

## 6

## Commercial law

## THE STUDY OF LAW

## Lead-in

- 1 Commercial law is the body of law that governs trade and commerce. Discuss these questions in small groups.
  - 1 What bodies of law govern commerce in your jurisdiction?
  - 2 How would a contract dispute between two companies from different jurisdictions be settled?
  - 3 Which international bodies do you know that set guidelines for commercial transactions?

## Reading 1: Commercial law

- 2 Read the text below and decide whether these statements are true (T) or false (F).
  - 1 *Commercial law* is a general term for a number of diverse areas of the law which regulate trade and commerce.
  - 2 Contentious work includes the drafting of contracts and advising clients.
  - 3 The Uniform Commercial Code applies to commercial transactions in all of the member nations of the European Union.
  - 4 The World Trade Organisation checks to see if countries follow the trade agreements they have signed.

Commercial law deals with issues of both **private law** and **public law**. It developed as a distinct body of **jurisprudence** with the beginning of large-scale trade, and many of its rules are derived from the practices of traders. Specific law has developed in a number of commercial fields, including **agency**, banking, **bankruptcy**, **carriage of goods**, commercial dispute resolution, company law, **competition law**, contract, **debtor and creditor**, sale of goods and services, **intellectual property**, **landlord and tenant**, **mercantile agency**, **mortgages**, **negotiable instruments**, **secured transactions**, **real property** and **tax law**.

The work of a commercial lawyer may involve any aspect of the law as it relates to a firm's business clients, and the role of the lawyer is to facilitate business clients' **commercial transactions**. It is essential for a commercial lawyer to have not only a good knowledge of a lot of **substantive law**, but also a thorough understanding of both contemporary business practices and the particular business needs of each client.

A commercial lawyer may be asked to advise a client on matters relating to both **non-contentious** and **contentious work**. Non-contentious work largely involves advising clients on the drafting of contracts, whereas contentious work commonly involves the consequences of breach of contract.

Many jurisdictions have adopted **civil codes** that contain comprehensive statements of their commercial law, e.g. the Uniform Commercial Code (UCC), which has been generally adopted throughout the USA. Within the European Union, the European Parliament and the **legislatures** of member nations are working to unify their various commercial codes.

A substantial amount of commercial law is governed by international treaties and conventions. The United Nations Commission on International Trade Law (UNCITRAL) regulates international trade in cooperation with the World Trade Organisation (WTO). The WTO is responsible for negotiating and implementing new **trade agreements**, and is in charge of policing member countries' adherence to these agreements, which are signed by the majority of the world's trading nations and **ratified** by their legislatures (for example, Parliament in the UK or Congress in the USA).

## Key terms: Fields, institutions and concepts in commercial law

- 3 Look at the areas of activity in commercial law mentioned in the first paragraph of the text above and answer these questions. Use the glossary if necessary.
  - 1 Which field deals with the legal rights associated with products of the mind, such as patents, copyrights and trademarks?
  - 2 Which field involves the laws and regulations governing market behaviour, particularly agreements and practices that restrict free enterprise?
  - 3 Which institution deals with the supply of credit information about business organisations to other businesses and financial institutions?
  - 4 Which field is concerned with the legal relationships between the shipper (or owner) of goods, the carrier, and the receiver/consignee of goods?
  - 5 Which field focuses on the laws regulating money paid to the government in connection with commercial transactions?
- 4 Choose the correct word or phrase to complete these definitions.
  - 1 'Agency' is the term for the relationship of a person who acts *in addition to / on behalf of / on account of* another person, known as the principal.
  - 2 Bankruptcy is when someone cannot pay what they *owe / own / won*, and all their property is surrendered to a court-appointed person who liquidates the property to pay the claims of *creditors / owners / debtors*.
  - 3 A secured transaction is a loan or credit *translation / transaction / termination* in which the *lender / loaner / debtor* acquires a security interest in certain property owned by the borrower and has the right to repossess the property if the borrower cannot pay.
  - 4 Negotiable instruments are documents which represent a right of *charge / payment / credit* for a specified sum of money on demand or at a defined time.

## Listening 1: Profile of a commercial lawyer

Just as commercial law itself encompasses many distinct fields of law, commercial lawyers often deal with different areas of commercial activity in the course of their careers. You are going to hear the podcast of an interview with Michael Grant, an associate at a commercial law firm, which appears on the website of the alumni association of an Australian university.

**5** ▶▶6.1 Listen and answer these questions.

- 1 Why has he decided to return to university?
- 2 What does he advise law students regarding career choices?

**6** ▶▶6.1 Listen again and tick the work he did before joining Ravenstone, Altman and Ofner, LLP.

- |   |                          |
|---|--------------------------|
| 1 Preparing notices of dismissal                        | <input type="checkbox"/> |
| 2 Interviewing junior lawyers for positions at his firm | <input type="checkbox"/> |
| 3 Analysing technical documents                         | <input type="checkbox"/> |
| 4 Submitting patent applications                        | <input type="checkbox"/> |
| 5 Writing patent drafts                                 | <input type="checkbox"/> |
| 6 Drafting maritime legislation                         | <input type="checkbox"/> |
| 7 Resolving charter party disputes                      | <input type="checkbox"/> |
| 8 Handling cargo claims                                 | <input type="checkbox"/> |
| 9 Litigating ship collisions                            | <input type="checkbox"/> |

## Language use: Adverb functions

Adverbs are often used to describe the action expressed by the verb. We distinguish adverbs of time (e.g. *often, usually*) and adverbs of manner, which describe how an action is carried out (*slowly, carefully*). Adverbs can also be used to qualify adjectives (e.g. *particularly interesting*).

**7 a** Underline the adverbs in the sentences below from Listening 1 and then decide which function the adverbs have (a–c).

- a describing time of action
- b describing manner of action
- c qualifying an adjective

- 1 He's currently undertaking a Master's of e-Law at Monash University.
- 2 There's something about the challenge of taking a complex commercial transaction and expressing it clearly and concisely that really appeals to me.
- 3 I also had to write patent drafts, which are incredibly detailed descriptions of the inventions in precise legal terms.
- 4 It was interesting, although at times extremely difficult and demanding.
- 5 But I quickly realised that what I liked best was working closely with the other lawyers on litigation, defending or enforcing patents.
- 6 I usually spend most of the day reviewing documents, drafting agreements, meeting with clients and, of course, answering emails.

**b** Where are the adverbs placed in relation to the verbs?

- 8** For each of these sentences, decide which adverbs don't fit.
- 1** My work *often* / *carefully* / *regularly* involves litigating charter party disputes, although I *occasionally* / *sometimes* / *remarkably* handle collision cases as well.
  - 2** Maritime salvage claims can be *closely* / *extremely* / *incredibly* challenging due to the complicated legal situation.
  - 3** The *remarkably* / *quickly* / *extremely* fast pace of change in the area of information technology law means that lawyers at our firm have to *mainly* / *regularly* / *often* attend seminars about the effects of new legislation.
  - 4** Researching technical innovations *carefully* / *extensively* / *extremely* is a(n) *very* / *extremely* / *regularly* interesting step in the process of writing a patent draft.

## Speaking 1: Internships

In Listening 1, Michael Grant described his internship with a maritime law firm. It is common for law-school students to work in the summer months as an intern in a law firm, government department, non-profit group or organisation. An internship can be paid or unpaid. Some internships lead to course credits which count towards a law degree.

- 9** Discuss these questions with a partner.
- 1** Have you done an internship? If so, describe the organisation and your duties there.
  - 2** What do you think makes an internship a valuable experience? What can be gained from it?
  - 3** What would your ideal internship be?

## Text analysis: Letter of application for an internship

Law students often write a letter of application to apply for an internship in response to a specific advertisement. However, it is also common for a student to write what is known as a prospecting letter, or letter of interest, in which the sender asks if there are any openings for interns at the company or institution.

- 10** Quickly read the letter on page 64 written by a student. Is it a prospecting letter or a letter of application replying to a specific advertisement?
- 11** Read the letter again and answer these questions.
- 1** What kind of organisation is she applying to?
  - 2** Which areas of the law is she interested in?
  - 3** What legal work experience has she had?
  - 4** Which documents are enclosed in the letter?
- 12** Underline the adverbs used in the letter. Why do you think the writer uses so many adverbs? What effect does it have?

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Amy Krois-Lindner, Matt Firth and TransLegal

Excerpt 2

[More information](#)

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<sup>4</sup> Dear Sir or Madam

### Summer internship in commercial law

<sup>5</sup> I am a student of law at the University of Vienna, Austria. <sup>6</sup> I am now in my second year and I expect to complete my degree in June 2010. <sup>7</sup> I am interested in applying for the summer internship in commercial law which is advertised on your website.

<sup>8</sup> In my studies, I have completed all of the required courses successfully to date. I am particularly interested in commercial law, and have taken elective courses in debtor–creditor law and negotiable instruments. <sup>9</sup> Furthermore, I have frequently attended guest lectures and discussions at my university on topics related to commercial law. <sup>10</sup> I have also already gained work experience at a law firm, as I carried out an internship last summer at a small law firm specialising in tax law in my hometown of Dornbirn. <sup>11</sup> There my duties included researching new legislation and helping the partners prepare cases for trial. <sup>12</sup> Full details of my studies and work experience are included on the enclosed résumé.

<sup>13</sup> The internship you are offering is especially attractive to me, as I would like to get to know what it is like to work at a large commercial law firm with many international clients and to have the experience of working abroad in an English-speaking country.

<sup>14</sup> I am extremely motivated and a hard worker and I sincerely believe that I would make the best of such an opportunity.

<sup>15</sup> I can confidently say that I have a particularly good knowledge of English, as I have spent several summer vacations with my family in the USA and I have taken two courses in Legal English at my university. <sup>16</sup> I am enclosing writing samples in English as you request in your advert; the letters were written as part of my Legal English courses.

<sup>17</sup> Should you require further information, please do contact me. <sup>18</sup> I look forward to hearing from you.

Yours faithfully

Julia Schwende

- 13** Match the sections and ideas which should be included in a letter of application for an internship (a–m) with the corresponding sentences in the letter (1–18). Some sections/ideas are used more than once.
- a** Reference to how you found out about the internship
  - b** Your address
  - c** Reference to things requested in the ad (writing sample, references, etc.) and enclosed in the letter
  - d** Recipient's address
  - e** Reasons for your interest in internship
  - f** Description of your legal work experience
  - g** Introduction, saying who you are
  - h** Date
  - i** Description of your studies and coursework
  - j** A 'call for action' which closes the letter
  - k** Salutation
  - l** Reason for writing letter
  - m** Details of any personal qualities, qualifications or skills that make you right for the internship

## Reading 2: Commercial law internship

- 14** Read this text. Where do you think it appeared?

### **Powderhouse Sommerville LLP International Commercial Law Internship**

The international commercial law firm Powderhouse Sommerville LLP launched its International Commercial Law Internship at the University Law School in 2006 and has renewed it for the current academic year.

Powderhouse Sommerville LLP is one of the world's largest law firms, with over 1,600 lawyers and 15 offices in North America, Europe and Asia.

Professor May Rikos, Director of the University Law School, said: 'The University Law School welcomes the opportunity to work with one of the first-rank global commercial law firms.'

Under the terms of the internship, students taking International Commercial Law courses in Mergers, Comparative Antitrust Law and World Trade Law will be invited to compete for the internship. Selection will be on the basis of an essay plus interview of the students who achieve the top essay mark in each of the relevant courses. Applications must be submitted by March 10, and the interviews will take place in late March/early April. The Internship will take place from May to July inclusive in the Powderhouse Sommerville Frankfurt Office.

Link to application at the bottom of this page.

- 15** Read the text again and answer these questions.

- 1** Who can apply for the internship?
- 2** How will students be chosen for the internship?
- 3** When and where will the internship take place?
- 4** How can a student apply?

## Writing 1: Letter of application

- 16** Write a letter of application in response to the internship advertisement in Exercise 14. Be sure to include all of the sections and ideas necessary.

## LAW IN PRACTICE

### Lead-in

Internships are very often the first experience young lawyers have of the realities of globalisation in the workplace. Many large legal firms have offices across the globe, employing lawyers of many nationalities.

**17** Discuss these questions with a partner.

- 1 What do you understand by the term *globalisation*?
- 2 What factors have contributed to the globalisation of the world's economies?
- 3 What are the implications of globalisation for:
  - a businesses?      b commercial lawyers?

### Reading 3: Role of commercial agents

Most companies engaged in international trade make use of agents to represent them abroad. The relationship between agent and principal is commonly governed by a commercial agency agreement, and the European Union has sought to harmonise<sup>1</sup> its member states' agency laws in order to give agents greater protection.

This text is taken from the introduction to a document written to inform lawyers about recent changes in the law concerning commercial agency agreements.

**18** Read the text and decide whether these statements are true (T) or false (F).

- 1 Under EU law, a commercial agent is a person who sells goods and services on behalf of a principal.
- 2 Agents are generally paid a flat rate; that is, a charge that is the same for everyone.
- 3 Principals will often abandon agency agreements once a customer base becomes established.

- 1 The role of commercial agents is well known. They act as independent intermediaries representing their principals in the market. A commercial agent is defined by EU Directive 86/653 as a person 'who is a self-employed intermediary having continuing authority to negotiate the sale or purchase of goods (but not services) on behalf of his principal or to negotiate and conclude such transactions on behalf of and in the name of his principal ...'. They do not buy products from their principals, but arrange sales directly from their principals to the customer. For the provision of this service, commercial agents are typically paid a commission by their principals, calculated as a percentage of the sale price of the product to the customer.
- 2 Commercial agency is of particular importance in international trade. It provides a convenient structure enabling a foreign supplier to penetrate an overseas market. By using the services of an agent established in the targeted overseas market, the principal can benefit from the knowledge and local connection of the agent, avoid the investment and commitment of managerial resources required by the establishment of a branch or subsidiary and, by taking advantage of the agent's services on a commission basis, can effectively test the overseas market on a 'no cure, no pay' basis.

<sup>1</sup> *Harmonisation* is the process by which different states adopt the same laws.

- 3** But the position of the commercial agent is vulnerable. Because of the agent's role as intermediary, the principal necessarily has perfect knowledge of the customers procured by the agent. As sales volumes build, the temptation for the principal to circumvent the agent and enter into direct relationships with customers can often become overwhelming against the background of an increasing commission bill, often fuelled by repeat orders from the same customers. It is commonplace, therefore, for the commercial agent to find his relationship with his principal brought to an end precisely at the moment where the agent's efforts have resulted in the establishment of a significant new customer base for the principal in a new market. In this way, the agent becomes the victim of his own success and the principal takes advantage of the goodwill in the principal's product, created largely as a result of the agent's efforts.

**19** Read the text again and answer these questions.

- 1** Why is commercial agency important for international trade?
- 2** How do commercial agents sometimes become 'victims of their own success'?

**20** Match these words and phrases from the text (1–4) with their definitions (a–d).

- |                                    |   |
|------------------------------------|---|
| <b>1</b> commission                | <b>a</b> when payment is only made following a positive result                                    |
| <b>2</b> intermediary              | <b>b</b> the benefit a business gets from having a good reputation                                |
| <b>3</b> a 'no cure, no pay' basis | <b>c</b> someone who carries messages between people who are unable to meet                       |
| <b>4</b> goodwill                  | <b>d</b> payment to someone who sells goods which is directly related to the amount of goods sold |

## Reading 4: Commercial agency contract<sup>1</sup>

The ICC<sup>2</sup> Model Commercial Agency Contract is commonly used by businesses entering a new market, and is an example of a standard form<sup>3</sup> contract. Its provisions are based on prevailing practice in international trade rather than national laws.

- 21** What are the advantages of using a standard form contract based on common business practices rather than negotiating contracts according to domestic laws?
- 22** What kind of provisions would you expect to find in a commercial agency contract?
- 23** Chance Computing is a UK-based company that produces budget laptop computers for schoolchildren. It uses agents to sell its products to other countries. Read the clauses on the next page taken from Chance Computing's standard commercial agency contract and answer these questions.
  - 1** Can the agent set the price at which goods will be sold to third parties?
  - 2** Under what circumstances can the contract be terminated?
  - 3** What is the governing law?
  - 4** If the principal breaches the contract, what court has jurisdiction?

<sup>1</sup> *also* commercial agency agreement

<sup>2</sup> The International Chamber of Commerce is an organisation of businesses from over 80 countries that works to promote and support global trade and globalisation

<sup>3</sup> *also* boilerplate



- 3 The Agent shall endeavour to obtain business for the Principal and is bound to serve the interests of the said Principal to the best of his ability. He will do his best to provide all information necessary for the purpose of promoting business, and especially inform the Principal immediately about every order received.
- 4 He may not deviate from the prices, delivery and payment conditions of the Principal without his consent.

- 9 The contract shall come into force on 10 February 2006 and shall be valid for an indefinite period.  
Where the contract has been agreed for a fixed period, it shall be expected for the same period provided that notice of termination shall not have been served, by registered letter, at least six months prior to the end of a calendar quarter.  
Where the contract has been agreed for an indefinite period, it may be terminated by either party thereto giving, by registered letter, six months' notice prior to the end of a calendar quarter.
- 10 The provisions of the EEC Council Directive of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed agents (86/653/EEC) apply to this agreement. In other respects, the law of the domicile of the Agent is to be consulted.
- 11 Any disputes arising out of or in connection with this agreement shall be decided by the competent Court in the area where the claimant has his residence or registered offices.

- 24** Take it in turns with a partner to explain the provisions of the contract using your own words.

**SAMPLE ANSWER**  
»P.147

EXAMPLE: *Clause 4 says that the agent needs permission from the principal to change prices and conditions of sale, etc.*

## Reading 5: The Commercial Agents (Council Directive) Regulations 1993

The Commercial Agents (Council Directive) Regulations 1993 (as amended) is an example of an EU directive incorporated into English law, and implements EU Directive 86/653, as referred to in the commercial agency contract in Exercise 23.

- 25** Quickly read Regulation 17(1) on the next page and answer these questions.

- 1 What is the general aim of the regulations?
- 2 Under the Act, what two words are used to refer to the money to which an agent might be entitled following the termination of an agency agreement? What is the difference in meaning between these two words?

### Entitlement of commercial agent to indemnity or compensation on termination of agency contract

- 17 (1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.
- (2) Except where the agency contract otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.
- (3) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to an indemnity if and to the extent that—
- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and
  - the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.
- (4) The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.
- (5) The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.
- (6) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.
- (7) For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which—
- deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or
  - have not enabled the commercial agent to amortise the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.
- (8) Entitlement to the indemnity or compensation for damage as provided for under paragraphs (2) to (7) above shall also arise where the agency contract is terminated as a result of the death of the commercial agent.

**26** Read the whole of Regulation 17<sup>1</sup> and answer these questions.

- According to 17(2), under what circumstances will agents be granted an indemnity rather than compensation?
- According to 17(3), what is necessary before an indemnity is granted?
- According to 17(4), how is the indemnity calculated?
- Is compensation available if contract ends following the death of the agent?

<sup>1</sup> The last two paragraphs (17(9) and 17(10)), have been cut from this extract.

- 27** A colleague from outside the EU contacts you to ask about the legal protections in place in the EU for commercial agents. Write a summary of Regulation 17 to circulate to your litigation department.

## Listening 2: Meeting with corporate counsel

Following two years of increasing sales in southern Europe, Chance Computing wants to break into the more competitive central European market. Jenny Miller, Sales Director of Chance Computing, has asked Clive Sanborn, corporate counsel, for advice on terminating a number of agency agreements.

- 28** ◀ 6.2 Listen to the first part of their conversation and answer these questions.

- 1 Why does Chance Computing want to end the agreements with their agents in southern Europe?
- 2 What is the maximum amount of compensation an agent can be paid, according to the regulations?

- 29** ◀ 6.3 Listen to the second part of their conversation and answer these questions.

- 1 Is compensation limited only to lost commissions?
- 2 For how many years are the agents' commercial activities restricted following termination of the agreement?

- 30** ◀ 6.2, 6.3 Listen to the whole conversation again and decide whether these statements are true (T) or false (F).

- 1 The agents are in breach of contract.
- 2 Under the agreement, the minimum notice period is six months.
- 3 The agreement allows for the payment of an indemnity of up to one year's average commission fees.
- 4 The agents must make any claims for compensation within one year of the termination of the agreement.
- 5 The restraint-of-trade clause is valid for five years.
- 6 Under the law, a restraint-of-trade clause in an agency agreement must refer to either the relevant geographical area or the type of goods in question.
- 7 The lawyer believes a court would be likely to find for the agents and not uphold the restraint-of-trade clause if the principal breached the terms of the agreement.

## Speaking 2: Role-play: discussing options

- 31** Following his discussion with Jenny Miller, Clive Sanborn discusses the options available to Chance Computing with an intern who is shadowing him. With a partner, role-play their conversation. Discuss the various options that are available to Chance Computing, together with their possible outcomes. Consider the best case, worst case and most likely scenarios.

**Student 1:** You are Clive Sanborn. Summarise the position that Chance Computing are in.

**Student 2:** You are the intern shadowing Clive. Suggest some options for the company based on the information in this unit.

## Writing 2: Summary

- 32** Write a summary of your discussion. Include a model compensation package for Chance Computing to offer their agents.

SAMPLE  
ANSWER  
» p. 147

# Language Focus

## 1 Word formation

Complete the table with the adjective form of these nouns.

noun	adjective
merchant	merchantable, ...
commerce	
negotiation	
finance	
bankruptcy	

## 2 Noun–adjective collocations

Which of the adjectives from Exercise 1 collocate with these nouns? (Some can collocate with more than one adjective.)

- 1 ..... instrument
- 2 ..... trading
- 3 ..... bank
- 4 ..... agency
- 5 ..... law
- 6 ..... terms

## 3 Abbreviations

What do these abbreviations stand for?

- 1 UCC
- 2 WTO
- 3 UNCITRAL

## 4 Key terms in intellectual property law

Which word completes all of these expressions?

- 1 ..... draft
- 2 ..... application
- 3 to secure a .....
- 4 to enforce .....
- 5 to grant .....
- 6 ..... office

## 5 Prepositions

Complete the phrases and sentences below from the unit using the prepositions from the box.

by for into of of on on

- 1 to advise a client ..... a matter
- 2 a breach ..... contract
- 3 Commercial law is governed ..... international treaties.
- 4 An agent works ..... behalf ..... a principal.
- 5 to apply ..... an internship
- 6 a contract comes ..... force