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BLAB

HANDOUTS

INTRODUCTION TO THE LEGAL SYSTEM (MODULE 1) -SECOND PARTIAL-

for attending
students

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It is a useful tool for studying the subject, but does not guarantee preparation as exhaustive and complete as the material recommended by the University.





UNIT 11: SUPPLEMENTATION OF CONTRACT AND GOOD FAITH

1) Supplementation of Contract

- **Civil Law Jurisdictions and Contractual Gaps:** In civil law systems, when contracts have gaps and no appropriate rule is found in the civil code or other statutes, the contract must still be interpreted and enforced by supplementing the missing part.
 - This mechanism is called **supplementation of contract** and ensures the contract can function even if the parties forgot to regulate something.
- **Art. 1374 Italian Civil Code – Supplementation of Contract:** contracts are binding not only for what is expressly stated by the parties, but also for what is:
 - Stipulated by the law (default or mandatory rules).
 - If no law applies, then by usage (customary practices).
 - If there is nothing applicable then by equity (good faith).

2) Good Faith

- **Good Faith in Civil Law:** In civil law systems, good faith is a core principle that governs how contracts are negotiated, formed, and performed. It is treated as a mandatory legal standard.
 - **Germany – § 242 BGB:** The debtor must perform their obligation in the way required by good faith as understood through usage. This means performance must align with what is considered fair and reasonable in practice.
 - **France – Art. 1104 French Civil Code (as amended in 2016):**
 - Contracts must be negotiated, formed, and performed in good faith.
 - This rule is a matter of public policy, meaning parties cannot contract out of it.
- **Good Faith In Common Law:**



- **English Common Law:** There is no general duty of good faith in contract law. Parties are seen as adversaries, especially during negotiation and performance.
 - **Exceptions:** Cooperative contracts and fiduciary relationships.
 - English law values stability and continuity, which is why it resists adopting broad good faith duties (Wood v Capita).

- **American Common Law:** the duty of good faith plays a much stronger role, especially in the performance of contracts. This applies across many U.S. states and has influenced other common law jurisdictions like Australia.
 - **U.S. Legal Instruments:**
 - **UCC § 1-203:** every contract or duty under the UCC requires good faith in its performance or enforcement.
 - **Restatement Second § 205:** contracts impose a duty of good faith and fair dealing in both performance and enforcement.

3) Yam Seng v. International Trade Corporation Case

- **Facts of The Case:**
 - **Parties and Agreement:** ITC granted Yam Seng exclusive rights to distribute “Manchester United” fragrances in duty-free shops across specified regions including the Middle East, Asia, Africa, and Australasia.

- **Conduct by ICT during the Contract:** ITC authorized another distributor (not Yam Seng) in Singapore to apply a lower retail price than the official duty-free price Yam Seng was allowed to offer. ITC also misled Yam Seng, giving false information about the price applied by this other distributor in Singapore.

- **Legal Conflict:**
 - **Claim by Yam Seng:** Yam Seng sued ITC for breach of an implied term that ITC would not harm its sales by offering the same products in the same territories at lower prices than those Yam Seng was permitted to offer.



- **Decision:**
 - **Finding by L.J Leggatt:** The court found that ITC acted in bad faith by misleading Yam Seng about pricing and by failing to prevent a lower price being offered domestically in Singapore.
 - **Conclusion:** ITC was held to be in breach of contract, due to bad faith conduct during the performance of the agreement.

4) Bristol Groundschool Ltd v. Intelligent Data Capture Ltd

- **Facts of The Case:**
 - **Parties and Background:** BGS and IDC collaborated through contracts to produce aviation training manuals, with BGS owning the rights and IDC providing graphic content.
 - **Conflict:** When the relationship deteriorated, BGS sued for breach of contract and copyright infringement. IDC counterclaimed. One issue was whether BGS breached a duty of good faith by accessing IDC's internal files without permission, anticipating a possible breach by IDC.
- **Legal Principle:**
 - **Relational Contract and Duty:** The court found this was a relational contract, which includes a general obligation based on expected fair conduct between parties.
 - **Standard of Conduct:** The duty includes, at minimum, honesty. The relevant test is whether the conduct would be seen as commercially unacceptable by reasonable and honest people in the specific context.
- **Final Decision:**
 - **Breach, but Not Repudiatory:** BGS breached its obligation by accessing IDC's files, but the breach was not serious enough to end the contract. The actions were limited, precautionary, caused no real harm, and did not undermine the core trust of the agreement.



5) Contract Drafting in the Common Law and International Context

- **Contract Drafting in Common Law:**
 - **No Principle of Special Contracts:** common law systems do not apply a specific set of rules for different types of contracts, and implied terms play a limited role.
 - **No General Duty of Good Faith (In English Law):** English common law does not impose a broad duty of good faith or cooperation between the parties, except in specific types of contracts (e.g. fiduciary or relational contracts).
 - **Contrast with American Law:** in the United States, good faith is enforced in the performance and enforcement of contracts, based on rules like UCC § 1-203 and Restatement § 205.
 - **Limited Judicial Intervention:** courts only play a role in extreme or unforeseen situations, avoiding interference in contractual balance.
 - **Detailed Drafting:** parties draft contracts in great detail to limit the scope of judicial interpretation.
 - **Focus on Certainty:** contract terms are set out explicitly to ensure clarity and predictability.
 - **Risk Allocation and Due Diligence:** parties are expected to investigate thoroughly and allocate risks clearly within the contract.
- **Drafting International (Commercial) Contracts:**
 - **Boilerplate Clauses:** standardized provisions placed at the end of contracts, regulating procedural aspects like notices, amendments, interpretation, dispute resolution, and more.
 - **Autonomy from National Law:** these clauses reduce the need to rely on any national legal system.
 - **Truly International Character:** the contract becomes independent from any specific jurisdiction and operates on its own legal terms.



UNIT 12: FORMATION OF CONTRACT

1) Offer and Acceptance

- **Offer and Acceptance:**
 - **Basic Rule:** A contract is formed when an offer and an acceptance meet, showing the parties' intention to be bound (Art. 1113 Italian Civil Code).
 - **Legal Structure:** An offer is a declaration of willingness made by the offeror. An acceptance is the offeree's corresponding declaration or conduct indicating agreement.
 - **Communication:** Both offer and acceptance must be communicated to the other party to have legal effect (knowledge rule in civil law).

2) Offer vs Invitation to Treat

- **Difference Between the Two:**
 - **Offer:** Creates the power of acceptance in the offeree — if accepted, the contract is formed. The offeror cannot refuse once the offer is accepted.
 - **Invitation to Treat:** A preliminary step — an expression of willingness to enter into negotiations. Both parties can still refuse, withdraw, or modify the terms.
 - **Key Point:** In an invitation to treat, both sides can say no; in an offer, only the offeree has that choice — the offeror is bound once the offer is accepted.
- **Examples:**
 - **Menu in a Restaurant:** This is an invitation to treat. The restaurant can still refuse service (e.g. if full or food is sold out), so the menu does not bind the restaurant.
 - **Vending Machine: This is an offer.** Once the customer inserts the money and selects the product, the machine cannot refuse — the contract is formed.

- **Offer to the Public:** If someone publicly states, “Anyone who finds my cat will get \$3,000,” this is an offer made to the public. Anyone who fulfills the condition accepts the offer and creates a binding contract. The offeror cannot later refuse.
- **Display of Goods & shop windows, shelves, catalogues):** Generally treated as invitations to treat, not offers. However, if circumstances clearly show the seller intends to be bound (e.g. advertised stock at a fixed price), it may be treated as an offer — especially in civil law jurisdictions, which are more open to this interpretation, unless the stock is exhausted.
- **Francesca’s Example:** Francesca tells Catherine, “If someone pays me €500 for my wrecked ring, I’d gladly give it away.” Whether this is an offer depends on:
 - **Intent:** Is Francesca serious, or just joking?
 - **Object:** Is the specific ring clearly identified?
 - **Price:** Is the €500 a firm price or just a starting point for negotiation?
 - If unclear or joking, this may be just an invitation to treat.

3) Withdrawal and Irrevocability of the Offer

- **Balancing Interests:** The law balances two interests: The law weighs two opposing interests — the offeror’s interest in being able to withdraw the offer at any time, and the offeree’s interest in having time to consider the offer before deciding.
- **Withdrawal of the Offer:** In general, legal systems allow the offeror to withdraw the offer before it is accepted, unless it has been made irrevocable.
- **Irrevocable Offers:** Although withdrawal is usually permitted, the offeror can voluntarily bind themselves to keep the offer open, turning it into an irrevocable offer.
 - **In Civil Law Systems:** It is enough for the offeror to unilaterally promise to keep the offer open for a specified period.

- **In Common Law Systems:** A separate option contract must be created between the parties. If this agreement is gratuitous, it must be made by deed to be valid.
- **Contract of Option:** An option is a preliminary contract where the option issuer commits to keeping the offer open, while the option holder has the right to accept it unilaterally within a fixed time.
 - **Call Option:** A call option gives the holder the right to buy an asset at a fixed price (strike price).
 - **Put Option:** A put option gives the holder the right to sell an asset at a fixed price (strike price).

4) Acceptance

- **Definition of Acceptance:** Acceptance is any statement or conduct by the offeree that indicates agreement with the offer. It shows the offeree's willingness to be bound by the terms proposed.
 - **Forms of Acceptance:** Acceptance can be made in any form, unless the offeror has specified a particular method. It can be expressed through words or implied by conduct.
 - **Silence is Not Acceptance:** The offeree's silence or inaction does not, by itself, amount to acceptance. The law requires some form of active agreement.

5) Time and Communication of Acceptance:

- **Importance of Timing:** In commercial practice, it is essential to know when a contract is concluded, as this marks the moment when parties become legally bound and acquire their contractual rights and obligations.
- **Civil Law Approach, the Knowledge Rule:** A contract is concluded when the acceptance is notified to the offeror.



- **Purpose:** This rule protects the recipient's interest by ensuring that legal effects only arise when the acceptance reaches them.
- **Legal Basis:** According to II-4:205, the contract is concluded when the acceptance reaches the offeror.

- **Common Law Approach, the Postal Rule:** In English common law, if the acceptance is sent by post, the contract is concluded at the moment the letter is posted.
 - **Default Application:** This rule applies unless the offer explicitly requires that acceptance must be received.

- **Exception to Postal Rule – Holwell v. Hughes Case:**
 - **Contract Terms:** The offer required acceptance "by notice in writing to the intended vendor."
 - **Factual Background:** The claimant's lawyer sent the notice, but it was never delivered.
 - **Judgement:** the court held that the postal rule did not apply because actual notice was required.
 - **Outcome:** Since the acceptance was not received, the contract was not concluded and the appeal was dismissed.

6) Formal Requirements and Written Form:

- **Legal requirement of written form:** Some contracts must be in writing due to statutory provisions, either for their validity or for evidentiary purposes.
 - **Forma ad substantiam actus:** Writing is required for the contract to be valid and concluded.
 - **Forma ad probationem tantum:** Writing is only required for the contract to be admissible as evidence.

- **Voluntary written form:** If writing is not required by law, the parties may still agree that the contract must be in writing for it to be valid. If so, the contract is not concluded until it is written.



- **Sale of land:** In most civil and common law systems, contracts for the sale or transfer of an interest in land must be in writing.
 - The document may be in simple written form and does not need to be handwritten, but it must be signed by the parties or their agents.
- **Gifts:** Gifts usually require formalization
 - **In Civil Law:** A deed issued by a public notary is typically required (e.g. notarielle Beurkundung, acte authentique, atto pubblico).
 - **In Common Law:** Even if not treated as contracts, gifts often must be made by deed to be enforceable.

7) Merger Clause

- **Definition and effect:** A merger clause is a contractual term stating that the written contract contains all the terms agreed between the parties. Any prior statements or agreements not included in the document are excluded from the contract.
- **Legal reference:** According to II-4:104, if the contract includes a merger clause, previous understandings or negotiations have no legal effect unless written into the document.
- **Use in international contracts:** Merger clauses are commonly included in international commercial contracts under names like “entire agreement” or “whole agreement” clauses, typically found in the boilerplate section.

UNIT 13: INVALIDITY OF CONTRACTS

1) Overview of Contractual Invalidity

- **Definition of invalidity:** A contract is invalid when it is impacted by a significant flaw that impairs its legal enforceability. Depending on the type of flaw, the contract may be considered void from the outset or may be subject to annulment by court decision.
- **Voidness / Nullity:** This form of invalidity renders the contract completely ineffective from the beginning. It is aimed at protecting general or public interests.
 - **Terminology for nullity:** Known as *nullité absolue* in French, *nullità* in Italian, and *Nichtigkeit* in German.
 - **Examples of void contracts:** Contracts that lack an essential element, have an unlawful subject matter, or are contrary to mandatory rules, public policy, or morality.
- **Avoidance / Rescission:** This form of invalidity allows the contract to produce legal effects until it is challenged and set aside by the entitled party. It serves to protect private interests.
 - **Terminology for avoidance:** Known as *nullité relative* in French, *annullabilità* in Italian, and *Anfechtung* in German.
 - **Examples of avoidable contracts:** Contracts entered into by minors, by persons lacking legal capacity, or contracts affected by defects of consent such as mistake, fraud, or duress.
- **Purpose of the distinction:** The key distinction lies in the type of interest protected. Nullity upholds public values and legal order, while avoidance provides a remedy for private injustice. As a result, nullity may be raised by anyone, even by courts *ex officio*, whereas avoidance must be actively invoked by the harmed party.

2) Legal Effects of Invalid Contracts

- **Nullity produces no legal effect:** When a contract is null, it is invalid from the beginning and is never capable of producing any legal effect. It is treated as if it never existed.
 - **Conclusion of a null contract:** From the moment of its conclusion, a null contract has no validity and generates no obligations or rights between the parties.
- **Avoidable contracts may produce temporary effects:** Unlike null contracts, avoidable contracts can initially produce legal effects. These effects remain in place unless and until the contract is avoided by the entitled party through a court claim.
 - **Retroactive removal of effects:** Once avoidance is judicially confirmed, the contract is treated as if it never produced legal effects.
 - **Restitutions:** As a consequence of avoidance, the parties are obliged to return whatever they have received under the contract, restoring the status quo ante.
- **Validation of null contracts:** Null contracts cannot be validated by anyone, under any circumstance. This is because the invalidity is meant to protect general or public interests, which override party autonomy.
- **Validation of avoidable contracts:** Avoidable contracts may be validated by the party who has the right to seek avoidance. This reflects the fact that the invalidity serves to protect private interests, and the harmed party may choose to confirm the contract rather than challenge it.

3) Grounds for Nullity

- **Categories of Nullity:** General grounds for voidness/nullity can be grouped into two broad categories — defectiveness of the agreement and illegality or immorality of the contract.



- **1) Defectiveness of the Agreement Between the Parties:**
 - **Apparent agreement only:** The agreement is merely superficial and lacks the parties' actual consent. This occurs when, for example, consent is simulated or purely formal.
 - **Failure to meet required form:** The agreement does not comply with legally required formalities (want of form). In such cases, even mutual consent is not enough to create a valid contract.
 - **Nonexistent or impossible subject-matter:** The object of the contract either does not exist or cannot possibly exist, making the agreement void for lack of a valid basis.

- **2) Illegality and Immorality**
 - **Illicit contracts:** Contracts are void when they infringe upon mandatory rules that prohibit both parties from entering into the agreement.

 - **Contravention of public policy or morality:** Agreements that go against public policy (*ordre public*) or public morality (*contra bonos mores*) are void. This includes situations where the contract's objective is harmful to the community or societal values.

 - **Judicial evaluation of consequences:** The legal consequences of breaching a statutory rule depend on factors such as:
 - The public policy goal the statute seeks to protect
 - The language, scope, and purpose of the statute
 - The consequences for the innocent party
 - Broader equitable considerations

 - This approach is illustrated in the case Phoenix General Insurance Co. of Greece S.A. v Administratia Asigurarilor de Stat [1987] 2 All ER 152, where the judge assessed the impact of illegality in light of public interest.

- **Lack or Impossibility of the Subject Matter:**

- **Civil law approach:** Contracts that are impossible to perform are generally void and unenforceable. Courts will not uphold obligations that cannot, even theoretically, be fulfilled.
- **Common law approach:** Courts may enforce such contracts. If a party agreed to perform an impossible obligation, it is still liable for damages due to breach.
- **Legal provision – Article 1163:**
 - (1) A valid obligation must have as its subject-matter a present or future act of performance.
 - (2) This performance must be possible and either determined or determinable.
- **Case – *McRae v Commonwealth Disposals Commission* [1951] HCA 7G:** The seller claimed to sell a tanker that didn't exist, based on unfounded assumptions. The High Court of Australia held that this was a reckless mistake and awarded damages for breach of contract.
- **Adoption of the common law view in civil law:** The German BGB now reflects the common law stance following its reform in 2001–2002.
 - (1) A contract is not automatically void because performance was already impossible at the time of conclusion.
 - (2) The other party may still claim expectation damages or reimbursement of expenses.

4) Grounds for Avoidance

- **General Grounds for Avoidance:**

- **Incapacity of one of the contracting parties:** A contract may be avoided when one of the parties lacked the legal or factual capacity to give valid consent at the time of conclusion.
- **Vitiating factors (*Willensmängel* / *vices du consentement* / *vizi del consenso*):** These are defects that impair genuine consent, justifying avoidance.

- **Mistake (Irrtum / erreur / errore):** One party forms an incorrect understanding of a key element of the contract.
 - **Deceit or fraud (arglistige Täuschung / dol / dolo):** One party is intentionally misled into the agreement.
 - **Duress (Drohung / violence / violenza):** One party is forced or pressured into consent under threat.
- **1) Mistake - Comparative Approaches:**
 - **Civil law jurisdictions:** These systems follow an *intention-based* approach to contract formation, which places emphasis on the actual will of the parties. This makes it easier to avoid a contract based on mistake.
 - **Common law jurisdictions:** These systems follow an *expression-based* approach, prioritizing the external manifestation of intent. Unilateral mistakes generally do not justify avoidance unless they result from a misrepresentation.
- **Mistake in Civil Law Jurisdictions:**
 - **Conditions for avoidance based on mistake:** The mistaken party may avoid the contract if two cumulative conditions are met:
 - **The mistake is material (essential):** The mistake must concern a main point of the contract, not a minor or secondary element.
 - **The other party knew or should have known:** Avoidance is possible only if the other party was aware or, acting in good faith, should have been aware of the mistake.
- **Mistake in Common Law Jurisdictions:**
 - **Unilateral mistake and contract validity:** A unilateral mistake, even if fundamental, does not affect the validity of the contract.
 - **Equitable remedy of rescission:** Avoidance (rescission) is only granted when the mistake was caused by:

- A misrepresentation made by the other party,
 - A misrepresentation by the other party's agent,
 - A third party's misrepresentation, if known to the other party.
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- **Case Study – Spice Girls Ltd v Aprilia World Service BV:**
 - **Background of the Agreement:**
 - On 4 March 1998, heads of agreement were reached for Aprilia to sponsor the Spice Girls' tours.
 - Ms Halliwell expressed her intention to leave the group on 3 and 9 March, but this was not disclosed.
 - On 30 March 1998, SGL sent a fax with representations confirming commitment from all members.
 - On 4 May 1998, all members participated in a commercial shoot, reinforcing the impression of full commitment.
 - The final agreement was signed on 6 May 1998.
 - In September 1998, Ms Halliwell left the group, and Aprilia ceased payment, alleging misrepresentation.
 - **Legal Question:** Whether SGL was liable under section 2(1) of the UK Misrepresentation Act 1967.
 - **Applicable legal principles:**
 - *With v O'Flanagan (1936)*: A representation becomes false if circumstances change and the change is not disclosed.
 - *Smith v Chadwick (1884)*: If a statement is likely to induce someone into a contract, inducement can be inferred.
 - **Judgment by the Court of Appeal:**
 - The court held that the representations in the fax and the commercial shoot were material inducements.
 - Aprilia would not have entered the contract had it known about Ms Halliwell's intention to leave.

- **Conclusion:** SGL was found liable under s.2(1) Misrepresentation Act 1967.

- **2) Deceit (Fraud):**
 - **Definition of deceit:** A deceit (or fraud) occurs when one of the contracting parties is intentionally induced into a mistake as to the prospective contract.

 - **Fraudulent misrepresentations:** Fraud can be committed through express false statements. This form is recognized in both civil and common law jurisdictions.

 - **Silence or non-disclosure:** Fraud can also occur by intentionally withholding information. This is recognized primarily in civil law jurisdictions and is a relatively recent development.

 - **Claim for avoidance (dolus causam dans):** If the mistaken party would not have entered the contract had they known the truth, the contract can be avoided.
 - **Limits to avoidance:** Avoidance is not allowed when the misrepresentation consists of mere commercial puffery (*dolus bonus*) that no reasonable person would have taken literally.

 - **Claim for damages (dolus incidens):** If the mistaken party would still have contracted, but on better terms, they may seek compensation instead of avoidance.
 - **Expectation damages:** The court awards damages based on what the mistaken party would have received under more favorable terms, had they been correctly informed.

 - **Avoidance for deceit committed by a party:** Avoidance is granted when the fraud is committed by the other contracting party or their agent.

 - **Avoidance for deceit by a third party:** If the fraud is committed by a third party, avoidance is granted only if the other contracting party knew or should have known of the fraud.

- **3) Duress**

- **Definition of duress:** Duress consists in threats of harm that induce a party to enter into a contract in order to escape the threatened danger.
- **Types of threats:**
 - **Personal threats:** Against the party or their family's life, physical integrity, honor, or property.
 - **Economic threats:** Targeting the financial interests of the party (economic duress).
- **Effect of duress:** The contract is voidable if consent was obtained through such threats, as the agreement was not freely given.
- **Legitimate threats vs duress:** A threat to take lawful action (such as suing) does not usually constitute duress.
 - **Article 1141 (as amended in 2016):** A threat of legal action only amounts to duress when the legal process is misused — for example, to obtain a manifestly excessive advantage or for a purpose other than its legitimate function.
- **Duress by a third party:** In most civil law jurisdictions, avoidance is granted even if the threats are made by a third party, regardless of whether the other contracting party acted in good faith.



UNIT 14: UNFAIR STANDARD TERMS

1) Standard Contracts and Information Asymmetry

- **Standard contracts:** Companies that frequently enter into the same type of contracts often create standard terms and conditions to apply in all of their contractual relationships.
 - **Purpose:** These contracts increase efficiency and reduce transaction costs.
 - **Concern:** Standard terms are usually drafted to protect the interests of the party who developed them.
- **Information asymmetry – Akerlof’s market for lemons:** George Akerlof’s 1970 paper explained how quality in markets can deteriorate when buyers and sellers have unequal access **to information**.
 - **Market degradation:** In markets with information asymmetry, the average quality of goods tends to fall.
 - **Used car example:** There are good cars (“peaches”) and bad cars (“lemons”), but the buyer cannot know in advance which type they are purchasing.
 - **Pricing effect:** Buyers are only willing to pay the average price, regardless of actual quality.
- **Adverse selection problem:** When buyers undervalue good products due to lack of information:
 - **Low price pressure:** Owners of high-quality used cars will not get a good price and may choose not to sell.
 - **Market exit:** Good-quality sellers leave the market, lowering the average quality even further.
 - **Result:** Only lemons remain in the market, leading to overall market inefficiency.
- **Application to standard terms:** The same logic applies to markets for standard contract terms.

- **Low negotiation incentive:** Standard terms often deal with rare or unlikely events, so the other party usually does not take the time to read or negotiate them.
- **Market effect:** Because there is little scrutiny, bad clauses tend to dominate — good clauses are driven out.
- **Solution:** This dynamic may justify state intervention to regulate standard terms and protect parties from unfair conditions.

2) Control Systems of Unfair Terms

- **Formal control:** A term considered unfair has no legal effect unless it is specifically approved in writing by the adhering party.
 - **In Italian law:** According to Art. 1341(2) c.c., unfair terms must be individually approved in writing to be valid.
- **Substantive control:** Even if a term has been formally accepted, it may still be invalid if it is substantively unfair.
 - **In German law:** Under § 307 BGB, provisions in standard terms are ineffective if they unreasonably disadvantage the other party, contrary to the requirement of good faith.
- **EU Consumer Law (directive G3/13/EEC):**
 - **Purpose of the directive:** The goal is to protect consumers from unfair terms in one-sided standard contracts, especially those that exclude essential **rights**.
 - **Obligation of Member States:** Member States must take measures to prevent the inclusion of unfair terms in consumer contracts.
 - **General criteria:** The directive aims to establish general principles for determining whether a contractual term is unfair.

- **Enforcement mechanisms:** Courts or administrative authorities in Member States must have proper tools to prevent the continued use of unfair terms in consumer contracts.
- **Signing-without-reading problem:** The directive addresses the issue that consumers often sign standard contracts without reading or understanding them.
- **Substantive control in practice:** Authorities evaluate whether the content of the contract is unfair, not just whether it was accepted formally.
- **Use of supplementary rules:** Supplementary legal rules serve as a benchmark to assess fairness.
 - **Objectification of justice:** These rules reflect the community's shared sense of fairness, as described by L. Raiser.
 - **Gap-filling function:** Default rules apply to fill in missing or unfairly excluded terms.

3) Unfairness Test

- **Unfairness Test in Consumer Contracts:**
 - **General rule under Article 3(1) of Directive G3/13/EEC:** A contractual term may be considered unfair if it causes a significant imbalance in the parties' rights and obligations under the contract, contrary to the requirement of good faith.
 - **Significant imbalance:** The CJEU emphasized in *Mohamed Aziz* (2013) that courts must consider what the applicable rules of national law would provide in the absence of such a term.
 - **Good faith requirement:** A term is contrary to good faith if the seller or supplier could not reasonably assume that the consumer would have agreed to the term in individual negotiations.
 - **Interpretation by CJEU:** In *Mohamed Aziz*, the court clarified that national judges must assess whether the term could be reasonably accepted by a consumer if individually negotiated.

- **Case Law – ParkingEye Ltd v. Beavis (2015):**
 - **Facts:** A sign in a car park managed by ParkingEye informed users that exceeding the time limit would result in a charge of £85.
 - **Legal issue:** The question was whether the £85 charge created a significant imbalance and was contrary to good faith.
 - **Majority opinion (Lord Neuberger G Lord Sumption):**
 - **Consumer acceptance:** A hypothetical reasonable motorist would have accepted the charge as part of a fair and objective agreement.
 - **Justification:** The charge served a legitimate purpose — managing parking space and ensuring turnover — and was not excessive or arbitrary.
 - **Conclusion:** Although there was an imbalance, it did not violate good faith because the term served a legitimate commercial interest.
 - **Dissenting opinion (Lord Toulson):**
 - **Doubt over consumer consent:** There was insufficient evidence to assume that a consumer would have agreed to such a penalty in an individually negotiated contract.
 - **Unclear justification:** ParkingEye did not prove that the charge was necessary or that it reflected typical industry practice.
 - **Criticism of reasoning:** He questioned whether the deterrent effect justified the amount and noted that other car parks do not charge similar fees.
- **Examples of Unfair Terms from Annex of Directive:** The annex provides examples of terms which may be regarded as unfair. The list is non-exhaustive but reflects typical problematic clauses.
 - **Limitation of liability:** Clauses that exclude or limit the legal liability of the seller or supplier in cases of death or personal injury due to their actions.
 - **Unfair exclusion of consumer rights:** Terms that limit the consumer’s ability to exercise rights in the event of non-performance or inadequate performance.

- **One-sided binding terms:** Clauses that bind the consumer while allowing the seller or supplier to remain non-committal.
- **Retention of payments:** Clauses allowing the seller or supplier to retain sums paid if the consumer cancels, without similar obligations on the supplier.
- **Disproportionate penalties:** Terms requiring the consumer to pay disproportionately high sums for failing to fulfill contractual obligations.

4) Consequences of Unfairness and Enforcement

- **Effect of Unfair Terms – Article 6 (1):** If a term is found to be unfair, it is not binding on the consumer. The rest of the contract remains valid if it can continue to exist without the unfair term.
- **ECJEU case law:**
 - **Banco Español de Crédito (2012):** National courts must exclude the application of unfair terms without modifying their content.
 - **Asbeek Brusse (2013):** The contract must continue, in principle, without any amendment other than the removal of the unfair term.
- **Enforcement of Consumer Protection rules:**
 - **General obligation – Article 7(1):** Member States must ensure that adequate and effective measures are available to prevent the continued use of unfair terms in consumer contracts.
 - **Actors involved:**
 - **Consumers:** Individuals affected by the contract can seek enforcement.
 - **Administrative authorities:** Government agencies may intervene.
 - **Consumer organizations:** Bodies representing consumer interests may act.
- **Individual Enforcement:**

- **Litigation between consumer and trader:** Individual cases may require deviation from ordinary civil procedure to protect the consumer's weaker position.

- **Key case – Pannon (200G):**
 - **Court's duty:** The national court must examine the unfairness of a term on its own initiative.
 - **Consumer choice:** The consumer may choose whether to rely on the declaration of unfairness.
 - **Final decision:** Whether the term is binding is up to the consumer, as they are best positioned to decide based on the judge's assessment.

- **Public or Collective Enforcement:**
 - **Purpose:** To correct systemic imbalances between consumers and businesses, even where individual parties are not directly involved in the action.

 - **Actors:**
 - **Public authorities:** Government bodies with regulatory powers.
 - **Consumer organizations:** Groups empowered to act on behalf of consumers.

 - **Actions and targets:**
 - **Scope:** Can be brought against individual sellers or suppliers, or against groups such as associations that recommend standard terms.
 - **Main tool:** Injunctions to prohibit the continued use of unfair terms



UNIT 15: BREACH OF CONTRACT

1) Breach of Contract Overview:

- **Anticipatory breach of contract:** This occurs when a party declares in advance that they do not intend to perform their obligations under the contract. The breach happens before the performance is actually due.
- **Actual breach of contract:** This occurs either on the date performance is due or during the course of performance, when a party fails to fulfill their contractual obligations.

2) Remedies for Breach:

- **Purpose of remedies:** The main goal of contract law is to protect the parties' expectations by ensuring that promises are fulfilled. If a party fails to perform, the law grants remedies to the other party.
- **Definition of a remedy:** A remedy is a court order that upholds someone's right or compensates for an illegal act. It allows the aggrieved party to seek legal relief when the contract is breached.
- **Types of remedies:**
 - **Specific performance:** If a party does not perform, the court may force them to do so. This remedy compels actual fulfillment of contractual duties.
 - **Termination of contract:** The non-breaching party may seek to dissolve the contract, refuse to perform their own obligations, or request restitution for anything already paid.
 - **Damages:** A monetary award designed to place the aggrieved party in the position they would have been in had the contract been properly performed.
 - **Flexibility:** Damages can be awarded alone or together with claims for performance or termination.
- **Theoretical foundations:**



- **Moral approach to contract law:** Contracts must be honored (pacta sunt servanda). The legal system favors compelling performance to fulfill the debtor's obligation.
- **Economic approach to contract law:** Contracts serve to improve welfare. If performance isn't viable, the law allows the debtor to pay compensation to restore the other party's financial position.

- **Comparison between legal systems:**
 - **Civil law approach:** Specific performance is the general remedy. It is denied only in exceptional cases.
 - **Common law approach:** Damages are the default remedy. Specific performance is exceptional and typically reserved for unique goods or circumstances.

3) Civil Law Approach to Remedies:

- **Right to claim performance:** Each party in a civil law contract holds an enforceable right to demand the other party's performance. Non-performance, defective performance, or delay all trigger this right.

- **Specific performance as the general remedy:** In civil law systems, the default response to breach is specific performance — the creditor can ask the court to compel the debtor to fulfill their obligation.
 - **Enforcement by authority:** If the debtor fails to comply with the court order, an official may seize the good owed and deliver it to the creditor.

- **Exceptions to specific performance:**
 - **Impossibility to perform:** Performance is physically or legally impossible, regardless of whether the debtor is at fault.
 - **Disproportionate cost:** Performance is still possible but would cause unreasonable expense or effort for the debtor.
 - **Contracts involving personal services:** For example, a contract to paint a portrait. Enforcing such a service may violate personal freedom or result in subpar performance if forced.

- **Legal basis – German Civil Code (§241 BGB):** The creditor has the right to claim performance from the debtor in order to enforce the obligation.
- **Legal basis – French Civil Code (Art. 1221):** After having given notice to perform, the creditor may demand performance in kind unless:
 - Performance is impossible; or
 - There is a manifest disproportion between the cost to the debtor and the creditor’s interest in receiving the performance.

4) Common Law Approach to Remedies:

- **General principle – damages over performance:** In common law, the default remedy for breach of contract is monetary compensation (damages). The promisee is entitled to money rather than performance itself.
- **Efficient breach theory:** According to Justice Oliver Wendell Holmes Jr., the law should allow a party to break the contract and pay damages if doing so is more efficient than performing it. This gives parties freedom to breach when economically justified.
- **No specific performance for generic goods:**
 - **Rule:** Courts deny specific performance if the goods are replaceable on the open market.
 - **Case – Société des Industries Métallurgiques v Bronx Engineering Ltd (1G75):**
 - A machine was wrongfully withheld.
 - The court refused specific performance because the machine could eventually be replaced, even if it took 9–12 months.
- **Monetary damages suffice when a market substitute exists:**
 - **Example – wheat contract:** If A repudiates a contract to sell B 1,000 bushels of wheat at market price, B can simply buy from the market. Damages are adequate — no specific performance.
- **Specific performance for unique goods:**

- **Example – Van Gogh painting:** If A agrees to sell B “Wheatfield with Crows” for €800,000 and breaches, B’s only way to get that specific artwork is through specific performance. Damages are inadequate due to the uniqueness of the item.
- **Exception – when damages are inadequate:**
 - Specific performance is granted when no adequate market substitute exists.
 - **Typical cases:** Land, art, rare objects, or anything with unique qualities.

5) Termination of Contract:

- **Termination As a Remedy:** If a party claims performance and/or damages, it must still perform its obligations. However, the innocent party may choose to terminate the contract if allowed by law.
 - **Effect of termination:** Dissolves the effects of the contract. No further performance is owed by either party.
 - **Restitution:** Any performance already rendered must be returned to the respective party.
- **Civil Law Approach to Termination:**
 - **Material Breach Required:** In civil law, termination is permitted only if the breach is material (serious).
 - **Example – Insignificant breach:** A owes B 2 tons of wheat and delivers 1,999 tons. This does not justify termination.
 - **Example – Significant breach:** A baker delivers a wedding cake one day late. This is a fundamental breach justifying termination.
 - **General Principle:** Breach of contract may lead to termination only if the breach is fundamental.
- **Fundamental Breach of Contract:** A minor failure to fully perform results in liability for damages, but not necessarily in the right to terminate the contract.
 - **Art. 8:103 PECL:** A non-performance is fundamental if:
 - **Strict compliance** is essential to the contract.



- **Substantial deprivation:** The breach deprives the aggrieved party of expected benefit, unless unforeseeable.
 - **Intentional breach:** The breach is deliberate and undermines trust in future performance.
- **Common Law Approach to Breach and Termination:**
 - **Types of contract terms:** The ability to terminate depends on the nature of the term breached.
 - **Conditions:** Major terms. Breach allows for termination and damages.
 - **Warranties:** Minor terms. Breach allows for damages but not termination.
 - **Innominate (intermediate) terms:** Whether termination is allowed depends on whether the breach deprives the other party of the whole benefit of the contract.
 - **Case Study – Hong Kong Fir v Kawasaki (1G62):**
 - **Facts:** A ship was hired for two years but suffered delays due to poor crew and machinery. The ship became seaworthy after 15 weeks of repair.
 - **Decision:** Since the charterers could still use the ship for the remaining 20 months, the breach did not justify termination.
 - **Key takeaway:** An intermediate term was breached, but the consequence wasn't severe enough to justify termination. Only damages were awarded.

6) Agreed Rights of Termination:

- **Contractual termination rights:** Termination may occur even in the absence of a fundamental breach if the parties have contractually agreed upon specific termination conditions.
 - **Explicit dissolution clause:** The contract may include a clause stating that it will be dissolved if a particular obligation is not performed in a specified manner. This allows parties to give fundamental importance to obligations that would otherwise be of minor importance.
 - **Time essential for one party:** The contract can be terminated if a fixed time for performance has been explicitly designated as essential to the interest of one of the parties.

UNIT 16: DAMAGES AND LIQUIDATED DAMAGES

1) General Principles of Damages:

- **Right to damages:** If the contract is not performed, is late, or is performed badly, the creditor can claim damages.
- **Positive interest:** The aim is to place the injured party in the financial position they would have been in if the contract had been properly performed.
- **Full Compensation:**
 - **General rule:** The injured party should receive full compensation for the damage caused by the breach.
 - **Expectation damages:** This means putting the party, as far as possible, in the situation they would be in if the contract had been performed.
 - **What can be compensated:**
 - **Loss suffered:** The actual damage the party has already experienced.
 - **Gain deprived:** The benefits or profit the party expected to get but didn't receive.
- **Unidroit Principles of Compensation:**
 - **Reference rule:** Article 7.4.2 of the UNIDROIT Principles says the injured party has the right to full compensation.
 - **Included types of harm:**
 - **Loss suffered:** Harm the party actually experienced.
 - **Gain deprived:** Missed benefits the party was expecting.
 - **Other considerations:**
 - **Avoided loss or cost:** Any savings or benefits caused by the breach must also be considered.
 - **Non-financial harm:** Damages can also cover emotional suffering or distress, not just financial loss.



2) Foreseeability of Damages:

- **Foreseeability rule:** In awarding damages, the courts compensate the aggrieved party only for those injuries which were foreseeable or within the contemplation of the parties at the time the contract was made
- **Types of foreseeable injuries:**
 - **Ordinary flow of events:** Injuries which will flow naturally from the breach in the ordinary course of events
 - **Known special circumstances:** Injuries which arise from the aggrieved party's special needs or circumstances of which the other contracting party has knowledge or reason to know
- **Standard for foreseeability:** Foreseeability does not require actual foresight but only reason to foresee
- **Case: Hadley v Baxendale [1854] EWHC J70:** A foundational case establishing the foreseeability principle in contract damages
 - **Background:** Mr Hadley and another ran the City Steam-Mills in Gloucester and had a crank shaft that needed repair
 - **Contract with Baxendale:** They hired Baxendale to deliver the shaft to a manufacturer, but didn't inform him that the mill would stop working until it was returned
 - **Delay:** Baxendale delayed the delivery, and as a result, Hadley's mill stayed closed, causing business losses
 - **Court's reasoning:** Baxendale didn't know the shaft was essential for operations, so he couldn't foresee the financial loss
 - **Conclusion:** Hadley could not recover the lost profits because Baxendale did not have reason to know that his delay would cause those losses

3) Duty to Mitigate Damages:

- **Duty to mitigate damages:** The aggrieved party cannot recover losses that could have been avoided through reasonable effort and without undue expense

- **Consequences of failing to mitigate:** The gains that the aggrieved party could have made by reasonable effort are deducted from the amount they could otherwise recover
- **Reasonable effort:** Only a reasonable attempt to reduce damages is required; the effort does not need to be successful
- **Case example:**
 - **Facts:** X hires Y (a nurse) to care for X's father during a vacation. Y is to be paid €4,000. Before Y begins work, X cancels the contract
 - **Mitigation attempt:** Y advertises his services in two newspapers, but gets no responses and remains unemployed for 3 months
 - **Result:** Y sues for €4,000 plus advertising costs. X claims Y didn't try hard enough to find other work
 - **Court's view:** Y may recover the full amount, because he made a reasonable effort to mitigate the damage
- **DCFR – III. – 3:703 Foreseeability:** A debtor is liable only for loss that was foreseeable at the time the obligation was made
 - **Scope of foreseeability:** Includes losses the debtor actually foresaw or could reasonably have foreseen, unless the breach was intentional, reckless, or grossly negligent
- **DCFR – III. – 3:705 Reduction of loss:** The creditor must try to reduce the loss and can recover expenses from doing so
 - **Loss limitation rule:**
 - The debtor is not liable for losses the creditor could have reduced with reasonable steps
 - The creditor may claim for any reasonable expenses spent trying to reduce the loss

4) Liquidated Damages Clauses:

- **Definition of liquidated damages clauses:** Parties agree in advance that, if a breach occurs, the party in breach must pay a pre-specified amount to the injured party.
 - **Purpose of advance agreement:** Allows the amount to be determined before any actual breach or failure of performance.
 - **Nature of damages:** The real damages may be unknown at the time of contracting, so these clauses represent a good-faith pre-estimate of probable damages.
 - **Forecast inaccuracy:** The estimate often turns out to be inaccurate once the actual harm occurs.

- **Functions of liquidated damages clauses:** These clauses serve multiple purposes.
 - **Convenient estimation:** Provide a convenient way to calculate compensation through a good-faith pre-estimate.
 - **Coercive function:** Push parties to fulfill obligations, as high liquidated sums discourage breach.
 - **Damage limitation:** Often reduce the actual amount of compensation to below probable full damages.

- **Common law approach:** Courts distinguish between two types of clauses.
 - **Liquidated damages clause:** Enforceable if the amount is a genuine pre-estimate of damages.
 - **Penalty clause:** Unenforceable if the aim is to penalize or pressure the breaching party into performance.
 - **Judicial review:** Labels ("liquidated damages" or "penalty") are assigned by courts after determining whether the clause reflects a fair pre-estimate of potential harm.

- **Civil law approach:** Civil law systems generally treat both penalty and liquidated damages clauses similarly.
 - **Enforceability:** Even clauses that are not pre-estimates of damages can be enforced.

- **No strong distinction:** Civil law doesn't strictly separate penalties from liquidated damages.
 - **Single clause type:** Civil law recognizes one unified clause concept (e.g., *clause pénale*, *Vertragsstrafe*).
 - **Judicial reduction:** Courts can reduce the sum if it's clearly excessive or disproportionate.
 - **Mandatory rule:** Parties cannot waive the court's power to reduce excessive clauses.
- **DCFR rules (III – 3:712):** The DCFR provides for stipulated payments in case of non-performance.
 - **Creditor's right:** If the contract includes a specified amount for breach, the creditor can claim it even without proving actual loss.
 - **Judicial moderation:** Courts can reduce this amount if it is grossly excessive compared to the harm and circumstances.

5) Case – U.S. v Bethlehem Steel Co. (1G07):

- **Case:** The U.S. government contracted with a manufacturer to supply gun carriages, prioritizing fast delivery over lower bids.
- **Reason for urgency:** Haste was essential, so the government chose the manufacturer who promised the quickest delivery.
- **Clause in contract:** For each day of delay in delivery, the manufacturer had to pay \$35 to the government.
- **Basis of the amount:** The \$35 per day was calculated based on the average price difference between the selected manufacturer and slower, cheaper suppliers.
- **Breach:** The manufacturer delayed some of the deliveries.
- **Legal question:** Is this liquidated damages clause enforceable?
- **Conclusion:** Yes, the clause was enforceable because it aimed to compensate the government using a reasonable and fair formula, reflecting the actual loss (i.e., the higher cost accepted in exchange for faster delivery).

UNIT 17: FUNCTIONS OF TORT LAW AND GROUNDS FOR LIABILITY

1) What is Tort Law?

- **Definition and scope of tort law**
 - **Purpose:** Tort law applies when a person suffers a loss (economically relevant) and seeks to have someone else compensate for it.
 - **Function:** It grants remedies to injured persons against those who caused the harm, either by payment or restoring the *status quo*.

- **Tort as a legal source**
 - **Legal classification:** Torts are considered sources of legal obligations, along with contracts and other legally relevant acts (e.g. Art. 1173 Italian Civil Code).
 - **Autonomy:** Tort obligations arise independently of any prior legal relationship, such as a contract.

- **Nature of the tort relationship**
 - **Parties involved:** The relationship is between a tortfeasor (wrongdoer) and an injured party (victim).
 - **Core duty:** The tortfeasor has a duty to compensate or restore the injured party for the harm suffered.

- **Core structure of tort liability:**
 - **Lack of prior link:** There is no formal legal relationship between the parties before the harm occurs (e.g. no contract).
 - **Non-contractual nature:** Tort liability is often referred to as **non-contractual liability**, because it doesn't stem from breaching contractual duties.
 - **Cause and effect:** It is based on an act by one person being causally linked to harm suffered by another.

- **Key guiding questions of tort law:**

- **Why shift the harm?:** Explores the *functions* of tort law — when and why one person should bear the cost of another’s harm.
- **Under what conditions?:** Identifies the *elements of liability* — when someone can be held responsible in tort.
- **What kind of harm?:** Defines the *scope* of tort law — what types of harm are legally compensable.
- **How to get compensation?:** Refers to the *remedies* available — the legal tools used to compensate the injured party.

2) Functions of Tort Law

- **Default rule of tort law:** The starting point is that victims bear their own loss unless there is a good reason to shift those costs to another party (natural or legal).
- **Main functions of tort law:**
 - **1 – Compensation (Distributive Justice):**
 - **Core idea:** Allocation of goods should be secured based on the parties’ relative merits.
 - **Restorative goal:** It is unjust not to restore wealth to the harmed party once damage has occurred.
 - **Timing:** This follows an **ex post approach**, addressing the situation after the damage has taken place.
 - **Function 2 – Sanction (Retributive Justice):**
 - **Wrongdoer’s punishment:** Those who commit harmful acts should be punished proportionally, even if no other benefit is gained.
 - **Application:** Though this principle originates in criminal law, it also applies to civil wrongs.
 - **Legal response:** The obligation to make good the harm reflects the legal system’s proportionate reaction to the tort.
 - **Timing:** Also follows an **ex post approach**, focusing on the act after it occurs.
 - **Function 3 – Deterrence (Efficiency):**

- **Behavioral influence:** Tort law shapes behavior by setting legal consequences that discourage wrongful acts.
 - **Forward-looking:** Encourages rational agents to avoid actions likely to cause damage.
 - **Economic logic:** It is efficient to prevent accidents by assigning potential costs of damage before they happen.
 - **Timing:** This is an **ex ante approach**, acting before the harm occurs.
- Regulatory Implications and the Role of Fault:
 - **Not only theoretical:** The function of tort law has practical consequences for how legal systems assign liability and assess duties.
 - **Retributive justice approach:**
 - **Requirement of fault:** If tort law aims to punish, fault must be shown (nullum crimen, nulla poena sine culpa).
 - **Distributive justice / Deterrence approach:**
 - **No fault needed:** If the goal is to restore or incentivize safe behavior, liability can exist even without proof of intent or negligence.

3) Grounds for Liability

- **Fault:**
 - **Definition:** Cases in which a tortfeasor has acted wrongfully and must compensate for the damage resulting from their wrongful behavior.
Key point: This is liability for one's own fault.
- **Vicarious liability:**
 - **Definition:** Cases in which someone is held liable for damage wrongfully caused by another tortfeasor.
 - **Key point:** The person is liable not because of their own fault, but because of another's (e.g. employer liable for employee).
- **Strict liability:**
 - **Definition:** Cases in which a tortfeasor is liable for damage caused by an animal or an object for which they are responsible.

- **Key point:** Liability exists even without proof of fault — based solely on responsibility over the source of the damage.

4) Fault – Based Liability

- **Conditions for Fault Based Liability:**

- **General Rule – Fault-based system of torts**

The default structure of tort systems is based on fault, meaning liability only arises when the tortfeasor can be blamed for a wrongful act.

- **Definition of Fault**

- A wrongful act for which the agent can be blamed.

- **Historical Importance**

- Fault has historically been considered essential for tort liability, as emphasized by jurist von Jhering: *"Nicht der Schaden sondern die Schuld verpflichtet zum Schadensersatz"* – *Not the damage but the fault obliges to compensate.*

- **Subjective Elements of Fault:**

- **Intentional Behavior:** The harmful event is both foreseen and desired by the agent as a result of their own actions or omissions.

- **Negligence:** The harmful event, although foreseeable, is not desired by the agent and occurs due to carelessness, imprudence, lack of skill, or failure to comply with laws or regulations.

- **Criteria to Assess Fault**

- **Common Law Tradition**

- Breach of a duty of care is assessed through case law (judge-made law).

- **Civil Law Tradition**

- Statutory interpretation is the basis for assessing fault.

- **Common Law – Breach of Duty of Care:**

- **Case: United States v Carroll Towing [1G47]**
The case involved the sinking of the barge *Anna C* after a tugboat removed a barge, causing the rest to break free. The U.S. sued Carroll Towing Co. for damages.
- **Judge Learned Hand Formula**
Liability arises from a balance of three factors:
 - **Probability** the accident would occur.
 - **Gravity** of the resulting injury.
 - **Burden** of taking adequate precautions.
- **If (Burden < Cost of Injury × Probability)**
Then the defendant has *not* met the required standard of care.
- **If (Burden ≥ Cost of Injury × Probability)**
Then the defendant *has* met the standard of care.
- **Civil Law – Statutory Interpretation:**
 - **Core Approach**
Unlike common law, the civil law approach to torts is based on written statutes that are uniformly applied.
 - **Two Key Requirements**
 - **Unlawful Conduct**
There must be an act or omission violating a legally protected interest.
 - **Damage Caused**
The unlawful conduct must cause compensable damage.
- **Art. 2043 Italian Civil Code:**
 - **Legal Provision:** *Any wilful or negligent conduct that causes an unjust damage to another obliges he who has caused the damage to compensate it.*
 - **Case Law Interpretation:** Due to the brevity of statutory provisions, judges play a key role in shaping how Art. 2043 is applied in practice.

5) Vicarious Liability

- **Definition of vicarious liability:** Vicarious liability arises when one person is held liable for damage wrongfully caused by another (the actual tortfeasor).
- **Relationship requirement:** There must be a defined relationship between the tortfeasor and the person held liable, such as employer–employee or parent–child.
- **Connection requirement:** The wrongful act must occur in the context of that relationship.
- **Typical examples:** Vicarious liability often arises in situations involving authority or supervision.
 - **Employers:** Liable for torts committed by employees.
 - **Parents:** Liable for wrongful acts of their children.
 - **Schoolteachers:** Liable for torts committed by students under their care.
 - **Supervisors:** Liable for acts of mentally impaired persons under their control.
- **Civil law approach – Section 832 BGB (Germany):** This rule provides liability for those with a duty of supervision.
 - **General rule:** A person legally required to supervise a minor or impaired person is liable for their wrongful acts.
 - **Exclusion of liability:** The supervisor is not liable if they prove they fulfilled their duty or the damage would have occurred anyway.
 - **Contractual supervision:** The same liability applies if the duty of supervision is assumed by contract.
- **DCFR approach – VI.–3:201:** The DCFR imposes accountability for damage caused by employees or representatives.
 - **Course of employment:** The tort must occur while the employee is performing their work duties.
 - **Employee’s fault:** The act must be negligent or intentional, or the employer must otherwise be responsible.

- **Common law approach:** Vicarious liability is an exception to the usual requirement of personal fault.
 - **Public policy justification:** Liability is imposed even if the defendant committed no tort and owed no duty, based on fairness and risk allocation.
 - **Main application:** Most commonly applies to employer liability for employee torts.
- **Case – Century Insurance Co. Ltd v Northern Ireland Road Transport Board [1G42] AC 50G:** A key case in the development of vicarious liability.
 - **Facts:** A petrol tanker driver lit a cigarette while unloading petrol, causing an explosion.
 - **Legal issue:** Whether the act occurred in the course of employment.
 - **Court’s reasoning:**
 - **Contextual evaluation:** The act must be judged in the context of the circumstances.
 - **Lord Wright’s conclusion:** The employer is liable if the employee commits a negligent act while doing their job — as if the employer had done it themselves.

6) Strict Liability

- **Definition of strict liability:** Strict liability applies when harm is suffered by a victim without the need to prove anyone’s fault or blame. The law sometimes shifts the burden of loss from the victim to another party.
- **Rationale for strict liability:**
 - **Industrialization:** Increased accidents during the industrial era led to more protective rules.
 - **Fairness:** Shifting loss to parties better positioned to absorb it is seen as more equitable.
 - **Best insurer principle:** The liable party is often better able to bear the cost or insure against the risk.
 - **Prevention:** Encourages safer practices to avoid liability.

- **Economic efficiency:** Promotes internalization of externalities — parties must account for risks they create.

- **Strict liability in civil law:** The Italian Civil Code introduces specific forms of strict liability based on activity or context.
 - **Article 2050 c.c.:** Liability for the **exercise of dangerous activities.**
 - **Article 2052 c.c.:** Liability for **damage caused by animals.**
 - **Article 2054 c.c.:** Liability **arising from circulation of vehicles.**

- **Strict liability in common law:**
 - **Case law:**
 - **Rarity:** UK common law rarely recognizes strict liability without fault.

 - **Statutory law:**
 - **More frequent:** UK statutes more commonly impose strict liability.
 - **Examples:**
 - Nuclear Installations Act 1965
 - Animals Act 1971
 - Product liability under the Consumer Protection Act 1987



UNIT 18: OBJECTIVE ELEMENTS AND SCOPE OF PROTECTION

1) Objective Elements:

- **St Injurer's conduct:** Tort liability is based on actions that are carried out consciously and voluntarily by a person.
- **Intentional or negligent behavior:** The conduct that triggers liability can be either intentional or negligent, as long as it is voluntary and sensible.
- **Art. 2046 Italian Civil Code:** A person is not liable if they caused damage while acting unconsciously and involuntarily, unless that condition was caused by their own negligence.
- **Causation:** There must be a connection between the defendant's conduct and the damage suffered by the victim.
- **"But for" causation (conditio sine qua non):** The defendant is liable if the damage would not have occurred without their conduct.
 - **Logical test:** This approach asks whether the event still would have happened if the conduct had not occurred.
 - **Risk of overextension:** It can create very long chains of responsibility, including causes that are too remote.
- **Adequate cause theory:** The defendant is liable only if their conduct was generally likely to cause the kind of damage that occurred or to increase its likelihood.
 - **Legal filter:** It selects only legally relevant causes, even if many other factors were necessary for the damage.
 - **Focus on foreseeability:** The damage must be a foreseeable outcome of the conduct, not just a possible one.
- **Case – Edelweiss and HHG ships:** The HH9 operator gave incorrect information about the ship's width. This caused the ships to get stuck, and the Edelweiss sank. The wrong information was considered a "but for" cause of the accident.

- **Case – BGH 23.10.1G51:** The court rejected liability based on “adequate cause theory,” stating that the real cause was the mistake by the lock personnel, not the HH9 operator.
- **Limits of “but for” causation:** This test goes too far by making someone fully responsible just because their action started a chain of events.
 - **Legal consequence:** Not all necessary conditions are considered legal causes in tort law.
- **Function of adequate causation:** This approach helps exclude distant or irrelevant factors from legal responsibility.
 - **Example of distinction:** Even if something is logically necessary, it may not be treated as a legal cause.
- **Damage:** Tort law only compensates for certain types of harm; not everything that causes discomfort or inconvenience is legally relevant.
- **Example of compensable damage:** A company fails to install pollution control devices, causing toxic emissions that ruin a neighboring farm’s crops.
- **Example of non-compensable damage:** A man delays renovating his home, and neighbors complain that the building ruins the look of the street. This kind of aesthetic or emotional harm is not legally protected.
- **Legal notion of damage:** Understanding which harms count as damage under the law helps define the actual limits of tort liability.

2) Scope of Tort Liability

- **Rules-based system:** Tort law systems that define specific causes of action in advance, usually through legislation.
 - **Example systems:** Common law countries and the German legal system.
- **Principle-based system:** Tort law systems that apply a general principle or abstract rule to determine liability.
 - **Example systems:** French and Italian legal traditions.

- **German Civil Code – Section 823(1):** A person who unlawfully harms the life, body, health, freedom, property, or other rights of another, intentionally or negligently, must compensate the victim for the damage.
- **French Civil Code – Articles 1240 and 1241:** Any act that causes damage to another obliges the person at fault to compensate for it, whether the fault was intentional, negligent, or careless.
- **Ex ante limitation in rule-based systems:** These systems identify in advance which interests can be protected by tort law.
- **Legal consequence:** The protection is fixed by the written law.
- **Interpretation-based limitation in principle-based systems:** The scope of liability is decided by interpreting a general clause through judicial decisions.
 - **Legal consequence:** The protection depends on case-law evolution.
- **Common ground across systems:** Despite their differences, all Western tort law systems compensate for certain core interests.
 - **Protected categories:** Physical injuries, personality and privacy rights, and damage to property.
 - **Legal classification:** These are considered absolute rights in civil law systems.

3) Scope of Protection:

- **Art. 2043 Italian Civil Code:** Italian tort law allows compensation for any unjustified harm caused by someone else's conduct.
- **Extension of protection:** Over the past decades, Italian courts have expanded tort liability to include economic loss arising from relative rights.
 - **Relative rights:** These are rights based on contractual or specific legal relationships, not general rights valid against everyone.
- **Case – Associazione Calcio Torino v. Soc. A.L.I. (1G53):** The entire Torino football team died in a plane crash caused by an airline's negligence.

- **Claim for compensation:** The football club sued for the loss of its contractual rights (credit rights) toward the players.
 - **Court's decision:** The claim was rejected because the damage affected only relative rights, not absolute subjective rights.
 - **Legal reasoning in 1G53 case:** The court considered that only harm to absolute rights (like life, property, personal integrity) can be compensated under tort law.
 - **Result:** No liability was recognized for the loss of contractual rights.
- **Case – S.p.a. Torino Calcio v. Romero (1G71):** Footballer Luigi Meroni died after being hit by a car. The team sued the driver for the loss of their credit rights with the player.
 - **Similar facts, different outcome:** The Court of Cassation reversed its earlier position.
 - **New principle:** The court ruled that even **relative rights can be protected** by tort law.
 - **Legal evolution:** This shift shows how Italian tort law gradually moved toward broader protection, recognizing economic interests and contractual relationships as compensable under certain conditions.



UNIT 1G: REMEDIES AND PRODUCT LIABILITY

1) Remedies in Tort Law

- **Monetary damage:** Financial compensation equal to the value of the loss suffered by the plaintiff, including both the damage already occurred and the loss of expected profit, depending on causation.
- **Restitution to the original position:** Seeks to restore the situation the plaintiff would have been in if the tort had not happened.
 - **Materially feasible:** The restoration must be realistically possible.
 - **Not too burdensome:** The cost of restoring must not be excessive for the defendant.
- **Compensatory damages:** Aimed at giving the victim back the value of what was lost due to the wrongful act.
 - **Purpose:** To help the victim recover what was lost.
 - **Legal foundation:** Reflects the idea of compensation and distributive justice in tort law.
 - **Burden of proof:** The victim must prove the damage suffered.
 - **Legal reference:** Example from Art. 1223 of the Italian Civil Code.
- **Punitive damages:** Damages that go beyond the actual harm in order to punish the wrongdoer.
 - **Punishment:** Meant to penalize the tortfeasor.
 - **Deterrence:** Aims to discourage similar behavior in the future.
 - **Compensation for limits:** May cover losses that cannot be recovered otherwise.
 - **Legal expenses:** Can also help pay for the victim's legal costs.
- **Common law vs. civil law on punitive damages:**
 - **Common law:** Punitive damages are generally allowed and commonly awarded in systems like the U.S.
 - **Civil law:** Traditionally focused on compensation, but now more open to accepting punitive damages, especially in Europe.



2) Case Study: Punitive Damages

- **BMW of North America, Inc. v. Gore (1GG6):** A U.S. Supreme Court case involving punitive damages awarded for deceptive business practices.
 - **Facts:** Dr. Gore bought a new BMW that had been repainted before purchase. BMW's policy was to sell repaired cars as new if the repair cost was under 3% of the car's value.
 - **Lawsuit:** Gore sued for fraud after discovering the repainting.
 - **Award:** Jury awarded \$4,000 in compensatory damages and \$4 million in punitive damages. The Alabama Supreme Court later reduced the punitive damages to \$2 million.
- **Constitutional issue – Due Process Clause:** The Supreme Court questioned whether the high punitive damages violated constitutional limits.
 - **Holding:** Excessive punitive damages violated the Due Process Clause.
 - **Justification requirement:** Punitive damages must be reasonably necessary to serve the State's interest in punishment and deterrence.
 - **Degree of reprehensibility:** How bad the defendant's conduct was.
 - **Ratio to compensatory damages:** The relation between punitive and actual harm suffered.
 - **Comparison to penalties:** How the punitive award compares to other possible legal penalties for similar misconduct.

3) Non-Pecuniary Losses

- **Non-pecuniary losses:** These are damages awarded for harm that affects the victim's personal well-being or dignity, rather than their financial situation.
 - **When justified:** Granted in cases involving personal injury, injury to dignity, freedom, or personality rights.
 - **For relatives:** May also be awarded to persons closely related to a victim who suffered a fatal or very serious non-fatal injury.
 - **No patrimonial loss:** These damages do not reduce the victim's financial assets.

- **Comparative systems:** All European tort systems provide for this type of compensation, though with different rules and levels of protection.
- **Assessment of a non-pecuniary damage:** The amount is not fixed and depends on several factors.
 - **No rigid tariff:** There is no strict list or standard table of awards.
 - **Comparability:** Courts aim to treat substantially similar cases in a consistent way.
 - **Key factors:**
 - **Gravity, duration, consequences:** These aspects of the harm guide the amount of compensation.
 - **Tortfeasor's conduct:** In some systems, the wrongdoer's behavior may affect the damages awarded.
 - **Methods of assessment:** Judges often use tables for specific injuries (e.g. loss of a leg or eye), and in some cases, the law sets fixed amounts.

4) Comparative Perspective: Pecuniary and Non-Pecuniary Damages

- **UK Supreme Court, Cox v. Ergo Versicherung AG (2014):** A case comparing German and English law regarding damages after a fatal accident.
 - **Facts:** Major Cox, a British officer stationed in Germany, was killed in a traffic accident. His widow, Katerina, later returned to England, entered a new relationship, and had children.
 - **Issue:** Which types of damages is the widow entitled to recover?
 - **Types of damages considered:** Pecuniary losses and non-pecuniary losses.
- **German law:**
 - **Pecuniary loss:** Under § 844(2) BGB, damages are awarded if the deceased was legally or potentially obligated to provide maintenance to a third party. Compensation takes the form of an annuity covering the expected duration of that support.
 - **Non-pecuniary loss:** Damages for emotional suffering caused by the death of a relative are not awarded unless the pain and suffering reach the level of a medically recognized mental disturbance comparable to physical injury.

- **English law (Fatal Accidents Act 1976):**
 - **Pecuniary loss:** The law excludes consideration of remarriage or the prospect of remarriage when calculating compensation for a widow.
 - **Non-pecuniary loss:** Fixed bereavement damages are awarded as a lump sum (£12,980 per eligible family member), also referred to as *solatium*.

- **Main differences between German and English law:**
 - **Remarriage consideration:**
 - **German law:** Takes remarriage or a new relationship into account when calculating support.
 - **English law:** Expressly excludes remarriage or its prospect as a relevant factor.

 - **Bereavement compensation:**
 - **German law:** Does not provide automatic bereavement compensation; emotional suffering must reach the level of severe psychological harm.
 - **English law:** Grants bereavement damages as a fixed lump sum without the need for medical proof.

- **Non-pecuniary damage – Ryanair delay case (Giudice di Pace di Bari, 13.3.2021):**
 - **Facts:** A father missed his son's graduation ceremony in Milan due to a 12-hour flight delay by Ryanair.
 - **Claim:** The father sued Ryanair for damages.
 - **Awarded damages:**
 - 250 € as economic loss
 - 73 € as reimbursement of expenses (flight costs)
 - 500 € as non-pecuniary loss

5) Product Liability

- **Product liability – Background:** Tort liability for defective products became important in the second half of the 20th century due to mass production and complex distribution chains.
 - **Problem:** Traditional tort law often failed to protect consumers effectively.

- **Example – Mr White and the microwave:** A microwave received as a gift explodes due to a manufacturing defect, causing injuries and damage.
 - **No contract:** He cannot sue for breach of contract.
 - **Proof in tort:**
 - **Fault:** Was the defect technically avoidable?
 - **Causation:** Did the defect come from production or sale?

- **EU Directive 85/374/EEC:** Sets a strict liability regime for producers in the EU.
 - **No need to prove fault:** Liability exists even without negligence.
 - **Purpose:** Distribute risk fairly in modern industrial production.

- **Defective product – definition:** A product is defective if it is not as safe as the public is entitled to expect.
 - **Factors considered:**
 - Product presentation
 - Reasonable use
 - Market date
 - **Types of defect:**
 - Manufacturing
 - Design
 - Failure to warn

- **Producer's defenses:** Not liable if they prove:
 - They did not circulate the product
 - Defect appeared later
 - Product not made for sale
 - Compliance with official rules
 - **Development risk:** Allowed if the defect could not be known with the scientific knowledge of the time.

- **Product development risk – BGH case (1GG5):** A girl was hurt by an exploding water bottle with a small chip.
 - **Finding:** The defect was in manufacturing, not design, so development risk does not apply.

- **Limits of the development risk clause:**
 - **Only design defects qualify:** It does not cover manufacturing flaws.



- **Reason:** Manufacturing defects can usually be avoided with proper care.

- **Scope of the Directive and burden of proof:**
 - **Covers damage to:**
 - People (death or injury)
 - Property for private use
 - **Victim must prove:**
 - The damage
 - The defect
 - The link between them



UNIT 20: PROPERTY LAW

1) Foundations of Property Law

- **Definition of property law:** Property law concerns the legal rules governing rights over things (tangible or intangible) that are enforceable against everyone (erga omnes).
- **Right in rem vs. right in personam:** A right in rem is a right over a thing that is valid against the world, while a right in personam is a claim against a specific person.
 - **Example of right in personam:** The seller of a car has a right against the buyer to receive payment.
 - **Example of another right in personam:** A person whose car was damaged has a right against the tortfeasor for compensation.
 - **Example of right in rem:** The car owner has a direct right to the car itself, enforceable against everyone.
- **Nature of rights in rem:** These are absolute rights that do not depend on a personal relationship or specific obligation. They focus on control, use, and exclusion regarding things.
- **Erga omnes:** Property rights are enforceable against anyone who interferes with the object, unlike contractual or tortious rights which are enforceable only against particular individuals.
- **Economic justification – Tragedy of the Commons (Hardin, 1968):**
 - **Common goods:** Resources that are rivalrous (used by one person at the expense of others) and non-excludable (cannot prevent access).
 - **Overuse problem:** When access is free, each user has no incentive to conserve the resource, leading to depletion.
 - **Collective inefficiency:** Individual actions driven by self-interest cause a socially undesirable outcome (resource exhaustion).
- **Purpose of property law (economic perspective):**

- **Incentive to work:** Secure property encourages people to produce and invest.
- **Incentive to maintain and improve:** Owners care for their property when they know they will enjoy its future benefits.
- **Avoidance of conflict:** Legal recognition of ownership reduces disputes over possession and use.
- **Support for market economy:** Property and contract law together enable the voluntary exchange of goods and efficient allocation of resources.

2) Objects and Classifications of Property

- **Objects of property rights:** Property rights apply to things or goods, which are the legal objects over which individuals can exercise rights in rem.
- **Rights in rem over things:** Property law regulates how people may use, dispose of, and exclude others from things, both tangible and intangible.
- **Scope of property law:** Not all goods are treated the same. A key legal distinction concerns the nature of the object, especially:
 - **Movable vs. Immovable goods**
 - **Tangible vs. Intangible goods**
- **Movable goods:** Items that can be transferred from one place to another without being damaged or altered. Example: smartphones, books, furniture.
- **Immovable goods:** Items that cannot be moved without destruction or transformation. Example: land, buildings.
- **Civil law tradition:**
 - Applies a unified field of property law to both movable and immovable goods.
 - Based on the absolute right of ownership, which covers all categories of property.
- **Common law tradition:**
 - Divides property law into two separate branches:
 - **Land Law (Real Property):** governs immovables

- **Personal Property:** governs movables
- Reflects a structural distinction between different types of property and the rules that apply to each.

3) Comparative Systems: Civil vs Common Law

- **Civil law system of property:** A unified framework that governs all types of assets, both movable and immovable, under the same rules of ownership.
 - **Absolute right of ownership:** Civil law treats ownership as an all-encompassing right, allowing the owner full control over the object, unless limited by law.
 - **Legal variations:** Although the right is unified, different rules may apply depending on whether the good is movable or immovable (e.g. rules on transfer, publicity, and security rights).
 - **Full-fledged power over goods:** Ownership gives the holder broad freedom to use, enjoy, or dispose of the object, unless prohibited by legal limits.
 - **Exclusive power over goods:** The owner has a claim against all others to prevent interference with their enjoyment of the good.
 - **French Civil Code – Article 544:** Ownership is defined as the right to enjoy and dispose of things in the most absolute manner, provided it does not violate laws or regulations.
 - **German Civil Code – § 903 BGB:** The owner may deal with the object at their discretion and exclude others, unless a statute or third-party rights restricts this.
 - **Italian Civil Code – Article 832:** The owner may fully and exclusively enjoy and dispose of things, as long as they follow the obligations established by law.
 - **DCFR definition of ownership:** Ownership is the most comprehensive property right a person can have, including the power to use, enjoy, modify, destroy, dispose of, and recover the property, subject to applicable law or rights granted to others.
- **Common law tradition:** Originates from feudal relationships and does not recognize a single unified property law. It separates land law (real property) from personal property.

- **Land law (real property):** Based on the idea that the Crown is the ultimate owner of all land. Individuals only hold limited rights (tenure) over land.
- **Doctrine of estates:** Under this doctrine, individuals hold land for different durations and under specific conditions. These interests are called "estates in land."
- **Property Act 1925 (UK):** Modernized English land law and limited property rights to two main types:
 - **Fee simple:** Right to exclusive possession of land for an unlimited time (similar to ownership).
 - **Term of years:** Right to exclusive possession for a limited duration.
- **Personal property law:** Governs movable goods and intangible rights (called choses in action), such as credits or shares.
- **Title in personal property:** The primary right is called "title," which means the right to exclusive possession of a chattel. It is the most extensive entitlement one can have over a movable object.

4) Intellectual Property and the Limits of Ownership

- **Intangible goods in civil law:** Property law, especially in civil law systems, traditionally applies only to tangible (corporeal) things.
 - **Legal definition in German law:** Section 90 of the BGB states that only corporeal objects are legally considered "things".
- **Nature of intellectual property law:** Intellectual property law is a distinct and autonomous area of law that governs exclusive rights over intangible resources, and it follows an evolutionary approach as legal recognition expands to new forms of intangible goods.
 - **Copyright law:** Grants creators exclusive rights to use and distribute original works of art.
 - **Patent law:** Grants inventors exclusive rights to use and distribute novel inventions.
 - **Trademark law:** Grants businesses exclusive rights to signs, logos, or expressions identifying their products.
- **Example – Myriad Genetics case:** Myriad Genetics was a biotech start-up that identified and patented DNA sequences (BRCA1 and BRCA2) linked to cancer risk.



- **Gene isolation and patents:** Between 1994 and 1995, Myriad isolated the BRCA genes and filed patents in the United States.
- **Commercial development:** In 1996, the company released BRCAAnalysis, a diagnostic tool for detecting BRCA mutations.
- **Company growth:** By 2012, Myriad had over 1,200 employees, \$500 million in revenue, and was publicly traded.

- **Challenge to gene patents:** In 2010, the Association for Molecular Pathology challenged Myriad's gene patents in U.S. courts, questioning whether human genes can be privately owned.

- **Supreme Court ruling – 2013:** The U.S. Supreme Court issued a unanimous decision that clarified the limits of patentability.
 - **Genes as natural products:** Natural DNA sequences cannot be patented because they are not considered inventions.
 - **Isolated sequences:** Merely isolating a gene found in nature does not make it patentable.
 - **Human-made inventions:** Synthetic or significantly modified genetic material may still be eligible for patent protection.



UNIT 21: PROPERTY PROTECTION AND PROPERTY INTERESTS

1) Protection of Ownership

- **Exclusivity of ownership:** Ownership is exclusive because the law gives the owner specific remedies to protect their rights.
- **Absolute right with erga omnes effect:** Ownership is protected against interference by anyone, not just specific people.
- **Recovery action (Rei vindicatio):** The owner has the right to ask for their property back from anyone who is holding it without a valid reason.
 - **Case: Hellot v. Leclerc (Cour de cassation, 22 April 1823):** Hellot and Leclerc owned neighboring buildings. Leclerc tore down a shared wall and built a new structure that went 14 inches into Hellot's land and made it unstable. Hellot sued. Leclerc argued that (i) Hellot's building had already collapsed and couldn't legally be rebuilt, and (ii) removing the new building would cause him major harm, while Hellot's damage was minor. The court ruled in favor of Hellot: he could demand that the encroaching building be removed and his land returned, no matter the condition of the property or how much harm he suffered.
 - **Case: Houssin v. Legrasse (Cour de cassation, 20 March 2002):** Legrasse built a fence that crossed 0.50 cm into Houssin's land. The lower court said the encroachment was too small to matter and dismissed the case. But the higher court disagreed: even a small encroachment is still a violation of ownership. Houssin had the right to ask for the fence to be removed. The amount of encroachment does not matter.
- **Injunctive relief (Actio negatoria):** The owner can stop or prevent any interference with their property, as long as they still have possession.
 - **Case: German Supreme Court, 1 December 1GG5:** The claimants bought land next to a factory to build an underground car park. During construction, they discovered the soil was contaminated by chemicals from the factory. Even though the factory had closed and gone bankrupt, the court ruled that

the company was still responsible. It could be ordered to clean up the pollution because it interfered with the new owner's peaceful use of the land. The responsibility continues even after the activity stops.

- **Case: German Supreme Court, 12 July 1985:** A neighbor rented out his house to a couple who used it as a brothel. The claimant said this harmed his underage daughter and lowered his property's value. He asked the court to stop the activity. The claim was dismissed. The court explained that moral concerns are not enough — injunctive relief only applies to legal or physical interference with property.

2) Property Interests

- **Primary property rights:** These give the holder the full set of powers over a good.
 - **Ownership:** Full control and enjoyment of the good.
 - **Intellectual property:** Legal rights over creations of the mind.
- **Secondary (lesser) property rights:** These only include some of the powers that belong to the owner.
 - **Secondary right of use:** Limited right to use a good without owning it.
 - **Secondary security rights:** Rights created to secure obligations, like a loan.
- **Limited property rights:** Rights with **erga omnes** effect that come from ownership over a movable or immovable thing.
- **Fragmentation of ownership:** Based on the French theory of "démembrement de la propriété", these rights result from splitting up the original full ownership and granting parts of it to others.
- **Categories of limited property rights:**
 - **Limited rights of enjoyment:** These give someone specific but limited rights to use an object, compared to full ownership.
 - **Servitudes:** Also known as easements in common law; allow certain uses of another's land.
 - **Usufruct:** Comparable to the term of years in common law; allows use and benefit of something owned by someone else.

- **Use-Habitation:** Right to use or live in a property without owning it.
- **Limited rights of security:** These are created to secure the payment of a debt and usually granted by the debtor to the creditor.
 - **Hypothec / Mortgage:** A non-possessory security right over immovable property.
 - **Pledge:** A possessory security right over movable property.
- **Common features of limited property rights:**
 - **Protection erga omnes:** They are absolute rights and can be enforced against anyone.
 - **Run with the asset:** They remain attached to the asset even when it changes ownership, binding the new owner.
 - **Numerus clausus principle:** Only the law can establish new types of limited property rights. Individuals cannot create their own.

3) Servitudes

- **Definition of servitudes:** A servitude is a legal right that places a burden on one piece of land (**servient land**) for the benefit of another piece of land (**dominant land**) owned by someone else.
- **Example – right of way:** This allows the owner of the dominant land to cross over the servient land, for example to reach a public road.
- **Servitudes as rights in rem:** These rights are linked to the land itself, not to the person who owns it.
 - **Effect of transfer:** If the servient land is sold, the servitude remains attached to the land and still applies to the new owner.
 - **Key idea:** The servitude follows the land, not the individual owner — this is why servitudes are said to "run with the land."
- **Dominant land:** The land that benefits from the servitude. It gains a right over the neighboring property.
- **Servient land:** The land that is subject to the servitude. It carries the burden for the benefit of the dominant land.



- **Types of servitudes:**
 - **Affirmative servitudes:** These allow the owner of the dominant land to carry out certain actions on the servient land.
 - **Example – servitude of way:** The dominant land’s owner is allowed to walk or pass through the servient land to reach something like a road or entrance.
 - **Negative servitudes:** These prevent the owner of the servient land from doing certain things that could affect the dominant land.
 - **Example – servitude not to build on land:** The owner of the servient land might not be allowed to build anything that would block the view or light of the dominant land.
- **Limits on servitudes:** The servient land cannot be subject to a duty that requires the owner to take action or do something. The servitude can only limit what the owner is allowed to do, not force them to do something.

UNIT 22: SECURITY RIGHTS POSSESSION

1) Security Property Rights

- **Purpose of security property rights:** They are created to secure the payment of a claim.
- **Types of security property rights:** There are two main types, depending on the type of asset.
 - **Right of pledge:** Created on most movable objects and on certain rights, such as credits.
 - **Right of hypothec (or mortgage):** Created on immovable goods and on some specific movable goods.
- **Creditor's power:** The security right is held by the creditor and gives them the power to sell the secured item through a judicial procedure and use the proceeds to satisfy the debt.
- **Example – mortgage on a house:** Mario borrows €100,000 from a bank to buy a house. As security, the bank holds a mortgage on the house.
 - **If Mario repays on time:** Nothing happens.
 - **If Mario does not repay:** The bank may evict him, sell the house at auction, and use the proceeds to recover the debt.
 - **If the house sells for €100,000:** The bank recovers the full loan and must return €20,000 to Mario (if Mario only owed €80,000).
 - **If the house sells for €60,000:** The bank recovers €60,000, and Mario still owes €20,000.
- **Main features of security property rights:**
 - **Running with the asset:** If an asset is sold, the security right remains attached to it. The buyer receives the object still encumbered by the security.
 - **Priority in insolvency:** Holders of a security right are paid before other creditors.

- **General rule (paritas creditorum):** Creditors share equally if there are no securities.
- **Exception for secured creditors:** A creditor with a security right gets paid first from the value of the asset.

- **Example – priority in insolvency:** John owes €100,000 to a bank and €50,000 to a supplier.
 - **No security rights:** If the house is sold, the bank receives 2/3 of the proceeds and the supplier 1/3, in proportion to their claims.
 - **With security rights:** If the bank has a hypothec over the house, it is paid first from the sale.
 - **If the house brings €80,000:** The bank receives all, the supplier gets nothing.
 - **If the house brings €140,000:** The bank receives €100,000, the supplier receives €40,000.

2) Possession: Definition and Protection

- **Definition of possession:** Possession means having actual control over a good, regardless of how it was obtained or whether the person has a legal right to it.

- **Possessor and owner may be the same person:**
 - **Example:** A person who owns a good is also in possession of it.

- **Possessor and owner may be different persons:**
 - **Example:** A person in possession of stolen goods.
 - **Example:** A buyer who received goods under a void contract.
 - **Example:** A person who took goods from the owner in good faith.

- **Possession of a right:** If someone behaves as if they were the owner or held a property interest, the law considers them to be in possession of that right.

- **Legal effects of possession:** The law gives importance to actual control and allows the possessor to defend their position.

- **Protection of possession even without legal title:** Possession is protected even when the possessor does not have ownership or a valid legal right.
 - **Reason:** The law protects possession based on the state of fact, not the legal situation.
 - **Key principle:** The state has the exclusive right to use force.
 - **Goal:** Possession is protected to preserve peace and order in society.
- **Self-help by the possessor:** The possessor can defend themselves in certain situations.
 - **By proportionate self-defence:** When facing violent acts from third parties.
 - **By immediate recovery:** When they recover the good right after someone interferes with their possession.
- **Legal protection:** If the conditions for self-help are not met, the possessor must go to court to protect their possession.

3) Possession: Legal Remedies

- **Restoration action:** If someone is violently or secretly deprived of possession, they can sue the person who took the good in order to regain possession.
- **Legal protection even if the possessor is not the owner:** The right to bring a restoration action does not depend on ownership. A non-owner who was in possession can bring a claim, even against the legal owner if the owner used violence or secrecy to retake the good.
- **Restoration of possession (state of facts):** The legal system, as a first step and on a temporary basis, orders that possession be restored to the person who was unlawfully deprived of it.
 - **Goal:** To return the object to the previous possessor, regardless of ownership, if they were violently or secretly dispossessed.
- **Recovery of ownership (situation at law):** The legal protection of possession is temporary. After that, the true owner can bring a recovery action to reclaim the good from the possessor.
 - **Purpose:** This action lets the owner recover the “thing” from whoever holds or controls it.

4) Possession of Movables

- **Case example – Paul and Bill:**
 - **Paul** buys a painting at an art center and pays €5,000. He asks the seller to keep the painting until he returns.
 - **Bill** enters the same art center, sees the same painting, and offers €30,000 in cash. The seller accepts and gives the painting to Bill.
 - **Paul** later sees Bill with the painting and claims it.

- **Protection of Paul (legal ownership):**
 - **Paul bought from the true owner:** The seller no longer owned the painting when he sold it to Bill.
 - **General rule:** No one can transfer ownership they do not have.
 - **Conclusion:** Bill cannot acquire ownership from a non-owner.
 - **Legal principle:** Protection of the situation at law.

- **Protection of Bill (factual possession):**
 - **Bill acquired the painting from the seller:** He gained control over the object.
 - **Good faith:** Bill had no clear reason to doubt the seller's ownership.
 - **Practical difficulty:** It would have been hard for Bill to verify the real ownership.
 - **Legal principle:** Protection of the state of fact.

- **General principle:** A person cannot transfer a property right they do not legally have.

- **Exception – acquisition of movables from a non-owner:** A person can acquire ownership of a movable transferred by a non-owner if three conditions are met
 - **Delivery of the good:** The thing must be handed over (possession).
 - **Good faith:** The buyer must act in good faith at the moment of transfer.
 - **Suitable title:** There must be a legal reason or valid transaction supporting the transfer.

- **Rationale – protection of good faith transactions:**
 - **Goal:** To ensure transparency and reliability in commercial dealings.

- **Effect:** A good faith possessor can acquire ownership, even if the seller was not the real owner.
- **Encouragement of trade:** The system protects those who trust appearances and promotes the circulation of goods.
- **No duty to verify ownership:** Buyers are not required to investigate whether the seller is the real owner of the goods.

5) Possession of Immovables

- **Case example – Paul and Bill:**

- **Paul** owns a plot of land in the countryside but never uses or visits it.
- **Bill**, his neighbor, notices the field is abandoned and begins cultivating it.
- After years of silence from Paul, **Bill** builds a fence to protect his crops.
- After 20 years, **Paul** returns, finds the land fenced and used, and demands that Bill remove the fence and give back the land.

- **Protection of Paul (legal ownership):**

- **Paul is still the owner:** Ownership does not expire just because the land was unused.
- **Right to inactivity:** The law allows an owner to do nothing with their property.
- **Legal principle:** Protection of the situation at law.

- **Protection of Bill (factual possession):**

- **Bill possessed the land for many years:** His use was consistent and uninterrupted.
- **He improved the land:** By farming it, he increased its value and avoided waste.
- **Moral fairness:** He deserves more protection than an owner who did nothing.
- **Legal principle:** Protection of the state of fact.

6) Acquisitive Prescription: General Rules

- **Definition:** If someone possesses a good continuously and without interruption for a certain period of time, they may become the legal owner, even if they weren't originally entitled to it.
- **Scope of application:** This rule applies to both movable and immovable goods in all Western legal systems.
- **Variation by jurisdiction:**
 - **Period of time:** The number of years required to acquire ownership can vary.
 - **Subjective element:** Some systems require good faith for shorter time periods and impose longer periods if the possessor knows the good is not theirs.
- **Comparison:** See Ch. 10 para 5 for comparison with extinctive prescription (not covered in these slides).
- **Rationale for the rule:**
 - **Promoting active use:** Encourages people to make productive use of abandoned property.
 - **Promoting certainty:** Over time, the factual situation becomes aligned with the legal situation.
- **Human Rights Dimension of Acquisitive Prescription in the European legal framework:**
 - **European Convention on Human Rights (Protocol 1, Article 1):** Everyone has the right to the peaceful enjoyment of their possessions.
 - **Deprivation of property:** Must be justified by the public interest and must follow legal conditions.
- **Critical question:** Is it in the public interest to deprive an idle owner of property without any compensation?
- **CASE: Pye v United Kingdom (2005-2007):**
 - **Facts:** The Graham family occupied Pye's land and tried to acquire it by acquisitive prescription under English law after 12 years.



- **Initial ruling:** The English courts confirmed the Grahams were the rightful owners, as Pye had not taken back possession.
- **Human rights claim:** Pye took the case to the European Court of Human Rights, claiming this outcome violated his right to property under the Convention.
- **First decision:** The Court agreed with Pye and ruled that adverse possession violated Article 1 of Protocol 1.

- **Final outcome (Grand Chamber appeal):**
 - The Court reversed its decision.
 - It held that there was interference with the right to property, but it was proportionate and allowed by law.
 - **Conclusion:** Acquisitive prescription is still considered compliant with human rights law.

FOR DOUBTS OR SUGGESTIONS ON THE HANDOUTS



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