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Rwanda MCC Threshold Program

JUSTICE STRENGTHENING PROJECT

FINAL TRAINING REPORT

INTERNATIONAL COMMERCIAL LAW

MAY 10-21, 2010



Sophie Thomashausen and Deirdre Kelly, Associates at Allen & Overy, led the trainings in Banking Law.

JUNE 16, 2010

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RWANDA MCC THRESHOLD PROGRAM JUSTICE STRENGTHENING PROJECT

INTERNATIONAL COMMERCIAL LAW TRAINING
May 10 - 21, 2010

Kigali, Rwanda

TRAINING REPORT:
June 16, 2010

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Training Report

Overview

Instructor:	Solicitors and Barrister from the law firm Allen & Overy.
Participants:	Judges of the Supreme Court, High Court & the Commercial High and Primary Courts; Prosecutors from the National Public Prosecutors Authority; and lawyers from the Kigali Bar Association.
Venue:	Top Tower Hotel

Introduction

In continued pursuit of the cooperation between the Institute of Legal Practice & Development (ILPD) and Allen & Overy – an international law firm with head offices in London – specialized trainings were conducted from May 10 to 21 in international commercial law. These trainings were a continuation of the Umubano Project, a joint venture between ILPD and United Kingdom law firms to promote the strengthening of the rule of law in Rwanda, whereby law practitioners provide *pro bono* trainings that improve the capacity of justice sector personnel to deliver quality justice in all phases of the judicial system.

Opening the training, the Minister of Justice, the Honorable Tharcisse Karugarama underscored the importance of the training: “15 years ago, our country was destroyed and at the foot of a terrible war, there was no hope of justice, no hope of law, no hope of life itself. The courageous individuals who survived the genocide and did not flee have over the last 15 years brought life back into Rwanda. We have come a long way but there is still much to do to secure Rwanda’s future as a stable and safe home for its people. The training being provided by Allen & Overy will help do that by helping raise the quality of justice and aspirations of the Rwandan population and particularly expectations of the citizens from the legal profession.”

The training was specifically intended to address an existing gap in the area of skills and knowledge in commercial law in light of recent reforms in the commercial sector where almost all laws have been amended or new ones hitherto not existing in the country enacted. These reforms in the commercial law area have also been followed by increased international investment and commercial activity in Rwanda. However, the personnel currently charged with adjudicating over or commencing/defending commercial matters have little or no exposure to such legislation and related procedure. Furthermore, some of the new legislation has not been used in Rwanda before since it comes from a common law background. Therefore Allen & Overy, with its 80 years of experience in practicing under the common law system as well as other legal systems, was a great choice to fill this gap.

The Rwanda Millennium Challenge Corporation Threshold Program: Justice Strengthening Project (Rwanda JSP) was requested by the ILPD in the framework of the Rwanda JSP’s objectives of improving the capacity of ILPD to deliver relevant and quality training to Rwandan Justice Sector institutions; to financially support the ILPD pay the cost of the training venue, meals and related logistical support. Allen & Overy did pay for their trainers’ air fare, hotel accommodation, remuneration and other personnel expenses related to their coming to Rwanda to deliver the training.

Allen & Overy trained 97 members of the Rwandan Justice sector, including 39 judges, 17 prosecutors and 41 practicing lawyers. Of these, 30 were women. The range of subjects covered were diverse and as such the trainees were exposed to the foundations of practice of international commercial law, covering areas such as Treaty Law, Contracts, Banking Law, Corporate Law, Insurance, Investment Treaties and the International Centre for Settlement of Investment Disputes (ICSID), Legal skills, Managing a law practice and the Role of *pro bono* work from the legal practitioners' view.

The Rwanda JSP, on the request of ILPD, accepted to support this training because of its importance in the areas of improving the capacity in the Justice Institutions to deliver quality justice as well as supporting ILPD to obtain visibility, to gain experience and skills in organizing high level trainings, and to help strengthen its partnership with Allen & Overy specifically and the Umubano Project generally. In addition, lawyers collaborated with Allen & Overy in the development of training materials prior to the delivery of training. Practicing lawyers, including one from the Ministry of Justice, team taught with Allen & Overy faculty, thereby increasing the capacity of the training pool for ILPD.

Training Materials

Allen & Overy prepared a wide range of training materials that ranged from decided cases, problem questions and PowerPoint presentations (See Annex II for a complete list of materials distributed). Based upon areas of expertise, the KBA partnered lawyers with Allen & Overy faculty in order to develop training materials that were relevant to the Rwandan experience. These materials, all in English, were given to participants in accordance with the different courses that were taught. This ensured easy reference during the courses and further reading and consultation in their respective practices. A full set of the trainings materials are available at the Rwanda JSP offices and for consultation at the ILPD Library.

Organization of the training

The training was designed to cover five main areas of international commercial law:

1. Aspects of Dispute Resolution,
2. Administrative Law & Treaty Law,
3. Banking Law and Practice,
4. Corporate Law and Practice, civil litigation, legal skills, managing a law practice; and,
5. International Capital Markets.

Participants were divided into three groups, according to their professional functions (judges, prosecutors and practicing lawyers). During the two weeks, the training was conducted according to a pre-set program that was prepared by the instructors for each group of participants, given that all each group was not supposed to cover the same topics at the same time. Each group was trained separately by at least two Allen & Overy instructors co-teaching each course.

Judges and prosecutors had set groups and predetermined schedules while lawyers were allowed to choose their courses depending on their professional interest, requirements and

availability. Though the number of lawyers was not supposed to exceed 40 at a time, the attendance sheets indicated that some times the number exceeded what had been anticipated. This reflected the importance and interest the trainees attached to the trainings. Participation of Rwandan lawyers in the development of materials and also as team teachers also contributed to the level of interest among practicing lawyers.

Before the trainings began, it had been decided that the main language of instruction would be English. However, as many participants found it difficult to follow English-language trainings (most completed their legal training in French and practice mainly in French and Kinyarwanda) and in response to this some key Allen & Overy trainers who were bilingual switched from English to French and vice versa in order to ensure that the trainees fully followed the training. There was also a group of lawyers who had earlier been identified in the lawyers' group to assist instructors by translating the teachings either in French or Kinyarwanda as well as contextualize some of the matters discussed by the trainees. The judges' group also had an expert jurist from the Ministry of Justice who participated in the national commercial law reform process. She helped contextualize some aspects of the training, participated as a team teacher, and also ensured that trainees were comfortable with equivalencies and differences in English, French and Kinyarwanda.

Training Evaluation

To assess participants' current knowledge and understanding of different topics, pre-evaluation forms were distributed at the beginning of each course. From the analysis of the responses by participants, it is clear that trainees in general had a low knowledge of the topics as almost all of them rated their understanding below the average score.

This can most probably be associated with the fact that over the years, Rwanda has lacked modern commercial laws and related courts that would help them settle business disputes. To illustrate this: only as recently as March 2008 were Commercial Courts established in Rwanda for the first time. In the past, commercial cases were heard by ordinary courts. Related to that is the fact that commercial laws currently in use in Rwanda are relatively new. Therefore you find most personnel in the justice sector not well trained in that area and some of them still have difficulties in applying the new laws.

At the end of each course or session, a set of post-training evaluation forms were distributed to trainees to evaluate their level of learning. The outcome of the post-training evaluation forms reveal that though the trainees gained more knowledge and skills from the training, they noted that more training was needed to allow them to deepen their knowledge.

In addition, participants recommended the allocation of more time for the same kind of training, providing the training materials before each course, and using simultaneous interpretation to enable all trainees to fully and effectively follow the training. Trainees also suggested that allocating more time for practical exercises and discussion would be very helpful for them. They also proposed a list of other topics on which they would wish to receive further training.

Challenges

While the general rating of the training was good, the following challenges were identified:

- The training included more than 100 participants over ten full days. The request for Rwanda JSP's support was made too close to the activity, making budgeting and planning extremely difficult.
- Absence of prior planning and proper allocation of responsibilities led to the Rwanda JSP personnel's proactive engagement with sector institutions. This created tensions between ILPD and the Rwanda JSP to the extent that the latter lost all control over what was happening in terms of programming and training material requirements. This relatively compromised both efficiency and quality in the organization of the trainings.
- The uncertainty about numbers of participants as well as reliable information concerning the actual reimbursable expenses for government employees remained a hindrance to quick payment of reimbursable costs. This presented a particular challenge and inconvenience to trainees coming from outside of Kigali.
- The language of instruction was also raised as an issue because many people could not properly follow the course in English. Though some trainers could speak French, trainees felt that either their French was not good enough or the interpretation was too literal, missing the intended message or technical legal terms.

Opportunities

The size and scope of this training presented unique challenges, providing an opportunity for ILPD and JSP to improve their capacity as training partners. Allen & Overy is interested in continuing their relationship with ILPD, building upon this first effort, and maximizing the impact of JSP collaboration. Continued collaboration between ILPD faculty and Allen & Overy offers the opportunity to build additional curriculum, and expanded team teaching thereby building the capacity of ILPD.

Key Recommendations

- Continued partnership with Allen & Overy in order to build upon the knowledge, skills and abilities initiated by this training.
- Trainees recommended provision of more time for practical exercises and discussion.
- Simultaneous interpretation for all future trainings of this nature is critical as the issues of language remains decisive as to the degree to which participants are able to fully benefit from the trainings. Ideally, participants should be able to choose to follow the trainings in

English, French or Kinyarwanda. However, this is extremely expensive and not within the capacity of JSP.

- At least six months of planning time is required for such a large and complete training effort in order to allow both the ILPD and the Rwanda JSP to jointly set a working framework, plan, budget and implement. Advisory or working groups of stakeholders should be incorporated into the planning process to insure effective and relevant implementation.

Annexes

I. Training Programs

SUPREME COURT										
DATE	10/05/2010	11/05/2010	12/05/2010	13/05/2010	14/05/2010	17/05/2010	18/05/2010	19/05/2010	20/05/2010	21/05/2010
08H00-08H15	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)	Arrival of Trainees: 19 (14 SC judges + 5 Inspectors of courts)	Arrival of Trainees: 19 (14 SC judges + 5 Inspectors of courts)	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)	Arrival of Trainees: 41 (22 commercial court judges + 14 SC judges + 5 Inspectors)
08H15-08H20	Arrival of Trainers: Richard Farnhill	Arrival of Trainers: Richard Farnhill	Arrival of Trainers: Richard Farnhill	Arrival of Trainers: - Paul Crook	Arrival of Trainers: Paul Crook	Arrival of Trainers: Deidre Kelly and Sophie T	Arrival of Trainers: Deidre Kelly and Sophie T	Arrival of Trainers: Deidre Kelly and Sophie T	Arrival of Trainers: Deidre Kelly and Sophie T	Arrival of Trainers: Angeline Welsh
08H20-08H50	Official Opening	Contract Law	Contract Law	Corporate Law	Corporate Law	Banking Law	Banking Law	Banking Law	Banking Law	Introduction to arbitration - legal framework, introduction to arbitration - proceedings from beginning to end
08H50-10h30	Insurance Law	Contract Law	Contract Law	Corporate Law	Corporate Law	Banking Law	Banking Law	Banking Law	Banking Law	Introduction to arbitration - legal framework, introduction to arbitration - proceedings from beginning to end.

10H30-11H00	COFFEE BREAK									
11H00-13H00	Insurance Law	Contract Law	Contract Law	Corporate Law	Corporate Law	Banking Law	Banking Law	Banking Law	Banking Law	Introduction to arbitration - role of the state courts
13H00-14H00	LUNCH	LUNCH DINER	LUNCH DINER	LUNCH						
14H00-15H30	Group Discussion	Closing Ceremonies + Certificates award								
15H30-15H50	Presentation of groups' discussions	Cocktail								
15H50-16H00	Trainer's comments and Inputs	Departure								
16H00	Closing									

MINISTRY OF JUSTICE

DATE	10/05/2010	11/05/2010	12/05/2010	13/05/2010	14/05/2010	17/05/2010	18/05/2010	19/05/2010	20/05/2010	21/05/2010
08H00-08H15	Arrival of 27 trainees	Arrival of 27 trainees	Arrival of 27 trainees	Arrival of 27 trainees	Arrival of 27 trainees	Arrival of 27 trainees	Arrival of 27 trainees	Arrival of 27 trainees	Arrival of 27 trainees	
08H15-08H20	Arrival of Trainers: - Sophie T and D Kelly	Arrival of Trainers: - Angeline Welsh	Arrival of Trainers: - Angeline Welsh	Arrival of Trainers: - Richard Farnhill with Angeline Welsh	Arrival of Trainers: -Angeline Welsh	Arrival of Trainers: - Richard Farnhill	Arrival of Trainers: - Paul Crook	Arrival of Trainers: -Paul Crook	Arrival of Trainers: - Sara Bodle/Sophie T.	
08H20-08H50	Official Opening	introduction to arbitration -legal frame work	Introduction to investment traeties &ICSID	Claims strategy remedies characterising claims	Introduction to constitution and administrative law in the commercail context 1.institutions 2. fundamental rights	Contract law	Corporate Law	Corporate Law	Capital markets	Legal Skills
08H50-10h30	Banking Law	introduction to arbitration -legal frame work	Introduction to investment traeties &ICSID	claims strategy remedies characterising claims	Introduction to constitution and administrative law in the commercail context 1.institutions 2. fundamental rights	Contract law	Corporate Law	Corporate Law	Capital markets	Legal Skills
10H30-11H00	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK
11H00-13H00	Banking Law	introduction to arbitration - arbitration proceedings from beginning to end	a Fictitious case	claims strategy 3. jurisdiction strategy	Introduction to constitution and administrative law in the commercail context 3. judicial review principles	Contract law	Corporate Law	Corporate Law	Group Discussion	Legal Skills
13H00-14H00	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH

14H00-15H30	Group Discussion	Introduction to arbitration -role of the state courts	Introduction alternative dispute resolution	Claims strategy 4.drafting inter-sol correspondence	Introduction to constitution and administrative law in the commercial context 4. contracting with public entities	Group Discussion	Group Discussion	Group Discussion	Presentation of groups' discussions	Closing Ceremonies + Certificates award
15H30-15H50	Presentation of groups' discussions	Introduction to arbitration -role of the state courts	Introduction alternative dispute resolution	Claims strategy 4.drafting inter-sol	Introduction to constitution and administrative law in the commercial context 4. contracting with public entities	Presentation of groups' discussions	Presentation of groups' discussions	Presentation of groups' discussions	Trainer's comments and Inputs	Cocktail
15H50-16H00	Trainer's comments and Inputs	Introduction to arbitration -role of the state courts	Introduction alternative dispute resolution	Claims strategy 4.drafting inter-sol	Introduction to constitution and administrative law in the commercial context 4. contracting with public entities	Trainer's comments and Inputs	Trainer's comments and Inputs	Trainer's comments and Inputs	Closing	Departure
16H00	Closing	Closing	Closing	Closing	Closing	Closing	Closing	Closing	Closing	

KIGALI BAR ASSOCIATION										
DATE	10/05/2010	11/05/2010	12/05/2010	13/05/2010	14/05/2010	17/05/2010	18/05/2010	19/05/2010	20/05/2010	21/05/2010
08H00-08H15	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees	Arrival of 40 trainees
08H15-08H20	Arrival of Trainers: - Paul Crook -Herbert Rubasha	Arrival of Trainers: - Paul Crook - Kavaruganda Julien	Arrival of Trainers: - Paul Crook - Kavaruganda Julien	Arrival of Trainers: - D Kelly and Sophie T - Patrick Nzirabatinyi	Arrival of Trainers: -D Kelly and Sophie T - Patrick Nzirabatinyi	Arrival of Trainers: - A Welsh - Cyaga Eric	Arrival of Trainers: - Richard Farnhill -Richard Mugisha	Arrival of Trainers: - Richard Farnhill with A Welsh - Jean Haguma	Arrival of Trainers: - Paul Crook and Chris Marshall - Me Anita Mugeni	Arrival of Trainers: - Sara Bodle/Sophie T - Kavaruganda Julien
08H20-08H50	Official Opening	Corporate Law	Corporate Law	Banking Law	Banking Law	Introduction to arbitration - Legal frame work	Insurance Law	Claims strategy 1. remedies characterising claims	Managing your practice	Capital Markets
08H50-10h30	Legal Skills	Corporate Law	Corporate Law	Banking Law	Banking Law	Introduction to arbitration - Legal frame work	Insurance Law	Claims strategy 1. remedies 2. characterising claims	Managing your practice	Capital Markets
10H30-11H00	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK	COFFEE BREAK
11H00-13H00	Legal Skills	Corporate Law	Corporate Law	Banking Law	Banking Law	introduction to Arbitration proceedings from beginning to end	Insurance Law	Claims strategy 3. jurisdiction strategy	Managing your practice	Preparation of recommendation
13H00-14H00	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH
14H00-15H30	Group Discussion	Group Discussion	Group Discussion	Group Discussion	Group Discussion	Introduction to arbitration -role of the state courts introduction to alternative dispute resolution	Group Discussion	Claims strategy 4. drafting inter-sol correspondance	Group Discussion	Closing Ceremonies + Certificates award

15H30-15H50	Presentation of groups' discussions	Introduction to arbitration -role of the state courts introduction to alternative dispute resolution	Presentation of groups' discussions	Claims startegy 4 drafting inter sol correspondance	Presentation of groups' discussions	Cocktail				
15H50-16H00	Trainer's comments and Inputs	Introduction to arbitration -role of the state courts introduction to alternative dispute resolution	Trainer's comments and Inputs	Claims startegy 4 drafting inter sol correspondance	Trainer's comments and Inputs	Departure				
16H00	Closing	Closing	Closing	Closing	Closing	Closing	Closing	Closing	Closing	

II. Training Materials

Aspects of Dispute Resolution

1. Allen & Overy training programme: 10 May 2010 – 21 May 2010
2. Allen & Overy firm profile
3. Allen & Overy trainers: who we are.
4. Evaluation forms

Contract law

5. An overview of the Law of Contract - slides
6. Notes to accompany presentation entitled "An overview of the Law of Contract"

Insurance Law

7. Introduction to Commercial Insurance Claims – slides

Litigation skills

8. Claims Strategy – slides

Introduction to arbitration and ADR

9. Introduction to Arbitration – Legal Framework - slides
10. Introduction to Arbitration – Arbitration Proceedings from Beginning to End - slides
11. Introduction to Arbitration – Role of the State Courts - slides
12. Introduction to Investment Treaties & ICSID - slides
13. A Fictitious Case - slides
14. Introduction to Alternative Dispute Resolution - slides

Constitutional and Administrative law

15. Introduction to constitution and administrative law in the commercial context - slides

OVERVIEW OF THE LAW OF CONTRACT

ANGELINE WALSH

FORMATION

- (1) Contracts are more than simple agreements; they are agreements, the breach of which gives rise to legally enforceable remedies. Here, we look at the three elements that are required to bring about this legal enforceability:
 - i. an agreement, comprising an offer and a matching acceptance;
 - ii. consideration; and
 - iii. Intention to create legal relations.
- (2) Each is addressed in turn.

Agreement

- (3) Whilst a contract is more than a mere agreement, an agreement is still a vital element of any contract. The first question is when the law considers whether an agreement has been reached. This can be assessed in two ways: subjective and objective. A subjective test looks at the actual intention of the contracting parties; an objective test looks to what they said or did and not what they intended to say or do. English law adopts a strictly objective test:

*"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."*¹

- (4) The court, therefore, looks at the parties' object of manifestations of intent. What they are actually thinking is irrelevant to the court's assessment as to whether agreement has been reached.
- (5) The first step in identifying any agreement is the offer. An offer is an objective manifestation of an intention to be bound, immediately on acceptance of the offer, to a legal relationship. The party making the offer is called the offeror: the party receiving it is the offeree. Only the offeree can accept the offer.² There is normally no requirement that the offer be in any particular form, whether oral or written, by words or by conduct. Provided it manifests sufficient intent, it will constitute an offer.
- (6) Where difficulties can arise is in distinguishing an offer from what is called an invitation to treat. An invitation to treat is a mere start to the negotiating process. It does not signify that the party making the invitation wishes immediately to be bound upon an acceptance of it. The classic example of an invitation to treat is an advertisement. An advertisement will publicise goods that may be available for sale. That advertisement is not normally capable of being accepted to form a contract. If it was, the

¹ *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010], UKSC 14 at [45]; see also *Smith v Hughes* [1871] LR 6 QB 597

² An offer can be made to the world at large, in which case anyone can accept it by complying with its terms. Common examples include reward cases and sales promotions.

advertiser would risk being contractually obliged to supply far more goods than he had available to him.³ This is only a guide, however; the precise facts will be critical. Thus, an advert promising to sell to "the first 50 people through the door" may well constitute an offer to those people.

- (7) The distinction between an offer and an invitation to treat can be a difficult one on the facts, particularly where there are lengthy preliminary negotiations. At what point does the "real" bargaining start? The key is to assess whether, the maker of the communication appears to intend to be bound immediately upon its acceptance. If he does, it is an offer; if he does not, it is an invitation to treat. Even once an offer is made it can normally be withdrawn at any point prior to acceptance.
- (8) An acceptance is an objective manifestation of an intention immediately to be bound to the precise terms of the offer. The offeree cannot amend the terms of the offer and purport to accept the amended offer. That is a counteroffer and kills the original offer, rendering it no longer capable of acceptance.⁴
- (9) In most cases, it is open to the offeror to specify the method of acceptance, such that if the offeree fails to comply with that method of acceptance, there is no agreement pursuant to the terms of the offer and, so, no contract. The offeror must be very clear that the method stated is the only method by which the offer can be accepted, however. Where he uses words that are not sufficiently clear, the court will hold that the offeror is bound by an acceptance made in a form which is no less advantageous to him than the form prescribed.⁵ An exception to the general rule that the offeror can specify the means of acceptance is the rule on acceptance by silence. Because the test for formation requires an objective manifestation of intent, there can be no acceptance by mere silence, even when the offeror has stated that silence will constitute acceptance.⁶ Objectively, it is impossible to assess whether silence means agreement or simply that the offeree is not interested and sees no reason to respond.
- (10) There are two particular cases with acceptance which can give rise to difficulty: the "battle of the forms" and the postal rule.
- (11) Battle of the forms cases arise where each party insists on using its own standard terms of business. At no stage does either party expressly accept the other party's terms but work starts in any event. A breach occurs and a question arises as to which terms govern.
- (12) As in all questions on offer and acceptance, this is an issue of fact to be determined in every case. As a general guide, however, the courts will look to the last offer made before work was commenced, the so called "last shot doctrine".⁷ Alternatively, especially if only preliminary steps have been taken under the putative contract, they may conclude that there is actually no contract and that the appropriate remedy is restitutionary.⁸
- (13) The postal rule comes into play where the offeror seeks to revoke the offer at a time after the offeree has dispatched an acceptance but before the acceptance is received. In cases where the postal service was indicated, by the offeror, to be an appropriate mode of acceptance then the acceptance will be effective at the time it is sent.⁹ In all other cases, it will be effective when received. By and large, the courts have been reluctant to apply the postal rule outside cases involving physical mail services on the basis that other forms of distance communication, such as telex or fax, are instantaneous.¹⁰ It remains to be seen how the courts will deal with e-mail.

Consideration

- (14) Consideration is the idea of exchange or price. As a general rule, we do not expect to get something for nothing. English law operates on the same basis. Whilst it is open to parties to make gratuitous

³ *Partridge v Gittenden* [1968] 1 WLR 1204

⁴ *Hyde v Wrench* [1840] 3 Beav 334

⁵ *Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1969] 3 All ER 1593

⁶ *Felthouse v Bindley* [1862] 11 CB (NS) 869

⁷ *Butler v Ex.-Cell.-O Corp (England) Ltd* [1979] WLR 401

⁸ Seen generally, *RTS Flexible Systems Ltd*

⁹ *Byrne v Van Tienhoven* [1880] 5 CPD 344

¹⁰ *Entores v Miles Far East Copr* [1955] 2 QB 327

promises, the law is not about to enforce them. The law will only enforce an agreement as a contract where it is supported by consideration on the part of both parties.

- (15) Consideration requires each party to both confer a benefit or incur a detriment at the request of the other party. I buy a newspaper, the newsagent now has more money (a benefit for him) and I have less (a detriment for me) whilst I have a newspaper (a benefit for me) and he has one less newspaper available to sell (a detriment for him). In this example, as is often the case, both parties enjoy a benefit and suffer a detriment. That is not necessary, however. If I agree to pay you £50 to walk to York, you receive the benefit of £50 but incur the detriment of expending the time and energy of walking to York. I incur a detriment – giving up the £50 – but it is irrelevant that I have enjoyed no benefit – your incurring a detriment at my request is sufficient.
- (16) Whilst the general principle is not difficult, issues have always arisen with whether the performance of an existing obligation can constitute sufficient consideration. The classic view is that it cannot. Therefore, the part payment of a debt in agreement for discharge of the whole debt is not good consideration, since the debtor is only doing that which he was obliged to do, and the creditor can seek the balance of the debt despite the agreement to the contrary.¹¹ Similarly, where a party negotiates an increase in pay to carry out the same work that it was contractually obliged to perform, the increase is not enforceable: the worker is doing nothing that it was not, previously, obliged to its employer to do.¹²
- (17) That traditional view, has, however, come under some pressure in recent years, particularly in the context of variations to contracts. Consequently, where a carpentry subcontractor could not afford to carry out the works that it had agreed to do and agreed an increase in the rates payable by the main contractor, the variation was held to be enforceable. The main contractor was said to receive the practical benefit of not having to identify and engage a replacement carpentry subcontractor.¹³
- (18) These two lines of reasoning are extremely difficult to reconcile. The carpentry sub-contractor was already contractually obliged to the contractor to carry out the work that he subsequently agreed to perform. Factually, the situation was impossible to distinguish from *Stilk*. It is a critical area of uncertainty in the law on formation of contracts.

Intention

- (19) This is very often the "forgotten relation" in the test for formation, yet can be critical. It is always open to the parties to make their agreement non-binding, simply by saying so. Where a communication is marked "subject to contract" or is described as a "gentleman's agreement", then it is not intended to be legally binding; unless that condition is waived, the court will not enforce the agreement.¹⁴

Recent Issues

*Offer, acceptance and intention – the judgment in Bear Stearns Bank plc v Forum Global Equity Ltd*¹⁵

- (20) *Bear Stearns* involved the trade between Forum and Bear Stearns of certain loan notes in the insolvent Italian food company, Parmalat. On 14 July 2005, Forum had orally agreed to sell the notes to Bear Stearns. On 15 July 2005, Bear Stearns had agreed to sell half of those notes on to Morgan Stanley. On 6 October 2005 the loan notes were replaced by shares in the new Parmalat entity. However, by 21 October 2005 the final documentation had still not been agreed between the lawyers and Forum withdrew from the transaction.
- (21) The court held that there was a contract between the parties, meaning that Forum was not entitled to walk away. The correct test is:

¹¹ *Foakes v Beer* [1884] 9 App Cas 605

¹² *Stilk v Myrick* [1809] 2 Camp 317

¹³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1

¹⁴ *Rose & Frank Co v JR Crompton & Bros Ltd* [1925] AC 445 affirming [1923] 2 KB 261; of *RTS Flexible Systems*

¹⁵ [2007] EWHC1576 (Comm)

"... to ask how a reasonable man, versed in the business, would have understood the exchanges between the parties. Nor is there any legal reason that the parties should not conclude the contract while intending later to reduce their contract in writing and expecting that the written document should contain more detailed definition of the parties' commitment than had previously been agreed."¹⁶

- (22) The court focussed very heavily on the market in which the parties were operating. In this case, the market almost always operated on the basis of oral deals; that militated strongly to a finding that it was the oral deal that formed the contract, not the later written documentation, which simply evidenced it.¹⁷ Put another way, the court, focussed on the commercial deal, not the legal details, as being significant. The simple fact that there were significant but not essential terms to be agreed, in particular date of delivery, was not fatal to a finding that the parties had entered a contractual relationship. In this particular market, there was no expectation or practice that a settlement date had to be agreed.¹⁸ To the extent that further terms were necessary to give business efficacy to the core agreement, the law would imply them.¹⁹
- (23) *Bear Stearns* reiterates a number of key points on formation:
- i. the objectivity of the formation test: the question was not whether the individual parties thought that they were bound; it was whether another market participant, an objective third party, looking at the other's communications would have thought that an agreement had been reached;
 - ii. it was always open to the parties to make clear that their agreement was subject to a final binding contract, but they had to do so clearly; and
 - iii. in particular, the court was not prepared to accept that the need for ongoing negotiations as to the detailed terms rendered the whole agreement between the parties subject to those terms being settled.

*Consideration – the Judgment in Adam Opel GmbH v Mitras Automotive UK Ltd*²⁰

- (24) The debate on consideration between the "practical benefit" approach suggested by the Court of Appeal in *Williams v. Roffey Bros* and the more traditional "legal benefit" approach laid down in *Foakes v Bear* and *Stilk v Myrick* seemed largely, to have been settled in favour of the traditionalist approach. The Court of Appeal's reasoning in *Williams* had been apparently disapproved subsequently by the Court of Appeal in *Re Selectmove*²¹ and had struggled to find a great deal of support anywhere else. That support has now come, however, from the High Court.
- (25) In *Adam Opel* the court specifically endorsed the applicability of the *Williams* approach.²² The judge's reasoning does not address how, if at all, the two competing lines of cases can be reconciled. He simply identifies the conflict between *Stilk* and *Williams* and, without analysis or reference to any further cases, states that *Williams* is the proper test to apply. The comments are not, strictly, binding and are, in any event, apparently inconsistent with superior authority from the Court of Appeal and the House of Lords. However, the case does demonstrate that there is scope to argue that the "practical benefit" test ought to apply and that this area of the law remains unsettled.²³

¹⁶ *Ibid* at 171

¹⁷ *Ibid* at 172

¹⁸ *Ibid* at 165

¹⁹ *Ibid* at 169

²⁰ [2007] ALL ER (D)272

²¹ [1995] 1 WLR474

²² *Ibid* at para.40-43

²³ See also *Forde v Birmingham City Council* [2009] 1 WLR 2732 at 88 – 89

Formation – Practice Points

- (26) In considering whether a contract has been reached, it is important to look at the following issues:
- i. a contract is more than merely an agreement; always look to see that there is sufficient evidence of intention and consideration;
 - ii. if you want to make an agreement non-binding, it is important to be clear in doing so. Do not simply rely on the surrounding circumstances which may, with the benefit of hindsight, be considered ambiguous; and
 - iii. whilst the argument remains that performance of an existing contractual obligation represents good consideration, such consideration should be handled with considerable care. Where possible, see if there is some "legal benefit" that you can provide, thereby removing all doubt. Remember that if you can provide some additional benefit, such as early payment, that will be good consideration under both the legal and the practical benefit tests. Where you are obliged to rely on *Williams* consideration, look at embodying your agreement in a deed, which does not require consideration to be legally enforceable.

Variation

- (27) The law on variation, gives rise to two particularly difficult issues, the question of consideration and the effect of "no variation" clauses.

Consideration

- (28) The issue with consideration is that considered at paragraphs (14) to (32) above: is it sufficient for one party to agree to perform its existing obligations or does each party need to provide new consideration in order for these variations to be binding? As we have seen, the law has yet to reach a decision.

"No variation" Clauses

- (29) Under a "no variation" clause, the parties agree either not to vary their contract at all or only to vary it in a certain way, normally in writing. The question that arises is whether such clauses are binding. On the one hand, it is normally open to the parties to make, unmake and remake their contract as they wish. The law is normally quite reluctant to interfere. On that analysis, such clauses should be ineffective. On the other hand, if such clauses are not enforced, they are simply worthless and the law generally seeks to avoid rendering any term of an agreement meaningless. That militates in favour of enforceability.
- (30) In *World Online Telecom Ltd v I-Way Ltd*.²⁴ the matter came before the Court of Appeal. This involved a typical "no variation" clause in which it was provided that any amendment to the parties agreement had to be in writing, signed by or on behalf of both parties. The parties had reached an oral agreement as to the income distribution that was different to the one set out in the original agreement. I-Way brought a claim for its share of the rebate on the basis of this oral agreement. World Online applied for summary judgment (a form of early resolution which can only be granted if there is no real prospect of a claim or defence succeeding) of that part of I-Way's claim on the basis of the "no variation" clause.
- (31) Because the application was one for summary judgment, the only question that the Court of Appeal had to decide was whether that claim had any realistic prospect of success. It did not have to decide whether it actually did succeed on the facts. As such, having acknowledged that the state of the law on these questions was "not settled" the Court of Appeal did nothing to settle it. It refused the application for summary judgment, but that simply meant that the argument had a prospect of success if the case came to trial. The Court of Appeal gave no indication as to whether, in fact, it would succeed.

²⁴ [2002] EWCA Civ 413

Practice Points – Variation

- i. When looking to amend your contracts, keep in mind that the effect of "no variation" clauses remains unknown. To the extent that they are contained in an agreement, they should be treated with considerable caution;
- ii. to the extent that the concern is to control variations of the contract, one solution is to vest the authority to agree such changes in a particular group or to a particular office holder. There are potential practical difficulties with this becoming cumbersome, but for key changes, such a route would normally be enforceable (it would deny the actual or apparent authority to anyone below that level) and that will provide greater certainty; and
- iii. remember the rules on consideration when varying contracts – a variation must be supported by consideration, although the standard may be lower than for the original formation of the contract.

INTERPRETATION

What approach does the Court adopt?

- (32) When it comes to the interpretation of contract terms, the English Court will more often than not be considering the meaning of the express terms of a written agreement. The task of interpretation equally applies to the terms of oral agreements, although as a matter of evidence it is generally harder to set out the terms of an oral agreement with precision.
- (33) Interpretation is looked at from the point of view of the “reasonable person”, the objective third party observer. The personal quirks of the parties are set aside.
- (34) For example, in *Reardon Smith Line Ltd v Yngar Hansen – Tangen*²⁵ the House of Lords considered the interpretation of a charterparty contract in relation to a Japanese motor tank vessel. The contract provided for the charter of the vessel on completion, even before work had commenced on building it, as part of arrangements to finance its construction. However by the time the vessel was ready for delivery, the market had collapsed and it was in the charterers' interest to escape from their contracts. A dispute arose over the words of the contract identifying the vessel. Lord Wilberforce concluded that practices adopted in the shipbuilding industry in Japan did not form part of the admissible background material, whether or not these practices were known to the parties.
- (35) There are good public policy reasons for the objective approach:
 - i. a statement may subjectively mean different things to different parties. It is however an agreed statement and requires a collective, not an idiosyncratic, interpretation;
 - ii. a contract binds people to enforceable promises. In entering into the contract, the parties therefore expect some level of certainty as to what they are agreeing to or, in other words, some certainty that they will not be taken to agree purely to the subjective intention of the other party.

The objective approach to contract interpretation takes into account two factors: the plain terms of the agreement reached between the parties; and the admissible factual matrix against which those terms must be read.

The Whole Contract

- (36) A contract: "*must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions*

²⁵ [1976] 1 WLR 989

of the [contract] if that interpretation does no violence to the meaning of which they are naturally susceptible."²⁶

- (37) The starting point is therefore to ascertain what your contract is. More often than not this will be a relatively straight forward process as the contract will be set out in one written document. This is not always the case, however:
- i. if several instruments have been entered into in order to effect one contract, each will be taken into account in interpreting the others. For example, where a man applied for and was allotted profit sharing deposit notes in a company on the strength of a written prospectus, it was held that the notes and the prospectus could be read together as constituting the contract between the subscribers and the company;²⁷
 - ii. where a previous contract is incorporated into the contract under consideration, they will be interpreted together;²⁸ and
 - iii. there may also be written or oral amendments to the contract which must also be taken into account.

Factual Matrix – what is it?

- (38) As set out above, one starts with the words of the contract. But the: "*meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would have reasonably have been understood to mean.*"²⁹
- (39) The factual matrix will be admissible in all cases, not merely cases of ambiguity. In order to interpret any contract, the Court must consider background material which a reasonable man would have regarded as relevant and which would have affected the way in which he would have understood the language of the document and which would have been reasonably available to the parties.
- (40) Words are to be understood in their plain, ordinary, and popular sense. The Court will be reluctant to accept that people make linguistic mistakes, particular in formal documents. Words should therefore be given their natural and ordinary meaning.
- (41) However, this does not go so far as to restrict the Courts from finding, on the basis of the relevant background, that something must have gone wrong with the language. For example, in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.*³⁰ emphasised:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

- (42) A colourful example of the interplay between words and background information reasonably available was given by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*³¹:

"No one, for example, has any difficulty in understanding Mrs Maltrop. When she says 'She is obstinate as an allegory on the banks of the Nile', we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the Nile and choosing one which sounds rather like 'allegory'."

²⁶ *N.E. Railway v Hastings* [1900] AC 260 per Lord Davey at 267

²⁷ *Edwards v Marcus* [1894] 1 QB 587

²⁸ See section 58 of the Law of Property Act 1925

²⁹ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896

³⁰ [1985] AC 191, per Lord Diplock at 201

³¹ [1997] AC 749 at 774

- (43) When background material is taken into account as an aid to interpretation, it may result in words construed in a way which is different to their natural and ordinary meaning.

"The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

- (44) Examples of admissible background material include agreed facts about market practice,³² the genesis of the transaction, the context in which the parties are operating,³³ where the parties have negotiated on the basis of an agreed meaning given to a word or phrase³⁴ and any related, but separate, contracts.
- (45) When one comes to consider the commercial context of the transaction, there is some lack of clarity in the case law as to whether one is looking at the background information which was available to the parties at the time of the transaction or whether it was information which was generally known in the particular market or other information which was publicly available.
- (46) In *Attorney General of Belize & others v Belize Telecom Limited & Another*³⁵ the Privy Council considered the interpretation of the articles of association of the leading telecommunications company in Belize. The issue related to the tenure of directors who were appointed by the holder of the golden share in the company. While now in private hands, the golden share had previously been held by the government. Attached to it were certain rights to appoint directors on a sliding scale, depending on the number of ordinary shares the golden shareholder had in the company. The appointing shareholder ceased to hold the required number of ordinary shares and the issue was whether the directors appointed by him remained on the board. The articles of association were silent. In approaching the issue of interpretation the Privy Council considered: "*such background as was apparent from the memorandum of association and everyone in Belize would have known, namely that telecommunications had been a state monopoly and that the company was part of a scheme of privatisation*" could be taken into account.
- (47) There is no conceptual limit as to what can be regarded as background material. It is not confined to factual background but can also include the law.³⁶

Factual matrix – what is out?

- (48) The law excludes from admissible background the previous negotiations of the parties and their declarations of subjective intent.³⁷
- (49) The exclusion of pre-contractual negotiations was recently revisited by the House of Lords in *Chartbrook v Persimmon Homes Ltd*³⁸. Lord Hoffman reaffirmed their exclusion for the following reasons:
- i. The admission of pre-contractual negotiations would create greater uncertainty of outcome in disputes over interpretation and add to the costs of advice, litigation or arbitration. A substantial amount of documentation would need to be trawled through, and there would be greater scope for argument over the correct interpretation;³⁹ and
 - ii. pre-contractual negotiations are "*drenched in subjectivity*" and it is therefore "*not easy to distinguish between those statements which (if they were made at all) merely reflect the*

³² *Zeus Tradition Marine v Bell* [1999] CLC 391, reversed on other grounds [2000] CLC 1705

³³ *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995-996

³⁴ *Rugby Group Ltd v ProForce Recruit Ltd* [2006] EWCA Civ 69

³⁵ [2009] 1 WLR 1988

³⁶ *BCC v Ali* [2001] 1 AC 251, *Chartbrook* [2009] UKHL 38

³⁷ *Investor Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896

³⁸ [2009] 1 AC 1101

³⁹ *Chartbrook* at paras 35 to 38, although Lord Hoffman notes that these public policy reasons have less force when it is considered that such evidence may be admissible on an application for rectification of a contract.

aspirations of one or other of the parties and those which embody at least a provisional consensus which throw light on the meaning of the contract which was eventually concluded."

- (50) In reaching this conclusion Lord Hoffmann recognised that as a consequence, the parties could be held to be bound by contractual terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. However, this was justified by the more general interest of economy and predictability in obtaining advice and adjudicating disputes.
- (51) Draft agreements are inadmissible on the grounds that they do not represent the final consensus between the parties.⁴⁰
- (52) Subsequent conduct of the parties is also inadmissible for the purposes of interpretation.⁴¹
- (53) As a general rule therefore when you are considering how your contract should be interpreted, drafts and pre-contract negotiations should be excluded from the process. However, this exclusion is not as absolute as it may first appear, since such material may still be admitted as part of the background factual matrix to throw light on what they meant by the language used.⁴²
- (54) It can also be relied on to:
- i. show that the document was not intended to express the entire agreement between the parties. For example, where the parties intend their contract to be partly oral and partly in writing, such evidence may be adduced to prove the oral part of the contract;⁴³
 - ii. constitute evidence in support of an application for rectification of the contract (as to which see below); or
 - iii. show that the parties have used terms bearing a special meaning which is different to the ordinary and plain meaning.⁴⁴

Rectification

- (55) Where there is an obvious mistake in expression, the court will correct it as a matter of interpretation. For example, a company traded under the name "Sargrove Automation", but the company named in contract was "Sargrove Electronic Controls Ltd" which was a real but dormant company. The Court of Appeal read the name stated in the contract as the trading name of the company, holding that it was a case of a mere misnomer.⁴⁵
- (56) However, where the mistake is one of the legal effect of the contract, the court has the power to correct those mistakes by rectifying the contract.
- (57) A clear statement of what is meant by rectification was made by Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd*:⁴⁶

"Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error write them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what

⁴⁰ *Lola Cars International Ltd v Dunn* [2004] EWHC 2616 (Ch)

⁴¹ *Union Insurance Society of Canton Ltd v George Wills & Co* [1916] 1 AC 281. Although it may be relevant in other ways, for example where there is an oral and written contract it may be relevant to ascertaining the full terms of the contract.

⁴² *Chartbrook*, para 33

⁴³ *Mercantile Bank of Sydney v Taylor* [1893] AC 317, 321

⁴⁴ *Alexiou v Campbell* [2007] UKPC 11

⁴⁵ *Nittan (UK) LTD v Solent Steel Fabrications Ltd* [1981] 1 Lloyd's Rep. 633

⁴⁶ [1953] 2 QB 450 at 461

they said or wrote to one another in coming to their agreement, and then compare what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document but nothing less will suffice."

- (58) Rectification is only available where the contract is a written agreement. This self-evidently follows from the fact that when the Court is asked to interpret an oral agreement, it must find the terms of that agreement as a matter of fact. It is open to the Court at that stage to determine what was the true (oral) agreement which was reached between the parties. In other words, where there is no written agreement, there is nothing to correct.
- (59) When it comes to considering what the pre-existing agreement reached between the parties was, the Court undertakes the same interpretation exercise as described above, save for one important difference. The Court can look at pre-contractual negotiations in order to determine what agreement was reached between the parties.⁴⁷
- (60) However, there are certain additional hoops through which a claimant must jump in order to succeed in a claim for rectification. The Claimant must show that the error in the written agreement was either a common mistake or a unilateral mistake.

Common mistake

- (61) Where there is evidence that the parties actually agreed to different terms to those which are ultimately recorded in the contract, or the legal effect of the words used was not what the parties agreed on, rectification may be ordered on the basis of common mistake. However, both parties must be unaware of the mistake in the final written contract.
- (62) Therefore the party seeking rectification must show:
- i. the parties had a common continuing intention, whether or not amounting to a formal agreement, in respect of a particular matter in the instrument to be rectified;
 - ii. there was an outward expression of accord;
 - iii. the intention continued at the time of the execution of the instrument sought to be rectified; and
 - iv. by mistake, the instrument did not reflect that common intention.⁴⁸

- (63) The burden of proof is on the party seeking rectification, who must adduce "*convincing proof*"⁴⁹ that:
- i. the document to be rectified was not in accordance with the parties' true intentions at the time of execution; and
 - ii. the document in its proposed form does accord with their intentions.
- (64) A party seeking to persuade the Court to rectify the agreement, should therefore have evidence contemporaneous or anterior to the contract which is capable of defining the extent of the rectification. Where a party relies on an agreement reached prior to the written agreement, it must show that the intention of the parties continued unaltered up until the time of execution of the written agreement.

Unilateral mistake

⁴⁷ *Murray v Parker* [1854] 19 Bev 305, 308

⁴⁸ *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71, 74, para 33

⁴⁹ *Joscelyne v Nissen* [1970] 2 QB 86

- (65) Where a party signed an agreement which did not record his intentions correctly, and the other party knew of the first party's error and deliberately avoided drawing the first party's attention to it.
- (66) There are additional hurdles to overcome in order to persuade a Court that there has been an unilateral mistake. A party has to show:
- i. Party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision, which mistakenly it did contain; and
 - ii. that the other party, Party B, was aware of the omission or the inclusion and that it was due to a mistake on the part of Party A. In this context Party B must have actual knowledge of the mistake. Actual knowledge for this purpose includes wilfully shutting its eyes to the obvious, or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;⁵⁰
 - iii. that Party B has omitted to draw the mistake to the notice of Party A; and
 - iv. that the mistake must be one calculated to benefit Party B.⁵¹
- (67) What is very significant about the doctrine of unilateral mistake, is that there is no requirement for the Court to find that there was a pre-existing agreement between the parties. It is sufficient that Party A believed that the written contract contained the particular term. The effect of this is that Party A's subjective intentions are relevant in these circumstances, which is inconsistent with the objective reasonable third party bystander approach to contractual interpretation.

Implication of Terms

- (68) The Courts will imply terms into contracts to give effect to the intention of the parties. Terms can be implied either as a matter of law or on the particular facts of the case.

Implication as a matter of law

- (69) Whether terms are implied into a contract as a matter of law depends on the nature of the contract entered by the parties, relationships such as employer and employee, buyer and seller or landlord and tenant.
- (70) Examples of terms implied as a rule of law include:
- i. sale of goods contracts - undertakings as to title, quality and fitness for purpose;⁵²
 - ii. supply of services contracts - where a person agrees to carry out a service, and where that supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill;⁵³
 - iii. arbitration agreements - it is implied that arbitration is confidential;⁵⁴
 - iv. contracts of tenancy - implied repairing obligations imposed upon a landlord under the Landlord and Tenant Act 1985;⁵⁵ and

⁵⁰ *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509

⁵¹ *Thomas Bates Son v Wyndhams Ltd* [1981] 1 WLR 505

⁵² Sale of Goods Act 1979 Sections 12 to 15

⁵³ Supply of Goods and Services Act 1982 Section 13

⁵⁴ *Ali Shipping Corp v Shipyard Trogir* [1998] 1 Lloyd's Rep 643

⁵⁵ Also where a tenancy agreement relates to a flat in a high rise block, there is an implied obligation on the part of the landlord to keep reasonable care to keep in repair and lit essential means of access and rubbish chutes. *Liverpool City Council v Irwin* [1977] AC 239

- v. employment contracts – implied duty of confidence.⁵⁶

Implication as a matter of fact

(71) The requirements for a term to be implied as a matter of fact have been expressed in different ways in the case law, but can be summarised in the following three conditions:

- i. it must be necessary to make the contract work;
- ii. it must be capable of clear expression; and
- iii. it must not contradict any express term of the contract.

(72) The second two conditions are straightforward. It is the test of necessity which has been subject to recent judicial comment.

(73) In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977)*⁵⁷ Lord Simon of Glaisdale identified the following conditions for the implication of term (aside from clear expression and no contradiction). The term must be:

- i. reasonable and equitable. For example, in *BP Refinery* it was argued that a term should be implied into an agreement which provided for favourable rates to a company, in order that the company would build an oil refinery, would come to an end early when the company ceased to occupy the refinery site. This was rejected on the basis that it would not be reasonable as it would operate to deprive the company of the consideration it would receive for building the oil refinery;
- ii. necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it. For example, a term was implied into a contract in which a publican agreed to take all his requirements of electric energy from an electricity company, that the publican would not take electricity from anyone else,⁵⁸ and
- iii. so obvious that it "*goes without saying*". For example, a term was implied into a contract for the inoculation of cows that the substance used would be safe.⁵⁹

(74) In *Attorney General of Belize* Lord Hoffmann attempted to distil these conditions and concluded that they were no more than other ways of saying: "*is that what the instrument, read as a whole against the relevant background, would be understood to mean?*"⁶⁰

(75) Lord Hoffmann was concerned about the danger of the various conditions being considered independently and undermining the objective approach. In relation to the formulation "*necessary to give business efficacy*" to the contract, he said that it could be that a contract works perfectly well in the sense that both parties are able to perform their express obligations and on the face of it there is therefore no need for an implied term because it would not be necessary in order to give business efficacy to the contract. However, where the consequences of that would contradict what the reasonable person understood the contract to mean, it may be that the "*necessary to give business efficacy*" test would preclude the Court from finding an implied term in order to sustain the reasonable person's understanding of the contract. Lord Hoffmann was also concerned that the requirement that an implied term "*goes without saying*" runs the risk that the Court will consider what the actual parties would have thought about the implied term.

⁵⁶ *Malik v BCCI* [1998] AC 20

⁵⁷ 180 CLR 266 at 282-282

⁵⁸ *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch. 799

⁵⁹ *Dodd v Wilson* [1946] 2 All ER 691

⁶⁰ *Attorney General of Belize*, para 21

- (76) There was some debate as to whether Lord Hoffmann's approach had diluted the requirement set out in *Liverpool City Council v Irwin*⁶¹ that the implied term be necessary. The Court of Appeal in *Mediterranean Salvage & Towage Limited v Seamar Trading & Commerce*.⁶² classified that if had not. It agreed that the conditions set out in *BP Refinery* were to be treated as different ways of saying much the same thing. However, the Court of Appeal said that what Lord Hoffmann was doing was emphasising that the process of implication was part of the process of interpretation of the contract. But the Court will not imply a term in all circumstances where it reflects what the parties have agreed, as seen by the reasonable third party bystander. Because implication is potentially intrusive, in that it deals with matters for which the parties have made no express provision, the law imposes a restriction, namely is the proposed term necessary to make the contract work?⁶³
- (77) The guiding principle is therefore one of necessity. In order to determine whether an implied term is necessary to make the contract work, the Court must first establish what the contract means, and to that it must answer the question posed by Lord Hoffmann (or in other words undertake the process of interpretation).
- (78) Finally, in relation to implied terms it is worth noting that terms may be implied by custom. The question is whether there is in a particular trade a uniform practice so well-defined and recognised that the parties must be assumed to have had it in their minds when they contracted.⁶⁴ For example, it has been held that a bank is entitled to capitalise interest, because that was the established usage of bankers.⁶⁵ However, such terms will not be implied where they are inconsistent with express terms and they can be excluded.

TERMINATION

- (79) Termination can be brought about either because express termination provisions contained in the contract have been triggered or because one party has repudiated the existence of the contract and the other party has accepted that repudiation and brought the contract to an end. Both present practical issues.

TERMINATION PURSUANT TO THE TERMS OF THE CONTRACT

- (80) Contracts often contain termination clauses, either providing for the contract to come to an end on the happening of a certain event (for example a one year contract terminates in accordance with its terms after one year) or allowing one or both parties the right to terminate upon the happening of a certain trigger event. The contract should provide for what will happen, in either case, upon termination.
- (81) The main difficulty with termination clauses tends to arise from giving a party a right to terminate for breach of contract by the other party. Courts are inherently reluctant to permit a party to terminate for breach where that breach would not give rise to a common law right of termination (discussed at paragraphs 81 to 94 below). As such, the courts have held that clauses permitting for termination for "any breach"⁶⁶, "fundamental breach"⁶⁷ and "repudiatory breach" do nothing more than replicate the common law standard, which is a high one. The term "material breach" almost certainly signifies a level somewhere below repudiatory breach, although how much lower is very unclear.⁶⁸
- (82) The key, therefore, is clarity. The purpose of a termination clause should be to allow you to bring your contract to an end with certainty. Such clauses should, therefore:

⁶¹ [1977] AC 239

⁶² [2009] & Lloyd's Rep 639

⁶³ *Mediterranean Salvage*, paras 15 to 18

⁶⁴ *Fox-Bourne v Vernon & Co Ltd* (1894) 10 TLR 647

⁶⁵ *National Bank of Greece SA v Pinos Shipping Co (No.1)* [1990] 1 AC 637

⁶⁶ *Rice (t/a Garden Guardian) v Great Yarmouth BC* [2003] TCLR 1

⁶⁷ *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1AC 361

⁶⁸ *Schuler (L) AG v Wickman Machine Tool Sales* [1974] AC 235

- i. specify which clauses are caught by the termination provisions. The court will be far more likely to enforce a clause which allows for termination in the case of certain specified clauses than over a widely drafted clause that provides for termination for any breach of any clause;
- ii. make clear in the termination provision, that it is intended to operate regardless as to whether a common law right of termination has arisen; and
- iii. specify the consequences of termination. Is the termination clause intended to supplement or supplant the common law rules? To what extent will the right to claim damages be preserved?⁶⁹

Termination rights at common law

- (83) In understanding the common law it is important to draw a distinction between breach of contract and repudiation.
- (84) A breach of contract is a failure to perform the strict terms of the contract. The remedy for breach is damages for losses arising from the breach of that clause. The measure of damages is the monetary sum that will put the claimant in the position that it would have been had that particular term been complied with. For example, I am obliged to sell widgets to you under a supply contract. I deliver one consignment of widgets three days after the due date. As a result of this, your factory is unable to operate for one day and you suffer a loss of profits of £10,000. You are entitled to recover the £10,000 from me, since if I had done what I agreed to do there would have been no closure and no loss of profits.
- (85) A repudiation is the manifestation, by one party, of an intention to walk away from all of its obligations under the contract. A repudiation may, but does not necessarily, involve a breach of contract. If I write to you saying that I will not perform under the contract, that is a repudiation and that can bring the contract to an end even though my obligations to perform had not yet arisen. Such a repudiation is known, rather confusingly, as an anticipatory breach.
- (86) Certain breaches of contract will constitute an act of repudiation. These are referred to as repudiatory breaches and can take one of two forms:
- i. any breach of a condition; and
 - ii. a serious breach of an innominate term.
- (87) A condition (to give it its full title, a promissory condition) is a term of a contract which has either been defined as a condition by previous case law or by statute or is a term which is so significant that any breach of it would manifest an intention, by the breaching party, no longer to be bound by the terms of the contract.⁷⁰ The latter definition is a circular one and can give rise to very considerable uncertainty. Whilst describing a term in a contract as a condition will be persuasive, it will not be conclusive as to whether or not it is, in fact, a condition.⁷¹
- (88) An innominate term is, in practice, almost any other term of the contract. A breach of an innominate term will only be a repudiation where it substantially deprives the non-breaching party of the entirety of the benefit to which it was entitled under the parties' contract.⁷² Again, this is a very factual question and can give rise to very considerable uncertainty.

⁶⁹ *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] All ER(D) 134 has confirmed that damages for loss of bargain (see paragraphs 14-15 below) may still be recovered even where the termination is pursuant to the terms of the contract.

⁷⁰ *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711

⁷¹ *Schuler (L) AG v Wickman Machine Tool Sales* [1974] AC 235; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] All ER(D) 134 at paragraph 15

⁷² *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26

- (89) Whilst certain breaches therefore will also constitute an act of repudiation, repudiation can also occur without needing to show a breach. The most common example of this is the doctrine of so-called "anticipatory breach". Where a party expresses an intention not to perform its obligations at a time before it is bound to perform, that will constitute an anticipatory breach and, hence, an act of repudiation. The non-repudiating party will have the option of affirming the contract (and suing for breach in the normal way if there is an actual failure to perform) or terminating the contract and suing for its loss. Despite being described in terms of breach, no breach is actually involved, since no obligation to perform has arisen at the point of repudiation.⁷³
- (90) The remedy for repudiation, including repudiatory breach, is a right, granted to the non-repudiating party, to elect to terminate the contract and claim damages for all losses suffered. The effect of exercising the right to terminate is purely prospective. All obligations that have accrued before the point of termination will survive.⁷⁴ This includes obligations owed to the breaching party. If you have a debt unconditionally owed to your contracting counterparty, their subsequent repudiatory breach will not, therefore, affect your obligation to pay, regardless of whether you rely on that repudiation and terminate the contract.
- (91) Return to our example, but this time assume that you would suffer no losses from the late delivery, would make £1 million over the life of the contract and that prompt delivery is a condition of the contract (a so called "time is of the essence" clause). Again, I fail to deliver on time.
- (92) This time, even though my breach caused you no loss, you have a right to terminate the contract and recover all the profits you would have made under it - £1 million.
- (93) There is, however, a substantial risk for the party alleging repudiation. Remember, a repudiation is one party manifesting an intention to walk away from the contract where it has no right to do so. A party purporting to terminate a contract for repudiatory breach is clearly walking away from the contract – that is what termination involves. If it has no right to do so, it is, itself, in repudiatory breach and will face potential claims for termination and damages for loss of the contract from the other side.
- (94) A third issue that has very recently been considered by the Court of Appeal is that of persistent breaches. In this type of case, the breach is not of a condition, nor is any individual breach sufficiently serious that it deprives the non-breaching party of substantially the whole of the benefit to which it was entitled under the contract. The question arises as to whether the breaches can be, in some way, "added up" to manifest sufficient evidence of an intention no longer to be bound. In *Alan Auld Associates Ltd v Rick Pollard Associates*⁷⁵ the Court of Appeal held that it could.
- (95) The claimant had persistently made late payments of its obligations to the defendants. The defendants had, therefore, purported to terminate the contract for repudiation. The claimant argued that the defendant could not do so as a matter of law. The Court of Appeal rejected that argument. It held that party was entitled to look at previous breaches in determining the likely future conduct of its contractual counterparty. In this case, the claimant had only one obligation – to make payments – and the breaches of this obligation were substantial, persistent and cynical. No payment was made on time, most were extremely late. There was a background of repeated complaints from the defendant and broken promises by the claimant. The defendants were, therefore, entitled to assume that they would be treated in the same way for the remainder of the contract. Against such a backdrop, a finding of repudiation was entirely legitimate.
- (96) The judgment in *Alan Auld* demonstrates that repeated breaches, where the cumulative effect is sufficiently serious, will give rise to a repudiation and can bring the contract to an end. Obviously,

⁷³ The confusion caused by referring to this doctrine of "anticipatory breach" has been criticised (*Bradley v H Newsom Sons & Co* [1919] AC 16 at 53) but the terminology remains.

⁷⁴ *Johnson v Agnew* [1980] AC 367

⁷⁵ [2008] EWCA Civ 655

given the risks involved, this is not a step that should be taken lightly, but is a route that is open to the non-breaching party.

Breach of a condition precedent

(97) Where a party's obligation under a contract is subject to a condition precedent, it is not obliged to perform until that condition is satisfied. Such conditions are not an undertaking by any party that the condition precedent will be satisfied; as such, there is no action in damages for failure to perform a condition precedent. The only pressure on a party responsible for satisfying a condition precedent is that no obligation arises on the other party until the condition precedent is satisfied. Where a condition precedent is inserted for the benefit of one party, that party can, in its absolute discretion, waive the condition precedent. It can then sue, and be sued, under the contract.

Practice Points

- (98) Termination questions often arise when the parties' relationship is already under pressure and can give rise to some of the hardest judgment calls. The key is forward planning:
- i. the drafting of termination clauses is critical. They are likely to be interpreted restrictively but, if properly worded, can preserve the common law damages claim;
 - ii. keep in mind the difference between breach of a condition and breach of a condition precedent;
 - iii. keep in mind the difference between breach and repudiation; and
 - iv. if an individual breach is not sufficient to demonstrate repudiation, consider the cumulative position, always remembering the risks associated with any claim for repudiatory breach.

VITIATION

(99) The concept of vitiating is quite different from that of either repudiation or breach. Whereas repudiation and breach both acknowledge the existence of a contract but challenge whether it has been performed and whether it is ongoing, the concept of vitiating attacks the very existence of a contract. It is much more closely linked to the formation of the contract than to its termination. Here we will look at the most common grounds for vitiating and the effect that vitiating can have on the contract.

Grounds for vitiating

Common mistake

(100) In some cases a common mistake is readily accepted as a vitiating factor. For example, where a contract is entered into for the sale of specific goods and those goods have, unbeknown to either party, perished before the contract is entered into, then the contract is void for common mistake.⁷⁶ Similarly, where the parties contract on the basis that a contract is physically possible to perform and it is in fact physically impossible to perform (for example, a party contracts to deliver a minimum weight of agricultural produce from land that is incapable of producing that amount) the contract will be void.⁷⁷ Finally, where a party contracts to do something that is legally impossible, the contract will again be void.⁷⁸

(101) Where difficulty arises is when there is some mistake as to the nature or quality of the subject matter of the contract. Two examples will help to illustrate the issue.

⁷⁶ Sale of Goods Act 1979 section 6; this is thought to give effect to the decision in *Couturier v Hastie* [1856] 5HL673.

⁷⁷ *Sheikh Brothers Ltd v Ochsmere* [1957] AC136.

⁷⁸ *Cooper v Phibbs* [1867] LR2HL149.

- (102) In *The Great Peace*⁷⁹ a vessel at sea was in distress. The owners contacted an independent agency to identify any other vessels which were nearby and could render emergency assistance. The owners were told that the defendant had a vessel in the vicinity. The owners therefore contacted the defendant and entered into an emergency charter. Shortly thereafter the parties discovered that, through no fault of either party, the defendant's vessel was considerably further away than the parties had thought. The owners did not immediately cancel the charter but, rather, sought to identify other vessels which might be closer and able to render assistance more quickly. Having identified such a vessel they did then seek to escape from the first charter on the ground that both parties had been mistaken as to the location of the defendant's vessel.
- (103) The Court of Appeal rejected the argument. In order to have a contract declared void for common mistake it was necessary to show that the basis upon which the parties had entered their bargain was essentially and radically different from the actual position. This, the owners could not do. In particular, when they became aware of the true position of the defendant's vessel they did not immediately seek to terminate the charter. This demonstrated that whilst the true position was somewhat different to that which the parties had thought, it was not so different as to render the charter utterly useless for the owners' purposes. On the facts, that was fatal to their claim.
- (104) Similarly, in *Kyle Bay v Underwriters at Risk*⁸⁰ Kyle Bay had entered into a settlement with its business interruption underwriters. Both parties had mistakenly believed that the contract was written on a non-declaration linked basis; in fact, it was not with the result that the policy's value was approximately one third less and so insurers had underpaid by around 33%. The Court of Appeal, applying the "essentially and radically different" test refused to overturn the settlement. Whilst there was a substantial financial difference, it could not be said that it was essential or radical.
- (105) The "essentially and radically different" test is a very difficult one to satisfy. There are good reasons for this as a matter of law. As we have noted, the courts have repeatedly insisted that the test for formation is an objective one: the courts will look at what the parties say not at what the parties actually think. By definition, mistake goes to a party's subjective intent. If the court is to overturn a contract that is, an objective analysis, properly formed on the basis that there is some flaw in the party's subjective intent, it will only do so in unusual circumstances.
- (106) It was previously thought that this might give rise to undue hardship. As a result, the Court of Appeal sought to develop a doctrine of equitable mistake, which would apply a somewhat less stringent test.⁸¹ That approach gave rise to a number of difficulties. First, the appropriate standard was unclear and difficult to apply in practice. Second, it was difficult to reconcile with existing House of Lords authority. The doctrine of equitable mistake has been expressly disapproved by both *The Great Peace* and *Kyle Bay*. Technically, the Court of Appeal does not have the power to overrule its earlier decisions, so there may remain a theoretical basis for equitable mistake claims. At the same time, it seems unlikely that there is much, if any, practical role for the doctrine going forward.

Non est factum

- (107) This is a very specialised form of the defence of mistake. It applies where a party has signed a document in circumstances where he or she is permanently or temporarily unable through no fault of their own to have without explanation any real understanding or purport of a particular document, whether that be from defective education, illness or innate incapacity.⁸² The latter reference tends to relate to blindness or mental incapacity. The effect of a successful plea of *non est factum* is that the instrument signed by the impaired party is void.

Duress

⁷⁹ [2003] QB679

⁸⁰ [REF]

⁸¹ *Solle v Butcher* [1950] 1KB671

⁸² *Saunders vAnglia Building Society*[1971] AC 1004

- (108) Where a contract is entered into under duress, it will be voidable. English law recognises three forms of duress. The first, and most straightforward, is duress to the person. Where actual or threatened violence to the claimant or its family where a factor influencing the claimant to enter into the contract, that contract will be voidable for duress.⁸³ Second, in appropriate circumstances where the threat is to the claimant's property the contract may also be subject to avoidance for duress.⁸⁴
- (109) The final category of duress is also the most controversial. In cases of economic duress, the claimant is induced to enter into a contract or vary an existing contract on the basis of some illegitimate commercial pressure from the defendant, usually the threat by the defendant to breach an existing obligation. Both factors have proved difficult for the English courts⁸⁵.

Undue influence

- (110) The essential feature of undue influence is that some relationship of trust or dependency exists between the claimant and the defendant and the defendant in some way abuses that relationship to induce the claimant to enter into the contract. The law still divide undue influences cases into actual undue influence, which very closely resembles duress, and presumed undue influence, where the simple existence of the relationship give rise to questions as to the transaction⁸⁶.

Misrepresentation

- (111) Where a contract was entered into on the basis of a misrepresentation, in appropriate circumstances the claimant will be entitled to avoid the contract.

- (112) All claims of misrepresentation involve three common factors:

- (i) a representation is made to the claimant by the defendant or its agent. The representation need not take the form of an oral or written statement – a gesture that may well be sufficient. However, silence generally is not sufficient to defend a claim for misrepresentation. English law only imposes a duty to disclose in a limited number of cases, the so called contracts of utmost good faith,⁸⁷
- (ii) the representation must be false (or, in the case of fraud, can be true but intended to mislead); and
- (iii) the claimant must rely on the statement in entering into the contract.

- (113) What differentiates the different forms of misrepresentation is the mental state of the defendant in making the representation:

- (i) Fraud/deceit: Here the defendant either knows his statement to be untrue or he does not care whether or not it is true. Not caring is not the same thing as failure to take reasonable care (see negligence below). In the case of negligence, the defendant does take steps to verify the accuracy of his statement. It is simply that those steps are inadequate and fail to meet the level that would have been attained by a reasonable man. In the case of recklessness, the defendant takes no steps at all. He does not know that the statement is untrue, but he does nothing to establish that it is true.
- (ii) Negligence: As noted above, this is a failure to demonstrate reasonable skill and care on the defendant's part. If the defendant holds himself out as having particular expertise, he will be held to a higher standard than the ordinary layman.

⁸³ *Barton Armstrong* [1976] AC 1004

⁸⁴ *The Evia Luck* [1992] AC 152

⁸⁵ *Dimskal Shipping Co Ltd v ITWF* [1992] 2 AC 152

⁸⁶ *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773

⁸⁷ The most common example of which is a contract of insurance: see Marine Insurance Act sections 18-20.

- (iii) Misrepresentation Act 1967: In this case, the defendant has also failed to show reasonable skill and care. The key difference with negligence is that in a claim for negligence that the burden is on the claimant to show that the defendant could not reasonably have believed his representation to be true; in the case of the Act it is for the defendant to show that he did have reasonable grounds for his belief.
- (iv) Innocent misrepresentation: Historically, equity would permit contract to be set aside on the basis of purely innocent misrepresentations. The cases in this area, however, are very old and it is unclear the extent to which this doctrine survives outside the contracts of utmost good faith.

The effect of vitiation

- (114) There are two issues that arise here. The first is the effect that vitiation has on the contract. In the case of common mistake (other than equitable mistake, to the extent that doctrine survives) and *non est factum*, the contract is rendered void. That is to say that it never existed at all. The effect of the court's order is not to alter the status of the parties' relationship. Rather, the court simply recognises that the apparent contract was nullity and never had any existence. In all other cases, the contract is merely voidable at the application of the claimant. Here, the contract does exist but the court can set it aside from its inception.
- (115) Whilst the distinction is a subtle one, it is critical in connection with third party rights. This can be illustrated with a very common example. The claimant is due to enter into a contract, normally the transfer of real property, to a fraudster. The fraudster then mortgages that property with the defendant, which is a bank or other financial institution. The fraudster disappears with the money. The bank wishes to enforce its security over the property; the claimant wishes to recover its property from the bank. If the original transfer from the claimant to the fraudster is void, then the fraudster never had anything to give the bank and the bank has no rights. If, on the other hand, it is merely voidable then the court will not set aside the original transfer because the bank is a good faith third party and the court will not act to its detriment. Put another way, if the claimant can establish a mistake or *non est factum* the claimant wins; if it can only show duress, undue influence or misrepresentation, it loses. It is for that reason that one often sees cases which appear to be an obvious fraud pleaded as mistake in English law.

Corporate Law and Practice

1. Allen & Overy training programme: 10 May 2010 – 21 May 2010
2. Allen & Overy firm profile
3. Allen & Overy trainers: who we are
4. Evaluation forms
5. The Art of Drafting - slides
6. Drafting Exercises (and Answers to be handed out **after** session)
7. Cross-Border Negotiation Skills - slides
8. A Comparative Analysis of the Rwandan Companies Law, from an English law perspective - slides
9. Due Diligence: How do you do it and why is it important? - slides
10. Preliminary Agreements – slides
11. Preliminary Agreements: Case Study
12. International Share Purchase Agreement - slides
13. International Share Purchase Agreement: Case Study (and answers to be handed out **after** session).
14. International Joint Ventures - slides
15. Building up a law firm and increasing profitability

ALLEN & OVERY LLP

International commercial law training in Rwanda

May 2010

MODEL ANSWERS TO SPELLING AND GRAMMAR EXERCISE AND TO DRAFTING EXERCISES

N.B. TO BE HANDED OUT BY PAUL CROOK AFTER EACH EXERCISE– PLEASE DO NOT PUT THESE INTO THE PARTICIPANTS' FOLDERS. PLEASE PREPARE SINGLE SIDED UNSTAPLED ANSWERS (SO THAT PAUL CAN HAND OUT EACH ANSWER SEPARATELY AFTER EACH EXERCISE) PLEASE CAN ANSWERS BE HOLE PUNCHED, SO THAT THEY CAN BE PUT INTO FOLDERS BY PARTICIPANTS AFTER EACH EXERCISE.

Drafting Exercise 1 – Model Answer
The use of 'must', 'may', 'shall' and 'will'

- (a) **In the context of a share purchase agreement:** Subject to the Conditions being satisfied or, where applicable, waived, the Seller **shall** sell and the Purchaser **shall** purchase the Shares.
- (b) The Shares **shall** be sold free from all Encumbrances and together with all rights attaching to them.

Drafting Tip

In a legal document, 'will' should not be used as an alternative to 'shall' where the word is being used to impose an obligation. However, in this form, 'shall' must only be used to express an obligation. It should not be used to express a mere future event. If you use 'shall' and 'will' interchangeably in a document to mean the same thing, this may cause ambiguity and a court may assume that a difference is intended.

- (c) If an Event of Default occurs, the Company **must or shall** notify.

Drafting Tip

Using 'shall' in legal documents to express an obligation is correct, although it can sound legalistic. To avoid it, it is sometimes possible to use 'must' instead.

- (d) The parties acknowledge that if Mr Smith sells the Property on or before 31 December 2020, Mr Smith **will** retire from the Board on 1 January 2021.

Drafting Tip

In a legal document, 'will' should not be used as an alternative to 'shall' where the word is being used to impose an obligation. But 'will' should be used for a pure future tense where no obligation is being imposed.

In the context of a memo to a client

- (a) Of the offered shares, 160 million **must / may / will** be sold to retail investors, 100 million to domestic institutional investors and 60 million to international institutional investors.
- (b) A French language prospectus and an English-language international offering circular **must / will** be prepared in connection with the offering.

Drafting Tip

The use of "shall" in a memo is wrong. "Shall" is only correctly used when it is written in the document that is imposing the obligation.

Drafting Exercise 2 – Model Answer

Misused words

License and Licence

- (a) The Company has a **licence** to distribute hazardous products.
- (b) The Company is **licensed** to distribute hazardous products.

Drafting Tip

Licence is a noun (e.g. a thing). It is a legal document that allows you to do, use or own something. Note that in American English, this is spelt 'license'. Driving without a *licence* is against the law. *License* is a verb (e.g. an action). When the authorities *license* a person or an organisation, they give permission to the person/organisation to carry out a certain activity.

Damages / liquidated damages

- (a) In the case of a breach of warranty, the Seller will pay **damages** to the Purchaser.
- (b) A payment of **liquidated damages** in the amount of €5 million was agreed between the parties.

Drafting Tip

Damages represents an undetermined sum of money paid in compensation for a loss or injury. It is the remedy of most general application and the one usually claimed for actions in breach of contract. *Liquidated damages* is a definite amount of damages set out in the contract and assessed between the parties, to be paid by the party breaching the contract. It is a pre-determined estimate of actual damages for a breach.

Indemnity / damages / compensation

- (a) The risk of a claim by the Environmental Safety Agency was dealt with in the Agreement by including a specific **indemnity** of up to €2 million in favour of the Purchaser.
- (b) The plaintiff asked to be **compensated / indemnified / paid damages** for his loss of earnings.
- (c) The Seller shall not be liable in respect of a Warranty Claim unless the amount of **damages** to which the Purchaser would, but for this paragraph, be entitled as a result of the Warranty Claim is at least €500,000.

Drafting Tip

Indemnity is protection against future loss (e.g. a general indemnity against tax liabilities arising during a certain period). A *specific indemnity* represents an agreement between A and B that a sum of money will be paid by B to A if a specific future risk identified by A materialises to cause A a loss. *Compensation* is a general term used to define something that is given or received as payment or reparation for a service or loss or injury. See explanation for *Damages* above.

Rescission / termination / withdrawal

- (a) The Agreement may be **rescinded / terminated** by the Purchaser if anything occurs (except something arising from an act or omission of the Purchaser) that has a material adverse effect on the financial condition, prospects or business of the Company.
- (b) The Purchaser may **terminate** the Agreement if any of the Warranted Statements is untrue or inaccurate in a material respect.
- (c) Any bidder may **withdraw from** the tendering process by giving written notice to the Government.

Drafting Tip

Rescission and termination have similar legal meanings that may vary depending on the jurisdiction. Generally, the main distinction between *rescission* of a contract *ab initio* and *termination* of a contract for breach is that the former has retrospective effect, while the latter does not. Termination will usually affect only some of the obligations under a contract. *Termination* can also be the coming to an end of a contract period, although the term *expiry* of a contract is most often used in this context.

Withdrawal is usually used in the context of an offer rather than a contract e.g. an offer may be *withdrawn* at any time before it is accepted.

Credit / debt / receivables

- (a) There is a **credit / receivable** of €2 million in favour of the Bank.
- (b) The intra-group **debt** of €100,000 was repayable to the Company on demand.
- (c) The **receivables** formed part of the company's Net Assets.

Drafting Tip

Debt is the state of owing something (usually money) to which the obligation of repayment is usually attached. *Credit* is an agreement in which a borrower receives something of value in exchange for a promise to repay the lender at a later date (e.g. to buy something on credit). *Receivables* represents money owed to a company by customers for goods sold or services rendered, but not yet collected. This included trade receivables, finance receivables and sales receivables.

Judgement/judgment

- (a) The judge delivered his **judgment** in open court.
- (b) Lawyers need to exercise good **judgement** when taking on new clients.

Principle/principal

- (a) The **principal** reason for doing these exercises is to improve your drafting skills.
- (b) The **principle** that guided him in his personal life was respect for others.

Drafting Exercise 3 – Model Answers
Expressing dates and time limits accurately

- (a) The Agreement shall be amended **on or before** the Completion Date.
- (b) The Agreement shall terminate **at midnight (CET) on 31 December 2009**.
- (c) X must notify the Central Bank once every six months **on or before 31 May and 30 November of each year**.
- (d) The Parties shall agree the List of Assets **within two Business Days after** Completion.
- (e) The notice was published **in** a newspaper.
- (f) The Issued Bonds shall be transferred to the Company **on** the maturity date.
- (g) The Shares shall be listed **on** a regulated market.
- (h) I would like to draw your attention **to** the following points.
- (i) The total value of the shares was increased **by** €100 (old value €200 new value €300 – this is an **increase of** €100).
- (j) The total value of the Shares was increased **to** €100 (old value €50, new value €100 –the value is **increased by** €50 and this is an **increase of** €50).
- (k) There was an increase **in** the Company's share capital
- (l) **In** this regard, we have no comments to make.
- (m) Execution **by** the client is required in order for the agreement to be valid.
- (n) The price was in proportion **to** the value of the Shares.

Drafting Exercise 4 – Model Answer
Drafting Style

Thermal Energy

- (a) The Producer must, if and when required under article 9 of the Convention, provide Steam to either:
 - i. the Municipality of York; or
 - ii. third party users under clause 3.1(b) of the Assumption Agreement.
- (b) The Toller must, if and when required under subclause 3.1(b) of the Assumption Agreement, make available Steam to third party users.
- (c) The Toller must provide (or procure the provision of) [to the Producer] such quantities of Natural Gas as [to the Producer] at the Natural Gas Delivery Point as meet the Natural Gas Quality Parameters.
- (d) If and to the extent the Toller complies with its obligations under paragraph (c), the Producer shall convert the Natural Gas received at the Natural Gas Delivery Point into Steam and shall deliver Steam to the Toller at the relevant delivery point.

Drafting Exercise 5 – Model Answer

Keeping sentences short and omitting redundant words

- (a) No prior notification is required if an Issue or offering of securities already comes within a cumulative notification. However, a follow-up notification must be filed after the issue or offering. *(18 + 15 words)*
- (b) In particular, the Central Bank applies a case-by-case analysis to decide whether Article 129 applies. Its current practice is that an offering does not take place in [jurisdiction] if at least one of the following conditions is met. *(16 + 23 words)*
- (c) Banks must also file an Information File (**IF**) with the Central Bank. The IF is an information sheet usually filed with the 129 Notification. The document may be filed after the 129 Notification, however it must be filed before the actual offering. The IF must be prepared by the issuer and distributed to its clients (by the issuer or the distributors).⁸⁸ *(11 +12 +18 +19 = 60 words plus a footnote)*
- (d) On 15 April 2009 the IAA started an investigation to assess whether TPI had violated 19.1 of Law No. 287/90 for having failed to comply with the Resolution. The IAA had already carried out an inspection at the offices of certain subsidiaries of TPI, as well as at the premises of Eaglepack Ltd - which in the meantime had acquired Hawkpack. *(28+34 words = 62 words)*

⁸⁸ Resolution of the Governor of the Central Bank of 30 July 2004 as recently amended and restated in Title X of the Guidelines (as effective from 1 October 2006).

Drafting Exercise 6 – Model Answer

Editing

- 1.1 This clause deals with the procedure for resolving any dispute that may arise between any of the parties in connection with this agreement (a **Dispute**).
- 1.2 Any party may give written notice to any one or more of the other parties that a Dispute exists, specifying the nature of the Dispute (a **Dispute Notice**).
- 1.3 If the Dispute has not been resolved before the expiry of one month after the day on which the Dispute Notice is given, any party may refer it to an arbitrator by giving notice to the others not later than 14 days after the expiry of the one month period.
- 1.4 The arbitrator shall be an appropriately qualified independent person experienced in matters of the kind to which the Dispute relates, agreed between the parties or, in default of agreement within [7] days after the date of service of the Dispute Notice, appointed by the President [for the time being] of the Kigali Bar.
- 1.5 The arbitrator's decision on the Dispute shall, in the absence of manifest error, be final and binding on the parties.
- 1.6 The costs of the arbitrator shall be borne equally by the parties involved in the Dispute.
- 1.7 If a Dispute affects some, but not all of the parties, references in this clause to the parties shall be treated as being references only to those so affected.

Drafting Exercise 7 – Model Answer

Re-writing

- 2.1 During the period of 12 months beginning on (and including) the date of this agreement, none of the Sellers shall:
- (a) directly or indirectly solicit the business of any Customer, whether on his own behalf or on behalf of any other person; or
 - (b) except as permitted by subclause 2.2, disclose any confidential information relating to the business or affairs of any Group Company or of any Customer.
- 2.2 Subclause 2.1(b) does not prevent a Seller from:
- (a) providing information that he is required by law or regulation to provide; or
 - (b) disclosing any information that comes into the public domain, unless it does so as a result of an unauthorised act of any Seller.
- 2.3 If a Seller is required by law or regulation to provide any confidential information, he shall (to the extent he may lawfully do so):
- (a) immediately inform the Purchaser in writing of the requirement; and
 - (b) within seven days of providing that information, supply the Purchaser with copies or particulars of it.
- 2.4 In this clause:
- (a) **confidential information** includes (without limitation), in relation to a Group Company, its price lists and information about its rates of discount;
 - (b) **Customer** means any person who is, or within the period of 12 months ending on the date of this agreement has been, a customer of a Group Company; and
 - (c) **Group Company** means the Company and its subsidiaries.

Drafting Exercise 8 - Model Answer

Free Hand Drafting

Dear Sirs,

You have told us that you are interested in buying ● (the **Proposed Transaction**) and we have agreed to give you information about ● and its subsidiaries (the **Target Group**).

You agree that all information about the Proposed Transaction or the Target Group which is given to you by us (in writing or orally) or obtained by you from observation or discussion with representatives of the Target Group (together **Information**) is confidential. You must keep the Information in strict confidence and not disclose it to anyone without our prior written agreement. You may, however, disclose Information, on a need to know basis, to your senior executives and advisers, but each of them must first be given a copy of this letter and must agree to follow it (and you will be responsible for any breach of confidentiality by them).

You must use the Information only for the Proposed Transaction.

Your obligations do not apply to Information that: (a) is already public; (b) becomes public, except through a breach of this letter or of any other duty of confidentiality; or (c) is required to be disclosed by law or by a court or regulatory body, but, if this happens, you must (if permissible) tell us and cooperate with us about the timing and content of such disclosure or any action we may reasonably take to challenge it.

You must not, without our prior written consent, make any announcement or disclosure about the Proposed Transaction or the existence or status of our discussions.

If we ask you to do so, you must (at your cost) return (without keeping copies) all documents under your control containing any Information and you must take all reasonable steps to delete all Information from your computers.

When we give you any Information, this is not to be treated as an offer of securities or assets and we make no representation or warranty as to its accuracy or completeness. We do not accept any duty of care to you.

You agree that damages may not be an adequate remedy for breach of this letter and that an injunction or specific performance may be an appropriate additional or alternative remedy.

Your obligations under this letter will no longer apply if and when you complete your purchase of the Target Group, but otherwise they are not limited in time and will continue after our discussions end for any reason.

References in this letter to "you" and "your" include (where appropriate) your subsidiaries, agents and advisers and your and their directors and employees, and references to "we", "us" and "our" include (where appropriate) our subsidiaries, agents and advisers and our directors and their directors and employees.

This letter is governed by ● law.

Please confirm your agreement by signing and returning a copy of this letter.

Yours faithfully,

Wordcount: 469 words

Drafting Exercise 9 – Model Answer - Free Hand Drafting

1. ADDITIONAL DEFINITIONS:

Deferred Consideration means the further consideration which may become payable by the Purchaser to the Sellers under clause 2(1);

Actual Net Profits means the consolidated trading profit before tax of the Companies calculated in accordance with clause 2(5);

Relevant Year means, as the context requires, the year ending 31 December 2010, the year ending 31 December 2011 or the year ending 31 December 2012;

2009 Accounts means the consolidated audited accounts of the Company for the year ended 31 December 2009;

2. DEFERRED CONSIDERATION

(1) As further consideration for the sale of the Shares, the Purchaser shall pay to the Sellers a sum not exceeding \$60 million, calculated in accordance with the following provisions of this clause, in respect of the Net Profits for each Relevant Year.

(2) If the Actual Net Profits are equal to or exceed the amount set out opposite the Relevant Year below (**Target Net Profits**), the Deferred Consideration payable in respect of that Relevant Year shall be the sum of \$20 million:

Relevant Year	Target Net Profits
2010	\$10 million
2011	\$15 million
2012	\$20 million

(3) If the Actual Net Profits for any Relevant Year are less than the Target Net Profits for that year, the Deferred Consideration payable in respect of that Relevant Year shall be the sum of \$20 million less twice the amount by which the Actual Net Profits for that Relevant Year are less than the Actual Target Net Profits for that year [*Note].

(4) If any calculation under subclause (3) results in a negative figure, no Deferred Consideration shall be payable by the Purchaser in respect of that Relevant Year.

(5) The Actual Net Profits shall be calculated from the audited consolidated accounts of the Companies for the Relevant Year. Those accounts shall be prepared by the Purchaser:

(a) in accordance with the specific policies set out in Schedule ●;

(b) subject to (a) above, on a basis consistent with the 2009 Accounts; and

(c) subject to (a) and (b) above, in accordance with generally accepted accounting principles and practices in [*Jurisdiction*] [or IFRS], so as to show a true and fair view

of the results of the Companies for the Relevant Year and of their assets and liabilities at the end of the Relevant Year.

- (6) The Deferred Consideration shall be paid by the Purchaser to the Sellers on the thirtieth day after the date on which the Actual Net Profits for the Relevant Year have been calculated under subclause (5).
- (7) The Sellers shall be entitled to the Deferred Consideration in the proportions shown in Schedule ●.

*Note: You could use a formula instead – e.g. $DC = \$20m \text{ less } [2 \times (TNP - ANP)]$

Drafting Exercise 10 – Model Answer

Free Hand Drafting

[] Put Options

- (1) In consideration of the Sellers agreeing to sell the Sale Shares to the Purchaser on the other terms of this agreement, the Purchaser grants to each Seller a right (a **Put Option**) to require the Purchaser to purchase all or any of his Retained Shares in accordance with this clause.
- (2) A Seller may exercise a Put Option only:
 - (a) during [year 4] and before [end of year 9]; and
 - (b) in each of those years, during the period of 30 days immediately following the delivery to the Sellers of a statement of the Company's adjusted profit for the immediately preceding financial year under subclause (6) (each an **Exercise Period**).
- (3) A Seller may exercise a Put Option in respect of all or some only of his Retained Shares except that, in the case of the first two Exercise Periods, a Seller may only exercise a Put Option in respect of such number of Retained Shares as does not exceed:
 - (a) in the case of the first Exercise Period, one-third of all the Retained Shares held by him immediately after Completion; and
 - (b) in the case of the second Exercise Period, two-thirds of all such shares (less any Retained Shares in respect of which he already exercised a Put Option during the first Exercise Period),

in each case calculated after taking into account any changes occurring after Completion in the issued share capital of the Company.
- (4) A Seller may exercise a Put Option only by giving notice in writing to the Purchaser, specifying the number of Retained Shares in respect of which the Put Option is exercised. Service of such a notice shall constitute a binding agreement for that Seller to sell, free from all liens, charges and encumbrances, and for the Purchaser to purchase, the number of Retained Shares specified in the notice at a price ascertained in accordance with subclause (5).
- (5) The price at which Retained Shares shall be purchased shall be a sum equal to the appropriate proportion of EBIDTA for the immediately preceding financial year, multiplied by the relevant multiplier, and for these purposes:
 - (a) the **appropriate proportion** is the proportion which the aggregate nominal amount of the Retained Shares being sold bears to the aggregate nominal amount of all the ordinary shares of the Company then in issue, calculated after taking into account any changes occurring after Completion in the issued share capital of the Company;

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International commercial law training in Rwanda

May 2010

INTERNATIONAL SHARE PURCHASE AGREEMENT: CASE STUDY

PAUL CROOK

1. Parties

The parties to the proposed share sale transaction are:

- (a) Software Holdings, a large software production company incorporated in your jurisdiction, listed on a Stock Exchange local to your jurisdiction (the **Seller**); and
- (b) Games R us, a US computer games and multi-media company based in California and listed on the New York and London Stock Exchanges (the **Buyer**).

2. The transaction

The sale by the Seller of PotterMania Co. (**PotterMania**), a limited liability company incorporated in your jurisdiction which holds rights and has developed software in relation to various Potter themed computer games (including the interactive Quidditch game). PotterMania is owned as to 80% by the Seller and as to 20% by the Senior Management of PotterMania.

The price offered by the Buyer is:

- (a) US\$15 million on a debt free/cash free basis (assuming that the working capital of PotterMania at closing will be €1 million); and
- (b) US\$10 million to be satisfied by the issue at closing of 1 million shares of common stock in the capital of the Buyer.

The Buyer proposes to borrow the cash element of the purchase price from various banks.

3. Facts

PotterMania has a non-exclusive licence to use the Potter name and characters in producing its range of interactive computer games. Its main competitor (which holds a similar non-exclusive licence) is Malfoy Inc. (**Malfoy**), a competitor which has developed a range of "alternative Potter" computer games (such as Malfoy's Revenge).

Both PotterMania and Malfoy were set up about three years ago and have taken all that time to negotiate their licences, design their range of games, advertise them and bring them to market. They both launched their "blockbuster" games (Quidditch and Malfoy's Revenge) last Christmas and both have been successful. PotterMania expects to make substantial profits from this year onwards, but to date has incurred significant start-up losses.

It is rumoured that the Seller (which is in some financial difficulties due to a downturn in its main markets) is keen to sell PotterMania which is valued highly, although it has never made a profit in its three years of operation. Also, the market believes that PotterMania's technology is likely to become vulnerable for two reasons: first, viruses, known as "Bludgers" have found their way into PotterMania's flagship Quidditch game; and secondly, there have been reports of problems with confidentiality. For example, there have been unexplained leaks of information from PotterMania to its competitors.

One of Malfoy's top software designers has recently left Malfoy and has joined the PotterMania team. Malfoy has started legal proceedings against PotterMania in New York; it is claiming US\$10 million and an injunction preventing the designer from working with PotterMania, alleging that PotterMania has "interfered" with its contract with the software designer and that it has stolen its know-how and confidential information. Malfoy is also claiming 50% of all profits made by PotterMania from future games designed by the designer. PotterMania has counterclaimed US\$15 million, alleging that Malfoy has stolen its know-how and confidential information and that it has deliberately and maliciously introduced the "Bludger" virus into the Quidditch game.

The Buyer is a large multi-media company based in Hollywood. Its "vision" is to use DVD technology to "converge" films, music, computer games and popular literature. Ultimately, it plans to release an interactive DVD computer game which will enable the player to become one of the characters in the film or book and to interact with the other characters. In this way, the player will be able to become James Bond or Harry Potter for the duration of the game.

The Senior Management of PotterMania is essential to its on-going business.

PotterMania has also acquired (but has not yet exploited) the non-exclusive right to use the names and to develop computer games in relation to a number of well known children's books and films; the Seller has already told the Buyer that these contracts (as well as the Potter licence) have a change of control clause.

As part of the sale process, Senior Management has been making roadshow presentations to potential buyers. Also, since the Seller has no technical grasp of the activities of PotterMania, it is relying on employees of PotterMania, including Senior Management, to provide all due diligence and warranty information. It is rumoured that at these presentations the chief executive of PotterMania has been making extravagant claims regarding PotterMania and its projected sales of the Quidditch game.

PotterMania has net debt, excluding items required for its working capital of US\$9 million. This comprises an inter-company loan of US\$5 million from the Seller to PotterMania, repayable on demand, and a bank term loan of US\$3 million repayable in a year's time. In addition to this, it has an overdraft facility drawn down as to US\$1 million (with a limit of US\$2 million). The projected average working capital of PotterMania for the current financial year is US\$1 million.

The Buyer has developed its business solely in the US and this will be its first international deal. Although the Buyer has had good luck with the technology relating to its own range of computer games, it has recently changed its auditors and there are rumours about some of its financial practices. If these rumours turn out to have any substance, the value of the Buyer's stock could be seriously affected. In fact, the Buyer's share price has dropped by 5% (from US\$10 to US\$9.50 per share) in the last month.

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SHARE SALE CASE STUDY: ANSWERS

PAUL CROOK

NB: PAUL CROOK WILL HAND THESE OUT AT THE END OF THE SESSION – PLEASE DO NOT PUT IN FOLDERS

Note: the questions are in italics.

Once you have read the case study facts, please work in your groups to answer the following questions. Your facilitator will be on hand to give you any guidance you need. If a question asks you to consider how you would draft a particular clause, you are not required to draft it, but just to answer in general terms.

Conditions precedent

Acting for the Buyer, what might you seek to include as conditions precedent to closing of the deal?

- Antitrust and other regulatory consents (to the extent necessary)
- Buyer's shareholder approval (but only if required under relevant Listing Rules)
- Listing of Buyer's shares to be issued at closing on the relevant Stock Exchange
- Change of control consents for the Potter licence and, possibly, the rights to develop games based on children's books and films (if they have real current value)
- Execution of new employment agreements by Senior Management (which all parties may want to be in agreed form prior to signing)

Note that the Seller will **not** agree to include conditions precedent in the sale agreement to the effect that (i) the Buyer completes and is satisfied with the results of its due diligence exercise; or (ii) the transaction is approved by the Buyer's board of directors. Due diligence should be completed and board approvals obtained **before** the agreement is signed.

Normally, the Seller will not agree to a financing condition (i.e. a condition that the Buyer is able to finance the purchase by borrowing). However, these are not normal times and the Buyer may push for this if it is the only way it can finance the deal.

Assume that the Seller agrees to the items in your answer to question 1 being conditions precedent to closing provided that the Buyer pays the Seller a break fee of US\$1 million in the event that they are not satisfied by an agreed long stop date. Consider this proposal from the Buyer's point of view in relation to each of your proposed conditions in turn.

- Whether payment of a break fee is acceptable to a Buyer will depend on the negotiating positions of the parties. If, for example, the Seller was selling PotterMania by way of an

auction in which there were a number of credible bidders, then it might insist on payment of a break fee on the basis that the conditions precedent required by the Buyer are not requirements of the other bidders, and their inclusion makes the Buyer's bid far less attractive than an unconditional bid. However, in this case the Seller appears keen to sell PotterMania because it is in financial difficulty and there is no suggestion that the sale is by way of competitive auction. In these circumstances, the Buyer may be able to resist agreeing to a break fee.

- If the Buyer agrees to the break fee it should only do so in relation to conditions which are included as a result of the Buyer's unique position (e.g. antitrust approvals and Buyer's shareholder approval if required, and listing of the Buyer's shares). The value of PotterMania largely relies on the Potter licence and the Buyer should not be required to pay a break fee if the Seller cannot deliver it at closing. Neither would the Buyer want the Senior Management to be able to cause the break fee to become payable by refusing to enter into new employment agreements on reasonable terms.
- If a break fee is agreed, consider limiting it to the costs actually incurred by the Seller in negotiating the transaction with the Buyer (up to an agreed cap).

The Buyer is based in the US where it is usual for share sale agreements to contain a clause permitting a purchaser to terminate the agreement if there is a material adverse change affecting the target company between signing and closing. The Buyer has done a number of other deals in the past, all of which have contained such a clause, and insists that the share sale agreement for PotterMania includes one. If you were acting for the Seller, how would you define a "material adverse change" in the agreement?

- You would seek to define what is meant by "material" – e.g. by reference to a percentage effect on PotterMania's turnover or net assets.
- You would also exclude changes which affect markets or industries as a whole (i.e. market MACs) and limit the definition to changes which are particular to PotterMania alone (i.e. a business MAC).
- You could specifically define the matters which are to trigger the termination right – e.g. fixed assets being destroyed, litigation being commenced, Senior Management terminating their employment contracts, the Potter licence being withdrawn, intellectual property rights being challenged etc.

Consideration structures

The case study facts state that the Senior Management of PotterMania is essential to its on-going business. How might the Buyer structure the consideration payable to the Senior Management in order to ensure they remain committed to the business?

- Part of the consideration payable to Senior Management could be structured as an earn-out based on the profits of PotterMania over the next two to three years.
- Alternatively the Senior Management could be offered shares in the Buyer rather than the cash element of the consideration. They would then have a financial interest in how the Buyer (encompassing PotterMania) performs.
- The Buyer could also offer a "golden handcuff" payment to the Senior Management to induce them to enter into new employment agreements containing a commitment to stay with PotterMania for a certain period after completion.

The case study facts state that part of the price to be paid for the shares in PotterMania will be US\$15 million on a debt free/cash free basis (assuming working capital of US\$1 million).

- (a) *Assuming that PotterMania's net debt at closing is estimated at the figures set out in the case study, how much will the Buyer pay in cash for PotterMania's shares?*
- If PotterMania's net debt is estimated at US\$9 million at closing (i.e. as set out in the case study), the Buyer will pay US\$6 million for the shares (i.e. US\$15 million less US\$9 million).
- (b) *What will the Buyer do with the remainder of the US\$150 million at closing?*
- US\$5 million will be used to repay the Seller the amount of the inter-company loan
 - If the bank loan of US\$3 million and the overdraft of US\$1 million are to be repaid then the Buyer will put PotterMania in funds to do this. Alternatively, the Buyer will keep the remaining US\$4 million, reflecting the fact that it has acquired a company which is worth US\$4 million less as it has US\$40 million of debt.
- (c) *How would the consideration be adjusted after closing if the completion balance sheet showed that the overdraft facility was actually drawn down to US\$1.7 million at closing and the working capital was US\$1.3 million?*
- The net debt would be US\$700,000 more than estimated but this would be partly offset by the fact that the working capital was underestimated by US\$300,000. The net effect is that the Buyer has paid US\$400,000 too much for PotterMania, and the Seller would be obliged under the agreement to repay that amount.

The Buyer proposes to satisfy US\$10 million of the consideration by issuing 10 million shares to the Seller. Can you see any issues with this, and if so how might you deal with them?

- The number of consideration shares should be calculated by reference to the market price at or immediately prior to closing. The Buyer's share price is falling and 10 million shares with a lower market price are worth less than the same number of shares with a higher market price.
- There are concerns as to the Buyer's share price and rumours of financial irregularities. The Seller will therefore need comfort/protection (e.g. some basic warranties regarding accounts of the Buyer and full disclosure to the market).
- Even with these protections, the Seller may not be prepared to accept the shares as consideration, and instead insist on cash.
- The Buyer will not want the Seller to sell the consideration shares in the market immediately after closing, thereby de-stabilising the Buyer's share price even more. It will therefore want to impose some kind of "lock-up" restriction on the Seller, preventing it from selling the shares for a period after closing.

The Seller claims that the Buyer's valuation of PotterMania is too low because it does not fully take into account the substantial profits PotterMania expects to generate in the next few years. The Buyer accepts that it has valued PotterMania's future profit stream on a very conservative basis but says

that it is not prepared to take the risk of paying more and then finding that the profits expected by the Seller are not achieved.

(a) *Which consideration structure might deal with both parties' concerns?*

- An earn-out

(b) *What would the Seller be most concerned about in relation to this structure and how might you deal with those concerns in drafting the agreement?*

- The Seller would be concerned about the Buyer making changes to PotterMania's business after closing which would depress the amount payable under the earn-out clause.
- To deal with this concern you could base the earn-out figure on a line in the profit and loss account of PotterMania which is less open to manipulation (e.g. total sales), rather than a line further down the profit and loss account from which costs of sales and other expenses have been deducted (e.g. net profits).
- You could also provide for the effect of any non-ordinary course changes to the business (e.g. redundancies, office closures) made after closing to be excluded from the earn-out calculation.

Warranties

Acting for the Buyer, who would you advise your client to obtain warranties from, and on what basis would you argue for this?

- The Seller, on the basis that it is receiving most of the consideration for the shares, and so should be prepared to bear the risk of the warranties being incorrect, regardless of the fact that it does not have day-to-day conduct of the business.
- Senior Management, on the basis that they are also receiving a benefit from the sale (i.e. money for their shares and new employment agreements), they have the most knowledge about PotterMania and should be required to give warranties to give them an incentive to disclose against them fully.

Would you expect these warrantors to agree to joint and several liability? If not, what compromise might be acceptable to all parties?

- Joint and several liability would mean that the Buyer could sue all or any of the warrantors (i.e. the Seller and Senior Management) for the whole amount of a breach of warranty claim.
- On its own, this is unlikely to be acceptable to Senior Management who are only receiving 20% of the consideration for the sale of the shares.
- One possible compromise is for joint and several liability to be agreed but for the Seller and Senior Management to enter into a contribution agreement allowing each of them to claim a proportion of any damages back from the others based on the proportion of consideration received. This would be the best solution from the Buyer's perspective.
- Alternatively, the share sale agreement could state that liability for breach of warranty is to be apportioned between the Seller and Senior Management pro rata to their

shareholdings in PotterMania, with each warrantor's liability being subject to a financial cap not exceeding the consideration received by that warrantor. This places the risk of one of the warrantors not satisfying a claim for breach of warranty back on the Buyer.

Can you foresee any difficulty in the Buyer recovering damages for breach of warranty based on the case study facts?

- Yes, the Seller is rumoured to be in financial difficulties and so may not be able to meet a claim against it for breach of warranty in the future. Senior Management are individuals, and there is a risk that they will spend the proceeds of sale, die or simply disappear, all of which will affect the Buyer's ability to recover against them.

How might you advise the Buyer to protect itself against any risks you identify in answer to the previous question? (Think of as many alternatives as you can)

- Escrow account
- Right to set-off warranty claims against earn-out payment (if any)
- "Lock-up" of consideration shares in Buyer, with right to sell those shares in the market and use the proceeds to satisfy a successful warranty claim
- Detailed due diligence
- Completion accounts

The Buyer has asked for the following warranties to be included in the sale agreement and the Seller asks for your advice on these. What do you advise? (Consider whether the warranty is acceptable, whether it would be acceptable if it was amended and how you might argue for any amendments you are suggesting.)

- See tracked changes and below for answers
- (a) *The assets of ~~PotterMania~~ ~~comprise all the assets necessary for the continuation of its business as carried on at the date of this agreement.~~*
- Delete – Buyer should form its own view based on due diligence
- (b) *Neither PotterMania, nor (so far as the Warrantors are aware) any of its officers, agents or employees, has in the last three years, done or omitted to do anything which is a contravention of any statute, order, regulation or the like which has resulted or ~~may is likely to~~ result in any material fine, penalty or other liability or sanction on the part of PotterMania.*
- (c) *PotterMania has, and has at all times complied in all material respects with the terms and conditions of, all licences, authorisations and consents necessary to own and operate its assets and to carry on its business as it does at present and has not received written notice that any such licences, authorisations or consents are to be terminated, revoked, suspended, modified or not renewed~~no circumstances exist which may result in the termination, revocation, suspension or modification of any of those licences, authorisations or consents or that may prejudice the renewal of any of them.~~*

- (d) *PotterMania is not engaged in any litigation, arbitration or alternative dispute resolution proceedings (except as claimant for normal collection of debts) and, so far as the Warrantors are aware, there are no such proceedings pending or threatened by or against PotterMania.*
- (e) *There are no circumstances which are likely to give rise to any litigation, arbitration or alternative dispute resolution proceedings by or against ~~PotterMania.~~*
- Delete – too uncertain
- (f) *PotterMania has not stopped or suspended payment of its debts, become unable to pay its debts or otherwise become insolvent in any relevant jurisdiction.*
- (g) *PotterMania's latest audited accounts correctly state the assets of PotterMania and give a true and fair view of the state of affairs of PotterMania as at 31 December 2009 and of the profit or loss of PotterMania for the period ended on that date.*
- (h) *~~The unaudited management accounts of PotterMania for the period of three months ended 31 March 2010 have been prepared on bases consistent with those employed in preparing previous management accounts over the last three years and give a true and fair view of the income and expenditure of the Group Companies for that period.~~*
- (i) *~~Having regard to the existing bank and other facilities available to it, PotterMania has sufficient working capital for the purposes of continuing to carry on its business in its present form and at its present level of turnover for the foreseeable future and for the purposes of executing, carrying out and fulfilling in accordance with their terms all orders, projects and contractual obligations which have been placed with or undertaken by it.~~*
- Delete – Seller not prepared to warrant the future; Buyer should form its own view based on due diligence
- (j) *The projected sales figures for the Quidditch game prepared by Senior Management and delivered to the Buyer have been properly prepared and are true and accurate in all material respects.*
- Delete – Seller will not warrant the future or the opinions of management
- (k) *As a result of the proposed acquisition of PotterMania by the Buyer:*
- (i) *no supplier of PotterMania has notified PotterMania in writing of its intention to ~~cease or will~~ cease supplying it ~~or has reduced or will reduce its supplies to PotterMania;~~ and*
- (ii) *no customer of PotterMania has notified PotterMania in writing of its intention to ~~terminated or will~~ terminate any contract with it ~~or withdraw or reduce its custom with it.~~*
- (l) *~~PotterMania is now and has at all material times been adequately covered against accident, damage, injury, third party loss, loss of profits and other risks normally covered by insurance.~~*
- Buyer to review insurance policies and come to its own view

- (m) *A copy of each of the insurance policies effected for the benefit of PotterMania and current as at the date of this agreement are set out in or annexed to the Disclosure Letter.*
- (n) ~~*All information relating to PotterMania or its assets or affairs which would be material to a purchaser for value of the Shares, or of the undertakings or assets of PotterMania, is contained in this agreement and the Disclosure Letter.*~~
- Delete – Buyer should include specific warranties about any areas it is concerned about. Seller does not know what might be material to the Buyer. This "Sweeper" Warranty cannot be accepted.
- (o) ~~*All information contained or referred to in the Disclosure Letter is true and accurate and fairly presented and nothing has been omitted from the Disclosure Letter which renders any of that information incomplete or misleading.*~~
- Delete – the purpose of the Disclosure Letter is to limit the Seller's liability for breach of warranty, not to expand it. To the extent something is not properly disclosed, it will not be a valid disclosure (i.e. will not limit the Seller's liability for breach of warranty).

Warranty limitations

The Buyer asks you what monetary and time limitations you would expect to be agreed for a deal of this type and size. What do you advise?

- This depends on the negotiating positions of the parties, but a guide might be as follows:
 - Cap – 50% of consideration (possibly including debt refinanced and value of the consideration shares) – i.e. US\$12.5 million
 - De minimis - claims of less than US\$1,000 do not count - but be careful to define a "claim", i.e. lots of small claims from same software problem count as one big claim
 - Threshold - if claims in aggregate exceed 1% of consideration, then all recoverable (i.e. hurdle, not an excess); such claims not to include the US\$1,000 de minimis
 - Time limit - 18 months for non-title, non-tax warranties (i.e. enough time for PotterMania to complete its 31 December 2010 audit), the limitation period (e.g. 7 years) for title and tax warranties

The Seller's lawyers have included the following limitation in the draft sale agreement. What would you advise the Buyer in relation to this, and why?

Insurance

If, in respect of any matter which would otherwise give rise to a warranty claim, PotterMania is entitled to claim under any policy of insurance (or would have been so entitled had it maintained in force its insurance cover current at closing), the amount of insurance monies to which PotterMania is or would have been entitled shall reduce or extinguish that warranty claim.

- Although it seems fair that the Buyer/PotterMania should not be able to profit out of a warranty claim by recovering twice (once under the warranties and once under an

insurance policy), the Buyer's primary recourse for breach of warranty should be against the Seller. Consequently, the breach of warranty claim should only be reduced to the extent that PotterMania actually recovers under its insurance policy.

- Any costs or insurance premium increases as a result of a claim under an insurance policy should be taken into account before the warranty claim is reduced.

The Seller's lawyers have included the following limitation in the draft sale agreement. What would you advise the Buyer in relation to this, and why?

The Seller shall have no liability under or in respect of the warranties for any loss of business or profits, or in connection with any indirect or consequential loss, arising out of any matter or circumstance giving rise to a warranty claim.

- Advise the Buyer that this limitation should be deleted. Loss suffered in connection with a breach of warranty is likely to be consequential (e.g. PotterMania is in breach of the Potter licence – direct loss is damages payable to the owner of the licence, but if the owner terminates the licence as a result of the breach a consequential loss of profits will occur as PotterMania will no longer be able to produce and sell its Potter computer games).

Disclosure

Acting for the Buyer, you have included the following limitation in the draft share sale agreement:

The Seller agrees with the Purchaser, PotterMania and each employee of the Purchaser or PotterMania to waive any rights or claims which it may have in respect of any misrepresentation, inaccuracy or omission in or from any information or advice supplied or given by PotterMania or such employee in connection with the giving of the warranties and the preparation of the Disclosure Letter.

The Seller has deleted this on the basis that it has no technical grasp of the activities of PotterMania and senior employees of PotterMania, including Senior Management, have provided all due diligence and disclosure information. What would you advise the Buyer in relation to this?

- The Buyer should insist that this limitation is included in the agreement. Otherwise the Seller could deflect liability for breach of warranty on to employees of PotterMania which will, by that time, be part of the Buyer's group. If the Seller insists, fraud and wilful concealment by employees could be carved out of the limitation.

The draft disclosure letter prepared by the Seller's lawyers contains the following disclosure against warranty (k) above. What additional statements would you ask the Buyer's lawyers to include in the disclosure letter in relation to this?

PotterMania currently licenses Vision 20/20 Technologies voice recognition software to enable voice interaction in its computer games. This licence is automatically renewed on an annual basis every 30 April unless either party gives at least 90 days written notice of non-renewal. Recently, PotterMania was told verbally by Vision 20/20 Technologies that this licence may not be renewed but has received no written notice to that effect.

- Whether this licence is significant to PotterMania's business and what the effect would be if it were terminated.
- Whether this software is available from another source.

- The Buyer should consider whether it wants PotterMania to contact Vision 20/20 Technologies to ascertain its intentions.

Indemnities

Do the case study facts raise any issues which you might deal with by way of indemnity?

- Malfoy claim
- Breach of confidentiality
- Breach of material licences
- Breach of third party IP rights

Would you expect any time, monetary or other limitations to apply to these? If so, what?

- Yes
- The time limit would depend on how long it is likely to be before the damage is suffered and quantifiable (which may be different to the period agreed for general warranty claims)
- Often, no de minimis or threshold applies to indemnities (as the intention behind an indemnity is that the Seller bears all risk of known liabilities). However, the cap applicable to the warranties is likely to apply to the indemnities as well.
- The Seller may wish to take conduct of the Malfoy, breach of confidentiality and other third party claims.

If these matters were provided for by way of a provision in PotterMania's accounts, would you still advise the Buyer to request an indemnity?

- This would depend whether the size of the provision was considered to be adequate. If not, then the Buyer might ask for an indemnity to the extent that the resulting liability exceeded the provision. Assuming that the accounts in which the provision appears are the ones which the Buyer used to value PotterMania for the purposes of the deal, the provision should have been taken into account in calculating the price and so it would not be appropriate to ask for an indemnity on top of this.

These are training materials only. The information within these training materials does not constitute definitive advice and should not be used as the basis for giving definitive advice without checking the primary sources.

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Banking Law and Practice

INTRODUCTION TO LOAN DOCUMENTATION

Overview

The course offers an overview of a banking transaction and an introduction to the principal finance documents encountered in a loan transaction. The material will cover key provisions of commitment documents and loan agreements and how these fit together. We will highlight common areas of negotiation [name of Rwandan local trainer / future course coordinator] and will be providing their insight and guidance on the “internal” view. We will also cover – at an admittedly “high level” given time constraints – certain considerations in terms of security and guarantee arrangements.

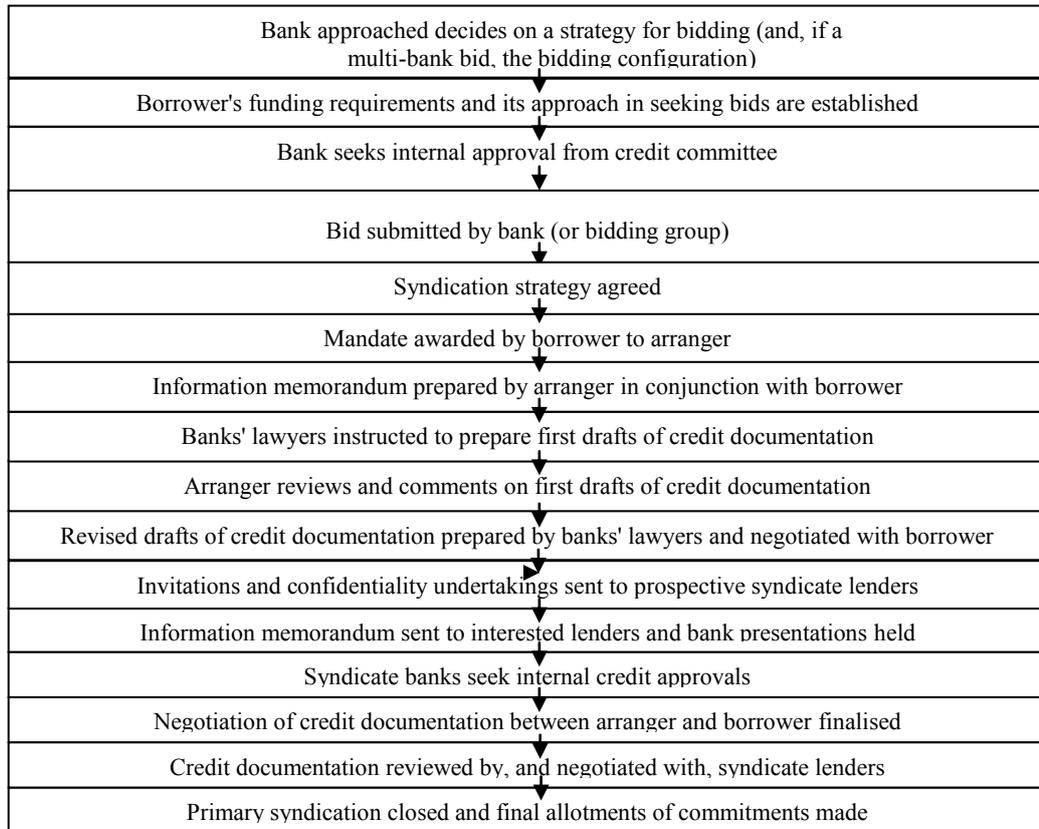
This material will mostly be delivered in the form of presentations, with workshops integrated to facilitate discussion and a deeper review of key provisions. The intention is that the course is as interactive as possible and attendees should feel free to question and comment freely.

In addition, a handbook covering the essential points will be provided at the beginning of the course. This is designed to enable participants to take notes in the space provided in the various handouts, as well as providing summaries of each lecture in order that these may be referred back on future occasions.

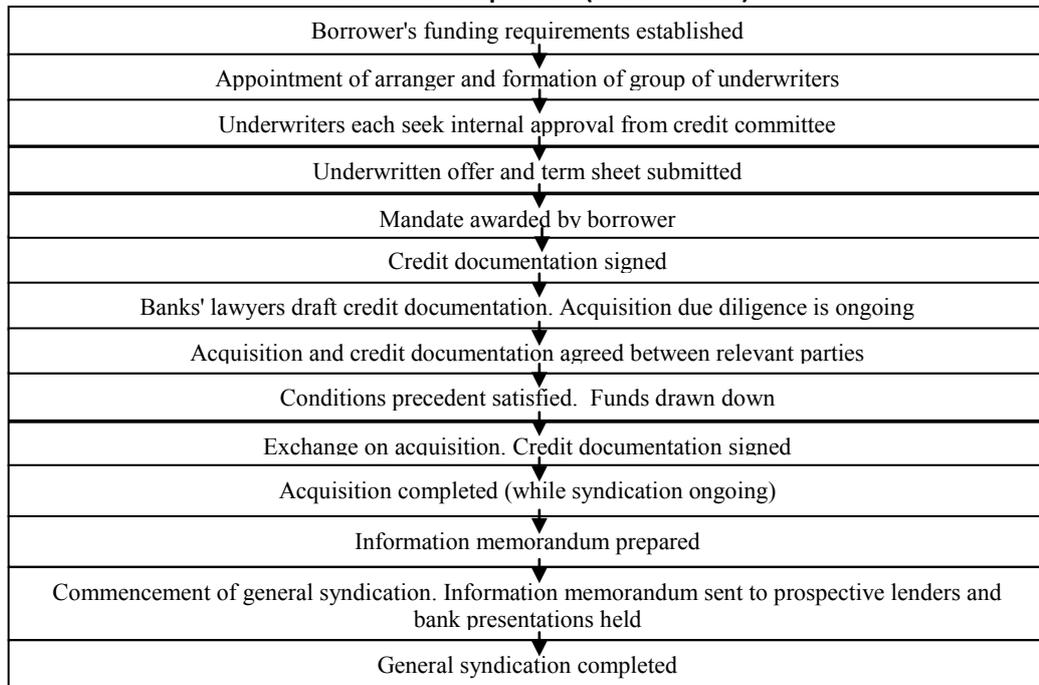
We hope you enjoy and benefit from the course.

DEIRDRE KELLY and SOPHIE THOMASHAUSEN

**THE SYNDICATION PROCESS: TYPICAL ORDER OF EVENTS
LOAN FOR GENERAL CORPORATE PURPOSES**



Loan for an acquisition (underwritten)



Loan Agreement Exercise

Preparation time: c. 60 – 90 minutes hour

Review: c. 60 – 90 minutes

Briefing

You are acting for the arranging banks of a syndicated term loan and revolving credit facility for Megacorp for it to use for its general corporate purposes.

The agreement you have drafted is based on the LMA standard form for Single Currency Term and Revolving Facility Agreement. This has been reviewed and amended by the Company's lawyers. The Company and some of the syndicate lenders also have some questions concerning the operation of a number of the clauses. The relevant clauses are listed below.

Your task is to review these clauses and to see whether or not the Company's lawyers drafting changes are acceptable and to answer the queries of the Company and the Lenders. If any of the comments are not acceptable, you should explain why and suggest what they should say. Where a general explanation of a clause is requested, you need to provide this, bearing in mind who has asked the question.

You have been provided this exercise in advance so as to allow you to read through the questions and think about the answers on your own in advance of the workshop.

On the day of training, the exercise will be divided into two parts. The first part (1.5 hours) is for preparation in groups. During this time, it is suggested that you work in groups of 8 to 10 to discuss your individual answers and arrive at common answers for your group. Groups are expected to answer all the questions.

The second part (1.5 hours) consists of a discussion of your answers and the relevant clauses with a facilitator. Time permitting, the facilitator will request responses to each of the questions from all the groups in turn. Group responses will rotate among group members in order or as specified by the facilitator.

III. List of Attendees

SUPREME COURT TRAININGS						
N°	NAMES	POSITION	TOTAL DAYS ATTENDED	GENDER	TEL N°	E-MAIL
1.	BWASISI Germain	Judge, Commercial Court, Nyarugenge	10	M	078 867 3067	gerboi2002@yahoo.fr
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3.	HABARUREMA Pascal	Judge, Commercial Court, Musanze	10	M	078 886 0442	habapas@yahoo.fr
4.	HATANGIMBABAZI Fabien	Judge, Supreme Court	10	M	078 856 1780	hatangimbabazi@supremecourt.gov.rw
5.	HAVUGIYAREMYE Julien	Judge, Supreme Court	6	M	078 856 2255	j-havugiyaremye@yahoo.fr
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10.	KAMERE Emmanuel	Judge, Commercial High Court	10	M	078 308 8081	kamerem2001@yahoo.fr
11.	KANYANGE Fidélité	Judge, Supreme Court	10	F		
12.	KIBUKA Jean Luc	Judge, Commercial High Court	10	M	078 830 7918	jkibuka@yahoo.fr
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14.	MBERAKURORA Olivier	Judge, Commercial Court, Huye	10	M	078 867 8729	mbera@yahoo.fr
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16.	MUKAMULISA Marie Therese	Judge, Supreme Court	9	F		
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18.	MUKANYUNDO Patricie	Judge, Supreme Court	10	F		mukapatricie@yahoo.fr
19.	MUNYAMAHORO Nzayi	Judge, Commercial Court, Musanze	10	M	078 859 5109	munyayeph64@yahoo.fr
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24.	NIWEMUGENI Solange	Judge, Commercial High Court	9	F		
25.	NSENGIYUMVA Jean Claude	Judge, Commercial Court, Musanze	10	M	078 356 4083	salehbinnsonga@yahoo.com
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29.	RUGABIRWA Ruben	Judge, Supreme Court	10	M	078 830 4576	ruganku@yahoo.fr
30.	RUKUNDAKUVUGA Regis	Inspector of Courts	9	M	078 830 7915	fregis68@yahoo.fr
31.	RUSERA Emily	Judge, Supreme Court	10	F	078 830 0467	ruskayi@yahoo.fr
32.	UMURERWA Christine	Judge, Commercial Court, Nyarugenge	10	F	078 854 1046	umurerwachristine@yahoo.fr
TOTALS	11 Supreme Ct., 5 Com. High Ct., 12 Com. Ct., 4 Inspectors		310 Training Days	23 Male; 9 Female		

PROSECUTORS TRAININGS

N°	NAMES	POSITION	TOTAL DAYS ATTENDED	GENDER	TEL N°	E-MAIL
1.	BUSINGYE Flavia	Legal Officer, Rwanda Revenue Authority	8	F	078 856 0331	legal@rra.gov.rw
2.	BUTARE Emmanuel	Principal State Attorney, Ministry of Justice	3	M	078 854 0354	el_but@yahoo.com
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5.	GASANA Raoul	Attorney, Rwanda Revenue Authority	3	M	078 861 3701	rgasana2020@yahoo.fr
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7.	KAREMERA George	Principal State Attorney, Ministry of Justice	7	M	078 830 3830	karemera@lawyer.com
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11.	MBONERA Theophile	Principal State Attorney, Ministry of Justice	7	M	078 868 9374	mbotheos@yahoo.fr
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13.	MURANGWA Hadija	Head of Legal Department, Rwanda Revenue Authority	3	M	078 830 0959	legal@rra.gov.rw
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15.	NTAGANDA Felix	Principal State Attorney, Ministry of Justice	1	M	078 830 5701	ntagaf2002@yahoo.fr
16.	RUBANGO Epimaque	Principal State Attorney, Ministry of Justice	7	M	078 830 4550	epiru@yahoo.com
17.	SEBAZUNGU Alphonse	Asst. Attorney General, Ministry of Justice	4	M	078 830 1036	alseb5@yahoo.fr
18.	UMWALI Marie Claire	Principal State Attorney, Ministry of Justice	2	F	078 841 4005	umwali24@yahoo.fr
TOTALS	11 Ministry of Justice, 4 Rwanda Revenue Authority, 2 Social Security Fund, 1 National Bank		100 Training Days	14 Male; 4 Female		

LAWYER'S TRAININGS

N°	NAMES	POSITION	TOTAL DAYS ATTENDED	GENDER	TEL N°	E-MAIL
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60.	MUKARUSINE Agnes	Lawyer, Member of the Bar Association	2	F	078 841 7142	mrusine2007@yahoo.fr
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81.	NUBUMWE J. Bosco	Lawyer, Member of the Bar Association	3	M	078 849 0000	nubumwejb@yahoo.com
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89.	RUGIRA Olivier	Lawyer, Member of the Bar Association	2	M	078 875 3566	namwiza@yahoo.fr
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94.	RWATANGABO Pascal	Lawyer, Member of the Bar Association	2	M	078 852 1187	rwatangabo2002@yahoo.fr
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97.	SAFALI Alexis	Lawyer, Member of the Bar Association	9	M	078 835 4591	safakua@yahoo.com
98.	SAFARI Leonard	Lawyer, Member of the Bar Association	1	M	078 862 0724	safaleo2005@yahoo.fr
99.	SEBAZIGA MASERUKA Sophonie	Lawyer, Member of the Bar Association	2	M	078 858 5364	maseruka2003@yahoo.fr
100.	SEBUNYENYERI BIRARO Fisher	Lawyer, Member of the Bar Association	7	M	078 855 6525	birarof@yahoo.fr
101.	SHEMA Gérald	Lawyer, Member of the Bar Association	4	M	0788406778	shemger@yahoo.fr
102.	TCHIAMALA Juves	Lawyer, Member of the Bar Association	2	M	078 853 3410	juvesother@yahoo.fr
103.	TWAHIRWA Stephen	Lawyer, Member of the Bar Association	5	M	078 830 1247	twaste@yahoo.fr
104.	TWAJAMAHORO Herman	Lawyer, Member of the Bar Association	1	M	078 853 4833	apapeki@yahoo.fr

N°	NAMES	POSITION	TOTAL DAYS ATTENDED	GENDER	TEL N°	E-MAIL
105.	TWAYIGIZE J. Claude	Lawyer, Member of the Bar Association	1	M	078 848 4229	clayigize@yahoo.fr
106.	TWIRINGIYEMUNGU Joseph	Lawyer, Member of the Bar Association	4	M	078 830 1793	joseph_rw@yahoo.fr
107.	UMUGWANEZA Diane	Lawyer, Member of the Bar Association	3	F	078 874 5853	umugwanezad@yahoo.fr
108.	UMUGWANEZA Nelly	Lawyer, Member of the Bar Association	9	F	078 830 3447	unellynell@gmail.com
109.	UMWIZA Lyse	Lawyer, Member of the Bar Association	6	F	078 883 8485	umwiza.lyse@yahoo.fr
110.	URAMIJE James	Lawyer, Member of the Bar Association	5	M	078 859 6400	uramije@yahoo.fr
111.	UWAMAHORO M. Christine	Lawyer, Member of the Bar Association	6	F	078 858 9584	bolinegoo@yahoo.fr
112.	UWANYILIGIRA Delphine	Lawyer, Member of the Bar Association	4	F	078 884 8890	giradelly@yahoo.fr
113.	UWASE Aline	Lawyer, Member of the Bar Association	6	F	078 847 0559	aliwasemamie@yahoo.fr
114.	UWAZIGIRA Gloria	Lawyer, Member of the Bar Association	2	F	078 884 1540	
115.	UWINEZA Odette	Lawyer, Member of the Bar Association	5	F	078 885 4174	nezaodette@yahoo.fr
116.	UWITONZA Ange	Lawyer, Member of the Bar Association	2	F	078 867 5725	
117.	UWIZEYIMANA Jean Eric	Lawyer, Member of the Bar Association	6	M	078 853 2996	jeuwizeyimana@yahoo.fr
118.	UZAMUKUNDA Prudentienne	Lawyer, Member of the Bar Association	3	F	078 848 4514	uzamukundap@yahoo.fr
TOTALS	118 Lawyers, all Members of the Rwanda Bar Association		409 Training Days	69 Male; 49 Female		

IV. Pre- and Post-Training Evaluations

Aspects of Dispute Resolution

PRE- TRAINING EVALUATION FORM

Course : Dispute Resolution

Trainers : Angeline Walsh and Richard Farnhill

Student name: _____

Before undertaking the following course, please rate your current understanding of the following topics:

1. Law of contract

How familiar are with the law of contract? (Please circle)

Not at all (0) Slightly Familiar (1) Familiar (2) Very Familiar (3)

2. Claims

How comfortable would you be in dealing with litigation claims?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

3. Commercial insurance claims

How comfortable would you be in dealing with commercial insurance claims?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

4. Arbitration

Please rate your understanding of arbitration where an arbitrator is appointed by the parties to make a binding decision if there is a dispute between them and how it works?

No Knowledge (0) Some (1) Good (2) Very Good (3)

5. Alternative Dispute Resolution

Please rate your understanding of Alternative Dispute Resolution, different ways to resolve a dispute between parties other than at court.

No Knowledge (0) Some (1) Good (2) Very Good (3)

6. Constitutional and Administration

Please rate your understanding of constitutional administrative law.

No Knowledge (0) Some (1) Good (2) Very Good (3)

POST- TRAINING EVALUATION FORM

Course : Dispute Resolution

Trainers : Angeline Walsh and Richard Farnhill

Student name: _____

As a result of undertaking the following course, please rate your current understanding of the following topics:

1. Law of contract

How familiar are with the law of contract? (Please circle)

Not at all (0) Slightly Familiar (1) Familiar (2) Very Familiar (3)

2. Claims

How comfortable would you be in dealing with litigation claims?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

3. Commercial insurance claims

How comfortable would you be in dealing with commercial insurance claims?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

4. Arbitration

Please rate your understanding of arbitration where an arbitrator is appointed by the parties to make a binding decision if there is a dispute between them and how it works?

No Knowledge (0) Some (1) Good (2) Very Good (3)

5. Alternative Dispute Resolution

Please rate your understanding of Alternative Dispute Resolution, different ways to resolve a dispute between parties other than at court.

No Knowledge (0) Some (1) Good (2) Very Good (3)

6. Constitutional and Administration

Please rate your understanding of constitutional administrative law.

No Knowledge (0) Some (1) Good (2) Very Good (3)

7. Training materials

How effective did you find the training materials?

Poor (0) Satisfactory (1) Good (2) Very Good (3)

8. How could this course be improved?

9. Is there any course you would like to receive further training on?

Corporate Law

PRE- TRAINING EVALUATION FORM

Course: Corporate Law

Trainers: Paul Crook

Student name: _____

Before undertaking the following course, please rate your current understanding of the following topics:

1. Drafting skills

How comfortable would you be in drafting legal documents in English? (Please circle)

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

2. Cross-border negotiation skills

How comfortable would you be negotiating with lawyers in other countries?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

3. Comparison of Rwanda Companies and English companies law

Please rate your understanding of similarities and differences between Rwandan companies Law and English Companies Law.

No Knowledge (0) Some (1) Good (2) Very Good (3)

4. Due diligence

Please rate your understanding of the due diligence process and how it works

No Knowledge (0) Some (1) Good (2) Very Good (3)

5. Preliminary agreements

Please rate your understanding of heads of terms, confidentiality agreements and exclusivity agreements.

No Knowledge (0) Some (1) Good (2) Very Good (3)

6. International share purchase agreements

Please rate your understanding of international share purchase agreement which deals with the sale of shares in no-Rwandan companies.

No Knowledge (0) Some (1) Good (2) Very Good (3)

7. International joint ventures

Please rate your understanding of joint venture agreements used to govern the arrangements between two or more parties.

No Knowledge (0) Some (1) Good (2) Very Good (3)

8. Building up a law firm

Please rate your understanding of building the size of a law firm and increasing its profitability.

No Knowledge (0) Some (1) Good (2) Very Good (3)

POST- TRAINING EVALUATION FORM

As a result of undertaking the following course, please rate your current understanding of the following topics:

1. Drafting skills

How comfortable would you be in drafting legal documents in english? (Please circle)

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

2. Cross-border negotiation skills

How comfortable would you be negotiating with lawyers in other countries?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

3. Comparison of Rwanda Companies and English companies law

Please rate your understanding of similarities and differences between Rwandan companies Law and English Companies Law.

No Knowledge (0) Some (1) Good (2) Very Good (3)

4. Due diligence

Please rate your understanding of the due diligence process and how it works

No Knowledge (0) Some (1) Good (2) Very Good (3)

5. Preliminary agreements

Please rate your understanding of heads of terms, confidentiality agreements and exclusivity agreements.

No Knowledge (0) Some (1) Good (2) Very Good (3)

6. International share purchase agreements

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7. International joint ventures

Please rate your understanding of joint venture agreements used to govern the arrangements between two or more parties.

No Knowledge (0) Some (1) Good (2) Very Good (3)

8. Building up a law firm

Please rate your understanding of building the size of a law firm and increasing its profitability.

No Knowledge (0) Some (1) Good (2) Very Good (3)

9. Training materials

How effective did you find the training materials?

Poor (0) Satisfactory (1) Good (2) Very Good (3)

10. How could this course be improved?

11. Is there any course you would like to receive further training on?

Banking Law

PRE- TRAINING EVALUATION FORM

Course: Banking Law

Trainers: Deidre Kelly and Sophie Thaumashausen

Student name: _____

Before undertaking the following course, please rate your current understanding of the following topics:

1. Different Loan Facilities

Please rate your understanding of different types of loan facilities.

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

2. Loan agreements

How comfortable would you be drafting/negotiating loan agreements?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

3. Syndicated loans/facilities

Please rate your understanding of syndicated lending transactions in which the loan or credit facility is provided by more than one lender to a borrower.

No Knowledge (0) Some (1) Good (2) Very Good (3)

4. Mandate Letter

Please rate your understanding of a mandate letter under which authority is given by the borrower to a lender to arrange a loan for it.

No Knowledge (0) Some (1) Good (2) Very Good (3)

5. Alternative Dispute Resolution

Please rate your understanding of Alternative Dispute Resolution, different ways to resolve a dispute between parties other than at court.

No Knowledge (0) Some (1) Good (2) Very Good (3)

6. Constitutional and Administration

Please rate your understanding of constitutional administrative law.

No Knowledge (0) Some (1) Good (2) Very Good (3)

POST- TRAINING EVALUATION FORM

Course: Banking Law

Trainers: Deidre Kelly and Sophie Thaumashausen

Student name: _____

As a result of undertaking the following course, please rate your current understanding of the following topics:

1. Different Loan Facilities

Please rate your understanding of different types of loan facilities.

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

2. Loan agreements

How comfortable would you be drafting/negotiating loan agreements?

Not at all (0) Quite Comfortable (1) Comfortable (2) Very Comfortable (3)

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Please rate your understanding of syndicated lending transactions in which the loan or credit facility is provided by more than one lender to a borrower.

No Knowledge (0) Some (1) Good (2) Very Good (3)

4. Mandate Letter

Please rate your understanding of a mandate letter under which authority is given by the borrower to a lender to arrange a loan for it.

No Knowledge (0) Some (1) Good (2) Very Good (3)

5. Training materials

How effective did you find the training materials?

Poor (0) Satisfactory (1) Good (2) Very Good (3)

6. How could this course be improved?

7. Is there any course you would like to receive further training on?
