What is comparative law?

- Learning about legal institutions, court decisions and doctrines;
- Being confronted with the otherness of foreign law;
- Studying the similarities and differences between two or more countries or legal systems;

Revising one's own perception of one's own legal system 'whose doctrines will seem less inevitably correct, its debates less essential, and its reality less straight forward than before' (Kischel).

<u>To understand foreign law, one needs to know:</u>
- The sources;
- The court decisions;
- The academic production;
- The daily practice of institutions;
- The custos;
- Interactions with other legal systems;
- Historical, cultural and social background;

One needs, in other words, a holistic approach

<u>5 main legal systems in the world:</u>
- Civil Law
- Common Law
- Customary Law
- Religious Law
- Mixed Legal Systems

The various legal families

Common Law systems:

- Common law systems developed from the English system.
- English Law has spread to many other countries such as New Zealand, Australia, the USA and Canada.
- There are approximately 80 countries which apply the common law system in the world –formerly part of or influenced by the former Britsh Empire.

<u>To which territory does English Law apply to?</u>

→ England and Wales
- Scots Law applies in Scotlant;
- Northern Irish Law applies in Northern Ireland.

Common Law = 'the body of law derived from judicial decisions, rather than from statutes or constitutions' (Black's Law Dictionary).

- Common law systems are largely based on precedents
- Doctrine of stare decisis (or binding precedents) means that 'stand by the decision'
- Courts are bound to follow previous decisions made by judges in equal or higher courts > form a precedente.

Historical part:
- The historical development of the common law of England started with William the Conqueror in 1066.
- Before this date there was no single national legal system (a system of 'custom' was applied by a variety of local decision-making bodies)
- William the Conqueror decided to establish a system of central or national government and a centralised system of justice
- A practice was started of sending judges around the country to hold assizes (or sittings) to hear cases locally.
- This enabled the judges, over a period of roughly 200 years, to take the best local laws and apply them throughout the territory.
- This allowed for the unification of the previously existing local systems of law and to make it into one legal order which could be applied consistently throughout the nation, thus creating law which was `common to the whole country i.e., common law.
- As the work of the common law courts grew, the judges began to use previous decisions as a guide for later cases.
- This was the beginning of the doctrine of precedent.
- The King was regarded as retaining a residual discretion to dispense justice in personal appeals made directly to him
- disappointed litigants could present a petition to the King, appealing to his conscience to provide them with justice.
- The King progressively delegated this power to the Chancellor
- As the number of cases grew, it became the Court of Equity (or Chancery)
- 2 parallel court systems: the Courts of Common Law and the Courts of Equity
- In 1873, the Judicature Act 1873 abolished the courts of equity and established a comprehensive unified Supreme Court structure comprising a High Court and a Court of Appeal.
- Courts administering both common law and equity
- NB: The most superior of the courts in England and Wales was the House of Lords until 2009 when it was replaced by the Supreme Court of the UK.
- Final court of appeal in the UK for civil and criminal cases from England, Wales and Northern Ireland.

CIVIL LAW SYSTEMS:

> largely based on a Code of Law
> Codified statutes are of primary importance
> Courts lack authority to act if there is no statute
> Have their origin in Roman Law

- Civil Law system also referred to as ‘European continental law’ - Most widespread type of legal system in the world
- There are approximately 150 countries in the world which apply the civil law system (in various forms).
- Derived mainly from the Roman Corpus Juris Civilus, a collection of laws and legal interpretations compiled under Emperor Justinian I between A.D. 528 and 565
- French jurist Portalis (late XVIII early XIXth century) noted: ‘the task of the legislator is to determine those principles most conducive to the common good […] The skill of the judge is to put these principles into action, to develop and extend them to particular circumstances by wise and reasoned application’.

- The basis of the French legal system is laid out in a key document originally drawn up in 1804: the Code civil ("Napoleonic code") established in 1804 - it lays down the rights and obligations of citizens, and the laws of contract, property, inheritance, etc.
- Original aim of the Code: to be a set of rules written in a clear style and intelligible by lawyers and non-lawyers alike.
- The French Code civil enacted the civil law applying to the whole country
- Result of a long historical development
- Absorbed both the rules from the droit écrit of the south (influenced by the principles of Roman law) and the droit coutumier of the north (influenced by the German Frankish customary law)
- The French Code civil remains the cornerstone of French (private law) to this day - it has been updated and extended many times
- it is considered the first successful codification

Napoleon said: 'My real glory is not to have won forty battles: Waterloo will erase the memory of all these victories. What nothing will erase, what will live eternally, is my Civil Code'.

- Until the 2016 revision, most of the articles in the Civil Code had remained untouched
- However, reform became necessary for various reasons:
• judicial re-interpretation had become too extensive growing body of case law interpreting the Code meaning that the 1804 Code had ceased to be an accurate statement of the law of contract applied
• loss of international influence: French contract law perceived to be less attractive than some common law regimes as applicable law in international commercial contracts -> modernisation intended to make it more competitive in a globalising world.

- The highest court in France in private law matters is the Cour de cassation.
- It has the power to confirm a judgment or to quash and annul it.
- If quashed and annulled, the case is sent before another court of first instance or a court of appeal in order to deliver a decision respecting the ruling of the Cour de cassation. This process is called the renvoi.
- The Cour de cassation rules on points of law, not on the facts.
- The facts of the case are re-examined by the court of first instance or a court of appeal.
- French civil law, and French contract law in particular, have strongly influenced the legal systems of many countries in the world.

<u>WHATS A CONTRACT?</u>

→ ENGLISH LAW

What is a contract? No set defintion of a contract in English Law.
- Central role played by the judge in the elaboration of the rules of the law of contract.
- Emphasis on legal certainty and economic efficiency.

3 conditions in order for a contract to exist in English law:
- (1) an agreement (i.e. an offer and an acceptance);
- (2) an intention to create legal relations; and
- (3) consideration

- First condition: the formation of a valid contract requires the agreement of the parties;
- When deciding whether or not a contract has been concluded, the courts look for an offer made by one party (the offeror) and a corresponding acceptance by the other party (the offeree).
- The test of whether there is an agreement is an objective test:
- How the proposal would be understood by a reasonable person in the position of the offeree: could such a responsible person believe that an offer was made?
> the English courts do not generally seek to ascertain the subjective intentions of the parties. > It is their intention, objectively ascertained, that counts.

English legal historian John Baker wrote: 'Despite many judicial expeditions to find him, the reasonable man has not been reduced into captivity'

- Sometimes, a series of propositions and counterpropositions will be made before an agreement can be reached.
- In order to decide whether the reasonable person would find that the parties reached an agreement, consideration must be given to the words and conduct of the parties
- In deciding whether the parties have reached agreement, the first step is to consider whether an offer has been made.
- An offer is a statement by one party of their willingness to enter into a contract on the terms that they have put forward.
  > Proposition that is sufficiently precise and definite to be capable of being turned into a contract by acceptance.
  > Definite promise to be bound, without more, if the offeree agrees to the offer terms

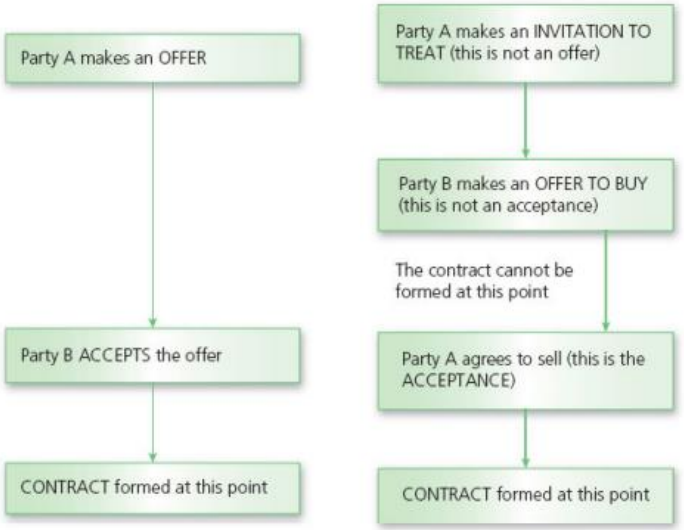
E.g. Sofia shows her bicycle to Duarte and tells him: 'you can have my bicycle for 100€'. This constitutes a valid offer.

- In deciding whether an offer was made, the English courts are not concerned to ascertain the subjective intention of the party alleged to have made the offer
  - the judge will examine the intention of the party as that intention appears to other.
    > the court focuses attention on the objective intention of the parties, not their subjective intention.
- Not every statement made by one person to another in the course of negotiating a contract is an offer
- It is necessary to distinguish between firm offers and and mere 'invitations to treat'.

Offer v. Invitation to treat
- An invitation to treat is an invitation to the other party to enter into negotiations; an invitation to make an offer.
- It does not constitute an offer.
- The invitee can decide to make an offer itself, leaving it to the original invitor to either reject or accept it.

Importance of the distinction:
- if an offer is accepted, this will result in a binding contract, provided the other essential elements of a contract are satisfied;
- if an invitation to treat is 'accepted', it will not create a contract

Importance of the distinction:



Case scenario 1: The latest computers are displayed in a shop window at a very attractive price. A customer comes into the shop and declares that he would like to buy one of the computers at the advertised price. Another customer has seen the computers advertised in promotional material that gives all the relevant information, including the price. He contacts the salesperson and tells him that he would like to buy one of the computers. The salesperson no longer wants to sell the computer at the advertised price.

Offer v. Invitation to treat

Gibson vs. Manchester City Council (1979)	- The House of Lord held that the language used indicated that this was an invitation to treat, inviting the tenant to make an offer to purchase, rather than an offer to sell which the tenant had accepted.
- Mr. Gibson was the tenant of a council house and was interested in buying it. - After having completed a form which asked the council to inform him of the price at which the council was willing to sell the house, and details about mortgage facilities. - the City Council sent him a letter with the requested information stating that it '*may be prepared to sell the house*' to him. It was accompanied by an application form for Mr Gibson to fill. - Mr Gibson replied that he found the price too high, the Council replied that it did not want to change the price - Later on, Mr. Gibson wrote to the Council to '*carry on with the purchase as per my application*'. - The Council decided to no longer sell the house.	- Lord Diplock: The words I have italicised ["*may be prepared to sell the house to you*" […] seem to me […] to make it quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by Mr. Gibson's written acceptance of it. The words « may be prepared to sell » are fatal to this; so is the invitation, not, be it noted, to accept the offer, but « to make a formal application to buy » upon the enclosed application form.

Communication of the offer:
- The offer will be effective only on communication of the offer to the offeree.
> the offeree must be aware of the offer before s/ he accepts

> If the offer is contained in a letter which is posted, the offer is effective only when the letter is received by the offeree.

- Advertisements, displays of goods in shops will usually be regarded as mere invitations to treat

Display of goods in show windows

Fisher v Bell (1961): - Shopkeeper placed a knife in its shop window with a price tag stating "Ejector knife–4s." - Under the Restriction of Offensive Weapons Act, 1959, it was illegal to sell or offer for sale this type of knife. - Police office walked past the shop, saw the knife in the window and informed the shopkeeper that he would be reported for offering for sale such knife - Question: did the display of the knife in the show window constitute an offer for sale?	Held: the displaying of the knife in the shop window was a mere invitation to treat – the shopkeeper could refuse to sell the knife

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Display of goods in show windows

Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953) - Self-service store operated by Boots selling drugs - The Pharmacy and Poison Act 1933 required, for the sale of certain of the drugs displayed, be 'effected by or under the supervision of a registered pharmacist'. - no pharmacist near the shelves to supervise the sale, only at the cash-desk. - The question arose as to whether Boots had acted unlawfully.	Held: the display of goods in the self-service shop constituted an invitation to treat. The contract was concluded at the cash-desk, thus under the supervision of a pharmacist, as required by statute.

Display of goods in show windows

Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953)

Somervell LJ: "although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shop-keeper or someone on his behalf accepts that offer. Then the contract is completed."

> Deciding otherwise (i.e. construing the display of goods as an offer) would entail that '*once an article has been placed in the receptacle [basket, shopping cart] the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred*'.

Advertisements

Partridge v Crittenden (1968):

Mr Partridge had put on sale in a magazine 'Bramblefinch cocks, Bramblefinch hens, 25 s. each.' However, these birds were protected by law and Mr. Partridge was charged with unlawfully offering sale wild birds contrary to the Protection of Birds Act 1954.

Held: the advertisement was an invitation to treat and not an offer and so Mr Partridge could not be convicted.

Lord Parker stated that:

'I think when one is dealing with advertisements and circulars (...) there is business sense in their being construed as invitations to treat and not offers for sale.'

> Limited stocks argument: Idea that otherwise, the advertiser might find himself contractually obliged to sell more goods than he in fact owned

Advertisements

Carlill v. Carbolic Smoke Ball Co (1893)
- Company placed several advertisements in newspapers to market its product, stating that:

'£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter. (...).'

Carlill v. Carbolic Smoke Ball Co (1893)
- Mrs. Carlill read the advertisement, bought the smoke ball, used it as instructed, but contracted influenza. She claimed the £100.

- The company refused to pay her, arguing that thead was mere advertising and was not to be taken seriously.

- Mrs. Carlill filed a lawsuit for breach of contract against the company.

Bowen LJ affirmed that:
'We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "1000 l. is deposited with the Alliance Bank, showing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter — that is, the sincerity of his promise to pay this 100 l. in the event which he has specified. […]
Was it intended that the 100 l. should, if the conditions were fulfilled, be paid? The advertisement says that 1000 l. is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100 l. would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.'

FRENCH LAW

The Notion of Contract

- The French approach has its roots in Roman law, in canon law and in the philosophy of the Enlightenment.
  > Set out in the writtings of Domat in the XVIIth century ('Les lois civiles dans leur ordre naturel'), and in the XVIIIth century by Pothier in his Treaty of Obligations
  > Enshrined into the Code civil.
- Fundamental role of the law, seen as the expression of the general will.
- Limited role played by the French judge.

The definition of a contract:
- Inserted in the Civil Code: Art. 1101 of the French Civil Code: a contract is an agreement by which two or more persons express their willingness to create, modify, transfer, or extinguish obligations.

→ The formation of a contract
- Art. 1113 of the French Civil Code: a contract is formed by the meeting of an offer and an acceptance expressing the parties' willingness to be bound. Such willingness may be expressed in words or clearly implied from the relevant party's unequivocal conduct.

→ The characteristics of an offer
- Art. 1114 of the French Civil Code: An offer, whether it is made to a specific person or to the world at large, contains all the essential elements of the proposed contract and indicates the will of the offeror to be bound in case of acceptance. Failing this, it is only an invitation to enter into negotiations.

→ Advertisements
- Advertisements are normally considered as offers in French Contract Law.

Advertisements

Maltzkorn c. Braquet (1968): - advertisement in a newspaper proposing the sale of a piece of land for a stated price of 25,000 francs - - Mr Maltzkorn told the seller that he accepted the offer. - The seller refused to sell him the land, claiming that the ad was a mere invitation to treat.	Held: the Cour de cassation affirmed that there is a presumption that an advertisement in a newspaper for the sale of asset is an offer can be rebutted in the presence of factors suggesting otherwise . > an offer made to the public at large binds the offeror vis-à-vis the first person who accepts it in the same way as an offer made to a specific person

Advertisements

Maltzkorn c. Braquet (1968): - advertisement in a newspaper proposing the sale of a piece of land for a stated price of 25,000 francs - - Mr Maltzkorn told the seller that he accepted the offer. - The seller refused to sell him the land, claiming that the ad was a mere invitation to treat.	

→ Display of goods in show windows

- Displays of goods in shop windows and on supermarket shelves usually constitute offers, provided the price is displayed.

Exploding lemonade bottle (1964) - A customer was injured when a bottle of Vittel lemonade that had just been taken out of the basket at the checkout exploded before it had been paid for.	Held: the display of goods on the supermarket shelf constituted an offer and the offer was accepted when the bottle was placed in the purchaser's basket. > The customer could claim damages in contract

Policy reasons:
- The rule protects customers against a seller who advertises at a low price to lure people into his shop or onto his website, and then makes up some excuse for not selling to them.
- Limited stock argument does not convince French judges as they assume that an offer will automatically lapse when the stock is finished. ??

- 3 conditions for a contract to be valid in French Law:
Article 1128 of the Civil Code: The following are necessary for the validity of a contract:
1.The consent of the parties
2.Their capacity to contract
3.Consent which is lawful and certain

"Case scenario: On March, 19, 2019, João offered to sell his car to Caterina for 4000€ and told her that she will need to give him a definite answer by April 16, 2019. On April 10, 2019, Mario offered to buy João's car for 4500€, and João accepted. Unaware of this, Caterina informed João on April 15, 2019 that she would like to buy his car for 4000€. João replied that he no longer wished to sell her the car. Question: should João be entitled to revoke is offer to Caterina?
Case scenarios: - The solutions to these questions differ from one country to the other"

Revocation of an offer

English Law
- Revocation of an offer means that the offeror is no longer bound by their offer > demonstration of freedom of contract > it would be unfair if the offeror was bound to wait for an indefinite period of time before the offer was accepted.
- In English Law, an offer may be withdrawn at any time before it is accepted.

Routledge vs. Grant (1828) -Mr Grant offered to purchase Mr Routledge's house and gave him 6 weeks within which to accept the offer. -Before the expiry of this six-week period, Mr Grant revoked the offer - -Mr Routledge subsequently informed Mr Grant that he accepted his offer	-Held: the offeror was entitled to revoke his offer, and as such it had been validly withdrawn and Mr Routledge's purported acceptance was ineffective. -Best CJ: if a party make an offer and fix a period within which it is to be accepted or rejected by the person to whom it is made, though the latter may at any time within the stipulated period accept the offer, still the former may also at any time before it is accepted retract it; for it to be valid, the contract must be mutual

- Revocation of an offer: Policy reasons:
- Allowing revocation favours the offeror who may have changed their mind or discovered that they can sell the goods at a higher price to someone else
- On the other hand, the offeree relying on the offer may have taken action as a result before formally accepting the offer; e.g. negotiating a loan from a bank, travelling to see the good, etc. o que acontece?
- There is one exception to the rule that an offer may be withdrawn at any time before it is accepted: when consideration is given in return for the offer to remain open. > the offeree pays money to the offeror in order to keep the offer open.

NOVA SCHOOL OF LAW

Mountford v Scott (1975) -The offeror offered to sell the offeree his house for £10,000. -The offeree paid him £1 for an option to purchase the house at that price, exercisable within 6 months -Before the expiry of the 6-month period (and before the option was exercised), the offeror informed the offeree that he no longer wished to sell his house to him -The offeree subsequently exercised his option to purchase the house.	-Held: the offer could not be revoked within the six-month period. The offeror had promised to leave the offer open for six months and the offeree had given him £1 as consideration to keep his offer open for six months.

- For a valid revocation the offeror should communicate their decision to revoke to the offeree before the offeree accepts the offer.
- For revocation by post to be effective, It must be received by the offeree before they post their letter of acceptance

- Communication of revocation - An offer can be withdrawn using the same channel as the one used when the offer was communicated > E.g. if the offer was published in a newspaper, then a notice revoking the offer should be published in the same newspaper

Byrne & Co. vs. Van Tienhoven & Co (1880) - On 1 October, the offeror (based in the UK) posted a letter offering to sale certain specific goods (1000 boxes of tinplates) to the offeree. - On 8th October, the offeror changed his mind and sent a letter withdrawing the offer - The offeree (based in the US) received the letter of 1st October on 11 October and sent a telegram of acceptance on the same day, confirmed by posting a letter a few days later. - On 20th of October the offeree received the letter withdrawing the offer	-Held: the revocation of the offer was ineffective since, for a valid revocation it must be communicated. Therefore a contract had been formed between the parties on October 11 when the offeree accepted the offer. -The postal rule does not apply in revocation: postal revocation takes effect not when posted but on receipt by the offeree.

- Revocation of an offer does not need to come exclusively from the offeror - notification of an offer's withdrawal by a third party can also be effective.

Dickinson vs. Dodds (1876) -On Wednesday 10 June 1874, Mr Dodd offered to sell his house to Mr Dickinson for an agreed sum, and specified that the offer was to remain open until Friday 12 June, 9am -On Thursday afternoon, Mr Berry informed Mr Dickinson that the house had already been sold to someone else. -On Thursday evening, Mr Dickinson handed a letter of acceptance to Mr Dodds. Mr Dodds replied that it was too late.	Held: communication by a third party that the offer had been withdrawn was valid - James LJ: 'Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer."'

The revocation of an offer

French Law

The revocation of an offer - In French law, the offeror can revoke their offer before it is accepted:
> after the time period fixed by the offeror has passed; or
> after a reasonable period of time has passed.
If the offeror nevertheless revokes its offer, there will generally be no contract but the offeror will incur liability.

- However, revocability may lead to injustice. Revocation is considered to be abusive it it frustrates the legitimate expectations of the offeree.
E.g. > if the offer contains a time period within which it is to be accepted, or > if the offeree could reasonably believe that the offer would remain open for a reasonable time.

Chastan v Isler (1958): - On 11 August 1954, Mr Isler sent a letter to Mr Chastan informing him that he was willing to sell him his chalet for 2.5 million Francs. - Mr Chastan wrote back to Mr Isler saying that he planned to visit the chalet on the 15th or 16th of August. Isler approved of this arrangement in another letter. - On 14th August, Mr Isler agreed to sell the Chalet to Mr Puy. Unaware of this, on the 15th of August, Mr Chastan visited the Chalet and notified Mr Isler the next day that he wanted to purchase it at the stated price	Held: the fact that the offeror had agreed for the offeree to visit the Chalet on a certain date meant that it was implied that his offer would not be revoked before then. The court stated: 'whilst an offer may in principle be revoked at any time prior to its acceptance, that is not the position where the person making it has expressly or impliedly undertaken not to revoke it before a certain date'.

Acceptance

There are several ways in which an offer can come to an end:

- Acceptance: when an offer is accepted it will result in a contract.
- Rejection: if the offeree rejects the offer, it comes to an end.
- Counter-offer: if the offeree makes a counter-offer, then the offer is destroyed.
- Revocation: if the offeror revokes the offer, the offer comes to an end.
- Lapse of time: if the offer is for a specific period of time, the offer will automatically lapse after the stated time. If no time period is mentioned, the offer will lapse after a reasonable time.
- Death of the offeree: death of the offeree before the offer has been accepted renders the offer incapable of being accepted > an offer is made to living people, and as it has been made solely to the offeree it cannot be accepted by any other person.
- Death of the offeror: if, after making an offer but before it is accepted, the offeror dies, and the offeree has notice of the offeror's death, the offeree cannot accept the offer.

"Case scenario: Sofia tells Duarte: 'you can have my green and black bicycle for 100€'. Duarte replies: 'I would be interested in buying it, but I am not prepared to spend more than 80€'. Sofia rejects his. However, the next day, she goes and see Duarte and tells him that she has changed her mind and would like to accept his offer. Duarte informs her that in the meantime, he has bought a bicycle from someone else and no longer wishes to buy her bicycle. Has a valid contract been formed between Sofia and Duarte?"

Acceptance

English Law

- An agreement is not complete until the offer has been validly accepted.
  - Only then can a contract be formed
  - The rights and obligations under the contract begin from the time of acceptance
  - In sale of goods contracts, the risk transfer generally takes place at this point.

- An acceptance is an unequivocal expression of consent to the proposal contained in the offer

→ Professor Treitel defines acceptance as: "a final and unqualified expression of assent to the terms of an offer"

- Acceptance constitutes an unconditional assent to all the terms of the offer.

- Legal effect: immediately binding both parties into a contract.

- 'Mirror image' rule: the offer must be mirrored by an acceptance
  - If the offeree adds one or several new term(s), then it constitutes a counter-offer.
  - A counter-offer terminates the original offer.
  - In commercial contracts, the situation is sometimes less straight forward.

Hyde vs. Wrench (1840)	
-Mr Wrench offered to sell his farm to Mr Hyde for £1,200. - My Hyde declined the offer -- My Hyde sent another letter offering to sell his farm for £1,000. - Mr Hyde offered £950. Mr Wrench informed Mr Hyde that he refused the offer. - 2 days later, Mr Hyde agreed to buy the farm for £1000. - Mr Wrench refused to sell the farm to him. - Mr Hyde sued him for breach of contract.	Held: a counter-offer destroys the original offer. The offer was no longer in existence when Mr Hyde purported to "accept" the original offer, after having made a counter-offer which was refused by Mr Wrench. Lord Langdale stated: 'I think there exists no valid binding contract between the parties for the purchase of this property. The defendant offered to sell it for £1000, and if it had been at once unconditionally accepted there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties.'

Communication of acceptance

- Usually, it does not matter how the acceptance is made, as long as it is effectively communicated to the offeror.
- If the offer specifies the method of acceptance, then it will normally have to be complied with. E.g. 'acceptance must take place by returning the attached form', or 'to be sent by registered delivery'
- Exception: when the method of acceptance is merely proposed in the offer, an equally expeditious method would suffice: > the precise method does not have to be followed, so long as the communication by the alternative method results in the acceptance being delivered at the same time

→ At which moment in time is the contract concluded?

- English Law distinguishes between instantaneous and non instantaneous communication.

> at the moment in which the offeree's willingness to accept the offer appears? E.g. when the offeree writes the letter of acceptance
> at the moment in which the offeree's willingness to accept the offer manifest itself? E.g. when the letter is posted
> at the moment in which the acceptance is received by the offeror; e.g. the letter arrives in the mailbox of the offeror
> at the moment in which the offeror becomes aware of the acceptance; e.g. they read the letter.

- Where the mode of communication is instantaneous, e.g. face-to-face conversation or telephone, acceptance takes effect when and where the acceptance reaches the offeree. Rationale: the offeree will generally know when his acceptance was not communicated to the other party, and can try again.

Entores case (1955)	Held: acceptance took place when the message by Telex was received. The postal rule does not apply for instantaneous communications - Denning L.J. said: "Let me consider the case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound." Denning L.J. added: "Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes "dead" so that I do not hear his words of acceptance. There is no contract at that moment...The contract is only complete when I have his answer accepting the offer."
- Entores, a London-based company, sent an offer to purchase goods (100 tons of copper cathodes) to the offeree, an Amsterdam-based company - The offer was sent by Telex, a form of instantaneous communication. - The Dutch company sent an acceptance of this offer acceptance by Telex. - Legal issue: when did acceptance take place (when it was received or when it was sent?)	

- Where the mode of communication is non-instantaneous (e.g. sending a letter by post), the postal rule applies: acceptance takes effect when a letter is posted (i.e; dropped in a post box or handed to a postal worker) and not when it is received by the offeror.
- Exception to the general rule that acceptance of an offer takes place when communicated to the offeror.
- Rationale for the postal rule: the “meeting of the minds” necessary to form a contract occurs at the exact moment where acceptance is sent via post by the person accepting it (rather than when it is received by the offeror).
- Rule formulated in a time when the post was not too reliable: it was easier to prove that one posted a letter than it was to prove that it was received by the other party.
- The postal rule favours the offeree by putting the risk of late or lost acceptance on the offeror.
    > To avoid this risk, the offeror can expressly require actual receipts as a condition before being legally bound by his/her offer.
    - Limits the possibility of revocation by the offeror: revocation is only allowed before acceptance and must reach the offeree before it becomes effective.

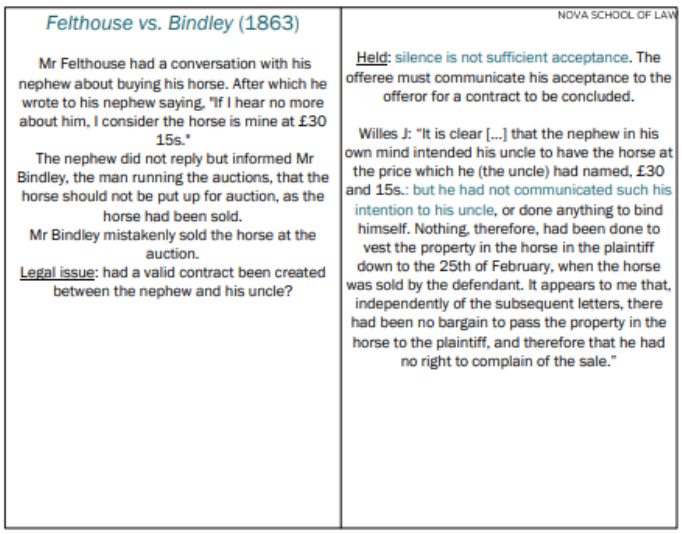
Adams v Lindsell (1818)	NOVA SCHOOL OF LAW - Held: the offer had been accepted as soon as the letter had been posted, on September 5. - A valid contract had been formed then even though the letter had not been received by the offerors. - The Court stated that it is were otherwise, “no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.”
- On 2 September 1817, the offerors sent a letter offering to sell the offerees some wool and requesting an answer ‘in course of post’. - The letter was misdirected so it did not reach the offerees until September 5. - The offerees posted their acceptance on the same day but it was not received until September 9 (two days later that the offerees would have expected to receive it). - In the meantime, on September 8, the offerors sold the wool to someone else.	

At which moment in time is the contract concluded?
- An offer made by post is not effective until received by the offeree
- Acceptance is effective as soon as it is posted

- For revocation to be effective, It must be received by the offeree before they post their letter of acceptance

- Important legal consequences deriving from the determination of the date and place in which the contract was formed: > capacity of the parties > transfer of ownership and risks > applicable law in international contracts > possibility for the offeror to revoke their offer.

Can silence amount to acceptance? - As a general rule, silence is not sufficient acceptance. - The offeree must communicate his acceptance to the offeror for a contract to be concluded



Felthouse vs. Bindley (1863)

Mr Felthouse had a conversation with his nephew about buying his horse. After which he wrote to his nephew saying, "If I hear no more about him, I consider the horse is mine at £30 15s."
The nephew did not reply but informed Mr Bindley, the man running the auctions, that the horse should not be put up for auction, as the horse had been sold.
Mr Bindley mistakenly sold the horse at the auction.
Legal issue: had a valid contract been created between the nephew and his uncle?

NOVA SCHOOL OF LAW

Held: silence is not sufficient acceptance. The offeree must communicate his acceptance to the offeror for a contract to be concluded.

Willes J: "It is clear [...] that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named, £30 and 15s.: but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant. It appears to me that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff, and therefore that he had no right to complain of the sale."

- Rationale for the rule that silence cannot amount to acceptance: protect the offeree. > E.g. while Sonia is away on holiday someone drops a note in through her letter box saying "I'd like to buy your car for £100. If I don't hear from you by the end of this week, I take it that your car is mine at that price." If the claimant in Felthouse had won his case, Sonia would be contractually bound to sell her car for £100!

- In certain situations, performance of an act is sufficient acceptance (no need for communication) - In unilateral contracts, the offeror impliedly waives the need to communicate acceptance. > E.g. of advertising a reward for a lost dog: it is not necessary for those who wish to try and find the dog and claim the reward to write a letter to the advertiser declaring their intention to accept. All they have to do is to perform the required act i.e. finding the dog (Bowen L.J. in Carlill vs. Carbolic Smoke Ball Co)

Battle of forms

- when two businesses are negotiating the terms of a contract, and each party seeks to impose its own (standard) terms (e.g. general sales conditions and general purchase conditions) upon the other: > a series of proposals and counter-proposals pass between the parties, and the contract is then performed. > E.g. A offers to buy goods from B on the basis of A's own standards terms and B purports to accept the offer on the basis of its own standard terms.
- Standard terms have been defined in the UNIDROIT Principles of International Commercial Contracts as 'provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party'.

- Possible solutions? No valid contract formed? But the parties have agreed on the main points and started to perform.
- 'First shot rule': the first terms which have been offered by the offeror prevail (unless they were explicitly rejected in the acceptance)
- 'Last shot' approach: considers each new reference to general conditions as a counter-offer, if this offer is accepted by performance of the obligation (e.g. delivery of the goods), the offeree is presumed to have accepted the general conditions referred to in the latest offer.
- 'The 'knock-out' rule: the terms for which the forms do not match will cancel each other out and will be dropped from the contract - they will be replaced by alternative solutions.

Butler Machine Tool case (1979)	NOVA SCHOOL OF LAW
- The sellers offered to supply a machine tool for £75,535 on the terms printed on the back of their offer, which included a provision for price variation clause (providing for an increase in the price if there was an increase in the costs). - The buyers responded to the offer agreeing to buy the machine tool with their own terms and conditions printed on the back of its reply (which did not include the price variation clause). - The sellers responded by returning the response slip, but wrote at the same time to say that the machine would be delivered in accordance with their quotation. - The machine was then delivered and the sellers asked for £75,535 + an additional sum of £2,892 due to them under the price variation clause.	- Held: the buyer's order did not constitute an acceptance of the initial offer from the seller but a counter-offer which had been accepted by the sellers. The contract was completed without the price variation clause. Denning L.J.: '…where the is a battle of the forms, there is a contract as soon as the last of the forms is sent and received without taking objection to it […] In some cases, the battle is won by the person who fires the last shot. He is the person who puts forward the latest term and conditions; and if they are not, objected to by the other party, he may be taken to have agreed with them'.

Acceptance

French Law

Art. 1118 of the French Civil Code states that: Acceptance is the manifestation of the will of the offeree to be bound on the terms of the offer. As long as the acceptance has not reached the offeror, it may be withdrawn freely provided that the withdrawal reaches the offeree before the acceptance reaches the offeror. An acceptance which does not conform to the offer has no effect, apart from constituting a new offer.

3 elements:
(1) Acceptance indicates the offeree's willingness to be bound by the terms of the offer.
(2) Acceptance may be freely retracted at any stage, so long as it has not been received by the offeror.
(3) Acceptance must be unconditional. If it does not correspond to the offer, it constitutes a counter-offer.

- Acceptance can be communicated in various ways (e.g. written, oral or by some unequivocal action).

At which moment in time is the contract concluded? - The French Cour de cassation originally considered that this was a question of facts that should be left to the appreciation of the trial courts - Then contradictory decisions emerged amongst the various chambers of the Cour de Cassation.

- Cour de cassation, Chambre commerciale, 7 janvier 1981: affirmed that the contract was intended to be formed, 'not by the reception by [the offeror] of the acceptance of [the offeree], but by the emission by the latter of this acceptance'.
- Cour de cassation, 3ème Chambre civile, 16 juin 2011: affirmed that 'the formation of the contract was subject to the knowledge of the acceptance of the offer by the offeror'

Article 1121 of the French Civil Code provides that: A contract is concluded as soon as the acceptance reaches the offeror. It is deemed to be concluded at the place where the acceptance has arrived.

> French law opted for the reception theory

Can silence amount to acceptance? - General rule: silence does not amount to acceptance - Art. 1120 of the French Civil Code: Silence does not count as acceptance except where so provided by legislation, usage, business dealings or other particular circumstances.

- Exceptions: > if the parties have agreed otherwise > previous business relationship between the parties, or business customs > where the offer is made in the exclusive interest of the offeree. > silence circonstancié ('circumstantial silence'): when silence is accompanied by a whole range of surrounding circumstances

Amusement Park case (1998)	NOVA SCHOOL OF LAW
The parties had agreed that the buyer could exercise an option to buy an amusement park from the seller by proposing a price and that the seller would then reply within 14 days. The offeree exercised the option by offering 100,000 francs, but he did not hear anything from the seller	Held: the *Cour de Cassation* found that silence amounted to acceptance in these circumstances."

Battle of forms

Art. 1119 of the French Civil Code provides that: General conditions put forward by one party have no effect on the other party unless they have been brought to the latter's attention and that party has accepted them. In case of inconsistency between general

conditions relied on by each of the parties, incompatible clauses have no effect. In case of inconsistency between general conditions and special conditions, the latter prevail over the former.
- Where both parties to a contract have attempted to impose differing sets of conditions, those conditions which conflict are without effect: the conflicting provisions will be replaced by the statutory provisions provided in the French Civil and Commercial Codes as well as related case-law.

- Known as the 'knock-out rule'. - The contract will only be upheld if the parties have agreed on the core obligations (e.g. price and object)

Electronic contracts

- Flexibility of the traditional model of agreement > traditional requirements of 'offer and acceptance' in contract formation > survived the new modes of communication in the XXth century; e.g. telex and fax

Question: which rules apply to contracts by emails and through websites? - Importance of the rules on offer and acceptance: > whether a contract was formed > where the contract took place - applicable law in international contracts > capacity of the parties > transfer of ownership and risks > possibility for the offeror to revoke their offer

Electronic contracts
<u>English Law</u>

Does the postal rule apply to email?
- General rule = acceptance must be communicated to the offeror.
- Exception in relation to non-instantaneous modes of communication (i.e. postal acceptances) for which the postal rule applies.
> acceptance takes effect when the letter is posted. > exception justified by considerations of commercial convenience.

Does the postal rule apply to email? - English courts have refused to extend the postal rule to faster modes of communication, such as telex (Entores case).

Does the postal rule apply to email? Debate amongst scholars as to whether emails are instantaneous or non-instantaneous modes of communication
-> 2 diverging opinions:
- Emails are not instantaneous because they usually pass through various servers, routers and internet service providers before reaching their destination.
- Emails are virtually instantaneous > 'any delay in the electronic relaying of an email message is now infinitesimal' (Simone Hill).

Does the postal rule apply to email?
- The majority of commentators believe that the postal rule should not apply to emails > as a virtually instantaneous mode of communication, the general rule applies → to be effective, an emailed acceptance must be received by the offeror. > the sender of an email is more likely than the recipient to be aware that it has not arrived (e.g. by receiving a message telling them that there is a problem).

When is an email acceptance received by the offeror?

1) **when the email is read by the offeror** > evidentiary problems: unless an acknowledgment is sent, it is difficult to prove when a particular email was read. > would give the offeror the power to nullify the acceptance by deciding not to read it, or to delay it's taking effect by putting off reading it.
2) **when the email arrives on the server which manages the offeror's email** > Much more likely to be adopted by English judges. > Provides greatest clarity and is easier to prove. > it is open to the offeror to stipulate that an acceptance is not effective until it is read or acknowledged by him.
- when the email arrives on the server which manages the offeror's email > solution adopted in the US: US Restatement (Second) of Contracts: 'A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.'
- UN Model Law on Electronic Commerce 'Unless otherwise agreed […] the time of receipt of a data message is determined as follows: […] receipts occurs at the time when the data message enters the designated information system.
3) when the email ought reasonably to have come to the offeror's attention - Used in some cases concerning Telex, e.g. The Pamela (1995) where the telex arrived shortly after midnight, outside of business hours. - Held (Gatehouse J): if the telex had been sent in ordinary business hours it would have taken effect on arrival, but the arbitrators in the case had been entitled to find that on the facts the notice of withdrawal had not been received until it was to be expected that it would be read (i.e. at the start of business the following Monday

When is an email acceptance received by the offeror?
- when the email ought reasonably to have come to the offeror's attention;
- Disadvantages: > creates uncertainty > lack of significance of business hours > common to check emails in the evenings and at weekends.
- When is an email acceptance received by the offeror? For the majority of authors:
> default rule: an email acceptance should in general be held to have been received by the offeror when it arrives on the server that manages their email (Andrew Burrows and Edwin Peel).
> default rule: - would apply even if the email, after having arrived on the email server, cannot be accessed because it is blocked by the offeror's firewall or automatically deleted as 'junk-mail' => because it is within the offeror's 'sphere of control'. - would apply even if the email is rejected by the offeror's email server because the offeror's email 'inbox' is full or because of a problem with the server.

Contracting through websites - Two ways in which a contract can be made:
1) contracts involving digital products (e.g. software, music or videos) > the customer goes on the retailer's website and downloads the product in return for payment. > website = a 'digital vending machine' > Once the buyer's order has been placed, performance of the contract by the retailer is likely to begin immediately (e.g. product downloaded onto the buyer's computer). => The presence of the website is a standing offer, which the customer accepts by making the relevant payment (Andrew Burrows and Edwin Peel).
2) contracts where the retailer's performance does not immediately follow the placing of the customer's order, but comes at a later time. > Scholars of argue that the display of goods or services on a website would constitute an invitation to treat > The offer would be made by the customers when they place their order. > UN Convention on the Use of

Electronic Communications in International Contracts, Article 11: A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.
> treating the display of goods or services on a website as an invitation to treat means that the website provider will not be bound to deal with every customer who seeks to place an order > may choose to decline an order if the supply of stock is limited, or if the customer is in a country where it is illegal to sell the goods in question.

Contracting through websites - At which moment does the online retailer become bound?
- By taking the customer's payment, the retailer will be considered to have accepted the customer's offer by conduct.
- When the website displays a message after payment has been accepted saying that the customer's order has been processed.
- When the customer receives the automated email confirming that the order has been received (legal requirement under the Electronic Commerce (EC Directive) Regulation 2002.

- Chwee Kin Keong decision: the confirmation email 'had all the characteristics of an unequivocal acceptance'.
- The act of payment constitutes the offer, and the confirmation email constitutes the acceptance.

Contracting through websites - An online retailer can take control of the process of contract formation: > e.g make clear to the viewers of its website that the presentation of goods and services on the website is an invitation to treat > e.g. give details as to the status of any email it sends to the customers after receipt of an order. E.g. terms and conditions of Amazon.co.uk: 'acceptance will be complete at the time we send the Dispatch Confirmation E-mail to you'.

Electronic contracts - French Law

- An electronic contract, like any other contract, must respect the conditions of validity under Article 1128 of the French Civil Code:
> the consent of the parties
> the parties' capacity to contract
> a certain and determined object - French law is very protective of the consumers

- Advertisements of goods or services online are considered as offers > They must contain all the essential elements of the contract
- Acceptance takes place when the online offeree clicks on the button for the validation of the order. > online offerors are required to put in place a 'double-click' process to avoid mistakes:
    - the first click should allow the offeree to verify their order (details and price)
    - the second click should allow the offeree to confirm their order.
- The offeror must then send an electronic acknowledgement of receipt.

Intention to create legal relations

English Law

- 3 conditions in order for a contract to exist in English law:
(1) agreement (i.e. an offer and an acceptance);
(2) an intention to create legal relations; and
(3) consideration

- Second condition: The formation of a valid contract requires an intention to create legal relations - Parties not only need to agree on the same thing ('meeting of the minds') but also on the fact that what they agree upon is binding in law. > each party can go to court to enforce the agreement if necessary.
- Not every arrangement that is made includes an intention that if one party fails to keep to the agreement, the other party should be able to sue for breach of the agreement. > For many promises, it might be morally wrong not to keep them but it will not have legal consequences.

- The test to decide whether there is an intention to create legal relations is an objective test
    - Lord Denning M.R. explained: 'in all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: would reasonable people regard the agreements as intended to be binding?'.
- The case law has developed two rebuttable presumptions to determine whether or not an intention to create legal relations exists that would make an agreement enforceable:
    > in the case of social or domestic arrangements, it is presumed that there is no intention to create a legal relationship enforceable in law (unless the contrary can be proven).
    > in the case of commercial or business arrangements, it is presumed that there is an intention to create a legal relationship and that the agreement is legally enforceable (unless the contrary can be proven).
- A social or family arrangement is an agreement between neighbours, friends or relatives. > presumption against an intention of creating any legal relationship. > The law presumes that the parties to such agreements did not intend to create legal relations > parties rely solely on family ties of mutual trust and affection.

Balfour vs. Balfour (1919)	
- An English married couple lived in Sri Lanka where the husband worked as a civil engineer. - They came back to England for a vacation. The wife had developed rheumatic arthritis was was advised by the doctor to stay in England. - Husband orally promised his wife that we would give her £30 per month until - she came back to Sri Lanka. - The relationship soured and the husband stopped making the payments. - The wife sued the husband stating that he had a legal obligation under the contract to continue paying her the £30 a month.	- Held: the wife succeeded at first instance, but the decision was unanimously overruled on appeal. - the court presumed that, as the parties were husband and wife and on amicable terms at the date of the agreement, they did not intend to create a legally binding obligation. - Lord Atkin said that in agreements between certain persons such as husband and wife, there is no contract, as the parties did not intend to sue each other if the promisor was unable to fulfil the promise.

Jones vs. Padavatton (1919)	Held: no binding contract - so the mother succeeded in gaining possession of the house that she had purchased. - There is a presumption that domestic agreements are based on mutual trust, ties and affection. - Fenton Atkinson L.J. said that at the time of the agreement mother and daughter had a very close relationship and would not have intended to sue each other. - Salmon L.J.: 'when arrangements are made between close relations, for example between husband and wife, parent and child, or uncle and nephew in relation to an allowance, there is a presumption against an intention of creating any legal relationship. This is not a presumption of law, but of fact. It derives from experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection.
- A mother persuaded her daughter to come to England to study for the Bar. They agreed that the mother would pay her maintenance. - Later on, they agreed that the mother would provide a house for her to reside in whilst she studied, and the mother bought a house for her daughter to live in. - After some years, mother and daughter quarrelled whilst the daughter was still completing her bar exams and the mother brought an action claiming possession of the house. - The daughter argued that the agreement between herself and her mother amounted to a legally binding contract. - Question: whether a legally binding contract was intended, or whether this was simply a family arrangement?	

- This is not to say that agreement between relatives, neighbours and friends can never amount to contracts. > There are situations in which the presumption that parties to a social or family arrangement did not intend to create legal relations can be rebutted.

Merrit vs. Merritt (1970)	Held: when parties are separated or in the process of separating at the date of the agreement and are not on amicable terms, the presumption of there being no intention to create legal relations does not apply. The court does, as a rule, impute to them an intention to create legal relations. Lord Denning M.R. stated that: [in cases where] the parties were living together in amity […] their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations'.
- Husband and wife purchased a house which was put in their joint names. - Husband left to live with another woman. - Husband and wife met to discuss the financial arrangements and agreed that the husband would pay the wife £40 per month, out of which the wive would have to make the outstanding payments to the bank for the mortgage of the house. - . They also came to an agreement whereby the house would be transferred into the wife's sole name once she paid off the mortgage (husband signed a document confirming that). Wife paid off the balance of the mortgage but husband refused to transfer the house into her sole ownership. Wife sued husband for breach of contract.	

- Contracts of a commercial nature are presumed to be made with an intention to create legal relations > this presumption can be rebutted; e.g. express words used in the commercial agreement such as 'binding in honour only', or 'gentlemen's agreement'. > it is for the other party to prove that s/he did not intend to be bound (difficult in practice).

French Law - Intention to create legal relations

- 3 conditions in order for a contract to be valid in French law under Article 1128 of the French Civil Code:
> agreement between the parties with the free and informed consent of the parties
> the parties' capacity to contract
> a certain and determined object

- The intention to create legal relations is not expressly included as a condition for the validity of a contract, however, it is included as part of one of the general principles underlying French Contract Law.
- French contract law analyses a contract as a 'meeting of intentions' (rencontre des volontés).

- Like in English Law, in French Law, social or family arrangements do not normally give rise to legal obligations.
- Similarly, acts of kindness or courtesy do not normally give rise to liability in contract > E.g. the provision of a service to a neighbour will not necessarily create a contract

- Contracts of a commercial nature are assumed to be made with an intention to create legal relations > Can be rebutted by evidence to the contrary > The standard of proof is 'balance of probabilities' - Certain arrangements are stated to be binding in honour only

Consideration

English Law

- 3 conditions in order for a contract to exist in English law: (1) agreement (i.e. an offer and an acceptance); (2) an intention to create legal relations; and (3) consideration

- In English law, agreements need to be supported by consideration - Consideration is necessary for a promise to become binding > The promisee must give consideration in exchange of the promisor's promise -> 'something' which is of value in return for a promise. - Consideration must be in money or money's worth.

- E.g. Lucrezia promises to paint his house > If Guilherme promises nothing in return, there is no consideration, and therefore no enforceable agreement. > If Guilherme promises to give her £200 in return, this is consideration, and there will be an enforceable agreement.

- Consideration was described in the case of Currie v Misa (1875) in terms of benefit and detriment and defined as: 'a valuable consideration, in the sense of the law, may

consist either in some right, interest, profit or benefit accruing to one party, or some forebearance, detriment, loss or responsibility given suffered or undertaken by the other'.

- Consideration is what one party is giving or promising, in exchange for what is being given or promised by the other party to the contract.

- E.g. A and B enter into a contract whereby B purchases A's bicycle for 90€ > A is gaining the benefit of 90€, but have the detriment of giving the bicycle away > B is gaining the bicycle but giving up 90€

- Professor Pollock ('Principles of Contract Law') defined it as 'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable'.

- 5 elements in Pollock's definition: 1) consideration can be an act (i.e. doing something of value); e.g. giving money 2) Consideration could be a forbearance (i.e. not doing something of value); e.g. not suing someone 3) A promise to act or a promise to forbear is consideration. 4) Consideration is given in exchange of a promise 5) Consideration has to be of value

- English judges will not enforce a promise which has not been paid in some way. - Policy reasons: requirement which stems from the idea that, in English Law, the contract is defined as an exchange, a bargain.

- Each party to the agreement must give, do or promise something of value in return for a promise.
- based upon commercial needs – consideration provides the test that a bargain was concluded. - Unique feature of common law systems.

- Originally, contracts were only recognised if they were contained in a deed. - By the 17th century, in agreements other than for land, the courts would demand evidence of the 'proof' that a bargain in fact existed. > allowing all agreements to be legally binding was seen as too broad > the English courts therefore also developed a device to keep the expansion of binding contracts under control. > the giving of consideration by both sides became the traditional method of ensuring that other types of agreement were contractual -> proof that the bargain existed.
- As a result, the rules of English Contract Law seeks to differentiate between: > agreements where there is something to be gained by both parties > agreements which are purely gratuitous (e.g. gifts).
- In the first scenario, in order to become binding, the promise needs to be supported by consideration; - In the second scenario, for the promise to become binding, it needs to be written in a deed. - NB: General theory of English law requires no written but it's imposed in some situations > E.g. consumer credit contracts

- Past consideration is consideration which is given before the promise is made. > It is generally not considered as sufficient consideration to support a contract. > The consideration and the promise must be part of the same transaction, otherwise it is unenforceable.

Roscola vs. Thomas (1842)	
- The parties reached an agreement for the sell of a horse at £30. - After the deal was struck, the seller was asked about the character of the horse by the purchaser, and the seller promised that the horse was "sound and free from vice" - The buyer subsequently discovered that the horse had a vicious temperament and bit people. - The buyer sued the seller for breach of his promise that the horse was free from vice.	- Held: the promise that the horse was sound was not part of the bargain, no consideration had been given in exchange for the promise. - Lord Denman: "it may be taken as a general rule […] that the promise must be coextensive with the consideration… a consideration past and executed will support no other promise than such as would be implied by law".

Re McArdle (1951)	NOVA SCHOOL OF LAW
- A married couple lived in the house of the husband's mother which, on her death, would be inherited by the husband and his three siblings. - The son's wife paid for substantial repairs and improvements to the property. - After the repairs had been carried out, the mother made her four children sign an agreement to reimburse the dauther-in-law out of her estate. - The mother died and the children failed to honour their promise. The daughter-in-law sued them to enforce the promise.	Held: Mrs McArdle had already performed the work before the relatives had made the promise. Her consideration was in the past, therefore the agreement was unenforceable. - Court unwilling to treat the claimant's consideration (i.e. doing the improvements) and the relatives' promise as part of the same transaction.

- Exceptions: certain circumstances of past consideration can give rise to an implication to pay some money or confer benefit on the promisee.

Lampleigh v. Brathwait (1615)	
- Brathwaite was accused of killing a man and asked Lampleigh to get him a King's pardon. - Lampleigh obtained the King's pardon but at considerable expense to himself. - In gratitude, Brathwaite promised to pay him £100 which he in fact never did.	Held: Lampleigh's claim succeeded. The court found that the promise was legally enforceable, as the service had been requested by the promisor and it was clear that both parties would have contemplated a payment.

Pao On v. Lau Yiu Long (1980):	
- Agreement for Purchase of Shares involving the payment of Price of Shares + Promise not to resell more than 60% of those shares within a year - Other agreement: indemnification Agreement entered into whereby the majority stakeholders of the company selling the shares would indemnify the claimants if the shares went down under a certain level. In exchange of that, the claimants promised not to resell more than 60% of those shares within a year.	Held: 'An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated further by a payment of the conferment of some other benefit and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance.'

- Exceptions: certain circumstances of past consideration can give rise to an implication to pay some money or confer benefit on the promisee (Lampleigh v. Braithwait): 1. The act must have been carried out at the promisor's request 2. The parties must have understood that the act would be rewarded in some way 3. The act must have been capable of legal enforcement had it been promised beforehand.

- Consideration may be future = executory consideration > exchange of promises to carry out acts or pass property at a later stage. > If one party breaks their promise, they are in breach of contract.

The adequacy of consideration - In English Law, consideration does not have to be adequate but it must be sufficient. > it does not have to be fair or equal in value to the promisor's promise > Idea that if one of the parties has made a bad bargain, they will have to stick with it, the court will not come to their rescue. > Freedom of contract entails that adequacy will be decided by the parties themselves.
- Consideration must be sufficient -> means valid, of value in the eyes of the law.

Thomas vs. Thomas (1852)	Held: the executors were bound by their promise as the Mrs Thomas had given sufficient consideration Patteson J: 'Motive is not the same thing as consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff'. Without consideration the transaction was merely a voluntary gift. However, by agreeing to pay rent in return for being allowed to stay in the property, Mrs Thomas had provided consideration, even though it was not economically adequate or anything like a commercial rent for the building. Therefore, the contract was enforceable.
- Before dying, Mr Thomas expressed the wish that his wife be allowed to remain in the house (but did not write it in his will). - After he died, his wife agreed with his executors that she would pay £1 per year as rent in return for being allowed to live in the house. - The executors later tried to dispossess the wife.	

The sufficiency of consideration - Consideration does not have to be money. 'something of value in the eyes of the law" However, it must be sufficient (i.e. it must have some value).

Chappell & Co Ltd vs. Nestlé Co Ltd (1960)	NOVA SCHOOL OF LAW Bainbridge vs. Firmstone (1838)
Nestlé had offered a record for 1s 6d (instead of 6s 8d) plus three chocolate bar wrappers, to promote their chocolate. - Chocolate wrappers were held to be sufficient consideration Lord Somervell: 'The question, then, is whether the three wrappers were part of the consideration [...] I think that they are part of the consideration. They are so described in the offer. "They", the wrappers, "will help you to get smash-hit recordings" [...]. It is said that, when received, the wrappers are of no value to the respondents, The Nestlé Co Ltd. This I would have thought to be irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.'	- A father lent his son a sum of money and told him that repayment was not necessary if he stopped complaining about how the father would distribute his property in his will among the children. - The promise not to complain was not considered sufficient consideration

American Law

Harmer vs. Sidaway (1891)	
American case An uncle promises his nephew $5,000 if the nephew would refrain from 'drinking liquor, using tobacco, swearing and playing cards or billard for money until he should become 21 years of age'. The nephew complied. The uncle passed away. His executor refused to make the payment	Held: the promise was enforceable because the nephew had provided consideration by restricting his freedom of action

Consideration and the performance of existing duties - Where the promisee merely fulfils an existing legal duty to the promisor, and nothing more, they do not provide consideration. > the promisee merely does something by which they are already legally bound > e.g. legal duty or contractual duty

Collins v Godefroy (1831)	
- A police officer was under a court order to attend and give evidence at a trial. The defendant was keen for the police officer to attend as this would help his case and so he promised to pay him a sum of money to ensure that he did so. - The police officer attended the trial for six days but was not called to give evidence. At the end of this he asked the defendant for the payment of the sum agreed. - The defendant refused to pay so the police officer brought an action against him.	Held: The agreement between the claimant and the defendant was not supported by consideration. The police officer was under a public duty to attend court anyway. Lord Tenterden affirmed that: 'If it be a duty imposed by law upon a party [...] to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think that such a duty is imposed by law'.

***Ward v Byham* (1956)**	
- A father of an illegitimate child promised the mother money towards its upkeep if she would keep the child 'well looked after and happy'.	Held: by looking after the child, the mother would be doing nothing more that she was already bound by law to do. However, since there is no obligation in law to keep a child happy, the promise to do so was seen as good consideration and therefore enforceable.

Stilk vs. Myrick (1809)	
- Mr Stilk was a seaman. He entered a contract to work as a crew member on a ship owned by the defendant, on a voyage from London to the Baltic and back, and that it was to be paid at a rate of £5 a month. -The contract stated that he would serve even in an emergency situation. - In the course of the voyage, two of the crew members deserted the ship. - The captain promised the rest of the crew that the wages of the two men who deserted would be divided between them on top of their own wages if they worked the ship back to London. - The crew agreed, but after reaching London, the captain refused to pay the extra money which had been promised to them.	Held: they were not entitled to the extra money as they had not provided any consideration. - According to the original contract, the sailors had agreed to serve even in an emergency situation. They were merely fulfilling what they had agreed to do under their original contract. Lord Ellenborough: 'Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed to London, they had undertaken to do all that they could under all the emergencies of the voyage. […] the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port.'

Consideration and the performance of existing duties - Exception to the basic rule that performance of an existing duty does not constitute valid consideration: where the promisee exceeds their duty.

Hartley vs. Ponsonby (1857)	
- A ship had set out with 36 crew members, but during the voyage many deserted the ship until they were only 19 left (only 6 of them were competent seamen) The captain promised the remaining crew members that they will be paid extra money if they continued working. The crew agreed and continued on the voyage even though it was unsafe for them to continue the voyage. When the ship arrived, the captain refused to pay the crewmen the extra money he had promised.	Held: the sailors were entitled to the extra money. - Although sailors are normally expected to complete a voyage if there is an emergency, in this case, so many crewmen had deserted the ship that the nature of the remaining sailors' duties had changed: they had exceeded their contractual duty. - The lack of crewmembers rendered the voyage unsafe and therefore the claimants could have refused to continue the voyage. Consequently, by agreeing to do the work, they had supplied fresh consideration.

Williams v Roffey Bros & Nicholls Contractors Ltd (1989)	NOVA SCHOOL OF LAW
- The defendants, building contractors, hired the claimant, a carpenter, to carry out carpentry work in the refurbishment of 27 flats. The claimant and his men began work, but as he had under-quoted for the work and ran into financial difficulties. - The defendants were concerned that the claimant would not complete the work on time and that they would have to pay money to the owner of the flats (the contract contained a penalty clause) - The defendants promised to pay the claimant a further sum of £10,300 (in addition to the originally agreed $20,000) at the rate of £575 for each flat in which the work was completed. - - The defendants only made one further payment	Held: the defendants' promise to pay the additional sum which was part of an oral agreement made between the claimant and the plaintiff was enforceable. - It was supported by consideration as the defendants received an extra benefit from the agreement - Purchas LJ: 'in the particular circumstances … there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9th April'.

Consideration and the performance of existing duties - Wherever a promisor promises additional payment for completing a task that the promisee is already bound to do under an existing contract, if the promisor gains an extra benefit in return, then the promise will be enforced. > Stilk v Myrick was being refined rather than overruled.
- Exception developed on the basis of consideration of fairness - Criticized by certain scholars for making the rules too vague and uncertain

French Law Cause

- 4 conditions in order for a contract to be valid in French law in force from 1804 to 2016:
- free and informed consent of the parties; - the parties' capacity to contract; - a certain and determined object; - a lawful cause.
- 3 conditions in order for a contract to be valid in French law in since the 2016 reform:
- free and informed consent of the parties - the parties' capacity to contract - a certain and determined object

A certain and determined object - The object refers to the subject-matter of the contract: > a contract's content must not breach public order and must be based on a present or future obligation

- The French civil code used to require the contract to have a cause. - This requirement was abolished with the 2016 reform of the civil code. > Seen as having become redundant - NB: the Dutch also decided to abandon this requirement when they introduced their new Civil Code in 1992.

Different meanings of cause: 1) a contract must not be contrary to morality (ordre public). 2) Cause means the reason for entering into a contract (the 'why' of the contract). E.g. in sale, the reason for the promise of the seller is the obligation of the buyer to pay the price and vice versa.

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Cause - Cause does not necessarily describe a bargain; e.g. a gratuitous contract has a good cause ('pleasure of doing some good')
- A promise based on past consideration has a good cause.
- Cause has to do with motive
Consideration - consideration refers to the idea of a contract as a bargain - past consideration is normally not good consideration - Consideration is not concerned with motive.

Good faith

Duty to disclose information during pre-contractual negotiations - Cicero's test cases: > the famine at Rhodes; and > the selling of a defective house

Duty to disclose information during pre-contractual negotiations - Cicero: "good faith requires any defect known to the seller to be notified to the purchaser [..]. . . no decent person engaged in buying and selling can ever resort to invention or concealment for his own profit […] then our grain-merchant and the seller of the unsanitary house acted wrongly when they concealed the facts."

Duty to disclose information during pre-contractual negotiations

- Cicero (Roman statesman, lawyer, scholar and writer) - The buyer must not ignore anything of what is known to the the seller.
- Thomas of Aquino (Italian Dominican friar, philosopher of the 13th century) - The seller of oats in the case of the the famine at Rhodes does not have a moral obligation to inform the Rhodians.
- Pothier (French jurist of the 18th century) - Distinguishes law from morality - Law cannot require the seller to inform the buyers of all the external factors of the object of the contract. - However, from an ethical point of view, the profit should be considered as unjust.

English Law

Pre-contractual liability - In English law, there is no general duty of good faith at the negotiating stage. - No special rule of pre-contractual liability exists in English law when no contract results. - Rationale: promoting pragmatism, predictability, and certainty.

Duty to disclose information during pre-contractual negotiations - There is no general duty of disclosure in English law > Generally, no liability arises if a party does not disclose information to the other during pre-contractual negotiations. Based on the idea that the relationship between the parties during pre-contractual negotiations is at arm's length.

Smith v Hughes (1871)	Held: the contract was binding. Mr Smith was under no duty to inform Mr Hughes of his mistake about the kind of oat. Blackburn J stated: 'even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, **there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor**."
- Mr Smith, a farmer, gave Mr Hughes, a racehorse trainer, a sample of his oats, - Mr Hughes then ordered over 500kg of the oats. - Mr Hughes received the oats and said that they were not what he had thought as he needed old oats for his horses and these were green oats. He refused to pay Mr Smith. - Mr Smith sued Mr Hughes for breach of contract	

- Not having a duty of disclosure is different from making a false statement > there may be legal consequences if one party makes a false statement during pre-contractual negotiations.

French Law

Duty to disclose information during pre-contractual negotiations - Art.º 1104 of the French Civil Code provides that: Contracts must be negotiated, formed and performed in good faith. **This provision is a matter of public policy.**

-The importance of the principle of good faith - The scope of the principles of good faith was expanded in the 2016 reform. - The 1804 Civil Code simply stated that contracts should be performed in good faith > The 2016 revision has codified case law which had extended the principle to the pre-contractual negotiations and formation stages.

- Art.º 1112 of the French Civil Code provides that: Parties are free to enter into, proceed with, and withdraw from precontractual negotiations. These negotiations must meet the requirements of good faith.

- French Law is very protective of weaker parties: - Article L. 111-1 of the French Consumer Law Code (Code de la consommation): imposes a general duty of information on the professional seller in relation to 'the essential characteristics of the good or service'.

- Art. 112-1 of the French Civil Code provides that: The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party. However, this duty to inform does not apply to an assessment of the value of the act or performance.

Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the quality of the parties. A person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and the other party has the burden of proving that he has provided it. The parties may neither limit nor exclude this duty. In addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to annulment of the contract under the conditions provided by articles 1130 and following

Last powerpoint

Background - Traditionally, States have been perceived as the main duty-bearers of human rights obligations.

- Milton Friedman, “the only social responsibility of business is to increase profits, so long as it stays within the rule of law.” - Changes from the 2000s: - Kofi Annan Declaration at the Forum of Davos, 1999
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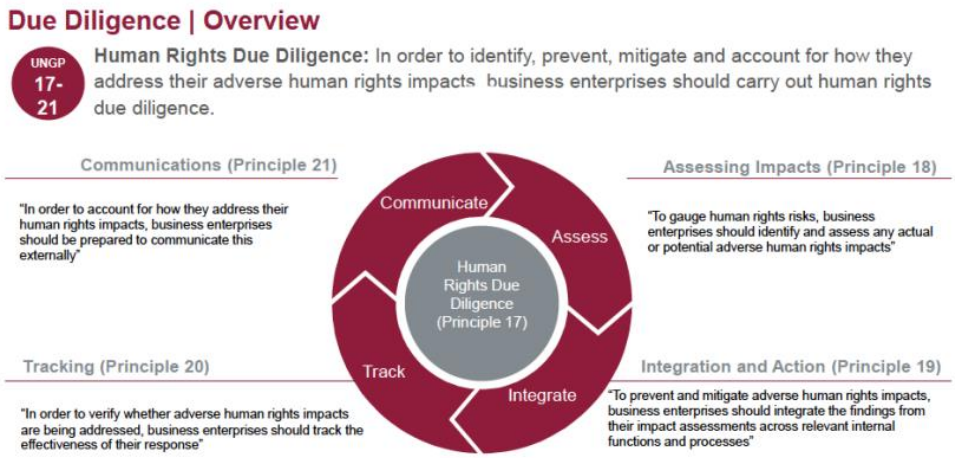
- The UN Guiding Principles on Business and Human Rights - Developed by UN Special Representative on Human Rights and Transnational Corporations, John Ruggie.
- The UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights - The UNGPs rely on a differentiated yet complementary approach to responsibility with regards to business and human rights.

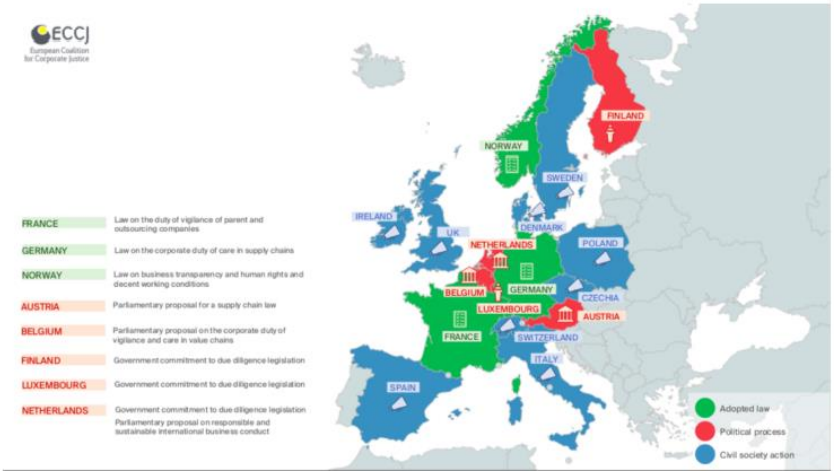
The UN Guiding Principles on Business and Human Rights

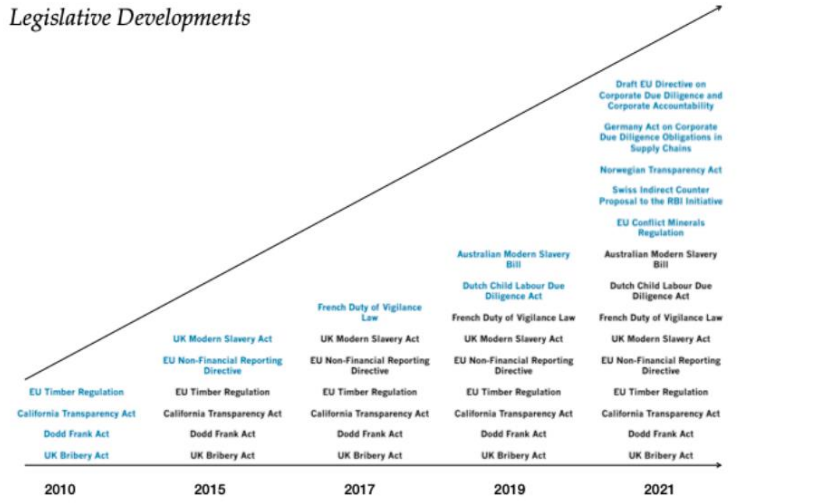
GP 15: In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The UN Guiding Principles on Business and Human Rights



Growing number of jurisdictions adopting or considering legislative measures encouraging or requiring companies to exercise human rights due diligence.





Source: adapted from OECD, 2019, and Tomislav Ivančić doctoral research

Consider the following case: In 2005, civil proceedings were filed in the United States against U.S. company Cargill Inc and the U.S. subsidiary of Swiss-based company Nestlé S.A. on the basis of allegations of complicity in human rights abuses. In particular, the companies are accused of having used child slaves in their supply chains to harvest cocoa in Ivory Coast. The proceedings were filed by six Malian individuals who alleged that they had been trafficked to Ivory Coast as child slaves and forced to work up to 14 hours a day, six days a week, without pay, in order to harvest cocoa beans. The claimants further claimed that they slept on the ground under armed guard to prevent them from escaping. They argue that the defendants were complicit in these abuses through purchasing cocoa from suppliers using child slaves in Ivory Cost and turning a blind eye on the use of child slave labor on the farms depiste being aware of the practice in order to keep cocoa prices low.

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Background Nestlé S.A. and Cargill sell their products throughout all of the EU member states, in the UK, in the US and in many other parts of the world. In 2020, Cargill's revenue rose to $114.6 billion, up 1% from the prior year. Nestlé S.a. is the largest food company in the world and in 2019, Nestlé employed approximately 291,000 people around the world. In 2019, its revenue equated 92.568 billion CHF. It has more than 200 subsidiaries and affiliates that manufacture and sell a wide variety of products, including coffee, mineral water, chocolate and malted beverages, chocolates and confectionery, culinary and refrigerated products, dairy products, baby food, breakfast cereal, frozen foods and ice cream, pet foods, pharmaceutical products, and cosmetics. One of its subsidiaries is Nestlé France which is located in Issy Les Moulineaux (France), has 2,843 employees and generates $2.23 billion in sales (USD).

Considering the relevant laws, answer the following questions: - Is the California Transparency in Supply Chains Act applicable to Cargill and Nestlé? And if it is or it were, what would their obligations be under that law? - Is section 54 of the UK Modern Slavery Act 2015 applicable to Cargill and Nestlé? And if it or it were, what would their obligations be under that law? - If the Dutch Child Labour Due Diligence Act had entered into force, would it be applicable to Cargill and Nestlé, and if it were, what would their obligations be under that law? - Is the French Duty of Vigilance Law applicable to Nestlé, and if it is or it were applicable, what would its obligations be under that law? - Is the German Act on Corporate Due Diligence Obligations in Supply Chains applicable applicable to Cargill and Nestlé? It it is or were applicable would would it require the companies to do? - Is the Norwegian Transparency Act applicable applicable to Cargill and Nestlé? It it is or were applicable would would it require the companies to do?