



Lecture L-9

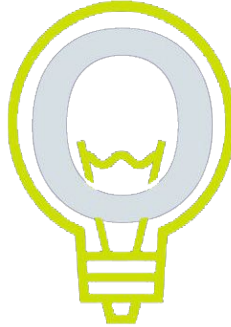
Business
Additional: Commercial Contracts;
Corporate Finance; Private
Acquisitions

Abbreviations

- Shh(s) – shareholder(s)
- Sh(s) – share(s)
- D – director
- MA – Model Articles
- CA – Companies Act 2006
- PR – Personal Representative
- BR – Board Resolution
- SR – Special Resolution
- OR – Ordinary Resolution
- WR – Written Resolution
- GM – General Meeting of Shareholders
- BM – Board Meeting
- BD – Board of Directors
- Co – Company
- DD – Due Diligence
- PL – Profit and Loss Account
- BS – Balance Sheet
- SPA – Share Purchase Agreement
- BSA – Business Sale Agreement
- CT – Corporation Tax

1) Limited Company:

Incorporation
Decision Making
Shares
Directors
Minority Protection & Rights
Insolvency



2) Partnerships:

Partnership Agreement
Limited Liability Partnerships
Joint Ventures
Insolvency / Bankruptcy

3) Business Media and Taxation

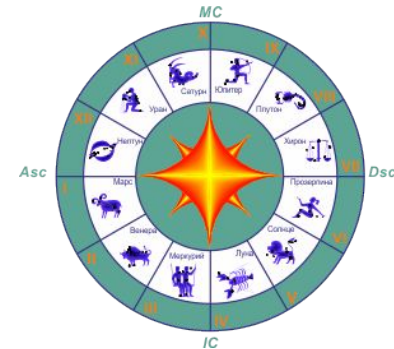
Types of business media
Advantages / disadvantages
Taxation
Conversion from one to another

4) Commercial Contracts

5) Corporate Finance

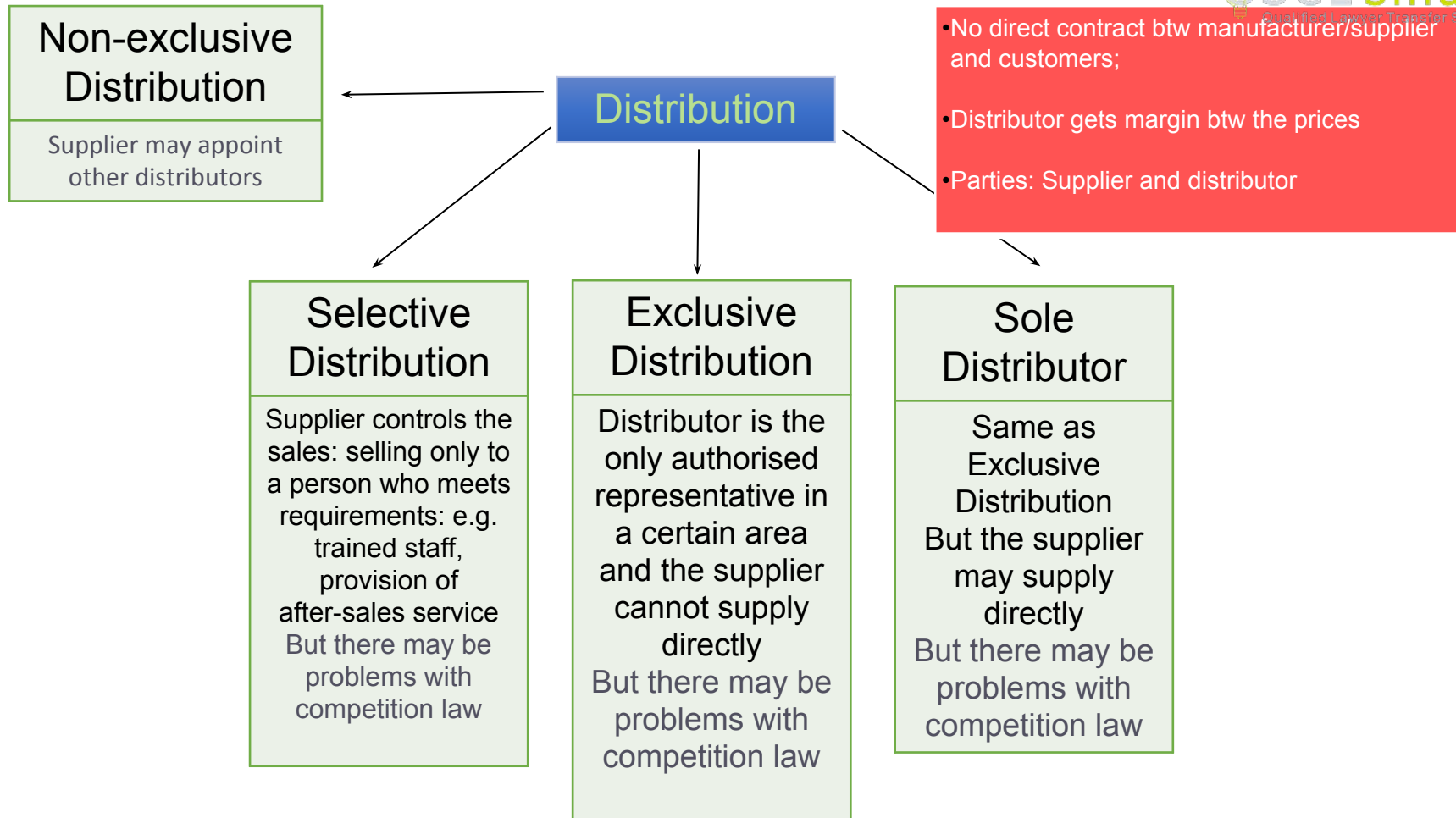
6) Private Acquisitions

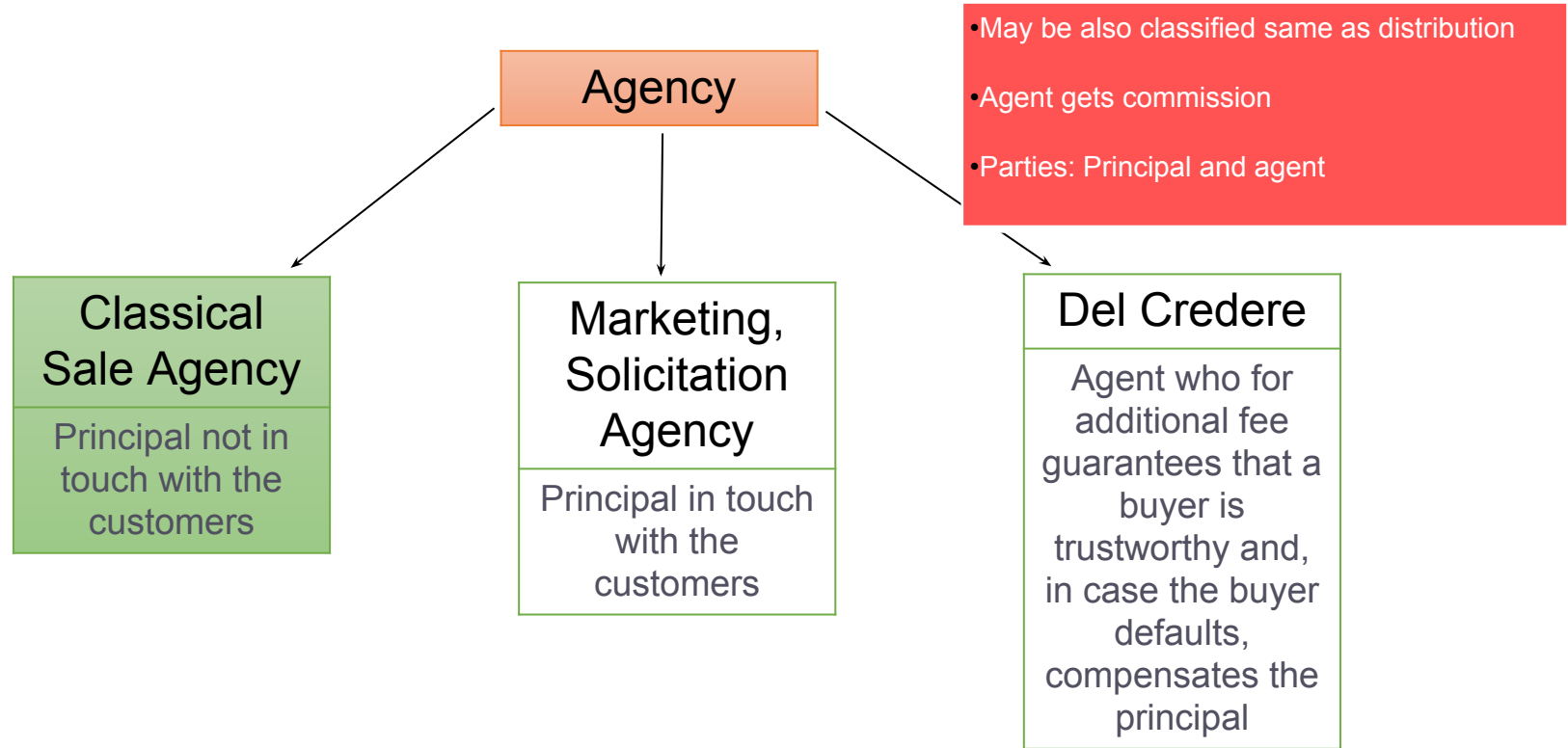
1. Commercial Contracts
2. Corporate Finance
3. Private Acquisitions



1.

Commercial Contracts





Other

Licensing Agreement

Granting a license to a 3rd party to manufacture and market the product on his behalf

Franchising Agreement

It is a uniform business format

•Advantages:

- 1) Franchisor (inventor):
 - Higher level of performance;
 - Less risks
- 2) Franchisee:
 - Already tested format
 - Assistance and training during the start-up
 - Easier to raise funds

•Disadvantages:

- 1) Franchisor:
 - Difficult to maintain consistently high standard – reputational risks
- 2) Franchisee:
 - Little room for individual initiative;
 - Goodwill remains with franchisor;

Joint Venture

2 or more entities collaborate

Factors to consider while choosing the form

- 1) Size and organisation: e.g. agency needs more supervision
- 2) Location and nature of the market: e.g. if unfamiliar market – distribution is safer
- 3) Nature of goods
 - Goods relatively straightforward – distribution;
 - But if it is essential to be in touch with the customer – agency
- 4) Responsibility to customers

Law:

- **Rome I (contracts)** – certain domestic mandatory rules still may apply;
- **Self-employed Commercial Agents (1986) (Directive 86/653)** – greatly protects the agents
- **101, 102 TFEU** – very relevant to distribution
- **Competition Act 1998**

Sale of Goods and Supply of Services

Sale of Goods Act 1979

Supply of Goods and Services Act 1982

Consumer Rights Act 2015

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulations 1999

Business Protection from Misleading Marketing Regulations 2008

2. Corporate Finance

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Debt Finance

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Equity Finance

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London Stock Exchange:

- **Settlement System CREST:** in order to use it, we need to amend MA e.g. no share certificates any more, no pre-emption rights, title transferred on completion, automatic dividends, proxy voting
- **Methods of Listing:**
 - 1) Public offer (IPO): to public at large; by Investment bank as an agent of the plc; brand new shares (subscription) or existing shares (sale) – the most expensive method, but may raise huge funds
 - 2) Placing – specific investors; by Investment bank as an agent of the plc; either brand new or existing shs – cheaper, but risk to lose control over the plc
 - 3) Introduction: shs already widely held by the public; existing shs admitted to the public offer – the cheapest, but does not raise substantive capital
- **2 Regimes of Listing:**
 - 1) Premium – equity shs; and
 - 2) Standard – debt securities

FCA: regulator

- Functions: maintains the official list; issues Rules and Regulations; considers applications for admission; ensuring and enforcing compliance

Debt Finance

Types of Loans:

Term Loan – 3-5 years

Overdraft – uncommitted facility (lender has no obligation to extend the loan; short-term funding; used to finance seasonal or temporary needs of businesses); maximum amount; repayable on demand

Revolving Credit Facility – combination of the above; repay and re-draw

Checks:

Due Diligence:

1. Does the Co exist?
2. Has it got a trading record?
3. Does the power to enter the transaction exist?
4. What are the existing obligations?
5. Any litigation against the Co?

Disclosure Letter:

- a) Representations and Warranties
- b) Undertakings and Event of Default

Loan Agreement:

1. **Purpose** – if fails money go to the resulting trust;

2. **Costs of borrowing:**

- (a) Commitment fee – for availability of funds
- (b) Arrangements fee – for putting loan into place; covers expenses; measures usually in % paid on execution
- (c) Interest – usually LIBOR (London Interbank Offered Rate)
- (d) Mandatory Costs – to FCA and PRA for supervision and regulating
- (e) Margin - covers costs of capital adequacy, expressed in 'basic points' – 0,01% e.g. 100 basic points = 1% per annum
- (f) Tax Gross up

3. **Special Clauses:**

I. **Acceleration clause:**

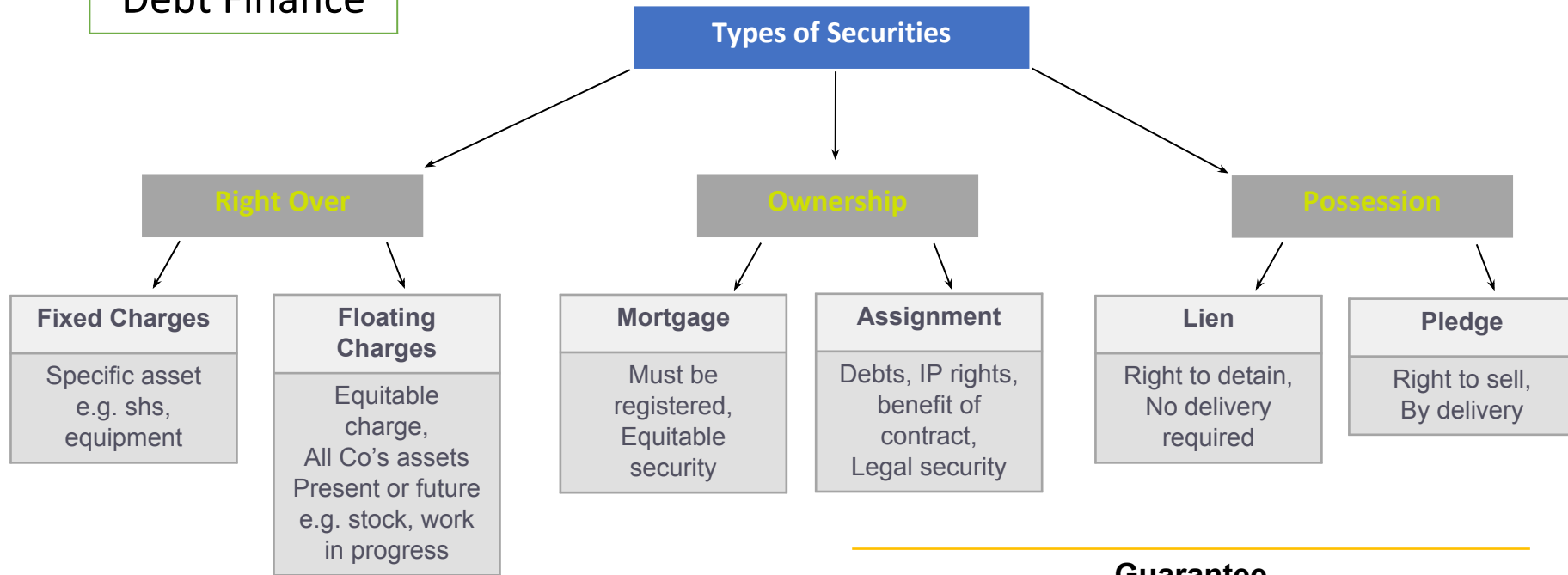
- a) If default **bank can cancel commitment, demand to repay** any time
- b) **Event of default:** breach of financial covenants or undertakings, Insolvency

II. **Undertakings and Covenants**

- a) **Information Covenant:** PL accounts, BS
 - b) **Financial Covenants:** e.g. Net Worth Covenant (maintain a min figure of assets); Interest Cover Covenant (min profits to pay interest) Financial Gearing Ratios
 - c) **General Undertakings:** without consent; Negative Pledge ; Insurance
- Not to lend**

III. **Representations and Warranties** : breach is event of default

Debt Finance



- **First in time rule:** first created charge prevails
- **Registration** – protection from bona fide purchaser
- **Debentcher** – must be registered within 21 day
FR01 form

Guarantee

- Is a secondary obligation, conditional upon default
- But requires proof of default
- Solution: draft it as indemnity
- Protection for guarantor: right to set-off and counter claim; right to be reimbursed by other guarantors; subrogation; variation (contract was materially changed without guarantor's consent)

Corporate Finance

1. Freehold premises = **MORTGAGE**
2. Equipment for premises - furniture = **FIXED CHARGE**
3. Office equipment - computers, faxes etc. = **FIXED CHARGE**
4. DVDs and various other stock in trade = **FLOATING CHARGE**
5. Intellectual Property = **STATUTORY ASSIGNMENT**
6. Cash at Bank = **FLOATING CHARGE**

3. Private Acquisitions

SPA

BSA

- 1) Warranties wider
- 2) FSMA applies
- 3) Shs acquired cannot be security for the loan
- 4) All liabilities transferred
- 5) Substantial Shareholding Exemption – may be available:
Check as it is subject to the upcoming reform

- 1) Transfer of title is much more complex;
- 2) FSMA does not apply;
- 3) No automatic transfer of contracts;
- 4) No automatic transfer of liabilities
- 5) Assets may be security for the loan

SPA	Key provisions	BSA
Remain but check if - change of control clause	Contracts	Assignment (burden remains) or Novation (consent required)
Remains	Employment	Transferred under TUPE, but employees may leave
Automatically transferred	Good Will	Must be specifically transferred
All remains	Securities / Charges	Only over particular assets

Ways to protect against hidden debts and charges

Letter of non-crystallization

Deed of release

Clause in the Agreement

PROTECTION FOR A SELLER

1. **Disclosure Letter** - does not cover matters of which buyer have got knowledge: actual, constrictive or
2. **Amending Warranties:**
 - a) Qualify the warranties e.g. saved as disclosed;
 - b) Limit them: to reasonable extend; to material breach
 - c) Exclude any change of circumstance in the future
3. **Limitation of Liability:**
 - a) Amount – no more than the price; exclude small claims e.g. up to £1000
 - b) Limit them: statutory – 6 years or 12 years if by deed; contractual – usually 1-2 years is reasonable
4. **Vendor Protection Provisions:**
 - a) Entire agreement clause
 - b) Non-reliance provisions: professional advice obtained + contractual agreement on the state of affairs (contractual estoppel)

PROTECTION FOR A BUYER

1. **Undertakings** - covenant to do certain actions or restrain from the actions in the future
2. **Indemnities** - promise to reimburse the buyer in respect to designated type of liability. Advantages:
 - a) No need to prove loss;
 - b) No need to mitigate; and
 - c) Pound for pound basisRemedies: damages resulting diminution in the value of the shs
3. **Warranties** - statements of the facts of what is to be acquired and/or state of affairs. Purpose:
 - a) Obtain information;
 - b) Allocate the risks; and
 - c) Price adjustmentRemedies: damages as if the contract was duly performed
5. **Representations** - statements of the facts that induce the other party to enter into the contract and rely on it. Claim in misrepresentation. Remedies:
 - a) Damages: as if contract was never entered
 - b) Rescission

Company Shares Reading

1. **Business Protection from Misleading Marketing Regulations 2008**
2. **Rome I (contracts); Self-employed Commercial Agents (1986) (Directive 86/653) – greatly protects the agents; 101, 102 TFEU; Competition Act 1998**
3. **Legal Practice Companion:** Business ‘Competition and trading’, ‘Commercial Contracts’ or **LPC Handbook**
4. **Business Law and Practice, Alexis Mavrikakis (CLP)** Part ‘Some aspects of trading’: Sale of Goods; Introduction to Agency and Distribution Agreements; Part ‘Running Business as a Company...’: Financing Company II – Debt; Taking Security
5. **Business Law, Slorach & Ellis (OUP)** Part ‘Companies’: Company finance; ‘Additional Resources’(free Online Resource Centre): Business contracts - agency or distributorship agreements
6. Agency and Distribution Agreements, Oury Clark

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