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INTRODUCTION TO THE LEGAL SYSTEM (1º MIDTERM)

1°YEAR BIEM / BIEF

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30428 Introduction to the Legal System – Module 1
Units 1-11

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Lecture 1: Law and the State

As managers we will have to do with law, in house councils (lawyers inside companies) external councils
Law is national so each legal system is different and each one has different applications

How would you define law?
Law is strictly related to society; it directs the behaviour of members in each community. Every society needs a set of rules to exist.
Eg. If I don't show up to dinner with a friend I breach social laws, common sense, but I don't breach law. There are no set punishments for social breaches, also laws must be followed universally by everyone and at all times.
Laws have punishments as a result of the breach.

The western legal systems are derived from Roman Law, although there are debates on the origin of Law as a discipline: romans structured law in a specific field of knowledge and they instructed their politicians.

"Directum" means just
"Ius" is word for right

Many legal systems have communicated between one another so many ideas have been spread among different countries
Ex. Italy and France belong to EU which means they have an overstanding legal system that creates common ground, the EU comprises all the common ground and gives it unity.

Law:
Positions of legal thinkers.

Legal positivism (ius quia iussum)	**Legal naturalism (ius quia iustum)**
The mainstream vision of world nowadays, invented in 1800. The law is what is being enacted by a competent legal authority. The authority is a democratically elected government. To check if a rule is legal then you should check whether it was promulgated by the authority in	Revival in the us legal system A good law had to be "just", "fair". Unless the rule is fair it cannot be legal. By "legal naturalism" it is meant that this view of law was hinged on the ancient sense of nature as a rational order, where all men, animals and things were to accomplish their own, inner reason of

charge of the nation. It is kind of a circular definition. The constitutional law is what defines the legal authority. **Upside**: it is easy to check the legality of laws **Downside:** you wouldn't be able to check the validity of law against its content and consequences This has led to many abuses throughout history.	being (naturalis ordo),whether or not a divine footprint was recognized in it. Law was justice and justice was the rational truth of nature, where all beings and things were deemed to accomplish what they were designed to do.

It wasn't always the case that law was national, before the 18th century and the advent of **Statism** the law wasn't applied on the territory of a state.

Legal system: A legal system, set of rules to be found/applicable in a national state. Legal rules are the result of political decisions of a legal authority (a German rule is the result of a German policy)
Roman law wasn't a legal system, it was an agglomerate of laws that were "just" and enacted in the Roman Empire
Domestic law =National law

Separation of domestic and international law can be traced back to the Peace of Westphalia => Westphalian paradigm
International law is the result of interaction between national states. states have sovereignty, so power to set rules within their territories, but they can bind themselves by entering treaties and agreements, contract with other states. By entering, they will give up a little of their sovereignty.
The EU is the result of treaties, at the beginning it was only 6 states. It enlarged by admitting new members in the treaty.
The EU is an experiment on sharing rules and values and not only a commercial agreement.
The shortcoming of international law is that it is difficult to enforce, there is no supernational tribunal able to sentence states to commit to national treaties.

Comparative law
Since each State creates its own law, any discourse about law is possible only with regard to a national law, which depends upon the acts enacted by each State (exception: international law)

A branch of legal science specifically investigates the comparison between a national law and another, which is referred to as comparative law.
We are not talking about a legal system; it is a field of study that aims to identify the differences and similarities of legal systems.
Founders of comparative laws (book)
Developed to find practical solutions to problems.

- National laws developed independently even if many took inspiration from Roman Law
- Each legal system has peculiarities and in dealing with new problems, a legal system can take inspiration from the experience of other countries that already tackled the problem

Indirect benefits of comparative law
1) As an aid to the legislator (**Legislator**: the agent empowered to issue legal rules in a national state.)
2) As a tool of construction of national or international law
3) As a subject to be taught and studied at universities
4) As an incentive and a guide to uniform existing laws
5) As a driver of a European law as such

Ex. The Italian government transplanted some rules from the US legal system.

A **Class Action** is an example of this (Many different individuals that share the same legal position can be represented together in court for a litigation) a serial litigation. The system facilitates litigation against a stronger party.
It would be difficult for a single consumer to fight against corporations.
Ex. Segregating assets/funds in a family trust to be of benefit to owners, from US and UK legal system

Comparative law can help with writing Treaties.
Indiana convention: International treaties on the sale of goods: body of rules pertaining to contracts with private individuals and companies in between states
Set international rules that influence businesses, sale of goods

Comparative law can help to uniform rules.
Ex. In the exchange of products. When you sell products, you must abide to the treaties signed by your country. This creates **predictability.**
It is crucial to know the legal horizon in which the firm I work for operates.
Comparative law puts us in the perspective of national states

Every business decision must be guided by legal advisors that know that section of the law (merges and acquisitions, employment, taxation…)

Different approaches to comparative law

Functional: Compare solutions of different legal systems to same legal problems. Class action. The Italian government surveyed the other systems on how they dealt with the problem of serial litigations.	**Historical - *tertium comparationis:*** Developed by a German scholar, Zimmerman Based on the assumption that western legal systems are derived from roman law Rather than comparing, compare against the common roman tradition. Western legal systems are all derived by it so you can compare them by putting each of them against the common roman root laws.
Micro comparison	**Macro comparison:** a wider approach, you compare legal systems as a whole, not looking at specific aspects

Lecture 2: Civil Law and Common Law

Macro comparison: a wider approach, you compare legal systems as a whole, not looking at specific aspects

- Constitutional law
- Create a taxonomy of legal systems; classification into families

Renee David: said that some legal systems are similar, share features values and mentality.

Civil law tradition They have laws regarding “good face” and prearrangements contracts Obligations towards contractor to declare some information	Common law tradition Derived from local cores, UK, colonies,

We also have **mixed jurisdiction** which presents feature of both common and civil
Sharia Islamic law
Law based on customary tradition.

Private international law
Example: A contract is concluded in Italy between a French party and a German party. The question arises whether applicable to the contract will be the Italian law, or the French, or the German

Such collisions of laws are addressed by a branch of each legal system, which is called international private law• As regards States which are Members of the European union, their international private law has been unified through regulations of the European union

It is often difficult to determine which law to apply when different national laws collide in a public or privat contract

⇨ Collision of laws: a contract with conflicting nationalities involved

In the EU the private international law is regulated and unified

These rules come into play to the extent that they decide which court holds jurisdiction and which rules are applied

Legal systems have tried to uniform themselves

Many of them entail a complexity with dealing with certain situation, so they set similar rules for these situations. Through **conventions**, ex Indiana Convention, they have the same rules for the sale of good so they have eliminated the differences

Uniformity can also be achieved through **legal transplant**: a legal system imports an institution, a feture of another legal system into its own regulation, ex. Class Action

Legal irritants: when the transplant is not successful and leads to problems, the new solution is clashing with pre-existing laws or legal mentality. Some legal systems borrow solutions for a while and then adjust the regulations.

Civil law and Common law jurisdiction

Civil law	**Common law**
1. **Code:** contains building blocks of legal system and then develop starting from that, codification of features of the system, constitutional law 2. **ius commune** (common law, applicable to all the empire) by it we define the body of laws that was discovered in second part of roman empire. –Roman law-- 3. **mentality**	1. **Case law:** not developed from a code 2. **Common law vs equity:** rules that where commonly applied to central courts in London and Scotland/northern Ireland, these rules where formalistic and stiff so they developed separated courts and law: equity 3. **mentality**

Corpus Iuris Civilis:

Discovered in 11th century, essential in understanding roman law, the basis of what we know of roman law.

The Corpus Iuris Civilis ("Body of Civil Law") is a collection of fundamental works in jurisprudence, compiled from 529 to 534 by order of Justinian I, Eastern Roman Emperor.

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He wanted to collect al legislative and jurisdictional works by roman scholars.

Code (Codex)	Digest or Pandects (Digesta, Pandectae)	Institutes (Institutiones) A textbook, containing practical rules and solutions to problems	New Laws (Novellae Constitutiones) An update of the codex

Ius Civile

The beginning of that tradition may be traced back to the renaissance of Roman law between the end of the 11th and the beginning of the 12th century.

In Bologna Irnerius rediscovered the Justinian compilation, made up in the 6th century, on the orders of Justinian, emperor of the Eastern Roman empire

• Irnerius began to read, to comment on and to teach the Justinian compilation

• The first university of the (Western) world was thus established (the **alma mater** studiorum, the university of Bologna)

• The study of Roman law, and particularly on the Pandectae or Digesta, spread throughout Europe

At that time the study of law was centred around the comments of Irnerius on the Corpus Iuris civilis, the **"Glossa"**

Civil law

The basic characteristic of such jurisdictions is that they have fully implemented the doctrine of separation of powers Legislature Executive Judiciary

Baron de Montesquieu (1689-1755): *«only the mouth that pronounces the words of the law, inanimate beings that are not able to modify either its force or its rigour».*

The core of private law is gathered and systematically organized into a civil code Code civil (1804) Bürgerliches Gesetzbuch (1900) Codice civile (1865, 1942)

It is exclusive to the civil law tradition the fact that judiciary can only judge cases and apply laws but they cannot create new laws. This does not happen in common law systems.

Common law

England was not reached by the civil law tradition.
We do not have a codification of private laws, but we have stare decisis (binding force of precedents), there isn't codification but a collection of solved cases that are binding for subsequent cases.

After the battle of Hastings (1066), rise of a "common law"
• The political and juridical unity achieved by England already in the 11th century prevented the ius commune of continental Europe from expanding on the island: civil war(1642-1651) and Glorious Revolution (1688-1689)
• The tenets of the French revolution could not gain ground in England, essentially because the democratisation of politics had already been achieved
• Common law is not based upon acts approved by the Parliament, particularly it is not codified
• Common law develops through a case approach by courts
• Rule of "stare decisis", pursuant to which precedents are binding for courts

Common Law: Developed by central courts in London that were very rigid, in order to apply a certain rule you case had to exactly fit into specific requirements
Ex. Here the punishment for breach of contract was always a fine.
Equity courts were developed that had a more flexible system.
Ex. Here it could be that in case of berach of contract you could force the party into the contract if possible

⇨ they were later unified by the **Judicatures Act** of 1873-1875

Mixed jurisdictions: Québec, Louisiana (US, presence of French colonizers and we still find a civil code that is similar to Napoleon civil code, "Code Napoleon"), South Africa (influenced by customary laws of population before colonizers), Scotland, Israel

Lecture 3 : Law and Justice

Legal naturalism (ius quia iussum)	**Legal positivism (ius quia iussum)**
By "legal naturalism" it is meant that this view of law was hinged on the ancient sense of nature as a rational order, where all men, animals and things were to accomplish their own, inner reason of being (naturalis ordo),whether or not a divine footprint was recognized in it. Law was justice and justice was the rational truth of nature, where all	During the 19th century, legal positivism has gradually overcome legal naturalism, thus becoming the common ground of any discourse about law and embodying the current mentality of jurists. In the positivist view, the "source" of a law is the establishment of that law by some socially recognized legal authority. The most famous

beings and things were deemed to accomplish what they were designed to do The law has to entail a sense of fairness	conceptualization of legal positivism is to be ascribed to Hans Kelsen

Intermediate positions were also created

Dilemma of unjust law: is an unjust law valid?
The doctrine of legal positivism can easily attract criticism, since from its point of view it must be considered as formally in force irrespective of its actual content.
Naturalism: if a certain law does not respond to a certain idea of justice that law is not valid, and citizens should not abide to it. This dilemma inspired various rebellious movements in history.

LN strong (Thomas Aquinus)	LN weak	LP mild (Hart)	LP pure (Kelsen)
Law needs to reflect a pre existing order of things, which is to be found in nature, readily available in the creation of things. Cristian view of the world. **"Unfair law is no law"** ➔ If a law is not just per se then it is not a law. If this was true then a member of the legal community could choose to not follow a law if deemed unjust. An unjust law can be corrected. **Defining Justice**	**The function of Justice** differs between strong and weak naturalism. **Qualifying justice**	According to Hart LP is the starting point but added a minimum content of legal naturalism. He tried to correct extreme positions by analysing the consequences of LP.	Theory of **normativism**: norms are main focus of legal system and find justification through a "pedigree" test: double check whether a rule was established through the legal process established by the legal system. ➔ Each norm owes its validity to another norm, which governs and rules the proceedings through which the former is enacted This is a bit of an extreme position, since if a law is enacted according to the process in place in a legal system it is good. In Kelsen's view the law was isolated from any idea of religion or justice. **"Pure Theory of Law"** (Reine Rechtslehre) (1933): based upon the fundamental assumption that law consists of legal rules, or *norms, which are completely autonomous from religion, morality, and so on* – in this sense, this theory is qualified as "pure".

If you consider the content of the law and not only the formality behind it, then you are able to assess whether a law must be adjusted. This kind of reasoning is open only if you admit that law is not isolated from religion, morals, traditions.

Invitation to overcome the formalistic legality

Distinction between the law as it is and the law as it should be	Civil disobedience	Natural law

The renaissance of a natural law

Martin Luther King: One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all".

Radbruch's formula: If it departs from justice in an intolerable way, positive law is no longer to be considered as law and therefore it cannot and must not be applied or complied with.
Such positions are a bit theoretical, they served as the legal justification to run the Nuremberg trials because the position of the war criminals was this: at the time of the crimes those officials were following laws that were in place in Germany and they were part of a chain of responsibility that wasn't against their actions. They didn't commit crimes under the legal system applied to them.
German border guard case: east German soldiers stationed on the wall of Berlin were convicted for having shot and killed trespassers. These trials were based on some form of legal naturalism.

Grundnorm (ground norm): norm at the base of each legal system. Ex. Italy, Italy rejects any form of war and violence.
How do you justify the constitution? You need an assumption according to which you can take it as the base of the legal system.
The idea of justice and fairness has developed and changed through history. So the notion of justice is deeply rooted in morality and historical context. -> if it refers to morality, a norm is flexible to change over time.

Rules principles, legal systems
Structure of norms: "Thou shall not kill" => This kind of absolute imperatives may be appropriate to religion or to morality, but not to law.

- ➔ Law conveys a coercive social order, while religion binds only those who believe in it and morality only those who accept it.
- ➔ Kelsen's theory: **a norm is such not because it stipulates a command, but because it stipulates the sanction to be applied in case the command is disobeyed by someone.**

Norms are built with a conditional structure -> part of punishment, consequence, attached to breach of norm
These would vary between legal systems

- ➔ A norm is shaped as a 'hypothetical independent period', whose protasis (= the IF-clause) consists of a state of affairs and whose apodosis (= the THEN-clause) of a sanction
- ➔ The norm attaches a (negative) reaction of the State to a possible event or behaviour (e.g**. IF** a contract is breached by one of the parties which have entered into it, **THEN** that party will be deprived of her/his rights towards the other)

The scope of norms

- ➔ "Treat like cases alike"

Generality	**Abstractness**
A norm is applicable to anybody who finds herself/himself in the state of affairs envisaged by the IF-clause A norm is addressed not to individuals identified as such but to a class of individuals who happen to find themselves in the state of affairs envisaged by the IF-clause	A norm is applicable to whatever event or behaviour matches the state of affairs envisaged by the IF-clause

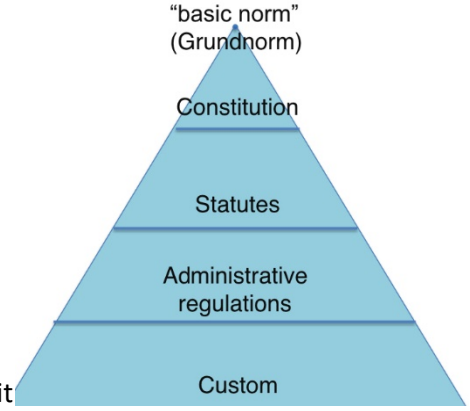
Lecture 4/5: Norms

Law:

Default rules (Private law) (dispositives Recht,règles supplétives, norme dispositive) may be set aside through an agreement between their address These rules can be derogated, are applied unless the parties have decided otherwise. These rules can be derogated in the contract itself, they are rules that can be "not followed" Contractors have the power to define their contract **Party autonomy would prevail**	• Nearly the entirety of private law consists of default rules • A major role is played by default rules which supplement agreements entered into by the parties
Mandatory rules (Public law) (zwingendes Recht, règles impératives, norme inderogabili)may not be set aside by an agreement between their address Mandatory rules, in business contracts incentive to comply are added Liquidating damages	• Most public law consists of mandatory rules • Paramount for public law is the supremacy of public interest over individual' interests

Normativism

- Norms are dislocated though a hierarchical order(Stufenbau), where each of them depends upon the higher one which stands above it



- A norm is valid if and only if it pertains to such a hierarchical order, which is termed as legal order(or legal system)

"soft positivism": the conventional "rule of recognition" of a norm may well incorporate, besides pedigree, principles of justice or substantive moral values (Hart)

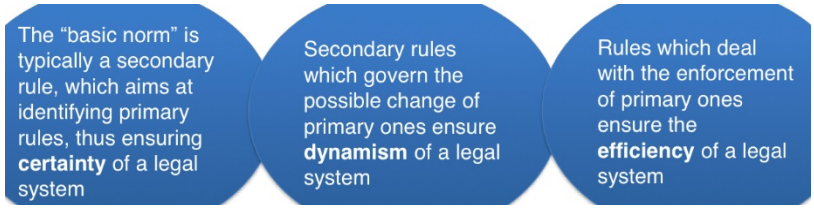
Which is the ground norm? It is a categorical imperative.
Grundnorm of Italian legal system: "all members of the Italian legal space shall obey the constitution"

Sources of law

Ex. Constitutions: includes norms that are binding for a community in a national state

A legal system comprises not only "primary" rules, but also"secondary" rules, which aim at identifying, changing and enforcing the first ones (Hart)

- A legal system is **certain, dynamic** and **efficient**



The secondary rules are the sources of law, they govern how primary rules can be changed. Primary rules change with society.
Legal systems are not static, they provide rules that allow the system to be revised and updated over time, they can also lead to the deletion, **abrogation** of norms (repeal)
These changes are channeled by the representatives of ppl in the parliament.
When such statute is enacted we have new primary rules

Rules on adjudication: they deal with enforcing primary rules

What about the Terms of Service of TikTok?
They are default rules and you can deviate from them but you might get a penalty
As a company you need to make sure that what you put in contracts breaching default rules is compatible with the mandatory rules

Secondary rules/Sources of law
You have a fragmentation of places where you would find rules applicable to a business scenario, ex. Domestic law, European law, International law

Sources of law play a major role in the historical development of a legal order,since they stipulate what facts or acts are capable:

- of creating new rules, or
- of amending or repealing those already existing
- They ascertain whether a particular rule is also a legal rule
- Each legal system is based upon its own sources of law, which are not recognized as such in another legal system, similarities in western world.

Fundamental rights section is usually contained in the constitution

Is a statute clashes with a constitutional principle, the higher hierarchy principle prevails and there are procedures to change the norm
The parliament sometimes enacts rules that are against the constitution, individuals sometimes challenge the compatibility of law with the constitution.
The Constitution's role is to give directives to the legislator.

The term "sources" can have two different meanings:

SOURCES OF PRODUCTION: change the law in force through

- **Legal Acts=laws=statutes**: sovereign decisions intended to enact new rules, or to amend or repeal those already existing;
- **Legal Facts**: customs and traditional practices, they play a minor role in the legal scene, meeting two requirements:
    - 1. objective stability over time, facts or cunducts must be carried out during a certain amount of time;
    - 2. social perception a given behavior is legally binding, people feel compelled to behave like so (so-called *opinio iuris ac necessitatis*);

SOURCES OF COGNITION (or COGNIZANCE): you have official gazettes that are sources of cognition, they contain all the new laws enacted by the authority.

give legal notice about the sources of production (e.g., Official Journal of the European Union)

Sources of production of the Italian legal system
Justify the system of the imperative that all Italians must abide to the constitution

1. The Constitution (Charter and complementary provisions) the constitution contains **both primary (rights) and secondary rules (rules of process, autonomy of different regions).**
2. Statutes/enactments having force of law (leggi, decreti legge, decretilegislativi)
3. Regional laws: certain level of authority to regions, to enact regional laws that rank to lower level when compared to national laws. **In federal states** each state has its own parliament and national laws interact with federal laws, you have supreme courts in each state but also the Supreme Court in Washington DC.
4. Regulations
5. Uses

Sources of cognisance: Gazzetta Ufficiale della Repubblica Italiana

Sources of EU law
Primary sources

1. Founding Treaties:

1951: Treaty of Paris: European Coal and Steel Community
1957: Treaties of Rome: EURATOM (European Atomic Energy Community); EEC(European Economic Community)
-> objective: **creating a European area of free trade, with no internal frontiers (free circulation of goods, services, workers, capitals)**

1992: Treaty of Maastricht
Last treaty: Lisbon Treaty 2007

The founding Treaties set out which competences are conferred to the European Union, regulate community bodies and their legislative power.
Each country gave up a bit of their sovereignty.

2. Current Treaties, following Lisbon: The European "constitution" is **TEU and TFEU**, Treaty on foundation of European Union
3. Charter of fundamental rights
4. General principles of EU law established by European central court of justice (after Lisbon it is "Court of Justice of the EU)
    - Superiority of EU law over national states
    - Subsidiarity
5. Fundamental rights derived from common traditions of funding states

Secondary sources of EU Law

non-binding acts	binding acts
• recommendations • Opinions	• Regulations • Directives • Decisions

Lecture 6: Public law
If a public administration act as an individual citizen they have to follow private law. Ex. When renting a building => the state is acting ***iure privatorum***
jurisdictions of continental Europe are generally acquainted with the distinction between private law (droit privé, Privatrecht, diritto privato) and public law (droit publique,öffentliches Recht, diritto pubblico)

- The distinction is somehow rooted in the sources of Roman law and over time dealt withby (German and French) scholarship
- The distinction became an institutional reality only in 1800, when Napoleon createdadministrative tribunals

Private law deals with the mutual relations between citizens

civil law (*droit civil, Bürgerliches Recht, diritto civile*): applicable to the generality of legal subjects	**commercial law** (*droit commercial, Handelsrecht, diritto commerciale*): specifically applicable to enterprises
Contract law, tort law, property law, family law, inheritance law	*Companies, fair competition (antitrust prohibitions), industrial and intellectual property*

The Italian Codice Civile encompasses both civil and commercial law and has reunited private law

What is public law?

- The rise of public law has historically aimed at exempting the State's authoritative power from undergoing private law norms (particularly regards civil liability towards citizens)
- As opposed to private law, which is applicable to all legal subjects and is therefore deemed as general, public law is special, i.e. applicable solely to the State as exercising its own sovereign powers
- If the State acts not for the sake of its own authoritative power, but like any other legal subject, private law is perfectly applicable to its legal relations
- the State is said to **act iure privatorum** (accordingly to private law) e.g., the State may have private properties and, if so, may well rent or sell them by entering into private law contracts with any other legal subject.
- **Administrative law** pertains to what is executory. It covers the many interactions between government agents and civilians.
- **Criminal law** deals with the prosecution of crimes (or criminal offences), i.e. unlawful acts which are punished by the State because of their harmfulness towards individuals or the community
- **Constitutional law** lays the State's foundations, both regarding protection of citizens' fundamental rights and liberties, and the structural and functional organization of its powers. Changes to the constitutional law are done with supermajority and a parliamentary process in a civil law system, in a common law system it takes time to change due to stare decisis.
- **Procedural law** regulates the proceedings for the judicial application of private law, criminal law and administrative law.
- **Tax law** regulates taxation.

Unit 6 - Legal relevance of natural events

Not any event that may take place or any action that may be undertaken triggers legal effects.

1. How it is possible to identify events or actions that carry legal effects?

If the situation falls under the definition of a norm, the "if" part, then it carries legal relevance
If you blow off a date then you will upset people but you will not face legal prosecution, you only went against social norms.

2. How it is possible to verify whether such events or action subsequently cease to be of legal effect?

If an event is not under a norm anymore then it may become legal and not generate legal consequences

Autonomous legal acts

The idea that we as members of a legal system are able to make declarations of will which have as a consequence a change in our assets, patrimonial personality, under the norms of a legal system.

Legal acts are concluded through a declaration of will (be it through language, or by conduct), which is intended to perform a change in rights and duties of who is acting (the party)
Any legal subject is given the power to produce a legal effect on her/his own patrimony or personality, to the extent to which the law does not pose any mandatory prohibition on doing so.
There can be laws that limit private autonomy (party autonomy)

Draft common frame of Reference
A group of legal practitioners reunited and extracted the "best" common frame of reference for private law. Also provides a definition of party autonomy.
(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules. (a part from base rules for making contracts, parties are free to decide how to regulate their relationship, ex. Joint venture. Mandatory rules take precedence)
(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided. -> definition of party autonomy
(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving aright which has already arisen and of which that party is aware

Legal acts play a major role in private law. Undeniably, they constitute the most important **category of legal facts,** and their domain tends to expand also in other areas of legal systems (criminal and administrative laws, for example) **Legal acts** can be identified from their characteristics: - structure and - content willing declarations with the goal of having legal consequences. Ex. A contract is a legal act that defines the relationship between parties. A will. A marriage. ***Structure:*** **Unilateral legal act**: wills, testaments, are the manifestation of the will of a single party. Unilateral legal transactions mostly produce their own legal effects when they come into someone else's knowledge. **Bilateral legal acts**: like marriage. Along some jurisdictions, mutual will suffices to conclude a contract of sale, along others it is moreover required delivery **Multilateral legal acts**: bylaws, what regulates a company and shareholders power ***Contents:*** **Patrimonial**: if the economic value of the interest pursued in the contract can be evaluated. The party's or the parties' will pursues an interest which can be economically assessed *E.g. Contract (art. 1321 Italian Civil Code)Contract is the paradigm of legal transactions with a content which cannot be but patrimonial* **Non patrimonial:** a marriage is non patrimonial since the interest pursued cannot be economically assessed, but sometimes you might have consequences on the assets of the spouses	**Legal facts** are actions/events that cause legal consequences

Parties' autonomy is related to/can be limited by mandatory law in regard to
- patrimony rights (broader)
- personality rights (narrower)

Dwarf tossing is an activity in which little persons wearing special padded clothing are thrown onto mattresses or at Velcro-coated walls. Participants compete to throw the little person the farthest.

- Are little persons disposing of their absolute (non-patrimonial) right to dignity?
- Should they be entitled to exercise **their private autonomy in this way?**

The mayor of a small French town prohibited dwarf-tossing shows in public places

- Little persons, willing to take active part in such shows in exchange for money, challenged the legitimacy of the administrative ban in order to maintain their source of income.
- The French **Supreme Administrative Court** found that an administrative authority could legally prohibit dwarf-tossing on grounds that the activity did not respect human dignity and was thus contrary to public order. The ruling was taken by the full assembly and not a smaller panel – as proof of the difficulty of the question (Conseil d'État, October, 27, 1995)

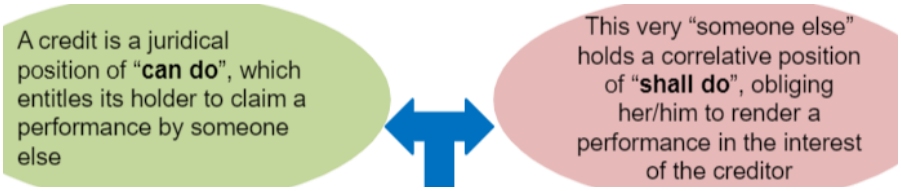
Also the United Nations Human Rights Committee stated that the ban was not discriminatory with respect to little persons. It ruled that the ban could be considered as *«necessary to protect public order, which brings into play considerations of human dignity»* (July 26, 2002)

Private autonomy of little people was restricted

Legal relations

Obligation: one of the main legal relations, which ties together the holder of a credit (*creditor*) and that of a debt (the debtor)

Credit: A credit (créance, Forderung, credito) entitles its holder (the creditor,der Gläubiger, il creditore) a claim for an economic performance to be rendered by another subject (the debtor, der Schuldner, il debitore)



The creditor can be seen as the seller and the debtor as a buyer – this is a situation in which we find ourselves frequently

Categories of Rights

As regards its content, a right consists of a cluster of powers and privileges. The range of this cluster may vary greatly from one single right to another.

1. **Relative rights**: the claim of the holder may be raised solely towards a single legal subject or group of particular legal subjects (*rights in personam*)

Most rights deriving from contracts are relative rights, but there does not need to be a legal relationship per se.
You create obligations towards a singe entity, person. Ex. When you buy a service.
Credit is a relative right towards a debtor.

2. **Absolute rights:** the claim of the holder may be raised *erga omnes*, i.e.towards any other legal subject (*rights in rem*)

You can prevent others from taking your property or enjoying it, unless you go against mandatory laws.

There can be legal transactions in absolute rights, ex. Selling shares of a company.
Ex. Private property, no one can come in between you and your enjoyment of the object you possess.

Patrimonial rights in rem:

- Property (intangibles) (e.g. ownership, Eigentum, proprietà)
- Intellectual property (e.g. copyright)

	- Industrial property (e.g. patent, trademark) Non-patrimonial rights in rem: - Rights of personality (droits de la personalité, Persönlichkeitsrechte, dirittidella personalità), which are encompassed in the broader genre of human rights (e.g. privacy, image, likeness, name

Disposable: a right that can be relinquished or transferred. Ex. Property.	**Non-disposable**: a right that you cannot relinquish. Ex. Freedom

Patrimonial The good owed by the rightholder can be exchanged for money	**Non-patrimonial**

Statutes of limitations

⇨ A legal action to protect a right can be started before a certain time limit after which the right cannot be enforced
Extinction of rights due to the lapse of a certain time period determined by the law(prescription)

Rationale:

• Facilitating resolution within a fixed length of time (which varies from legislation to legislation)
• Certainty of legal relationships
• Difficulties involved in the proof of facts
• Protecting the debtor's confidence

A statute of limitations does not apply to:

• Ownership
• Non-disposable rights

Tolling provisions The statute of limitations is tolled when the running of time period is suspended by the law until some event takes place (e.g., if it is a minor who has to bring suit, the time limit is generally tolled till she/he reaches the age of majority)

Mere ignorance of the existence of a cause of action generally does not toll the statute of limitations.

Lecture 7: Unit 7 - Legal Subjects

Human beings have a right to privacy, freedom of expression, freedom of religion and a right to physical integrity…not all of these rights make equal sense in case of legal entities (e.g., physical integrity)

animals?
§ 90a BGB Animals: «Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided».

Animal cruelty? Where is the threshold between pets and cattle? Animal trials?
German law states that animals are not things to accommodate a new perspective on things.

Not everything can be a legal subject, eg. AI, cars etc

Legal personality (Personhood) and capacity to act

Both human beings and legal entities:
• LEGAL PERSONHOOD (PERSONALITY)
are (potentially) vested with rights and duties to be the holder of rights and duties, we acquire it at birth and for all our life
• CAPACITY (OR POWER) TO ACT
have the power to establish (or modify) legal relationships power to exercise one's right to our own interest, acquired at a certain age, could be lost due to illness or criminal activity There are gray areas where the legal system provides for persons with incapacity to act.

Not every legal right and duty can be transferred to a legal entity such as corporations or firms
Even in gov. administration people operate within the system which is a legal subject
Certain attributes inherent to human beings (natural persons) are not transferable to corporations (legal persons)

Natural persons
• Human beings may generally be the holders of rights since birth (only in very few legal systems since conception)

• When natural persons die, most of their (patrimonial) rights (e.g., property) and duties (e.g., most debts) go into probate, except some which shall cease (e.g., rights of personality)

When individuals die, the majority of their rights cease to exist and legal systems interfere to determine will post mortem. Property rights are not extinguished but they are passed onto the heirs

Embryos and fetuses
- Embryos and fetuses are generally not considered as natural persons (being not yet born)
- It is thus settled a basis for constitutional legitimacy of abortion:

US Supreme Court (Roe v Wade, 1973): "the word 'person' as used in the Fourteenth Amendment of the US Constitution does not include the unborn"

Nonetheless, embryos and fetuses are vested with specific rights:
- to health
- wrongful birth
- to heirship

RIGHT OF ABORTION
DOBBS v. JACKSON WOMEN'S HEALTH ORGANIZATION (US Supreme Court)

The Constitution does not confer a right to abortion Roe and Casey are overruled by the Supreme Court of the US Abortion is no longer a federal right => the authority to regulate abortion is returned to the people and their elected representatives	Roe held that the abortion right is part of a right to privacy that springs from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments This process is typical of common law systems, where a single case is brought all the way to the Supreme Court can overturn a whole section of the law

According to Aristotle's Politics (Book I), slavery belongs to natural law:

"*Those who are as different [from other men] as the soul from the body or man from beast—and they are in this state if their work is the use of the body, and if this is the best that can come from them—are slaves by*

nature. For them it is better to be ruled in accordance with this sort of rule, if such is the case for the other things mentioned" (Aristotle, Politics, 1254b16–21

➔ He allowed slavery and that human being can be objects and couldn't have property

In the past, slaves did not have **legal personality**:
e.g., Lenoir vs. Sylvester (North Carolina, 1830): Does a slave have the capacity to accept a gift?

"*... a legacy cannot be given to a slave; for he can have no right, whatever, which does so, the instant it is transferred to him, pass to his master. Every thing which belongs to him, belongs to his master. In other words, he is in law himself chattels personal; and it would be absurd to say, that property can own property ...*"

MINORS

Natural persons attain the (legal) capacity (power) to act when they reach their majority (mostly upon turning 18 years of age, but it may vary from 15 to 21 years in different jurisdictions)

• Therefore, minors lack by definition the capacity (power) to act, and particularly, to enter into a valid contract, to make a valid will, to contract valid marriage
• If they earn **emancipation** (by a court), however, they acquire a partial capacity to act (marriage and acts of ordinary administration) so they will also be able to carry out certain legal transactions
That limit is based on the assumption that underage persons haven't developed their ability to judge and take decisions

Legal representatives

In civil law jurisdictions, legal representatives hold the power to enter into (patrimonial) legal transactions on behalf of minors or of incapacitated adults (the wards)

Corporations usually the contract is not signed by any manager of the company but by the legal representative of the company "proxy holder". This would bind the company.

A minor's legal representatives are their parents, whose both consent is required for acts of extraordinary administration on their child's behalf. In case their parents are missing or incapacitated themselves, a minor is legally represented by a ward appointed at court.

- An **incapacitated adult (without capacity to act)** is legally represented by a guardian or conservator, or by a support administrator, or by a trustee appointed at court.
- Legal representatives act as statutory proxies (or agents) of their child or ward.
- Legal representatives are controlled by a court, whose previous authorization is required for some major acts of extraordinary administration on their child's or ward's behalf.

Common law jurisdictions

Common law jurisdictions traditionally do not acknowledge any legal representative of minors or incapacitated adults

Courts can appoint a deputy (whether a parent or a friend) to act case-by-case on behalf of a minor or an incapacitated adult.

Legal acts by a minor

In most jurisdictions a threshold of age is settled (7 years generally), under which contracts entered by a minor are null and void.

Above that threshold of age, contracts entered by a minor are valid, provided that they meet some special requirements, which are variously set forth in different jurisdictions (limited contractual capacity) (s. the next slide).

To conclude a few legal transactions (like marriage or employment contracts) a minor age suffices (generally set out in 16 years), although a court declaration may be requested at that purpose (emancipation)

Can a minor sign a valid contract to buy a smartphone?

- Italy: Art. 2 Codice civile is not applied by courts to atti minuti della vita quotidiana, i.e., small transactions of daily life.
- France: Article 1148 Code civile stipulates that all persons lacking the capacity to act can nonetheless perform the ordinary acts authorized by the law or according to usage, provided that their terms are reasonable. Article 1151(1) Code civile sets forth that the acts of ordinary administration undertaken by a minor may be avoided if they amount to an economic disadvantage.
- Germany: § 110 BGB (so-called Taschengeldparagraph, i.e., pocket money paragraph) stipulates that a minor's contract is valid if they can perform their part of it with means provided specially or generally by their legal representative or by some third party with the representative's consent.

Incapacities of adults

1. **Protective incapacities**
   - Impaired or disabled adults (via judicial procedures of incapacitation, or judicial appointment of a support administrator of their affairs)
   - The incapacity may be either complete or partial, depending on the seriousness of their pathology
2. **Punitive incapacities**
   - Legal disabilities (disqualification)**Managers can be disqualified** from their office: means that their are recognised as incapable of sustaining their duties and are removed from their role
   - convictions for committing a serious crime can automatically include a legal disability (disqualification) for duration of sentence (forfeiture of offices, etc.)
   - offenders thus convicted generally maintain the capacity to get married and to make a will

Legal acts by an incapacitated adult

Contracts entered into by an incapacitated adult are invalid in the same terms as those entered into by a minor (s. above)
As with contracts entered into by a minor, therefore, legal systems tend to set forth some special requirements under which contracts entered into by an incapacitated adult are deemed valid (if they relate to necessaries, or to matters of daily life, etc.) (s. above)

Incapacity *DE FACTO*

A legal transaction performed by an adult who (although not incapacitated de iure) is **temporary impaired** by drunkenness, drug abuse, insanity, etc. may be avoided or repudiated by that party only provided that some strict conditions are met:

- either that the disorder was so serious that it fully negated the capacity to form contractual will,
- or, that, dealing with a contract, the counterpart was in bad faith, i.e., aware of such incapacity de facto. Willingly taken advantage of this impaired person

Consumers

• the notion of consumer stems from economics and sociology

• it has developed an autonomous meaning in the legal domain, having become the factor triggering the application of a distinct set of rules, known as 'consumer law'

Natural persons that are in a particular situation. If an individual is qualified as a consumer, a number of rules can be applied
=> additional status that natural persons can possess

origin: legal **rationale** for protecting consumers is based on the notion of market failures and inefficiencies, such as inequalities of bargaining power between a consumer and a business and information asymmetries.
Consumer is seen as weaker part in BtoC transactions

• EU law: the first ones to deal with consumer protection
• Mandatory provisions which limit contractual freedom in order to protect the consumer
• In some Member States a **consumer code** has been enacted
  - ➔ by the assumption that Consumers are not in the condition to negotiate the terms and conditions of their contract with the corporation.
  - consumer protection law
  - policing certain contractual terms that are deemed unfair by the legislator, it intervenes to protect the consumer

Notion of consumer

Despite being phrased in different ways, the vast majority of the definitions of 'consumer' found in EU legislation include a common core:

"a consumer is a natural person, who is acting outside the scope of an economic activity (trade, business, craft, liberal profession)"

If I operate outside of the field of their professional activity they can be under consumer protection

- The vast majority of EU Member States have one, overarching definition which applies across consumer law (§ 13 BGB, art. 3 Codice del consumo)
- The notion of consumer does not extend to legal persons
- A particularly controversial area is that of so-called mixed transactions which a person concludes for both a personal and a professional purpose (Solution in the DCFR: such a transaction is covered by consumer protection rules if it is concluded 'primarily' for non-professional purposes)

Dual purpose contract: to establish if the natural person is acting as a consumer or the provider in the contract
=> if the natural person is acting predominantly under the identity of its business they cannot be protected by consumer law since the legislator wouldn't see them as consumers in need of protection or in a weaker position

Legal entities

In the civil law jurisdictions:
• under **PUBLIC LAW** (e.g., the State, municipalities, regions) they exist under constitutional law in the civil law systems. The constitution states the terms of their existence
• under **PRIVATE LAW** (e.g., companies limited by shares)
Businesses can take different legal forms.

Legal entities under private law

Legal entities separated from individuals that founded them, independent from the assets of their members.
As legal entities they can hold rights and duties and can enter into contracts.
Corporate veil: technical notion for assets of companies being segregated from assets of shareholders and owners.
Created to have limited liability on corporation's debts.

Under our market economy ppl can reunite under corporation to operate a business

These are notions of private law: in Italy the Civil Code, where succession and family rights are, maintained notions of commercial law.

1. **CORPORATIONS (or LEGAL PERSONS)**

Completely autonomous entities, discrete personality, separate from the owners as to their management, organization, liability, etc.

2. **UNINCORPORATED LEGAL ENTITIES**

Collections of individuals, which (to some extent) share property, organization, **liability**, etc. They are not registered, but they operate towards a common goal.
Ppl are personally and unlimitedly liable for the debts of the legal entity.
They could be there to do charity or sports club

Rules on agency

By its nature, a legal entity, being fictitious, can act through the agency of natural persons.

Rules on agency apply:

- An agent who acts within the scope of authority conferred by a legal entity binds the latter in the obligations she/he creates against third parties (there are rules in place to protect third parties) Third parties can rely on the agent's power and that they are signing with the company
- In cases of defects in consent (e.g. mistake, fraud), the state of mind taken into consideration is the one of the agent (i.e. the natural person who acts on behalf of the legal entity)

Power of Attorney POA(Procura): power granted to agent/proxy that can always be revoked under peculiar circumstances

Non profit entities

"Non-profit" entities are established to further a social cause (charitable, scientific, educational, etc.)
• they are (partly) exempted from taxation
• they are prohibited from distributing their income to shareholders, leade

Non-profit corporations (legal persons)

➔ **Foundations**

corporation soles: a single incorporated office
e.g., The Crown

➔ **Associations**

corporation aggregates: a group of members, or partnership

Constitutional Documents

1. MEMORANDUM OF ASSOCIATION (if required) and ARTICLES OF ASSOCIATION

The key constitutional document of a company, which inter alia spells out its name, its purpose, and its capital

2. BYLAWS

The constitutional document that defines the internal structure and regulate the functions and decision-making processes of its bodies

Corporate purpose: when you set up a company you need to set out the area of business of the company in the Bylaw in a dedicated article.
In the Italian system there is a chart that identifies companies with codes based on their field

Corporate businesses

- JOINT-STOCK COMPANY/PUBLIC LIMITED COMPANY (PLC) (SPA, società per azioni, società a responsabilità limitata)

(midsize and large companies)Their ownership is subdivided into shares that are fully transferable and can be quoted and tradable on stock exchanges (**listed companies**). PLCs cannot be managed directly by the shareholders, but are managed by directors.
BoD: Board of directors, instead of their members.

- LIMITED LIABILITY COMPANY (LLC or Ltd.)Their shares are not tradable on stock exchanges; they can be managed directly by (some of) the shareholders

Unincorporated Businesses

1. **GENERAL PARTNERSHIP (GP)**Each partner can manage the business and has joint and several liability for the debts owed by the partnership
2. **LIMITED PARTNERSHIP (LP)** (private equity, hedge funds and investment funds)General partners have exclusive decision-making powers, are the sole representatives of the partnership and are unlimitedly liable for its debts;limited partners are liable only up to the amount contributed. Always found in private equity. Some members are protected from the problems the LP could have.
3. **LIMITED LIABILITY PARTNERSHIP (LLP**)(professional services firms, like law firms)The partners, albeit involved in the management of the partnership, are not personally and jointly liable for its debts; liablefor each affair is solely the partner who performs it personally

They combine partnership and corporation, liable in limited way with regard to the debt.
LPP Act 2000

Lecture 8: Contracts and other forms of obligation

What is a contract?

Contracts allow **consumers** to purchase goods and services

Contracts allow **businesses** to organize themselves and to trade goods and services both with other businesses and with consumers

Contracts may be concluded:

1. through documents drawn up by the parties, by a public notary, by a solicitor, etc.
2. orally or even by
3. conduct (coin in vending machine)

When you are part of a contract you are bound to abide it so you need to be aware of all the variables

Contract formation: identify when a contract is formed => through the standard model of “offer and acceptance”

- when a valid offer meets acceptance

In Italy, a real estate contract needs to be a public act, so a third party, a public notary, intervenes. Its role is to protect the parties.
This extra level of formality makes legal transactions very legally safe regarding the validity of the contract.

This does not happen in many common law systems.

Contracts in modern society

• Modern society is unthinkable without the possibility of concluding binding contracts.
• Societies without contracts are conceivable solely in situations where the State or the community takes care of everything, including the provision of the necessities of life (such as food, housing and health care)

In case of insolvency —> The innocent party is always able to enforce the contract in court

Definition of contract

ROMAN LAW
Contractus: *Cum-trahere meant "to bind" the parties*

=> ***CIVIL LAW JURISDICTIONS***
Contract = an agreement
• Donations are contracts, legally binding agreements
=> ***COMMON LAW JURISDICTION***
Contract = a bargain, i.e. an exchange
• Gratuitous promises are not contracts (if not made by deed)
• Gratuitous bailments are not contracts
• A bailment occurs when a person (the bailor) transfers possession of a chattel to another person (the bailee)

Lecture 9: Functions, Contents, and Choice of Contract Law

LEGAL LAW

CODICE CIVILE ITALIANO

Art. 1321 Codice civile, tries to point out parts of a contracts:

> *A contract is an agreement between two or more parties to establish, regulate or extinguish their patrimonial legal relationship*

- there to **establish,** create or **regulate, or extinguish** contractural relations. Three verbs, establish like a costumer relation or another, but also regulate (party autonomy: parties can regulate their patrimonial legal relationship as they want) and estabilish
- it is **not unilateral** and defines **also patrimonial relation**. You have essential components of a contract in this definition
- the adjective patrimonial is something **economically evaluated** – this is why to be valid a contract, Italian law also says it's patrimonial

CODE NAPOLEON

- Art. 1101 (as amended in 2016) – law discussed to amend certain provisions of civil code

> *A contract is a concordance of wills of two or more persons intended to create, modify, transfer or extinguish obligations*

On obligation to comply to a contract that's a meeting of wills, similar words to one's included in Italy, also similar to the Draft we saw.

- Art. 1103 (as amended in 2016) – again France emphasizes the **binding force of contracts**, unofficial English translation, just says that if you enter a void contract that's "lawfully formed", then the parties are bound by it as if the rules in it were enacted by democratically elected legislators. Just means they are binding as laws are.

    - This implies an enforcement of the contract, if you fail you're in breach of contract and the party starts litigation. If you haven't performed your part, you face the consequences either monetary to compensate the innocent party, or courts can force the breaching party to perform the obligations on their account. My force them to perform their obligations, agreed to undertake.

        Contracts which are lawfully formed have the force of legislation
        for those who have made them

CONTRACTS AND **OBLIGATIONS**

Just like credits, **also contracts are essentially a source of obligation**. They are sources of obligation, entering a contract you ensure a certain type of behaviour and obligation. For example the contract of **SALE**: it can take different forms, but every legal relationship that meets a certain requirement is a sale one. This is one of the types we talked about, that has a def.

e.g. *contract of sale (the contract having as its object the transfer of the ownership of a thing or the transfer of other rights in exchange for a price)*

Obligations of the **seller**

- To deliver the thing to the buyer, the good
- To warrant the buyer against eviction and defects in the thing sold

Obligation of the **buyer**

- To pay the price within the time and in the place fixed by the contract

SOURCES OF OBLIGATIONS

Obligations arising from contracts bring **back to sources of law**. Like a tort is an unlawful act and it's opposed to contract. Also other sources of obligation are present, not only torts, but also acts or facts occurring in the legal system , that entail obligations on the parties involved.

- **Contract** (Vertrag, contrat, contratto)
- **Tort** (unerlaubte Handlung, responsabilité extracontratuelle, fatto illecito)
- **Other** (minor) sources

PARTY AUTONOMY

Etymology itself is about ability to act without being controlled (autonomy) and now applied to contract law. To decide what us best is an assumption, so free to detail or keep general as you want but leaving room for default rule to apply to gaps, not expressly regulated by contracts.

To a large extent, contract law is based on **the assumption that parties are the best judges of their own interests**, so concepts and principles also:

- Party autonomy
- Subsidiarity principle
- Freedom of contract, both positive and negative aspects

FREEDOM OF CONTRACT ACCORDING TO CODE NAPOLEON

Art. 1102 (as amended in 2016)

1. Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by the legislation
2. Contractual freedom does not allow derogation from rules which are an expression of public policy (aka mandatory rules)

- We have the main points: inspired by French idea of unfairness and principle according to which individuals should be allowed to make their own decisions, so positive dimension is freedom to contract, but also negative dimension to contract law so **freedom NOT to enter a contract**.

- Emphasizes limits: **Mandatory laws** not to be derogated by exercising parties

LIMITS TO FREEDOM OF CONTRACT

We have some limits imposed in the basis that certain legal transactions are against the law (so mandatory laws) or morality (flexible notion, on social perception of conducts – in particular can change in each system, external limits) and present here in the firm of limiting contractural law.

- It may happen that parties would like to **contract in a way that is considered contrary to law or morality**
- It may also happen that one of the contracting **parties is INCAPACITATED**/ not capable of assessing her/his own interest, or, though being capable, her/his will is affected by some ground of irrationality. So limit their freedom to protect them and weaker party.

  ➔ In those cases, the law dictates '**mandatory rules**', which declare such a contract void or at least avoidable by one of the parties

LIMITS TO FREEDOM OF CONTRACT

May be limited or subjected to some rules that apply to B to B contracts, freedom to exercise their autonomy is now limited mostly to protect the consumer party in the transaction.

B-TO-B Contracts
B-TO-C Contracts

In business-to-consumer contracts EU internal market law imposes intense limits on party autonomy. Applicable in each member state, laws transposed implementing and applying the directives, so each has basic set of info rights, withdrawal and so on for consumers.
Directives regulate B to C transactions mostly.

EU (CONSUMER) CONTRACT LAW

With the goal of harmonizing consumer protection (one of most prolific area of EU provisions), EU has taken action for contracts, yet it's **fragmented approach**. Not general law to harmonize contract law in 27 countries, but mostly certain areas on civil or contract law are more affected.
Like consumer protection, acting specific directives on law. Regulated some areas by EU legislators.

- In the last three decades the European legislator enacted many directives regarding contract law, which in almost their entirety govern solely B-to-C transactions
- European contract law is rather fragmented: directives only deal with special contracts (e.g. package travel, doorstep sales, consumer sales) and only with certain aspects of these contracts (e.g. information duties, right of withdrawal)

EU CONTRACT LAW (TFEU)

The source of the EU competence is mostly to be found in Art. 114 of the Treaty on the Functioning of the EU which allows the European institutions to adopt measures harmonizing national provisions 'which have as their object the establishment and functioning of the internal market'.

- Towards market integration, the EU legislator – Parliament mostly, passed certain laws in countries. With fragmented approach as stated here in the TFEU treaty on functioning of EU, it intervened where needed integration and uniformation.
- Specific reference to article where the action of legislator is done, needs to be shown. Always EU legislator needs to act in accordance to certain law and referencing a specific article, like this one (article 114).

UNIFORM CONTRACT LAW
UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
Date of adoption: 11 April 1980 - Entry into force: 1 January 1988

Known as **VIENNA CONVENTION** or CISG, it is applicable **solely to B-to-B sales of goods**, certain practical consequences since convention contains set of rules on international aspect to sale of goods, international since based on different countries. So long as scenario is present, you apply these. Party needs to belong to a state party and need an international contract/ rule.

- This is one, only applying to B to B contracts, so communication and agreements are facilitated and interest of parties more easily aligned.

Lecture 10: Contract terms and their Interpretation

NATIONAL CONTRACT LAW

Enacted by each state's legitimate authority like Parliament and court enacts it. Area of law where a comparative exercise, similarities and differences, is fruitful.

- In national jurisdictions, contract law is primarily laid down by legislature and the courts
- Contract law is arguably one of the fields where more commonalities among the world's jurisdictions can be found

Despite such commonalities, parties may have the need to choose a specific national law to regulate their contract, particularly when they undertake a **cross-border transaction**.

We are talking about a national state.
Factors:

- company registered in France is familiar with French legal system and they may want to use French law

In contract you will typically find a "choice of law clause", a term of contract in which the parties specify:

Choice of law clause:

- **Applicable law**: Which law is applicable to their contractual relation ex. Spanish Law
- **Relevant jurisdiction**: competent court, tribunal with the exclusive over the contract, national judges. Which court shall have jurisdiction in the case of legal disputes between them

A court can be a **state court**, judges, the court responsible for handling the contract. Ex. Court of Medid
or an
arbitral tribunal (arbitration): court that will be competent in case of a litigation arising from the contract (IIC Paris)

Choice of court agreement

In case the parties choose to go before a national court or an arbitral court in case of disagreement

The convention is there to make sure that the choice of court agreements between parties of a contract are respected, unless the parties dispute the details of the choice of court

CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS

signed on behalf of the European Union and the United States of America Entry into force: 1-X-2015

If the parties are citizens of a national state then that national law is applicable and would naturally govern the contract

REGULATION (EU) No 1215/2012
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
BRUSSELS I REGULATION

If the parties are citizens of different EU states and it is unclear the choice of court we would look at **Brussels I regulation** to decide

Arbitration clause (a specific choice of court agreement) specifies "***Arbitration***" ch8
which is:
Alternative dispute resolution mechanism (ADR) => alternative to national courts
It specifically says that in case of dispute the parties will not go before a national court but an arbitral tribunal

- can specify composition of tribunal
- it is faster than state procedure and all its stages
- Parties can have privacy
- Arbitral award (verdetto)

"Any dispute or claim arising out of this Agreement shall be referred to and resolved by the International Chamber of Commerce (ICC) in Paris in accordance with the ICC Conciliation and Arbitration rules"

Arbitration is ruled by domestic jurisdictions as well as by international treaties, such as the 1958 New York Convention

Normally found in commercial contract, in which is advisable to include both a choice of law agreement and a choice of court agreement
There are many arbitration tribunals around the world providing rules on how to carry out arbitrations. Ex. Milan chamber of commerce

The Question of Proper Law - choice of parties can be:

1. To the contract law rules of a national State (e.g. France, Delaware, etc.)
    - **"Hard law" choice**
2. To the contract law rules set out in a restatement (e.g. PICC, PECL, DCFR), generally combined with an arbitration clause
    - **"Soft law" choice**

Soft Law: non-national law, artificially made

Contract law is increasingly affected by sets of rules which, albeit not binding, can be a source of inspiration for courts while settling a dispute, for parties while drafting a contract and can be chosen as the law applicable to the parties' agreement, **generally combined with an arbitration clause**

Not binding per se unless the parties decide that that particular soft law will be applicable to the contract

The best-known sets of soft law rules in contract law are:
- **Unidroit Principles of International Commercial Contracts** (PICC) of 1994-2016
- **Principles of European Contract Law** (PECL) of 1995
- **Draft Common Frame of Reference** (DCFR) of 2008-2009

PICC
The UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (4th ed., 2016)
• cover all the most important topics of general contract law
• main source of inspiration was the **CISG (Indiana convention on contracts)**
• general rules of international sales law and other contracts to be performed at one time
• drafted by a working group composed by scholars and practitioners from all over the world

PECL
Principles of European Contract Law
• set of model rules drawn up by leading contract law academics in Europe set up by Ole Lando ("**Lando Commission**")
• attempt to elucidate basic rules of contract law and more generally the law of obligations which most legal systems of the member states of the European Union have in common
• are based on the concept of a uniform European contract law system
• take into account the requirements of the European domestic trade

These principles can be referred to in the rules of the contract

Principles, Definitions and Model Rules of European Private Law
Draft Common Frame of Reference (DCFR)

- Important articles on party autonomy

Restatement (Second) of Contract
Organise in a single instrument the US contract law, got have best possible rules starting from existing rules

- promulgated by the ALI, a private organization of of scholars, judges and practitioners
- the first restatement of contract was promulgated in 1932, the second officially appeared in 1981
- seeks to formulate "in the aggregate" the American law of contract, as though the U.S. consisted of only one, rather than fifty, state jurisdictions
- when the single States are in conflict, it is represented not the rule adopted in their majority, but the "better view"

CHOICE OF CONTRACT LAW
Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
(Rome I Regulation)

ART. 3 of ROME I REGULATION

Freedom of choice (between parties of different EU nationality)

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

ART. 6 of ROME I REGULATION
If one of the parties is a consumer then this freedom of choice is limited

Consumer contract
Choice of law is barred when the business activity of the trader or the professional who enters into a contract has been either pursued in, or directed to the country where the consumer has her/his habitual residence
If so, the contract «*shall be governed by the law of the country where the consumer has his habitual residence*»

IN THE USA
In the US legal system , contract law is regulated at state-level, and there is no formal Federal contract law.

B-to-B transactions Uniform Commercial Code (U.C.C.)	B-to-C transactions Common law and special statutes (about food, drugs, etc.)

UNIFORM COMMERCIAL CODE (since 1952) It is drawn up by private organizations and actually adopted by the legislature of all 50 states, the District of Columbia, and the U.S. territories (e.g. Puerto Rico, American Samoa, etc.). The part of the UCC that deals with contracts is Article 2 and it is specifically restricted to contracts for the sale of goods.

CONTRACT INTERPRETATION
There are two opposing premises, approaches:

Intention	**Expression**
"Intention per se is the only important and effective thing" (FRIEDRICH VON SAVIGNY, System des heutigen römischen Rechts, 1840) **SUBJECTIVE THEORY** (*WILLENSTHEORIE*) PRINCIPLE OF **SELF-DETERMINATION**	"Any promise binds the promissor, whether or not intended by her/him" (OTTO BÄHR, Über Irrungen im Contrahieren, 1875) **OBJECTIVE THEORY** (*ERKLÄRUNGSSTHEORIE*) PRINCIPLE OF **RELIANCE** ON SOMEONE ELSE'S PROMISE **LEGAL CERTAINTY** (VERKEHRSSCHUTZ) Impartial bystander that gives meaning to that part of the contract

CONSTRUCTING A CONTRACT: could be defined as the process of determining the meaning of ambiguous or incomplete expressions
Legal gaps are incomplete or ambiguous expressions.

Subjective test:	**Objective test:**
It aims at seeking out the parties' subjective	It aims at seeking out the objective assessment of

understandings and is thus based solely on the inner intention of their communications or conduct	an external, detached observer and is thus based solely on the outspoken meaning of the parties' communications or conduct

Normally common law systems tend to use an objective approach while civil law systems rely on the intention behind the contract

Udall v Hill Ltd (1972) AC 441, 502
Hill (feeding stuff compounder) vs. Udall (mink breeder)

Contract for the supply of an animal foodstuff.
When reading a clause you naturally give a meaning to it, in this case there was an unclear clause regarding the foodstuff.
In the clause there was no mention of not putting a toxic agent inside

"*Ingredients of the foodstuff are to be of fair average quality of the season, expected to analyze not less than 70% protein, not more than 12% fat and not more than 4% salt*"
An ingredient of the supplied foodstuff contained a toxic agent which, though not unfit to animals in general, caused thousands of Udall's minks to die.

The consideration on this case was done in the perspective of a "reasonable man" that read the contract

Udall sued Hill for breach of contract
Udall's claim for damages was dismissed

What the seller promised is determined by ascertaining what his words and conduct would have led the buyer reasonably to believe that he was promising. That is what is meant in the English law of contract by the common intention of the parties. **The test is impersonal**. It does not depend upon what the seller himself thought he was promising, if the words and conduct by which he communicated his intention to the buyer would have led a reasonable man in the position of the buyer to a different belief as to the promise; **nor does it depend upon the actual belief of the buyer himself as to what the seller's promise was, unless that belief would have been shared by a reasonable man in the position of the buyer**

CIVIL LAW JURISDICTIONS	COMMON LAW JURISDICTIONS
are generally keen to strike a balance between the objective and the subjective test. They use analogy on two levels, using **principles of law** and by **using pre-existing laws.** Analogy: Means that a case is adjudicated pursuant to dispositions pertaining to similar cases or to akin branches of law. Civil law jurisdictions resort to normative mechanisms designed to **extend norms which already exist** to unregulated cases. **German Civil Code** § 133 Interpretation of a promise: In **interpreting a promise**, the effective intent	are generally keen to acknowledge solely an objective test, albeit variously moulded «*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*» Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at

shall be investigated, whilst the **literary meaning of its expression is not binding**

The literary meaning loses relevance with respect to the intention behind the contract

French Civil Code
Art. 1188 (as amended in 2016)

1. A contract is to be interpreted according to the **common intention of the parties** rather than stopping at the literal meaning of its terms.

2. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a **reasonable person placed in the same situation would give to it**.

"Reasonableness test", read the contract through the eyes of a model person

A reasonable person: common way of assessing a situation through a specific viewpoint. Neutral standard perspective for contractual interpretation

This different approach depends on the perception of the meaning of a contract in common law and civil law

Common law approach (French-like, 2 steps approach) is expressed in the **Unidroit Principles**

Art. 4.1

A contract shall be interpreted according to the common intention of the parties.

If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances

The statements and other conduct of a party shall be interpreted according to the party's intention if the other party knew or could not have been unaware of that intention.
If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a

«*The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement*»
Lord Hodge JSC
in
Wood v Capita Insurance Services Ltd [2017] UKSC

«*If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense*»
Lord Diplock
in
Antaios v Salen Rederierna A.B. [1985] AC 191 at 201

Exclusionary Rule
«The law excludes from admissible background the previous negotiations of the parties and their declarations of subjective intent»
You do not take into account the previous declarations of the parties regarding the contract that followed.

Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 913

reasonable person of the same kind as the other party would give to it in the same circumstance. you can also interpret declarations prior to the contract that constitute a contractual offer	

Expressed/Implied Terms
=> are contractual provisions, building blocks of a contract, or single articles

Express terms: those explicitly said in contract
Implied terms: those not cited and established by default rules

Legal systems have **default rules to fill the gaps of the contracts**, to constitute implied terms.

Implied terms in the Civil Law

- The parties' will cannot generally set out all contractual rights and obligations under the contract
- Parties only discuss those elements of the contract which they deem essential (e.g. price and time of delivery)
- Often, it is not established what will happen if one party does not perform the contract

Most contract law consists in 'default rules' (or rules of thumb), which are per se applicable, have the parties not agreed otherwise

CONTRACT LAW PROVIDED FOR BY CIVIL AND COMMERCIAL CODES (AND ADDITIONAL STATUTES)

GENERAL PART one body of norms which are applicable to any contract, notwithstanding its type	**SPECIAL PART** additional sets of norms particularly applicable to single and most relevant types of contract **TERMS IMPLIED BY LAW** they consist quite often in default rules which serve as **gap-fillers** of contractual agreements

SOME TRADITIONAL SPECIAL CONTRACTS
• SALE (emptio-venditio)

• LEASE (locatio-conductio)

• LOAN (mutuum)

• DEPOSIT (depositum)

Codice Civile default rules:
Art. 1510 Place of delivery
Lacking an agreement or usage to the contrary, a chattel shall be delivered at the place where it was located at the time of its sale, if the party knew of that place, or otherwise at the place where the seller had his domicile or where her/his enterprise was headquartered.

Certain provisions are included in the contract despite the parties haven't explicitly included them

COMMON LAW JURISDICTIONS

UK: Statutes are national law promulgated by the parliament

CLASSIFICATION OF SPECIAL CONTRACTS PLAYS A MINOR ROLE (if any)

implied terms are only rarely provided for by statutes and mostly desumed through proper interpretation of the parties' agreement

IMPLIED TERMS IN THE COMMON LAW

- *OBVIOUS, REGULAR AND CUSTOMARY TERMS:* refer to rules that are customary for that specific kind of contract. Terms they would have thought of if they put their mind to it
- *TERMS NECESSARY TO GIVE THE CONTRACT* «BUSINESS EFFICACY»: lacking terms that would be necessary for that contract to actually work are added by the court. "Business efficacy test"
- *TERMS IMPLIED AT COMMON LAW:* courts themselves may identify implied terms and insert them into the contract
- *TERMS IMPLIED BY STATUTE:*Gaps left in the contracts are drafted case by case, they refer to statutes trying to rationalise a set of rules for that specific type of contract

Lecture 11: Supplementation of terms and Good Faith

ergänzende Ausfüllung
integrazione del contratto

- Different from implication of terms

IF NO APPROPRIATE GAP-FILLER IS TO BE FOUND IN THE CODES (OR OTHER STATUTES)

=> the contract can be supplemented

Codice Civile: Art. 1374 Supplementation of contract

*A contract binds the parties not only as to what they have expressly agreed, but also **to all that is stipulated by the law** or, **in case no provision is available**, by the **usage** and by the **equity**.*

In this case equity refers to "**Good faith**" a central concept for supplementation in Civil law countries

Ex. Litigation between renter and landlord: If no local rule is present the judge can assign a rent by taking equity into account

GOOD FAITH IN THE CIVIL LAW

German Civil Code § 242 Performance according to good faith

The debtor shall render the performance in the way it is necessary to comply with the requirement of good faith settled in usage

Doctrine/Theory of Good faith: similar notion to everyday language. Reasonable terms of fairness. Parties need to comply with the obligations in the contract. Necessary ways in which the contract should be performed

Contracts are to be negotiated in good faith, eg. If a party does not disclose relevant information to the other party they might face breach of contract

Code Napoleon-French Civil Code
Art. 1104 (as amended in 2016)

1. Contracts must be **negotiated**, formed and **performed** in good faith.

2. This provision is a matter of public policy. (So it is a mandatory provision)

GOOD FAITH IN THE COMMON LAW

=> Good faith doctrine does not exists usually in common law jurisdictions, contracts are perceived as result of bargain, parties are adversaries that try to strike the best deal out of the other

ENGLISH COMMON LAW

• No general principle of good faith in general law of contract

• Adversarial position of the parties when involved in negotiations and performing their contractual obligations, except for cooperative (commercial) contracts and fiduciaries => **Good faith**

«The recent history of the common law of contractual interpretation is one of continuity rather than change. ***One of the attractions of the English law as a legal system of choice in commercial matters is in its stability and continuity, particularly in contractual interpretation****»*

Lord Hodge JSC in *Wood v Capita Insurance Services Ltd [2017] UKSC*

The english common law is the most used in commercial contracts worldwide due to its objective approach (specified in the choice of law clause)

UCC- Uniform Commercial Code
Section 1-203

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

AMERICAN COMMON LAW

• Significant role played by the requirement of **good faith**, especially with regard to the performance of a contract

• The same applies to other common law jurisdictions (as Australia, etc.)

RESTATEMENT OF CONTRACTS SECOND

§ 205 Duty of **Good Faith and Fair Dealing**

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111

Contract of exclusive distribution of perfumes

- in duty free shops
- in specific territories

- Through an agreement ITC granted Yam Seng the **exclusive rights to distribute in duty free shops certain fragrances bearing the brand name 'Manchester United'** in specified territories in the Middle East, Asia, Africa and Australasia.
- During the contractual relationship ITC:

- **authorized a different distributor** (not Yam Seng) to apply in **Singapore a lower retail price** than the duty free price that Yam Seng was permitted to offer
- misled Yam Seng about the issue, in giving false information about the price applied by the different distributor in Singapore

They damaged Yam Seng by providing false information

Exceptional case

Yam Seng sues ITC for breach in affirming the existence of an implied term according to which: '[ITC] would not prejudice [Yam Seng]'s sales by offering the same products for sale within the same territories at a lower price than [Yam Seng] was permitted to offer'.

Did ITC breach the contract?

L.J. LEGATT
'ITC was in breach of contract […] in acting in bad faith in misleading Yam Seng about the steps taken to ensure that the domestic retail price in Singapore was not lower than the duty free price'.

The law decided that in that particular case an implied terms of good faith was present

- To not provide false information
- To not undercut duty free prices in areas under the agreement between Yam Seng and ITC

Based on this precedence, courts in the UK can now apply the principle of Good faith to new cases

Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent (AKA John Kent), [2018] EWHC 333 (Comm) 22 February 2018

(Joint venture agreement between investor and businessman.
In a few years the businesses did not perform well so Al Nehayan wanted to close the business relationship with Kent through a promissory note.
Kent failed to pay and Al Nehayan sued for breach of contract.)

In 2008, Sheikh Tahnoon and Kent entered into an oral joint venture and became equal shareholders in Kent's luxury Greek hotel business, which later expanded to include an online travel business.

Sheikh Tahnoon provided significant amounts of money to the business, which suffered from numerous cash-flow issues. From April 2012, Sheikh Tahnoon refused to invest any additional funds. The companies were restructured in order for Kent to repay Sheikh Tahnoon.

The Parties entered into a promissory note by which Kent agreed to pay Sheikh Tahnoon a sum of €5.4 m in annual installments. Sheikh Tahnoon claimed the value of the promissory note which remained unpaid.

Al Nehayan v Kent [2018] EWCH 333

Kent claimed that his consent to the agreement and the promissory note has been obtained in breach of fiduciary duties and / or a contractual duty of good faith owed to him by Sheikh Tahnoon

L.J. LEGATT (since 21 April 2020 Jugje of the UK Supreme Court)

"*it is sufficient to identify two forms of furtive or opportunistic conduct which seem to me incompatible with good faith in the circumstances of this case. First, […] for one party to agree or enter into negotiations to sell his interest or part of his interest in the companies which they jointly owned to a third party covertly and without informing the other beneficial owner. Second, while the parties to the joint venture were generally*

free to pursue their own interests and did not owe an obligation of loyalty to the other, it would be contrary to the obligation to act in good faith for either party to use his position as a shareholder of the companies to obtain a financial benefit for himself at the expense of the other" (para 176).

A principle of Good faith can be implied in contracts such as Long running contractual relationship, when the parties have to take into account the interest of the other party

Contracts where the parties enter a collaborative relationship towards a common goal

CONTRACT DRAFTING IN THE COMMON LAW

1. absence of a principle of «special contracts» and limited role of implied terms at statutes
2. absence of general principles of good faith and co-operation between the contracting parties
3. limited role for the court in case of serious supervening circumstances

• parties tend to draft their agreement in as much detail as possible, *to limit the scope of judicial interpretation*

• the content of the bargain shall be set out *explicitly* as far as possible, *in the interests of certainty*

• parties shall conduct *due diligence exercises and allocate risks as far as possible in the contract itself*

DRAFTING INTERNATIONAL (COMMERCIAL) CONTRACTS
BOILERPLATE CLAUSES
Include choice of law and of jurisdiction clauses

1. Standardized clauses, generally put at the end of contracts, which govern the way in which they operate (e.g. notice procedures, amendment procedures, interpretation issues, dispute resolution mechanisms, etc.)
2. That way, parties must not rely on the general system of law applicable to the contract they have concluded
3. Therefore, that contract is autonomous and severed from any single jurisdiction and, thus, truly international

Entire agreement clause
This type of international commercial contracts tend to be autonomous from the external legal system, very detailed, there is a clause that says that the agreement is entirely contained in the contract => to limit external intervention by courts