered Design. She could also consider registering the screen-printed fabric and dress designs. If she does not register she will have no recourse if a competitor starts to copy the dresses and sell cheap imitations.

She could also decide to have her Sand Wedge design registered. A patent protects the "invention" side of the backpack/chair/sun lounge (they way it functions) while the design registration would protect the "look".

Domain name registration. Susie should register a domain name for her website in the territories she wants to trade in.

Answer: Sally

Trademark protection. Sally should register the Green Harbor Café trademark and green logo of the coffee cup riding on a surfboard. This is particularly important as she has certain "brand values" of sustainability and ethics that are incorporated in her brand which she will want to protect and leverage as the business expands.

Licensing. She may also want to license other product lines such as healthy take away food (incorporating the special papaya extract), or packaged ground coffee, or even expand to beach shorts and clothing...

Franchise. Sally may want to expand her business into new territories and could consider setting up a franchise model - where healthy food is served by young, healthy looking staff with an easy-going Australian "look and feel". The sustainability element would also be important to incorporate as it increases brand value. In the licensing agreements she should ensure there are quality control provisions, confidentiality, IP protection and audit rights.

PRIVACY AND DATA PROTECTION

1. Theory - What is the law in data protection?
2. In practice – Recent Case Studies
3. Does privacy still exist? Does it even matter?

Part 1 – Data Protection law

- Europe is the number one in the world because for data protection → The right to privacy is a highly developed area of law in Europe for historical reasons (after WW2) (if you were gay, Jewish or from a certain family, you would live in fear)

What is **Personal Data**? Means any information relating to an identified or identifiable natural person

Why is data protection relevant?

- Protection of personal data considered a human right
- Economic and social integration of Europe has led to huge increase in exchange of personal data between public and private entities
- Rapid technological developments and globalisation led to massive increase in collection and sharing of data (eg: social media)

Key Terms

1. Personal Data
2. Data Subject
3. Processing
4. Data Controller
5. Data Processing
6. Pseudonymisation
7. Consent

“Personal Data and Data Subject”

- Means any information relating to an identified or identifiable natural person (“data subject”) including name, id number, location data, online identifier, physical, physiological, genetic, mental, economic, cultural or social identity... (must be a living individual!)

“Personal Data”

- Very broad definition
- The definition is also technology neutral
- It does not matter how the personal data is stored – on paper, on an IT system, on a CCTV system etc

“Processing”

- Means “Any operation or set of operations which is performed on personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”

“Data Controller”

- The responsibility for compliance rests on the shoulders of the “controller”, meaning the natural person/entity which alone or jointly with others determines the purposes and means of processing personal data

“Data Processor”

- Means “a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller”

What is the difference between data processor and data controller?

- A controller determines the purposes, condition and means of the processing
- A processor is an entity which processes personal data on behalf of the controller (eg: billing processor, call center, consultant)

“Pseudonymisation” !!!

- Means “the processing in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information accessible elsewhere...”
- Eg: Author Mrs Silence Doogood is a pseudonym for Benjamin Franklin; Patient A has the same illness as patient D.

“Consent”

- Means “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he/she by statement or clear affirmative action, signifies agreement to the processing of personal data relating to him/her.”

Special Categories of Personal Data (GDPR Art 9)

- Processing of PD relating to:
 - Racial or ethnic origin
 - Political opinions
 - Religious or philosophical beliefs
 - Trade union membership
 - genetic, biometric data for purpose of identifying a natural person
 - Health Sex life or sexual orientation

shall be prohibited unless exception applies...

Exceptions to Prohibition for Special Categories

...shall be prohibited except:

- Consent: Explicit consent obtained
- Employment: Necessary for carrying out obligations/rights of the data controller or data subject in employment or social security
- Vital Interests: Protecting the vital interests of data subject/other where consent not possible
- Membership Organizations: Foundation, not-for-profit
- Publicly Disclosed: Already made public by data subject
- Legal claims
- Public interest
- Medicine: preventative or occupational medicine, diagnosis, provision of health care etc
- Public Health: protecting against serious cross-border threats to health/ensuring high quality care (eg: Covid)
- Research: archiving, scientific, historical research, statistics

UE Directive: is a general framework which all the members of the UE need to implement into local law. Countries may implement the directive in different ways following the culture and other particular factors of each country

Regulation: need to be exactly the same in all jurisdictions, fully uniformly applied

Tracing Data Protection Development:

- OECD Guidelines
- 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
- EU Data Protective Directive 1995
- EU General Data Protective Regulation 2018 (GDPR)

Historical background

- In 1980, in an effort to create a comprehensive data protection system throughout Europe, the OECD issued "*Guidelines for the Protection of Privacy and Trans-Border Flows of Personal Data*"

OECD Guidelines

- 7 Principles:
 - Notice—data collection should be limited and data subjects should be given notice when their data is being collected
 - Purpose—data should only be used for the purpose stated and not for any other purposes
 - Consent—data should not be disclosed without the data subject's consent or by authority of law
 - Security—collected data should be kept secure from any potential abuses
 - Openness—data subjects should be informed as to who is collecting their data and why, and should be informed of policies/changes of data controller
 - Access—data subjects should be allowed to access their data and make corrections to any inaccurate data; and
 - Accountability- data controller should be accountable for compliance

- Guidelines were non-binding
- Data privacy laws varied across Europe
- USA did nothing to implement the Guidelines
- (However ALL 7 principles were later incorporated into the EU Data Protection Directive (1995))

1981 Convention

- In 1981 the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was negotiated by Council of Europe
- Convention requires enactment of legislation -> many countries did
- diverging data protection legislation with Europe was an obstacle to free flow of data within EU
- → Proposed Data Protection Directive

EU law – Data Protection Directive 1995

- EU Data Protection Directive (95/46/EC)
- Adopted in 1995
- Regulates the processing of Personal Data in the EU
- Note: Framework legislation -> difficulty is that each Member State implemented into local law with some differences therefore no consistent "EU" wide approach

Data Protection Directive 1995

- Applies not only when the controller is established within the EU, but whenever the controller uses equipment situated within the EU in order to process data.
- Controllers from outside the EU, processing data in the EU, will have to follow data protection regulation.
- In principle, any online business trading with EU residents would process some personal data and would be using equipment in the EU to process the data (i.e. the customer's computer).
- Therefore, the website operator would have to comply with the European data protection rules.

DP Directive Principles

- Personal data should not be processed at all, except when certain conditions are met
- Conditions fall into three categories: transparency, legitimate purpose, and proportionality

Key Principles in Processing Personal Data under the DP Directive 1995

1. Transparency
2. Legitimate purpose
3. Proportionality

1. Transparency

- The data subject has the right to be informed when his personal data is being processed.
- Data controller must provide:
 - name and address,
 - the purpose of processing,
 - the recipients of the data and
 - all other information required to ensure the processing is fair. (art. 10 and 11)
- Data may be processed only under the following circumstances. (art. 7):
 - when the data subject has given his consent
 - when the processing is necessary for the performance of or the entering into a contract
 - when processing is necessary for compliance with a legal obligation
 - when processing is necessary in order to protect the vital interests of the data subject
 - processing is necessary for the performance of a task carried out in the public interest

- processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, (except where overridden by the interests of the data subject).
- The data subject has the right to access all data processed about him.
- The data subject even has the right to demand the rectification, deletion or blocking of data that is incomplete, inaccurate or isn't being processed in compliance with the data protection rules. (art. 12)

2. Legitimate Purpose

- Personal data can only be processed for specified explicit and legitimate purposes and may not be processed further in a way incompatible with those purposes. (art. 6 b)

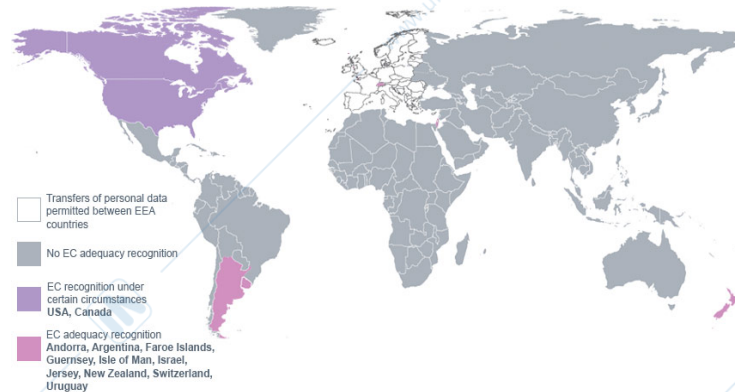
3. Proportionality

- Personal data may be processed only insofar as it is adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed
- data must be accurate and kept up to date
- All steps must be taken to ensure that data which are inaccurate or incomplete are erased or rectified
- data shouldn't be kept for longer than is necessary for the purposes for which the data were collected or for which they are further processed
- Extra restrictions apply to sensitive personal data (art. 8)
- The data subject may object at any time to the processing of personal data for the purpose of direct marketing (art. 14)

EU Regulators

- Each member state must set up a supervisory authority to monitor the data protection level in that member state. (art. 28)
- Individuals may lodge complaints about violations to the regulator or in a court of law
- A controller must notify the regulator before he starts to process data (art. 19)

Transfer of Data Outside EU



Transfer of Data Outside EU

- Personal Data may only be transferred to third parties outside the EU if they:
 - guarantee an adequate level of protection, or
 - The data subject agrees to the transfer; or
 - Binding corporate rules/ model contract clauses have been authorised
 - Privacy Shield (for transfers to US)

Binding Corporate Rules

- privacy protection can be at an organizational level, where a multinational organization produces and documents its internal controls on personal data (like a code of conduct)
- For transfer of personal data internationally within the same corporate group to countries that do not provide "adequate protection"

Model Clauses

- European Commission has approved a standard set of Contractual Clauses that a company can enter into to offer adequate safeguards regarding data protection

Safe Harbour Privacy Principles

- Enabled some US companies to comply with EU privacy law – self regulation
- US companies storing customer data may self-certify that they comply with 7 principles of EU Data Protection Directive (and Swiss requirements)
- In 2000, European Commission made a decision that the US principles complied with the EU Directive (known as the "Safe Harbour Decision")

Article 29 Working Party

- Gives advice about the level of protection in the EU and third parties
- Negotiated "Safe Harbour Principles" with the US
- Criticised as not being sufficient because there are fewer obligations on controller and it allowed certain rights to be waived contractually

Safe Harbour Principles

- In October 2015 the ECJ ruled that the Safe Harbour regime was invalid as a result of an action brought by an Austrian privacy campaigner against Facebook's transfer of data to USA

EU-US Privacy Shield

- Became operational in August 2016
- Framework which protects fundamental rights of EU citizens data when transferred to US for commercial purposes.
 - Regular reviews of companies' compliance by Department of Commerce
 - Safeguards on US government access to data
 - Commitment against mass surveillance on data transferred
 - Effective protection and redress for individuals – appointment of an Ombudsman
 - On-going annual joint review of EU & US

How Does it work?

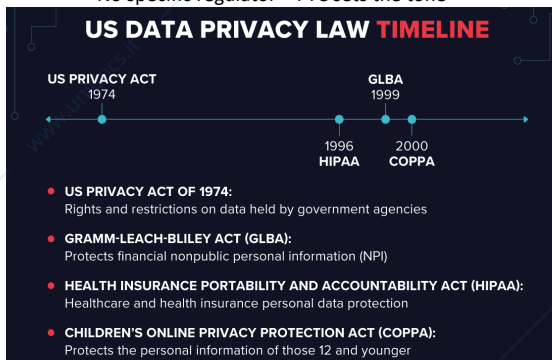
- US companies need to register to be on the privacy shield and self certify to compliance
- Department of Commerce monitors activities and verifies compliance
- List of members on Privacy Shield register updated over time

US Approach

- The U.S. has no single Federal data protection law comparable to the EU's Data Protection Regime
- privacy legislation is adopted on an *ad hoc* basis specific to sectors (e.g.: Video Privacy Act, Fair Credit Reporting Act)
- US relies on combination of legislation, regulation and self-regulation
- Some consumer privacy laws coming from the states (not federal law)
- Give priority to technology innovations

US Federal Law

- Sector specific laws –
 - Financial services (Gramm Leach Bliley Act) (Fair Credit Reporting Act)
 - Healthcare (HIPAA)
 - Telecommunications
 - Education (Family Educational Rights and Privacy Act)
- No specific regulator – FTC sets the tone

**US Privacy Act 1974**

- Right of US citizens to access data held by government agencies (not private companies)
- Right to correct errors
- Agencies should follow data minimization principles when collecting data – “relevant and necessary”
- Access to data on need to know basis
- Sharing data between agencies is restricted

HIPAA 1996

- Health Insurance Portability and Accountability Act
- Security Rule: data protection
- Privacy Rule: who gets to see medical data (family, healthcare provider). Marketing requires explicit authorisation
- Safeguards to limit “unnecessary or inappropriate” access to protected health data

How is privacy on the internet dealt with?

- It is not! The Internet is deregulated.
- Federal Trade Commission Act (1914) has been used against social media companies
- Section 5 prohibits “*deceptive practices*”
- Facebook was sued by FTC – agreed a \$5billion settlement – told users it won't sell their data when they did!

States Laws –

- State laws protect a wide range of privacy rights of individuals
- Large differences between states
- Areas covered differ from protecting library records to keeping home owners free from drone spying

State Laws – CCPA (2020)

- California Consumer Privacy Act (CCPA) does provide some consumer data privacy (no equivalent federal law)
- Consumers have right to access data
- Businesses can't sell personal information without providing a web notice + opt out
- Very broad definition of personal data (biometric, geolocation, browsing history, email)
- *May impact data-driven business models

GDPR VS CCPA		
GDPR	BOTH	CCPA
Right to correct incorrect data	Right to access	Requires a privacy notice on the site
Requires explicit consent	Right to delete	
	Right to opt-out	

Other States are following California

- Nevada
- Maine
- Massachusetts
- New York
- Hawaii
- Maryland
- North Dakota

ExtraTerritoriality

- Businesses may be subject to both federal and state data protecting laws for activities impacting US residents whose information the business collects, holds, transmits or shares.

New EU Law:

General Data Protection Regulation 2018

- The new EU Data Protection Regulation extends the scope of the EU data protection law to all foreign companies processing data of EU residents, regardless of the company's location.

Regulation Vs Directive

- A "Regulation" is a binding legislative act – it must be complied with across the EU. Specific and conclusive.
- A "Directive" is a legislative act that sets out a goal which the member states must achieve. There are differences in implementation. Result: different laws in different countries -> Complicated and costly to comply!

General Data Protection Regulation ("GDPR")

- Effective from 25 May 2018 (replacing EU Data Protection Directive (EC/98/46)
 - New, higher standards of privacy protection
 - All business the process EU citizen's personal data will be affected including those that are established outside of the EU

GDPR Overview

- Businesses will have to carry out privacy impact assessments prior to processing personal data
- rules on what constitutes a legitimate "opt-in" consent are stricter
- Further stricter rules apply to special categories of sensitive personal data such a biometric data
- This is a REGULATION which all Member States would have to adopt consistently
- Removes differences between Member States – one set of rules for companies operating in Europe
- Significant Penalties – up to 4% of annual worldwide revenues or 20 Million euros (rather than small fines)

What Companies Have in Place Today to Comply with EU privacy laws:

- ✓ Privacy policy and procedures
- ✓ Privacy governance organization
- ✓ Training employees
- ✓ Privacy Notices
- ✓ Information security
- ✓ Audit procedure
- ✓ Breach response process

GDPR Overview

- All companies must notify data breach within 24 hours
- Right to be forgotten (Google Case)
- Data Portability provisions
- Appointment of Data Protection Officer for larger companies

Extra territorial applicability

- One of the biggest changes is that GDPR will apply to the processing of EU citizens' data regardless of company's location.
- Previously, the DP Directive referred to data process "in the context of an establishment".
- GDPR applies when a non-EU company:
 - Offers goods/services to EU citizens (even if no payment is required – eg: search engine)
 - Monitors behaviour that takes place within EU
- Must appoint a representative in EU

Increased Penalties

- Applies to both controllers and processors – means that the "cloud" will not be exempt from GDPR enforcement
- Tiered approach:
 - Penalty 2% annual revenues for not having records in order (Art 28), not notifying of breach.
 - Up to 4% of annual revenues for insufficient consent/ violating Privacy by Design concepts.

GDPR KEY REQUIREMENTS



APPLIES TO INDIVIDUALS WHO CAN BE CUSTOMER, EMPLOYEE, OR PERSONNEL OF THIRD PARTIES.

1 Legitimate basis for data 	2 Info you hold (retention) 	3 Individuals' rights
4 Explicit and clear consent 	5 Children's data 	6 Privacy notices/statements
7 Data breaches 	8 Privacy by design 	9 Privacy impact assessment
10 Data protection officers 	11 Third party management 	12 Awareness

GDPR NON-COMPLIANCE CAN BE FINED UP TO 4% OF GLOBAL TURNOVER

- Legitimate basis for data:** organizations must know and be able to prove that processing of personnel data has a legitimate purpose.
- Information you hold:** organization should keep data only in so far as necessary.
- Individuals rights:** individuals have the right to ask questions about their personal data.
- Consent:** there should be explicit and clear consent for processing of personal data, easy to understand and withdraw. Sensitive data requires "opt in" consent, other data requires "unambiguous" consent
- Children's data:** explicit consent of the child's parents (or guardian) for minors less than 16 years of age for online services.
- Privacy notices:** Organizations must transparently state their approach to personal data protection in a privacy notice.
- Data breaches:** Organizations must maintain a data breach register and, based on risk the regulator and data subject should be informed within 72 hours.
- Privacy by design:** Mechanisms to protect personal data should be incorporated in design of new systems and processes.
- Privacy impact assessment:** organization must conduct a privacy impact assessment to review the impact and possible risks.
- Data Protection Officers:** organization should assess the need to assign a Data Protection Officer (public authorities, large scale systematic monitoring, large scale processing of sensitive data).
- Third parties:** The controller of personal data has the responsibility to ensure that personal data is protected.
- Awareness:** To create awareness among staff about key principles on data protection, conduct regular training.

Why did we need a new law?

- Desire for common standard across all 27 jurisdictions in EU
- 1995 Directive is pre-internet (ie "outdated")
- General unhappiness with Safe Harbour Regime
- Risks re abuse of privacy (eg Snowden scandal -> extent of US Government spying)

Proposed ePrivacy Regulation

- Presented in January 2017, by the European Commission it is a proposal for a new Regulation on electronic communications
- it repeals Privacy and Electronic Communications Directive 2002 (ePrivacy Directive)
- it establishes the principles of security and confidentiality of all forms of electronic communication
- establishes "opt in consent" rules about the retention and use of traffic data in electronic communications
- The new Regulation now applies to all forms of "Over the Top" electronic communications, (not just emails and web sites).
- Includes voice over IP (Skype, Facetime), instant messaging (WhatsApp, SnapChat, iMessage) and web based email services (GoogleMail, Outlook365)
- Streamline consent for "cookies"
- Protection against "SPAM"

Proposed new ePrivacy Regulations

- businesses in the digital advertising industry or those who operate an electronic communications service or 'big data' or "analytics" App will be more significantly affected

Case Studies

- NSA v Edward Snowden
- Google – "Right to be forgotten"
- FBI v Apple
- Cambridge Analytica
- Facebook Data Breach

1. NSA v Snowden

- Edward Snowden an American former US Government contractor copied classified information from the National Security Agency (NSA) in 2013 without authorisation
- Information revealed numerous global surveillance programs run by NSA with secret service from Australia, UK and Canada
- Charged with espionage and is currently living in temporary asylum in Russia
- NSA was harvesting millions of email and instant messaging contact lists, searching email content, tracking and mapping the location of cell phones, undermining attempts at encryption
- Using tools by internet advertisers to pinpoint targets for government hacking and to bolster surveillance
- Secretly tapping into Yahoo and Google data centres to collect information from hundreds of millions of account holders worldwide
- Leaked documents showed the NSA had been tracking:
 - the online sexual activity of people they termed "radicalizers" in order to discredit them
 - Charities including UNICEF and Médecins du Monde as well as allies such as the EU chief and Israeli Prime Minister
 - 122 "high ranking leaders" including Chancellor Merkel of Germany
- 90% of those monitored were ordinary Americans
- Snowden thought that the spying program would be struck down by the Courts as unconstitutional

Post Snowden

- Pres. Obama issued a directive stating the data collection by the intelligence services should be targeted to:
 - Espionage,
 - Terrorism
 - Weapons of mass destruction
 - Threats to cyber security/Armed forces
 - Transnational criminal threats

2. Google – “Right to be forgotten”

- Spanish Individual -> Google search -> news article which reported historical non payment of debts relating to land holdings (Costeja Case)
- Made complaint to Spanish Data Protection Authority -> European court of justice
- ECJ: Google must respond to requests to have information removed
- Google didn't write the article - it just searched it!
- Ruling allows individuals to request removal of information which is “inadequate, irrelevant or no longer relevant”
- Google now needs to create processes to accommodate requests to have links to their names removed
- Exemption for companies listed as “media” companies (newspapers, journalists)
- Interesting Court held the newspaper could keep link but Google no!
- Is reflected in new GDPR
- Google has removed a total of 3.8 million URL's since 2014.
- 90% requested by private individuals
- Google complied with 44% of requests for erasure
- ECJ is currently deciding the limits of the rule:
 - What type of information should be delisted? Should sensitive personal data be automatically removed upon request? (eg: religious affiliation)
 - Are search engines required to delete links globally or only within the EU? (.com site or just eu sites?)
 - Decision: only links on EU sites (not US sites)
 - France, Germany and UK have the most requests

Google Case Influence around the World

- Data protection authorities and courts in Canada, India, Colombia and Brazil are also considering similar right to be forgotten.

GDPR Art 17. “Right to be Forgotten”

- Data subject shall have the right to make the controller to erase personal data and block further dissemination with third parties
- Burden of proof reversed – controller must show the data is still relevant
- Google does not have to comply with all requests – it can refer the request to the Information Commissioner in the relevant country
- Non EU companies must comply when offering services to EU consumers
- Balance freedom of expression and the press (See US experience “free speech” although some movement to stricter laws)

Specifically, Art 17. GDPR

- Data subject shall have right to erasure of PD when:
 - No longer necessary for purposes collected
 - Withdrawal of consent
 - Data subject objects to processing and no legal grounds
 - Unlawful processing
 - In compliance with legal obligations
 - PD collected relating to a child without appropriate consent by parent (under 16yrs)

3. FBI vs Apple

- Recent case of privacy – February 2016
- FBI asked Apple to unlock an iPhone 5C used by two terrorists who killed 14 people in California in December 2015
- Apple refused arguing that the order goes too far and that bypassing the password means creating a “backdoor” in its iOS mobile operating system that could be used to access every other iPhone
- Apple was able to give the FBI backups only up to October 19, but terrorist stopped backing up the phone
- FBI wanted to access data on the phone
- The iPhone was locked with a passcode – 10 tries to enter correct passcode or all data would have been wiped clean
- FBI wants Apple to deactivate function that wipes data clean after 10 password tries
- Even if they do – delay features means it may take 5.5 years to brake 6 digit code

What does the FBI want Apple to do?

- Create a “backdoor” into passcode protected phone
- create a new, custom version of iOS
 - disable the auto-wipe function and
 - Disable the delay that limits how quickly new passcodes can be entered
- add a way to attach a cable or wirelessly connect to the iPhone so the FBI can automatically enter passcodes with a supercomputer

What data does FBI want?

- text messages, iMessages, photos, videos, contact list and call history, plus any audio recordings
- any additional email accounts or social-networking accounts
- To see who the terrorist were speaking to, Whether they were part of a terrorist cell, Whether other terrorist acts were planned?

Why wouldn't Apple comply? (stated reasons)

- creating the software will ultimately endanger all other phones as hackers and governments could steal it risking the privacy of all iPhone users
- it will create a precedent for future government requests for newer models of iPhone

- BUT Apple has complied with other court orders in past

Tim Cook, interview in 2015

"You can't have a back door that's only for the good guys"

Why won't Apple comply? (real reasons?)

- Possibly, Apple really believes it has a civic duty to protect customers personal information
- Possibly, Apple is tired of complying with law enforcement requests to hack its own phones
- Probably, Money. After Snowden scandal -> this shows Apple devices are secure so more people will buy them!

See Apple's letter to its customers at www.apple.com

"The implications of the government's demands are chilling. If the government can use the All Writs Act to make it easier to unlock your iPhone, it would have the power to reach into anyone's device to capture their data. The government could extend this breach of privacy and demand that Apple build surveillance software to intercept your messages, access your health records or financial data, track your location, or even access your phone's microphone or camera without your knowledge."

Who agrees with Apple?

- The tech industry:
 - The Information Technology Industry Council, a lobbying group that represents Google, Facebook, Microsoft, Samsung, Blackberry
- Edward Snowden - said *"the FBI is creating a world where citizens rely on Apple to defend their rights, rather than the other way around"*

Resolution

- One day before the hearing was supposed to happen, the government found a third party able to assist in unlocking the iPhone.
- On March 28 2016, the FBI had unlocked the iPhone and withdrew its request.

4. Privacy and Facebook-Cambridge Analytica Ltd

- British political consulting firm which combined data mining, data brokerage and data analysis with strategic communication during electoral processes.
- Used by Trump Campaign in 2016
- Rumored to be used by Leave.EU (Brexit) but recent Information Commissioner investigation says it was limited. (2020)

Facebook

- In March 2018 media reported that CA had acquired and used personal data about Facebook users from an external researcher who told Facebook he was collecting it for academic purposes.
- Gleaned information from Facebook app *"This is your digital Life"* from users and their "friends networks" without their permission
- Only 270,000 users installed the App but due to FB's sharing policies, the App was able to gather data on millions of their friends
- Approximately 87 million users were effected

CA's Methodology

- CA used a Data Profiling System using general online data – "Likes", demographics, consumer behaviours, internet activity
- Personality data derived from on-line surveys
- Used "behavioural micro-targeting" to predict the "needs" of subjects and tailor voter contact scripts to influence voters

"Today in the United States we have somewhere close to four or five thousand data points on every individual...so we model the personality of every adult across the US, some 230 million people".

Alexander Nix, CE of Cambridge Analytica, October 2016

Facebook Fined

- Facebook was fined £500,000 by ICO (UK) the maximum under the Data Protection Act (UK) for failing to safeguard users data and inform them of how their data was being harvested.
- What would have happened if this data breach happened after **May 2018?**

Facebook Security Breach Exposes Accounts of 50 Million Users

FB Data Breach

- September 2018: FB announced an attack on its computer network had exposed the personal information of nearly 50 million users.
- Attackers exploited a feature in FB's code to gain access to user account and potentially take control of them.
- Three software flaws in FB's systems allowed the hackers to break into accounts
- After a video-uploading program was introduced a flaw in the system which allowed hackers to steal "access tokens" (digital keys that keeps you logged in without having to enter your credentials every time you log in).
- Attack could have happened as far back as July 2017.
- EU authorities are investigating legal action
- If found guilty of breaching GDPR, FB faces a fine of up to 4% global revenues (on \$40 Billion!).
- Also faces a Class action in California

Impact of Scandals for FB

- Impact share-price (at one point down 24% - \$123Billion in market value)
- Advertising revenue down
- Congress ordered a hearing into the breaches and required Mr Zuckerberg to respond
- Will US lawmakers hit back with new regulation of social media or leave self regulation?

Does Privacy Still Exist? ...and does it even Matter?

- TED talks –
- Glen Greenwald – Why Privacy Matters

PRIVACY "POP QUIZ"

1. What is Personal Data?
2. What are Special Categories of (Sensitive) Personal Data?
3. What is the Right to be Forgotten concept?
4. Why did we need a new EU Regulation?

Answers

1. Data which identifies a living individual.
2. Data relating to health, religion, trade union membership, sexual life, political opinions.
3. Individuals can request erasure of information which is "inadequate, irrelevant or no longer relevant". Reflected in GDPR. (Doesn't apply to media companies.)
4. To provide a uniform European law across all 27 member states and to adapt laws to the post-internet world

"CYBER WORLD"

What is the Cyber world and Who operates in it?

"A real or virtual world of information in cyber space"

How we live in Cyberspace?

- Social media posts (facebook, twitter, linkedIn)
- E-commerce and M-commerce
- "Virtual life"
- On-line banking
- Downloading software, music, film
- Storing photos in the "cloud"
- On-line dating

Cyberworld

- The world is more interconnected than ever before
- Reliance on modern technology -> increased connectivity/communications/ access to information
- BUT increased risk of theft, fraud and abuse
- Law enforcement critical to safeguarding and securing cyberspace -> critical challenge: transnational aspect, the law very slow moving, difficult to track because there isn't a physical person

definition of "Cybercrime"

"Criminal acts that are committed online by using electronic communications networks and information systems."

- Crime involving a computer and a network
- Computer may be used in the commission of a crime or be the target of the crime
- Use of Internet (chat rooms, emails, notice boards, twitter, facebook) and mobile devices (SMS/MMS)



IP infringement -> copyright (illegal downloading)

- "transnational" - use of internet means there are no borders, criminals can be in 3rd country with poor enforcement (China, Brazil, Russia) or can mask their location via routing
- Challenge to effectiveness of domestic and international law and law enforcement
- Requires international cooperation

Three broad categories

- Crimes specific to the internet (eg phishing)
- Online fraud and forgery (eg: identity theft, malicious code, spam)
- Illegal online content (terrorist acts, racism, abuse material)

Cost of Cybercrime

- Estimated at \$6 trillion cost to global economy by 2021
- Direct and indirect costs
- Lost content, lost productivity, financial loss, reputational damage

"Easy money for criminals"

- Potentially high returns for low effort
- Low risk (difficulties with law enforcement)
- Physical presence not required

Did you know?

- Cybercrime is one of the fastest growing forms of transnational crime
- It has rapidly grown into a business that may exceed \$3 trillion a year
- Up to 80 million automated hacks occur every day
- Identity-related offences are the most common and fastest growing forms of consumer fraud online

- infringement (Digital Piracy)
- Offences against children
- Espionage
- Identity theft/privacy offences
- Financial theft
- Cyber warfare
- Cyber-terrorism
- Harassment
- Cyber-bullying
- Hate crimes
- Trolling
- Spam



- Examples of Cybercrime
- Hacking
 - Malware
 - Copyright

Categories of Cyber crime

- **Financial Crime:** hacking, on-line fraud, identity theft, credit card fraud, digital piracy
- **Non financial crime:** threats to children, harassment, hate crimes, bullying, terrorism, privacy infringement

Cybercrime threatens

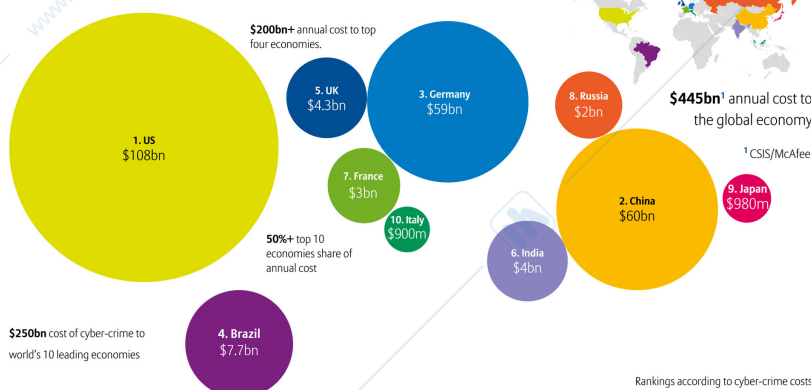
- **Individuals:** fraud, identity theft, financial loss, data privacy breach, harassment, exploitation
- **Business:** fraud, data security breach, Intellectual Property theft, digital piracy, denial of service
- **Government:** fraudulent application for welfare, espionage, attacks on national infrastructure, terrorism, cyber warfare

3 Types of Hackers:

- **Individuals** – for financial gain (credit card details, passwords)
- **Hackers financially backed by States**– target information of strategic value (oil drilling maps, software source code)
- **State employed hackers** – (military plans, infrastructure access)

How much does cyber-crime cost the world's leading 10 economies?

This AGCS atlas examines the estimated total cost to the global economy from cyber-crime per year, with a particular focus on the impact on the world's top 10 economies, according to GDP.



Country Ranking by GDP ¹	Cyber-crime as a % of GDP ²	Estimated cost ³	Country Ranking by GDP ¹	Cyber-crime as a % of GDP ²	Estimated cost ³
1 US	16.8trn .64%	\$108bn	6 UK	\$2.7trn .16%	\$4.3bn
2 China	\$9.5trn .63%	\$60bn	7 Brazil	\$2.4trn .32%	\$7.7bn
3 Japan	\$4.9trn .02%	\$980m	8 Russia	\$2.1trn .10%	\$2bn
4 Germany	\$3.7trn 1.60%	\$59bn	9 Italy	\$2.1trn .04%	\$900m
5 France	\$2.8trn .11%	\$3bn	10 India	\$1.9trn .21%	\$4bn

Threats of Cybercrime

- Economic security, reputation and social trust (counterfeiting, impersonation, identity fraud, money laundering, copyright infringement, tax evasion)
- Public interest and national security (pornography, defamatory communication, cyber stalking, paedophilia, international terrorism.)
- Privacy, domestic and even diplomatic information security (denial of services, and illegal interception of communication)
- Domestic, as well as international security – no single country can handle the issue on their own. Global response is necessary)

Important to Business!

Cyber incidents rank for the first time as the most important business risk globally

What we will cover today:

1. Fraud and financial crime
2. Cyber-extortion
3. Cyber-terrorism
4. Cyber-warfare
5. Data Breach/privacy
6. Copyright Infringement/Digital piracy
7. Relevant laws and enforcement

1. Fraud and financial crime

Examples

- Unauthorised altering of data
- Altering, destroying, suppressing or stealing data (trade secrets, customers lists, bank details)
- output to conceal unauthorised transactions (hiding fraud)
- Altering or deleting stored data
- Payments with stolen credit card
- Money transfer fraud
- Distribution of rouge security software
- Internet scams: phishing, social engineering, hacking, malware

“Phishing”

- Attempt to get sensitive information such as usernames, passwords, credit card details for malicious reasons via electronic communication
- Appears to be from trustworthy source (eg Bank, employer, IT administrators)
- “fishing” – using bait to try to catch a victim!

2. Cyber-extortion

What is Extortion? “The gaining of property or money by almost any kind of force, threat of violence, property damage, harm to reputation, or unfavorable government action. While usually viewed as a form of theft or larceny, extortion differs from robbery in that the threat in question does not pose an imminent physical danger to the victim.”

Cyber-extortion

- A website, e-mail server or computer system is subjected to or threatened with repeated denial of service or other attacks by malicious hackers
- Usually demand money in return for stop in attacks
- Can include Ransomware –malware which takes control over computer until money is paid.
- Corporate websites and networks increasingly being targeted
- Example: attack on Sony Pictures (2014)

Sony Pictures Case (2014)

November 2014: “Guardians of Peace” hacker group leaked:

- Shutdown Sony’s internal computer network
- Released confidential data from Sony Pictures

Data included personal information of employees and their families, executive salaries, social security numbers, and copies of unreleased films/scripts

Demand: not to distribute “The Interview”- comedy film about plot to assassinate Nth Korean leader

Threatened terrorist attacks on cinemas screening the film

Film premier was cancelled but film was released digitally, followed by limited cinema release the next day

Other films not yet released were leaked on the internet

US Intelligence allege the attack was sponsored by North Korea (they deny it!)

Potential Legal Actions against Hackers

- Illegal hacking and cyber crime
- Breach of privacy
- Infringement of copyright (unreleased film/scripts)
- theft of confidential information

What’s the Problem with taking legal action?

What’s the Problem? Difficult to prosecute the hackers if you don’t know who did it!

Legal issues in Sony Case

Piracy/Content Copyright infringement

- Leaking of unreleased films over internet (including script for latest Bond film “Spectre”)
- Hackers had political rather than economic motivation
- May indicate the start of a new kind of cyber-warfare if claims that Nth Korean sponsored attack are correct

What was the damage to Sony?

- Damages claim for loss of revenue for cancelled release of “The Interview”

- Damages claim for loss of revenue due to leaked film content

Other potential legal claims against Sony

- Potential damages claim from employees for breach of privacy
- Potential damages claim from partners/suppliers for data security breach
- Discrimination class-action regarding underpayment of female actors

Analysis of Potential Legal Actions against Sony

1. Security Data Breach:

- Sony is open to class action lawsuit that it didn't take enough security precautions against massive data breach
- Failure to maintain "*reasonable and adequate security measures*" to protect employees personal information (social security numbers, salary, bank account details)

Analysis of Legal issues in Sony Case

- People suing over fears of what could happen to their personal information not over actual losses resulting from breach
- Some threats to personal safety and families
- Potential claim from business partners regarding breach of confidentiality and/or content created by third parties

2. Employee Discrimination

- Potential class action case regarding discrimination – leaked documents showed female stars paid less than male counterparts and top earners all "white males"
- Eg: Oscar nominated actor Jennifer Lawrence was paid less than male co-stars in "American Hustle"

3. Cyber-terrorism

"Someone who intimidates or coerces a government or organization to advance his or her political or social objectives by launching a computer-based attack against computers, networks or the information stored on them."

- "an act of terrorism committed through the use of cyberspace or computer resources".
- Examples:
 - Hacking
 - Denial of service attacks (attack on infrastructure, communications, banking systems)
 - Preparation of real world terrorist attacks
 - Generating funding for terrorist activities
 - Publications of Propaganda (eg: ISIS)

ISIS

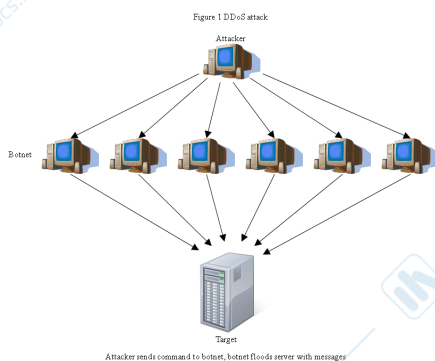
- On-line recruitment: Terrorists groups use of social media to radicalise young users
- propaganda and recruitment (Facebook, Twitter) for off-line attacks

4. Cyber-warfare

"involves the actions by a nation-state or international organization to attack and attempt to damage another nation's computers or information networks through, for example, computer viruses or denial-of-service attacks".

- "Internet based conflict involving politically motivated attacks on information and information systems"
- Can include non-State players such as terrorist groups, ideological extremist groups, hacktivists, transnational criminal organizations
- It has Geo-strategic significance
- Includes computer viruses, denial of service attacks
- Has become part of military strategy
- Many nations now invest heavily cyber-warfare capability
- China cited as one of the world's greatest offenders

Denial of Service



Examples of Cyber warfare

- **2020:** The UK National Cyber Security Centre found evidence of Russian military intelligence hackers had planned a disruptive cyber attack on the postponed **2020 Tokyo Olympics**
- **2020:** US Dept of Homeland Security revealed Russia and Iran are seeking to influence **US elections** by sowing uncertainty around election results
- **2020:** Russian hackers targeted government agencies in **NATO countries** using training material as bait for phishing scheme to infect target computers with malware
- **2020:** **Israel** announced two cyber attacks had been carried out against Israeli water infrastructure (unsuccessful)
- **2019:** North Korean ground hacked 28 **UN** officials in spear-phishing campaign
- **2019:** **New Zealand's** stock exchange faced several delays after DOS attack by unknown actors

Espionage

- "Spying" - Not an act of war
- Most countries engage in it although some incidents can cause diplomatic tensions
- **Examples:**
 - Massive spying by the US on many countries (exposed by Edward Snowden)
 - NSA (US) spied on German Chancellor Merkel and other world leaders

Examples of Cyber espionage

- **In 2016** - The Sofacy Group is also suspected to be behind a spear-phishing attack on members of the Bundestag and multiple political parties. Authorities feared that sensitive information could be gathered by hackers to later manipulate the public ahead of German federal elections in 2017.

US Election 2016

- US Intelligence officials allege that Russia hacked Clinton's Campaign and the DNC ("phishing")
- 60,000 emails released via Wikileaks damaging Clinton's campaign
- Putin dislikes Clinton because of her perceived support for public protest when he decided to become President for a 3rd term in 2011

2016 US Elections

- Republican party was also hacked but no emails were released
- Pres. Trump has stated publically that he admires Putin and wants to lift economic sanctions against Russia, imposed after Russia's encroachment of Crimea and invasion of Ukraine
- Critics say it was an attempt to influence the democratic election process
- Pres. Trump later acknowledged that Russia was responsible for the hacking
- US Government departments have been hacked in the past but emails never released publically

Russian interference

- 2017: Robert Mueller is appointed Special Counsel to investigate Russian Collusion in 2016 Election

Is Fake News a new form of cyber warfare?

- Fake news is a type of propaganda that uses deliberate misinformation or hoaxes spread via traditional print and broadcast media or online social media with the intent to mislead or damage an agency/entity or person.
- Recent phenomenon using social media

"Fake News"

- Often uses sensationalist, dishonest headline to increase readership, online sharing and internet "click revenue"
- Role of social media – Facebook news feed, YouTube algorithm, Twitter

Veles, Macedonia: "Fake News factory of the world"

Big Bucks \$

- Young unemployed men were creating websites with fake news which went viral. They earned huge sums of money from ads placed by Google AdSense –

Laws against "fake news"

- No specific EU laws yet
- France has proposed a new law banning fake news during elections.
- Italy (Feb 2017) – newly proposed law: "*Provisions to prevent the manipulation of information online, ensure transparency on the web and encourage media literacy*". (Penalty: Euro 5.000) (Currently in deadlock)
- Criticized as providing excessively broad discretion on the government to prosecute those critical of public or political figures
- EU Commission (Jan 2018) – task force to determine balance between freedom of speech/rights of citizen to reliable information

5. Data Breach/privacy

Breach of Data Protection/Privacy

- Breach of communications network security can lead to disclosure of personal information of employees, customers, partners, suppliers
- Personal Information – data which identifies a living individual
- Sensitive personal information – data relating to health, religion, trade union membership, sexual orientation etc
- Now covered in the GDPR (Art 33)
 - Data controller must advise effected parties within 72 hours of becoming aware of it
 - Must describe nature of personal data effected
 - Provide details of DP officer/contact point
 - Describe likely consequences
 - Set out measures taken to mitigate loss
 - Fines Euro 10 million (2% global rev) or Euro 20 Million (or 4% global rev)

Ashley Madison Case (2015)

On-line dating service for people who are already married/in relationship

Canadian based service

July, 2015 – hackers stole customer data (names, email addresses, home addresses, credit card information, sexual fantasies..)

Effected 30 million customers globally

Made news internationally

Hacking group threatened to post all data online if the dating service was not shut down

July, 22: some customer data was leaked

August, 20: further data leaked including CEO emails

August, 24: Police reported 2 unconfirmed cases of suicide associated with the leak

At least one further suicide has been reported since

Extortion: Web site told to close or release of customer data

Blackmail: users received extortion threats to pay money or have data released to spouses

Fraud: fraudulent operators requested customers to pay additional \$19 to have their accounts deleted (this was never done)

Damage: to reputations and family relationships (in extreme cases, led to deaths)

Privacy policy

- Users "have a reasonable expectation of privacy"
- Website privacy policy states use of "standard practices and technologies" to protect personal data

Ashley Madison – outcome

- \$576 million class-action lawsuit was filed against the company for not taking adequate security measures
- Lawsuit seeks – claiming compensation/punitive damages + interest
- \$380,000 Reward offered for information on hacking group
- No prosecution to date
- July 2017 Avid life Media agreed a settlement for \$11.2 million

6. Copyright Infringement/Digital piracy

What is it? ...*"an act of robbery on the high seas", or "The unauthorized use of another's production, invention or conception especially in infringement of a copyright"*

Digital Piracy

- Illegal downloading, streaming, hacking
- Also known as copyright infringement
- Illegal theft of content without the owners permission and/or payment of fees
- Effects software, music, film, TV, major sporting events, broadcast rights

What is Copyright?

- The Rights cover broadcast and public performance, copying, adapting, issuing, renting and lending copies to the public
- Difficult to enforce because almost impossible to police individuals use of the Internet, particularly in private home

Illegal Music Streaming

The Story so far.....From Napster to iTunes

Napster

- 1999 – college student founded Napster – a peer to peer file sharing site
- Specialised in Mp3 files- a format commonly used for music
- Users could share music free of charge
- Artists and record companies were cheated out of royalties
- Record label took Lawsuit in 2000 - \$26 million judgment -> Napster closed down
- iTunes launched – offering large range of music to download legally

Illegal Streaming

- It may be easy to do but it is still theft!
- Effects Creation of film, TV shows and music takes time and requires investment
- Who is going to pay for content production if audiences don't? -> reduction in good quality programming

Illegal streaming Football

- TV Broadcast rights extremely expensive
- Divided up into broadcast "Territories" and geo-blocked
- Thousands of illegal sites
- Difficult to enforce particularly if private screening

Case Study: FA Premier League v Murphy

Decision by Court of Justice of the European Union (CJEU) (2011)

Mrs Murphy (a pub landlady) used an imported satellite decoder card to show a Greek TV broadcaster' Premier League football programming in her pub (cost less)

Long running legal battle with Sky (UK)

Outcome: Murphy escaped criminal conviction but Court held that there was infringement of copyright and FAPL could require payment from Murphy

FAPL was able to enforce against other pub owners who used unauthorised foreign satellite service to broadcast football matches

7. Relevant laws and enforcement

Cyber crime law

- Few countries have legislation broad enough to criminalise all types of computer crime.
- UK was one of the first countries to pass legislation – Computer Misuse Act 1990
- Many commonwealth countries followed (Malaysia, India, Singapore)

-> Lack of successful prosecutions

Relevant Laws Against Cybercrime

- Council of Europe Convention on Cybercrime (2001)
- Known as Budapest Convention on Cybercrime – first international treaty to address internet and computing crime by harmonizing national laws
- Entered into force on 1 July 2004
- 47 States have ratified it (further 7 have signed it but not yet ratified)
- India, Brazil and Russia – Not Ratified

Budapest Convention

- Four chapters:
 - Ch. I: definition of terms
 - Ch. II: measures to be taken at national level (substantive criminal law, procedural law, jurisdiction)
 - Ch. III: International co-operation
 - Ch. IV: final provisions
- Categories of offences:
 - Offence against confidentiality, integrity and availability of computer data and systems (hacking, DOS, malicious codes)
 - Computer related offences (forgery, alteration of data, manipulation of digital signatures)
 - Content related offences (pornography, offences relating to children)
 - Copyright related offences (pirated software, entertainment disks)

Budapest Convention deals with –

- Infringement of copyright
- Computer related fraud
- Child pornography
- Hate crimes
- Violation of network security
- Powers and procedures regarding search and seizure of computer networks and legal interception

Penalties

- Art. 13 COE Convention: States are free to set penalties in line with principles of criminal justice.
- -> Perceived weakness of Convention because cybercrime does not respect borders – un uniform penalty approach.

EU law to tackle Cyber crime

- **2001** – EU Framework Decision on combating fraud and counterfeiting of non-cash payment
- **2002** – ePrivacy Directive: providers of communications services must ensure security of service and confidentiality of client information
- **2011** – EU Directive on combating sexual exploitation children online and child pornography
- **2013** – EU Directive on attacks against information systems: tackles large scale cyber attacks by strengthening national cyber-crime laws and new penalties

EU Directive – Attacks against Information Systems (2013)

- Replacement to EU Council Framework Decision (2005) because more regulation needed
- Sets out offences regarding illegal access to information systems and interference with systems and data
- New rules to outlaw the use of botnets and malicious software (such as illegally obtained passwords)

Directive – Attacks against Information Systems (2013)

- Penalties – 2-5 years imprisonment. Penalties more severe for criminal organisation or for attacks target key infrastructure/significant damage
- Greater co-operation between Member States authorities

Directive on Security of Network and Information Systems (“NIS”)(2016/1148)

- Adopted by the EU Parliament 6 July 2016 (entered into force in August 2016)
- Required to be transposed and implemented into national law by May 2018 and identify operators of essential services by 9 November 2018

NIS Directive

- Provides legal measure to boost the overall level of cyber security in the EU by ensuring:
 - Member States preparedness by requiring them to be equipped (eg: Computer Security Incident Response Team and competent national NIS authority)
 - Cross border collaboration between states to support strategic cooperation and information exchange
 - a culture of security across all sectors (essential services must notify serious incidents to national authority).
- ENISA – European Union Agency for Network and Information Security

Art. 13 New EU Copyright Directive

- Approved by EU Parliament March 2019
- Must be implemented by March 2021
- Proposes that “Content-sharing services” must licence copyright protected material from licence holders
- Platforms such as YouTube and Facebook will be held liable if their users upload copyright-protected material
- Excludes: memes and GIFs, open source software development platforms, cloud storage service, online marketplaces, online non-profit encyclopaedias
- If licencing is not possible the company may be held liable unless it can show:
 - ✓ It made “best efforts” to get permission
 - ✓ It made “best efforts” that material specified by rights holders was not made available
 - ✓ It acted quickly to remove infringing material of which it was made aware
- Applies to services that have serviced EU for more than 3 years or have an annual revenues of Euro 10 million (ie: not start ups)

Jurisdiction Issue in Cybercrime

- Determining the correct jurisdiction of authorities or the courts can be very difficult
- Consider:
 - Location of cyber criminal
 - Location of system being attacked (where are the servers?)
 - Location of any victims
 - Location over which the data involved in the attacks occurs (may cross several states/countries)

Jurisdiction and Cybercrime



Supranational Organisations

- US: FBI led Violent Crimes against Children (VCAC) and VCAC International Task Force
- InterPol: identifying victims and coordinating inter-government intelligence (190 countries)
- European Cybercrime Centre ("EC3") (28 Member States) - joint investigations conducted across EU
- NATO: cooperation between member states

Enforcement

- Anonymity of cyber criminals is major obstacle!
- IP address and clues left in data content help to track them down
- Enforcement issues very challenging, particularly when criminals are out of jurisdiction
- -> Increased cooperation between governments and push to adopt consistent laws and inter-jurisdictional task forces

Legal Challenges with tackling Cyber crime

- Time lag between technological developments and legislating to create new laws to cover those crimes
- Restrictions on law enforcement (eg, limited data retention, privacy laws)
- Gaps between laws of different countries
- Huge number of cybercrimes makes enforcement difficult
- Low number of successful prosecutions

Responses to Cybercrime

- Legal:
 - Legislation
 - Increasing international cooperation
- Technical:
 - internet content control/firewalls/anti virus software
 - computer forensics/collecting evidence
 - Encryption/reinforcing passwords
 - cloud computing/remote infrastructure
 - Surveillance and international cooperation

Prevention is better than Cure!

- Better to improve security first (security software, encryption, reinforce passwords)
- Advances in Legislation and Increased International Co-operation are helping
- Difficult to identify offenders and sheer scale of attacks makes law enforcement difficult
- Some risks to privacy of individuals with increased powers of authorities to monitor communications of citizens

Quiz

1. What is the name of the international convention relating to Cyber crime?
2. What is the European agency that coordinates investigation into cyber crime?
3. What is the name of the 2013 EU Directive and the maximum penalty for infringement?
4. What practical steps can be taken to reduce exposure to cyber crime?

Answers:

1. The Budapest Convention on Cyber Crime
2. European Cyber crime Centre ("EC3")
3. EU Directive – Attacks against Information Systems (2013). 25 years imprisonment
4. Mostly technical steps:
 - internet content control/firewalls/anti virus software
 - Encryption/reinforcing passwords
 - Surveillance and international cooperation

DISPUTE RESOLUTION

How to resolve disputes in international commercial contracts?

Types of dispute resolution

1. Negotiation/Escalation
2. Mediation and ADR
3. Arbitration
4. Litigation in the courts

Negotiation/Escalation

- Parties try to find a solution themselves

- Compromise to avoid legal action/lawyers
- Better chance of keeping working relationship in tact
- Introducing new/senior people can help resolution
- Parties retain control and no external costs

Alternative Dispute Resolution



What is ADR?

- May apply to commercial, diplomatic, community, workplace and family matters
- Imposes structure, timeframe and dynamic that ordinary negotiation lacks
- Mediator "facilitates" the process rather than directs it

Alternative Dispute Resolution (ADR)

- Includes Mediation and Conciliation
- Independent third party works with parties to find resolution
- Parties are involved in finding solution -> more control
- Not binding

Reasons to choose ADR

- Costs less than litigation
- Confidentiality (compare with cases argued in open court)
- Parties retain control over the process and can influence outcome
- Mutuality – progress based on compromise

Arbitration



What is Commercial Arbitration?

- Dispute resolution outside of the courts
- Parties must agree contractually to submit to arbitration
- Involves an independent third party to review the evidence and impose a decision
- Decision is binding on the parties (no appeals)

Domestic Arbitration

- Applicable to individuals (often consumers)
- result is a legally binding award rather than a negotiated settlement
- Decision reached by arbitrator by the application of rules of law
- Different countries have different rules for arbitration, sometimes involving oversight by Courts

International arbitration

- Parties must have places of business in different States
- Usually involves larger sums of money and corporations or nation States
- Less oversight by Courts
- The applicable law is usually the law of the "seat" of arbitration

1985 UNICTRAL Model Law (as amended in 2006)

- Provides a set of principles for nation states to improve national laws on international commercial arbitration
- Successful! 67 states and 97 jurisdictions have enacted laws made based on the Model Law
- Covers: all stages of process, through to enforcement and judicial review of awards
- It is a Framework: States are not bound to follow exact wording
- Flexibility on which parts to accept
- Compare with decision to ratify a Convention (States have to accept it whole or not at all)
- No uniform implementation around the world
- Parties to decide how many arbitrators (default position – 3 but can be more)
- The Award must state reasons for decision
- Limited supervisory role of courts

Key principles

- Party autonomy – parties are free to "contract out" of default rules
- Parties have to agree to arbitration process in the contract (but then can't refer straight to courts!)
- Must be appropriate subject matter – private commercial contracts (not areas of public interest-> State courts)

Arbitration and Governing law

- Law governing the contract may not be the same as that governing arbitration
- Ideally the arbitration agreement should contain its own choice of law clause
- If not expressed in either contract or arbitration agreement, usually law of place of arbitration will apply

1958 New York Convention on the Recognition and Enforcement of Arbitral Awards

- Short Convention

- Deals with recognition and enforcement of foreign arbitration awards
- Note: there is no similar Convention for enforcement of court judgments!
- Successful! – ratified by 154 States
- Certainty of enforcement can be a motivation for agreeing to arbitration
- **But Note:** some jurisdictions are unfriendly to arbitration and may have some difficulties in enforcement!

Reasons why Arbitral Award may not be Enforced:

- Breach of natural justice
- Against public policy
- Subject matter not one which can be resolved through arbitration (eg: marriage/divorce)

Reasons to choose Arbitration

- Avoid formalities and uncertainties of litigation in national courts
- Quicker, more efficient
- Costs – no appeals so should be shorter process
- Enforceability internationally (NY Convention)
- Commercial expertise of arbitrators
- the parties' freedom to select and design the arbitral procedures
- Confidentiality of proceedings and award

Reasons not to choose arbitration

- Not appropriate in multi-party disputes
- Limited protection where award is wrong (no appeals)
- **Limited powers:** No power to make interim judgments (eg: injunction) or to compel witnesses/evidence under threat of fine or imprisonment (compare with litigation in Court)

Litigation



What is

Litigation?

- Known also as “law suit”
- Legal proceedings taken by one party(ies) against another, in a court of law presided over by a judge
- “Plaintiff” – brings action
- “Defendant” – must respond to the complaint
- Applies to individuals, businesses, non-profit

Litigation

- Different rules on evidence, jurisdiction and procedure in different countries
- Different outcomes (eg: US commonly awards high punitive damages awards)

Reasons to choose Litigation

- Process follows established procedures ->Credible outcome
- Impartial judge, application of law
- Judgment is binding (with right to appeal in the event of procedural error)
- Provides definitive outcome
- Power to compel witnesses/evidence under threat of fine or imprisonment/sequester assets (not available in arbitration)
- **But:** likely to negatively effect parties' relationship
 - can be lengthy and costly

“Forum non conveniens”

- A Court has discretion to refer a plaintiff to a more appropriate forum (jurisdiction).
- Reasons include:
 - Fairness
 - Other country's court better equipped?
 - Prevent excessive forum shopping
 - Conserve scarce judicial resources

Forum non conveniens – USA

- Plaintiff reasonably initiates action in a certain jurisdiction
- Defendant may ask a court to dismiss an action on the basis of FNC (burden of proof)
- Court considers:
 - Location of witnesses/evidence
 - Undue hardship on defendant/vexatious motive
 - Availability of alternative court
 - Public policy considerations
 - Location where the cause of action arose (out of jurisdiction?)

Is Forum non conveniens compatible with Brussels Regulations?

- Brussels Regulations were drafted with intention to draft a uniform system of rules on jurisdiction for all EU Member States
- “Brussels Regs preclude a court of a Member State from declining jurisdiction conferred on it by Art. 2 on the ground that a court of a non Member state would be a more appropriate forum for the trial”...(Owusu v NB Jackson (ECJ 2005)
- Generally in commercial law - parties own will and free choice ought to be honoured.
- Courts must balance need for legal certainty Vs justice for the individual in specific case

Enforcement of Court's Judgment

- three different ways in which judgments can be enforced abroad:
 - multilateral convention (e.g: Brussels I Regs)
 - bilateral treaties (eg: UK and Commonwealth countries)
 - "ad hoc" procedures

Enforcement of foreign judgments

- Even where a conflict of laws exists, most courts will recognize the validity of a foreign judgment in most cases
- Under international law, a court will apply comity (reciprocity) by discretion, taking into account the following:
 - did the foreign court have jurisdiction?
 - were fair procedures used?
- The Brussels I Regulations (recast) (Art. 36 & 37) ensures that judgments given in a member State are recognised and enforced in all other Member states without special procedure
- The European Enforcement Order permits enforcement of foreign judgments within EU without need for intermediate proceedings- (only relevant to uncontested claims)
- Under U.S. law, this authority is part of the Full Faith and Credit Clause of the U.S. Constitution

More broadly, a court may not enforce a foreign judgement where:

- The judgment:
 - Was obtained by fraud
 - It is manifestly against public policy
 - Conflicts with another final judgment
 - Seeks to enforce the tax laws of a foreign jurisdiction
 - the defendant was not served with the document in sufficient time to arrange a defence
 - The defendant has no right to appeal
- The foreign court:
 - Was not an impartial tribunal with compatible procedures
 - Did not have personal jurisdiction over defendant/ subject matter
- The foreign court proceeding was in conflict with a settlement agreement signed by parties

Enforcement of Judgments

- Enforcement of domestic judgment – payment of a monetary award or court can award seizure of assets within jurisdiction to force payment
- May be difficult where there is no bi-lateral treaty between the countries (eg: US has not signed any such treaties to enforce foreign judgments)

Difficulties in Enforcing of Foreign Judgments

- Plaintiff may need to file another suit to seek enforcement of the other court's judgment
- Local court may be protective of domestic party and may not grant enforcement on "public policy" grounds or lack of jurisdiction
- Can be time consuming and expensive
- Defendant will try to "frustrate" the process

Enforcement and Assets

- Where are assets located? Must be in reach of judgment of otherwise the action is pointless
- If defendant has no assets (s)he is "judgment-proof"
- "debtor's prisons" have mostly been outlawed around the world

There is no point suing a "man of straw!"



If foreign judgment is rejected:

- Decision could be challenged via appeal
- Try to rectify any defect in judgment which lead to rejection of enforcement
- Re-litigate in jurisdiction you want to enforce in (Increased time and costs) (*BUT check not prevented from doing this by exclusive jurisdiction clause)

Pop Quiz

1. Which are the four correct methods of ADR? (Arbitration, Negotiation, Conciliation, Legislation, Mediation)
2. What are the advantages of Negotiation?
 - a. Its Quick
 - b. Cheap Process
 - c. Privacy
 - d. The outcome is decided by an expert
 - e. Right to appeal
3. Do the parties have to meet in mediation?
4. What is an arbitrators role?
 - A. Sit and talk
 - B. Acts like a judge

- C. Acts like a jury
 - D. Acts like a police officer
5. What is the name of the Convention that regulates international enforcement of arbitration awards?
 6. On what grounds would a court not enforce a foreign judgment?

TECHNOLOGY AND IT CONTRACTS

“Operating in a Borderless World”



What do we mean by IT contracts?

- Computer software
- Computer Hardware
- Information systems and databases
- Programming languages and code
- IT services of all descriptions (IT helpdesk, systems integration, data management, management of network systems)
- Cyber security/encryption
- Mobile payment systems
- Content and apps
- e-commerce and m-commerce
- Storing data in the “cloud”

IT systems facilitate business

- Communications (telephony, email, messaging)
- Business systems automation (operational systems – mechanical processes to ordering)
- Productivity tools (HR programs to financial reporting)
- Connecting with the customer (ecommerce, social media, CRM reaching out to consumers)

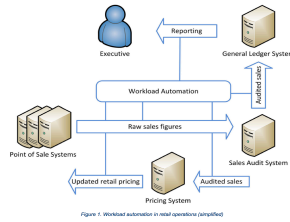


Figure 1: Workload automation in retail operations (simplified)



What we will cover today

1. Cloud Computing
 - “The Cloud”
2. E-commerce (and m-commerce)
3. Latest Trends
 - “The Internet of Things”
 - Wearable Technology
 - “Big Data”

Key Contractual Considerations

- Understanding technology and its business efficiencies/limitations:
 - What?
 - Why?
 - Where?
- Risks and rewards
- liability and limitation
- Protection of Intellectual Property
- Service levels/service credits
- Jurisdiction and Governing law
- Dispute resolution - international contracts -forum, arbitration, enforcement (assets and jurisdiction)

Ways to think about technology contracts

- **In the Past:** Business Procurement - acquiring hardware, licensing software, computer programming, system management; data base management.
- **Present** - renting Vs buying; outsourcing and off-shoring; cloud computing; e-commerce, social media, content convergence
- **Future** - what does the future hold? The power of giants Facebook, Apple, Amazon and Google in the future and the rise of robots...

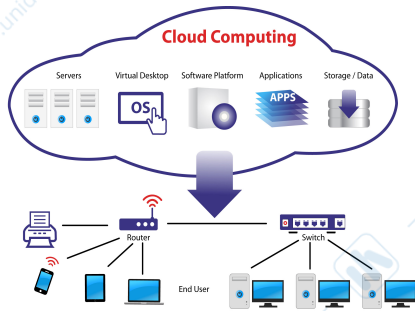
The Cloud



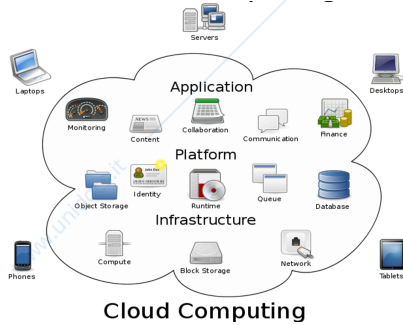
Cloud computing is the mass-market availability, through the internet, of a whole range of computer and communications technology-enable resources, provided as a service

The “Cloud” Phenomenon

- In just a few years it has become a tech that affects everyone’s daily lives
- Instead of buying every app and server we need, now we rent it
- We maintain friendships via apps, mobile phones and tablets run powerful apps in the cloud



Cloud computing



Current "Cloud" Players

Currently there are four big operators in the cloud computing market:

- Amazon Web Service: Elastic Compute Cloud (EC2) and Simple Storage Service (S3)
- Salesforce: Force.com
- Alphabet (Google) – Google Apps
- Microsoft – Azure – Office 365

The Cloud

- Eliminate need to purchase or install software, run own application and data servers
- Delivery of IT services over the internet on standard terms
- Massive economies of scale means lower business costs
- Increased reliability of internet coupled with advances in encryption are key to success

Issues to Consider in Cloud Computing

- **Key Benefits**
 - Low fixed charges
 - fixed Improved support/maintenance
 - Anytime, anywhere access
 - Minimise cap ex
 - Reduce internal management overhead
 - Scalable
 - Flexible (buy only what you need)
- **Key Risks**
 - Untailored solution ("standard" offering)
 - Contracting on fixed terms with limited warranties
 - Lack of integration with legacy systems
 - Lack of control over data
 - Risk of "lock in"
 - Risk of hidden charges for extra services
 - Compliance issues (privacy, encryption)
 - Reliance on Internet: a single point of failure?
 - What if supplier goes bust?

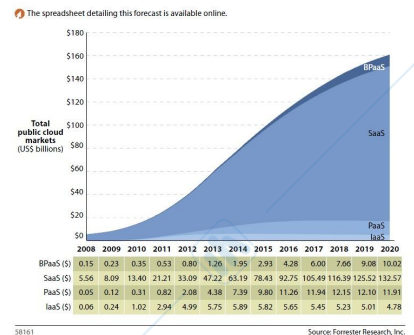
The "Cloud" – Risks

- Data in the cloud - you can no longer rely on your own firewalls and perimeter to prevent data leaks and breaches
- Security in the cloud era must focus on data rather than infrastructure
- cloud data encryption is critical

Key Risks in Cloud Computing

1. Privacy/data protection
2. Security
3. Service levels and service credits

Figure 3 Forecast: Global Public Cloud Market Size, 2011 To 2020



38161

Source: Forrester Research, Inc.

4. Exit and termination

KeyRisk1:privacy/data protection iCloud Celebrity Photo Leak

- August 2014: anonymous hackers obtained explicit photos of Hollywood celebrities, and publicized this material on the Internet
- A flaw in the iCloud platform allowed an unlimited amount of account password tries via the Find My iPhone interface
- Hackers were able to implement “bruteforcing”, (i.e. systematically trying multiple popular passwords until access is granted)



Key Risk 1 – Data protection/privacy

- Contractual provisions must cover:-
 - 1) Access to personal data
 - 2) Non-disclosure obligations
 - 3) Return of all data at the end of contract
- How well do you know/trust the supplier?

Key Risk 2- Security

- **Electronic**
 - Hackers, Trojan horses, viruses etc.
 - Alternative infrastructure and escrow
- **Physical**
 - On-site security guards
 - Inspection rights
- **Reliability:** Pick the correct service provider

Key Risk 3- Service Levels and credits

- Service levels/credit regarding availability and performance
- Point of access for measurement?
- Liquidated Damages/Service Credits
- LDs/Penalties

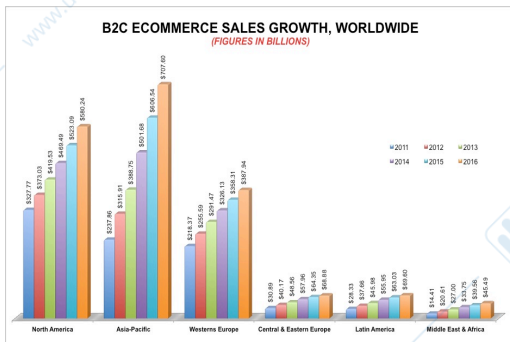
Key Risk 4- Exit and Termination

- Danger of being ‘locked-in’
- Retrieval of data and transition of services
- Consider the use of escrow – for both data and source code
- Disputes – carefully consider choice of law and means of dispute resolution.

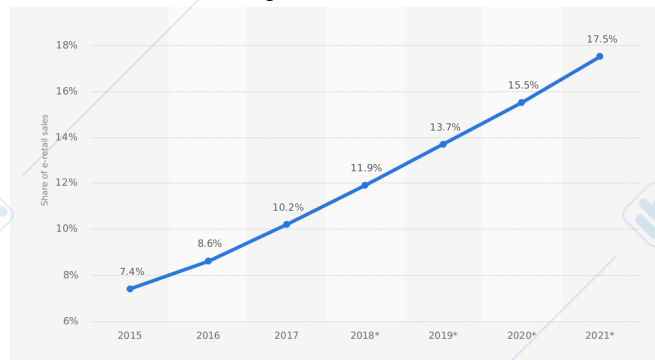
Ecommerce

Business Advantages:

- Provides an additional sales channel
- PLUS CRM advantages (“getting closer to your customer”, profiling for marketing)
- B2C ecommerce sales will increase this year to reach \$4.2 T (source: eMarketer)
- Growth driven by:
 - rapidly expanding online user bases in emerging markets
 - increases in m-commerce sales
 - advanced shipping and payment options
 - push into new international markets by major brands



E-commerce share of total global retail sales from 2015 to 2021



Challenges presented by e-commerce

- Making electronic transactions secure through the legal recognition of emerging technology – boost integrity and reliability of electronic messages
- Increase protection of electronic medium from external threats (hacking, viruses, worms)
- Need to build certainty
- Intangibility of electronic communications raise problems:
 - Does an email originate from the person claiming to send it?
 - How secure is the message?
 - Is the message received the same as that sent?

- What legal status does an electronically signed message have?

Ecommerce Regulation

- *"Government intervention should be to ensure competition, protect intellectual property and privacy, prevent fraud, foster transparency, support commercial transactions and facilitate dispute resolution."*

USA, A Framework for Electronic Commerce (Clinton Administration)

US Regulation

- Federal Trade Commission (FTC) regulates ecommerce activity
- Includes regulation for:
 - commercial email
 - Online advertising
 - Consumer privacy
- Uniform Commercial Code, State common law

UNCITRAL Model Law on E-Commerce (1996)

- Aims to enable the commercial use of modern means of communication and storage of information
- Establishes rules for formation and validity of contracts concluded electronically and retention of data messages
- Enacted in 70 jurisdictions

UNCITRAL-Model-Law on Electronic Signatures (2001)

- UNCITRAL (UN Commission on International Trade Law)
- Deals with confidentiality/integrity problems associated with electronic communications
- Need for establishing the identity of the sender of electronic communications
- Necessary to meet the signature requirements prescribed by law
- Enacted in 30 jurisdictions
- Provides a workable framework but is not comprehensive – States adopting the Model law must work out various legal issues (eg: levels of liability)

UNCITRAL ES Model Law

Founding Principles:

- Harmonisation and certainty – good alternative to international convention which take years to negotiate and ratify
- Flexible: Model law may be amended by States which adopt it to better suit its needs therefore more likely to be widely adopted->more international certainty
- Model law preserves party autonomy (Art 5)
- Parties may vary the law subject to any limitations that may be imposed by the applicable law (eg: public policy)
- Technology neutral (Art 3)– does not specify type of technology (eg Asymmetric cryptosystem) therefore does not become outdated as new tech emerges
- Non discrimination: the place of origin of electronic signatures and certificates does not determine the legal effectiveness
- Applicability: used in "commercial" context (Art 1): but probably not intended to override consumer protection legislation
- Reliability of e-signature:
 - Identification
 - Intention to be bound
 - Could include digital signature, digitised image of handwritten signature, biometrics (finger print, iris scan)
 - Signature creation must be linked to a signatory and no other person and must be under control of signatory and no other person.
- Creation of electronic signature:
- Envisages three parties:
 - The signatory
 - A third party certificate provider
 - The party who relies on the data provided (receiver)
- Cross-border recognition of certificates and e-signatures (art 12) – based on "reliability" not the geographic location where the signature was created or certified

EU Directive on Electronic Signatures (2000)

- Intended for the EU internal market
- Some similarity with UNICTRAL Model Law
- Makes distinction between "certificate" and "qualified certificate" (must meet benchmark in Annexes)
- Provides legal equivalence of e-signatures to handwritten signatures and admissible as evidence in legal proceeding (Art 5)

Electronic Communications Convention (ECC)

- Builds on and updates provisions of both Model Laws
- Enhances legal certainty of electronic communications across borders

EU Regulation

- Electronic Commerce Directive adopted in 2000, sets up an Internal Market framework for electronic commerce
- harmonised rules on issues such as:
 - transparency and information requirements for online service providers
 - commercial communications
 - electronic contracts
 - limitations of liability of intermediary service providers.

Ecommerce Directive applies to:

- news services (such as news websites)
- selling (books, financial services, travel services, etc.)
- advertising
- professional services (lawyers, doctors, estate agents)
- entertainment services
- basic intermediary services (internet access, transmission and hosting of information)
- free services funded by advertising, sponsorship, etc

Ecommerce Directive does not apply to:

- The field of taxation
- Data protection
- Gambling activities

Key Aspects of Ecommerce Directive

- Internal Market clause: providers of online services are subject to law where established (not where service is accessible)
- Mandatory consumer information + rules on online advertising and SPAM
- No liability for intermediaries: except where illegal content is notified, they must remove it

Ecommerce Directive

- Operators have to comply with laws of the EU country where they have their registered headquarters (not where the servers, email addresses are located) "country of origin rule"
- Operators must publish basic information on their activities (name, address, trade register number etc.) in a permanent and easily accessible form

e-Advertising requirements

- Communications must be clearly identifiable as advertising
- clearly identify the person/company responsible
- promotional offers, games or competitions are clearly identifiable
- and the conditions must be easily accessible and presented in clear and simple terms

Spam

- Unrequested e-mail must be clearly identifiable
- Companies who send out spam emails must respect 'opt-out registers'
- Member States can decide to outlaw Spam (eg: in Italy & Austria it is illegal to send spam

(legislative decree no. 196/2003 - Sections 121-132)

Online Contracts

- All EU countries must give equivalent legal status to Online contracts as paper contracts
- Consumers must be able to save and print out contracts and general conditions
- Online contracts must specify:
 - the technical steps to conclude the contract
 - whether or not the contract will be filed by the service provider and whether consumers can view it at a later stage
 - how consumers can identify and correct typing errors before placing their order
 - the languages in which the contract can be signed

Online orders

- the service provider must confirm receipt of the order without undue delay and electronically
- the order is considered to have been received when the seller (consumer) is able to access it
- Some "home" laws will apply in case of consumers

Liability of service providers

- Online service providers who act as "mere conduit", caching or hosting services providers are not responsible for the **information they transmit or host** if they fulfil certain conditions.
- In the case of hosting service providers, they are exempted from liability as long as:
 - they do not have actual knowledge of illegal activity or information and;
 - if they obtain such knowledge or awareness, they act at once to remove or to disable access to the information

EU Digital Single Market Strategy

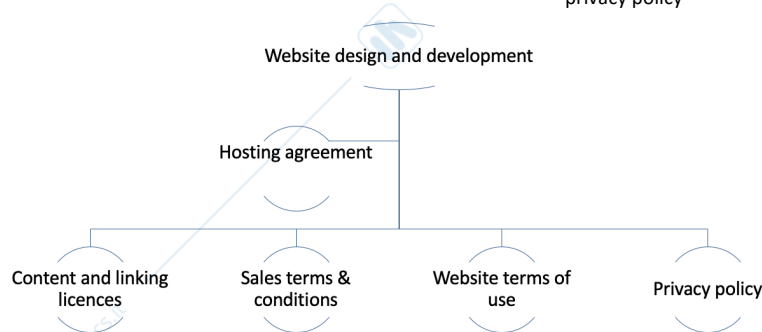
- Revised Payment Services Directive and new rules on cross border parcel delivery services
- New rule to stop unjustified geoblocking (Dec 2018)
- Revised consumer protection rules (2020)
- New VAT rules for online sales (2021)
- GDPR – data protection and privacy (2018)

Proposed ePrivacy Regulation

- Draft presented in January 2017, by the European Commission it is a proposal for a new Regulation on electronic communications to consolidate rules across member states and align with General Data Protection Regulation (into force May 2018).
- it establishes the principles of security and confidentiality of all forms of electronic communication
- establishes "opt in consent" rules about the retention and use of traffic data in electronic communications.
- Unsolicited Marketing: opt in consent to marketing (including via email and SMS)
- Cookies: now tracked within software and the user's browser rather than pop up consents from individual websites
- Confidentiality: privacy requirements extend to including "over the top" providers like Gmail, Facebook messenger, WhatsApp and Netflix
- Penalties for noncompliance are up to Euro 20 million or 4% of total worldwide annual turnover, whichever is higher.

Types of E-commerce Contracts

- Website design and development agreements
- Hosting agreements
- Content and linking licences
- Consumer facing documents:
 - sales terms and conditions
 - website terms of use
 - privacy policy



"Big Ticket" IT Disputes

- Be Aware of the risks!
- BskyB v EDS - £200 million damages awarded notwithstanding contractual cap on liability at £30 million.
- Contract to build Customer Management System for SKY

Sky (UK) v EDS (now HP)

- Damages Claim - £700 Million
- Value of contract - £48 Million
- Cap on liability - £30 Million
- Legal costs - £70 Million each!
- Length of case: 2002 – 2010
- **Importance:** Overrode agreed liability cap of £30M as EDS was found to have made "fraudulent misrepresentation" re ability and timeframe to complete IT project

Social Media and Apps

- Facebook: 2.5 Billion active monthly users, revenue grew from \$7.87 billion (2013) to \$70.7 billion (2019).
- The growth of Apps
- Blogs/Forums/Wiki links

What are they selling??

Consumer IT contracts

- Facebook - privacy setting controversies:

"We may share your information with third parties, including responsible companies with which we have a relationship." (Facebook privacy policy)

- (Following the Cambridge Analytica scandal FB users now have more control over privacy settings)

What's Hot? - Latest Trends

1. The Internet of Things
2. Wearable Technology
3. Big Data

"Internet of Things"

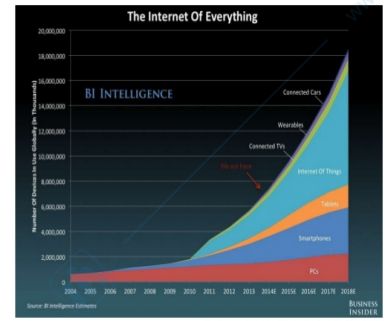
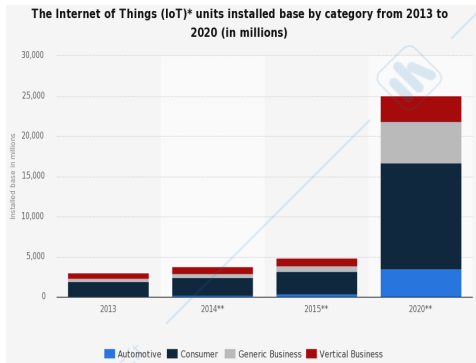
It is the network of physical objects - devices, vehicles, buildings and other items - which are embedded with electronics, software, sensors and network connectivity, which enables these object to collect and exchange data

"Internet of Things"

- allows objects to be sensed and controlled remotely across existing network infrastructure
- creating opportunities for more direct integration of the physical world into computer-based systems
- improved efficiency, accuracy and economic benefit
- The future of the way we will live
- The number of connected objects is forecast to grow to 50 billion in 2020 (recent Cisco report)
- **Examples:** smart grids, smart homes, intelligent transportation, smart cities

Examples of IoT in Smart Cities

- buildings that save power by adjusting heating and lighting according to the movements of their users and the weather
- networked traffic signals that dynamically manage traffic movement in response to changes in congestion and accidents
- infrastructure that senses wear-and-tear and issues repair alerts (including bridges, cables and water pipes)



Countries with highest penetration of IoT

- Korea
- Denmark
- Switzerland
- USA
- (* Italy not in top 25)

Types of Data Collected

- surfing the web on a laptop or smartphone can tell advertisers what websites a user frequently looks at -> profiling for marketing
- smart-home products offer insight into much more personal information of users:
 - health
 - biometrics
 - activity inside their home

“Internet of Things”

- More devices than ever are:
 - listening to us
 - monitoring us
 - tracking us
 - recording us

Key Legal Issues:

- Data protection/privacy
- Network Security -> preventing crime and cybercrime
- Managing “Big Data”

Data Protection

- Key issues for businesses using IoT-
 - Filtering vast amounts of data so that personal data that is irrelevant is not collected
 - Risk that data may be re-purposed – i.e.: consent only given for purpose it was originally collected.
- With many IoT applications operating together and communicating with each other autonomously, data subjects will be unaware of all the processing taking place
- -> Difficult to give the right consent and exercise their rights in respect of the data collected

Network Security Risks

- Security experts concerned at the lack of security credentials of the devices
- Internet itself is inherently un-secured
- Many IT “standards” used for IoT are not very secure (eg: wifi enabled video cameras are easy to hack!)

Security - Real life Risks

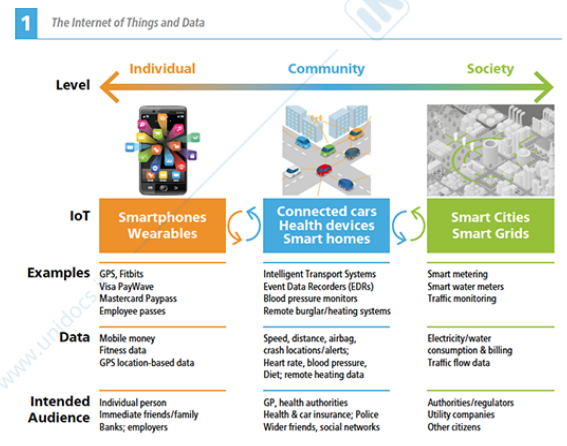
- Who gets access to all this information?
- Could criminals use your central heating system to access your mobile phone and gain access to your credit card details?
- Could criminals hack into your lighting system and tell when you are not home so they can rob your house?

Regulation of IoT

- Governments and regulators have started to focus on IoT
- Difficulty of balancing consumer protections with “not getting in the way of innovation”

EU Regulation

- EU Commission – published report on public consultation on IoT
 - Top issue to address is loss of privacy and data protection



- Industry should adopt common technical “standards”
- Report suggests IoT should be designed from the start to enable:
 - Right of deletion
 - Right to be forgotten (ECJ: Google Case)
 - Data portability
 - Privacy and data protection principles

Europe’s Article 29 Working Party

- Data Protection Regulators
- Opinion published (October 2014) focussing on:
 - **wearable technology:** clothes, watches and contact lenses that have embedded sensors, microphones and cameras that can record, monitor and communicate data;
 - **quantified self:** pedometers or sleep monitors allow individuals to record and monitor their lifestyle
 - **home automation (domotics):** connected households using smart fridges, lighting & smart security systems

Key Concerns Raised in WP Opinion

- **loss of control** over personal data which is communicated between individuals, devices and backend systems
- **low-quality consent:** no obvious point at which the end user can give consent to IoT devices and no alternatives to the end user's personal data being created, stored or shared
- **Risk of re-purposing data:** collected for a purpose but used for another
- **intrusive identification** of behaviour patterns and user profiling
- **limitations in remaining anonymous** whilst using services: wearing IoT objects that are close to the data subjects results in a range of identifiers being available (e.g. MAC addresses) with re-identification of anonymised data also an issue
- **security risks:** low quality security can make the data vulnerable to being attacked at various points

EU Regulation

- None specifically for IOT.
- Balancing privacy with need to stimulate innovation.
- Network and Information Security Directive (EU) – obliges “operators of essential services” to implement appropriate cyber-security measures.
- Some coverage through GDPR (May 2018)

US Regulation

- US regulators are also starting to focus on privacy and security
- The Technology industry must start adopting some industry standards on this – by designing into the system security and privacy features from the start
- The US regulator (FTC, 2015) – no need for specific IoT legislation yet
- Issued non-binding guidance - “its up to industry to do right by their customers”
- Recommendations for device manufacturers to improve security standards
- Recommended - strong, flexible, and technology-neutral legislation that requires companies to tell customers when there's a security breach

Wearable Technology

Types of Wearable Technology

- Fitness tracker
- Health monitor
- Monitor Energy levels and alertness
- Communications gadget
- Navigation tool



- Part of the “Internet of Things” phenomenon
- Health monitoring technology - Particular concerns re privacy for “sensitive personal data”
- Devices such as Google Glass – production halted due to privacy concerns as people could be recorded without consent (and due to high price at \$1500!)
- Collecting data through wearable tech is subject to data protection laws
- Employment contracts should be updated to ensure protection of company’s Intellectual Property and confidentiality

Into the Future...

What will happen when these sensors are embedded in the human body rather than worn on it??

“Big Data”

- Big Data is a broad term for data sets that are so large or complex that traditional data processing applications are inadequate to capture, manage, process and store it
- Massive need for servers to store all this data!
- Data is generated by mobile, aerial sensors, business transactions, software logs, CCTV, microphones, video, wireless sensor networks
- Opportunities for business to use big data to gain insight and drive growth – analytics for marketing



Issues with Big Data

- 44% of companies do not have a data governance policy
- Increased pressure on IT networks
- Requires additional budget
- Data protection concerns (especially for sensitive data)
- Security risk
- Who owns Big Data?

The Future of Technology...

Future Tech Trends

- Everything "on demand"
- Deep learning accelerators
- Robots
- The Internet of Bodies – digital pills, embedded IoT devices which interact with the environment
- "Smart" Autonomous vehicles
- Social Credit algorithms – facial recognition and biometrics to identify people and collect data on social media for approval of access to products or social services
- Multi-experience – immersive interactive technology – augmented reality, virtual reality



"Quotes"

It has become appallingly obvious that our technology has exceeded our humanity.

Albert Einstein

Computers
are useless.
They can only
give you answers.

- PABLO PICASSO -

"Information technology and business are becoming inextricably interwoven. I don't think anybody can talk meaningfully about one without the talking about the other". (Bill Gates, co-founder, Microsoft)

"Technology has the shelf life of a banana." (Scott McNealy, co-founder, Sun Microsystems)

"Technology... the knack of so arranging the world that we don't have to experience it".

-Max Frisch