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BUSINESS LAW

2/03/22

DEFINITION OF BUSINESS

BUSINESS: Business is a qualification of what law is about. In this case, business law is the law that regulates business.

Business is any economic activity carried out with certain qualifications which means professionally and organized by an entrepreneur (sole trader=ditta individuale or collective organization) with a view to a profit.

Business is carried out with certain qualifications.

One important thing is that not all the activities are economic in nature: you can exclude pro bono activity, leisure activity, sport activity etcetera. But also, a pro bono activity is an economic activity: for example, you can have sponsors, you can accept donations and other form of supports, you might also purchase and sell goods without the qualifications.
So not all economic activity can be defined business but only the one that are carried out professionally (so something you do in your spare time even if you make a few moneys is not business) and also must be organized by an entrepreneur (most simple entrepreneur=sole trader=ditta individuale= an individual caring out by himself a certain economic activity or collective organization=more commonly, starts up for example where individual are joining forces to caring out this economic activity) with a view to a profit.

Entrepreneur is not always a human being, but it is that organization that is caring out that economic activity = legal person which is the centre of the activity.

Organization: suit that cover the role of entrepreneur.
With a view of a profit means with a goal, with an objective which is make a profit. This is what differentiates business activities from many others economic activities (such as pro bono = in this case we are not caring out the activity with the objective of profit or make value or grow the value, or for example distribute profit in the form of dividends but pro bono has different goals). Important "view of a profit": this is what we are dreaming, so even if we are losing money (so revenues are lower than costs) due to maybe external circumstances we are still a business. In this case we are unsuccessful, so we are unable to turn this dream into reality.

Notice that when we are defining business, we are not looking at an ex-post analysis of what happen. We do not care if at the end of the year the company made a profit or a loss. We care about the fact that the economic activity was carried out with a view to a profit. So, if there is a loss for the company but investors for example are still financing it the company will continues the business because maybe it is a temporary situation and in the long-term will be better.

There are various situations where there are different objectives than profit however if there is a systematic exclusion of a view to a profit that is not a business. Another example is Funding with social values. Governments usually make investment with a view to a return: ENI or ENEL are business; they are also traded in the stock exchange even if they are state owned. Also, state can be a "sole shareholder" if he owns 100% of the capital of the company: so which objective the board of direction of those company will run as business? If it is structured as corporation it needs to carry out an activity with a view to a profit; then it can have a structure that is not caring about business but is rare for a state to not care about the numbers. For example: ALITALIA: why the state keeps investing in a business that have a loss every year and has 0 possibility to make a

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So there are so many rules around them but not all of them are considered legal rules and they are lacking the qualification of *enforceability: that rule is potentially enforceable: a source of legal consequences if I do not comply*.
Who identify which rules are enforceable and which are not enforceable? The society itself through its *constituted political power*. This is a very good connection with the third definition.
If there are some religious prescriptions and you are overlapping automatically into a law: means that society so a community of people will adopt some sort of political system. Maybe a kingdom, a parliament.

Under the jurisdiction → it means that you are subject to the laws of that state

Source of law → identification of who has the power to applicate a certain rule.
When we talk about laws, we are talking about those that are applicable to everybody

Law between the parties → strong as a law but just applicable to the parties that are signing it

Religion prescription isn't persecuted if it does not coincide with a real law.

The choice of law is important for the application of an agreement (for example I'm Italian and you are spanish, and we do the contract in UK, we can use either italian, spanish or english law)
There are restrictions, you can't hire someone with the law of another state (es in italy with laws of bangladesh).
Usually, you are bounded to laws of the state of where you live, but some laws of your state can follow you (this is why distinction between society and state, e.g. for example doing something wrong online, trading)

2) That which a judge will decide concerning matters properly brought before her/him (LEGAL REALISM)

Legal Realism → not the theory, but the practice, the law of the case, the specific decision of the judge in a specific case. It is important what the judge applies, is only a law if it lives. What matter is the application, much more than theories.
You see the past applications of the law in the past. Realism is the law of the case →CASE LAW we use precedents
You have to make decisions on the probability of success, so on the precedents. Courts, so judges, are very important for Legal Realism
This is more down to hearth. It has origin in the Anglo-Saxon world. We are generally looking at reality, at the application of a certain rule. So they do not care about the theory of the rule, they are focused on the decision of the judge in certain specific circumstances.
UK, US and common law system are more inspired by LEGAL REALISM.

Role of JURY in Legal Realism: not all of the decisions are taken by courts (by judges) but for certain cases, even in corporate matter, you need a jury composed by people selected by the parties. It is very rare that jury is involved in purely technical matters. But for instance in case of consumer's protection jury is involved and also the jury is involved in criminal cases to decide whether it is guilty or not and then the judge decides what is the punishment. But in business law jury is less important than judges even in the US. Of course the jury is not made of layers but of course need the guide of the judge to help with the functioning od the procedure but they are independent, they decide without the influence of the judge.

3) A set of commands by a constituted political authority (LEGAL POSITIVISM)

Legal positivism → Is a continental EU definition. Judges are not creators of law, but they are just the mouth of law; they state what is the law. The article is just red from the judge that will apply the

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accepted if it corresponds to moral or religious behaviour. Sometimes moral or religious prescriptions become law, so they can be enforced.

Examples: Fairness / Good Faith → it is an essential part in business law

Good example of cross contamination with morality. If my willingness is to effectively enter in an agreement with a counterpart. If my real objective is to make the bad of my counterpart, I'm in Bad Faith.
Fairness opinion, for example for the market price. Fairness in informations.
Application of morality in Business. Ex you can buy something at 3 times the price if you know it, but you don't know it, they haven't been fair to you.

Question: Some law might be against morality -> there are some situations in which certain prescriptions that prevent certain behaviour led to a rejection of that principle because it is considered immoral. Is it an excuse for not complying with the law? Generally not, but there have been battles for the development of our society that were due to the fact that certain laws were against morality. For instance: apartheid in South Africa or rules of a very modern US in the sixties in which there were a certain prescription on sitting black people on certain public transportation or being admitted to certain university. Those law were clearly against morality and society made a revolution, a natural rejection and start fight to change those laws. So if the society does not accept some rules because they are against morality it is a duty for that society to fight for a better law, fight for a change. But it is also important to understand that morality is not the same all around the world. And also, morality is a collection of changes overtime. Maybe something few years ago was considered a crime now it is not considered a crime anymore and vice versa.
Morality takes more time to change, it is a process while law is "easier" because we have a decision from a parliament, a court that changes the rules.

What we mean when we refer to LAW? During the course we will refer to law both in terms of judicial decisions (REALISM) as well as statutory enactments (POSITIVISM). So we will combine the 2 definitions intentionally because now is what is most commonly acceptable.

DISTINCTION BETWEEN PUBLIC AND PRIVATE

1) Public law → regulates the relationship between society constitution as government (Ex. Constitution)
Administrative law gives you a better view of reality, where you really see the rights, you have. Whenever there is a public interest, you are trying to protect, there is a public law.
Citizens' relationship with society constituted as government or a public authority -> typical examples: constitutional law, administrative law because they regulate my personal relationship with public authority, with the government and with the state;

> *Examples:* Constitutional Law, Administrative Law, Tax Law (in fact we pay taxes to finance public services in the public interest. Health care is all funded by our taxes for example so that is why is considered public law even if the payments of taxes are private transactions between an individual and the retailer of the good for example) and Criminal Law (deals with the relationship between the individual who committed a crime and is harming a public interest; there is also a difference between intentional killing = murder and unintentional killing = manslaughter but both are crime because we have to protect a social public interest which is the security of the relationships among individuals).

2) In the middle → *Example*: Antitrust Law also called Competition Law (it has been created in the first half of the 20th century in the US and then it was spread across the world. The public interest protected by Antitrust Law is the right to compete both for enterprises, with the right to enter a market and consumers, with the right of benefit from consequences of competition. Because if they compete

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We enter into private relationships with lots of people at the same time. This is usually did through a contract.

Freedom of enterprise → aim to improve general quality, one is willing to improve quality and get prices lower without competition. We want to guarantee a minimum protection to employees

Any business can have an implication that is a law implication.
Taxation law is a restriction on profitability, it is characterized by enforceability. Situation where you see that people have relationship with the state.

Public Law:

- constitutional law
- administrative law
- criminal law: you pay going to jail and effectively ended up paying money to the family of who you murdered

Private Law:

- Contract law: if you violate a pre-existing contract, you break the contract, I am trying to enforce the payment.
- property law
- agency law: the welfare of one party (the principal) will rely on the agent that is doing the work for him. Agency is crucial for private law.
- tort law: there is no pre-existing contract between me and you , but I have to pay for the damage I made to you.

Public/Private Law:

- Antitrust law: imposing restriction to the freedom of contract (e.g dominant players can't decide together the price of a good, because like this new firms can't enter)
- Securities law: security is an instrument where you can channel certain rights (bonds, stocks are securities). Whenever a firm goes public, it is making his securities tradable on a market. Now there are certain special rules that are going to be applicable to the firm. You have to show what is happening in your firm (house of glass vs house of bricks). Laws change to you in terms of transparency. Therefore, there is a public interest, of all people wanting to invest in you, and private of the single investor. It is not just a private decision because everything relies. Affects private companies, with a public intent.
- Labour law: made to protect employees, is a restriction to firms.

These protect private interest, with the intent to protect public interests →it enters into a private contract firm-employee, but it protects an entire weaker part.
Other example → Consumer protection law (because consumers are the weaker part in the market)

Distinguish between fine (you pay to the state) and damage to a third part (obligation to a third part)

Question: A contract between Public and Private administration -> itself is private in nature but when one of the parties is public authority there are certain rules that come from Administrative Law (Public Law) that impose some certain restrictions or for instance put some restrictions on how you select third party. Public procurement law is a branch of Administrative Law that says how public administration can choose its suppliers or other contractors. So General perspective -> Contract Law but also some things are regulated from Administrative Law. So we have both Private and Public law because you have to protect at the same time two different interests: the interest, private in nature, of the contract between the seller and the buyer. But since the client can be Public Administration there must be further layer of protection to make sure that this transaction is entered into compliers with certain rules in the best interest of the community.

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Some examples of civil law countries: Continental Europe (even the word civil law because is coming from roman law), and all part of the world that are directly or indirectly affected by the French, the Spanish, The Portuguese or the German tradition so for example South America, Africa and large part of Asia. (not important the position on the map).

- So there is the idea of having an act, a code that covers certain fields of law. First approach is the *“Civil Code”: so you are attempting to create a systematic code of rules that covers a certain area of laws. (philosophical approach).*
- <u>Statutory enactments:</u> legislative decree, regulation number, law are all different forms of statutory enactments. They all come from an authority that has the possibility to rule on that matter, to pass those acts, for example the government, the parliament, independent authority which have certain limited regulatory power.
- Strictly speaking in these systems judicial decisions (case-law) are not a source of law: as we said for Legal Positivism the judges are just the mouth. *Source* instead is who has the power of making laws. So in civil law systems, strictly speaking, judges are not source of law.

<u>**COMMON LAW**</u> →Originated in Engand, not following the comprehensive codes approach, but rather resolving disputes on a case-by-case basis. Common law is the <u>overall accumulation of judicial decisions</u>, known as case law. Based on the binding effect of precedents, so it isn’t true that it is unpredictable. A future judge must apply the rule in the way it was already applied. This principle binds all lower courts to the determinations rendered by the higher courts in that same jurisdiction on the same type of cases.
If the claim is of lower value, you only have one shot, you either win it or lose it, you can't replicate it. If someone had your same case in the past, you must apply in the same way. This makes common law faster than civil law.
In civil law countries, judges are the mouth of the law and not the creators of the law, so this doesn’t work.
KEY FEATURE of Common Law Countries -> *Originated in England, not following the comprehensive codes approach, but rather solving disputes on a case-by-case basis. Common law is the <u>overall accumulation of judicial decisions</u>, <u>known as case-law.</u>* It brings more to the English law and some examples of common law countries are the ones influenced and connected for linguistic reasons to the English empire so for example United States but not all of them because there are some certain southern states which qualify themselves as civil law systems (even if it is more for tradition rather than reality), Australia, India and some part of Asia. (not important the position on the map).
It is not following the code approach but rather resolving disputes on a case-by-case basis. In general, is the stratification over time of the ruling on cases. The evolution of the law is based on how courts developing overtime. This reminds of the Legal Realism approach.
Continues of the common law -> *based on the biding effects of precedents (<<stare decisis>>). This principle binds all lower courts to the determinations rendered by the higher courts in that <u>same jurisdiction</u> on the <u>same type of cases</u>.*

- Common law can exist if you are creating a form of “HIERARCHY”: *it is based on the principle of finding effects of precedents* (<<stare decisis>>). Basically you will expect how a judge resolve a certain dispute if you know what the precedents is. How can you assure predictability?

In England or US it is not just a matter of convincing the judges. If they are able to show that the ***same, identical*** situation has been solved in the past by a higher court in a certain manner, the judge that has to decide that case must decide in the same manner. This technique is called “DISTINGUISHING”: I am distinguishing this current case from the precedent so that the new judge is able to overrule and to change is mind maybe in my favor.

- <u>Same jurisdiction:</u> if there is a precedent by the court in the state of Nevada it is binding for the lower courts in Nevada, not in California or Texas.

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Every country has a mixture of common and civil law, with a prevalence of one on the other

9/03/22

Contracts

WHAT IS A CONCRACT

Definitions:
- Agreement
- Source of remains
- Physical signature
- Document
- Mutual interest
- Transaction
- List of legal requirements
- Ability to perform

A contract is a legally enforceable agreement, express or implied, source of rights and obligations (law between the parties) → is an agreement, but not all agreements are contracts because they are not creating legal obligations

Express → oral or written expression of what we agree (also by actions)

- First, **contract is an agreement** not a document. We can have contracts expressed (which means words even spoken or written) or implied (which means implied by actions). For instance, by newspaper without saying anything is a contract that you entered in by actions. It is implied by actions, by how you behave.
  In business transactions, this happen when two partners have past negotiation history (for example a supplier that you are dealing with for a long period of time). In this case there is an automatic performance for example if the client every 6 months needs a certain amount of good, so you have a continuing supply agreement. But, at a certain moment of time the client does not sign the confirmation of the order, but the supplier continues the shipping. This is a situation in which the continuation of business transaction keeps on going by actions without any communication between the parties.

[It is not the document; ***it is the handshake that seals the*** *contract (even if there are some cases like selling a real estate that need a written agreement)*]

- **The contract is source of obligation and rights**: these are two sides of the same coin. Whenever there is a right there is also an obligation. For instance if I am selling to you my motorbike, I have the right to claim consideration (amount of money that you must pay) and on the other and the purchaser of the motorbike has an obligation. In fact, from the contract there is no turning back.

- Contracts does not involve only two parties but sometimes even thousands. For instance, a corporation with all the shareholders. They are linked by the rules of that corporation.

- Also here there is the thing that distinguish law from everything else which is enforceability: contract it is not a single arrangement (meet tonight at the pub). If I am committing to a legal enforcement, if I do not comply with my obligation you can bring me to the court and ask for damages etc.

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you need to provide an alternative form of evidence: an email, a communication maybe recorded.

- **Considerations**, something of value given in exchange for a promise (price one of the possible considerations): This concept is not just that you have to pay something, but price is just one of the possible considerations. For example I can "pay you" for not doing something like opening a restaurant next to mine because it is something value for me. So there are some situations, in some particular jurisdiction, where it is safer to have a symbolic price (e.g. Ireland or England are two good examples) that you put like a price tag for something. And in fact in most jurisdictions this is what differentiate contract from donation. For example you introduce a nominal value of 1£, which is purely theoretical, so that no one can think that it was a gift and so there is no lack of consideration. In some jurisdiction, donations are not considered legal contracts so they do not create rights and obligations, it is just a gift where you do not expect nothing in return. In other legal systems donations are considered legal contracts. Another example could be exchange of securities. "Exchange offers" -> when you are exchanging something for something and not necessarily there is an exchange of money.
  [What are you willing to offer in order to receive that good or service?]
  So, it is also possible to consider the consideration as the consequence of negotiation (even if it will also cover many other things which have nothing to do with consideration).

  Consideration: something of value in return of a performance is very common law system, in Italy we use cause: the social and economic function of a transaction which is a different way of describing what the parties intend to reach with a transaction. Example: for a sale and purchase agreement the social and economic function is the transfer of a property upon payment of price. But don't say that they are synonymous but they are capturing the same underling concept.
- **Legality of the subject matter:** simply means that the contract needs to be legal. We are referring to the activities of the contract that are going to be carried out. If the agreement is to kill someone and I have the capacities of the parties, there is a mutual agreement, there is the consideration, but we are missing the fourth. The performance of the service is against criminal law. So what you are committing to is against the law, so it is missing the fourth requirement.
  Another example can be cartels among dominant players in an industry: they agree in price fixing but is an anticompetitive arrangement, it is a violation of the antitrust law, so it is not a valid contract.
  Also if bank is lending you money at a rate higher than the maximum set by the jurisdiction that is called "usury interest rate" the contract is missing the fourth requirement.
  Another example in the financial market if I am using an intermediary that is not disclosing and informing a customer on the risk of the investment there is a violation of certain specific rules that regulate the activities of intermediaries. In this case the contract of the investment, like the acquisition of a mutual fund, is invalid because is lacking the fourth requirement.
  Number 2: because maybe there is a dispute afterward on "Did we really agree on terms?" and here having a written document is important and helps a lot and gives an evidence on what we agree. Or number 4: "What we agree is legal?" and maybe there is a dispute afterwards on the Legality of the subject matter.

Question: If a law that defines a contract change after the contract was signed, are there any consequences? The answer is: depending on the change of the law. For instance, criminal law that change, and something is no longer a crime automatically liberate any parties previously condemned.

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If you trust the country party, make sure that the contract is clearly written in the document.

Certain common sense rules may be used to resolve contradictions. Fine print, obscurely placed, is given less weight than large, boldface type, handwritten interlineations.

CLASSIFICATIONS

Contracts can be classified in several different ways:

1. By **type of formation**: express contract vs implied-in-fact contract vs implied in law contract

An express contract → is stated in words, written or oral, or partly written and partly oral. The express contract is overtly, consciously, and specifically arrived at. A particular example can be smart contract which is not considered as implied because you are using a block chain technology which secure the transfer of those goods

There are two types of implied contracts: those implied in fact and those implied in law

- The existence and the terms of an implied-in-fact contract are manifested by conduct, rather than words. The proof of the contract lies in the conduct of the parties, a reasonable person aware of this conduct, including words, if any, would infer that a contract exists. You start performing, you start doing certain activities which are clear sign, clear evidence of the intention to enter a contract (buying the newspaper)
- An implied-in-law or quasi contract is created by operation of law (is automatically) in order to avoid unjust enrichment of one party at the expense of another. There is no agreement, no meeting of the minds; one party has rendered benefit to another under such circumstances that fairness and equity require compensation. (ex. medical treatment in America or perishable goods). because they are treated as a situation in which even there is no expression of your willingness to enter a contract the situation gives elements to assume that you would be agree on those. *Example*: if you are the owner of a certain good that is about to be destroyed and you have someone else that is showing that is available to put the good inside of a facility to prevent the destruction due to rain etc. and you are simply moving the good from outside to inside. Is there a contract between the owner of the good and the owner of the facility? No. But would the owner of the real estate be intitle to ask for an indemnification and a price for storing the good inside? Yes. Otherwise there is an unjustified enrichment of the owner of the good. How do you treat this type of unjustified enrichment? How do you create a legal remedy for the party that perform in accordance with this contract? Implied in law contract: the court say this is a situation in which is normal to assume that should have been a contract where the owner of the good should remunerate the owner of the property.

  Ex: service of doctors with conscious and unconscious patients: if a doctor provides you an emergency treatment while you are unconscious and then you are fine, the doctor sends to you a bill which must be *reasonably* costly, and you have to pay. What are the legal reasons for which that doctor can claim a remuneration? The answer is quasi-contract: the law assumes that in a normal situation the patient affected by a serious problem would have agree and request the treatment to the doctor

  Quasi contract: created by the operation of law (synonym of automatically by consequence of a legal provision (clausula(?)) or concept). Even corporations are legal entities which are created by operation of law. Legal entities which are artificial entities you need an automatic fixed concept called "the establishment and creation of that entity". The same happen with quasi-contract: it is a fictional creation by operational law so implies an underline contract in a situation of unjustified enrichment of one of the parties. Is something

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3. By **enforceability:** valid / unenforceable / void / voidable

- A valid contract meets all legal requirements and ban be enforced by either party, all elements of the contract are there, and the contract is fully valid and effective
- An unenforceable contract doesn't meet one or more legal requirements and cannot be enforced by either party. Examples are promises to make a gift (no consideration), promises made in jest (no contractual intent). situations in which the contract is missing something, there are no legal remedy in case of bridge by other parti. The contract is missing one of the fundamental elements means that one parti which is performing do not have legal instrument to force the counter parti. Example: gambling obligations (giochi d'azzardo) are not enforceable -> if I am playing poker and I lose money of course there is moral obligation to pay. The reason behind the use of the fish in poker is that you have already paid so there is no way for the casino to be worried about the fact that you will not pay your bets because you have already changed your money with tokens valid only for the casino. In this way there are no case of enforcement of the betting obligations. Instead, a game with a friend would be treated as a contract but would not be enforceable at law because under European law is a natural obligation (if you pay you have no instrument to have the money back but your counter parti has no legal to enforce)
- A void contract has no validity and cannot be enforced by either party. Examples are illegal agreements made under threat of physical force. Any movements of money for this contract is as they have never existed. Any effect of the contract needs to turn back.
- A voidable contract is binding on only one of the parties. The other has the option to withdraw from the contract or enforce it. situations that elements are missing or problems with the contract are more severe, so you have situations of invalidity of the contract. Means that there is noncompliance with something for instance: one of the four elements of a contract is compliance with law (legality of the subject matter).

You can also notice this invalidity of the contract after you make and sign the contract and you go to the court. So if you have the contract written on a piece of paper it does not means that is valid and effective.

Another situation the parties agreed to make the effectiveness of a contract subject to ***future and uncertain*** situations for the time being, for instance: someone hire me as management engineer but obligations (for me to work and for the employer to pay me) start with a precedence with is my degree that will happen in years. So some transactions are not enforceable from day 1 but they will be enforceable upon occurrence of an uncertain future event.

NEGOTIATION

Since a contract (except a quasi-contract) arises out of an agreement, and an agreement is a meeting of the minds, it's clear that most minds meet through the transaction of business, or through negotiation

Negotiation → is very important because <<meetings of the minds>> is not something that can occur in a blink of an eye simply because people are meeting and they are immediately able to have the exact same idea on a certain transaction. Sometimes transactions are extremely complex for instance a sale of a business that is so much more complicated than simply buying a mobile

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5. Binding or Non-Binding Offers**:** Non-Binding offer-> you are showing that you have an intention (maybe a little more than LoI) but not yet binding yourself to what you are writing. On the contrary, a Binding offer means that with the acceptance you have reached the contract because the offeror is showing definitive commitment to be bound by the terms of that offer and if the counter parti (offeree) accept that offer you reach the agreement (but still not a contract because only one parti is showing commitment).

Non-binding offers → it means that I'm not obligated to accept the contact, helps in developing the negotiation. You bind you wrote the offer; it will be a contract if the binding offer will be accepted. NDA is binding because of confidentiality. Binding offers when one of the parties is ready to accept

Binding: the offeree (or offeror?) is committing itself and is willing to be bound by the terms of the offer. If the offeree accept they have a contract.

Difference between NON-BINDING OFFER and WITHDRAW: if I make a binding offer, I have to ask myself "Can I withdraw it?" because I am exposed, I put in a piece of paper in front of my counter parti some things that can be accepted and will make my obligations firm commitment. On the contrary, if I am sending a non-binding offer, I do not care about the issue of withdraw the offer. Because that offer is simply an indication of my willingness to offer that amount but I am not yet committed. So even if I do not withdraw a non-binding offer, I am confident that I will never be bound by those terms. So in a strategic action plan, a non-binding offer is a sign that you are trying to give to the counter parti on the seriousness of your intention. Instead, with a binding offer I have to ask myself can I withdraw it? It depends on how you are drafted and how the offer is prepared.

6. Preliminary agreements → parties are bound to enter in the final documentation to sign it (they are binding) it is already a contract, but your *obligation is to sign the final contract*. It is a legal technique for have the same level of commitment from the parties. For instance in some situations in which not everything is ready for the final contracts, there are some little details to sort it out sometimes neither those, but the parties want to make sure there is a total and final commitment by both sides.
Difference with binding offers is that they are unilateral (comes from the offeror and goes to the offeree) and is an action of the offeror. While preliminary agreements is agreed upon, assumes the existence of a sign of acceptance by both parties.

7. Mutual discussion → Mutual interest is clarified and refined in terms of both parties' basic objectives. These concern such things as description of goods to be sold, work to be performed, and price for goods or services

8. Definition of the objective →The subject of the contract is defined, and a price is agreed upon.

9. Agreement → The contract is formally accepted – a written agreement is prepared and executed, or the parties shake hands.

4. ***Formal*** or informal: the more complex the transaction is the more you need a formal process of negotiation. A formal process is a ***step-by-step*** process which is documented with instruments and documents. For instance M&A transactions where you can have parti which is offering a line of business or 100% of a company. So what we are transferring is a very complex item and you maybe need to make sure that the entire negotiation process is

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The Offer: The simplest way to form an express contract begins with a formal offer. This offer may be transmitted by acts or words, spoken or written, directly to the offeree, or in conversation, through mails, by wire exc. Requirements of an Offer:
1. It must indicate a clear intent to make a contract. That's why letter of interest (LOI) is not an offer;
2. It must be sufficiently definite so that a court determine the actual intent of the parties;
3. It must be communicated to the other party;
The offer should contain the fundamental ingredients of the contract, then acceptance by the offeree will bind the deal. In communicating the offer, use of the word "offer" helps but it's not necessary.

3. Consideration → *<<Something for something>>:* a contract cannot be one-sided; it exists only if there is a promise or an action (or **non-action**) on each side: even a non-action can have value for a counter parti.

- Adequacy of the consideration: is it a requirement? No, nobody can say that a contract is invalid because you pay less than market value. Negotiation is even, no trick, no asymmetry of information.
- When does consideration exist?
- When consideration does not really exist: [guarda nelle slides]
    1. Illusory promises (promises something impossible to carry out; example: provide a service that will bring to the moon)
    2. obligations of something you are already bound to do (example: a professor asking money to do the lecture, but he is already bound to do that from his employment agreement) /moral obligation/past consideration
    3. statute of limitation (prescrizione): it is the effect of passage of time that can affect your right to claim a certain right, payment or property. This time depends on the right we are talking about. For instance: if you own me money and I have never ask you the payment and I wake up after 5 years, it is not applicable anymore because you have "lost" the right to claim that payment. Any right could be subjected to statute of limitation, even the right to real estate property. To lose your right for real estate property you need, for a very long period of time (15 to 20 years), not to claim that property. Not claim that right means that you forget about that property, allow others to use that property without paying a rent, taxes etc.

       How do you prevent the statute of limitation? Sometimes is enough to send a document that proves that you are claiming your rights, like a letter with registered mail because you have confirmation of receipts from the addressee.
    4. promissory estoppel

       Cause (civil law) = social and economic function of a certain transaction. Describes the function of transaction in a certain society.

4. Legality of the subject matter

- Specific prohibitions in all countries. If you go against the law is the lack of this requirement
- Limitations to freedom of the parties (e.g., labor law, antitrust): as employee you cannot work for 120 hours a week because it is illegal.

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sell or buy perishable goods, such as fresh fruit or vegetables, or goods having an unstable market such as securities, is generally held not to remain open as long as an offer to sell or buy real estate.
When the time during which the offer is to remain open is specified, that time then becomes the expiration date.
An offer may expire at an earlier time than stated because of rejection, counter offer

4. When can an offer be revoked?
The fundamental principal of contract law is that an offer can only be withdrawn before it is formally accepted by the offeree (original recipient). Because when you have an acceptance from the offeree, legally speaking, you already have a contract.
The offeror can decide a time till which the offer is irrevocable. This put the offeror to a strong commitment. Or the offeror can also say that is a standard one: so if the offeror does not say that is irrevocable the basic principle of contract law is valid.
So we can revoke before drafting of the preliminary contract (even if we know that it is not always present in fact also offers can be accepted even just orally).

Differences between "Offer" and "Contract": they are not synonym. A contract can only exist when there is an offer but the offer is a stage of a contract that requires the acceptance by another parti. An offer in the absence of acceptance is only a one-sided commitment by one of the parti. In the example of advertisement: *an advertisement can be a source of a contract and therefore it can create a contract*.
Area called "Right of Withdraw" (exception to the basic principles of contract law): it is an area dealing with protection of consumers (weaker side) and in particular consumer in distance transactions. [especially created with the diffusion of internet]. It is the right of the consumer, not applicable in M&A transactions for instance, to change his mind after a payment and for example send back the goods he purchased.

An offer may be withdrawn at any time before it is accepted
There are four exceptions to easy right to withdrawal:

1) Option contracts: commits the offeror to keep his/her offer open in return for a specified price. In other words, the offeror makes a contract to hold the offer open for some specified period, and is paid a consideration for this agreement

Ex: an offeror offers to sell a farm for $100000, agrees to hold this offer open for 7 days, and is paid $100 for this agreement to be held open.
In this example, if the offeror withdraws the offer by selling the farm to some other person within the 7-day period, this would be a breach of contract. The offeree has no obligation to buy because he has paid $100 for the right to accept the offer within 7 days.
If he does not buy, his $100 is not refunded, if he does buy, the $100 is not credited to the purchase unless the option contract expressly so provided.

An option is an excellent legal device to provide the opportunity to think a proposition over, investigate a deal, or raise money to go through with the deal.

2) Unilateral contracts: Since a unilateral contract depends on the performance of an act by the offeree, some courts consider that the offer can be revoked unless there has been substantial performance.

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unilateral silence as acceptance. Also the offeror cannot force the offeree to speak and reject the offer or I will consider an acceptance. There is also a however (some exceptions). *For instance:* telecommunication companies which automatically activate offers. Previously they were possible even without the acceptance of the customer now it is not possible and you need to obtain the consumer acceptance for any services even the free ones.

There are, however, certain circumstances under which silence may give rise to acceptance:
1. If the offeror observes the offeree acting in response to the offer, and says nothing, there may be a contract → There are situations in which the parties mutually *agree during the negotiation that silence will constitute acceptance* for instance if one of the parti say "If you do not hear from me consider this proposal accepted". Silence in this case will legitimately constitute acceptance because I agreed that you were authorized as supplier my silent as acceptance of your offer.

2. The parties may mutually agree that silence will constitute acceptance bv the recipient of goods that are shipped to him/her (record and book clubs use this approach) → Another case is when the offeree observes and realizes that the *offeror starts to perform* (providing certain services, shipping goods) and *the offeree remains passive*, he does not say anything. It is interprete as implicit acceptance of the offer.

3. If the parties, by previous dealings, have considered silence to be acceptance, the silent party must reject the offer if he/she wishes to change the customary practice. → Third case are the so called ***"Prior Dealings":*** when in the past parties have been acted in a certain manner for instance in a long relationship between supplier and buyer. The supplier usually sends the updated price list and in the past 6 years there has never been confirmation of the order, there has been reciprocal trust a common reliance on the quality of the services. In this situation the supplier interprets the silence as an acceptance is grounded upon the past behavior of the parties in a long business established relation.

Acceptance of a unilateral offer: does commencement to perform the act requested qualify as acceptance?

An offer is never accepted expressly but it is implied by actions carried out by the offeree. If I start to perform what I am bound to do even in the absence of a formal acceptance a court might argue that you have implicitly accepted the terms of the offer. It maybe sounds contradictory with the third requirement of acceptance (Any manner required by the offer), however when it comes to interprets factual circumstances, court gives relevance also to the conduct of parties. So if there is a unilateral offer, made by the offeror, where he did not specify precisely how the acceptance is needed to carry out and the addressee of the offer skips the formality of acceptance and immediately performs in accordance with the offer, for instance he pay to the supplier. In a case like this the court use the doctrine of implied by actions acceptance based on the fact that the offeree starts in an unquestioned way to perform and to act in accordance with the offer, which imply that in his mind there is a contract.

The real question mark is whether the offeror meanwhile change his mind because he did not hear back from the client and maybe offer the same goods to a third parti (double sale).

How to protect the offeror? Because the issue is: which is the transaction that prevail? And whether the offeror ends up with a liability with one of the two buyers. One of the two will be unsatisfied. So, the offeror has to be very clear in the track record of when and how the offer was accept. The offeror must send a letter which has an expiration term, which clearly states the

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Generally voidable: remedy is rescission (cancellation) → ***remedy in case of material mistake is voidability***. One of the parti might have an interest in terminating the transaction but if this remedy is not activated the contract remains standing. (Different from voidness: a contract which is not existing).
Example: If the purchaser that wants to buy a motorbike receives the bicycle and think "oh maybe it is better for my self and keep it (he previously wants a motorbike)" and he pays, the contract is voidable in theory, but he does not do anything, so the contract remain.

A detailed description of the products reduces the risk that this transactions is challenged so this could be a protection both for the seller and the buyer.

In a material mistake is nobody's fault, sometimes both parties are absolutely innocent and just happen. But there are some cases in which even if both parties are completely innocent at the beginning, if **during the negotiation** the **seller** realizes that the purchaser is making a big material mistake: example -> I am the seller of the bicycle and I am describing as a bike and I know that I am selling a bike, while we are negotiating with the purchaser, the purchaser starts to make strange comment or questions about the article. The seller has evidence during the negotiation that the purchaser is making a huge mistake. Me as seller, I am not trying to defraud it or to take advantage of him. But when I realizes that there is a potential mistake going on on the other side and I have all the elements to detect this potential mistake, I do not do anything, and I take advantage of this situation. This behavior of the seller might create legal consequences in case of precontractual liability.
The seller has a precontractual duty (precontractual because generally occurs before we enter into transaction) to point it out and explain to the purchaser. **Duty** to react in the event of signs and evidences of the material mistake ongoing on the other side. Also related to the principle of "Good faith" in the negotiation.

FRAUD

FRAUD: in fraud there is somebody who is taking advantage of the other. It is called the fraudulent party, somebody who is responsible of intentionally lying or something.
Five concurrent requirements: (1, 2 and 3 we are on the side of who is making the misrepresentation) (4 and 5 we are in the mind of potential purchaser)

1. Misrepresentation (legal word to say "you are stating something which is false") of a **material fact** (of an element which goes to the essence of a transaction) = you have a case of fraud only when this misrepresentation occurs on something which is material. If I was lying to you on a secondary element, in a trivial and less important aspect of the transaction, you can have a claim because you suffered damage for this, but you cannot claim a fraud. Besides the civil law and contract law consequences like cancellation of the contract, payment of damages, in certain jurisdiction fraud is also a crime depending on the circumstances.

Intentionality made of 2 and 3:
2. Made **knowingly** (consapevolmente): intentional misrepresentation, doing something on purpose, related to access of information. Doing something with the intention to make sure you buy the good but not to defraud you. When a person is making this false statement, need to know that they are false. If I am selling to you a painting that I bought at an auction and I make the statement "This is a genuine Vang Gogh" and then if this is wrong, so the painting is false. They cannot say that I have made fraud, because I made the misrepresentation of a material fact but if I did not make knowingly this action. I totally rely on an important and reliable source, and I thought that this painting was real.
If nobody were doing anything intentionally could be material mistake and the purchaser will have remedy if he claims, and he has the elements to ask for the termination of a contract.

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- ***Punitive*** *damages:* in addition to the damage suffered by the defrauded party which are used to punish the fraudulent party. Might happen in relations of consumers and enterprises

Remember: *innocent misrepresentations are not fraud*

UNDUE INFLUENCE

A party takes advantages of another by reason of a superior position in a close or confidential relationship.
The mere existence of the relationship and of the influence is not sufficient. You need to prove that this was done in an undue manner.
Examples: *doctor/patient*: If a doctor try to take advantage for his position and for the weakness of the patient it is a case of undue influence. The doctor influences the patient in an undue (inadatto) manner.
Trustee/beneficiary: even professors and students during a course is crazy to negotiate with students the sale and purchase of motorbike. Not prohibited by the law. If professor and student fairly dealing, the price is right and this does not affect the evaluation for example, this is a case in which the contract is valid.
Employer/employees: systematic position of superiority of the employer because the employee might fear fired, or moved to another location, or obtain a reduction of the salary. Or on the contrary they are expecting a promotion.
It is more from a psychological point of view, you need to understand the interactions between the parties, and you need to have clear elements.

Two other cases of external elements which prevent the real meeting of the minds:

DURESS *or* ***COERCION****: either physical or mental -> that deprives a person of its free will and leaves that person with no reasonable alternative than accept the contract terms as imposed.*
When someone is forced to do something, so it is against his free will. Much more than undue influence (because in the undue influence nobody is forcing someone else to enter into a transaction just taking advantage). Typical example: signing a contract under a gunpoint. In this case, from a contract law perspective, the contract cannot be valid (physical threat). Problem: How can you prove that? Mental coercion: threatened by somebody that you can really fear like someone colluded with mafia or criminal organizations, so there is an expectation that these threats are really dangerous for you. There are some words which triggers this mental coercion and you have to identify the context.

Distinction between mental coercion and undue influence: if I am proving a case of mental coercion which qualifies as duress, I need to prove that the party had no reasonable alternative than accept, he was forced to do that. Instead, undue influence is less blatant an threatening because is simply influencing the terms of the transaction. So you were not forced to enter the transaction. Just that the terms of the transaction would have been different. The difference is also that with mental coercion there might be also criminal consequences.

Question: What if the threat is perfectly legal? If the party's threat is to act in the market in a way damaging commercially speaking the other party can consider itself threatened?
Answer: Not really, it is simply putting the other party in the condition to know that you are intended to exercise your rights. So a perfectly legal threat is an information on your willingness on your willingness to exercise a right or to stand a perfectly lawful activity.

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3. Intent to defraud: in the film is clear and is double -> getting rich commission and then to get a profit out of the loss that certainly the buyer will suffer when the market will know and when the information will be public available because of a security investigation or for the auditors or maybe because the brokerage firm itself will at a certain moment in time release the information after they have dumped the shares.
4. Justifiably relied upon even on this point the movie shows something. In the fraudulent scheme there are a lot of elements that are added by the fraudulent party to increase the credibility and the reliance that the investor might made. In the telephone call, the buyer made 2 mistakes: 1) say "Forget the info": he does not make the due diligence, he does not ask for the info to be sent to him before making the investment decision. He is attracted by the idea of making quick money out of this trade. He relied upon on the ability and fast talk of the seller. 2) the contract is entered during the telephone call. How will the buyer send the confirmation of the contract to your office? Under securities regulation it is possible to have trades during phone calls because of the nature of certain trades. The confirmation of a trade can occurs during a telephone call, there is no signing of order forms, no confirmation, just the recording of confirmation. Nowadays the entire act of the confirmation must be recorded even the statements made by the broker in order to confirm the entering into the transactions. And those might be the elements on which a potential claim for fraud is based. But before not the entire telephone calls were recorded and moreover this boiler rooms and these fraudulent schemes end up with the owners with a bunch of money and was impossible to have the money back.
   Reco= recommendation -> the broker to step in because the potential client is asking for recommendation on the purchase of shares. And since junior brokers are not authorized to complete trading this was shifted to the senior broker.

So from a contract law perspective this transaction should be invalidated under a fraud!! In this case was based on a completely false statement. In other cases the securities fraud is more based on a misleading bases like omission of information, things that are not accurate non necessary a lie. A misleading information is enough.
We also know that this transaction would have happen if there was no mentioning of the price of the stock but a broker accept only after the say of the price.

To prevent these crimes you introduce:

- A number of disclosure mandatory information: so you try to prevent ex-ante by imposing to intermediaries and brokers to mandatorily provide information of the shares;
- A number of monitoring on the securities offered to clients with auditors, watchdogs who assure that information given are correct and verified
- And then ex post remedy: creating a deterrent by heavily punishing those who are conducted in these crimes so that others are scared of criminal sanctions.

Rating agency: role to rate the likelihood of insolvency of companies that are issuing securities or bonds or other financial instruments.

STATUTE OF FRAUDS

(Requisito di forma scritta)

The statute of frauds has nothing to do with fraud. Maybe the reason why it is called "Statute of frauds" is the origin. It is

- *The statutory requirement that certain agreements must be mandatorily incorporated in a written document* -> the statutory requirement of a contract in writing. It is called statute of frauds because **one of the advantages** of documents in writing is somehow to create a barrier against fraud. There are also other reasons like filing in a public register. ***BUT when***

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Very often particular transaction has several attachments also called enclosures or annexes: they are parts of the contract that for a number of reasons, sometimes for drafting reasons are left separate but they are attached. They have to be mentioned in the principal text (the body of the contract) and its term are considered integral part of the contract. Sometimes they are very long like 20 pages. They can also contain the core of the contract because sometimes technical specifications are much more important that number of concepts addressed in the contract.

17/03/22

PAROL EVIDENCE RULE

Strictly connected to Statute of Frauds but separate.

Prohibits either party from contradicting or invalidating a fully written contract by means of prior or contemporaneous evidence external to the contract. The concept of **Evidence** is key. What you want to avoid is a written document and simultaneously there is a contradicting agreement between the parties. The interest that you want to protect is *"reliance on written documents"*. When we have a contract documented in writing for whatever reason, this principle tries to avoid that this document in writing is not the real contract and that there are not other arrangements between the parties that are contradicting or totally invalidating the contract. So that any third party can rely on that written document because there is a presumption that what is written there is the real arrangement between the parties. Example: you are about to purchase an enterprise and you are conducting a negotiation with due diligence exercise, you want to know the information before. During due diligence you will review the documents and contract entered by the company. With the *parol evidence rule* you have the protection that there is a presumption that what is written there is the real agreement between the parties.

The purpose of this rule is to protect reliance by third parties.

Exceptions (we call them like that because they are different from contradiction. Better to call the distinctions): (they are not a problem)

- *evidence explaining* -> you could have situation in which there is neither a contradiction nor an invalidation but there is an explanation, a supplemental arrangement which is normal and legal.
- *later dealings, proving, completing/supplementing*

Simulation: not legal -> we put I there because it is legal stuff but in reality our arrangement is totally different. Sometimes it is used for tax dogging (because you are trying to pay less taxes). From a contract law perspective this is targeted by parol evidence rule.

PRIVITY DOCTRINE ***(the contract remains private between the parties)***

For a person to have a legal interest or right under a contract a person (individual, corporations and legal entities) must be a party to that contract.

It is a detailed description of the contract as "the law between the parties": a rule that is enforceable as a law but the difference between a **contract** and a **statute** is that a statute is applicable on any legal enactment to all people in respect of our choices in a voluntary basis. While contracts are rules

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the switch of all clients in a bank and the client has the remedy whether to leave the contract or in case of silent those position is automatically transferred.

- *Novation* (replacement): there was a contract and it is replaced with a new one and the new contract might have different parties. Sometimes this is a variant of the assignment of contract -> rather then assign the contract you use the novation instrument, for instance you are novating the original supply with another supply. In the assignment of contract you have the perfect continuity of the contract (the contract is the same) while in the novation there is a cut of the old contract.
- *Third-party beneficiaries* (creditor/ done/ incidental beneficiaries): in certain circumstances the contract is the contract is entered between party A and party B but the performance of the contract is made in the interest of a third party which will only get the good out of this contract. For instance: a gift -> a sale and purchase agreement between me and the seller. So they are the party of the contract but the third person will get the benefit out of it. This third party has the right to receive that benefit. It is a donation because there is a purchase with a consideration (I paid the gift) and there is a third party which get a benefit out of it (beneficiary).

Even in the context of corporations or groups, there are cases in which a contract is entered for the benefit of other companies. For instance, if a parent company is negotiating a single loan which is much more favorable in large groups rather than many little loans -> the parent ask for a loan and say to the bank that his money can be requested (draw down) by any entity of the group. In this case there is a third-party beneficiary because the financing is made only by the parent

23/03/22

For the sample contracts start from the consultancy agreement. We have to: identify the parties, what is the consideration, what are the obligations, specific topics (assignment of rights, delegation of duties, employment agreement). Also understand if there is something doubtful (critical aspects).

The second one is a patent agreement and is more complex. We just have to understand the mechanic of this contract. We have to: identify the parties, what is the consideration, what are the obligations, specific topics (assignment of rights, delegation of duties, employment agreement). Just understand if I am able to identify the flow of obligations and rights.

Novation pag 20 BLN 2: the book says that a third external party takes on parts of the “original contract”, but we know that novation implies the creation of a new contract.

Assignment and novation are both treated as exceptions to privity because they are treated as alternatives to reach the same goal. The goal is a third party which steps in but in the assignment of contract you have this continuity (same contract) instead in the novation the external party reaches the same result (takes on part of the original contract) but from a legal standpoint there is a replacement of the contract.

Reinstatement of a contract= very often occurs when there is no change in the parties. The parties say we have a contract but there are some problems, some misunderstanding or maybe things change overtime. But it is too complicated change that agreement, to many interventions. So it is better to reinstate -> replace our agreement with a new one that is superseding in full the original contract. (Similar with the novation but here is not necessarily the change of the parties)

You can also intervein in certain parts of the contract and this is not a reinstatement.

To understand if it is a novation or assignment, we have to know *what the parties want to achieve.*

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All of the parties should have performed all the contractual obligations and all rights of the contract have substantially satisfied.

- *Instantaneous performance*= nothing has to be done by the parties *vs duration contract*= when there are either performances that will last for a long time and you can consider the contract discharged only upon commission of the entire performance of the activities. You have to ask: is there something pending on either side? If the answer is yes you cannot say that the contract is discharged by performance.

  For instance is I am buying a good with 12 months warranty as a buyer I have performed all my obligations but on the seller side there is still a pending obligation because he still needs to honor the obligation of the warranty. So there is still something which grants a legal remedy to the other.

  So in some cases with an apparent instantaneous performance you still have some streams attached that will last for a number of years because there is still something to be done under the contract.

- *Conditions: events whose occurrence (or non-occurrence) changes, limits, gives rise to or terminates a contractual obligation (or right)* = if a contract is subjected to a condition (employment agreement where the condition precedence is the graduation so you will be hired after your graduation). Important that you cannot perform until a condition precedence is satisfied so you cannot enforce the contract. You will be able to enforce your rights after/before conditions are satisfied. [the enforceability is only possible when the contract is effective]. Types of conditions:
- *Express conditions*= clearly agreed upon in the contract *vs Implied conditions*= implied by fact (by the description of the service) → you are implying by circumstances that something needs to happen
- *Condition precedent (CPs)*= event that needs to occur before the performance of the contract, before the effectiveness of the contract (before the full effect of the contract) *vs conditions subsequent*= events whose occurrence will stop performance, a change in contractual arrangements
- *Condition concurrent*= the performance needs to occur simultaneously with an event. For instance, the mechanic of closing a transaction → when the delivery of certain good only occurs simultaneously with the confirmation of the payment of the amount. Otherwise, neither of the party can ask for the performance of the other.

[Executed or Executory: *executory* (vedi appunti prima) you cannot consider discharged. While with executed the contract is discharged by performance. Remember that **Execution= Signature.** To refer to **Discharge** use **Fully performed**]

[In the material **"quantum meruit"** = used in the concept of damage. The translation is "amount deserved" -> amount earned by somebody, reasonable sum or reasonable share of the performance. Value that the non-breaching party obtains from the partial performance of the breaching party -> this is a case in which the evaluation of the amount deserved so it is used in the concept of damages] non importante!

2. Discharge by Breach

*If one party fails in a material (substantial) way to perform its obligations (the **breaching party,*** party that do not perform*), the other party (the **non-breaching party**) has no obligation on the contract, meaning that the contract is discharged by breach.*

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3. Discharge by Anticipatory Breach

A variant of the breach is Anticipatory Breach. Does the non-breaching party have to wait to see that the other party will not perform? No. Statement of non-performance or clear and unambiguous evidence (bankruptcy). Even if the time of performance has not yet arrived*!*

When one party can anticipate and expect that the other party will not perform, so if there are clear signs that the other party will not perform, for instance a client is bankrupt and I have a contractual obligation to deliver goods to this client that will never pay me. Can I say that I am obliged to perform simply because the time of the deadline for the payment term has not expired yet? There are clear signs that the counter party will not perform the contract. So the legal doctrine, method in order to safeguard the interests of the non-breaching party? How should the non-breaching party behave? Because if he performs, he is 100% sure that the value that I will deliver to de counter party will be gone. Contract law says that the party who receives clear signs of non-performance is excused from his performance and can either suspend the performance or consider the contract discharged simply because there is a clear sign of non-performance by the other.

The counter party can also send a message with a clear statement of non-performance. The non-breaching party can of course ask a claim because he suffers damages.

There are situations in which if you understand that the counter party is in financial troubles you might under certain circumstances suspend performance. For instance, the client is in systematic delay of the payment of the invoices and we are in a situation of continuous supply with long duration. So there is a periodic delivery. If we understand that the client is in financial troubles, the supplier might suspend (not discharged) the supply util he receives the insurances of the client strong financial situation or at least something he can rely upon.

Even if the time of performance has not yet arrived*:* means that if you own me 1 million dollar and this payment is due in 3 months and I read on the newspaper that you are about to declare bankrupt, I can claim discharge by anticipatory breach unless you give me reassurances on your financial conditions even if I do not have a *liquid receivable* (=due and payable, it is due and payable in 3 months).

4. Discharge by Agreement of the Parties

The element that they have in common is that there is an agreement of the parties to terminate the contract.

- ***Mutual Recission***: the parties mutually decide to terminate a certain contract (a contract that end another contract), agree to terminate. You need to regulate all the pending relationships/payments/deliveries and it could be complicate.
- ***Accord and Satisfaction***: (not confuse with novation: the difference is that in novation there is a new contract even if it is not written, instead in the accord and satisfaction you are simply accepting an alternative performance, but the contract remains standing. The result of the two is the same.) the parties are saying “I know that you own me 1 million dollars under a contract, and I perfectly know that I am unable to perform, so let’s find an alternative performance that you can do, for instance give a certain property, enter in some other transaction, performance different activities for me”. So, through a different and alternative performance and we are considering the original contract fully satisfied.
- ***<<Payment in Full>> check***: cases in which there is an amount which is disputed or challenged or there are different views on the quantification of an amount. The debtor will make a proposal qualifying it as in full because the debtor do not think that he owns the creditor 1 million for example, so there is a dispute on the contractual terms. We might end up in court of we might end up in an arrangement → the debtor is offering to pay a portion of the requested amount but if the debtor qualifies unequivocally this payment as in full, this

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What is the link with discharge by operation of law? **The bankruptcy can be the reason of the discharge of certain contracts.** That in many jurisdictions one of the rights of the receiver (or trustee) is to pick and choose the contracts that are in his interest (contracts that are beneficial for the insolvent enterprise in order to continue the operation always for the beneficial of creditors) to continue and on the contrary those contract that are not interesting can be terminated. There are businesses managed by the receiver for many years in order to continue those contracts that need to continue. For instance, electricity. On the contrary there are contract terminated unilaterally by the receiver under the supervision of the court.

So not all contracts with a bankrupt business are automatically discharge by operation of law but only those that are not selected by the receiver (he selects that one that are useful for the maximization of the value for the creditors).

Who pays the electricity or the employees? The bankruptcy estate → there is a payment from the receiver with whatever is left in the accounts of the company. The **reason** is that is more valuable for the business to continue to pay the electricity because it will make more money out of the continuation of that activity rather than shutting down from one to the other and proceed. ***Because the higher of an on-going business is much higher than the pure calculation of the single items.***

[Insolvency is different from bankruptcy = inability to face your debts as they become due → sometimes different than liquidity crises because maybe a company still has assets but not liquidity**]**

Chapter because it is a procedure regulated from that chapter of the Bankruptcy Code in US:

- ***Chapter 7 Bankruptcy:*** Full fledge bankruptcy (fallimento) → main goal maximizes the return for creditor
- ***Chapter 11 Bankruptcy*:** Restructuring of your debt → attempt to avoid a full fledge bankruptcy (7) which end up with a liquidation of the business while chapter 11 is intended to hopefully restructure the debt and hopefully continue operation.

However not all the agreements are subjected to discharge by operation of law a precisely because if a company was declared bankrupt and as an automatic effect of the declaration of bankruptcy all contracts are considered discharged that would need an interruption of the operation of the business.

- **Statute of Limitations:** *effect from a legal standpoint of the passage of time in the absence of a claim by the holder of a certain right.* If the right holder does not exercise the right for a prolong period of time, he will lose that right. There are cases of discharge by operation of law as a consequence of a significant time that passes by. If the statute of limitations expires and all rights and obligations are gone because of the passage of time the contract is considered discharged by operation of law automatically as a consequence of the period of time.
- **Death:** another case of discharge by operation of law **->** but there is a warning: first of all when we are referring to death we are referring to agreements where a party is a natural person because when you have a contract entered by an entity, a corporation, another business organization and the party that represent the entity dies or not is totally irrelevant for the contract. Also, this occurs only when the contract for its characteristic and features cannot be continued by the heirs (eredi) of the natural person (a violin professional) or if there

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the judge will need to assess how much of that damage is due to the breach. Sometimes experts are called.

Types of Damages

We have 4 types of damages:

1. ***Compensatory Damages**: those damages compensate for the direct loss suffered by the non-breaching party. Indemnification that put you exactly in the position you should have been if the counter party has performed.*

   - *Reasonable Certainty: damages must be proved to a reasonable certainty →* I need to prove with a reasonable certainty. Sometimes is difficult (or impossible) to prove (like the delay of the supplier) 100% reasonable certainty so the court accept a certain degree of flexibility.
   - *Foreseeability (prevedibile):* **requirement to collect damages which is intended to capture the possibility for the breaching party to expect to a reasonable extent the consequence of the breach.** *Damages were reasonably foreseeable at the time the contract was made or at the time of the breach →* for instance I am a supplier of small part, and the price of the supply is 500$ and I do not deliver in time the products. But the buyer never mentioned the fact that they were essential for the completion of the project worth millions. So, if the client says "you own me 500$ which is the value of the supply you did not supply" but I also have to ask you 100000$ because I was unable to perform to complete the project and my client suffered damages. But the seller could say that he cannot expect that they were essential for the completion of the project and would create such a huge loss. So, it is difficult for the client to ask for the full amount because he is lacking the foreseeability. It was not foreseeable for the breaching party that the result would be that huge loss.
   - *Mitigation: claimant must use every reasonable effort to mitigate (avoid or minimize) the damages →* Example: if I have a very important piano in my apartment and there is a lick form the upper floor, I can simply mitigate the damages by moving the piano and putting a bucket under the leak. On the contrary, as claimant if I keep the valuable piano right under the leak and I say I suffered 50000$ because this piano is now severely damage, the court will ask if you have used all the effort to mitigate damages. If the answer is yes you are entitled of a full recovery otherwise the court will reduce the amount because you failed you obligation (legal duty) to mitigate (reasonable effort to the extent possible).

2. ***Consequential Damages** (indirect damages / lost profits out of the transaction with the client):* damages which include consequences of the breach. There also contracts which exclude consequential damages. They say that in case of breach of contract the non-breaching party is entitled to claim only direct damage (compensatory ones). This is a way to reduce the exposure for the breaching party. Sometimes in contract clauses limit the amount (like twice the price) or limit the possibility to claim. FAMMI UNA SEGAAAAAAAAAAAAAAAAAAAAAAA

3. ***Liquidate Damages** (commonly referred as penalty clauses):* are predetermination of a certain damage. The parties before end identify what is the consequence of a certain breach. The parties liquidate (you turn a concept or a value in a number) in advance: for instance, every day of delay in that supply is worth 1000$. Sometimes they have to be handled with care because you have to make sure that this is an amount which is reasonable (it should be not too low because it is an incentive to breach (sometimes is more convenient) and not too high).

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For the second contract (patent assign) just understand what is going on under that transaction with a general overview. Basic questions: Where is the consideration in this agreement? What is going on?

For the first contract (consultancy agreement): potential flows -> something is problematic, something is not clearly stated. There are things that could have been regulated or described and detailed better.

OTHER REMEDIES

The material of contract is under US jurisdiction, so they are describing other remedies from an American mindset. US judicial system tend to be very focused on the quantification and indemnification with a monetary amount of money (numbers any time possible). Less room for alternative remedies. They say whatever can be compensated and indemnified through an amount of money (price tag on any breach or non-performance). So they use the damage system because they have this approach. Default remedy is ***amount of money***. Then there are other remedies:

- *Specific performance:* if someone does not want to be compensated for damages but wants to have performance by the other party. For instance, you committed to transfer the property of a real estate and the other party does not want the equivalent value of the real estate but wants you to perform the obligation to transfer the property. In certain cases, you maybe have the alternative either you go one way or the other. The other party can also say: specific performance plus pay me for the other damages that I suffered because maybe I have to pay a layer, or I got the delivery of the real estate after the day we agreed so I have to incur in cost and find accommodation.
  Sometimes is also impossible to ask for specific performance. For instance, the violin player who does not show up at the concert. In that case you will want damage because you lost any confidence, and this guy is no longer credible for you. You just want that he indemnified you for the loss that he causes. Another example is the breach of confidentiality. You cannot ask a specific performance anymore. In other cases, instead you just want a specific performance.
  In Europe (civil law system), there is a tendence to give much more optionality to the claim. Specific performance and damage claim are put in the same level, and you have the possibility to ask either one or the other or a combination of the two. So the 3 remedies we see her have the same importance as damages. In fact, court will tend to award these types of remedies exactly as damages.

- *Injunctions:* requests made by the claimant to the court to order the addressee (breaching party) a certain behavior which can be positive or negative (do or not to do something or pay an amount of money). When you are seeking an injunction, you want a court to give an order to your counter party. The addressee of this injunction is generally the breaching party. The order can be to do or not to do something. For instance, a payment injunction is a injunction → ordering somebody to pay. The reason for that is that through an injunction by a court then you can enforce your right. So it is an instrument to enforce your right from the contract. You have no possibility to say: I am the non-breaching party and I use my own force to force the counter party to perform. I need to go to a court and ask for an injunction. Through this injunction I can proceed with the execution of the obligation either to pay or to perform.

- *Interim relief:* So it is a preliminary an urgent measure requested by the claimant to the court based on a preliminary assessment of the merits of the case, and it is particularly focused on the urgency of the request. You have to show to a court that you have an urgent need for an "interim relief". It means that I do not want the final decision on the overall dispute but there is an urgent situation. If I do not get this preliminary order (for instance an order to stop a certain activity) I will suffer a damage which is huge and more important to specify that this

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3. Willis, a senior at Charlestown University, rented a room from Thomas by oral lease for a period of 10 months to expire June 1 On January 1, Willis moved from the room without notice to Thomas, but left the room occupied by Goldman, also a student. Thomas accepted Goldman's personal check for the January rent, but Goldman moved out on February 1 Thomas now seeks rent from Willis for the months of February March April, and May Can he collect?

3. "Condition," "of the essence," subject to" and equivalent words or phrases.

6/04/22

AGENCY

*Introduction: why agency is a **bridge** between contract and business organizations?*

*Definition of Agency: <<The relationship between a person (**agent=**middleman) who is empowered to represent another legal party* (could be another natural person or collective organization, entity, corporation) ***(principal)** and brings the principal into legal relationships with third parties* (key aspect of agency)>>

[There are particular agency agreements, in particular commercial agent, that are acting as distributors in marketing or distribution chain of a certain product (so agency/agent -> peculiar commercial agreement). Also in the insurance business there are agents. So ***Commercial Agent = type of contract***. Also it is a ***relationship***.]

Principal= party subjected to the actions of the agent. He enters into relationship with third parties through the agent. *Agent*= he is taking actions on behalf of the principal. He is empowered to represent the principal. He will be remunerated in several ways.

*What is the so-called **agency problem**? Whenever welfare of a party depends on the actions of another. Protecting from principal from the risk of selfish behaviors by the agent, non in the best interest of the principal <<**Conflict of Interest**>>.* This problem is strictly related to the definition of agency and it exists whenever welfare of a party depends on the actions of another.

So in this case we have the welfare of one party that is the principal that depends on how the agent behaves, on what the agent will do and perform in his activity of representation with third party of the principal itself. For instance if my commercial agent or distributor is acting in a good manner and he his performing accurately his tasks, I will get benefits and profits selling a lot of my products. On the contrary if the agent is unsuccessful lazy or in other way is inefficient, I will suffer damages. So my welfare depends on the action of someone else.

So you can identify an agency whenever there is a power of representation. For instance: an investor that is purchasing shares of a corporation. Even in this case there is a huge agency problem because the price of the stock (dividends) will depend on how the CEO, the corporation will act during a certain time.

A contract may or may not create an agency relationship. For example employee on their first contract they will have a contract but in no way they have representative power, he cannot act as agent.

***Good question**: Does it mean that the agent has the power to bring the principal into binding (vincolante, obbligatorio) relationships with third parties at his discretion?* The answer is yes with the exception of 3 final words (at his discretion). We have to delete them because the agent has the power to enter into binging relationships with third parties but in accordance with terms of his

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claiming and exercise your right and you are formally asking to the counter party for a specific performance.

So the goal is essentially the same. What you want is that the breaching party complies his commitment under the contract, so you basically want that party to perform. And this is the difference with the families of damages where you want to be indemnified for the loss you have suffered.

[Within the family of request of performance there are cases in which you will ask for an injunction (order by a court) and other cases in which you will start a full fledge claim for specific performance. The result will be that in the final ruling of the court there will be an assessment that your fact is grounded and so the specific performance will be granted not necessarily through an injunction.] There are cases in which the ruling itself replace the performance. For instance: if I enter into preliminary agreement for the sale of an asset and the promissory seller changes is mind so rejects to enter into the final and definitive agreement. So you can go to the court and say I want a specific performance, but I do not want an order for that party to go in a certain place and sign (because I cannot ask for that). What I want is that there is a ruling by the court that replaces the final agreement and produces the same effects. So there are no orders towards the breaching party, there will be no injunction to do or not to do a certain thing. So with this decision I will be able to obtain the property of that asset that the seller was refusing to transfer to me. **Example in which the specific performance is reached through the ruling itself.**

AUTHORITY OF AN AGENT

- *In order to validly bind the principal* (create valid and enforceable obligation on the principal), *any contract (or other transaction) entered into by the agent must be within the limits of the authority granted to the agent.* -> This is the reason why the express appointment is the most used one. Because you are setting in advance the limitation and the boundaries to the power granted to the agent. Also related to the fact that in one organization there are a lot of agents which have different authorities. Limitations are of various nature not only linked to the value of transactions but also the type of transaction, or geography for commercial agents and distributors. Also the limitation can be an absolute limit, so that you cannot do that or case in which for instance a double authorization.

- *If not* -> ***ultra vires****:* this expression means beyond your powers. This means that the agent will directly face consequences (the performance of the agreement if the agent is in the position to perform or if he cannot (employment agreement) he faces the consequences in terms of damages and indemnification that I am exposed to pay). If you go beyond your powers you can face bad consequences for instance: in some cases you can be directly exposed to the obligation under the agreement meaning that if I committed to pay a certain amount of money and I did not have the authority to commit for that amount of money the other party can suit me and bring me to court and ask to pay (most dangerous one). There are some circumstances in which the principal cannot deny the transaction. For instance in a company if you are the CEO you have some authorities but to carry out certain transactions the rules say that for particular high value transactions you need to be authorized by the board of directors. Let us imagine that you do not comply with this and you enter into a transaction and sign this transaction with third party, then you have to face the direct consequences of the agreement. The third party say "wait a minute: I enter into a contract with the CEO and now because he violates some internal rules, I have a contract against an individual. This must be a joke because I (third party) is not protected at all because I will not be able to enforce this multimillion contract against an individual person."
  To solve this kind of problem and in order to protect third parties is important to say that the limitations to the authority of an agent are only valid inside the company and cannot be enforced against third parties. So in this case the third party has a valid title against the company, even if the CEO acted beyond his power. The consequences are that the

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court need to prove somehow whether the agent was aware of the illegal nature of the action he was performing upon instructions of the principal. If the agent is totally innocent and he was not aware of the illegal nature of the actions that he was carrying out, most probably he will be excluded from the punishment. (in this case is the principal that usually try to show that the agent was aware of all the situation).
The boundaries of this obligation to perform in accordance with the instructions of the principal of course is not a license to commit illegal actions. But in most of the cases the agent is not exposed because he does things that appear under all circumstances legal actions. On the contrary if instructions are blatantly illegal as agent you are under the obligation to not accept to complete that action.]

2. Exercise due care and skill*:* [You should behave diligently]. This is a principle that covers any activities, so it is very ***variable*** and this is ok because it is impossible to apply it no matter what. You have to act diligently in a manner that is linked to your professional expertise and to what can be reasonably expected from you in those circumstances. It is the most variable, it depends on what you are asked to do, what is your expertise, the context in which you are operating.
[Due diligence that is expected from an agent based on a number of characteristics and features of the agents itself (expertise, background, education, characteristics of the task).]

3. Carry out the activity personally: in the absence of a clear authorization [cases in which the principal can authorize a delegation of a certain task to sub-agent (subagency)] when you are appointing an agent you are creating duty for the agent to carry out that activity personally, this is the standard not the opposite (for subagency you need authorization).

4. Account: when you scale up (aumentare) this duty you understand that the entire branch which is Financial statements and Accounting in general is a byproduct (sottoprdotto/conseguenza) of this duty.

Example (scale down): if you are a cashier in a shop, you have the duty to account for what you have paid or cash in during the day. There is a person who will account any activity that was carried out on behalf of the principal (commercial agent that enters into a number of contracts every week will need to report ex-post and account for the actions and transactions carried out on behalf of the principal. First of all because it is an instrument of monitoring and more important, the principal needs to know which contracts and which legal actions have been carried out on his behalf.

So it is normal to have the duty to account in order to inform ex-post the principal of the actions carried out and contracts in which he entered to.

5. Not to permit a conflict of interest to arise: [also practical application of the duty of loyalty]. One of the duties of an agent is to avoid the conflict of interest which is inherent in any agency because you are not exposed to the negative consequences of what you are doing so you might be induced or under the temptation to do something that is directly or indirectly beneficial to you. What do you do if you as agent end up in a conflict of interest and it was not expected? The agent needs to disclose and inform the principal and obtain instruction on how to carry out the activity (1).

6. No secret profit or misuse of confidential information (or business opportunities): important even in the absence of a confidentiality agreement. Whenever you are an agent there is an implicit duty of confidentiality → meaning that if you are in possession of that confidential information as an agent you cannot disclose it to others. For instance: a commercial agent knows the price list of his company and just this thing to be a commercial agent put him in the obligation to not misuse this confidential information for personal profit or for a competitor of that particular client.

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AUTHORITY OF AN AGENT

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- *If not* → ***ultra vires****:* this expression means beyond your powers. This means that the agent will directly face consequences (the performance of the agreement if the agent is in the position to perform or if he cannot (employment agreement) he faces the consequences in terms of damages and indemnification that I am exposed to pay). If you go beyond your powers you can face bad consequences for instance: in some cases you can be directly exposed to the obligation under the agreement meaning that if I committed to pay a certain amount of money and I did not have the authority to commit for that amount of money the other party can suit me and bring me to court and ask to pay (most dangerous one). There are some circumstances in which the principal cannot deny the transaction. For instance in a company if you are the CEO you have some authorities but to carry out certain transactions the rules say that for particular high value transactions you need to be authorized by the board of directors. Let us imagine that you do not comply with this and you enter into a transaction and sign this transaction with third party, then you have to face the direct consequences of the agreement. The third party say "wait a minute: I enter into a contract with the CEO and now because he violates some internal rules, I have a contract against an individual. This must be a joke because I (third party) is not protected at all because I will not be able to enforce this multimillion contract against an individual person."
  To solve this kind of problem and in order to protect third parties is important to say that the limitations to the authority of an agent are only valid inside the company and cannot be enforced against third parties. So in this case the third party has a valid title against the company, even if the CEO acted beyond his power. The consequences are that the company will have a claim against its CEO. But in one way or another the agent is always the potential exposed.
  Important: Ultra vires works both if you are not an agent but most of the times works if you are an agent but you go beyond your powers. So can works if you have no authorities but it is much more used in the context of an action carried out by an agent but he is going beyond his power.

- *Actual vs apparent authority:* linked to creation of agency by estoppel.

- *Warrant of authority by the agent, if untrue third parties can sue the agent:* the warrant of authority is a representation made, even orally or in written in the contract, on the fact that the individual is representing that he is and agent. He is guaranteeing the fact that he has the power to act on behalf of the principal. It is common practice also to ask for it. What is the consequence of this warrant of authority? That is it is untrue third parties can sue the agent (consequence of ultra vires: third party can directly suit the agent).

RIGHTS OF THE AGENT (OR OBLIGATIONS OF THE PRINCIPAL TOWARDS THE AGENT)

1. ***Claim remuneration:*** any agency in the absence of a different arrangement between the principal and the agent is triggered as a charge obligation.

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4. ***Payments by means of an agent:*** sometimes agents are used as a vehicle for making payments or collecting payments.
   - If a ***Payment*** is made ***by third party to the agent*** and then he has the obligation ***to pass on to the principal:*** so in this situation you are using the agent to collect an amount of money from third parties. The third party is released from his obligation when he hands out the payment to the agent. What happens if the agent does not pass the money to the principal? This is not a third-party business like when I pay to a cashier, in this case the contract is fully perform. The only exception is when you know, as a third party, that the agent does not have the power to collect the payment.
   - ***Payment by the principal to the agent to pass on to the third party:*** when the principal is using the agent to make a payment. In the case in which the principal gives the money to the agent and he "runs away", the principal is not released from the obligation because the third party will claim his right to receive the payment.

   The risk of an inappropriate behavior of the agent is upon the principal in both cases.

TERMINATION OF AGENCY

1. ***Mutual agreement:*** the agency can or cannot be consequential or embedded into another existent contractual relationship, if that is the case and other contractual agreement is terminated automatically also the agency is over. Sometimes there is the termination of the agency agreement but the rest of the contract will still remain in place.
2. ***Unilateral action of one of the parties:*** revocation by the principal or resign by the agent.
3. ***Irrevocable agreements (authority coupled with an interest):*** there are cases in which the agency is irrevocable when the authority to bind the principal coupled with an interest. Cases in which for instance I cannot be fired as an agent and so the agency cannot be revoked unilaterally by the principal. For instance imagine that you are obtaining a financing from a banking and you are giving as a security a pledge of certain shares, meaning that you are giving that shares as a security for the payment of the obligation. Coupled with this pledge there is an appointment from the bank as an agent to sell those shares on my behalf if I default on the finance so the bank is appointed as an agent that will be authorized on occurrence of certain event to sell the pledge shares to third parties to get the money. So means that the agent has an interest in completing the transaction.
4. ***Termination by operation of law (e.g., frustration/force majeure, death/insanity, bankruptcy):*** automatic consequence upon occurrence of certain event. ***Frustration*** → supervening impossibility; something becomes frustrated because is becoming not feasible anymore. Relationship with ***force majeure*** → asset destroyed etc.

Business organization

INTRODUCTION OF BUSINESS ORGANIZATION

Business organizations: are legal ***form*** through which a certain business activity is carried out. Not to be confused with managerial organization of a business.

Legal forms for carrying out a business:

- ***Individual enterprise****:* if I am running a business, I can carry out that activity as a *sole entrepreneur (aka sole trader).* Does it mean that involve just one person? Not necessarily. A sole entrepreneur can hire employees. So what distinguish this organization from others is that the one that is exposed to the entrepreneurial risk and potentially keeping profit for

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The relationship among partners (2 or more) *is contractual in nature: the partnership is, by all means, a* ***contract*** *among parties who wish to carry out a business collectively.* So contractual parties are bound to the obligations and rights of partnership agreement → what distinguish a partnership from a corporation is that partnership is only a contract. [With limited liability corporations the contract is the starting point but once you are establishing the corporation, the corporation is something different from you. It is a separate legal entity, artificially created by operation of law and from that moment on there are 2 different legal entities (1 is a natural person an individual and the other is an artificial legal entity).]

Parties of a partnership contract have a common goal, consideration = something of value in return of what you do. In this context something of value is “you are wishing to carry out a business (with a view to a profit) collectively”.

Subject matter for partnership: run a business in common

There are 3 types of partnerships:

- ***Standard (or general)*** *partnerships (società in nome collettivo o società semplice): key feature is that all members are liable to the full extent of their personal wealth for the debts of the business* → in other ways they have the same type of exposure that a sole entrepreneur would have. Each and all members of a general partnership do not benefit of any type of limitation to their liability. For instance, if there is a creditor that owns a receivable with the partnership each partner is **entirely** responsible for the debts of the business. So since it is a contract the third party does not care and could ask you to pay the full amount of the debt. Maybe then you can have a claim against your partner.
  De-facto partnership (acting and implying the existence of a relationship) are treated like standard partnerships (no distinction between partners)

- ***Limited*** *partnerships (società in accomandita semplice, s.a.s.): existence of two categories of partners (limited partners vs general partners)* → **general partners** are unlimitedly liable (same situation of ordinary partners in standard partnership, power to decide the strategy of the enterprise, management and decision); **limited partners** are partners that enjoys limited liability = you are only liable to the extent of your investment and they are treated as silent partners vis-à-vis third parties (out of the management and of decisions; internally they might be involved in discussion). But in order to enjoy this benefit of limited liability what are you giving up? You are giving up the possibility to manage, are only passive investors (financial investment). And if the limited partner breaches this even only on one occasion and decides to manage, he will lose for all debts the benefit of limited liability.

  Question: Since everyone is a limited partner, who manage the partnership? LP are treated as a sort of scale down corporations. Since it is a partnership only partners can manage it. Since limited partners are the only category of partner existing, exceptionally only them can manage the partnership. They are not very spread because usually instead of LP they use LC.

- ***Limited liability*** *partnerships (not in all jurisdictions, no Europe) [material]* → it is a bridge between partnerships and corporations (limited liability company). So in certain jurisdictions it is possible to create partnerships in which all partners, including general partners, enjoy limited liability so like all partners are limited partners and they are authorized to manage and act on behalf of the limited partnership (LP). So the difference is that here a legal entity is not founded. What do you give up choosing this type of business organization? Much more disclosure.

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- *Not actively involved in the business (statutorily prevented from doing that, otherwise he/she loses the benefit of limited liability)*

LEGAL STATUS AND FORMATION

Contractual Relationship: relationship that exist between partners *vs* ***Legal Personality*** → it is not a full fledge legal entity, the partnership can be a party to a contract. Legally speaking partnership can enter into relationships with third parties, but it is not treated as a separated legal entity.

Formation of a partnership:

- *Partnership agreement (usually but not necessarily in writing.* There are also expressed partnership agreements orally*) – aka <<Articles of Partnership>>*

- *De facto partnerships:* evolution of a spare time activity into a business.

- *Alteration of partnership agreement (**unanimity principle** → remember as it differs from corporations):* How do you change terms of a partnership agreement? Since a partnership agreement is a contract, you apply in the absence of special arrangement the principle of unanimity. Because we know that to change a contract, we need the approval of the contractual party. You cannot change it unilaterally, there are just a few cases. For instance with banking regulation.
  Sometimes in partnerships this rule is changed otherwise you are granting ***VETO right*** which means → prohibit a certain activity to be carried out through your dissent. And with the principle of unanimity each partner has a VETO right.

TYPICAL CONTENTS OF A PARTNERSHIP AGREEMENT

- ***Nature of the business.***
- ***Name of the firm (important limitations)***: under which name this partnership will operate in the market. For instance, a limitation in some jurisdiction is that you have to put at least the name of one general partner, or you cannot insert the name of a limited partner.
- ***Contribution made (or to be made by partners)****:* commitment to contribute, injection of equity capital.
- ***Methods of determination and sharing of profits and losses****:* this not necessarily needs to mirror contribution, depends on the partners. There are cases of non-proportional participation to profits and losses → non-proportional to the amount of your contribution. What is equal is your participation to profit and your participation to losses.

[There is a relationship between 3 and 4: in the absence of any specifical arrangement the contributions are assumed to be equal among partners. And there is also the assumption that profits and losses will be shared equally.]

- ***Internal organization (usually rather simple)****:* no particular formalities.
- ***Term/Dissolution****:* in certain jurisdiction the fact that you are setting a term or even if you are treating the partnership as an open-ended enterprise (meaning that there is an indefinite period of time → in most jurisdiction in this case you are having the most fragile relationship with your partner because partnership law grants the right to withdraw to each party.) Best way to create a bond instead is to fix a term → there is a commitment of the parties in the absence of changes to remain there, unless you find someone that can replace.
- ***Arbitration/Jurisdiction****:* how you solve potential disputes among partners, inside the organization. So it does not involve any litigation with third parties, they are not automatically subjected to what is written in arbitration/jurisdiction. It is the choice of law which means under which law that partnership is established.

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- ***Duty to account:*** important for partnerships to inform everyone because all general partners are entitled to have the general representation power, so the power to enter into transaction on behalf of the partnership and also not all the transactions require a previous authorization. Also because all the other fellow partners are responsible whether limitedly or unlimitedly for the debts of the partnership.
- ***Duty not to compete:*** there is a presumption unless specifically authorized by the fellow partners, that each partner is not carrying out directly or indirectly a competitive business. For instance if you are a shareholder in a corporation and you invest money in FCA are you committing yourself to buy a Volkswagen share? Not really, you can diversify your portfolio and buy whatever you wish.

Instead, partnerships do not work that way. You are a partner precisely because you are committing to the success of it and so there is a presumption and therefore a duty not to compete for the personal relationship that exist among partners. It is possible to exclude this duty. Sometimes this duty is extended also to limited partners sometimes only to general partners.

RIGHTS OF PARTNERS

Each duty can be turned into rights.

- ***To share equally capital and profits of the business (or, more precisely, proportionally with their contributions):*** when we say equally is because it is the default standard rights in the absence of a specific arrangement -> so partnerships are presumed to be shared equally profits and losses. Then in the partnership agreement they could regulate this in a different way -> proportional or non-proportional to the contributions.

What do we mean with capital? What happens if there is money in the bank account of the partnership or property or asset belonging to the partnership and there is a **liquidation** of the partnership or a **distribution**? You are referring to whatever is owned and property of the partnership which is then given back to the partner. So how to allocate whatever is left among partners? Either equally if there is no particular decision or in accordance with participation to profit and losses.

Important: you do not have the right to be reimbursed to what you originally contributed. Maybe I contributed a trademark that originally was worth 0. Then this trademark worth millions and in this case, I do not have the right to have that trademark back, I will have the right to get the value of that trademark proportionally with the participation to profits and losses. The trademark will be considered as something of the partnership, not yours anymore.

- ***To be indemnified for any liability incurred in the course of the business:*** this is often a misconception because people tend it to read it as a form of safeguard that allows partners to act and be indemnified as an agent is indemnified by the principal. And it is like that: you are acting as an agent but *at the same time you are also principal* so you will also suffer the negative consequences of what you have done proportionally to your participation to profit and losses.
- ***To take part in the management (not for limited partners):*** this is not an obligation. There are some partners that even if they have the right to take part in the management, they do not exercise that one. Remember: managers of a partnership can only be chosen among partners. You cannot leave the management to third parties.

Limited partners instead have a prohibition to carry out a managerial activity and the sanction in case of the breach of this condition is the losses of limited liability.

- ***To access firm's books:*** books are not comparable with the ones prepared by corporations. However there is an obligation to keep the books and to keep an account for the activities carried out by the partners. You have to give the instruments to each partner, including limited partners, to see what is going on. Different for corporations.

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simply to pay creditors; then you also have the right to get what is left, based on the percentage of your participation, after full satisfaction of third parties creditors -> because the growth of the partnership will not only generate a flow of profits (do not say dividends with partnership because partnerships cannot issue securities).]

RELATIONSHIP AMONG PARTNERS AND WITH THIRD PARTIES

- ***Authority of partners to bind the firm:*** there is a presumption that each partner (general partners), other than limited partners, is presumed to have implied authority (right to create obligations upon the principal). Related to seconds and third bullets.

- ***Each partner other than limited partners is presumed to have implied authority.***

- ***Limitations in the partnership agreement, are they effective?*** Partnership agreement is not public, so all partners are presumed to have implied authority so among partners this limitation will work but vis-à-vis third parties these limitations are not effective. So limitations in the partnership agreement are effective among partners but they are not effective with (good faith) third parties.

- ***Liability for debts and contracts / Liability for torts: joints and several liability:*** all kind of liabilities upon the partnership are regulated with the principle of joint and several liability which means that each third-party creditor, in respective of his receivable, has the right or obtain the full payment by the partnership if the partnership has the money. In the absence of a performance and complete satisfaction, third-party can ask the full amount to each individual partner in respective to participation to profits and losses. Once more is a principle that is intended to protect third parties.

- ***Liability of incoming and outgoing partners:*** it is a particular situation especially when there is a transfer. Transfer of participation is possible but not so common as in corporations. "I obtain the green light from the fellow partners (since we know that one partner can prevent the admission of a new partner that substitutes another one)". But in those cases what happens to the liability since we have (as always) protect third parties?

  When are you stepping in a partnership are you liable for what happens from this moment onwards or also liable for past obligations of the partnership? -> ***Incoming partners*** are liable for whatever the partnership will do starting from the day after I enter into the partnership.
  ****Important:*** this is not the same in many jurisdictions: particularly in many jurisdictions especially *civil law system*, the liability of incoming partners is different. When you are stepping in a partnership you are also liable for the debts existing at the time of your entrance provided that those debts were resulting from the partnership's account. This is a further protection for third parties since they have the liability of outgoing partner and also the liability of the incoming partner (two liable people).
  So what is the benefit for him to join the partnership? Simply because we are optimistic and he expects this partnership growing overtime, and the value of the participation in the partnership (so what is in the box) appears to be already a good thing, something that the incoming partner can rely upon.

  Same thing on the other way around if you are an outgoing partner, should you entirely forget about what is going on in the partnership or are you still liable? -> ***Outgoing partners*** are still liable for the debts of the partnership that exist at the time of their participation. [Opposite of corporations] Unless you get release by third party creditors. When there is an outgoing partner is not necessarily that there is someone who release him and even in those cases you remain liable for any debt that existed at the time of your exit.

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there is a right to withdrawal when partnership is open ended with a prior notice (reason for which open ended partnerships are not so many). This is different from selling the participation: in this case someone is stepping in. Withdrawal complicated for partnerships -> resources are getting out of the business.
-***Exclusion (automatic or voluntary):*** sanction in case of breach of contract. First of all there might be a material breach. For instance: non-compete duty, violation of fiduciary duty, the partner is not paying is commitment. The breaching party can challenge this decision because he still has the money to be liquidated in accordance with the same criteria applicable in withdrawal or death. One of the cases in which you do not apply principle of unanimity.
If they are specified in the partnership agreement we can find: Bad leaver: regulation maybe with a form of disincentive or Good leaver. Otherwise you will have mutual treatment -> right to be reimbursed. Then the partners can ask you damages.

- ***Voluntary:*** is the case in which there is a decision made by the partnership.
- ***Automatic exclusion:*** there are certain criminal sanctions that are automatically causing exclusion of a partner, bankruptcy of the partner since we know a partner can run his business. Because if creditors go to him and he has no money to give to the creditors but there are moneys in the "box" of the partnership. In this way, if I am automatically excluded means that I will immediately have a receivable from the partnership, reimbursement of the value of the participation, which is an asset that my creditors are entitled to rely upon.

Question done by the professor: How do you calculate majority? In corporation we do not consider the single individual but the number of shares he owns (shareholder). Usually 1 share = 1 vote.
In partnerships, the principle is unanimity so in the best-case scenario you do not have the problem to decide the criteria to use. As soon as you introduce the concept of majority in partnerships, partners have to ask how to calculate the majority → using head count or percentage to *participation to profits and losses*. In most cases, the latter is the one that is used.

Corporations

This terminology that we are going to use change a lot depending on the jurisdiction. In the material English version plus a US reading about Corporate Law.

- ***Corporations →*** the word corporation is more used in US law**.** Analog of corporations *(aka joint-stock companies, **S.p.A.**, S.A., AG, Inc. (Incorporated used in US)).*

What is important is that only corporations can be *listed on the stock exchange*, so they are *Public* companies and they issue securities***.*** On the contrary you can have several corporations which maintains this concept of joint-stock companies but they are *not listed* and those are called *Private* companies.

Public companies: not related with somehow there is the intervention Government. With public companies we simply refer to companies that are listed on the stock exchange, so this means that they are open to the market, to the public. There are some pros and cons: for instance they have to make some intensive disclosures (cons), they have the privilege to attract capital from a vast number of investors -> the market in general so whoever wants to buy their shares (pros).

Private companies: they are simply not listed on the stock exchange, so they are not opened to the market so they simply remain private. But this does not change the essence, you remain a

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EFFECTS OF INCORPORATION (SEPARATE LEGAL PERSONALITY)

- ***Limited Liability:*** for all shareholders. This means that since the corporation is a separate legal entity it is liable towards creditors for its all debts with its own assets. The corporation cannot rely on anything or anyone else.
  From the perspective of the shareholders there is a benefit of limited liability for everyone because you will choose how much you want to invest in a corporation, how many shares you will be subscribing upon issuance, how many shares buying on a stock exchange if it is listed. And as long as these shares have been entirely contributed meaning that I have paid in full what I committed to (concept of *contribution in the share capital*).
  So when there is an *issuance of shares* the corporation will get in return the contributions, the money or the assets that the shareholder will contribute to the corporation. Instead the shareholder, from the money that he is investing in the corporation will get in return a share certificate (some with papers others not) which means a participation to the company so a number of shares which will give you the status of residual claimant. So you will hold an equity investment and you will get a return, dividends etc. what is important to highlight is that nobody will ask you more because you fully complied with your obligation of contribution (of course this happens when there is a full payment of the contribution). When companies issue new shares, shareholders are not obliged to subscribe for new shares (to follow the issuing) because they have already contributed, and no one can force you to contribute more (concept of limited liability). Worst case scenario: they collapse and worth 0 which means that you as shareholder will lose your investment.

- ***Perpetual Succession:*** ability of corporations to outlive shareholders. Shareholders can extend the duration of a corporation so a corporation can be perpetual, and succession means that whatever will happen (shareholders sell the shares, die, merge of shareholders) the corporation stands. The consequence is that the corporation will continue as perpetual succession in respective of the events affecting shareholders.

- ***Business property is owned by the company:*** the property belongs to its owner and since its owner is the corporation (no matter who are shareholders), it belongs to the corporation. This does not mean that you cannot grant a certain right as a license to the corporation. For instance Patent Assignment Agreement.

- ***Full contract capacity in its own right:*** also in partnerships it is possible but in someway there are always partners behind that are taking all the responsibilities.
  [Question: there is a contract between Partnership A and third parties -> Who are the contractual parties? Correct legal answer: the party is the partnership. But this have consequences on the partners since general partners are unlimitedly liable for business debts. So even if you are granting possibility to partnership to enter into a contract you are not in the same situation of corporation]. For corporations, the full contractual capacity is upon the corporation itself, there is no implied liability for the shareholders they are a separate legal person. So the corporation is the full fledge party into a contract so is the only entity liable obligations deriving from that contract.

- ***Liability in crime (and tort):*** most clear evidence that the system treats them as separate legal entities is that they can be criminally liable. So you can sanction for a crime a legal entity even if sounds strange, because to be criminally liable it might appear clear that you need a guilty individual, but this can happen properly because it is an effect of incorporation. If a crime is done through a corporate decision and the corporation was

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TYPES OF CORPORATIONS

1. ***Limited vs unlimited (the latter very rare):*** unlimited are the once that do not want to have for all shareholders the limited liability benefit (exclusion of one or more) but they are very rare. Limited instead grant the limited liability benefit to everyone.
2. ***Private vs public companies (aka close corporations vs public corporations) – going public not available for LLCs:*** vedi prima. Remember not permanent decision.
3. ***Parent companies vs subsidiaries (within groups of companies):*** with group of companies you need to identify that there is a relationship between corporations for instance one corporation holds the absolute majority (50+1 %) share capital of another or even if it is not the absolute majority but relative majority -> it is a number of shares (30% and rest of 70% multitude of tiny shareholders) that allows the company above to control the decisions of the company below by holding the shares. (Shareholders not always natural person). There are also cases of joint control among shareholders to exercise jointly a dominant interest. Subsidiaries (below) are companies control by the parent -> so to distinguish them we have to identify the relation of control. Shareholders of parent companies can benefit from the profit of subsidiaries.
4. ***By size (small, medium, large):*** on most jurisdictions the size does not change the type of companies. LLCs small/medium size enterprises and in certain countries they have a maximum number of investors, but in Italy is not like that. On what we analyze the size of the corporation? On debts, market cap, n of shareholders, revenues, employees all of that are things to analyze and according to these features there are different rules.
5. ***Domestic vs foreign companies:*** companies can operate also abroad, in foreign branches so they are qualified as foreign companies. So in the same country there will be coexistence of domestic and foreign entities established under foreign law. They can have the main operation in a foreign country and other operations in another country. (question mark where you pay taxes)

4/05/22

FORMATION OF THE COMPANY

The formation of corporation is a little bit more complex than the formation of partnerships. They are not only contracts, but they also cannot be established with an implied manner (so there are not tacit or de facto corporations). What we are going to say is both for corporations and LLCs.

There are different steps: the first step is a contract. How do you treat that initial contract (certificate of incorporation)? We need:

- *Memorandum of Association (aka for US charter of incorporation):* document (done once when the company got incorporated) through which one or more founders are agreeing of starting and establishing a corporation → remains identical over time, tells you when the corporation was established, reports the date when the corporation was created. In the beginning the 2 documents are symmetrical and will report the same info (like the name of the corporation)
- *Articles of Association (aka bylaws)* → regulate internal function of corporation, it can evolve, adapting to the needs and changes of the corporation. how the corporation is organized, it changes over time. They are relatively simple documents, the larger the corporation the simpler the bylaws, there are references to internal procedures.

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(bank know maybe the market not) for complexity of the structure or for lack of updating information. You have to disclose only if you have an important part (even 5%). If you want to know who the shareholders are you can ask for a commitment also by the controlling shareholders during the negotiation.

- ***The registered office clause*** also known as corporate seek (o seat) → not necessarily the headquarter. the official seat of the corporation, not necessarily the actual offices of the corporation must be there, e.g., the corporation can have the registered office in the Cayman Island but operate in another State. You are free to establish your corporation in the European territory, the laws applied to your corporation will be the ones in the registered office's country. You can change the registered office but keep your headquarters where they are. (see about taxes)

  1. Any official legal document like the ***notification of a claim*** or the tax authority that notifies the start of an investigation and stuff like that are notified to the registered office.
  2. Then based on the registered office you will know where the ***company's register*** is when you need to register. Depending on the jurisdiction the company's register has certain competencies.
  3. Moreover the ***court in case of dispute among shareholders*** will be determined by your choice of corporate seek. For a litigation inside the corporation maybe between shareholders and directors, or between shareholders etc. in this case they have to start a litigation in the court that has legal competencies of the registered office.
  4. The registered office triggers the ***application of corporate law*** of the country so how corporation functions. → example of Campari that ask for the simple change of the corporate seek and moves to Italy to Netherlands. It triggered the application of an entirely different corporate law. [corporate law → registered office; criminal law → country where you are operating]

  What matters is where the company is incorporated in respective of where you are operating. You can choose your favorite corporate law (registered office) in respective of where you are operating.

  Security regulation → is the law applicable to stock exchanges are related to corporate law but they are different. One of the exceptions of the clear-cut application of corporate law based on the registered office clause is security regulation. Because it will be determined on where the shares are listed (traded in the stock exchange of that state). So law applicable to the corporation will remain the one of the countries (functioning of the board of directors, shareholders meeting) but securities regulation (how I have to disclose, function of the trading of the shares, right of minority in terms of information) all rules applicable in the state you are trading.

- ***The objects clause (corporate purpose):*** identify the range of activities that the company can perform and it is important for a number of reasons.

  Managers must stick to the corporate purpose and also it is a way to attract capital (people invest in that thing) and usually if it is too broad people are skeptical in investing in that company.

- ***The limited liability clause:*** the company is liable with its own assets so that shareholders internally are limitedly liable to the amount of the contribution that they have promised.

- ***The authorized share capital:*** maximum number of share that the corporation is authorized to issue, not necessarily the ones that have actually been issued (that is called the issued share capital). Issued and authorized can be equal but it is not a requirement. The issued share capital cannot be greater than the authorized share capital, it can however be smaller. Different from current share capital. It is the maximum number of

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wants to make sure that when he is selling participation, he also has the right to force minority to sell the shares.

- ***Rights attached to shares:*** are 2 families: ***economic and administrative rights*** → the right to divided, the right to obtain extraordinary distribution of resources, the right to obtain as a residual claimant to get a percentage of the liquidation. Generally they are not listed in the bylaws because are applied with default rules in the civil code or other status. However if you want to put some specifics rights attached to all shares or to a class of shares you will have to identify which rights are attached to which class of shares. Then there are ***voice rights***: the rights to express your opinion. Most typical: right to vote the shareholders which is attached to the shares but you have to see how it is regulated in the bylaws because not necessarily all classes of shares will be granting the same voting rights. Sometimes there are no voting rights. If nothing is written each shares have the same voting right.
- ***Rules on shareholders meetings:*** EGM → extraordinary (equityholder) general meeting and AGM → annual (ordinary) general meeting (opposite of EGM) → takes place every year for the approval of the financials and mean while other things like the approval of the directors but they are not appointed every year, usually every 3 years in IT.
- ***Appointment and powers of directors***
- ***Internal monitoring system (dopo) →*** internal system that the corporation has to check compliance with law and functioning of the operations with particular focus on the board of directors.
- ***Majorities / Supermajorities (alteration of articles/bylaws):*** majorities or supermajorities required for some certain resolution both at ***board level*** (meaning the body in charged of the management) and more general at a shareholder level.
  - ***Majorities:*** for the approval of the board, financials etc.
  - ***Supermajorities:*** with an increase of the percentages for other important and strategic resolution that have long and higher impact in the corporation. For instance amendments of the bylaws, capital increase, decrease to dissolve the corporation (absolute decision).

SHARE CAPITAL

Different features of the share capital:

- ***Minimum share capital (only in certain jurisdictions and only for certain types of companies):*** LLCs general have significantly lower minimum share capital (if any, we said sometimes 1 pound that is like not having it). However there are certain companies that require them minimum share capital in most jurisdiction. For running certain business there are specific rules depending on the type of activities carried out by the corporation. For instance to run a bank or an insurance business you need to satisfy much higher minimum capital required by banking regulation (so not only a rule coming from the civil code).
- ***Share capital: FIRST WAY TO DESCRIBE IT (WHAT IS COMING IN) → aggregate amount of all contributions by shareholders in cash (amount of money) or in kind (everything that is not cash → assets, patents, trademarks) →*** way through which enterprises are financing themselves through equity investment made by investors (different investors). It is the ***riskier*** type of capital since they are subjected to entrepreneurial risk. On the other hand is more stable for the corporation since it is better than having a lot of debts so being a borrower is more complicated than gathered equity capital. But it is not easy to find investors that are willing to put risk capital as contribution in the enterprise. We have to find people that believe in the values of the corporation. But

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Of course you issue shares, but you have to find investors that are willing to subscribe those shares and you have also to set the subscription price.
It is specified in the bylaws because changes overtime.
Issued (=outstanding) : portion of the authorized share capital and you have commitment by investors to contribute to subscription price. It represents the current status of the corporation. Important: shares can only be issued when they are subscribed otherwise is an offer. If I do not find someone who is subscribing the shares that I am willing to issue I cannot complete the issuance. So to issue shares you need to find subscribers.
Paid-up (or Paid-in) Capital: (not so common for listed companies but happens in private company) capital that is really turned into money for the corporation from investors, so it is the amount of money paid by the shareholders for the subscription of shares. As we said is not necessarily 100% of the amount commitment. So the corporation can have in the bank only a portion of the amount promised by the subscribing shareholders.
The company (i.e. board of directors) can ask for the rest of the contribution at any time.

Accounting point of view: you have money in the balance sheet only for the amount of paid-up capital and for the rest you will have a receivable vis-à-vis your shareholders.

Question: Does paid-up capital also include capital paid in kind or just money? Also payment in kind with an important difference. With the payment in kind under almost all jurisdictions you cannot paid-up only a portion. For instance if I have promised to contribute a certain quantity of goods (kind) I cannot contribute only a percentage of them. So if you contribute with kind you need to immediately satisfy and perform your commitment.

Risk of ***DILUTION*** is the risk that affect shareholders and occur any time there is the issuance of new shares. You hold 30 shares of a company and this company has 100 shares issued (I have 30% of share capital). If this company has an authorized share capital of 200 if the company will issue all the authorized share capital my position which will be always 30 shares will be diluted from 30% to 15%.

Clarification: The company issue shares and then investors subscribe to the shares → primary market. While sale and purchase are more for shares that already exist in the secondary market → exchanges among shareholders.
Par value = valore nominale ; Subscription price can be higher than the par value (market have this value at a premium) → paid – in capital. Differenza tra valore nominale e di emission → riserva.

TYPES/CLASSES OF SHARES

There is not a better class than another, it depends on the circumstances.

- ***Ordinary shares:*** 1 share 1 vote and equal administrative and economic rights

- ***Multiple Voting Shares (including Loyalty Shares →*** when the multiplication of the vote occurs for the passage of time***):*** in some jurisdictions not so popular. You have multiple votes per each share you hold. The multiple votes can be absolute, sometimes is for certain resolution, sometimes only upon certain conditions your vote gets multiplied. ***Loyalty Shares:*** You are reward shareholders for their loyalty, for remaining in the company for a number of years and they get multiplier of the votes. You can see if they are multiple voting shares in the bylaws.

  If I sell my multiple voting shares the answer to “do they maintain the multiple vote?” is it depends because for example if I “gained” this multiple voting shares because of loyalty once I sold them everything will start from the beginning.

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corporation, the existing shareholders and creditors)

- ***Pre-emptive rights (of subscription) of shareholders:*** important! not in all jurisdictions but in most jurisdictions, companies are granting this statutory pre-emptive right of shareholders. It is a way to avoid dilution → newly issued shares unless this preemption right is excluded need to offer first to exist shareholders. It is a feature that is not founded in all corporate laws but only some. If it is good or bad for the corporation it depends, sometimes it is good to go for new investors.

- ***Issuance at a discount*** (subscription price is lower than the market price and is usually done by companies in trouble, bad for shareholders. Surely, these has a chain of effects, and the entire market will adjust to the bad financial scenario of a company.) ***or at a premium*** (subscription price that is higher than the face value/par value. As a capital reserve, the share premium account certainly cannot be used to finance dividend payments)

- ***Bonus shares (transfer of reserves to share capital):*** when shares are issued for free at existing shareholders in reality is a way for the company to look like they are remunerating shareholders. But in reality, what is done is that the company is transfer reserves into capital. So is not that you are issuing shares without contribution but in the balance sheet reserves are turned into capital which means good news for the corporation because it means that it will have a stronger capital but "eating" something from reserves that you could have distributed as dividends to shareholders.

CAPITAL MAINTENANCE

Rules on how you maintain the share capital.

The law insists on companies receiving the full capital value for the shares they issue, but once the capital has been received by the company, there are equally important rules controlling what can be done, especially what cannot be done, with it. These are all situation to avoid directors affecting the share capital, and in all jurisdictions, there are rules to make sure that capital is protected.

- ***Capital can also increase***

- ***Capital Reduction:*** The nominal value of the share capital is fixed, even if market change (up or down) the market value ofshares, but the number of share and their nominal value is not changed.
  - ***Voluntary→*** not very common***.*** You have no losses and decides to reduce the capital and return contributions to shareholders*.* Creditors tend to oppose to voluntary capital reductions and they generally have the right to do so. This implies a real reimbursement for shareholders, and a huge loss for creditors, that could go against this action. That's why needs protection. Voluntary reduction could be maid paying off any already paid up share capital that is in excess of the company's requirement.
  - ***Mandatory in case of losses→*** when the net assets go below the share capital. So it is reduced to give a right representation of your status, to match the reality. Then you can increase the capital again issuing new shares and ask for new contribution*.)* Nothing to oppose since the money is already gone. **reduction** are only nominal, there are no reimbursement for shareholders. The capital is already burn and capital and reserves have been wiped out. What a company is doing is just an adjustment of the nominal share capital to the new one given by losses. If huge losses occur internally, then a company could be forced to reduce its share

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- ***Distributions and dividends:***
  - ***Only to be paid out of distributable profits or reserves*** → *they may come only either from annual profit, or from reserves of previous years. It is a* way of avoiding that the capital is returned to the shareholders. Because the equity capital should be stable and should remain within the company. You can only distribute the excess: profits and reserves.
  - ***Not to be paid out of capital*** (said in the arrow before) → nothing can comes from the share capital; it must be untouched.

Public companies are subject to the additional controls and limits. In general, net assets at the time of distribution must exceed the total of called up capital plus un-distributable reserves, and the distribution cannot decrease the value of net asset.

- ***Purchase of own shares / aka treasury stocks (buyback): purposes and restrictions →*** company for a number of reasons is authorized to buy its own shares. Treasury stocks is not a class of shares. Company asks the authorization to shareholders to go on the market and buyback certain shares. There are restrictions in which shares can be bought back and which money can be used to buy them. It is only possible by using these excess distributable profits or reserves otherwise it would be a return of the capital.

  We talk mostly of treasury stocks, buyback from the market. To sustain the market, or to remunerate directors or managers with stocks. In terms of finance, you are spend money giving to shareholders (it seems like a capital reduction) but in reality, stocks repurchased turn back in the bag of the company and could also be reused, so able to generate future profit. There are even restriction: in some jurisdiction there could be a fixed amount of own shares kept in bag and actually most of jurisdictions do not allow to use free capital to rebuy them, but instead like the case of dividends. Just for private company the share capital could be used for the purchasing of own stocks.

LOAN CAPITAL (DEBTS)

Agreement with third parties that will lend money. The company is a borrower and this means that will generate a payable for the corporation.

It is a common practice for companies to borrow additional money to finance their operation. It is usual for the memorandum of association of companies to contain an express power allowing the company to borrow money but, in any event, such power is implied as incidental to the conduct of the business of any trading company. Two principal ways to obtain a loan, but in either case the lender is likely to require that security is given for the loan, in order to allow them to recover the value of the loan from the company if it defaults on its interest payments or its final repayment.

Notice that in either case, securities do not provide participation in the management and equity. It is just a relationship of creditor\debtor.

- ***Bonds*** (a loan agreement incorporated into a financial instrument (security))***/ Notes (=Bonds) (various types and limitation)*** Landing money to the corporation (bondholder) to receive them back plus periodically interests (with interest rates). These are different types of bonds. They do not grant rights to vote or receive dividends, simply bondholders are creditors. Some country can allow bondholders representative (called trustee) or a meeting of bondholder, but never involved inthe management of the company debtor. Bonds differ in some feature.

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The TRADITIONAL LATIN SYSTEM is the most popular and used construction IN ITALY.

THE SHAREHOLDERS' MEETING appoint : > BOARD OF DIRECTORS or SOLE DIRECTOR (only in PRIVATE COMPANY)
> BOARD OF STATUTORY AUDITORS → IN ITALY = COLLEGIO SINDACALE

↓

BE CAREFUL !! It is different from EXTERNAL AUDITOR !
This INTERNAL CONTROL BODY has to control what happens on the BOD, they have to control the COMPLIANCE OF LAW and in general the functioning of the company.
So they don't represent the company and they can't take strategic or economic decisions, they just have to control.

↓

They can be helped by EXTERNAL AUDITORS so they collaborate with these AUDITOR FIRMS for example the SECURITY & EXCHANGE COMMISSION to vigilate on the compliance of business law.

BSA does NOT partecipate ACTIVELY to the decisions making of the BOD so BSA is internal to the company but it is totally separated by the BOD.

Executives are chosen among directors. Any corporation has a bord of directors (not just one director) → the collegial decision-making process is better even if is more expensive and longer. Shareholders typically external to the actual operations of the business → separation of ownership and management, owners give the keys of the car to someone else, they delegate, generally those who own do not manage, but in small company it is possible to see the major shareholder sitting on the board of directors. In large public companies this does not happen, the ones who own the company do not manage it. In widely held companies a single shareholder does not a major portion of the corporation, so they do not have a high influence. In closely held companies very few shareholders have the quasi-entire ownership of the corporation. The more the company is widely held the more importance, control, and freedom upon the decision of the directors. The bigger you get the more investors will get diluted the more the ones who own the company will have no part in managing it. Presidents of the company not necessarily are executive chairmen; they could not necessarily be involved in the management of the company → being the company's president does not necessarily imply being CEO.

The lower the number of shareholders, the higher the possibility that those shareholders want to occupy position on the board of directors. This is especially true in limited liability companies → shareholders might be involved in the decision-making process.

Shareholders are appointing at the shareholders' meeting 2 bodies:

- ***BOARD OF DIRECTORS***. In close corporations and private companies is possible to appoint Sole Director but it is no possible for listed companies because there is the need of having an internal control system, so all listed (public) companies are managed by a board so by multiple directors. Little companies instead prefer to give everything to a single director so the shareholders' meeting will appoint only one individual that has the full responsibility to manage the corporation.
- ***BOARD OF STATUTORY AUDITORS***: (different from external auditors) they are appointed in the shareholders' meeting to control what happens in the Board of Directors. They have to monitor compliance with law of directors and in general they have a control of the functioning of a corporation. Not in charged of the management, they do not take strategic decision. They have much more specialized task that is monitor compliance with law -> internal watchdogs. They cooperate with the External Auditor, will collaborate also with the security and exchange commission (external control bodies: administrative agencies that are monitoring the functioning of listed companies).

EXTERNAL AUDITOR: External firm providing auditing services and will monitor an accurate, fair representation of the financial situation, but they are not internal to the corporation.

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So the shareholders have lower control over the management but they have control on the Supervisory Board. However there is an important aspect: the supervisory board can appoint and revoke the members of the management board. Means that management board is important that they behave well since the supervisory board has the role to monitor and they also have the power to fire them.

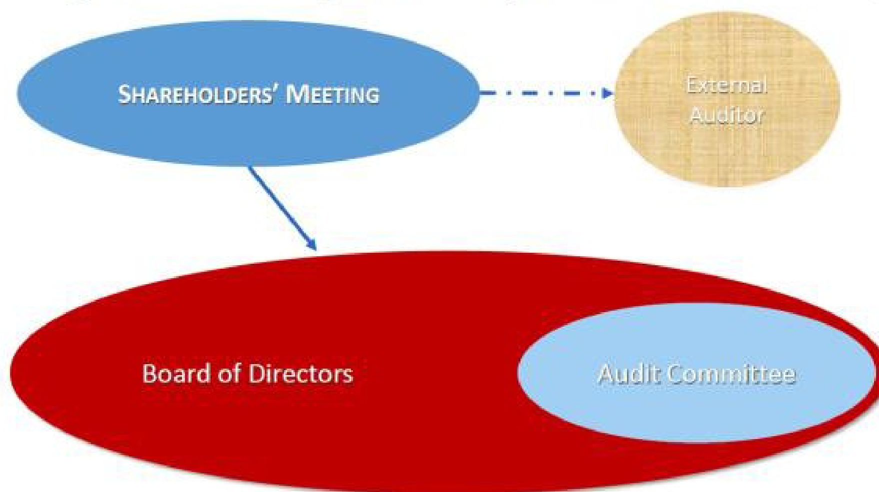
Here there is much more collegiality of the decisions since high level decisions are taken by the Supervisory Board while the management is in charge of the operations. CEO are less strong than in the other systems because they have to deal with the supervisory board. The supervisory board also have the power to approve the financials.

So this system removes a lot of powers from shareholders and gives additional power to the Supervisory Board. Shareholders select members of the Supervisory Board so they will select people that they trust and so in a certain way they are delegating power.

Supervisory Board make the approval of the financials.

The union said that they do not want to seat in the board because in some way you are part of the decisions taken and they thought they are much stronger if they are outsider the board. [Not so different form the traditional: where we have the statutory that has the task to control, to report things to shareholders and also to the court but they do not have the right, the power to remove the board of the members of director. Only the shareholders can do that. → this is quite fair since the board of directors have the task to act in the best interest of the corporation and to maximize shareholders' value.

SINGLE TIER SYSTEM (U.S./U.K.)



The most used all around the world, the simplest. Just one appointment of a corporate body. Even here,external auditors are treated in the same way.
So, here shareholders approve the financial statement and appoint the BoD , that become the center ofthe dynamics and the life of the company. Surely there is control and monitoring, but it is internal.
There are certain non-executive directors (cannot take decision), members of the board, that participateto the meeting, vote but whose role is to control and monitor.

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It is the BEST system in the world and its main advantage is its SEMPLICITY.

The shareholders during their meetings has to APPOINT ONLY ONE BODY => BOARD OF DIRECTORS

In single tier system the INTERNAL SUPERVISION AND CONTROL IS CARRIED OUT BY THE AUDIT COMMITTEE that is a part of the BOD. So there is a MORE DIRECT comunication and also control infact components of audit commitee are part of BOD and so they can see and vote directly regard to the actions of management of company. In this way they are MUCH MORE ABLE TO CONTROL directors' work from within and THEY CAN INFLUENCE THE DECISIONS

So it is very probably that there is a conflict of interest for components of Audit commitee and to avoid this risk are required multiple tasks to be part of it.
A feature required to be in audit committee is the INDIPENDENCY FROM THE CEO & THE SHAREHOLDERS
The members of Audit Commitee have to be OBJECTIVE but still they are part of the DECISION-MAKING PROCESS
So this is a very difficult role to do.
During SH's meeting, SH appoint the BOD and will be some of board members who satisfy INDIPENDENCE REQUIREMENT and the decision of appointing them to Audit Commitee depends on the jurisdiction. So is NOT the shareholders that decide ex-ante who among appointed directors will be sitting on Audit commitee but usually this selection is made during one of the firsts meetings of the BOD.
(→ CEO for example)
Directors can be EXECUTIVE or NOT-EXECUTIVE.
An EXECUTIVE DIRECTOR can NOT sit on Audit Commitee because they have to MONITOR what's going on and monitor their own actions would be meaningless.

In conclusion to be part of AUDIT COMMITEE the requirements are:
- TO BE PART OF BOD
- INDIPENDENCY REQUIRMENTS
- IS NOT GARANTED WITH THE EXECUTIVE POWER

Indipendency requirements can be various and they depend on the jurisdiction but the common concept is that they have as aim to garantee that you are really INDEPENDENT FROM THE CORPORATION AND SHAREHOLDERS to avoid any possible conflict of interests.
→ For example an EMPLOYEE can NOT be part of Audit Commitee

CORPORATION DIRECTORS

Directors are the most important figure of management in the company, needless the highest figure of agent. (Particular, in the daily work of a corporation, is the concept of shadow directors. This is a person who, although not actually appointed to the board, instructs the directors of a company as to how to act A person is not to be treated as a shadow director if the advice is given in a purely professional capacity).

One of the main distinctions between Corporations and Limited Liability Companies is the role of Directors:

- ***Corporations:*** *shareholders typically remain external to the actual operations of the business* -> they select external directors, so they are delegating the actual management of

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Role of the directors

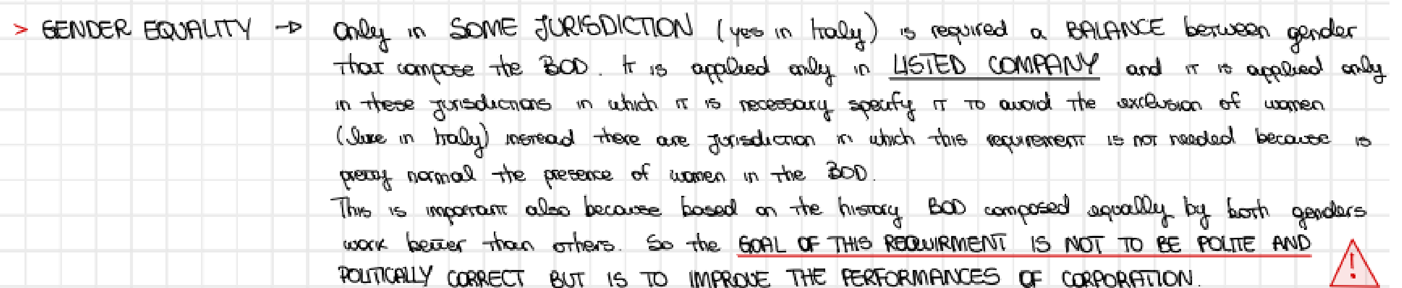
The **directors (agents)** (acting as a BoD) or sole directors are AGENTS of the **company (principal)**, not of the shareholders. → Fiduciary relationship with the company. So they should act in the interest of the corporation not in the interest of shareholders.

Directors' position

a) Appointment of a director: firstly, it can be direct or indirect by shareholders, depending in the type of governance system. Anyone can become a director of a company, there is not the requirement of certain educational qualification. Also, there is no requirement for a director to be a member of the company. However, the articles of some companies do require the directors to hold shares in them. Remember that, a public company must have at least two directors, whilst a private company can operate with only one director. Also, the very first director must be named in the articles or memorandum.

When appointing shareholders look at the gender quality (proportion of both genders in the boar), at minority representative or at the potential independent directors (important for certain role, especially for monitoring, acting with freedom, but not in line with the real interest, so they should be only a portion of directors).

(independent requirements, minority representatives → not in all jurisdictions. It means that a certain percentage of the seats around the table is taken from the list that receives the second or third number of votes. Requirement in some jurisdictions to make sure that there is the involvement of other shareholders like the minor shareholders*; gender equality:* not in all jurisdictions is required a fair balance between both genders. Should not be a prevailing gender that has more than 2/3 of the votes. This rule applies only in listed companies. In some countries there is not such need because it is absolutely normal that board of directors will be made of good balance between man and womens)


Appointment of directors (independent, minority representatives, gender equality)

To be appointed as director are needed some requirements based on the jurisdiction:

INDIPENDENCY REQUIREMENTS → We have already talken about it and they are different depending on the jurisdiction.

> MINORITY REPRESENTATIVES → It is a requirement only in some jurisdictions like in ITALY. It means that: when the BOD is appointed there is a LIST OF CANDIDATES and this list can be divided in multiple ranks based on the numbers of votes that each candidate receives from shareholders, with the concept of MINORITY REPRESENTATIVE at least two or three candidates of the lowest ranks have to be added to the BOD. This is a more DEMOCRATIC WAY to elect directors because in this way also minority shareholders have the possibility to choose someone that will be on the BOD. This principle IS APPLIED ONLY IN SOME JURISDICTIONS and ONLY IN LISTED COMPANIES instead in private companies the appointment is totally free.

> GENDER EQUALITY → Only in SOME JURISDICTION (yes in Italy) is required a BALANCE between gender that compose the BOD. It is applied only in LISTED COMPANY and it is applied only in these jurisdictions in which it is necessary specify it to avoid the exclusion of women (like in Italy) instead there are jurisdiction in which this requirement is not needed because is pretty normal the presence of women in the BOD.
This is important also because based on the history BOD composed equally by both genders work better than others. So the GOAL OF THIS REQUIRMENT IS NOT TO BE POLITE AND POLITICALLY CORRECT BUT IS TO IMPROVE THE PERFORMANCES OF CORPORATION.

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Removal of directors (with or without cause) → It is the END of the role of director and it can happen in any point in time. So none director has the garantee to be a director until the end of the appointement because shareholders can REMOVE HIM also before the end of the office.
It can succeed with or without justified causes.
If the removal is made WITHOUT JUSTIFIED REASONS ⇒ THE DIRECTOR WILL RECEIVE AN INDEMNIFICATION (⇒ it is the equivalent of damage claim in contract law) FOR THE REMUNERATION THAT HE SHOULD BE RECEIVING REMAINING IN THE OFFICE FOR THE ENTIRE TERM. In addition there can be other particular terms that are not regulated by the corporate law but by the employee agreement (⇒ contract between director and corporation)

Resignation → End of agency relationship made by the DIRECTOR who can decide to resigne from the office

Rotation → Is a way to garantee that nobody remains in the BOD for more than a certain number of year and the aim is also to have a moment in which the entire board is renewed because it is very important that there is like a TRANSICTION where there are MIXING OF "NEW BLOOD" AND "OLD BLOOD"
So usually every year a different PART (not all) is changed and in this way is made a sort of rotation.

Expiration → Normal expiration of the term

Disqualification → When the director LOSES ONE OF REQUIREMENTS to sit in the BOD. It can be the loosing of independency requirement or make a crime that doesn't allow you no more to work in the company or also healthy conditions that prevent the director to work (ex. mental illness) or also the death of director.

g) **Role and responsibilities of executive and non-executive directors:** executives are peak directors that can run decision and control other members (CEO ex). Take a decision means that they can act by their own, without the previous mutual consent of the other members (for example they can decide to buy a real estate for the company). So, they are allowed to do concrete things.

Moreover, they are not necessarily members of the board, but depends on the jurisdiction (but always at least the CEO, but for CIO is not mandatory to be a member of the group).

Non-executives are independent director, member of the auditory board or also even normal director not granted to delegate powers, have the responsibility to monitor and remove.

Both of these two type of directors have the continuous duty to monitor, oversee the management, and share information with CEO.

executive directors are those that have a certain operational delegation of ordinary power, executive power → they are running on a daily bases the operation of the business (managing directors = executive directors = CEO is the head of this executive structure) and of course they have different features like remuneration of the non-executive directors because they have a different engagement. Non-executive directors are still seated in the board, they participate to the decision, but they have no delegation of authority or power or responsibilities of the management.

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General power (and responsibility) to manage the company

When the shareholders appoint the directors they are giving the power and responsability to manage the company to EVERY DIRECTORS both CEOs and not executive directors.
Then in the BOD there is an internal allocation of power and duty among the components of the board and the remuneration of everyone will depend on this role and task.
So the RESPONSABILITY IS THE WHOLE BOARD OF DIRECTORS then there is an INTERNAL ALLOCATION OF MANAGERIAL POWER AMONG DIRECTORS.

So usually the SH appoint the total BOD and then the BOD elect the executive directors but in reality when SH appoint the BOD they are really managing who will be the executive based on their background.

Delegated powers to executive directors

Really the election of EXECUTIVE OFFICER is NOT MANDATORY and it is also possible carry out all activities collectively but usually it is very rare and it is made only in SMALL LLC.

Right (and duty) to be informed and act in an informed manner

Inform and be informed are duty and right of ALL component of BOD.
Infact if the executive does a disaster all directors have the responsability because they are failing the duty to monitor the actions of CEO.

In the BOD usually is elected also the figure of the PRESIDENT OF THE BOARD = THE CHAIRMAN that is different from the CEO.

DIRECTORS' LIABILITY

Directors are liable for damages to corporation but also to creditors, individual shareholders and third parties.

When this liability of directors' kicks in? When they are breaching their duties under law and bylaws. So they are not simply liable because the corporation is losing money.

Contrary to general agents, directors are liable for damages to corporation and also (in some jurisdictions) to creditors, individual shareholders and third parties.

Here applies the concept of "derivative lawsuit" = even if the claim for damages comes from shareholders it's the company itself to act as the plaintiff that goes against directors.

Common law did not place any great burden on directors in this regard. Damages could be recovered against directors for losses caused by their negligence, but the level of such negligence is high.

Notice that, in LLCs liability principles apply also to shareholders involved in the management.

Breach of their duties pursuant to law and bylaws.

There are two types of duties:

- ***Specific Duties:*** prescription → obligation that you have under the law like to prepare and draft financials, conveying the shareholders meeting once a year.

- ***General duties of an agent → All family of Fiduciary duties:***
  - ***Duty of care and skill***
  - ***Duty of loyalty***

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Also because the BOD HAS TO ACT IN THE INTEREST OF THE CORPORATION and not based on something said by controlling shareholders or in the interest of them !!
So if the BoD act under SH instructions without taking authonomously decisions, it could fall in trouble and in a conflict of interest because it is possible that following these instructions he will made interests of controlling SHs and not interest of the entire company.
DIRECTORS HAVE TO ACT ALWAY IN DILIGENT MANNER, RESPECTING THEIR DUTIES AND HAVE TO TAKE DECISIONS IN THE ONLY BEST INTEREST OF THE ENTIRE CORPORATION AND IN GOOD FAITH

IN THIS WAY THE DIRECTORS WILL BE RESPECT THEIR OBLIGATIONS AND THEY WILL BE PROTECTED BY THE BUSINESS JUDGMENT RULES (even if they make an UNSUCCESFUL (but lawful) TRANSACTION)

MERGER => A merger between two corporations is made by the two BoD then when the proposal is done it will be checked by SHs of both corporations and if both accept it will take place
So the BoD has to convice the MAYORITY (majority is always "OF THE SHARE CAPITAL" and not "of shareholders") to do the merger.

ACQUISITION/DISPOSAL OF ASSETS => In general is in the power of directors doing an acquisition or disposal of company's assets without any authorization of SHs. But there some particular cases in which the authorization of SHs is required and it happens for very big transaction for instance if the director want to sell a so big asset that this selling is like a liquidation of corporation.

DUTY OF CARE

Diligence standard (duty of care) depends on:

- **Nature of the office (professional diligence):** director of a small company or a listed company changes the standard
- **Specific expertise / background / experience of the directors:** higher expectation from you

So if you are particularly qualified there is a higher standard of diligence.

LIABILITY:

In order to trigger real liability you have to prove that there is a breach of duties so something was not done in compliance with law or you violated you duty of care + prove damage + link cause/effect

C.D. BUSINESS JUDGEMENT RULE:

The court will not review and scrutinize ex post the <<merits>> of the business decision (with the limit of unreasonableness/entire fairness in case of conflict of interest)

The court will evaluate the managerial decision of the board not assuming that this guy had a crystal bowl and could predict what is ahead. You need to evaluate and scrutinize the decision within the limit of information that were available at the time that this decision was taken. So you will not be scrutinized ex-post the outcome of the decision because you cannot base the decision on the basis

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Notice that, it is better for him not to be present in the meeting where the other will decide about theinterest, in order to avoid any kind of effect due to his presence.
The resolution by the other members needs to have a motivation, extent reasoning, detail info aboutwhy that final decision.

- **Related party transaction**: to avoid that directors to take advantage of its superior position in in acontrolled entity. There is no apparent conflict, but simply is considered suspect.
  If a subsidiary is dealing with his controlling director, he needs to obtain a clearance by independentdirectors or expert (ex. commercial bank**)** that evaluate the transaction. In every financial statement there is a section regarding these types of transaction, because the company must to tell the market about it.
- **Business opportunities**: if there is a link between the opportunity and the company, the director that has this info must first inform the company, then can move alone if the company itself decidenot to go on.

18/05/22

SHAREHOLDERS' RIGHTS

1) **Voting Rights**

a) Approval of Financial Statements (and other specific matters. More extended in LLCs that aremore flexible, allowing shareholders to express their view, interact in the management. it depends on the system the company adopted, this is true if they work following a single tier system (only one board of directors like in the UK and USA), if there is a two-tier system (the German system) this is not typically true. Directors can be removed anytime, no one can guarantee you that you will stay there in that position for the entire duration of the office. Internal control bodies on the other hand can stay there with the guarantee of no sudden removal
b) Appointment and Removal of Directors (an internal control bodies) ; These two voting not for the two-tire system where only internal control body;
c) Amendments to the bylaws (including capital increases\ authorization to the issue of new shares;
d) Mergers, Demergers, Conversion (blatant amendment of the bylaw). Can be considered as glorified changes to the bylaws, these are more fundamental changes. They are basically changes to the bylaws but are treated differently because they are more complicated matters that have big consequences on the size or legal form of the company. These allow the evolution of the company over time
e) Winding-up / Liquidation: Managers become Liquidators → Change the objective of the firm.

Linked to the right to vote there is also the right to challenge the resolution if it was taken against the law or the bylaws

The smaller you get in the corporate ladder the largest is the involvement of shareholders → LLCs usually have a large list of shareholders' responsibilities. The more you increase the size of the enterprise the more shareholder you have (the shareholders base increases) so they delegate more.