BUSINESS LAW
ACKNOWLEDGEMENTS

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COURSE OVERVIEW

INTRODUCTION

Business Law is one of the critical courses for the entrepreneur. Without exception, every business enterprise, at one point or another, finds itself dealing with legal issues. The law itself is a broad field, and it is difficult to discuss it exhaustively. The most exceptional thing about Business Law is that it is inclusive of other branches of law such as labour law, and employment law. Our discussion will, therefore, take these into account. However, at the centre of Business Law are law of contract, law of sale, law of lease, and law of agency. These are discussed in some depth, and at every turn, the entrepreneur is expected to infuse personal experience and typical business practical examples into the discussion and activities. The primary aim of going through the course is to prepare future entrepreneurs to operate their business within the local and legal framework of their respective countries.

COURSE GOALS

Upon completion of the Business Law course you will be able to:

1. Describe the different types of legal frameworks required to run a business.
2. Establish your business as a legal entity in accordance with local and national guidelines.
3. Explain the link between foundational ideas of a business and Business Law.
4. Define key concepts used in Business Law.
5. Recruit and contract employees cognisant of labour and employment legal aspects.
6. Demonstrate a fuller understanding of and the ability to apply the key areas of Business Law, namely: law of contract, recruitment and contracting, law of sale, law of lease, and law of agency.

REQUIRED READINGS

The following textbooks are recommended to support this course.


*Business Law Today, Standard Edition by Roger LeRoy Miller, Gaylord A. Jentz, Hardcover: 1200 pages, Publisher: South-Western College/West.*
ASSIGNMENTS AND PROJECTS

A series of activities and assignments will guide you through the concepts in this course and ask you to demonstrate that you can apply the concepts to support the creation of your risk management model and approach. A summary of this work is included at the beginning of each unit. A description of the major assignment in this course is found at the end of the study guide. Your institution / instructor will guide you through this material and will also assign additional projects as deemed necessary.

JOURNALING REQUIREMENTS

To capture the output from the reflective questions and activities you are asked to keep a personal journal. At the end of the course the personal journal will be submitted to your instructor for feedback and grading.

ASSESSMENT PROJECTS

Assessment takes the form of responding to activities, as well as written assignments and examinations as determined from time-time by the institution. In cases where coursework assignments, fieldwork projects, and examinations are used in combination, a percentage rating for each component will be communicated to you at the appropriate time.

ASSESSMENT

Assessment takes the form of responding to activities, as well as writing coursework assignments and examinations as determined from time-time by the institution. In cases where coursework assignments, fieldwork projects, and examinations are used in combination, percentage rating for each component will be communicated to you at the appropriate time.

TIME REQUIRED

This course is worth 14 credits, and each credit is equivalent to 10 notional hours. You are, therefore advised to spend not less than 140 hours of study on the course. This notional time includes:

- going over activities embedded in the study material;
- peer group interaction (where necessary);
- face-to-face tutorials (where necessary);
- working on tutor-marked assignments; and
- preparing for and sitting examinations (where that is a requirement)

COURSE SCHEDULE

Depends on the institution offering the course.
STUDENT SUPPORT

This will vary from one institution to the other. Basically, this is an online programme, but individual institutions might prefer blended mode of delivery.

ACADEMIC SUPPORT

Information about academic support varies, depending on the institution that offers the programme.

HOW TO SUBMIT ASSIGNMENTS

Normally, assignments are part and parcel of continuous assessment, so feedback will be given to students, and the grades captured for aggregation at the end of the programme.

TECHNICAL SUPPORT

Individual institutions have unique ways of providing technical support. These will be communicated to learners in tutorial letters.
### SOME IMPORTANT TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Actio Quanti Minoris</em></td>
<td>Action for reduction of price.</td>
</tr>
<tr>
<td><em>Agent</em></td>
<td>A person who acts on behalf of another person.</td>
</tr>
<tr>
<td><em>Consensus</em></td>
<td>Agreement</td>
</tr>
<tr>
<td><em>Capacity</em></td>
<td>Ability legally to contract.</td>
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<tr>
<td><em>Contra Proferentum Rule</em></td>
<td>An ambiguous statement is interpreted against its author</td>
</tr>
<tr>
<td><em>Delict</em></td>
<td>Civil wrong entitling the wronged party to remedies.</td>
</tr>
<tr>
<td><em>Employer</em></td>
<td>One who hires another to provide services to him.</td>
</tr>
<tr>
<td><em>Employee</em></td>
<td>One who is engaged in a contract for the provision of services in return for payment of wages.</td>
</tr>
<tr>
<td><em>Estoppel</em></td>
<td>Prevented from denying.</td>
</tr>
<tr>
<td><em>Fiduciary Relationship</em></td>
<td>A relationship of trust and loyalty.</td>
</tr>
<tr>
<td><em>Independent Contractor</em></td>
<td>One engaged in a contract of services, and is not closely.</td>
</tr>
<tr>
<td><em>In Mora</em></td>
<td>To blame for delay Quantum: Amount or quantity.</td>
</tr>
<tr>
<td><em>Jurisdiction</em></td>
<td>The right of a court to determine a case.</td>
</tr>
<tr>
<td><em>Latent Defect</em></td>
<td>A defect not obvious to the eye.</td>
</tr>
<tr>
<td><em>Legislation</em></td>
<td>Law made by parliament in the manner given in the constitution.</td>
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<tr>
<td><em>Lessor</em></td>
<td>One who makes available to another, the use and enjoyment of property.</td>
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<tr>
<td><em>Lessee</em></td>
<td>The one who uses another’s property in return for payment of rent.</td>
</tr>
<tr>
<td><em>Long Lease</em></td>
<td>A lease for a period of ten years or more or for a period adding up to.</td>
</tr>
<tr>
<td><em>Mandate</em></td>
<td>The agreement through which the agent agrees to perform the principal’s instructions.</td>
</tr>
<tr>
<td><em>Merger</em></td>
<td>Assuming of two titles by one person.</td>
</tr>
<tr>
<td><em>Merx</em></td>
<td>The subject matter of contract of sale.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Novation</td>
<td>Agreeing to vary rights and obligations. <em>Prescription:</em> Limit by which one may enforce rights.</td>
</tr>
<tr>
<td><em>Nemo Dat Quad Non</em> Habet</td>
<td>One cannot pass a greater right than one actually has.</td>
</tr>
<tr>
<td>Obita Dicta</td>
<td>By the way statement. This can only be persuasive to the court.</td>
</tr>
<tr>
<td>Principal</td>
<td>The one who engages the agent.</td>
</tr>
<tr>
<td>Perfecta</td>
<td>Concluded in all respects.</td>
</tr>
<tr>
<td>Privity Of Contract</td>
<td>A recognised freedom to choose a contracting partner.</td>
</tr>
<tr>
<td>Quasi-Mutual Assent Rule</td>
<td>A subject test for agreement in contracts.</td>
</tr>
<tr>
<td>Ratification</td>
<td>Adoption of an act performed by another who had not been given authority to act.</td>
</tr>
<tr>
<td>Ratio Decidendi</td>
<td>The binding part of judicial precedent. It is the reason for the decision.</td>
</tr>
<tr>
<td>Risk</td>
<td>Liability for accidental loss or deterioration of subject matter after conclusion of contract but before delivery.</td>
</tr>
<tr>
<td>Short Lease</td>
<td>Lease for less than ten years.</td>
</tr>
<tr>
<td>Spei</td>
<td>Hope</td>
</tr>
<tr>
<td>Sub-Letting</td>
<td>Lessee lets another person to use part of the leased property.</td>
</tr>
<tr>
<td>Tacit Hypothec</td>
<td>A right to retain possession of lessee’s property by the lessor until payment of rent arrears.</td>
</tr>
<tr>
<td>Vicarious Liability</td>
<td>Employer’s liability for the wrongful act of his employee.</td>
</tr>
<tr>
<td>Void</td>
<td>A legal nullity</td>
</tr>
<tr>
<td>Voidable</td>
<td>Valid but the innocent party may choose to avoid.</td>
</tr>
<tr>
<td>Vindicatio Right</td>
<td>The right of owner to get back his property from another who has no right.</td>
</tr>
<tr>
<td>Vaccua Possessio</td>
<td>Free undisturbed possession.</td>
</tr>
</tbody>
</table>
UNIT ONE - THE BACKGROUND

INTRODUCTION
This is the first of three units comprising the Business Law programme. It is made up of two topics, and as indicated in the heading, gives the background to the course. The foundation concepts about business are recapitulated, with the initial focus on forms of business and the business environment. The nature of law, that is, what it is in conjunction with business ethics, is further examined. A distinction is then made between ethics and general moral obligations. In the second topic, the discussion is developed further to include the purpose and function of law. The entrepreneur is expected to develop a clear understanding of these aspects, in combination with sources of law. Cognisant of the fact that disputes and conflicts are resolved at the courts of law, the court structure and jurisdiction ought to be understood by the entrepreneur. This is closely explained, and further examined by discussing categories of law.

UNIT OBJECTIVES
After completing this unit you should be able to:
1. give a brief explanation of forms of business, the business environment, and business ethics;
2. define the nature of law and the legal status of the enterprise; and
3. explain sources of law and court structure.

UNIT READINGS
As you complete this unit it is recommended that you read the following chapters/articles:

- ISI Journal Citation Reports © Ranking: 2011: 49/134 (Law); 63/113 (Business). Online ISSN: 1744-1714.

ASSIGNMENTS AND ACTIVITIES
There will be one assignment for the entire course as indicated above.

Note: This can be changed based on individual institution design and assessment requirements.
TOPIC 1.1 - THE BUSINESS BACKGROUND

INTRODUCTION
The early courses on the BBE programme discussed at length issues to do with forms of business ownership, the business environment, and business ethics. The present course is about business law. However, to set the tone, a brief review of each of the three aspects purportedly discussed earlier in the programme will be made. This will provide contextual grounding for the fuller discussion of business law. This background is, therefore, essential as it demonstrates the interrelatedness of the law, on the one hand, and forms of ownership, the environment, and ethics, on the other.

OBJECTIVES
After working through this topic you should be able to:

1. give a brief summary of forms of ownership, the business environment, and business ethics;
2. demonstrate the link between business law and each of the three concepts;
3. explain what is meant by the legal status of a business entity; and
4. illustrate how business ethics can be derived from general moral obligations.

CONTENT
- Forms of business ownership.
- The internal and external business environment.
- The legal status of an enterprise.
- Ethics and business law.
- Deriving business ethics from general moral obligations.

WARM UP ACTIVITY
1. From your earlier studies in the programme what do you remember about?
   - Forms of ownership?
   - The business environment?
   - Business ethics?
2. What do you understand by the legal status of an enterprise?

Record your response in your course journal.

This warm-up activity is aimed at refreshing your mind about what you have already read about, and more importantly, to help you forge the link between business law and what you are already familiar with. Reflect on your views before proceeding.
MODES OF BUSINESS
In our first course to the BBE programme, the different types of enterprises were explained in detail. Presently, the business types are summarised in order to lay the foundation for our subsequent discussion about business law. A knowledge of business modes is essential if the entrepreneur is to come to a clearer understanding of legal issues. Below is a diagram that summarises types of business at a glance. After viewing the figure, read on in order to recapitulate what you learnt during your first semester.

Forms of Business Ownership for a Small Business

The Sole Proprietorship

‘Sole’ means owned by one person. Thus, an enterprise under ownership of one person is termed sole proprietorship. It has the following characteristics.

- A business that is owned and managed by one person and has no partners or co-owners. The owner can appoint knowledgeable people to work for him/her.
- Provides capital, takes all decisions alone, manages the enterprise and accepts all the responsibilities for the profits and debts.
- The lifetime of the enterprise is linked to that of the owner and there is no difference between private and business property.
- If the enterprise fails and there are debts, the creditors can attach the owner’s personal assets.
- It is easy to discontinue: If the entrepreneur decides to discontinue operations, he can terminate the business quickly even though he will still be personally liable for all the outstanding debts and obligations that the business cannot pay.
- The profit incentive to a proprietorship > Once all expenses are paid what remain as profit after tax belongs to the owner.
There are no special legal restrictions as it is the least regulated form of ownership.

**Partnerships**

This type of business is characteristically different from the sole proprietorship, and has these two main features.

- A partnership is formed when a group of people agree to combine their capital, labour, know-how and experience with the aim of making a profit.
- At least two and not more than 20 people conclude an agreement preferably drawn up by an attorney and should contain names of the partners, name and nature of the enterprise, and establishes the contribution, salaries of the partners, division of profits and other aspects of the partnership.

**Close Corporation (Or Incorporation)**

Even more different from the two above-mentioned forms of ownership is the close corporation, which has these characteristics.

- Does not have shareholders, only members who all have an interest in the enterprise.
- The total member interest must be 100% at all times.
- Each member contributes in the form of money, movable or fixed assets or services rendered.
- Only private members may be members of a close corporation.
- Membership is limited to 10. A member’s interest may be transferred to others.
- A close corporation’s name ends with the abbreviation ‘cc’, and the word ‘company’ may not appear in the name.
- The name, registration number, and the names of its members appear on all business documents.

**Private Company**

This fourth form of ownership has distinguishing features that makes it different from the four discussed above.

- The company is a legal person in its own right. It has a ‘life’ independent of its shareholders.
- There are various kinds of companies, like the private company, the public company, and the company limited by guarantee (such a company does not issue shares and is not profit-orientated).
- A private company is the most suitable type for a small businessperson.
• A private company, with a maximum of 50 shareholders, must be registered with the Registrar of Companies and is identified by the words ‘(Proprietary) Limited’ or ‘(Pty) Ltd’, after its name.

Activity 1.1 A

Given the four types of business ownership discussed above, in what ways are they linked with the law within a given environment?

Record your answer in your personal journal for later review and feedback by your course instructor.

The simplest response is probably that without some form of regulation, running businesses will be a haphazard affair that might result in all forms of confusion. In the ensuing discussion, the detailed manifestation of entrepreneurial law is explored. As we also bear in mind that any business does not operate in a vacuum, we now give a brief recapitulation of the environment in which the forms of ownership are identifiable, and in turn, in which business law functions.

THE BUSINESS ENVIRONMENT

The term Business Environment is composed of two words ‘Business’ and ‘Environment’. In simple terms, the state in which a person remains busy is known as Business. The word ‘Business’ in its economic sense means human activities like production, extraction or purchase or sales of goods that are performed for earning profits.

On the other hand, the word ‘Environment’ refers to the aspects of surroundings. Therefore, Business Environment may be defined as a set of conditions – Social, Legal, Economical, Political or Institutional that are uncontrollable in nature and affect the functioning of organizations. Business Environment has two components:

- Internal Environment
- External Environment

**Internal Environment:** It includes five Ms i.e. man, material, money, machinery and management, usually within the control of business. Business can make changes in these factors according to the change in the functioning of a given enterprise.

**External Environment:** This refers to factors, which are beyond the control of business enterprise. These factors are: Government and Legal factors, Geophysical Factors, Political Factors, Socio-Cultural Factors, Demographical factors etc. It is of two Types: 1. Micro/Operating Environment 2. Macro/General Environment
**Micro/Operating Environment:** This is the environment, which is close to a business and affects its capacity to work. It consists of Suppliers, Customers, Market Intermediaries, competitors and the public.

- **Suppliers:** They are the persons who supply raw material and required components to the company. They must be reliable and business must have multiple suppliers i.e. they should not depend upon only one supplier.
- **Customers:** Customers are regarded as the king of the market. Success of every business depends upon the level of their customers’ satisfaction. Types of Customers: wholesalers, retailers, industries, government and other institutions, and foreigners
- **Market Intermediaries:** They work as a link between business and final consumers. These include: middlemen, marketing agencies, financial intermediaries, and Physical Intermediaries
- **Competitors:** Every move of the competitors affects the business. Business has to adjust itself according to the strategies of the competitors.
- **The Public:** Any group, which has actual interest in a business enterprise is termed as public e.g. media and local public. They may be the users or non-users of the product.

**Macro/General Environment:** – It includes factors that create opportunities and threats to business units. Following are the elements of Macro Environment:

**Economic Environment:** It is very complex and dynamic in nature that keeps on changing with the change in policies or political situations. It has three elements:

1. Economic Conditions of Public
2. Economic Policies of the country
3. Economic System
4. Other Economic Factors: – Infrastructural Facilities, Banking, Insurance companies, money markets, capital markets etc.

**Non-Economic Environment:** Following are included in non-economic environment:— **Political Environment:** It affects different business units extensively, and is characterised by:

1. Political Belief of Government
2. Political Strength of the Country
3. Relation with other countries
4. Defence and Military Policies
5. Centre State Relationship in the Country
6. The thinking of opposition parties towards Business enterprises
**Socio-Cultural Environment:** The influence exercised by social and cultural factors, not within the control of business, is known as Socio-Cultural Environment. These factors include: attitude of people to work, family system, caste system, religion, education, marriage etc.

**Technological Environment:** A systematic application of scientific knowledge to practical task is known as technology. Everyday there has been vast changes in products, services, lifestyles and living conditions, these changes must be analysed by every business unit and should adapt these changes.

**Natural Environment:** It includes natural resources, weather, climatic conditions, port facilities, topographical factors such as soil, sea, rivers, rainfall, etc. Every business unit must look for these factors before choosing the location for their business.

**Demographic Environment:** It is a study of perspective of population i.e. its size, standard of living, growth rate, age-sex composition, family size, income level (upper level, middle level and lower level), and education level. Every business unit must see these features of population and recognise their various needs and produce accordingly.

**International Environment:** It is particularly important for industries directly depending on import or exports. The factors that affect the business are: globalisation, liberalisation, foreign business policies, and cultural exchange.

**Activity 1.1 B**

1. Closely examine each of the environmental factors cited above.
2. Which of these are of special interest to your enterprise?
3. To what extent are they linked with business law?

Record your answer in your personal journal for later review and feedback by your course instructor.

Depending on the enterprise you are engaged in, the environmental factors will impact differently. By identifying any of interest to you and relating them to the law in your country, you will be able to come up with a useful guide on how to relate your business to the law. We now turn to the legal status of an enterprise.

**Legal Rules Versus Moral Rules**

A fundamental question constituting the basis of the present discussion is: What is the nature of law in general, and that of business law in particular? Laws are rules established by authority to regulate the behaviour of members of a community or country. The term law itself may be used in a variety of contexts. Laws are different from rules, as explained presently.
Law refers to legal rules as opposed to moral rules. Legal rules are obligatory while some moral rules may also be obligatory. Legal rules are enforceable by the state while moral rules need not be enforced. Here is an activity to help you make the distinction.

**Activity 1.1 C**

Five rules are listed in either column. Which of these are legal, and which are moral rules? Justify your view by discussing with peers.

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Students must not cheat in an examination.</td>
<td>1. An entrepreneur may not fire a worker without reason.</td>
</tr>
<tr>
<td>2</td>
<td>Employers must respect those who work in their enterprises.</td>
<td>2. A worker may not steal from the employer.</td>
</tr>
<tr>
<td>3</td>
<td>An entrepreneur should not fall in love with his secretary.</td>
<td>3. The employer and the employee must honour contracts entered into.</td>
</tr>
<tr>
<td>4</td>
<td>An entrepreneur should treat elderly workers more kindly.</td>
<td>4. An entrepreneur may not engage in child labour.</td>
</tr>
<tr>
<td>5</td>
<td>An entrepreneur should not lie to the employees.</td>
<td>5. An entrepreneur must pay overtime wages for hours worked.</td>
</tr>
</tbody>
</table>

Record your answers in your personal journal for later review and feedback by your course instructor.

Did you indicate that rules in the first column are moral rules, while those in Column B are legal rules? Why should this be so? Although both types of rules regulate how human beings within an enterprise should behave and interact, legal rules are laid down and enforced by the state. For example, an entrepreneur who violates labour rules, e.g. child labour is liable for punishment based on laid down statutes. By contrast, the state is not concerned with whether an entrepreneur falls in love with his secretary, who may be somebody’s wife. The state will not punish him for this unless it becomes a reported case.

Legal rules must meet certain basic principles whether in the context of business or otherwise:

- Legal rules must be applied equally in similar cases.
- They must be applied equally to people who are similarly circumstanced.
• The law should be applied equally whether one is rich or poor. It may not be just to treat minors and adults similarly nor would it be fair to treat insane people in the same way as those who are normal.

**LEGAL STATUS OF AN ENTERPRISE**

An enterprise, for example, a company is considered by law to be a separate legal entity. The rule is that once a company is properly incorporated, it must be treated like any other independent person with its own rights, obligations, or liabilities appropriate to itself. The consequences of the enterprise’s legal status are as follows:

1. The company is capable of owning property separately from its members.
2. The company can sue and be sued in its own name because of its legal status.
3. The enterprise has perpetual succession, unless it is a sole proprietorship. This means its existence is not affected by the death or resignation of individual shareholders.
4. Because the company has its own rights and liabilities, separate from those of members, when it is being wound up, this does not affect the estate of members.

On the basis of the foregoing, it will now be clear to you that being an entity, a business is bound by business law in its various manifestations. For example, these aspects of law constitute business law: employment law, labour law, law of contract, law of sale, law of lease, law of agency, and so forth. This can be illustrated diagrammatically thus:

The diagram confirms the multi-faceted nature of business law, which means it is an area of entrepreneurship that is critical, but at the same time cannot be discussed exhaustively. To that extent, only certain themes are selected.
Further, as an entity with a legal status, an enterprise is bound by ethical just as it is bound by legal rules. Business ethics is an important aspect, which we discussed at some length in one of our early modules on the BBE programme. Presently, a brief summary of business ethics is given in order to lend weight to the central focus on business law.

ETHICS AND BUSINESS LAW

In some countries, business persons are considered to be crooks. This attitude needs to be corrected by, apart from sticking to legal rules, demonstrating ethical morals. According to http://www.wisegeek.com/what-is-business-ethics.htm, Business ethics is the behaviour that a business adheres to in its daily dealings with the world. The ethics of a particular business can be diverse. They apply not only to how the business interacts with the world at large, but also to their one-on-one dealings with a single customer.

Many businesses have gained a bad reputation just by being in business. To some people, businesses are interested in making money, and that is the bottom line. It could be called capitalism in its purest form. Making money is not wrong in itself. It is the manner in which some businesses conduct themselves that brings up the question of ethical behaviour. Thus, Business ethics (also known as corporate ethics) is a form of applied ethics or professional ethics that examines ethical principles and moral or ethical problems that arise in a business environment. It applies to all aspects of business conduct and is relevant to the conduct of individuals and entire organizations.

Ethical issues include the rights and duties between a company and its employees, suppliers, customers and neighbours, and its fiduciary responsibility to its shareholders. Issues concerning relations between different companies include hostile take-overs and industrial espionage. Related issues include corporate governance; corporate social entrepreneurship; political contributions; and related legal issues.

Put simply, Ethics are considered the moral standards by which people judge behaviour. Ethics are often summed up in what is considered the “golden rule”—do unto others as you would have them do unto you. While this makes sense as a general rule of thumb, it may not be entirely useful when looking to define business ethics.

In business, there are many different people you have to answer to: customers, shareholders and clients. Determining what to do when an ethical dilemma arises among these different interests can be extremely tricky, and as such business ethics are complex and multi-faceted. The following are some of the factors that affect business ethics:

- Honesty
- Objectivity
- Integrity
- Carefulness
- Openness
- Respect for intellectual property
- Confidentiality
- Responsible publication
- Responsible mentoring
- Respect for colleagues
- Social responsibility
- Non-discrimination
- Competence
- Legality
- Human subjects protection

**RESTRICTED BUSINESS ETHICS**

James Fieser (http://www.wisegeek.com/what-is-business-ethics.htm) observes that Moral obligations in business are restricted to what the law requires. The most universal aspects of Western morality have already been put into legal systems, such as with laws against killing, stealing, fraud, harassment, or reckless endangerment. Moral principles beyond what the law requires – or supra-legal principles -- appear to be optional since philosophers dispute about their validity and society wavers about its acceptance. For any specific issue under consideration, such as determining what counts as responsible marketing or adequate privacy in the workplace, we will find opposing positions on our supra-legal moral obligations. It is, therefore, unreasonable to expect businesses to perform duties about which there is so much disagreement and which appear to be optional.

**Deriving Business Ethics from General Moral Obligations**

In http://www.utm.edu/staff/jfieser/vita/research/Busbook.htm, it is argued that morality must be introduced as a factor that is external from both the profit motive and the law. This is the approach taken by most philosophers who write on business ethics, and is expressed most clearly in the following from a well known business ethics essay, “Proper ethical behaviour exists on a plane above the law. The law merely specifies the lowest common denominator of acceptable behaviour.” (Laczniak, 1983:6).

The most convenient way to explore this approach is to consider the supra-legal moral principles that philosophers commonly offer. Five fairly broad moral principles suggested by philosophers are as follows:

1. *Harm principle*: businesses should avoid causing unwarranted harm.
2. *Fairness principle*: businesses should be fair in all of their practices.
4. **Autonomy principle**: businesses should not infringe on the rationally reflective choices of people.

5. **Veracity principle**: businesses should not be deceptive in their practices.

The attraction of these principles is that they appeal to universal moral notions that no one would reasonably reject. But, the problem with these principles is that they are too general. They do not tell us specifically what counts as harm, unfairness, or a violation of human rights. The following activity requires you to reflect on these principles.

**Activity 1.1 D**

Closely examine the five moral principles cited above. With reference to ethical considerations in the business environment you are familiar with provide examples of each of the principles in entrepreneurial practice.

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<thead>
<tr>
<th>A</th>
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<tbody>
<tr>
<td>1. Harm principle</td>
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<td>2. Fairness principle</td>
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<td>3. Human rights principle</td>
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<tr>
<td>4. Autonomy principle</td>
<td></td>
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<tr>
<td>5. Veracity principle</td>
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</tbody>
</table>

Record your answer in your personal journal for later review and feedback by your course instructor.

**Summary**

The first topic set the tone and prepared ground for further discussion by recapitulating on the forms of ownership, the business environment, and business ethics. The legal status of a business was then explained. The areas covered included:

- the link between forms of ownership and business law;
- internal and external business environment;
- the nature of law in general, and that of business law in particular;
- the legal status of an enterprise;
- a summary of ethics and business law; and
- deriving business ethics from general moral obligations.
Self-Reflection Questions

Some entrepreneurs lack information about the link between the law of their country and the business they run.

a. What do you consider to be the relationship between the form of ownership of a business and the law?
b. What is the difference between legal rules and moral rules?
c. In what ways are these significant for the entrepreneur?
d. To what extent does the business environment of your country influence ethical considerations by an entrepreneur?

Record your answer in your personal journal for later review and feedback by your course instructor.
TOPIC 1.2 THE NATURE OF LAW

INTRODUCTION
In this topic we discuss what the law is. Initially, focus will be on its purpose and functions. We also look at sources of law, and the court structure, jurisdiction, law as a system of rights, legal capacity and concepts that are related to business law. The primary intention is to illustrate the link between ideas discussed and the running of a business. As an example, it is essential for the entrepreneur to have basic knowledge about differences between the Supreme Court and the High court. Issues will arise in an enterprise that might call on the entrepreneur to be in attendance at these court types.

OBJECTIVES
After working through this topic you should be able to:

1. Explain the nature, purpose and function of law.
2. Identify the sources of law
3. Distinguish one type of court from the other
4. Explain the different categories of law

CONTENT

- The nature of law
- The purpose and function of law
- Sources of law
- Court structure and jurisdiction
- Categories of law

WARM UP ACTIVITY
1. Why do you think there should be law in your country?
2. Where do laws come from?
3. How do general laws link with your business?

Record your response in your course journal.

THE NATURE OF LAW
Laws are rules established by authority to regulate the behaviour of members of a community or country. The term law itself may be used in a variety of contexts. As such there is no universally acceptable definition of law. As noted in the first topic,

Law refers to legal rules as opposed to moral rules. Legal rules are obligatory, while some moral rules may also be obligatory. Legal rules are enforceable by the state while moral rules need not be enforced. The entrepreneur will be interested to know what the sources of law are. Possession of this knowledge helps entrepreneurs to handle legal issues as they arise in the day-to-day conduct of business.
**THE PURPOSE AND FUNCTION OF LAW**

Imagine a society in which there were no rules regulating how we behave and how we interact with one another. Imagine if persons who stole from or who assaulted others were not punished, and if there were no rules setting out, for example, that once you have paid a worker, you acquire a right against that employee to do the work agreed upon.

If there were no rules governing human interaction, there would be chaos. Citizens would be unsafe and would be unprotected against thieves and unscrupulous entrepreneurs. Human interaction would be confused and disorderly, and individuals would resort to self-help, taking the law into their own hands, to protect themselves and their families against aggressors. They would then do all that is in their power to protect their rights to property, good name and peaceful existence.

Essentially, therefore, the purpose and function of law is to protect us, and in the case of the workplace, to protect both the employer and the employee. Law was established for the safety of citizens and to promote an ordered and stable society.

**SOURCES OF LAW**

We now examine the main sources of law and the importance of each of them. Although reference will be mainly to Botswana and other countries in Southern Africa, the presumption is that there are commonalities between what obtains in this sub-region, and your particular part of the world.

Sources refer to the pace(s) where the law can be found. The laws of Botswana are to be found in the following different sources:

- Legislation;
- case law (judicial precedent);
- Common law;
- Custom;
- Textbooks; and
- Foreign law.

**Legislation**

This is the most modern important source of law. It is also the most important and quickest method of making new law, changing existing law amending or repealing or abrogating the law altogether. The legislature is created by the country’s Constitution. It is the constitution, which states that there shall be a Parliament in Botswana, and that Parliament may make laws for peace, order and good government of the country.

Parliament may make any law whatsoever, as long as the law is not prohibited by the constitution. The constitution lays down procedures for change to its
provisions. Laws are introduced in Parliament as Bills. This is usually by the Minister concerned. The Bill has to go through several stages before it is passed to the President for his approval and signature. The President may refuse to approve the Bill, in which case it is referred back to Parliament. When the President approves the Bill, it becomes an Act or Statute. It is then gazetted.

Parliament simply would not have the time or expertise to deal with all divergent social issues. Thus it delegates powers to either ministers or other bodies to make subsidiary legislation or by-laws. These bodies can only make such laws as authorised by Parliament. Subsidiary legislation should not be *ultra vires* powers given (beyond the given powers). Legislation is an authoritative source. It overrides all other laws, which may provide to the contrary.

**Judicial Precedent**

Judges are not employed to make law. They are not legislators, though there could be exceptions. Instead, they are employed to interpret and apply the laws through the court system. Judges of superior courts such as the Supreme Court and High Court may find themselves making law, for example, where the judge is faced with a novel case or where the case before him is not covered by the existing sources of law. This may result in a subtle shift of the law.

The Supreme Court is not bound to follow its own decisions. As a result it is possible for the Supreme Court to overrule previous decisions as erroneous. This is important for the development of the law. Note: the law is not static, though the change ought not to be too sudden. Judges may, using their skills of interpretation, give a practical meaning to any unclear provisions of statutes. Since Parliament is the supreme law-making body in the country, any legislation it passes is considered original legislation.

**Customary Law**

A custom arises out of a constant practice over a very long time. For the practice to be accepted as a custom it must meet certain requirements. The following are illustrative.

- The custom must be well known.
- It must have existed for a very long time
- It must not be contrary to any statutory provisions.
- The custom must not be contrary to acceptable morals.

**Common Law**

As a source of law, common law refers to unwritten law that has been adopted or inherited from another legal system. A clear example is South Africa. Since much of the law adopted in that country has its origins in a combination of the law of the ancient Roman Empire, and law of the Netherlands, the common law of South Africa is called *Roman-Dutch Law*. Common law is used to fill in the
gaps and to improve the local law. This fusion of Dutch law with the ancient law of the Roman Empire was brought to the Cape in 1652 by Jan van Riebeck and became known as Roman-Dutch Law.

Botswana was historically a protectorate of England. Since the influence of English Law in the development of its legal system cannot be ignored, it is also regarded as forming part of the country’s common law. In truth, therefore, the country’s law is a hybrid system comprising a fusion of Roman-Dutch Law and English Law.

Custom

Custom, as a source of law refers to rules of conduct that, through being adhered to uniformly over a long period of time, have acquired the force of law. For a custom to be recognized as law, four requirements must be satisfied:

- The custom must be long established.
- The custom must be reasonable.
- The custom must be clear and certain.
- The custom must be uniformly observed by the community.

Textbooks

Over the years, experts in various fields of law have written textbooks and articles. Legal scholars, law professors, lecturers, and legal practitioners write articles and books addressing many problems, and stating their views with reasons. Depending on the status of the author, and the force of the text these arguments and opinions may be considered by a court in coming to a decision. In this way, arguments and opinions in textbooks and articles are regarded not as an authoritative source of law but as a persuasive source.

Foreign law

If there is no authority on a particular point of law in Botswana, reference may be made to the position in some other legal system on the topic. Like textbooks and legal articles, foreign law can never be binding in Botswana courts, and the opinion from a foreign law can only have persuasive force. Now tackle this activity.

Activity 1.2 A

As an entrepreneur you will experience issues in your organization, and these will be influenced by different sources of law. For each of the sources discussed above, cite one example from your country’s legal system that can be readily related to business practice.

<table>
<thead>
<tr>
<th>Source of law</th>
<th>Example related to business practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Textbooks</td>
<td></td>
</tr>
</tbody>
</table>
The essence of this activity is to help the entrepreneur relate sources of law to typical situations that arise in the running of businesses. A sound knowledge of this, helps you prevent unnecessary problems as you interact with employees, partners, and other business in your environment.

**COURT STRUCTURE AND JURISDICTION**

The court system is a branch of government responsible for settling disputes in civil matters and for punishing offenders who commit crimes. As laid down in the Constitution, the system of courts comprises a hierarchy. Entrepreneurs are well advised to have a functional understanding of the structure simply because on occasions they find themselves, for one reason or another, having to attend court hearings.

**The Constitutional Court**

This court is the highest court in Botswana for all matters relating to the interpretation, protection and enforcement of provisions of the constitution. It only has jurisdiction in constitutional matters. Decisions made in this court may not be taken on appeal.

**Supreme Court**

It is normally the highest court of Appeal in the country, and has these characteristics:

- It is the superior court of record and final court of appeal.
- It consists of the Chief Justice who is head of the judiciary and judges of the Supreme Court.
- Generally, this court is not a court where the case may be heard for the first time.
- It is a court of appeal from other courts unless the case is a constitutional one.

The court has unlimited jurisdiction in both criminal and civil cases. There shall be no appeal from any judgment or order of the Supreme Court. This is the
highest court in the country. It is important to note that the Supreme Court is not bound by any of its own judgments, rulings or opinions or by those of its predecessors. This is important because the law has to develop. If a ruling is erroneous it must be changed. Other courts are bound by the decision of the Supreme Court.

**High Court**

It is presided over by judges who are appointed according to the constitution of the country. The High Court has full and unlimited jurisdiction in both civil and criminal cases. This Court is also a court of appeal from the Magistrate Court. It has jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice. Appeals from the High Court lie with the Supreme Court. This court can pass a death penalty or life imprisonment judgment.

**Magistrate’s Court**

Is presided over by a magistrate. The Public Service Commission appoints magistrates. The incumbent must have recognized qualifications of a legal practitioner in Botswana or is qualified in a capacity comparable to that of a legal practitioner. Law to try certain cases, but not others limits magistrate courts. For example, All magistrates courts have no jurisdiction to try criminal cases involving treason, murder, and any offence where the person shall be sentenced to death if convicted. They cannot dissolve civil law marriages.

**Primary Courts**

These courts are simple courts, which are not very formal. Proceedings are not in written form. Legal practitioners cannot represent clients in these courts. In Botswana these are referred to as customary courts, and are presided over by the Chief. These courts apply customary law only. They do not have jurisdiction in criminal cases. They cannot dissolve civil law marriages. The Community Court may determine incidental matters e.g. custody of children, maintenance, etc.

**Specialist Courts**

These only deal with special areas which have been found to require a special court, for example:

- *Labour Relations Tribunal*: This deals with issues arising out of contracts of employment.
- *The Administrative Court*: This deals with various issues submitted to it under various pieces of legislation. For example, court for income tax appeals decides appeals against income tax assessment according to the Income Tax Act of the country.
• Small Claims Courts: These are resorted to where the sum of money claimed is small and does not exceed a certain amount (e.g. R3 000 in South Africa)

Now work on this activity.

Activity 1.2 B

Considering the nature of your enterprise, and the issues that commonly require recourse to law,

a. Identify two types of courts you are likely to find yourself attending.

b. Explain issues related to your enterprise that will bring you to these courts.

Record your answer in your personal journal for later review and feedback by your course instructor.

The two types will vary depending on the nature of the enterprise, and the degree of legal issues that commonly occur. Your views can be shared with fellow students pursuing the same studies.

CATEGORIES OF LAW

Let us conclude this topic by referring to three important categories of law that impact on your enterprise. Namely:

• Civil law,
• Criminal law, and
• Mercantile law.

In what ways do you think these are different?

Civil Law

This is a wider term for the many branches of law, which govern the relationship between the citizens and some objects. Civil law may be subdivided into other categories e.g. Private law and Public law. Private law would include the following:

Family Law - Family law is characterized by:

• Principles governing the relation between husband and wife, marriages, separations and divorces.
• The law of parent and child, e.g. custody of children.

Property Law - Property law deals with the following:

• concept of real rights,
• comprehensive rights,
• ownership,
- ways of acquiring ownership, and
- copyright.

**Law of Succession** - The law deals with issues of taking over of rights and obligations of another person.

**Law of Delict** - This law concerns actionable wrongful conduct which causes damage or loss to another and the remedies available to the innocent party.

Thus, civil law regulates the conduct of individuals.

**Criminal Law**

Regulates conduct of individuals and the State. The state always has an interest because there is an unwritten contract between the state and the citizen that the State would protect the citizen and his own property. In return the citizen promises not to take the law into own hands and to serve the state when called upon to do so.

The major aim of applying criminal law is to rehabilitate the offender. He is punished for his conduct. It also aims at deterring the offender and other like-minded persons.

The act prohibited must have happened before it is interpreted as a crime. There cannot be a crime unless the prohibited act has happened e.g. in a murder case, somebody must have been killed a person. The wrongdoer must have had the intention to commit the offence, e.g. in murder, there must be intention to kill.

The act complained of must be unlawful.

**Mercantile Law**

This is also known as Business law, and is the major preoccupation of the present course. It is of particular importance to industry and commerce, because it includes topics such as:

- insolvency,
- insurance, and
- negotiable instruments

**Activity 1.2 C**

In what ways do you think mercantile law intersects with criminal and civil law? In your explanation, bear in mind the enterprise you are familiar with.

Record your answer in your personal journal for later review and feedback by your course instructor.
SUMMARY
In this topic we discussed the following:

• The differences between legal rules and other rules.
• The basic principles of legal rules.
• That some sources of law are binding or authoritative while others are not binding but merely persuasive.
• We looked at the hierarchy of the court system and the courts’ right to determine a case.
• We noted that civil law is different from criminal law.
• We also established that in business law we are concerned with civil law, which determines our rights and obligations.

Self-Reflection Questions
a. Which legal cases are more prevalent in your enterprise: civil or criminal cases?
b. Explain the distinction between the High Court and the Supreme Court.
c. Explain judicial precedent as a source of law.

Record your answers in your personal journal for later review and feedback by your course instructor.
UNIT 2 - LABOUR LAW AND BUSINESS LAW

INTRODUCTION

An understanding of Business Law remains incomplete without basic awareness of labour law and employment law issues that impact on entrepreneurship. Following the discussion of the nature of law, and the general background to business, the present unit discusses three topics. The first explains the basic elements of labour law in-so-far as they are linked with Business law. An aspect of labour law that should be of particular interest to the entrepreneur is Child Labour. This is treated separately, for a number of reasons, the main one being that in developing countries, the issue of child labour is rampant mainly because children have no knowledge of legal implications when they seek employment. Entrepreneurs exploit this, and take advantage. However, consequences of exploiting labour can be dire, and employers need legal information as they run business. The third topic, dealing with contract of service, is more inclined towards employment law, but is treated in this unit because it is closely linked with labour law. However, for our purposes, it too has close connection with Business Law.

UNIT OBJECTIVES

After completing this unit you should be able to:

1. Define key terms.
2. Explain theories of labour relations.
3. Discuss with examples trade unionism and labour relations.
4. Interpret correctly child labour law.
5. Explain the relevant ILO conventions.

UNIT READINGS

As you complete this unit it is recommended that you read the following chapters/articles:

- International Labour Review Vol 151 (2012), N0, 1 – 2.

ASSIGNMENTS AND ACTIVITIES

There will be one assignment for the entire course as indicated above.
TOPIC 2.1 - LABOUR LAW

INTRODUCTION
This topic builds on the definitions of commonly used terminology, understanding of which is necessary to our appreciation of labour law vis-à-vis business law. As an example, it is necessary to have a shared understanding of what a trade union is. In nearly every enterprise, the issue of trade unions is often a cause of misunderstanding between the employer and those employed in the business. The usual cause is the lack of understanding about the legal status of trade unions, a clear understanding of which would go a long way towards a harmonious working relationship in the organisation. We then take up discussion of labour relations statute in-so-far as it influences collective agreements and sources of labour relations. This is followed by a discussion of three closely related issues, namely, international labour standards, custom/practice, and common law.

OBJECTIVES
After working through this topic you should be able to:

1. define important terms such as ‘trade union’, ‘labour law’, etc.;
2. identify trade unions in your country and the sectors to which they belong;
3. suggest the reasons for joining a trade union;
4. discuss theories of labour relations;
5. relate theories of labour relations to typical workplace situations; and
6. explain the connection between sources of and principles of labour relations.

CONTENT
- What is a trade union?
- Why do workers join trade unions?
- Labour Law
- Unitary theory
- Pluralistic theory
- Marxist theory
- The Systems theory
- Sources of labour relations
- Principles of labour relations
WARM-UP ACTIVITY
As an entrepreneur:

1. What is your definition of a trade union?
2. Why do you think a trade union is necessary or unnecessary in your enterprise?
3. Which of your employees should not be allowed to join a trade union, and why?

Record your responses in your course journal.

As you respond to the questions, bear in mind that there are very few countries if any that do not have trade unions of one form or another. Further, your enterprise will be the exception for not having workers who are not interested in their legal rights in the normal running of a business.

WHAT IS A TRADE UNION?
Trade unionism is an idea to do with industrial democracy and worker participation in the management activities of an organization as a way of facilitating harmonious labour relations (Cole, 1981). Trade unionism arose as a result of the notion that freedom was not extended to those in factories. It was argued that the workplace should not be regarded solely as an economic entity governed by the laws of the market, rather it is seen as a reflection of the wider society. In a democracy, workers should have some say and voice in how that small society – the hospital, the police station, the school, the local council, the department of transport, or the small business is run. The right of workers to participate in the workplace is equated to the right of citizens to participate in government. We shall, therefore, define a trade union as:

An organization formed to represent and advance the interests of workers from a specific economic sector. Subscription to the trade union is voluntary, in line with the freedom of association.

Shadur (1994) is in agreement with this definition that is also echoed in ILO Convention Number 144 (1976). A trade union has some functions including:

- Engaging in collective bargaining on behalf of its members with their counterpart, the employer or other trade unions.
- Educating members in relation to labour relations, labour laws, and other relevant subjects.
- Organising and co-ordinating collective job action either planned or embarked on by the members.
- Representing members who are involved in labour disputes before a labour officer or labour court.
Activity 2.1 A

In the first column below, list some of the trade unions you know in your country. In the second column write the sector of the economy to which that trade union belongs.

<table>
<thead>
<tr>
<th>Trade Union</th>
<th>Sector</th>
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Record your answers in your personal journal for later review and feedback by your course instructor.

Share these with colleagues so that you become widely aware that the trade union to which employees in your enterprise belong is not alone in the quest for democracy. A trade union is a legal creation.

Within a country, there is what is known as the **Federation of Trade Unions**. This is an umbrella worker organization to which individual trade unions are affiliated. Trade unions, e.g. the trade union of your employees, voluntarily affiliate to such a confederation. Trade unions are known by different names in a particular country. In South Africa, you will have heard of the Congress of South African Trade Unions (COSATU), while in Zimbabwe we have the Zimbabwe Congress of Trade Unions (ZCTU). What name is the federation given in your country?

**Why Do Workers Join Trade Unions?**

When a person starts work, someone who represents a trade union, the Shop Steward, may ask if they want to join the trade union. If the worker decides to join the trade union, they will pay an annual subscription (a yearly fee). Part of this subscription will go towards employing union officials. These officials will represent the views of the union to the employees in a bid to achieve their aims. So what benefits does the employee receive in exchange for paying their subscription? It varies from union to union, but generally includes these benefits.

- Strength in numbers.
- Improved conditions of employment, for example, rates of pay, holidays and hours of work.
- Improvement of the work environment, for example, health, noise, and safety.
- Improved benefits for those who may not be working because they are sick, retired, or have been retrenched.
- Improved job satisfaction by encouraging training.
- Advice and financial support if a member thinks that they have been unfairly dismissed or made redundant, have received unfair treatment, or have been asked by the entrepreneur to do something that is not part of their job.
- Benefits that have been negotiated or provided for union members such as discounts in certain shops, provision of sporting facilities or clubs.

Activity 2.1 B

There are cases when some employees argue that the so-called benefits for joining a trade union are experienced by the few who hold positions in the trade union. To what extent does this reflect what you are familiar with in your enterprise?

Record your answer in your personal journal for later review and feedback by your course instructor.

There might be no correct answer to satisfy some employees, but in giving a response to this question, it is important to establish causes of such misgivings and try to find ways to ensure there is transparency in the way issues are dealt with. Employees part with their money, and expect fair returns.

Labour Law

From the point of view of an entrepreneur interested in business law, it is important to have a clearer definition of labour law and how it relates with business law. Starting with the word Law itself, it refers to a system of legal rules that govern conduct, define the consequences of actions and are enforced by the state. The nature of legal rule is that it regulates a relationship between parties.

On the other hand, Labour Law is a body of legal rules, which regulates relationships between employers and employees, employers and Trade Unions, employers’ organizations and Trade Unions, and also concerned with relationships between the State, employees, trade Unions and employers’ organizations. The Parties involved are:
The labour laws of a country are regulated by Act of Parliament. In Botswana the following chapters and Acts should be very closely referred to when discussing Labour Relations.

1. Trade Unions and Employers’ Organisations (Chapter 48:01)
2. Public Service Act, 2008 (Act no. 30 of 2008)
3. Trade Disputes (Chapter 48:02)
4. Employment Act (Chapter 47:01)
5. General Orders (1996)

As an entrepreneur, are you aware of the labour law Acts that affect your business operations? Record them in your course journal.

It is important to have a thorough knowledge of these acts in order to run your enterprise satisfactorily.

**LABOUR RELATIONS THEORIES**
There are four basic ideas about labour relations that the entrepreneur should be familiar with. We refer to these ideas as theories. Sonia (2001) spells out such theories clearly as Unitary theory, Marxist theory, Pluralistic theory, and Systems theory. We now discuss them in turn.

**Unitary Theory**

This theory denies or restricts the right to the existence of divergent interests and viewpoints in the workplace. Conflicts in the organization are seen as unreasonable, wrong and disruptive. When conflicts occur, blame goes to activists and militants in the organization. Typical characteristics of Unitary theory are:
The organization is perceived as an integrated and harmonious whole with the ideal of one happy family.

Management and employees emphasise mutual cooperation.

Demands loyalty of all staff.

Consequently, trade unions are deemed as unnecessary since the loyalty between trade unions and organisations is considered mutually exclusive (www.en.wikipedia.org/industrialrelations).

**Pluralistic Theory**

In this theory the organization is considered to be made up of powerful and divergent sub-groups, each with its own loyalties, and with own set objectives and leaders. For example, in terms of labour relations the workers in a given organization have greater loyalty in their representatives than in the employer. The characteristics of the theory are:

- The role of the management is to persuade and coordinate, and not based on controlling.
- Trade unions are seen as legitimate representatives of employees.
- Collective bargaining is seen as a solution to conflict resolution.

**Marxist Theory**

The Marxist Theory views the workplace as being characterized by division of interest between capitalists/the entrepreneurs (buyers of labour power) and the workers (sellers of labour power). Essentially, this is a theory in which conflict is seen as a major characteristic between the exploited workers and the exploiting employer. The major characteristic of this theory is that the conflict of interests, which originates in the industrial context cannot be easily reconciled. It also extends into all major social and political activities at the workplace. Economic and political issues cannot be separated.

**Systems Theory**

This theory regards the business enterprise as a team unified by a common purpose, therefore, rejecting the idea of persistent conflict between the employer and the employee. The theory views the industrial relations as comprised of certain actors, contexts and a body of rules created to govern the actors in the work community. It is characterized by:

- The desire to bring about peace and stability in the working relationships.
- There are rules to be followed by both the employer and the employees.

Let us now review our understanding of the theories by working on an activity.
**Activity 2.1 C**

1. Why is it necessary for a Shop Steward to be familiar with the theories discussed above?
2. In the columns below, list advantages and disadvantages of each theory bearing in mind the organization you work for.
3. Which of these would work well in your business?

<table>
<thead>
<tr>
<th>Theory</th>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unitary</td>
<td></td>
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<tr>
<td>Pluralistic</td>
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<tr>
<td>Marxist</td>
<td></td>
<td></td>
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<tr>
<td>Systems</td>
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</tbody>
</table>

Record your answer in your personal journal for later review and feedback by your course instructor.

The theories on worker participation guide business owner to proceed with his/her responsibilities from an informed position. By its nature, trade unionism is full of controversies. For that reason, your ability to identify advantages and disadvantages of each theory helps you to become an effective employer. It is necessary to observe that there is no theory that is best on its own. Rather, entrepreneur should aim at combining the most obvious benefits that arise from all theories.

**Sources of Labour Relations**

The following, which shall be discussed in some detail at a later stage are some of the basic sources of labour relations.

**Contract of Employment**

This is an agreement between two parties in terms of which one party (the employee) places labour potential at the disposal, and under control of the other party (the employer) in exchange for some form of remuneration.

**Collective Agreements**

These include agreements entered into at the level of Bargaining Council and agreements struck between Employer and Trade Union at organizational and shop floor level e.g. recognition agreements.
Judicial (Court) Precedent

This comes from the English law, and means that courts take into account their previous judgments in similar cases, because they are bound to the approach followed in the past.

Legislation

Legislation is a law laid down by the organ of the state, which has the power to do so. Business laws are embodied in writing and are known as statutes or acts.

International Labour Standards

These are standards contained in the conventions and recommendations of the ILO because a country, e.g. Botswana is a member and signatory of this organization and conventions.

Custom / Practices

This is also known as trade usage and is an important source of law where it can be proved. It is unwritten law. To attain the status of custom, practice, or trade usage, an act or manner of doing things must prove to be:

- Well known
- Have been constantly practiced by a particular employment sector over a considerable period of time
- Legal
- Not contrary to good or acceptable moral standards
- Reasonable

Common Law

Common law refers to all legal rules not found in legislation. This is usually found in a section of the country’s constitution. Common law is resorted to when there are no applicable legislative provisions governing a particular situation. Where there is a conflict between legislation and common law, the legislative provisions are to be followed.

The Constitution of a Country

The constitution includes the decisions of the courts regarding the interpretation of the constitution, as well as legal comparison with constitutions of other legal systems.

So far we discussed eight sources of labour relations. Work on the next activity as a way of sharing a common understanding.
Activity 2.1 D

Why do you think it is necessary for the entrepreneur to be familiar with the sources of labour relations?

Record your answer in your personal journal for later review and feedback by your course instructor.

After reflecting on the question, discuss openly with colleagues, giving them your personal views as well as getting theirs. Eventually, your discussion should lead to the common understanding that unless the sources are clearly understood, it is difficult to lead workers who are members of the trade union satisfactorily.

PRINCIPLES OF LABOUR RELATIONS

Principles are guidelines that inform the manner we should proceed in a given labour related situation. They are, therefore, an important component of business law. In Botswana, the *Trade Disputes (Chapter 48:02)* spells out ideas that are in agreement with the following principles. Read and compare them with those of your country.

**Principle 1 - Natural Justice**

A person who is affected by an administrative action should be given a fair and unbiased hearing before a decision to act is made. These two points should be taken into account:

- The right to a fair hearing.
- The right to unbiased rule.

**Principle 2 - Legitimate Expectation**

It may become established practice that a disciplinary hearing is held before someone is dismissed for disciplinary reasons. An example is a case in which the Attorney General, in the Court of Appeal, ruled that the summary dismissal by the Government of 17,335 workers who had embarked on an unlawful strike was in disregard of workers’ legitimate expectation and was therefore itself unlawful.

**Principle 3 - Lawfulness**

This refers to the state or quality of being within the law.

**Principle 4 - Fairness**

The principle of fairness can be divided into two parts, namely, procedural and substantive fairness.
1. **Procedural Fairness** - It requires that the employer should normally conduct an enquiry or a hearing to determine whether there are grounds for dismissing an employee.
   - The employee has to be notified of the allegations against him or her.
   - The employee has to be given reasonable time in order to prepare his or her case response.
   - The employee should be allowed to obtain the assistance of a trade union representative or fellow employee.

2. **Substantive Fairness** - Substantive has two meanings:
   - There must be valid reason for disciplinary action e.g. in a case of dishonesty, there should be sufficient proof, judged objectively, that the employee has been dishonest.
   - Also, the type of disciplinary action imposed on the employee (in this case dismissal) must be fair. Dismissal should be the appropriate penalty for the act of dishonesty (determining factors shall be the nature of the employee’s job and or the nature of the employer’s business).

Below is a case study to help you reflect on ideas discussed above. It is a typical example of what happens in Botswana. Reflect upon the case and identify circumstances similar in your country.

**Case Study**

Kenosi is a Shop Steward in a public service organization. Two employees have recently joined his organization, and it is his responsibility to encourage them to join the trade union. He informs them that the two must understand that the employer is exploiting workers, and does not pay them enough. He also tells them that workers must unite to fight this oppression. One of the workers has been unemployed for a long time, and feels that the approach proposed by the trade union representative is likely to lead to confrontation with the employer. The employee is afraid of losing his job, now the only source of livelihood. One thing the employee is sure of is that when he signed the contract of employment, there was no mention of a trade union in the contract of employment. To him, this sounds like he is being forced to join the trade union.

1. Which labour relations theory do you think the Shop Steward is using when explaining the situation to the new employees?
2. What dilemma is the trade union representative creating for the new workers?
3. Which sources of labour relations seem to be unclear to the employee according to their discussion?
4. Which principles of labour relations is the Shop Steward violating?
5. Which aspects of labour relations do you think the trade union
representative needs to learn more about?

Record your answers in your personal journal for later review and feedback by your course instructor.

**SUMMARY**
We have now come to the end of the topic dealing with basic ideas about labour relations in the workplace. This is an aspect of labour law, which is closely linked with business law. It is believed that equipped with knowledge you will be in a better position to run your enterprise with some degree of efficiency. The lack of knowledge about labour relations can interfere with attainment of the specified goals of the business. Once more, here is a brief summary of what we covered in our discussion.

- What is a trade union?
- Which unions belong to which sectors?
- The federation of trade unions.
- The importance of joining a trade union.
- Labour law.
- Four theories of labour relations.
- Advantages and disadvantages of individual theories.
- Sources of labour relations.
- Principles of labour relations.

**Self-Reflection Questions**

a. What enterprises do you run or are interested in?
b. What is the name of the trade union that your employees belong to?
c. Of the theories discussed above, which one seems to be working in your enterprise? Give reasons.
d. List what you think you have learnt towards a better understanding of the connection between labour relations law and business law.

Record your answer in your personal journal for later review and feedback by your course instructor.
TOPIC 2.2 - CHILD LABOUR

INTRODUCTION
Child labour is said to constitute 10% of the total labour force internationally. India has over 44 million child labourers while Indonesia has over 2.7 million working children. In Africa Nigeria has the highest number of child labourers with over 12 million being engaged in formal employment. Child labour is a global phenomenon, and is not confined to developing countries alone. Millions of European children work in estates and industries. In the United States the majority of children among immigrant communities work on farms.

Conceptions of the role of children in the developed world, together with definitions of childhood based on age are different from those held in the developing world. In the subsistence economies of the developing world and throughout history, children have contributed their labour to the family livelihood in so far as they have been able to. In the developed world child work is viewed differently, prohibited by legislation, and in turn, is vigorously enforced. In many developing countries, of which small states of the Commonwealth are a part, many businesses employ children. This is critical especially when we talk of modern day slavery. The question is: What law is there to regulate malpractices of child labour? Think about your country and the businesses that employ children.

OBJECTIVES
After working through this topic you should be able to:

1. Distinguish between child work and child labour.
2. Identify and explain causes of child labour.
3. Correctly explain ILO Convention 138 and 182.
4. Explain Labour Relations Regulations regarding age of employment and hours of work.
5. Discuss key aspects of child contract of employment.
6. Explain what prohibited employment activities are.

CONTENT
- Child labour versus child work
- Causes of child labour
- ILO Convention 138
- ILO Convention 182
- The labour relations regulations
- Prohibited employment activities
WARM-UP ACTIVITY

1. What is your understanding of child labour?
2. What law do you follow in your enterprise to regulate employment of children?
3. How familiar are you with The International Labour Organisation’s rules about engagement of child labour?

Record your responses in your course journal.

As an entrepreneur, you should be able to possess a fair knowledge of business law regarding child labour. Bear in mind your responses to the warm-up activity as you read what follows.

CHILD LABOUR VERSUS CHILD WORK

Children are expected as part of their socialisation both at home and at school to work. This therefore makes it necessary to distinguish between child labour and child work. The former is considered bad while the latter is accepted as part of constructive socialisation. Child labour is work that impairs the health and development of children, particularly when it interferes with the schooling of the child. In practice, light work after school or legitimate apprenticeship opportunities are not usually called child labour. However, a problem arises when household or domestic work involves long hours and can deprive children of education and particularly in agriculture where family work can expose children to chemicals and other hazards.

Some of the major characteristics of child labour are:

- Children working at a very tender age. In developing countries it is common to find children as young as seven years old working, and working long hours especially on farms.
- Children working long hours, sometimes up to 16 hours a day.
- Children working under physical, social and psychological strain, for example, working in mines or heavy industries.
- Children working in unhealthy and dangerous situations, for example, vending on the streets.
- Children working for meagre wages.
- Children bearing too much responsibility e.g. they often take charge of siblings who may be younger than themselves.
- Children working in circumstances where they are subject to intimidation. This destroys their self-confidence.

Activity 2.2 A

With reference to the situation in your country, suggest an example for each point that is listed in the first column. In a follow-up discussion, suggest in what ways you consider your example an instance of child labour.
Situation | Example
--- | ---
Children working long hours. | 
Children working under psychological strain. | 
Children working for meagre wages. | 
Children bearing too much responsibility. | 
Children working in circumstances where they are intimidated. | 
Record your answers in your personal journal for later review and feedback by your course instructor.

Responding to this activity makes you aware of typical situations of child labour in your country. Which of the above mentioned situations apply to your enterprise?

**REASONS CHILD LABOUR OCCURS**
The one urgent question that begs an urgent answer is: What are some of the causes of child labour within an economic environment?

- Children work primarily because their families are poor. When survival of the family is at stake everyone is expected to work to contribute to the family’s resources.
- School is unavailable, inaccessible or just too expensive and children have to work instead.
- The AIDS pandemic is wiping out the most economically active age group and this leaves children to fend for themselves and to look after terminally ill AIDS patients or the aged members of the family.

**THE INTERNATIONAL LABOUR (ILO) CONVENTION 138**
Convention 138 is a consolidation of principles that have been gradually established in various earlier instruments and applies to all sectors of economic activity, irrespective of whether or not children are engaged in wage employment. The convention obliges ratifying states to:

- Fix a minimum wage for admission into employment.
• Pursue a national policy and programme designed to ensure the effective control of child labour. Such policies should cover the following aspects:
  o Protection of children who are working, through providing them with health services, feeding programmes and non-formal education as a long term objective for the eradication of child labour. The immediate priority should be to remove children from the most hazardous workplaces.
  o Unveiling the most hideous forms of child labour in small enterprises and exploitation of destitute children by rich relatives.
  o Raise progressively the minimum age of employment or work to a level consistent with the fullest physical and mental development of children or young persons.

The convention was not intended to be a static instrument prescribing fixed minimum standards, but a dynamic tool aimed at encouraging the progressive improvement of standards in the control of child labour. The following are some of the articles contributory to business law and business practices.

**Article 1** of the convention deals with the Minimum Age of Admission to Employment (1973), encourages states both to develop policies for abolishing child labour and to progressively raise the minimum ages when children can legally begin to work.

**Article 2** goes beyond the general requirements by stating that the age should be less than the age when compulsory school ends, and in any event should not be less than 15 years. This article, however, concedes that states whose economies are not sufficiently developed are allowed to set the age at 14 years. This should only be transitional because where the minimum age is less than 15 years, as a matter of urgency, all states are supposed to raise the minimum age to 16 years in all economic areas.

To what extent do these articles influence recruitment policy in your country and in your enterprise?

**Activity 2.2 B**

To what extent are the three aspects and the articles listed above observed in your country when it comes to child labour?

Record your answer in your personal journal for later review and feedback by your course instructor.

It is interesting to note that many small states of the Commonwealth often violate the ILO Articles. Sometimes even custodians of the law are the worst perpetrators when it comes to violation of child labour laws.
ILO CONVENTION 182 – WORST FORMS OF CHILD LABOUR CONVENTION

Convention 182 compliments Convention 138 by focusing on the most intolerable forms of child labour. This Convention’s emphasis is on the fact that child labour, national policies, and action plans should give priority to abolishing the worst and intolerable forms of child labour. It applies to all children under the age of 18 and obliges the member states to suppress immediately all forms of child labour including:

- All forms of slavery or practices similar to slavery.
- The sale and trafficking of children.
- Forced compulsory labour including debt bondage and serfdom.
- The use of children for prostitution.
- The production of pornography or performance of pornographic material.
- The production of or trafficking of drugs or other illegal activities.
- The engagement of children in any type of work, which by its nature or the circumstances in which it is carried out, is likely to jeopardize their health, safety and morals.

Activity 2.2 C

1. Seven worst forms of child labour have been listed above. Which ones are common to your country, and which ones are not?
2. What do you understand by slavery in this modern age?

Record your answers in your personal journal for later review and feedback by your course instructor.

All the same, the convention completely prohibits any form of work by children under 12 or 13 years of age. Furthermore, the protection of girls is expressly spelt out in this convention, especially in hideous forms of employment in private. The convention also seeks to provide strict enforcement of adequate criminal procedures. It encourages member states to assist each other by means of international judicial and technical assistance to combat the intolerable forms of child labour. It further encourages the adoption of programmes of action, within the framework of time bound development plans and perspectives.

THE LABOUR RELATIONS REGULATIONS

Closely examine the labour law on employment of children in Botswana, and compare that with what obtains in your country.

Age of Employment - No person shall employ a child under the age of 12 years. A child who is over the age of 12 years may perform light work only where such work is an integral part of a course of education or training for which the school or training institution is primarily responsible, and it does not prejudice child’s
education, health, safety, social and mental development. A young person may be employed in an activity in which he/she receives adequate specific instructions or vocational training in that activity.

**Hours of Work** - No member shall require a child or young person to work:

- More than six hours in any one day.
- For a continuous period of three hours without a break of at least 15 minutes.
- A young child or person shall be entitled to at least one and a half days off work per week; at least 24 hours shall be continuous.

**Contract of Employment** - A contract of employment for a child or a young person shall not be valid unless it is entered into by or with the consent of the parent or guardian of the child or young person. A child or young person shall not be employed to work during a school term, as fixed in terms of the Education Act, unless the contract of the employment concerned has been approved by the Minister of Education.

**Records Should be Maintained** - An employer of a child or young person shall keep the following records in respect of such child or young person:

- the name and age of the child or young person;
- the name and address of the parent or guardian or social welfare officer of the child or young person; and
- the details of terms of contract of employment.

Every employer of a child or young person shall keep the records for a period of not less than three years, and on request shall produce such records to both a labour relations officer and a designated agent of an employment council. To what extent do entrepreneurs in your country abide by this stipulation?

**Prohibited Employment Activities** - The following are some of the activities prohibited by the law.

- Any work which is likely to jeopardize or interfere with the education of the child.
- Any work, which involves being in contact with any hazardous substances, articles or processes including ionizing radiation.
- Any work involving underground mining.
- Any work that exposes a child to electrically powered hand tools, cutting or grinding blades.
- Any work that exposes a child to extreme heat, noise or whole body vibration.
- Any night shift work.
Below is a case study to help you reflect on ideas discussed above. It is a typical example of what happens in Botswana. Try and replace it with the circumstances identifiable in your country.

**Case Study**

The Law in Botswana prohibits the employment of illegal immigrants. Mr Motsie is a senior police officer, and has a cattle post and land where he grows sorghum and maize between Orapa and Serowe. A family has fled political instability taking place in a neighbouring country. The family has three children aged five, nine, and eleven years respectively. Mr. Motsie offers husband and wife the job to work in the fields, and for the nine-year and eleven-year old to herd cattle. The nearest school is fifteen kilometres away, and in any case even if the school were a stone’s throw away, the children would not be able to attend as their stay in the country is illegal.

It also happens that at this time of the year, there is a menace from warthogs (wild pigs), which ravage the maize crop. To ensure there is some harvest, father, mother and children remain awake for nights on end to scare away the warthogs.

1. Which aspects of the labour law are being violated in this situation?
2. What are your views on the part played by Mr. Motsie in this particular situation?
3. In what ways is this a difficult situation?
4. What would you advise should be done?

Record your answers in your personal journal for later review and feedback by your course instructor.

**SUMMARY**

We have now come to the end of the topic dealing with Child Labour. The following aspects were covered:

- Child labour versus child work.
- The causes of child labour.
- ILO Convention 138.
- ILO Convention 182.
- Labour relations Regulations.
- Contract of employment for children.
- The types of records to be maintained.
- Prohibited employment activities.
Self-Reflection Questions

a. What is the distinction between child labour and child work?

b. Look around your business environment. What are the causes of child labour, if any?

c. Find out whether your country is a member of the ILO. If it is, to what extent does your government apply Convention 138 and Convention 182 to guide business law with regard to child labour?

Record your answers in your personal journal for later review and feedback by your course instructor.
TOPIC 2.3 - CONTRACT FOR SERVICE

INTRODUCTION
One of the key areas of business law that binds the interests of the entrepreneur and his/her employees, is the contract of service. This derives from law of employment. Every country has provision for the clear articulation of this aspect in its statutes. In Botswana, the Employment Act (Chapter 47:01) specifies the law pertaining to contract of service and related issues. Which Act does that in your country? In this topic, definitions of key terms are offered and explained. We then examine elements of a contract of service, and in the process explain types of employment contract, variation of terms and transfer of employees. The entire discussion is carried out with the entrepreneur in mind. Unless the entrepreneur is familiar with the characteristics of a contract of service, it will be extremely difficult for him/her to run the business successfully.

OBJECTIVES
After working through this topic you should be able to:

a. Specify what a contract is and explain its significance in labour relations.
b. Identify guidelines or principles governing the contract of service and relate them to work related situations.
c. Justify the principle that persons below a certain age are not allowed by law to enter into a contract of employment.
d. Explain and apply to the workplace the meaning of breach of contract and contradiction of moral values.
e. List elements of a contract and explain their importance.
f. Demonstrate an understanding of the four types of contract and evaluate their impact on labour relations.
g. Describe what is involved in the variation of terms and implications on the contract.
h. Explain the issue of transfer of employees.

CONTENT
• What is a Contract of Service?
• General principles of the law of Contract of Service
• Elements of the Contract
• Types of contract
• Variation of terms
• Transfer of employees
**WARM-UP ACTIVITY**

1. What do you understand by contract of service?
2. It is said that some employers breach contracts. Explain the meaning of the term ‘breach of contract’.

Record your response in your course journal.

**WHAT IS A CONTRACT OF SERVICE?**

The simplest definition of a contract of service is that it is an agreement between two parties. The agreement is in terms of which one person works for another and is paid for that. It is the basis of any employment relationship. Du Plessis, Fouche, and van Wyk (1999) define this relationship as a contract between two persons, the employer (the entrepreneur, in this case) and the employee, for the letting and hiring of the latter’s services for reward. The employer is able to supervise and control the employee’s work. As Basson et al. (2000) rightly put it, the employment contract is the starting point of the entire labour law rules.

**Principles Guiding the Law of Contract of Service**

In the eyes of the law, there are certain principles or guidelines that make a given contract valid, and these are:

- There must be agreement between the parties. Such agreement is also known as consensus.
- The parties must have legal capacity to enter into agreements, and this varies from one country to another. In other countries, a person seeking employment must be over the age of eighteen, be mentally sound and sober.
- Contracts entered into by persons below the stipulated age are void even if their guardians assist them.
- The contract must be legal, and not in contravention of any law.
- The contract must not be contrary to good morals.
- No formalities are required, and it may be oral or put in writing.

What are the implications of these principles to the entrepreneur? Express your views in this activity.

**Activity 2.3 A**

a. What is the age limit for one to enter an employment contract in your country?

b. ii. Why do you think labour law prohibits contracts entered into by persons below the stipulated age?

c. iii. What do you understand by the statement that a contract must not be contrary to good morals?
You are requested as an entrepreneur to conduct some reading research in order to respond to these questions. The Employment Act of your country will give you valuable information. A possible reason why those who are under age should not enter into a contract is that unscrupulous employers could easily exploit them. Finally, a contract is said to be contrary to good morals when the nature of employment turns out to be contrary to original intentions. As an example, a hotel owner who enters into a contract with a good looking young woman to be the receptionist, but later pushes her into immoral acts in order to attract customers, is in violation of good morals.

**Elements of the Contract**

In addition to the above guidelines, the following essential elements must be included in the contract of employment.

*Specified Work* - This refers to the point that the work, which the employee is expected to do must be clear, and agreed to by both parties. The employee, in addition to his work will be responsible for related, unspecified tasks provided that they are within his/her expertise and are lawful.

It is important to note that demoting or changing the employee’s work duties or tasks in a manner that reduces his/her status, may constitute breach of employment contract.

*Remuneration* - The parties must agree on the remuneration to be paid to the employee in consideration of the services rendered. The amount of this remuneration is subject to minimum wage legislation, and to collective bargaining agreements.

Before reading on, explain these two terms to your colleagues who are doing this course: breach of contract, and minimum wage legislation.

**Types of Contracts**

Normally, there are four types of contracts. Are you aware of these? Can you name them? Let us examine them together.

1. **Fixed Term** - This contract is entered into for a specified period of time, and automatically terminates on the expiry of the agreed period. However, the parties can extend it if they so wish. Either party can terminate such a contract before the expiry of the agreed period for any good cause.

2. **Probation** - In this contract, employees are hired for a fixed trial period during which their performance is assessed. If their work is sub-standard, the contract of employment is not renewed after probation.
3. **Casual** - Casual employees are those who are employed on temporary basis when work is available. In Botswana they are usually workers who are hired on a daily basis, mostly by manufacturing industries or local authorities to carry out menial tasks such as packaging, loading, or grass cutting. Contracts of this nature are usually oral.

4. **Indefinite Term** - Such contracts do not specify a duration period and endure until terminated by either party.

The activity below requires you to reflect on the foregoing types of contracts.

<table>
<thead>
<tr>
<th>Activity 2.3 B</th>
</tr>
</thead>
<tbody>
<tr>
<td>The entrepreneur and the employee are expected to be familiar with examples of the different types of contracts as discussed above, as well as the challenges posed by each in terms of labour relations. In the three columns below, suggest typical examples of each type and the challenges associated with it from the work environment of your country.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of contract</th>
<th>An Example</th>
<th>Challenges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fixed term</td>
<td></td>
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<tr>
<td>Probation</td>
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<tr>
<td>Casual</td>
<td></td>
<td></td>
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<tr>
<td>Indefinite</td>
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</tbody>
</table>

Record your answers in your personal journal for later review and feedback by your course instructor.

Examples will vary from one country to the other. As an illustration, an expatriate who is given a two-year period to work in a hospital is said to be on a fixed term contract. One challenge is that such an employee works under a sense of insecurity regarding possibility of contract renewal. The employee may
choose to terminate the contract at short notice, thus leaving the employer to look for a replacement, which may not be readily available.

**Variation of Terms**

There are circumstances when need arises to change the original terms of employment, which are contained in the contract. It is noteworthy that neither party may unilaterally vary the terms of contract of employment. Any unilateral variation constitutes breach of contract, and entitles the other party to seek redress. Legally, such redress may involve recourse to litigation for an order of specific performance asking the court to order the defaulter to observe the contract. Alternatively, the aggrieved party could request cancellation of the contract and a claim of damages.

In the majority of cases, it is entrepreneurs who default by varying the terms of an employee. As an example, a farmer employs someone as a general labourer but later realizes that the person has an important skill of driving a tractor. The farmer then requests the employee to combine the original duties with driving a tractor without changing the remuneration. This is in breach of contract. Unfortunately employees may not know that what the farmer is doing is illegal.

**Transfer of Employees**

Transfer of public employees is commonly practiced in many countries. In Botswana, procedures are clearly spelt out in the Employment Act (Chapter 57:01). Most employers vary contracts of employment by transferring employees between departments or geographical locations.

It is upheld by law that it is within the employer’s prerogative to transfer employees from one department to another, or from one province to another. However, such a transfer must be preceded by consultations with the employee. Legally, public service members may be transferred between public service posts within and outside the country. However, a transfer must not amount to demotion.

Before reading on, reflect on the situation in your country and cite examples of variation of contract and transfer of employees.

**Further Considerations**

Before the contract is finalized, there are additional or further considerations to be taken into account by the parties. Employers and employees have often quarrelled over details that appeared minor at the hiring stage. These include, but are not confined to the following.

- The employer or his/her representative has the right to supervise the employee.
- The degree to which the employee is dependent on the employer in the performance of duties should be clearly spelt out.
In terms of the employment contract, an employee is not allowed to work for anyone else unless it is part of the contract.

The employee is expected to render his/her duties personally instead of delegating somebody.

It should be made clear whether the employee will be paid according to a fixed rate or by commission.

The parties should agree about whether the employee should provide his/her own tools for the work to be done.

It should be made clear that the employer has the right to discipline the employee. The existence of this right normally indicates control.

The employee must be entitled to leave.

The employee must be entitled to freedom of association.

Activity 2.3 C

By referring to the considerations cited above, suggest examples of misunderstandings that could arise or have arisen when issues are not clarified at the beginning of the contract.

<table>
<thead>
<tr>
<th>Consideration</th>
<th>Example of a possible misunderstanding</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The employer’s right to supervise an employee.</td>
<td></td>
</tr>
<tr>
<td>2. The extent of employee’s dependence on the employer in performance of duties.</td>
<td></td>
</tr>
<tr>
<td>3. Not allowed to do jobs for someone.</td>
<td></td>
</tr>
<tr>
<td>4. Employee not allowed to delegate someone to do duties assigned to him/her.</td>
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<tr>
<td>5. Whether or not the employee will provide own tools.</td>
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<tr>
<td>6. The right of the employer to discipline the employee.</td>
<td></td>
</tr>
<tr>
<td>7. The right of the employee to join the trade union/worship at a church of own choice.</td>
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</tbody>
</table>

Record your answers in your personal journal for later review and feedback by your course instructor.
The responses you give will derive from personal experience. The importance of sharing these is that the entire understanding of labour relations about this aspect will be enriched. For example, some employees have been known to resist supervision either from the employer or a manager in their department, arguing that they were being policed. Such a misunderstanding can affect work relations. Another example is when an employee joins a trade union. Some employers see this as a way of causing trouble in the department or organization. In some cases the work relationships get tainted, and the employee can be victimized to the extent of losing the job.

Case Study

Mrs Mohale has worked for Water Utilities for the past ten years as a senior marketing manager at a branch in Gaborone. Her husband lives and works in Gaborone at the University of Botswana as a senior lecturer in the department of Business Studies. Their children are doing well at a school in the city. Mrs Mohale was called into the Manager’s office one Monday morning and abruptly told that she had been transferred to the Francistown Branch on promotion, and that she must report on duty at the new place at 8:00am in two days’ time. Francistown is one of the cities found in Botswana, and is 500 kilometres away from Gaborone.

1. What type of contract do you think Mrs Mohale works under?
2. What do you find un-procedural about the employer’s approach from the labour relations point of view?
3. What dilemma do you think Mrs Mohale is now facing?
4. What are the social implications of this development to the Mohale family?
5. What advice would you give Mrs Mohale, who is a member of the trade union for which you are the representative?

Record your answers in your personal journal for later review and feedback by your course instructor.

SUMMARY

We have now come to the end of the topic dealing with contract of service as an important aspect of business law with which the entrepreneur should be familiar. The following areas have been given coverage.

- What a contract of service is.
- The principles of the law of contract, e.g. age limit, breach of contract, etc.
- Elements of a contract such as specified work and remuneration.
- Types of contract, including fixed term and indefinite term.
- Variation of terms of contract and implications.
Self-Reflection Questions

a. Explain the meaning of variation of terms.
b. Identify one type of contract you normally use in your enterprise and explain what challenges you often face when implementing it.
c. With reference to your type of business venture, what instances of breach of contract do you commonly experience? Explain how you deal with them.
d. Why is your employee not allowed to do jobs for someone else by law?

Record your answers in your personal journal for later review and feedback by your course instructor.
UNIT 3 - ASPECTS OF THE LAW OF CONTRACT

INTRODUCTION

The two foregoing units dwelt on the background to Business Law and Labour Law, projecting the close connection with business law. Presently, focus shifts to core issues about the course, namely, the different aspects of the Law of contract. Within a business enterprise, the entrepreneur is expected to abide by legal stipulations, hence it is essential to cultivate a conscious awareness of legal issues such as recruitment and contracting. These are key issues regarding business law. Three equally critical aspects, namely, law of sale, law of lease and law of agency are discussed at some length. Most business activities centre around these.

UNIT OBJECTIVES

After working through this unit, you should be able to:

1. Describe types of contracts.
2. Explain the following:
   a. capacity to contract;
   b. Breach and term of contract;
   c. Recruitment;
   d. Contracting and sub-contracting;
   e. Contracting documentation;
   f. Law of sale;
   g. Obligations and remedies of buyer and seller;
   h. Law of lease; and
   i. Law of agency.

UNIT READINGS

As you complete this unit it is recommended that you read the following chapters/articles:

- Contract & Fiscal Law Websites and Electronic Newsletters.

ASSIGNMENTS AND ACTIVITIES

There will be one assignment for the entire course as indicated above.
Topic 3.1 - Law of Contract

Introduction
In the previous units, we focused on the background to Business Law. The purpose was to ground the entrepreneur in basics about the subject. This was followed by a discussion on labour/employment law in as far as they relate with business law. Presently, focus shifts to aspects of the law of contract. There are several of them, and the present topic lays the foundation. Key definitions are discussed relative to types of contracts. Also related terms, will be explained as a way of affording the entrepreneur the opportunity to apply them in practice.

Objectives
After working through this topic you should be able to:

1. Define and explain concepts about law of contract.
2. Apply the terms to practical instances occurring in the enterprise.

Content
- Definitions
- Types of contracts
- Mistake
- Misrepresentation
- Remedies
- Capacity to contract
- Interpretation of terms
- Termination of contracts
- Breach of contract

Warm-up Activity
1. What are the different types of contracts?
2. In what ways could misrepresentation lead to the breach of contract?
3. Bear your responses in mind as you proceed with our discussion below.

Record your response in your course journal.

Definitions
Contract

A contract is defined as being an agreement, between two or more parties within their contractual capacities which are possible of performance and is enforceable by law.

The most important features of the definition include the following:

- it is an agreement;
- between two or more parties;
• within their *contractual capacities*;
• which are *possible of performance*; and
• the agreement should be *enforceable by law*.

The definition contains the essential elements of a valid contract. We should then look at each of the essentials.

**Agreement**

This is otherwise known as *consensus*. It means to express willingness. To establish whether there is agreement, the transaction is ordinarily analysed into offer and acceptance.

The person who makes an offer is the *offeror* and the one who accepts is the *offeree*. Oral agreement is as binding as a written one.

**Offer**

Generally an offer is defined as presenting an idea or concept for approval, rejection or consideration. The implication of a serious offer is that the offeror is showing willingness to enter into contract with the offeree. The offer must meet all the requirements of a valid contract, that is, it must show that the maker has a serious intention to be contractually bound merely by the other party. An offer must define all the terms on which an agreement is sought, and must be specific. With an invitation, one party is seeking offers from another, retaining the right to either accept it or not.

An offer may be made to a specific person or to the public in general. Anyone complying with the terms of the offer can accept it.

**Acceptance**

In the context of a business enterprise, a contract cannot come into existence unless the offer is accepted. The offer must be accepted by the party to whom the offer is made. This is known as privity of contract. Parties are free to choose their contractual partners.

An acceptance must be clear and unconditional. If the offeree gives own terms other than those given by the offeror then this does not constitute acceptance but a *counter offer*. The counter offer is open for either acceptance or rejection by the original offeror. In which case their roles have been reversed, the initial offeror now becomes the offeree and likewise the offeree becomes the offeror. When the offeror stipulates a mode of acceptance, then only the mode would be recognised for valid acceptance. Any other method would not be considered as valid acceptance.

Acceptance may be by conduct. However, the offeror cannot dictate that he would take the offeree’s silence as acceptance. When one is silent, one does
not necessarily accept or agree. Also for acceptance to be valid, the offeree must have knowledge of the offer. Otherwise the offeree would not intend to accept anything.

A contract can come into being either tacitly or expressly. Tacit acceptance means that the offeree may not have verbally consented to the terms of the contract, but by his actions implied agreement to enter into contract. Express consent is the verbal or written approval of the contract.

**Activity 3.1 A**

a. Describe some examples from your business of counter offers that you have experienced.

b. Make a distinction between offeror and offeree within a business context.

Record your answers in your personal journal for later review and feedback by your course instructor.

**TYPES OF CONTRACTS**

There are different types of contracts as shared below.

**Void and Voidable Contract**

A void contract is not a contract at all. It is referred to as a legal nullity. In actual fact it is a misnomer to talk of a void contract. As per our definition of a contract and the key features, we established that a contract must be enforceable by law. For example, A and B may agree to rob a bank and thus enter into contract, however the essence of the contract in itself is not enforceable by law. If A fails to perform as per agreement, B cannot bring A to law. Contracts may be void due to the following:

- Illegality
- Lack of contractual capacity
- Initial impossibility/subsequent impossibility
- Mistake

A voidable contract is one which is valid per se but due to some issue, the innocent party may at his option decide to withdraw from it. A contract may be voidable due to the following:

Lack of contractual capacity e.g. a minor may withdraw from his unassisted contract. A trustee may avoid contracts entered into by the insolvent which have the effect of detrimentally affecting the estate.

- Duress
- Undue influence
- Misrepresentation
Duress/Metus (Fear)

An innocent party may withdraw from a contract which he was induced to enter due to fear or threat of harm or injury.

Characteristics/features of duress include the following:

- The threat must be made by the other contracting party.
- It must be a threat of harm or injury to the innocent party, his immediate family or property.
- The fear must be reasonably held (not fear of the unknown). It is not sufficient for the other party to plead that the innocent party is easily intimidated.
- The contracting party must not have threatened what he is entitled to. For example, if I threaten to do what I am legally entitled to, there is no duress.

In the case Shepstone v Shepstone a husband threatened to sue for custody of children where the ex-wife was cohabitating with a married man. The court held that there was no duress. The husband was legally entitled to the claim:

The duress must have caused the innocent party to conclude the contract.

The innocent party must take steps to withdraw from the contract as soon as the source of fear is removed.

Undue Influence

This is not based on fear at all. It is based on the fact that the conduct of the other party is improper and unfair. That one party because of his dominant position or relation prevailed on the will of another to enter into a contract against his will. In essence, one party by virtue of his position, influences the other’s decision with regards to entering into contract. Undue influence occurs mainly where the parties have a special relationship e.g. doctor and patient, lawyer and client, guardian and minor, pastor and member of church. However, the special relationship is not a legal requirement. The existence of a special relationship makes it easier to prove its abuse to make the will of the other party pliable. Consensus is thus defective, making the contract voidable.

The victim would not have concluded the contract on his own free will. A good example is the important case of an old and ailing farmer who donated to his doctor his three farms because of undue influence. The innocent party is allowed to withdraw from the contract.
Activity 3.1 B

a. Explain the distinction between a voidable contract made under undue influence and duress.

b. Support with typical examples from your business enterprise.

Share your response with a colleague, and relate closely to the enterprise you either run or are familiar with.

Record your answers in your personal journal for later review and feedback by your course instructor.

Mistake

When a party enters into a contract and gets the thinner end of the bargain, he may say, “I was mistaken in entering into the contract”. The law does not concern itself with such a mistake. Courts do not make contracts for the parties. A mistake occurs when there is some misapprehension or misunderstanding as to some material fact. This would mean that the parties have not achieved an agreement. It must be noted that a mistake of law has no effect on the contract because ignorance of the law is no defence or excuse. Mistakes have different categories:

Unilateral/One Sided Mistake- Only one party makes a mistake, while the other is aware of the obligations. The law will not allow the unmistaken party to take advantage of the mistake i.e. snatching at a mistake. The mistake must be fundamental to make the contract void. All mistakes must be reasonable or just for the contract to be avoided. If the mistake is unreasonable, then the law would not excuse it. This would be affected by the Quasi mutual assent rule. This rule states that where a party, by his/her words or conduct leads another (as a reasonable person) to believe that he was assenting to the terms proposed by him/her, and that party upon that belief enters into the contract with him/her, the person thus conducting oneself would be equally bound as if he/she had intended to agree with the other party’s terms. Here is an example to illustrate the point raised above.

John purchases a painting purported by the proprietor of the shop to be an authentic Picasso. However, on appraisal by his art-critic friend it is established that it is indeed an imitation and of far less value than the consideration paid. The shop owner does not know he is selling a fake, and neither does John.

Common Mistake - Both parties make the same mistake; e.g. in a contract of sale both parties believe that the goods being paid for are in existence whereas they have been destroyed. In this case, the contract is void.
**Mutual Mistake** - Here the parties have negotiated at cross purposes. The offer made is not the one accepted; e.g. A intends to sell his Mini car to B but B thinks the offer relates to the Pajero also owned by A. There is no meeting of the minds. The contract is therefore void. The mistake must be material. Material mistake would be a mistake, for instance, on the identity of the subject matter or its content and not mistake on the motive or reason for contracting.

**Misrepresentation**

A representation is a statement of fact made during the negotiation stage which becomes one of the reasons that induces the other party to enter into the contract. It becomes a misrepresentation if the facts are false. A statement of opinion, even if false does not amount to a misrepresentation. Everyone is entitled to his opinion. However, if one states that one holds a certain opinion whereas one does not, this will be a misrepresentation of his state of mind. The party can avoid the contract.

The requirements for misrepresentation are as follows:

- it must be false;
- it must be made by the other contracting party;
- it must be made before or at the time the contract was entered into;
- the statement must be material; and
- the innocent party must have been contracted on the faith or basis of the statement. When a true statement subsequently becomes untrue, silence may amount to misrepresentation if the maker is aware of the changed position. There is now a duty to speak.

**Activity 3.3 C**

Write a brief case study to illustrate misrepresentation.

Record your answer in your personal journal for later review and feedback by your course instructor.

In Business law, case studies are helpful in giving clarity to ideas about issues. In this particular instance, reference will be to the law of contract.

**Types of Misrepresentation** - There are different types of representation that the entrepreneur should be familiar with. Study the following closely, and relate them to the business you run.

**Fraudulent Misrepresentation** - This type has the following defining characteristics:
- It involves a false statement made with full knowledge of its falsity. Back to our example of John and the painting. Had the store owner sold the painting with the full knowledge of its authenticity, this would be considered fraudulent misrepresentation.
- It may involve making reckless statements without caring about their truth. Recklessness amounts to fraud but negligence does not.
- It also involves making a statement when in doubt about its truth but nonetheless closing one’s eyes to all avenues of the truth. This is fraudulent diligence in ignorance.

**Negligent Misrepresentation** - A statement must be made negligently. He who makes it intends to induce the contract. He fails to take steps which a reasonable man would have taken in the circumstances. The maker must owe the other party a duty of care. He must know that reliance is placed on his skill and expertise, and that if statements are not true, the other party would suffer loss. Let us consider our example about the painting again. Now, let us assume that the shop owner was indeed a connoisseur of art, and sold the painting without verifying whether it was authentic. He is held in contempt both of law and of the contract.

**Innocent Misrepresentation** - The statement is made innocently without the intention to mislead.

**Remedies**

A party that suffers a loss because of a breach of contract by another party, may be able to obtain redress/remedies. The contract is voidable in all instances, thus the innocent party has a choice whether to uphold or rescind the contract. This calls into play the issue of remedies.

If one party breaches the terms of a contract, the other may suffer a loss. Where this occurs, there are various remedies, which the party suffering from the other’s breach can use. A breach of contract is caused by a failure to perform a duty specified by the contract. The contract’s terms can be divided into conditions and warranties. These can be expressly stated or implied within the contract. A condition is something fundamental to the contract. Breaching a condition will allow the other party to the contract to terminate it by ‘repudiating’ it and to claim damages. Breaching a warranty will only allow a damages claim and does not bring the contract to an end. Monetary damages for breach of contract are intended to be compensatory – i.e. to put the injured party in the position he reasonably expected to be in when the contract was created.
Delictual Remedies

Damages are available for fraudulent and negligent misrepresentation. There are no delictual damages for innocent misrepresentation. Damages are/may be available whether the victim upholds or rescinds the contract. The innocent party must be put in the same position (as far as possible) in which they would have been had the misrepresentation not happened. Damages here are not contractual but are based on delict. The innocent party must be put back to the position before the misrepresentation, not in the position he would have been had the contract been properly performed, which is the basis of contractual damages.

Capacity to Contract - It is important to establish who the parties to the contract are. This is important because some parties have no contractual capacity at all while the ability of others to enter into contract is limited. Capacity to contract refers to the legal competence to enter into contract. In one of the foregoing topics of employment law, where the issue of child labour was discussed, some points about capacity were raised. Below are examples of persons whose capacity to contract is prohibited under law of contract.

Minors - The legal age of majority in Botswana is 18 years. A child under the age of 7 years has no capacity to act at all. He is unable to form an intention to enter into a binding legal obligation. Those above the age of 7 years must as a general rule have the assistance of a guardian when entering into contracts. The guardian must give assistance when the contract is being entered into or he must ratify after its conclusion. When the guardian says the minor can do as he wishes this is not assistance. The High Court is the upper guardian of all minors. Contracts concluded without the guardian’s assistance are voidable at the minor’s instance. The minor may withdraw from the contract without incurring any obligations unless he has been unjustly enriched. His estate cannot be benefited at another’s expense. If the minor continues to use the subject matter after attaining majority he will be taken to have ratified the transaction and he cannot withdraw. The minor cannot keep the subject matter of the contract when he withdraws from it, unless he has used it in a manner which shows whims of minority i.e. giving it away as a gift without any legal obligation to do so.

When a minor is bound by unassisted acts

- When he is married, he cannot revert to minority even after divorce.
- When he is tacitly emancipated for all acts he is independent for all purposes e.g. he has healthy finances, or stays alone.
- Partial emancipation applies only to do those acts related to his trade e.g. a cobbler would be allowed to purchase glue.
- When a guardian ratifies previously unassisted contract.
The law wants to balance two interests. Firstly, to protect minors from their minority and secondly, to ensure that innocent third parties should not suffer due to the conduct of others.

**Activity 3.1 D**

The issue of minors and the law of contract is quite topical in economies experiencing poverty. Cite five examples you are familiar with from the business world.

Record your answers in your personal journal for later review and feedback by your course instructor.

The examples you cited will strengthen your understanding of how minors ought to be safeguarded against malpractices in the business world.

**Mental Capacity/Insanity**

Every person is presumed sane until declared insane by a competent court. This is a requirement of the Mental Health Act. When a person is insane, he/she has no capacity to conclude contracts. If he/she does, there would be no right of obligations arising out of these. Such contracts are void.

To establish whether the contract entered into by an otherwise insane person is void, two questions have to be asked:

- **Was the person so mentally deficient that he did not know that he/she was entering into a contract at all?** If the answer is yes then the contract is void as the person did not have intention to contract.

  But even if the answer is no, the second question still has to be asked:

- **Was he so mentally deficient that although he knew that he was entering into a contract, he did not appreciate the nature and consequence of the transaction?** If the answer is yes then the contract is also void. For example:

  > A may, due to mental deficiency, know that he is entering into a contract but he may believe that it is one of a sale when it is one of marriage!

During lucid times, an otherwise insane person can enter into valid contracts.

**Intoxicated Persons**

Alcohol or drugs may affect a person’s intention to be contractually bound. Sometimes the effect of alcohol or drugs on a human mind is similar to that of insanity. The same questions as on insanity have to be asked. However, it is the
person who alleges that alcohol or drugs prevented him from forming an intention that has to prove this fact.

**Insolvent Persons**

This is governed by the provisions of the Insolvency Act. An insolvent is one who has been so declared by the Court. This may either be because the person has voluntarily surrendered his/her estate for the benefit of creditors or his/her creditor(s) have successfully had that person’s estate compulsorily sequestrated. The creditors would have discovered that the debtor has committed an act which is stated in the statute to consist of an act of insolvency. They then apply to the court for the debtor to be declared as an insolvent.

The insolvent may not dispose any of his/her assets so as to detrimentally affect his/her estate without the consent of the trustee appointed to act on behalf of creditors. One can however, enter into ordinary contracts to sustain one’s life; e.g. contracts of employment.

**Prodigals**

This is similar to the biblical son who recklessly and extravagantly spent his assets. He has to be declared a prodigal and a curator appointed to manage his affairs. Somebody must prove why that person should be declared a prodigal because the courts are not keen to interfere in personal affairs.

**Artificial Persons**

These are bodies which are given legal personality by the law. For example companies, parastatals and the state. These have to act through duly appointed agents. However, they are granted legal personality and can sue and be sued in their own name so they can enter into contracts just like natural persons. This is as far as it is competent for the artificial person to enter into such contract. For example, a company cannot enter into a marriage contract!

In most contract disputes, parties disagree on what the terms of the contract are. In the course of negotiations, various statements may be made, some oral and others in writing. Not all statements so made are terms. A term is a statement which has effect as part of the contract. It obliges the party to act in a particular manner. A term defines the party’s rights and obligations.

Terms must be distinguished from statements which are merely preliminary to negotiations. For example, those statements made before the conclusion of the contract are merely to lure customers. They are regarded as sales talk or mere puffs, and not legally important. A statement like: This bicycle is the strongest in Africa is not part of the terms of contract. Statements of opinion are also not actionable as everyone is entitled to their opinion.
The following are some of the types of terms.

- **Express terms**: These are precise and certain as stated by the parties.
- **Implied terms**: Not expressed but the court may imply these from the following:
  - Conduct of the parties.
  - Because the court believes that the parties would have agreed to these terms if they had put their minds to them.
  - For business efficiency.
  - On the basis of custom or trade usage.

Our discussion so far has centred on contract capacity, and to relate this to the business world, work on this activity.

**Conditions**

These form a particular category of terms which determine whether a contract comes into being or is terminated. They are of two types:

- **Suspensive Condition/Condition Precedent**: The flow of obligations is suspended until the condition is fulfilled. In the meantime, there is merely a contractual relationship.
- **Resolutive Condition/Condition Subsequent**: The materialisation of the condition terminates the contract. The contract becomes operative there and then until the happening of the uncertain future event.

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<th>Activity 3.1 E</th>
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<tr>
<td>The foregoing discussed persons who may not enter into contract. For each one listed in the first column, suggest typical examples from the business world. Write your example in the second column.</td>
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<table>
<thead>
<tr>
<th>Person</th>
<th>Typical Example</th>
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<tr>
<td>Insane person</td>
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<td>Intoxicated person</td>
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<td>Insolvent person</td>
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<td>Prodigal</td>
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<td>Artificial person</td>
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Record your answers in your personal journal for later review and feedback by your course instructor.
We now turn to an important aspect of law of contract, namely, a brief guideline on how to interpret terms of contract.

**INTERPRETATION OF TERMS**

We said that the courts do not make contracts for the parties. In determining what the terms of the contract are, the courts lean towards preserving agreements rather than striking them down. Thus, courts prefer an interpretation that will make the contract effective rather than one which will cause it to fail.

In interpreting contracts, courts take into account the intention of the parties. This is ascertained from the words used. The contract is interpreted as a whole. When a meaning must be attributed to particular words, these are given their ordinary everyday grammatical or popular meaning. The exception is when doing this would result in absurdity or when it can be proved that the words were used in a technical sense. For example, the word ‘riot’ would obviously refer to the chaotic disorder by more than one person. Where the transaction is merely ambiguous, the words would be given the meaning which suits the agreement. One rule which is important where there is ambiguity is the *contra proferentum* rule. The effect of this rule is that any ambiguity in a written document will be interpreted against the person who drew up the document and now purports to rely on it. This rule is a fair one.

**Termination of Contracts must be distinguished from termination of offer.**

**Performance** - When parties have performed what they agreed on. There is nothing else to do. Thus the contract is therefore terminated.

**Agreement** - A contract is a result of agreement so it can be terminated by the same.

**Set-off** - Where parties are reciprocally indebted and the debts are of the same nature, then they are terminated by set-off. However, if one debt is greater, then the smaller is discharged and the greater reduced by the amount of the smaller. Both debts must be due for payment.

**Merger** - One person becomes both debtor and creditor in respect of the same obligation e.g. when a tenant buys the house which was the subject of lease, he becomes his own land lord and the contract of lease is terminated. You cannot contract with yourself.

**Supervening Impossibility** - This terminates a contract if the contract was initially possible to perform, but due to no fault of both parties it then becomes impossible to perform. This may be due to *vis major* act of the State or God. This is an act beyond the control of either party. For example, if one of the parties is declared an enemy by the State.
Novation - This consists of an agreement between the parties substituting the terms of the old contract with a new one. This terminates the old contract. Novation may be made compulsory by the court or voluntarily by the parties.

Delegation - In this case a new debtor is introduced into the transaction with the agreement of the creditor. This releases the old debtor. Agreement of creditor is important as the creditworthiness of the new debtor is a material factor.

Cession - This is transfer of personal rights. A new creditor is brought into the transaction. There is no need for agreement of the debtor as it does not matter who he pays as long as the debt remains the same. The debtor must be notified to avoid double payment.

Prescription - This means the time limit has expired. It is possible to fail to enforce rights after the passage of a certain time period. Prescription runs from the time the claim becomes enforceable. It is also possible to acquire rights through passage of time e.g. if one occupies another’s land openly for over 30 years then it is possible to acquire ownership by prescription (if other essentials are met) acquisitive prescription.

Death - The death of a party terminates the contract only where the obligations are of a personal nature. If not, then the estate of the deceased would have to bear the liability.

Activity 3.1 F

Identify any four ways of terminating contracts, which are of interest to your enterprise, and explain some of the challenges faced when contracts are terminated in that manner.

Record your answer in your personal journal for later review and feedback by your course instructor.

Interpretation will always vary depending on the circumstances. However, expression of possible challenges helps you reflect on what goes on in your business.

Breach of Contract

Where a party does not perform the contract properly, this amounts to breach. Both the debtor and the creditor may breach the contract. Breach may be due to the following:

- Doing what one promised not to do. This is positive malperformance.
- Stipulating that one no longer wants to perform as agreed. This is repudiation.
- Showing clearly that one will not perform when time for performance is up. This is anticipatory breach.
• Late performance when time for performance is given and important.
• However, where no time for performance is given, then the creditor should give notice so as to make time important and therefore put the debtor in 
mora/delayed performance.

**Remedies for Breach**

What does the innocent party do when his contract has been breached? Where one party breaches the contract, the other is entitled to contractual remedies:

**Specific performance** - This means to achieve what the parties initially intended or a substantially similar result. This remedy would not be granted if it is impossible to accomplish, or if to demand this would cause undue hardship on the defaulting party, or where there is performance of a personal nature, demanding skill or expertise of the defaulting party.

1. **Cancellation of the Contract** - If the breach is serious, the innocent party can regard the contract as cancelled and raise breach as a defence if sued on it.
2. **Damages** - The object of awarding a sum of money to the innocent party is to compensate him/her for loss arising from breach. It is important that the innocent party whose contract is breached must not just sulk, but do his best to minimise his loss. In contract, one is not awarded damages for hurt feelings or disappointment. The loss or damages must not be remote. It must result from the normal course of the breach.
3. **Interdict** - This is obtainable before breach. To prevent the other party from breaching the contract one applies to court for an order.

**SUMMARY**

We have now come to the end of the topic dealing with contract of service as an important aspect of business law with which the entrepreneur should be familiar. The following areas have been given coverage.

• What a contract of service is.
• The principles of the law of contract, e.g. age limit, breach of contract, etc.
• Elements of a contract such as specified work and remuneration.
• Types of contract, including fixed term and indefinite term.
• Variation of terms of contract and implications.
Self-Reflection Questions

Explain the meaning of variation of terms.

1. Identify one type of contract you normally use in your enterprise and explain what challenges you often face when implementing it.
2. With reference to your type of business venture, what instances of breach of contract do you commonly experience? Explain how you deal with them.
3. Why is your employee not allowed to do jobs for someone else by law?

Record your answers in your personal journal for later review and feedback by your course instructor.
**TOPIC 3.2 - RECRUITMENT AND CONTRACTING ARRANGEMENTS**

**INTRODUCTION**
The one topic is of value in the discussion of Business Law is Employment Contracts and Sub-Contractor Contracts. There needs to be some discussion about the type of legal documents that you need to recruit and manage your employees (full and part-time) and any sub-contractors that you may wish to hire. Many businesses use contractors to support their clients. It is important that the business owner knows how to initiate a contract for services or a contract for product development using sub-contractors within his or her own business structure.

**OBJECTIVES**
After working through this topic you should be able to:

1. Define and explain recruitment arrangements
2. Distinguish, with examples, the difference between contracting and subcontracting.
3. List legal documents needed when recruitment takes place.
4. Identify and explain the recruitment steps.

**CONTENT**
- Recruitment arrangements
- Contracting and subcontracting
- Contract documentation
- The recruitment process

**WARM-UP ACTIVITY**
a. What steps do you normally take when recruiting employees in your enterprise?
b. Does contracting mean the same as subcontracting?
Bear your responses in mind as you proceed with our discussion below.
Record your responses in your course journal.

**RECRUITMENT ARRANGEMENTS**
In [http://www.lawdonut.co.uk/law/employment-law/recruitment-and-employment-contracts](http://www.lawdonut.co.uk/law/employment-law/recruitment-and-employment-contracts), entrepreneurs are advised that establishing a successful recruitment process can have a major impact on your business. Similarly, once you’ve decided to hire someone, setting out the terms of your agreement with them in a clear written contract helps reduce the risk of any disputes arising later. Most importantly, it is essential to specify the type of working arrangement for which a person is hired. A number of working arrangements can apply when employers engage workers. It is important to understand the
different arrangements as they can affect the terms and conditions of employment. Several arrangements are summarised below.

**Full Time Permanent**

Full time permanent employees work a number of hours per week, stipulated in the statutes for the given industry on a regular, on-going basis. They are eligible for such entitlements as paid annual, bereavement, parental, sick and carer’s leave, and public holidays. In developed countries, but not yet in Botswana, male full time employees are entitled to paternity leave.

**Part Time Permanent**

Part time permanent employees work on a regular, on-going basis but work fewer hours than full time employees. Part time employees may work a set number of hours on specific days. They get the same entitlements as full time permanent employees, but on a pro-rata basis according to the hours worked.

**Casual**

A casual is an employee who may be hired on an hourly, daily or weekly basis and there are a variety of employment arrangements covering casual employment. Generally, casual employment is categorised by a short term or irregular period of employment. There is no guarantee of ongoing work and no requirement for the employee to be available for work.

Industrial instruments may require an employer to notify the employee of their engagement as a casual, and limit the duration a person can be employed as a casual. Casual employees are not entitled to annual, sick or carer’s leave or any public holidays.

**Fixed Term**

Fixed term employees are employed to do a job for an agreed length of time. Many employers hire fixed term employees to do work on a specific project or to fill in for employees who may be on leave. Fixed term employees are eligible for entitlements such as paid annual, bereavement, sick and carer’s leave, and public holidays in relation to the term of their contract of employment.

**Commission**

Persons whose services are remunerated wholly by commission or percentage reward are not classified as employees for the purposes of the *Minimum Conditions of Employment Act* of Botswana. People in this category may be paid on a ‘commission only’ basis which means they only receive money when they sell or achieve a specific target. A person can also be appointed on a ‘commission and retainer’ basis. In this situation, the person may be classified as an employee and may be eligible for entitlements under relevant legislation and/or an industrial instrument.
Piece Work

Persons whose services are remunerated wholly at piece rates are not classified as employees for the purposes of the Minimum Conditions of Employment Act. Being paid a piece rate means the person receives a set amount for completing a specific task that can be counted or measured. For example, payment based on a number of boxes of fruit packed or tonnage of timber cut. A person may be classified as an employee and may be eligible for entitlements under relevant legislation and/or an industrial instrument.

Independent Contractor

Independent or ‘sub’ contractors are not employees. The difference between a contractor and an employee can be complex. Independent contractors differ from employees primarily because they will generally run their own business, control the way they work, supply their own tools and be paid upon completion of a job.

Apprentice

Apprentices are employed on an agreement that provides for a fixed term, employment based training programme. The apprenticeship agreement may be between two to five years and depends on how long it takes to become a qualified tradesperson. An apprenticeship combines on-the-job experience with off-site training.

Probation

Probation is a set period of time that may be used by employers to make sure employees can do the work they were employed to perform. A probationary period can range from one to six months, depending upon the work and the industry. Work done during a probationary period is paid, and employees are eligible for entitlements to leave and public holidays. Probation does not apply to casual employment.

Now, work on this activity, and ensure that by the end of it you have clearer understanding of the different types of arrangements.

Activity 3.2 A

1. List any two arrangements you were not sure of before reading the above. What implications do they have for employment arrangements in your business?
2. Which of the arrangements discussed above do you normally use when you recruit employees?
3. What challenges do you face using those arrangements?

Record your answers in your personal journal for later review and feedback by your course instructor.
There is no right or wrong answer here. All depends on the type of enterprise you run. The important point to note is that a clear awareness of what each arrangement entails, goes a long way in reducing labour relations problems with workers.

**CONTRACTING AND SUBCONTRACTING**

Contracting and subcontracting are contractual arrangements commonly used ([http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1074451280&typ e=RESOURCES](http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1074451280&type=RESOURCES)). There is an important distinction between using contractors and subcontractors.

**Contractors** provide agreed services to a client for a set fee - and possibly duration - under a contract for services. Many businesses typically use contractors for:

- building work,
- catering,
- cleaning,
- gardening,
- marketing services,
- IT maintenance and support,
- security services, and
- recruitment.

Contractors can charge the client fees by the hour, day or on a lump-sum basis. Their contracts often specify milestones for part payment, e.g. on completion of specific goals.

**Subcontractors**, on the other hand, undertake a contract from the contractor. Subcontractors can be anything from an individual self-employed person, e.g. a plumber carrying out work for a building contractor, to a large national organisation. A subcontractor has a contract with the contractor for the services provided. However, it should be noted that an employee of the contractor cannot also be a subcontractor.

Subcontractors undertake work that a contractor cannot do but for which the contractor is responsible. For example, a building contractor may hire a subcontractor to complete the electrical wiring part of the contractor's building job. The contractor is responsible to the client for the building job including the part performed by the subcontractor.

Subcontractors might work on task-based contracts with no fixed date, long-term arrangements which can be discontinued at any time, or fixed-term contracts.

**Activity 3.2 B**
As explained above, contracting and subcontracting are commonly used in the business world.

1. What examples of these are common in your enterprise?
2. What sort of documentation is required when contracting somebody?

Record your answers in your personal journal for later review and feedback by your course instructor.

Your response should reflect what obtains in your business, and give examples of what needs to be put in writing for a given contract. A more detailed discussion of documentation is given below.

**Contract Documentation**

Anyone that engages someone to work for them is an employer. Whether charitably or privately run, the trustees, directors or owners of any business must fulfil the legal responsibilities that come with their role; some of which have been introduced to protect the rights and welfare of employees, or to assist employers in getting the best from their workers. Others relate to operating PAYE and other systems of administration for the Government.

It is important that employees are managed well from the very beginning, to benefit the setting as a whole and the employees themselves. Effective hiring starts with a well-planned recruitment process. Focus on what you need the employee to do and prepare a job description and person specification setting out the required skills and experience. You must avoid any form of discrimination in the way you recruit staff. This includes discrimination on grounds of race, sex, age, disability and so on.

Make sure you understand how what you say or write during the recruitment process (such as during a job interview) can constitute an offer of employment or become part of an eventual employment contract. What follows are some of the considerations on documentation.

- When you do make a job offer, it makes sense to send out a written offer clarifying the main terms and conditions. You will need to ensure that these comply with key legal restrictions such as limits on the working week.
- Your initial employment offer should state whether the offer is subject to any conditions such as satisfactory references. You can also include a probationary period of up to a year as the maximum.
- A contract of employment exists for every employee, whether you have provided a written employment contract or not. The employment contract is created the moment an employee accepts your job offer. You should take legal advice if you are unsure whether an individual is employed by you or is self-employed in their own right.
As well as any written offer of employment, the terms of the employment contract can be affected by any other employment documents (such as a job description or a written statement of employment terms), or spoken agreement. The terms of the employment contract can also be affected by employment practice: for example, if you provide a bonus every Christmas, it may become a contractual entitlement to be reflected in writing.

You are legally obliged to provide a written statement of employment terms within not more than two months of taking on a new employee. The written statement must include specified basic details such as pay, working hours and holiday entitlement.

No agreement or contract can override an employee’s statutory rights. For example, there are statutory entitlements to sick pay, maternity leave and the minimum wage. However, a contract can offer more generous entitlements than the statutory minimum.

In general, you cannot unilaterally change the terms of an employment contract without risking a claim of constructive dismissal. So you should aim for employment contracts to be as flexible as possible. For example, you should avoid narrow job descriptions and include the right to change the job description or the employee’s place of work. Make it clear when employment benefits are intended to be discretionary.

You may want to consider other contractual terms, particularly for senior employees. For example, you might want the employment contract to include clauses on confidentiality and restrictions on leaving to set up a competing business or poaching staff. You should take legal advice to ensure that any terms in the employment contract will be enforceable.

Written obligations are different in that unlike oral ones, they can be read by anybody because they are in black and white, so they need to be carefully documented. With reference to the above, work on the next activity.

Activity 3.2 C

The above explanation gives detailed information about documents needed, as well as their importance. By reading through the information closely, identify documents you would require and list them for future use.

Record your answers in your personal journal for later review and feedback by your course instructor.

Some of them include job offer letter, a job description, and conditions of service. I am sure you have covered many of them. Obviously, the entrepreneur should be familiar with the recruitment process, especially the basics. These will be presently summarised here, assuming that they were given wider coverage.
in the human resource management course. It all begins with the existence of a vacant post in the enterprise.

THE RECRUITMENT PROCESS

In [http://handbooks.homeless.org.uk/hostels/environment/staff](http://handbooks.homeless.org.uk/hostels/environment/staff) a number of instructive steps are offered for your guidance as follows.

**Step 1: Reviewing the Vacancy and Revising the Job Description**

The recruitment process should commence as soon as a member of staff hands in their notice. It is the ideal time to review the role. Asking the outgoing staff member for honest and constructive feedback on their experiences of employment with your organisation can help you refine the role. Exit interviews with staff over a period of time will also enable you to understand areas of concern with staff, especially if the same issues are raised by a number of employees. Review of the tasks required by the post and review of the job description is then undertaken before advertising.

**Step 2: Developing the Person Specification**

The next step is to review the person specification for the role. Good practice agencies minimise the essential criteria to enable as many people as possible to apply for the post, giving maximum choice to managers. Issues of gender, ethnicity and religion ought to be avoided.

**Step 3: Advertising the Post**

Larger organisations, especially those working in big cities, are likely to use a range of methods to advertise vacancies. Smaller organisations may have more limited budgets. Advertising a vacancy as widely as possible obviously increases the number of candidates likely to apply. You should then decide which media to use. The following may be helpful to bear in mind:

Advertising by word of mouth alone, even for temporary and locum staff, is not recommended – these staff members may end up in the organisation in the long term and will not have come from as wide a pool of candidates as possible. However, emailing details of the vacancy which has been advertised elsewhere to contact lists may encourage more people to apply.

Remember to give enough time for people to respond to the advert. Three weekends is recommended, especially if using online adverts or job centres and recruitment agencies.
Step 4: Shortlisting

At this stage, shortlisting should be against the essential and desirable criteria for skills, experience and knowledge. A shortlisting grid should be drawn up, detailing the item being considered, a space for marking and a space for comments (which can be considered should there be any lack of agreement about the shortlist). Applicants should be scored against each item as either meeting (M), partly meeting (P) or not meeting (N). More weight should be given to essential criteria, and desirable criteria only assessed if there is a large pool of candidates who all meet all of the essential criteria.

It is good practice for shortlisting to be done by at least two individuals, and three if possible. Each person should bring their top six candidates for discussion at a short meeting and relative merits discussed before a final shortlist is agreed upon. The member of staff who will be making the final recruitment decision in consultation with others must be involved at this stage.

Step 5: The Interview and Job-Related Tests

Interview questions should be prepared well in advance by the line manager. The best way of constructing interview questions is to ask a question that firstly will show how a potential recruit has behaved in the past and secondly shows how they meet one of the competencies of the post. For example:

"Can you tell us about a time when you had two competing deadlines for the same day set by different managers which both involved a substantial amount of work? How did you resolve this?"

You will be able to tell a candidate's working relationships, ability to work under pressure, attitude towards work and hopefully some experience relevant to the role you are recruiting. Good practice agencies suggest asking a maximum of eight main questions, with plenty of opportunity for follow up questions from each of the panel members to probe the candidate's response and draw out a good understanding of their experience and attitude. Each question may provide information on one or more competencies. However, every competency included in the framework for the role or grade should be able to be tested during the interview process.

During the interview, the panel (preferably at least two members of staff) should take it in turn to ask questions. Panel members may find it helpful to write detailed notes of answers to enable them to score properly after each candidate. It is also useful to have a copy of the questions prepared with sufficient space beneath each for notes. Don't be afraid to probe anything in the application form which you should rightly query - such as frequent changes in employer, an unexplained absence from employment, high levels of sickness absence. There may well be a reasonable answer.
The other aspect of the interview process is job-based testing. This may vary - in-tray tests and is useful for administrative staff. Asking the candidate to prepare a 15-minute training session on a subject of their choice if they are to deliver training; or perhaps a role play with one of the panel 'in character' as a client for a key worker.

**Step 6: Selection**

The selection process should ideally be completed on the same day or day after the interview. Each shortlisted candidate should have met all of the essential criteria on the job description and therefore should be scored against the competencies. It is helpful for panel members to grade a candidate's performance from 1 (poor) to 5 (excellent) against each competency and to write notes against each performance. Panel members then review each candidate in turn, coming to an agreed score for each competency, and interviewed candidates are then ranked. Ranking assists with the final decision, which remains with the appointing manager.

If the panel is in the unfortunate position of finding none of the candidates suitable to appoint, it is better to leave the vacancy open and try to recruit through another channel, or return to the pool of applications. Employment law is firmly on the side of the employee and it is in the organisation's best interests to make the right decisions. Poor recruitment decisions can be costly, legally complicated and time intensive in terms of performance management at a later date.

**Step 7: References**

No matter how thorough the interview and selection process, some seemingly-excellent candidates can prove to have been difficult in previous employment. Some agencies will take up references for a fixed period of time. Reference requests should cover issues such as honesty when handling money, sickness absence (both total number of days and spells of absence), timekeeping, and detailed questions on performance. If you do not receive a reference back - or the reference you receive seems poor or average - it is worth phoning the referee for an informal chat. This does not violate any employment law or practice as long as the conversation remains within the bounds of performance, attitude and attendance. One leading HR manager in the sector told Homeless Link that it is not uncommon for friends to provide references for each other when they have fabricated previous employment. So, ask for stationery with letterhead to be included with the reference posted back. Under no circumstances should you appoint someone without any references at all - even students should be able to supply referees from college or university.
Step 8: Induction

A thorough induction into the organisation is important to both settle the member of staff in with new colleagues and also to set parameters and expectations of the job role. A good induction programme should give the inductee information about the organisation, their role, where their role fits with others in the team, division and organisation and grounding in policies and procedures. In larger organisations, the induction session can be shared between key staff - for example appointments with the office manager and IT support should be arranged as early as possible before the employee develops the wrong impression about the organisation.

The foregoing represents the essential steps of the recruitment process. Contracts based on such transparent procedures are likely to be more binding. What are your views about these steps?

Activity 3.2 D

1. Which of the steps outlined above have you not followed when recruiting in your organisation?
2. In what ways are the steps linked with employment arrangements, which we discussed at the beginning of the topic?

Record your answers in your personal journal for later review and feedback by your course instructor.

The idea of doing the activity is to encourage you to be more systematic when recruiting. If there are any steps you have been ignoring, think more carefully when next you want to recruit. Regarding the second question, there are certain employment arrangements such as casual vacancies. It may not be necessary to follow the eight steps.

Summary

We have now come to the end of the topic dealing recruitment and contracting as important aspects of business law. The following important components were covered.

- recruitment arrangements, which include full-time, part-time permanent, casual, piece job, fixed term, to name a few;
- contracting and subcontracting as critical aspects of entrepreneurial engagement;
- the documents needed when a contract is signed; and
- the steps involved in the recruitment process.
Self-Reflection Questions

1. What is the distinction between casual and piece work arrangement?
2. Suggest the advantages of employing somebody either full-time or part-time permanent.
3. Why is oral advertising discouraged in business enterprises?
4. Why is induction necessary in an organisation?
5. What are the advantages of somebody working for you on contract instead of full-time?

Record your answers in your personal journal for later review and feedback by your course instructor.
TOPIC 3.3 - LAW OF SALE

INTRODUCTION
The law of sale, by far the most critical aspect in any enterprise, comprises numerous facets. Presently, the discussion begins with important definitions, and these are mainly about the essential elements of the law of sale. There are certain goods that may not be sold, according to the law, and these will be explained alongside goods that can be sold. The one obvious factor about a sale is the price, and the entrepreneur would be expected to be clear what pricing involves. This aspect is closely linked with the passing of risk, ownership, and ways of delivery. Inclusive in the discussion will be what is expected of the seller within the contract, namely, his/her duties and warranties against latent/patent defects. In the explanation of the duties of the seller, focus will also be on remedies and obligations of the buyer.

OBJECTIVES
After working through this topic you should be able to:

1. define key terms about the law of sale;
2. distinguish Merch that can and that cannot be sold by law;
3. explain with examples, the issues of price, risk, and ways of delivery; and
4. define warranties, remedies, and obligations of the seller and the buyer as they apply to business.

CONTENT
- Definition of terms
- Essential elements of the contract of sale
- Goods which can be sold
- The price
- Ownership
- Ways of delivery
- Duties of seller
- Warranties against defects
- Remedies of the buyer
- Obligations of the buyer

WARM-UP ACTIVITY
1. What do you think are the major considerations when entering a contract of sale?
2. What is the broader meaning of the word ‘risk’ as used in a contract of sale?

Record your responses in your course journal.

After reflecting on the activity, and sharing your ideas with an interested party, you may read on to establish some of the views held about the contract of sale.
DEFINITION
Among the various types of contracts, the contract of sale is the most completed. It is virtually impossible to live or carry on any kind of business without carrying out a purchase or sale regularly. A contract of sale may be defined as a contract in which one party, the seller, undertakes to deliver the Merx to another party. The buyer/purchaser, in exchange for this, agrees to pay the seller a certain amount of money. As the definition implies, a contract of sale requires specific essential elements for it to be valid.

ESSENTIAL ELEMENTS OF A CONTRACT OF SALE
We must remember that a contract of sale is a contract just like any other contract, thus it must meet all the essential elements of a contract which have already been considered; that is:

- the agreement must be legal,
- parties must have contractual capacity,
- terms must not be vague, and
- it must be enforceable.

Further, the contract must meet those essentials peculiar to a contract of sale. These are:

- The agreement must be one of sale. The courts will always look at the transaction and call it what it amounts to despite what the parties decide to call it.
- Contracts of sale must be distinguished from gifts or free offers or donations. They must also be distinguished from exchange or barter.
- There must be an agreement on the article, which is known as the Merx or subject matter of the sale. This is important because some things cannot be sold and the sale of others is restricted or subject to regulations. The Merx is definite if it is mentioned by name in the contract. Nearly anything can be sold as long as it forms part of one’s patrimony, i.e., it can be owned by someone.
- In a contract of sale a price must be paid for the thing, or the parties must have agreed that the price will be paid in the future. Thus, an agreement to sell for free is not a sale. The purchase price must be definite or ascertainable. The price must be an amount of money, otherwise there is no contract of sale but of exchange.

Activity 3.3 A
Compose a brief case study to bring out the distinction between a contract of sale, and a contract of exchange.

Record your answer in your personal journal for later review and feedback by your course instructor.
Your case study is meant to consolidate the understanding you have about what happens in a typical business environment. It should be based on your clarity about the concepts.

Items Which Can be Sold

- The right to inheritance to a person who is still alive cannot be sold. But a right to inheritance to a deceased person can be sold.
- Stolen property and property belonging to third parties can be validly bought and sold. The sale of stolen property is valid, but the seller cannot pass ownership. This is because one cannot pass a greater right in the property than one actually has. This is expressed by the concept *nemo dat quad non habet*. The thief has no right in the property therefore the true owner has a right to recover the goods from whoever may be in possession. This is known as the *vindication* right. Where the thing bought has been recovered by the true owner, the buyer can only recover the purchase price from the seller where he is still available. Note that the buyer should not prematurely surrender the goods, lest he surrenders to another thief. The buyer should afford the seller a reasonable opportunity to come to his protection. If a buyer purchases goods with knowledge that they were stolen, or where he ought to have known from the surrounding circumstance that they were stolen, then he is an accomplice after the act and has no entitlement to remedies.
- Not only tangible things can be sold - those which can be touched e.g. a book, but intangible things can also be sold e.g. goodwill, trademarks and patents.
- Not only existing goods can be sold. These are goods already in the possession of the seller. Non-existent or future goods capable of coming into existence may be bought and sold for example, a future harvest or catch of fish. This is sale of hope known as *Res Spei*.
- Unascertained goods can also be sold. These are goods, which need to be counted, weighed or measured to the buyer’s specifications.

**Activity 3.3 B**

a. Explain the meaning of tangible and intangible goods for sale.
b. What are unascertained goods? Cite examples of such goods.

Record your answers in your personal journal for later review and feedback by your course instructor.

Your response should make reference to the goods you commonly deal with in your type of business, or that of your competitors.
The Price/Pretium

There must be agreement as to the price. The price is important as it distinguishes a contract of sale and gifts, donations, or exchange. There can be a valid agreement to sell at a price to be determined by a third party who agrees. If the third party does not agree, then there is no sale.

The price must be in current money not in goods. However, where the value of goods is insignificant, the court may still call it a contract of sale.

Passing of Risk and Ownership Risk

You should be able to understand the aspect of risk. This has no relation to the aspect of ownership. Risk refers to the issue of who bears the loss due to accidental deterioration, damage or loss to the merx/thing after the conclusion of the contract but before delivery. The issue of risk does not arise before the contract is concluded. It also does not arise after delivery.

It is important to note that the issue of risk also entails benefits accruing to the merx at the same time. For example, if A buys a cow from B and there is agreement on the cow to be bought and the price, then if the cow calves before delivery and payment of the purchase price, the calf belongs to the buyer. The general rule is that risk passes to the buyer as soon as the contract is concluded, or is perfecta. This rule has nothing to do with the issue of ownership.

There are exceptions to the general rule. These are as follows:

- The parties are free to agree to vary the general rule.
- Where the seller has delayed delivery - he is in mora if the loss would not have occurred had he delivered timeously.
- Where the seller is negligent in the business sense.
- Where the sale is one of unascertained goods. Risk would only pass when the goods have been ascertained i.e. there has been counting, weighing and measuring the goods before risk passes. The existence of a contract of sale merely requires that the merx musts be definite or ascertainable For example, if A buys 50 bags of maize from B, and before delivery B’s entire stock is destroyed by fire, then risk has not passed to A because the goods have not been ascertained, weighed, counted or measured.
- Where the contract is subject to a suspensive condition. This is because there is only a contractual relationship before the condition is satisfied. The obligations are suspended. If Albert and Edward agree that Albert will buy a car from Edward if Albert can obtain a loan from his bank, the contract cannot become perfecta until Albert does indeed obtain a loan. As soon as the condition is fulfilled the contract will be perfecta.
- If the contract is void for one reason or another, because a void contract does not give rise to any obligations.
Ownership

Ownership is a bundle of rights, which include among others:

- the right of use of the merx;
- the right of enjoyment; and
- possession or the right to alienate the item.

Ownership is a real right, which can be claimed against the whole world. A person may have a right of ownership without actual possession of the item. Conversely, a person may have possession without ownership.

Activity 3.3 C

Under what circumstances can you:

a. have a right of ownership without actual possession of the item?
b. have possession without ownership?

Record your answers in your personal journal for later review and feedback by your course instructor.

To support your answer, cite typical examples in the business world, then read what follows.

For ownership to pass, certain requirements must be met. These are as follows:

- The seller must be owner. The *nemo dat quad non habet* principle. This means one cannot pass a greater right than one actually has.
- The thing must be capable of being owned. If not, then ownership cannot be passed. For example, air cannot be owned.
- The seller must intend to pass ownership while the buyer must intend to receive ownership.
- The purchase price must have been paid or credit must have been given. There is a presumption that sales are for cash unless the seller is taken to have waived or given up his right to receive cash. Thus, in a credit sale ownership passes to the purchaser. In Hire-Purchase transactions, ownership of goods does not pass to the purchaser until the payment of the last installment.
- The seller must have delivered the thing to the buyer. As a general rule, delivery entails the seller putting the goods at the disposition of the buyer. Thus delivery ordinarily takes place at the seller’s place of business. We must note that at law, the seller is not obliged to deliver the goods to the buyer’s place. Delivery is ordinarily subject to agreement between the parties.

There are however, a number of recognised ways of delivery:
a. **Actual Delivery** - This is from hand to hand, physical delivery otherwise known as *manu de manu* delivery.
b. **Delivery With a Short Hand** - Known as *brevi manu* delivery. The buyer already possesses the *merx* he/she buys because of a previous transaction. For example if he/she had borrowed the computer. When he buys it the seller does not have to redeliver.
c. **Delivery With a Long Hand** - Here the goods are bulky to be moved, or the movement of such goods may be for the time being prohibited. The seller merely points at the goods, which shall then be taken to belong to the buyer. This type of delivery is referred to as *longa manu*.
d. **Symbolic Delivery** - The seller delivers something other than the goods. What is delivered here must give the buyer exclusive control of the goods e.g. keys to a house or bills of goods still at sea.
e. **Attornment** - Goods are delivered to a third party who acts as agent of the buyer.
f. **Constitutum Possessorium** - The seller keeps the goods on behalf of the buyer. The courts do not favour this type of delivery as it may tempt and lead to fraud.
g. **Registration** - Ownership in immovable property is passed by registration according to the provisions of the Deeds Registries Act. Thus the purchaser of a house who has paid cash without having the house registered in his name would not become the owner. The following activity requires that you give typical examples to show your understanding of the different ways of delivery.

### Activity 3.3 D

Record an example from your business environment re: the different modes of delivery.

<table>
<thead>
<tr>
<th>Mode of delivery</th>
<th>Typical example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration</td>
<td></td>
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<tr>
<td>Attornment</td>
<td></td>
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<tr>
<td>Constitutum possessorium</td>
<td></td>
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<tr>
<td>Delivery with a long hand</td>
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<tr>
<td>Symbolic delivery</td>
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</table>
Activity 3.3 D

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<table>
<thead>
<tr>
<th>Mode of delivery</th>
<th>Typical example</th>
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<tbody>
<tr>
<td>Actual delivery</td>
<td></td>
</tr>
<tr>
<td>Delivery with a short hand</td>
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</tbody>
</table>

Record your answers in your personal journal for later review and feedback by your course instructor.

Bear the examples in mind as you go about your business.

**DUTIES OF THE SELLER**

We now look at what the seller is legally obliged to do. These duties do not arise out of agreement with the buyer, but out of the law. This means that the duties are implied by the law. The duties are as follows:

- **Duty to deliver the goods.** By any method of delivery already considered. Where the seller delays delivery he/she will be *in mora* and risk may revert back to him/her.
- **To keep the goods in safe custody until delivery.** If the seller is negligent in the business sense, then he/she may become liable to the buyer. If the buyer delays taking the goods, then the seller would be liable only for wilful acts or gross negligence.
- **Duty to guarantee undisturbed possession of the goods.** (*vaccua possessio*). Remember the seller does not guarantee that he/she is owner. He/she only guarantees that no one with a greater title will disturb the buyer. However, the buyer has (*Loci standi*) the right to take legal action where possession is disturbed by those without any title.
- **Duty to guarantee against latent defects.** Latent defects are those defects, which are not obvious to the naked eye. The buyer does not have to carry out a cruel examination of the subject matter or to employ an expert to do the examination. The seller does not have to guarantee against latent defects. These are obvious defects such as a table with one of the legs shorter than the rest.
- **The duty would be excluded, or would not apply where the sale is voetstoots i.e. merx is sold as it stands.** This fact has to be brought to the attention of the buyer.
Before you read on, what business experiences have you had about latent defects?

**Warranties against latent/patent defects of product** - These are legally provided for in the Common law Rights of the purchaser.

**The purchaser is entitled to delivery of the merx** - Although the purchaser is entitled to delivery of the merx, this does not necessarily mean that the seller is liable for physically offloading it on the doorstep of the purchaser. It only means that the merx must be made available to the purchaser and that he or she is entitled to its free undisturbed possession.

**The seller is entitled to preservation of the merx pending delivery** - One duty of the seller is to preserve the merx until it is delivered to the buyer. If the merx is damaged or destroyed due to the negligence of the seller, they will be liable. If the buyer fails to take delivery of the merchandise, the seller will only be liable for gross negligence or intent. If the merx is damaged or destroyed while the seller is in *mora*, the seller bears the risk, except for misfortunes, which in any case would have affected the merx, even if they have delivered in time. Suggest examples of misfortunes from which the seller is excused before delivery of merx.

**Remedies to the Buyer**

Where the goods are defective the buyer has some remedies at law. We should remember that these remedies are for latent defects only. These are not obvious to the naked eye. An implied warranty against latent defects is read into every contract of sale, unless it has been excluded by the parties. The remedies are as follows:

**Actio Redhibitoria (Rescission)**

If the latent defect is so material that, had they known about the defect the purchaser would never have bought the article, or if the defect renders the article useless, the purchaser may claim the following:

- return of the purchase price;
- claim interest;
- repayment of all expenses incurred regarding the receipt and preservation of the merx; or
- reimbursements for improvements effected by him on the merx.

In this action the buyer must prove that the defect is of such a nature as to make the *merx* unfit for the purposes for which it was bought. Also that had the purchaser known of the defect, he/she would not have bought the item. We must be careful not to allow the buyer who is wise after the event, to be his/her own judge.
The Buyer could return the merx and get back the purchase price. This is also the case where the merx perishes due to the inherent defect. For example, if animals bought die of an unknown disease, which existed at the time of the sale, the buyer should get back his/her purchase price.

If more than one item is bought i.e. major item and accessories - a defect in the major item would entitle the buyer to actio redhibitoria whereas a defect in the accessory may not.

If the items are bought as a unit, then a defect in one entitles rescission of the entire unit. It should be noted that this action is different from the one where the buyer claims that the wrong goods have been delivered. This would amount to breach of contract.

**Actio Quanti Minoris**

The buyer retains the merx and claims a reduction in the purchase price. In this case the buyer may still want the merx anyway, or he/she may no longer be in a position to return the merx. The remedy is the difference between the price paid and the market value of the item in its defective state. This may be deducted from the cost of repairs.

Where the merx is defective, the seller does not have a legal right to ask to be allowed to repair it. An exception is where the nature of the contract and goods would allow such repairs, e.g. supply of artificial teeth. A supplier may be allowed to adjust them where they protrude. Similarly, a supplier of suits to fit would be allowed to alter them.

Where the buyer suffers damage to his/her own material as a result of the defective merx, this would amount to consequential losses. Ordinarily, the seller is not liable for consequential damages.

The exceptions are:

- **Defective Performance.** If the seller warranted that the merx is free of defects, then the seller’s liability is based on breach of warranty. Where the merx is delivered without the good qualities guaranteed by the seller, the purchaser may claim damages based on his or her positive interest and, if the merx is seriously damaged, there is cancellation of sale.

- **Misrepresentation.** If seller knew of the existence of the defect and deliberately concealed it there is fraud.

- **Manufacturers liability.** If the seller is a manufacturer or dealer who professes to have expert knowledge of the merx he is selling. The seller could have guaranteed the absence of latent defects expressly or by implication. Consequential loss is loss resulting from the use of the defective merx, for example the loss of crops resulting from a defective weed killer. This liability is wider than that of other sellers.
Both Actio Redhibitoria and Actio Quanti Minoris are known as Aedilition Remedies.

OBLIGATIONS OF THE BUYER
The buyer also has obligations, which arise from the law. He/she is obliged to do the following:

- To pay the purchase price. This is the most important of the buyer’s duties. For example, the buyer must pay the purchase price.
- The buyer is obliged to accept delivery. Where the buyer has delayed accepting delivery, then the seller’s duty of care is reduced. He will be liable only for gross negligence.
- Duty to reimburse the seller for necessary expenses.

Before continuing with the discussion, explain what you think is the distinction between remedies and obligations of either the buyer or the seller.

SPECIAL TYPES OF SALE
The entrepreneur is expected to be familiar with the special types of sale, which include the following.

F.O.R. (Free on Rail)
It may be free on rail sender’s station or buyer’s station. In the former, which is more common, the seller’s duty is to pack the goods and deliver them to the nearest railway station and load them on trucks destined for the buyer’s station. The railways then become the agent of the buyer.

However, if it is F.O.R. buyer’s station, then the obligations of the seller only end when the goods are at the buyer’s station. This means the railways become the seller’s agent. The former is a more expensive contract.

F.O.B. (Free on Board)
The seller delivers the goods to the harbour and puts them on board a ship. The same rule as F.O.R. apply.

C.I.F. (Cost, Insurance and Freight)
The seller must pack the goods, deliver them to the docks, and load them on a ship proceeding to the buyer’s port. He/she must pay for them to the port of destination, and must get the required documents; i.e. contract of carriage, bill of lading, document of title and receipts. The documents must be sent expeditiously to the buyer. They must also include the policy of insurance.

As the bill of landing is a document of title, delivery of it to the buyer is symbolic delivery of the goods. Ownership passes to the purchaser on delivery of the bill of landing. The risk passes to the purchaser as soon as the goods are on the
ship. The issue of risk is not all that important as the goods are supposed to be properly insured.

**Sale on Approval**

This is a sale, which is conditional upon the merx being approved by the buyer, and is a suspensive condition. If the approval is not given, then the obligations do not flow.

**SUMMARY**

This topic discussed the law of sale and the responsibilities of both the seller and buyer. It is important as an entrepreneur to understand the contracts for purchase that you enter into. You must be aware of your legal responsibilities once you enter into a binding agreement.

<table>
<thead>
<tr>
<th>Self-Reflection Questions</th>
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<tbody>
<tr>
<td>a. Identify and list any four essential elements of the contract of sale that are most applicable to your business.</td>
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<tr>
<td>b. Which goods that cannot be sold have you observed your competitor selling?</td>
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<tr>
<td>c. Explain ‘latent’ defects and how it can be a cause for legal wrangling in business.</td>
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<tr>
<td>d. Discuss the element of passing risk by sellers, which you consider unethical in an enterprise.</td>
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Record your answers in your personal journal for later review and feedback by your course instructor.
TOPIC 3.4 - THE LAW OF LEASE

INTRODUCTION
In this Topic we look at the letting and hiring of immovable property. Owners of property may for a variety of reasons not want to use their property themselves. They therefore would grant others the right to use and enjoy that property in return for rent. The relationship between the Landlord who is otherwise known as the Lessor and the tenant (Lessee) is governed by principles of common law.

OBJECTIVES
After working through this topic you should be able to:

1. define the nature of a contract of lease;
2. list the essential elements of a lease;
3. describe the different types of leases and rights granted to the lessee under type of lease;
4. distinguish between duties of the lessor and the lessee; and
5. explain how the lease is terminated.

CONTENT
- Definition of lease
- Essential elements of a lease
- Types of lease
- Requirement for rent
- Duties of lessor
- Delivery of use
- Remedies
- Payment of taxes
- Duties of lessee
- termination

WARM-UP ACTIVITY
1. What do you understand by the term ‘lease’?
2. What are the obligations of the lessor and the lessee in a lease contract?

Record your responses in your course journal.

OVERVIEW
The important starting point for you as an entrepreneur is to have a clear understanding of what a lease is, and then be able to explain the responsibilities of the two key players, namely, the lessor and the lessee. Everything else that is linked to this grounding will be easier to understand as you will experience reading the information below.
**WHAT IS A LEASE?**

This is based on the law of contract. The contract is a special one in that it is concerned with immovable property only. It is a reciprocal agreement between the lessor and the lessee whereby the lessor agrees to give the lessee temporary use and enjoyment of the property in return for the payment of rent.

A contract of lease does not confer ownership of the property on the lessee. This distinguishes a contract of lease from a contract of sale. The lessee is only granted a right of use and enjoyment. This means that the lessee should not consume the subject matter of the lease. He should be able, at the end of the period, to restore the subject matter in the same condition in which it was. Fair or reasonable wear and tear is expected. The deterioration should be as result of normal use. As a result, if by its use, the subject matter would be consumed or the lessee would not be in a position to restore it to the lessor, then a lease cannot be created over such property.

In legal terms, therefore, a lease is a reciprocal contract, which confers rights and imposes obligations on both parties. These rights and obligations are a matter of terms by the parties. Like other contracts, a lease must be legal. For example, a lease of a place to be used as a brothel is illegal in some countries. Such a lease would be void and unenforceable. Thus if the lease is illegal, the court will refuse to enforce a claim for rent.

**Essential Elements**

All essential elements of a contract have to be satisfied. In addition:

- The lessor must give and the lessee must receive the temporary use and enjoyment of the property.
- There must be agreement on the property let.
- There must be agreement on the rent to be paid.

**Formalities**

The lessor and the lessee must go through certain formalities that are commonly recognized by law.

**Duration**

A written contract is not a legal requirement for a contract of lease. An oral lease is as binding as a written one. The parties may agree that the lease be in writing. This may be intended as a record of the agreement. The understanding is that the lessee is only given temporary use and enjoyment of the subject matter. Parties are expected to agree on the duration. Basically, there are two types of leases:
1. **Lease in Longum Tempus (Long term Lease)**

This is a lease of a period of more than ten years or for the lifetime of the lessee. This lease gives a real right to the property. To obtain this right over successors of the lessor, the lease must be in writing and registered in the Deeds Registry. Where there is such registration the lessee’s right will prevail where the property has been alienated or where the lessor goes insolvent. The registration serves as notice upon the successors. Here is an example:

*Peter and Kumbi are the best of friends. Peter is a businessman and Kumbi is an accountant. The two have a written agreement that Kumbi would stay in one of Peter’s houses. In return, Kumbi would be responsible for doing all of Peter’s business books. This is to last as long as both parties are alive.*

**Activity 3.4 A**

What is the legal relationship between Peter and Kumbi?

Record your answer in your personal journal for later review and feedback by your course instructor.

The lease will remain legally binding as long as both parties are still alive, but legally, this is bound to change when one of them is dead. However, in the case where a lease is fixed to a certain period, every successor to the landlord takes the property subject to the lease. The new owner is not entitled to terminate the lease before the period fixed expires. He simply steps into the shoes of the old owner and must honour all the obligations thereunder.

2. **Short Lease**

This runs for a period of less than ten years. This lease in practice does not have to be registered. It may be a periodic lease, which runs from month to month. The contract of lease gives the lessee a personal right only. Under the general law, the lessee has no right to remain in occupation against successors in title to the property unless the successor has agreed to be bound by the lease. The lessee has some protection under the rule *Huur gaat voor koop*. This is an Afrikaans name used in South Africa, which means hire goes before sale. This provides some security of tenure for the lessee. To benefit from this protection, the lessee must be in occupation of the property let. Again, if a purchaser of leased property knows at the time of purchase that the property is subject to a lease, then he is bound by the lease even if it is not registered.
Requirement for Rent

Rent is an essential element of a lease. An agreement where A simply permits B to occupy property without rent being paid is not a lease. Similarly, if the parties fail to agree on the rent there is no lease. Rent must be in money or an ascertained quantity of produce such as fruits. Rent cannot be in services. But it seems possible that rent can be partly in money and partly in services.

Activity 3.4 B

From the legal perspective, cite an example where rent can be paid partly in money and partly in services rendered.

Record your answers in your personal journal for later review and feedback by your course instructor.

Illustrative examples will vary from one situation to another. For example, a lawyer may pay the owner partly in money on a monthly basis, but can also pay by providing legal services on a regular basis.

IMPLIED DUTIES OF THE LESSOR

In terms of the law, there are certain expectations on the part of the lessor. These include to:

- deliver to the tenant use and occupation of the property let;
- guarantee the tenant undisturbed use and enjoyment;
- make necessary repairs to the property;
- pay taxes levied on the property;
- guarantee against defects in that property; and
- on termination of the lease, to compensate the tenant for improvements.

Delivery of Use and Occupation

Delivery here means the property is put at the disposal of the lessor at the date agreed. In the case of a building, the lessor hands over the keys to the building. Thus the building must be vacant at the time of delivery. The lessee should be able to enjoy the full use of the property for the purpose for which it was let. For example the lessee of a shop was entitled to have access to an adjoining yard (owned by the lessor) to off-load goods from vehicles at the rear entrance to the shop. However, the lessee was not entitled to park his vehicles in the lessor’s yard as this was not a normal or necessary incident of due enjoyment of the shop.
If the property is leased for a specific purpose, e.g. a butchery, then the lessor must deliver the property in a condition reasonably fit for the purpose for which it is let.

What advice would you give to Sarah in the following situations:

**Activity 3.4 C**

A. When Sarah moved into the house she is leasing from Muzungu, the house was leaking and the windowpanes were broken. She notified Muzungu of the situation but he did not do anything. Now, rainwater has damaged her property.

B. Sarah’s new neighbour has brought onto his premises vicious dogs, which continuously bark at night so as to make it difficult for Sarah to find any sleep. The dogs also wander through the leased property upsetting rubbish bins and making the property dirty.

Record your answers in your personal journal for later review and feedback by your course instructor.

Situation A should draw on Muzungu’s obligations, thus there are remedies for Sarah. On the other hand, Sarah is entitled to legal intervention if after discussion with the neighbour there is no improvement in the situation.

**Failure to Deliver**

The lessee has the ordinary remedies. He/she may seek an order for specific performance by the landlord. The order for specific performance is only made if the landlord is able to make such delivery. The lessee may withdraw from the contract and sue for damages.

**Guarantee Tenant Undisturbed Use and Enjoyment**

Every landlord undertakes that he/she will not disturb the tenant in the enjoyment of use of the property leased. He/she also warrants that no person with a superior title will disturb the lessee’s use and enjoyment of the property let.

It is noteworthy that the landlord does not warrant that he is owner of the property. The lease is valid even where the landlord is not owner. Thus the lessor is not entitled to enter premiums let by him without the lessee’s consent. Unless such is for a legitimate purpose; for example, to inspect the premises, but not to take any fruit.

**Remedies**

If the lessee’s use and enjoyment is disturbed he/she may:

- claim immediate reinstatement; i.e. to have use and enjoyment restored;
• accept the deprivation as repudiation of the lease and cancel the contract;
• recover damages for any loss sustained; or
• be free from payment of rent for the period he/she is deprived of use and enjoyment.

If the lessee is disturbed by another with a greater title, he/she may not seek reinstatement, but has entitlement to an action for damages against the landlord unless when taking the lease, he/she was aware of the defect in the landlord’s title.

A lessee who is threatened with disturbance must inform the lessor so that the latter can come to his/her defense. A lessor does not warrant the lessee against disturbance by third parties without title. As a result, a lessee disturbed by a squatter has no claim against the lessor nor can he/she claim cancellation of the lease.

Make Necessary Repairs

A lessor is obliged to maintain the premises in a condition reasonably fit for the purpose for which it was let. He/she must repair doors, windows, the roof and other parts of the premises. He/she must also repair structural defects, which substantially interfere with the tenant’s use and enjoyment of the premises, but need not make structural alterations or improvements. If damage is caused by the tenant’s negligence the lessor has no duty to repair these.

If repairs are urgently necessary, and the landlord cannot affect them while the tenant is in occupation, the lessor may require the tenant to vacate the premises without becoming liable for damages for breach of contract. The purpose must be to effect repairs. The landlord may not under the guise of making repairs, require the tenant to vacate the premises so that he/she makes major alterations. Such a ‘repair’ is not reasonable or necessary. The lessee is not to pay rent during the period he/she is deprived of beneficial occupation. The landlord takes the risk of the premises depreciating through proper use. It is the duty of the lessee to give notice to the lessor of the existence of a defect and afford him/her a reasonable opportunity to remedy the defect. If the lessor fails to maintain the premises in a proper condition, the lessee may effect the necessary repairs himself/herself and deduct the cost from the rent. He/she may only effect repairs after prior demand and notice to the landlord. The lessee must also have given the lessor a reasonable opportunity to effect the repairs. The tenant is restricted to effecting necessary repairs but should not make structural improvements or alterations unless if the only way of repairing is replacement; e.g. a leaking roof which may need new materials.

The tenant can claim damages for loss caused by the existence of defects on the leased premises. The damage should flow from the breach of the lessor’s obligation to maintain the premises. But the lessor must have had knowledge of
the defect. The burden of proof is on the tenant or if his/her trade or profession makes him/her an expert in matters related to buildings.

The landlord’s liability for damages caused as a result of a defect in the leased property may be excluded by agreement. As an example:

*A landlord was made liable for damage to the tenant’s property caused as a result of rainwater coming through the roof where the landlord had notice of the fact that the roof leaked and failed to repair.*

**Payment of Taxes**

The lessor is the owner of the property let. In the absence of legislation or agreement to the contrary, the lessor should pay all taxes, rates or charges imposed by the State or municipality or any taxing authority on the property. On the other hand, the lessee must pay tax, which is imposed upon the produce or fruits of the property.

**Activity 3.4 D**

Janet has recently been promoted at her company. She believes that the house she is staying in does not reflect her new social and economic status. The house which Janet is staying in belongs to Farukai. Janet would like Farukai to do the following to the house:

1. Demolish and reconstruct the front view including extending
2. the bedroom.
3. Repaint the house.
4. Erect a Dura wall around the property and remove the fence, which is there.
5. Repair the doors because most of the doors are falling off.
6. Remove the asbestos roof and replace it with tiles as some of the asbestos had developed cracks, which allowed water in.

Record your answers in your personal journal for later review and feedback by your course instructor.

In each case advise Janet whether he is entitled to the request, or whether she may carry out the repairs herself and recover from the landlord.

**DUTIES OF THE LESSEE**

There are several duties attributable to the lessee, and the following are some of them.

**Payment of Rent**

This is the most important duty of the tenant. A lessee is under an obligation to pay the lessor rent for the right to use and enjoy the property let. Rent must be paid in time. If there is no agreement on the time, rent is payable on the
expiration of a lease or if the lease is periodic, on the expiration of the period i.e. end of month or week as the case may be. It must be paid at the agreed place to the person agreed.

If the lessee fails to pay rent, the lessor is entitled to claim payment as rent becomes due. He/she may also claim damages suffered. The lessor may cancel the lease. The lessee should vacate the premises otherwise there is unjust enrichment. The landlord may also request for an order for the lessee’s ejectment or eviction.

**Lessor’s Tacit Hypothec for Rent**

As soon as the rent is in arrears the lessor obtains a tacit hypothec for the amount of rent due to him. This right is to retain possession of certain movable goods of the tenant until the rent is paid.

The hypothec attaches to all things brought or carried on to the property - animals, tools, whatever their nature. He may also attach goods belonging to a sub-tenant for the amount of rent owing to the lessee, or goods belonging to third parties. The onus is on him/her to prove ownership because possession of a movable creates a presumption of ownership in the possessor. Also, by permitting property to be on hired premises and by failing to notify the lessor of his/her ownership, an owner leads the lessor to believe that the property is the lessee’s. For example, a third party’s animal, which is allowed to graze indefinitely upon a farm by the lessee, is subject to the lessor’s hypothec.

However, a vehicle supplied to an employee by his/her employer to be used solely in the course of employment is not subject to a lessor’s hypothec because there is no permanence contemplated.

The hypothec comes into operation only when the rent is owing. The landlord can only exercise the hypothec if the movables are at the leased premises. He/she cannot use this right if the goods have been removed. The landlord can then apply to court for attachment of these goods.

The lessee is entitled to a refund of the rent if he/she is deprived of the use and enjoyment of the property let to him either by the lessor’s default or through *vis major* or *casus fortuitus*. This is supervening impossibility, which extinguishes the contract. *Vis major* is a superior power or force, which cannot be resisted or control-led. *Casus fortuitus* means an exceptional occurrence not reasonably foreseen.

**Duty to Care for the Property**

It is the duty of the tenant to take care of the property let and to use it for the purpose for which it is let. Thus a place let for use as a dwelling house cannot be used as a workshop; causing damage to the property amounts to improper use. The lessee must use the property let with the degree of care expected of a
reasonable person in the use of one’s own property. One should not make structural alteration of the property so as to change the character of such property.

A lessor would be entitled to an interdict restraining a lessee from using premises for purposes for which they were not let, or for using them improperly, damaging them or altering them.

**Duty to Restore the Property**

Upon termination of the lease, the lessee must restore the property to the lessor. The property must be restored in the same condition in which it was delivered to him/her, subject to reasonable wear and tear.

The fact that the premises are in a damaged condition upon termination of a lease does not entitle a lessor to refuse to accept redelivery of them. He/she merely has a claim for damages i.e. the reasonable cost of repairs for the property. In addition to claim for damages to the premises, the lessor may have a claim for loss of rent during the period he/she is unable to let them because of their damaged condition.

**Subletting**

This is where the lessee lets property, which is hired. The lessee becomes a sort of lessor and creates another lessee. The lease between the original lessor and lessee is not affected by a sublease, and the original lessor and lessee remain bound to each other. This means that a sublease does not create a contractual relationship between the sublessee and the original lessor. The lessor cannot claim rent from the sublessee. Payment of rent under the original lease remains the responsibility of the lessee.

**Termination**

Certain procedures for termination are followed by law.

1. **Expiration of Time** - If time is given the lease terminates upon expiration of time. No notice of termination is needed.

2. **Notice** - A periodic lease is terminable by either party giving the other notice of termination.

3. **Mutual Cancellation** - Mutual agreement to cancel. Or when there is breach which entitles the innocent party to cancel. The other party may make an election to accept cancellation.

4. **Repudiation** - A party indicates an intention not to be bound by the contract. This repudiation may also be inferred from conduct; e.g. the lessee vacating the premises and returning the keys. It should be
remembered that repudiation is a form of breach and the innocent party has remedies.

5. **Extinction of Lessor’s Title** - A lessee derives the right to occupy and enjoy the property let from the lessor. Thus where the lessor’s right in the property terminates, the lease comes to an end.

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**Activity 3.4 E**

Explain the legal relationship created between the sub lessee and the lessor where the leased property has been sublet.

Record your answer in your personal journal for later review and feedback by your course instructor.

6. **Merger** - One cannot be one’s own creditor. Where the lessee acquires by sale or inheritance, the property let, this results in termination of the lease.

7. **Destruction of the Subject Matter** - This is total destruction without fault of either party. If destruction is due to lessee’s fault, the lease is not terminated and the lessee remains liable for rent for the unexpired period of lease. He/she must also pay the lessor the value of the property destroyed.

8. **Death** - This does not terminate a lease. The estate of the deceased party is bound except where the contract provides that the lease will terminate on death of either party.

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**SUMMARY**

In this topic we noted that a contract lease can only be effected on immovable property such as buildings. We also learnt that the lessee should, at the end of the lease, be in a position to hand back the subject matter of the lease to the lessor.

These aspects were covered in some detail.

- The lessee is only granted the right to use but not to consume the subject matter.
- We looked at how the lessee is protected when the leased property is sold.
- It was noted that the lessee should not simply be evicted by the new owner of the property.
- The conclusion was arrived at that both the lessee and the lessor have rights and duties, which arise out of the law and not by agreement of the parties. For example the lessee’s right to undisturbed use and enjoyment of the leased property, and the lessor’s entitlement to payment of rent at the agreed time.
Self-Reflection Questions

1. When are the duties of a lessor in conflict with the duties of a lessee?
2. Explain the distinction between long and short term lease.
3. Explain ‘subletting’ and the extent to which it is part of the lease agreement between lessor and lessee.
4. How is the concept of delivery of ownership in the contract of lease different from other contracts?

Record your answers in your personal journal for later review and feedback by your course instructor.
TOPIC 3.5 - THE LAW OF AGENCY

INTRODUCTION
So far, we have discussed different laws, for example, law of sale, law of lease, and contract of service. They all differ. The entrepreneur may ask: What is the law of agency? This theme is the focus of discussion in the present topic. Essentially, examine the creation of contracts through an agent. Ordinarily, the contracting people negotiate directly and conclude their contract. It is also common for people to act through others so as to conclude binding contracts. There are three dimensions to the law of agency, which are: the giving of the authority or mandate to the agent; the negotiation between the agent and the third party; and the resultant relation between the principal and the third party.

OBJECTIVES
After working through this topic you should be able to:

1. define an agent;
2. explain how an agency situation is created;
3. describe rights and duties of agents and principals; and
4. explain how the relationship between agent and principal is terminated.

CONTENT
- The need for an Agent
- Definition
- Creation of Agency
- Rights and duties between Agent and Principal
- Principal’s duties to Agent
- Termination of Agency

WARM-UP ACTIVITY
1. What distinguishes an Agent from a Principal?
2. How is an Agency created?

Record your response in your course journal.

Engagement of agencies has become common practice in the business world. You probably do have some rough idea what an agency is. This is the sort of knowledge you are expected to share by doing the warm-up activity. Bear it in mind as you read what follows.

THE NEED FOR AN AGENT
Many business transactions are carried out through agents. The law may require that that special type of agent carries out such transactions. For example, the registration of immovable property may only be done through a special lawyer/legal practitioner.
It may also happen that the party has limited contractual capacity and for the contracts to be valid the legal agent must either assist or act on one’s behalf. Examples would be:

- trustees acting on behalf of the insolvent;
- the guardian on behalf of a minor; or
- a curator on behalf of a mentally deficient person.

Here we are concerned with a voluntary agent, in a situation where the principal can act for himself/herself. This agent is voluntarily chosen to act on behalf of the principal. The reasons for choosing to act through an agent are many.

- One may arrange a holiday through a travel agent who will make contracts with hotels, airlines and tour operators.
- We may appoint agents simply because we do not have time to do the acts ourselves. Or the agent may possess the necessary expertise within that market.
- We may have difficulties ourselves because of the distance involved.
- It may be a practice acceptable in the industry we are dealing in.

**DEFINITION**

Agency is a contract. One person (the principal) employs another (the Agent) to act for the principal and enter into contractual and other relationships. The transactions would be binding between the principal and third party. Unlike the simple contract between two people, in agency three people are involved and there are **two contracts**, which involve the following:

- The one on whose behalf the acts are done is the **Principal**.
- The one who is to act is the **Agent**.
- The other person the agent deals with is a **third party**.

There must be a contract between the agent and the principal giving the agent the power to act on his behalf. This is a contract of **Mandate**. The second contract is the one, which comes out of the negotiations by the agent with the third party, but this is binding only between the principal and the third party. The agent must have contractual capacity so as to enter into the contract with the principal.

But as far as third parties are concerned and their relationship with the Principal, any person of adequate understanding may act and bind the principal. The agent is a mere instrument of the principal, and falls out of the picture after the conclusion of the contract between the Principal and the Third party.
Activity 3.5 A

From the business point of view, what legal problems could arise out of this type of business law?

Record your answer in your personal journal for later review and feedback by your course instructor.

Creation of Agency

An agency can be created in a number of ways such as those discussed below.

1. **By Express Agreement** - The understanding must be clear whether the authority to act is given orally or in writing. Where express authority is given, the agent is not permitted to exceed the four corners of the mandate.

2. **Implied Agreement** - This is inferred from the circumstances. The test is whether a reasonable person, when assessing the conduct of the parties, would consider that the parties have agreed to act on a basis, which can be characterised as an agency. The existence of a special relationship; e.g. employer and employee, partner and co-partner, may assist in deciding whether there is implied authority.

3. **Ratification** - The following are important points with ratification:
   - The agent acts without authority.
   - The agent represents to the third party that he/she was acting on behalf of the principal.
   - The principal then adopts the transaction so as to clothe it with retrospective authority.
   - The principal must adopt the whole transaction and not only the advantageous parts of it.
   - Once ratification has taken place, the effect is to place the parties in the position they would have been in had the agent originally had authority.

4. **Estoppel/Ostensible Authority** - Where a person, by words or conduct, represents (or permits it to be represented) that another person professing to bind him has authority to do so, he/she will not be permitted to deny the agency against a third party who acts on the faith of that representation as to prejudice himself/herself. In this case the principal is bound by what the agent does when there is no express, implied authority and no ratification. In fact, in estoppel the principal
would be denying the existence of authority and is prevented or estopped from denying its existence. **Note:** The representation must come from the principal and not the agent.

5. **Usual Authority** - This is a result position where people employed in such positions usually do certain acts, which will bind their principal if he/she does a similar act. For example, one employed as a director may bind one’s company if that person does those things directors ordinarily do. This is regardless of whether that person’s power is limited by the articles of association.

6. **Negotiorum Gestio/Agent of Necessity** - These are acts done without authority. The courts do not look favourably to unauthorised interferences in other people’s affairs. As a result agency of this type is very limited. Regarding such agents:

   - They act **justifiably** on behalf of another in cases of emergency.
   - There should be no prohibition.
   - The intention must be to benefit the other party.
   - They are then allowed to recover their expenses.
   - The party they act for is not a principal as such but is called the *dominus*.

The situation should be such that it is impossible or impractical to communicate with the principal. Examples would be feeding uncollected animals or taking care of perishables.

<table>
<thead>
<tr>
<th>Activity 3.5 B</th>
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<tbody>
<tr>
<td>Distinguish between agency by estoppel and ratification.</td>
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</tbody>
</table>

A is owner of a farm managed by B. A had previously expressly forbidden B to buy any further supplies of cattle feed on credit without A’s consent. Despite these instructions, B purchases more cattle feed on credit from J, who had supplied previous orders and had been paid by A. Further, A sees J’s delivery van supplying the cattle feed but does nothing. A now refuses to pay on grounds that the purchases were unauthorised.

From the point of view of law of agency, what advice would you give A?

Record your answer in your personal journal for later review and feedback by your course instructor.
RIGHTS AND DUTIES BETWEEN AGENT AND PRINCIPAL

The entrepreneur should understand the rights and duties between the two key stakeholders, namely, the agent and the principal.

Duty to Perform the Mandate

The agent must do what he/she is mandated to do. If this does not happen, then he/she is not entitled to any commission or may be liable to the principal for any loss arising out of breach of contract. The courts have decided that in some cases substantial performance by the agent would be enough to entitle the agent to commission.

- **Following Instructions** - The Agent must follow the principal’s instructions fully except where the instructions are illegal. He/she must not exceed his/her authority.

- **Caution** - The agent must exercise reasonable care, skill and diligence in the performance of his/her mandate.

Duty to Act in Good Faith

This is an important duty. The relationship between the principal and agent is a fiduciary one, that is, one of utmost good faith. The agent binds himself/herself to act in the interest of the principal. He/she must act honestly, loyally and single-mindedly in the principal’s interest. This duty includes the following: The agent must not make a secret profit in pursuing the principal’s mandate. If he/she does, then the profit belongs to the principal. For example, an Estate agent who buys the principal’s house and resells it for a profit breaches his/her duty.

The agent should not be bribed. He/she should not allow personal interests to conflict with those of the principal. In case of risk of conflict, the agent must make full disclosure and obtain the principal’s informed consent.

Duty not to Delegate Authority

The concept of delegatus non potest delegare means that a delegate must not sub-delegate. There are however exceptions to this rule. For example, where it is trade, business usage or Ministerial duties not involving the exercise of the agent’s discretion or skill the agent may validly sub-delegate.
Duty to Account

The agent must keep proper accounts of money received or spent on behalf of the principal and must allow the principal access to these books.

Entrepreneurs have experienced some problems with the law of agency. To share views, work on the following activity.

Activity 3.5 C
In the opposite column, write a brief example of how the duty that is indicated manifests itself in real business circumstances.

<table>
<thead>
<tr>
<th>Duty</th>
<th>Example</th>
</tr>
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<tbody>
<tr>
<td>The duty not to delegate authority</td>
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<tr>
<td>The duty to account</td>
<td></td>
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<tr>
<td>The duty to perform the mandate</td>
<td></td>
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<tr>
<td>The Duty to act in good faith.</td>
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</tbody>
</table>

Record your answers in your personal journal for later review and feedback by your course instructor.

Your response should be a true reflection of what goes on in a real business environment.

**Principal’s Duties to the Agent**

The principal also has common law duties owed to his agent. Some of them are as follows:

**Duty to Remunerate the Agent for Services**

Commission is paid according to agreement. It is only paid after substantial performance. If there is no agreement as to the amount, then courts will look at the value of the service to the principal, time expended by agent, his expertise and the prevailing market rates.

**Duty to Indemnify and Reimburse the Agent**

Where the agent has incurred liabilities or made payments on behalf of the principal, he is entitled to indemnification and reimbursement for payments made. These must be necessary expenses and payments. The agent should have been acting within the scope of his/her authority.
Where the agent has performed his mandate, he falls out of the picture. The only parties who remain are the principal and the third party. However, the agent may not disclose the existence of the principal. In this case the agent becomes personally liable. But if the third party discovers that the agent was actually acting for another person, he may choose to hold the undisclosed principal to the contract.

**TERMINATION OF AGENCY**

The agency situation is terminated in several way including the following:

- by acts of the parties;
- express revocation of authority by the principal or express renunciation by the agent;
- death of either party, insanity or insolvency of either party;
- supervening illegality e.g. the principal is declared an enemy alien;
- where appointment is for a specific time, then expiration of the time; and
- having completed the assignment as tasked.

**Activity 3.5 D**

Consider each of the following situations and give the principles of law involved:

1. **X** was appointed by **Y** to find a buyer for **Y**’s car. **X** without **Y**’s agreement purchased new mag-wheels for the car and also instructed **B** to re-paint it. He has now sold the car and demands a refund for the mag-wheels and the new paintwork.

2. **S** is a cattle rancher. **T**’s horses have strayed into his farm. **S** does not make any effort to contact **T**. He buys stock feed and feeds and waters the horses for three weeks. When one of the horses shows signs of illness, **S** hires a Veterinary Surgeon to attend to it. He now claims his expenses from **T**.

3. **G** is appointed to do certain work by **E**. He has substantially carried out the work, but has to appoint **F** to do part of the work as **F** is more skilled than him in this field. **F** has presented **E** with an exorbitant figure as his price. **E** is refusing to pay.

Record your answers in your personal journal for later review and feedback by your course instructor.
SUMMARY

In this topic we explained that an agent concludes a juristic act on behalf of the principal. The result is that he creates a legal relationship between the principal and third party.

- We noted the rights and obligations, which arise from the agent’s negotiation, accrue to the principal only.
- We concluded that for the principal to be bound by an act of the agent, authority has to be established in one way or another. The principal may also be bound because he voluntarily took on the agent’s previously unauthorised act or he is by law prevented from refusing that the agent was his agent.
- We also looked at the special relationship between the agent and the principal. This relationship is of utmost good faith based on trust and loyalty.

Self-Reflection Questions

In your type of business, when do you require the services of an agent?

a. Explain the duties between an Agent and a Principal.

b. Discuss with examples how an Agency can be terminated.

Record your answers in your personal journal for later review and feedback by your course instructor.
REFERENCES

Botswana Acts:

1. *Trade Unions and Employers’ Organisations* (Chapter 48:01)
3. *Trade Disputes* (Chapter 48:02)
4. *Employment Act* (Chapter 47:01)

ILO Conventions

1. ILO Convention Number 144 (1976).
2. ILO Convention 138
3. ILO Convention 182
4. ILO Convention Number 144 (1976).
5. ILO Convention 138
6. ILO Convention 182
   (smib.vuw.ac.nz:8081/www/ANZMAC1999/Site/Z/Zarkada_Fraser.pdf)  
   (Retrieved 03/08/2011)
9. [http://handbooks.homeless.org.uk/hostels/environment/staff](http://handbooks.homeless.org.uk/hostels/environment/staff)  
   (Retrieved 15/05/2011)
14. [http://www.utm.edu/staff/jfieser/vita/research/Busbook.htm](http://www.utm.edu/staff/jfieser/vita/research/Busbook.htm)  
   (Retrieved 27/05/2011)
UNIT 4 - GOVERNANCE, ENVIRONMENTAL, INTELLECTUAL AND COPYRIGHT LAW

INTRODUCTION

Governments of different countries promulgate laws to protect the environment, as well as to safeguard intellectual property and copyright. As an entrepreneur, it is in the interest of your business to learn more about these legal aspects, taking into account sound corporate governance practices. Developed countries like the USA, Japan, the UK and many others have developed laws to guide entrepreneurs. In the present unit, three topics are covered and they deal with:

- the issues of governance within a business;
- environmental law as it relates to business operations; and
- intellectual property and copyright law.

UNIT OBJECTIVES

After working through this unit, you should be able to:

1. Explain business governance.
2. Describe the role and functions of a board of directors.
3. Examine the impact of environmental law on business.
4. Examine intellectual property rights and laws.
5. Explore the use of copyright.

UNIT READINGS

As you complete this unit it is recommended that you read the following chapters/articles:

- Intellectual property - Copyright.  
  [www.ag.gov.au/Copyright/Pages/default.aspx](http://www.ag.gov.au/Copyright/Pages/default.aspx)
- Copyright Issues on the Web & Intellectual Property.  
  [webdesign.about.com/.../copyright/Copyright_](http://webdesign.about.com/.../copyright/Copyright_)

ASSIGNMENTS AND ACTIVITIES

There will be one assignment for the entire course as indicated earlier.
TOPIC 4.1 - BUSINESS GOVERNANCE

INTRODUCTION
Successful running of a business enterprise is not a hit or miss affair that is done casually. It involves planning, allocation of responsibilities, control and leadership. Several questions come to mind regarding how, why and when to invoke principles of governance. The purpose of this topic is to share ideas on how to govern your business and that way, make it grow.

OBJECTIVES
After completing this unit you should be able to:

1. define business process governance and business process management;
2. clarify why a board of governors is necessary;
3. explain how a board functions;
4. describe the composition of a board; and
5. name some of the board committees and justify their creation.

CONTENT
- Definition of Corporate Governance and related concepts
- Roles of Boards
- Responsibilities of Boards
- Composition of a Board
- Board committees
- Ingredients for an effective Board

WARM UP ACTIVITY
1. What is your understanding of corporate governance?
2. Why do you think knowledge about governance is essential for you, the entrepreneur?

Record your response in your course journal.

WHAT IS BUSINESS PROCESS GOVERNANCE?
The term Governance is commonly used in business, but sometimes we do not quite understand what it means. The warm-up activity is meant to encourage you to start thinking by drawing on what you understand by the term before reading what follows.

Business Governance is closely linked with the more general term of corporate governance. It is, therefore, logical to begin with a definition of corporate governance. According to a somewhat long definition, the concept refers to:

The framework of rules and practices by which a board of directors ensures accountability, fairness, and transparency in a company's relationship with all its stakeholders (financiers, customers, management, employees, government, and the community).
The corporate governance framework consists of:

1. explicit and implicit contracts between the company and the stakeholders for distribution of responsibilities, rights, and rewards;
2. procedures for reconciling the sometimes conflicting interests of stakeholders in accordance with their duties, privileges, and roles; and
3. procedures for proper supervision, control, and information-flows to serve as a system of checks-and-balances. Also called corporation governance.

On the other hand, Business Process Governance refers to a set of policies and business processes that set the way that the organisation’s business is run. Business Governance embeds the methodology of corporate governance and project governance with an emphasis on business process performance and including process simulation and optimisation of desired business outcomes by using real-time, historical and estimated data values (http://www.pnmsoft.com/resources/bpm-tutorial/business-governance/).

Business process governance, also called process governance or business process management (BPM) governance, is the use of rules to manage BPM programmes and initiatives. It involves setting standards and priorities for BPM efforts, identifying BPM governance leaders and defining BPM project participants’ roles, all to improve BPM strategies. The ultimate goal of both business process governance and BPM is to optimize an organization’s business processes and make workflow more efficient and effective (http://whatis.techtarget.com/definition/business-process-governance).

Governance is, therefore, fundamental. We have seen good boards become bad boards and bad boards become good boards. It has also been observed that organizations fail because of problems at the governance level. Ineffective governance compromises the ability of the management to succeed. Effective governance, in contrast, greatly assists the organization. Effective governance has the following characteristics:

- it is efficient,
- allows a respectful conflict of ideas,
- is simple,
- is focused,
- is integrated and synergistic,
- has good outcomes,
- preserves community assets, and
- leads to enjoyment and personal reward for the individual board members.
Demonstrate how these features apply to the governance of your business by working on this activity.

**Activity 4.1 A**

Comment on the governance of Board of your business taking into account each one of the features listed above.

Record your response in your course journal.

The idea of doing this activity is to set the foundation for subsequent discussion. By openly evaluating your Board, this places you in a position to determine what needs improvement or what new ideas need addition to change the status quo for the better.

In the sections that follow, let us review the roles and responsibilities of boards, factors that increase board effectiveness, and the evolution of governance.

**ROLES OF BOARDS**

Have you ever asked yourself why a business company should have a Board when there is the general managers and middle managers to run the operations? Boards have three primary roles: to establish policies, to make significant and strategic decisions, and to oversee the organization's activity.

**Policy Making**

Effective execution of policy is necessary to fulfill the other two roles. Policies define focus and differentiate responsibilities among the board, the management, and the other staff. Well-written policies lead to more efficient board functioning. Instead of having the same matter or very similar matters on the agenda repeatedly, the board can develop a policy that covers the issue and leave implementation of the policy to management. Boards have several hours together each year, spread over regular meetings. It is essential to use that time wisely. The board should review policies annually to see if they are still needed.

**Decision-Making**

Decision-making involves making choices about the organization's vision, mission, and strategies. Boards make decisions about issues that are strategic and significant, such as whether to enter an affiliation agreement with another organization. As decision makers, boards can also delegate non-governance types of decisions to others—and it would be wise to do so.

**Oversight**

Oversight is an important function, but boards must remember that the organization is theirs to oversee, not to manage. Some boards cross the line and try to involve themselves in management. Nevertheless, in the oversight role,
the board is legally responsible for everything that happens within the business. In the area of quality, for example, the board’s oversight role may include:

- setting the tone by stating that the organization is committed to quality;
- establishing policies related to quality, such as credentialing;
- ensuring that mechanisms are in place, such as committees, to establish a plan for quality; and
- monitoring implementation of the plan.

Board committees play an important role in the governance process. It is useful to periodically review the structure and functions of the committees and to ensure that everyone knows what to expect from them.

**Activity 4.1 B**

Suggest any other roles of the Board of your business that have not been covered in the discussion above.

Your response is meant to make additions of other functions boards can also serve. Share this with your instructor.

Also record your response in your course journal.

**RESPONSIBILITIES OF BOARDS**

Arnwine (2002) makes observations that re-focu our ideas about governance. In our discussion, let us examine some of the responsibilities expected of board members. Boards have numerous responsibilities:

- they oversee management, finances, and quality;
- set strategic direction; build community relationships;
- establish ethical standards, values, and compliance; and
- select a CEO and monitor his or her progress.

Probably the two most important tasks are selecting the CEO and establishing the direction of an organization. Although the management team of a company develops the strategic plan, it is the board’s responsibility to accept or modify the strategic plan and to set the direction. The board considers elements in the environment—such as growing competition and changing patterns of running the particular business—and develops a vision, a mission, strategic thrusts, goals, and tactics that respond to the environment, all the while showing the organization’s values.

Financial oversight is a familiar job that boards usually do well. Boards:

- ensure the use of financial controls;
- ensure that funds are prudently invested, considering cash management, banking, and contracting parameters; and
• establish policies related to budgets.

Their goal is to protect the community’s assets. Oversight of the quality area often involves utilization and risk management in addition to continuous quality improvement.

Attention to community relationships is a responsibility unique to not-for-profit institutions. Inasmuch as board members have contact with the community, they can be sensitive to the expectations and needs of its citizens and bring that knowledge to the boardroom. The focus is on all those the organization serves: consumers, businesses, elected representatives, payers, and collaborators. Boards are paying more attention to the quality of life in their communities.

The ethical standards of the organization are determined by the behaviour of the board. Through its on-going actions, the board decides what behaviour will and will not be tolerated. These actions supersede ethical statements—however important such statements are—in showing an organization’s true values. In recent years, compliance issues have risen to board-level responsibility as well, particularly as the media have reported people being sent to jail and organizations and individuals being fined millions of dollars for breaches in government regulations. Compliance is probably the only new issue that has been added to board responsibilities over the past 10 years.

When reviewing these responsibilities, it is important to note that the board as a whole, and not any individual member, has the authority. Further, the board exists only when it is in session. The Board can set committees to assist in governance. The committee is an appendage of the board, and the board can delegate certain tasks to a committee or an individual, but otherwise an individual board member has no prerogative. Thus, it would be inappropriate for a board member to walk in to a manager’s office and ask to review the books or demand certain changes. Such actions, in fact, can cause much disruption. The CEO is the full-time agent of the board and is the only person directly accountable to the board.

**COMPOSITION OF THE BOARD**
Before reading on, who sits in the Board of your business? The total number of board members is usually between seven and twenty, depending on the size and nature of the business entity. The number is influenced by the work that the Board needs to perform. Furthermore, the Board should have a cross section of skills to enable it to diligently perform its supervisory role. Such skills should include legal, accounting, human resources management, industry specific knowledge, and business acumen.

A board should have executive and non-executive directors. An executive director is one who is in employment of the company on a full-time basis. The executive director brings a wealth of first hand information to the Board. However, this raises a question of conflict of interest as the Board is expected
to provide oversight and monitor performance of the company’s management. The non-executive director, on the other hand, is one who is not contractually obligated to the company. He/she is neither supplier nor customer of the company. A non-executive director enhances the independence of the Board. His evaluation of the performance is likely to be objective and not clouded by conflict of interest.

**BOARD COMMITTEES**

The board may, in accordance with its Charter, constitute such number of committees it may deem necessary to assist in the performance of its roles and functions. These may be standing committees for continuous function, or *ad hoc* for specific functions. Some of the common committees are listed below.

**Audit and Finance Committee**

The role of this committee is to ensure that there are control mechanisms within the company to safeguard its resources. Members of this committee must be financially literate.

**Governance of Nomination Committee**

This committee is responsible for identifying and recruiting new directors. The committee is expected to undertake a skills analysis of the current Board to ascertain the diversity of skills represented on the Board.

**Remuneration Committee**

The committee is responsible for determining remuneration policy for company executive as well as directors. Remuneration plays an important role of attracting and retaining personnel.

**Executive Committee**

The Board delegates its authority to executive management, and as such appoints a committee of executive directors to assist the CEO in exercising the delegated authority.

With reference to a board you are familiar with work on the next activity.

**Activity 4.1 C**

1. Explain conflict of interest as it applies to a board member.
2. Suggest the period of tenure for board membership, with reference to the board of your business entity.

Record your responses in your course journal.
For a board member, we say there is conflict of interest when for example, his company is bidding for a tender to supply a certain product to the company of which he/she is a board member. Under those circumstances there will be conflict of interest. Your response to the second question is purely circumstantial, and depends on the situation your business is in.

**INGREDIENTS FOR AN EFFECTIVE BOARD**

Clark and Lorsch (2008) observe that there are three ingredients to the wheel of effective governance by a Board, namely: behaviour, structure, and expectations. If one of these spokes breaks down, the board will have a flat tire, and the faulty governance process can compromise the organization’s ability to move forward.

**Behaviour**

Appropriate board behaviour can be defined as functioning in accord with the board's roles and responsibilities. Thus, board members should know the difference between governance and management, see service as a responsibility of citizenship, and find enjoyment in such service. Appropriate behaviour also has key characteristics, the first of which is respect—for the organization, the management, the employees, and other members of the board. Respect is basic, but it doesn't always exist. Antagonism can be distracting and counterproductive.

Respect leads to two additional behavioural characteristics that are needed: openness in the board discussions and confidentiality. The two go hand in hand. Problems can arise because of breaches in confidentiality. Some board members speak casually about board activities among people at their churches or at parties. The result is that other board members feel they cannot be open because of this breach. The more sensitive the issue under discussion, the more important confidentiality becomes. As one board chairman used to say, “What you hear here or see here or do here, when you leave here let it stay here.”

Conflicts of interest also fall in the category of behaviour. Some people believe that a potential conflict of interest precludes service on the board. Usually this policy requires all members to disclose potential conflicts and to abstain from voting on such matters.

**Structure**

Boards may not pay much attention to structure, thinking that it is covered in the bylaws and requires no further comment. Nevertheless, problems often arise from structure rather than behaviour. For example, experience has shown that in several boards the chairman serves for as many as 30 years, and members were discontented and ready for someone new. Many board bylaws do not address tenure. Whether the term limit is two or three years or something different, it is helpful if everyone knows what to expect. Dissatisfied
members know that they will be able to vote for someone else, and volunteers may be more willing to take on the role of chairman if they know it is for a designated period. Other issues may concern the frequency of meetings or the size of the board.

**Expectations**

The final spoke consists of expectations or, more specifically, board members' knowledge of what is expected of them and what they can expect from others. One of the best ways to clarify expectations is to have new members sign a letter that outlines those expectations. Such a document also makes it easier to remove a board member if, for example, his or her attendance has been poor. It also serves to clarify the requirements of board membership when approaching a potential volunteer.

**Activity 4.1 D**

By referring to the three spokes/ingredients of an effective Board, write a brief explanation of how these three could be applied to make your company more competitive.

This activity calls upon you to keep critical view, which you can apply with your board for better results. Keep this in your diary and share with colleagues.

Record your responses in your course journal.

**SUMMARY**

Governance is at the heart of the success of a business venture. It is inconceivable to imagine a business that does not have a team that gives it some direction, hence the need for a board of directors, who may not be owners of the business. As we deliberated on that, in the foregoing sections of the topic, we covered these aspects.

- What is Corporate Governance?
- What is Business Process Governance?
- What is Business Process Management?
- The roles played by the company board
- The responsibilities of board members
- How a board is constituted
- The different board committees and their roles
- The ingredients for an effective board

**REFERENCES**

TOPIC 4.2 - ENVIRONMENTAL LAW

INTRODUCTION
The environment is made up of land, air and water; and environmental laws address all three. Environmental laws are made at both the state and federal level, with many different laws enforced under the purview of the Environmental Protection Agency (EPA). Acts passed to protect the environment include, among others, the National Environmental Policy Act, the Clean Water Act, the Clean Air Act, the Noise Control Act, the marine Protection, Research and Sanctuary Act, the Endangered Species Act, the Federal Water Pollution Control Act, the Federal Pesticides Act and the Comprehensive Environmental Response, Compensation and liability Act (CERCLA). These acts, together, make excessive pollution illegal, protect environmental resources and animals, and impose requirements on people and entities found to be polluting the environment with hazardous materials. To learn more about the legislation that protects the environment and about the legal issues involved, visit: http://law.freeadvice.com/government_law/environmental/environmental_law.htm

OBJECTIVES
After completing this topic you should be able to:

1. define environmental law and related concepts;
2. give a brief background of environmental law;
3. explain effectiveness and enforcement of environmental law; and
4. relate the importance of international law to your country

CONTENT
- Definition of environmental law.
- The necessity of environmental law.
- Who makes and effects law?
- Environmental law around the world.
- Environmental law and business.

WARM UP ACTIVITY
1. List any two ways in which a business is linked with the environment.
2. Suggest any two regulations you know, which regulate the way businesses operate in your environment.

Record your responses in your course journal.

The warm-up activity aims at setting you thinking and look around you while reading about this important topic.
What is Environmental Law?

Environmental law is a complex and interlocking body of treaties (conventions), statutes, regulations, and common law that operates to regulate the interaction of humanity and the natural environment, toward the purpose of reducing the impacts of human activity.

Probably the simplest definition (http://www.businessdictionary.com/definition/environmental-law.html#ixzz25b3n0780) is that environmental law refers to the body of rules and regulations, and orders and statutes, concerned with the maintenance and protection of the natural environment of a country. It provides basis for measuring and apportioning liability in cases of environmental crime and the failure to comply with its provisions.

Environmental laws are put in place to deal with balancing environmental concerns of the public generally with the rights of property owners (individual, business and governmental) to develop and use their property. It is reflected both in explicit environmental laws and in other statutes and regulations, such as local building codes, zoning ordinances, condemnation policies and land use restrictions. State and local environmental laws reflect local policy and priorities, which vary from place to place, sometimes resulting in conflicts between localities on environmental laws, enforcement and compliance.

Activity 4.2 A

Refer to businesses in your community and establish conflicts that have arisen in the last few months regarding failure by some enterprises to fulfil environmental statutes on business law.

Record your responses in your course journal.

This is meant to be a practical activity, involving observation, supported with your understanding of the definition of environmental law. Refer to your response re: how you run your business venture.

The topic may be divided into two major subjects:

- pollution control and remediation, and
- resource conservation and management.

Laws dealing with pollution are often media-limited—i.e., pertain only to a single environmental medium, such as air, water (whether surface water, groundwater or oceans), soil, etc.—and control both emissions of pollutants into the medium, as well as liability for exceeding permitted emissions and responsibility for cleanup. Laws regarding resource conservation and management generally focus on a single resource, e.g., natural resources such as forests, mineral deposits or animal species, or more intangible resources.
such as especially scenic areas or sites of high archeological value, and provide guidelines for and limitations on the conservation, disturbance and use of those resources. These areas are not mutually exclusive—for example, laws governing water pollution in lakes and rivers may also conserve the recreational value of such water bodies. Furthermore, many laws that are not exclusively "environmental" nonetheless components and integrate environmental policy decisions. Municipal, state and national laws regarding development, land use and infrastructure are examples.

Environmental law draws from and is influenced by principles of environmentalism, including ecology, conservation, stewardship, responsibility and sustainability. Pollution control laws generally are intended (often with varying degrees of emphasis) to protect and preserve both the natural environment and human health. Resource conservation and management laws generally balance (again, often with varying degrees of emphasis) the benefits of preservation and economic exploitation of resources. From an economic perspective environmental laws may be understood as concerned with the prevention of present and future externalities, and preservation of common resources from individual exhaustion. The limitations and expenses that such laws may impose on commerce, and the often unquantifiable (non-monetized) benefit of environmental protection, have generated and continue to generate significant controversy. Work on the next activity, making reference to the situation in your country.

Activity 4.2 B

1. What is the difference between conservation and management laws?
2. Explain ‘economic exploitation’ of resources with examples from your own country.

Record your responses in your course journal.

It is important, from the business perspective to have a clear distinction of these two concepts, and basically conservation laws are aimed at preservation of resources such as wild animals or water. On the other hand, management laws are regulatory. They, for example, will then be used to ensure conservation. Economic exploitation of resources refers to the business practice of drawing from resources for economic gain. Mining and fishing are good examples.

Given the broad scope of environmental law, no fully definitive list of environmental laws is possible. The following brief discussion of the history of environmental law gives an indication of the breadth of law that falls within the "environmental" metric.
HISTORY
While it is possible to identify earlier legal structures that would today fall into the "environmental" law metric - for example the common law recognition of private and public rights to protect interests in land, such as nuisance, or post-industrial revolution human health protections - the concept of "environmental law" as a separate and distinct body of law is a 20th Century development (Lazarus, 2004). The recognition that the natural environment was fragile and in need of special legal protections, the translation of that recognition into legal structures, and the development of those structures into a larger body of "environmental law" did not occur until about the 1960s. At that time, numerous influences - including a growing awareness of the unity and fragility of the biosphere following mankind's first steps into outer space (see, for example, the Blue Marble), increased public concern over the impact of industrial activity on natural resources and human health (see, for example, the 1969 Cuyahoga River fire, the increasing strength of the regulatory state, and more broadly the advent and success of environmentalism as a political movement - coalesced to produce a huge new body of law in a relatively short period of time. While the modern history of environmental law is one of continuing controversy, by the end of the 20th Century, environmental law had been established as a component of the legal landscape in all developed nations of the world, many developing ones, and the larger project of international law.

It is worth noting that Environmental law is often the source of controversy. Notably, the early history of national environmental regulation in the United States (at the time the world leader in environmental regulation) was marked by relative political unity. The National Environmental Policy Act (1969), the Clean Air Act (1970), the Clean Water Act (1972), and the Endangered Species Act (1973) all were enacted with broad bipartisan support, and ultimately signed into law by Republican President Richard Nixon. Even then, however, critics raised concerns regarding the need for such laws and the costs involved in implementing them. Richard Nixon himself initially vetoed the Clean Water Act, citing its projected costs, though he was ultimately overridden by Congress. Debates over the necessity, fairness, cost, and need for environmental regulation continue to this day (http://law.freeadvice.com/government_law/environmental/environmental_law.htm).

WHY ENVIRONMENTAL LAW IS NECESSARY?
To what extent do you think environmental is necessary? Look around you before reading on. In developing countries of Southern Africa, the dry season (June to October) is pathetic in terms of environmental exploitation. Travelling across Botswana, Zimbabwe, or Namibia, for example, there are serious veld fires. Grass for both term and wild-animals is destroyed, resulting in many animals dying from this human-imposed drought. Some of the stories told are that hunters burn the veld in order to best identify hunting spoil. Another
disastrous observation is how peasant farmers cut trees indiscriminately in order to sell firewood and earn a living. These examples clearly demonstrate the need to regulate exploitation of resources through legal instruments. Can you think of parallel examples in your country?

Environmental laws are necessary because in many cases, individuals, companies and industries might consider it more advantageous to take actions that can harm the environment than to take actions that protect it. For example, it might be more cost effective for a company to simply dump hazardous waste than it would be to clean it up properly. Similarly, creating emissions is typically cheaper than taking steps to cut those emissions. Unfortunately, these actions can significantly impact the air and groundwater, causing serious health consequences and irrevocably damaging the planet and its natural resources. Environmental laws seek to provide protection from the worst behaviours that can hurt the environment, while still allowing industry to function without prohibitively expensive obligations.

Environmental laws are also constantly evolving in response to new problems and new concerns. Several spectacular environmental disasters, like the 2010 BP Oil Spill in the Gulf of New Mexico, the 1989 grounding of the oil tanker Exxon Valdez and the resulting oil spill, nuclear reactor accidents (Three Mile Island in Pennsylvania and the Ukraine’s Chernobyl in 1986), and more, generate awareness of the need for strict regulation regarding behaviours that can cause the most damage.

The necessity of directly regulating a particular activity due to the activity’s environmental consequences is often a subject of debate. These debates may be scientific. For example, scientific uncertainty fuels the ongoing debate over greenhouse gas regulation and is a major factor in the debate over whether to ban pesticides. Hardman Reis (2011) examines issues of environmental degradation on a wider scale, and explains how governments, internationally, grapple with the issues.

**WHAT DO ENVIRONMENTAL LAWS REGULATE?**

Major environmental concerns include the preservation of species diversity, protection of water and groundwater, preserving air quality and increasing energy efficiency. Most of the environmental laws that have been passed, work towards one of these aims. For example, the Clean Water Act works to protect water sources and supplies from pollution. The aim of the Endangered Species Act is to prevent the extinction of plants and animals and to rebuild populations of species that have fallen to dangerous levels through restricting destruction of habitats, hunting and other potentially harmful actions. The Clean Air Act regulates sources of air pollution and restricts emissions of dangerous toxins into the air.
WHO MAKES ENVIRONMENTAL LAW?

Environmental laws may be passed by both state and federal legislatures. The Environmental Protection Agency (EPA) has been appointed on the federal level to issue regulations and advisories and to oversee the enforcement of several major federal laws protecting the environment. Each individual state and U.S. territory has agencies or departments that work to protect the environment and to enforce both state and federal laws. There is even some case law (called common law, or law made by judges) that addresses environmental issues. Now, reflect on the ideas discussed above by working on this activity.

Activity 4.2 C

In many developing countries, including some small states of the Commonwealth, the need to have in place environmental laws cannot be emphasized. Share your views about what goes on in your country by giving information in the second column. In the first column, you are given an item identifiable in your environment. Consider the following:

1. List any two Acts of Parliament aimed at protecting resources in your country.
2. Suggest any two issues related to environmental degradation, which concern you in your country.
3. Briefly suggest what you think should be done to arrest the situation before it is too late.

Record your responses in your course journal.

There are no right or wrong answers, because circumstances will vary from one country to another. What is important is to document your observations and share with the instructor or colleagues doing the same course. Make sure you keep a record of responses and also relate to the business you either run or intend to run.

EFFECTIVENESS AND ENFORCEMENT

Those interested in environmental matters will often criticize environmental regulation as inadequately protective of the environment. Furthermore, strong environmental laws do not guarantee strong enforcement. Nonetheless, the cost benefit analysis for society at large between having laws that protect citizens from toxic or dangerous living and work conditions such as those that existed in the early industrial 1800’s do not clearly come down on the side of regulation. This is largely due to issues about enforcement.

Environmental law is generally enforced by civil and sometimes criminal penalties. Those who violate environmental protection acts can be made to pay large fines and to pay for the cost of the damage that they do. In the USA the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) assigns financial liability for cleaning up polluted sites to any entity.
connected to or partially responsible for that pollution. In some cases, civil lawsuits may also be filed when environmental laws are broken, particularly if many people suffered adverse health effects due to contaminated water or other environmental hazards. Think of instances when this happened in your country.

**ENVIRONMENTAL LAW AROUND THE WORLD**

Many countries have adopted comprehensive environmental laws. Many nations ascribe to and follow, to varying degrees, international agreements regarding environmental issues. As an entrepreneur, you need to be aware of some of the developments worldwide, and borrow a leaf so as to improve your situation.

**International Environmental Law (IEL)**

Pollution does not respect political boundaries, making international law an important aspect of environmental law. Numerous legally binding international agreements now encompass a wide variety of issue-areas, from terrestrial, marine and atmospheric pollution through to wildlife and biodiversity protection.

While the bodies that proposed, argued, agreed upon and ultimately adopted existing international agreements vary according to each agreement, certain conferences, including 1972's United Nations Conference on the Human Environment, 1983's World Commission on Environment and Development, 1992's United Nations Conference on Environment and Development and 2002's World Summit on Sustainable Development have been particularly important.

**IEL Organizing Principles**

International environmental law's development has included the statement and adoption of a number of important guiding principles. As with all international law, international environmental law brings up questions of sovereignty, legal reciprocity ("comity") and even perhaps the Golden Rule. Other guiding principles include the polluter pays principle, the precautionary principle, the principle of sustainable development, environmental procedural rights, common but differentiated responsibilities, intergenerational and intergenerational equity, "common concern of humankind", and common heritage.

**IEL Sources**

International environmental agreements are generally multilateral (or sometimes bilateral) treaties (a.k.a. convention, agreement, or protocol). The majority of such conventions deal directly with specific environmental issues. There are also some general treaties with one or two clauses referring to
environmental issues but these are rarer. There are about 1000 environmental law treaties in existence today; no other area of law has generated such a large body of conventions on a specific topic (Hardman Reis, 2011).

**Protocols** are subsidiary agreements built from a primary treaty. They exist in many areas of international law but are especially useful in the environmental field, where they may be used to regularly incorporate recent scientific knowledge. They also permit countries to reach agreement on a framework that would be contentious if every detail were to be agreed upon in advance. The most widely known protocol in international environmental law is the Kyoto Protocol, which followed from the United Nations Framework Convention on Climate Change.

**Customary International Law**

**Customary international law** is an important source of international environmental law. These are the norms and rules that countries follow as a matter of custom and they are so prevalent that they bind all states in the world. When a principle becomes customary law and is not clear cut, many arguments are put forward by states not wishing to be bound. Examples of customary international law relevant to the environment include the duty to warn other states promptly about icons of an environmental nature and environmental damages to which another state or states may be exposed, and Principle 21 of the Stockholm Declaration ('good neighborliness' or *sic uteri*).

**International Judicial Decisions**

International environmental law also includes the opinions of international courts and tribunals. While there are few and they have limited authority, the decisions carry much weight with legal commentators and are quite influential on the development of international environmental law. One of the biggest challenges in international decisions is to determine an adequate compensation for environmental damages.

The courts include: the International Court of Justice (ICJ); the international Tribunal for the Law of the Sea (ITLOS); the European Court of Justice; European Court of Human Rights and other regional treaty tribunals. Arguably, the Organization’s Dispute Settlement Board (DSB) is getting a say on environmental law also.

**ENVIRONMENTAL LAW AND BUSINESS**

What are the implications of the foregoing to a business enterprise? To conclude our discussion on the critical theme of environmental law, let us examine the observations raised below (cf. http://www.referenceforbusiness.com/encyclopedia/Ent-Fac/Environmental-Law-and-Business.html#ixzz25fzFA5Ud)
Observers have called 1970 the "year of the environment." On April 22, 1970, the first celebration of Earth Day took place. Also that year, the National Environmental Policy Act (NEPA) was passed by the U.S. Congress, the U.S. Environmental Protection Agency (EPA) was created, and the Occupational Safety and Health Administration (OSHA) was established. Various U.S. environmental laws predate 1970, but since that year, those laws have been developed extensively, and the enforcement of those laws has changed the way business "does business." Every business in the USA is affected by environmental laws.

On a daily basis most businesses deal with one or more environmental laws and the administrative agencies that enforce them. For example, businesses must inform and educate their employees about hazardous materials in the workplace as required by OSHA, and they must inform their communities about such materials on their premises. Businesses must apply for and adhere to permits from the federal EPA for their air emissions and their effluents discharged into waterways. Businesses generating hazardous wastes must comply with the EPA's manifest system (a record-keeping system), and the disposal of hazardous and nonhazardous waste is regulated extensively. Businesses are being required to clean up or pay for clean up of environmental contamination caused by their past acts and practices. Further, businesses are now being required to monitor their production methods and seek ways to prevent pollution. The list of the ways in which environmental law affects the daily operations of business goes on.

Therefore, for any businessperson, it is helpful to be familiar with the problems addressed by our environmental laws, the provisions of those laws, and the kinds of mechanisms and administrative agencies through which those environmental laws are enforced.

Environmental laws deal with myriad pollution problems. Pollution or contamination of the environment is found within the walls of factories and other business facilities as well outside the walls of those facilities. Environmental law deals with contamination of our air, surface waters, drinking water, groundwater, and land. Those affected include workers and their families as well as other members of their communities. And, as U.S. businesspeople increase their participation in a global marketplace, it is becoming increasingly clear that environmental contamination extends beyond local and regional concerns; its effects are international and even global. As illustrated along the U.S.-Mexican border, environmental contamination does not recognize political boundaries.

The United States is a "legalistic" society in that its people rely on its legal system to "do something" about injuries to individuals as well as social problems affecting large numbers of people. Thus, it is not surprising that individuals as well as groups of concerned citizens rely on our legal system to
"do something" to compensate individuals who suffer harm due to exposure to environmental contamination (toxic substances), to provide a mechanism for clean up of environmental contamination, to protect citizens from exposure to toxic (hazardous) substances, and to prevent further contamination of the environment.

The foregoing dwells on the American situation regarding issues related to business and environmental law. In the next activity, features of environmental law are listed in the first column. In the second column, tick **Yes** to show that the same exists in your country, **No** to show that it does not exist, or **Do not know**.

<table>
<thead>
<tr>
<th>Feature</th>
<th>Yes</th>
<th>No</th>
<th>Do not know</th>
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</thead>
<tbody>
<tr>
<td>1. There is a national Environmental Policy Act</td>
<td></td>
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<tr>
<td>2. Every business in the USA is affected by environmental laws</td>
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<tr>
<td>3. Administrative agencies enforce environmental laws</td>
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<tr>
<td>4. Businesses inform communities about hazardous matters in the workplace</td>
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<tr>
<td>5. There are laws, which businesses that generate hazardous wastes must comply with</td>
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<tr>
<td>6. There are regulations governing the disposal of hazardous and non-hazardous waste</td>
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<tr>
<td>7. Businesses are compelled to seek and implement ways of preventing pollution</td>
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<tr>
<td>8. There are laws dealing with different forms of contamination</td>
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<tr>
<td>9. The USA extends environmental contamination efforts beyond its borders</td>
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<tr>
<td>10. The USA law is concerned with injustices to individuals and groups who suffer harm from toxic substances</td>
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</table>

Where you tick **Yes**, it shows the extent to which your country is measuring up to expectation, while **No** signifies that something should be done to ensure compliance with expectations. **Do not know** shows that you are not sure, so as
an established or aspiring business person, you ought to actively check with your government offices about the state of affairs.

SUMMARY
Our second topic in this Unit explained the concept of environmental law, citing typical examples. The following key aspects were covered.

- definition of environmental law and related terms;
- the necessity of environmental law and those who are responsible for formulation of such law;
- the effectiveness of environmental law nationally and internationally;
- challenges faced when enforcing the law;
- international environmental law and its effect; and
- the connection between a typical business and environmental law.

References


http://law.freeadvice.com/government_law/environmental/environmental_law.htm (Retrieved 6-09-2012)

TOPIC 4.3 - INTELLECTUAL AND COPYRIGHT LAW

INTRODUCTION
In business, entrepreneurs invent new ways of doing things, such as new products or services. Authors in the business of writing to create and share knowledge continue to multiply, so do musicians, models and many others. By investing their ideas, it is only logical that such ideas remain theirs and are protected from piracy, a polite word for stealing. Ideas are commonly known as intellectual property (IP), and they are intangible as opposed to real property, which is concrete and more easily defined. When we talk of protection of ideas, the term we invoke is copyright. You will probably be asking: Why intellectual and copyright law? As a business person, a sound knowledge about your rights and the rights of others to protect what is yours or theirs, is foundational. This topic, therefore, introduces you to the two interrelated business concepts.

OBJECTIVES
After completing this topic you should be able to:

1. define copyright and intellectual property;
2. explain intellectual property and copyright law;
3. make a clear distinction of what is and what is not copyrighted; and
4. discuss franchising as it links with intellectual property and copyright law.

CONTENT
- Defining Intellectual Property
- Copyright law
- What is copyrighted?
- What is not copyrighted?
- Intellectual Property and the small business
- Industrial properties
- Things to bear in mind
- Franchising

WARM UP ACTIVITY
1. What is your personal understanding of intellectual property?
2. What, in your opinion, is meant by copyright?

Record your response in your personal journal.

After some serious reflection on the two concepts, read the subsequent sections. Bear in mind your personal definitions.

DEFINING INTELLECTUAL PROPERTY
Two websites have informed the discussion below, namely, www.copyrightservice.co.uk/copyright/intellect and www.wipo.int/about-ip/.
Intellectual Property is an intangible form of property, the result of the creation of the brain or the mind, which is then manifested or interpreted in a form that has a physical existence and possesses exclusive property rights. Examples include images, symbols, names, designs, industrial processes and business methods used in commerce; inventions; artistic, literary and musical works; and software.

IP is protected by law. This is the area of law that deals with and oversees the creation of intellectual property patents, copyrights, trademarks and trade secret laws; the protection of intellectual property rights; and the legal pursuit of those who infringe on another’s rights to his/her intellectual property. It overlaps with several other areas of law, such as patent law, copyright law, contract law, tort law, trademark law and litigation not forgetting environmental law.

Both statute and common law play a part in IP law. Trade secrets are established through common law and to protect them, one must utilize the legal options provided by contract law and tort law. Statute creates and governs trademarks, patents and copyrights, which represent ownership of an original idea for a limited period of time. Such artistic and creative works as paintings, music, books, photographs, movies and software may be protected by copyright law. Trade secrets, patents and trademarks laws are most often utilized by businesses because of the commercial value of the protected property.

More specifically, intellectual property laws grant rights to their creators as the sole beneficiaries of any monetary compensation that derives from their work, and to prevent it from being copied or infringed upon by others. How frequently do you think about intellectual property and your enterprise? Share your views by working on this activity.

Activity 4.3 A

Look at some of the businesses in your community.

1. What evidence is there of infringement of intellectual property?
2. What do you think the relevant ministry of your government should do to curb this business malpractice?

Record your responses in your course journal.

In many of the small states of the Commonwealth, traders tape music onto CDs and sell them in the streets without licence. This would be a clear instance of infringement. As for what your government ministry should do, relative to the evidence in your situation that is personal. Make suggestions and share with colleagues.

Intellectual property law is divided into two different categories, copyright law and industrial properties.
COPYRIGHT LAW
The first is most broadly recognized as a copyright law, which deals primarily with all things artistic.

Paintings, books, music, movies, and even software are covered under copyright law. Copyright laws can protect artists from their work being modified or duplicated in some way or, conversely, encourage its common use depending on the kind of copyright it enjoys and the intentions of the artist.

Copyright laws exist to give creators some kind of work exclusive rights pertaining to that work, such as the rights of publication, adaptation, and distribution. There are a variety of different copyrights available, and creators can do anything from allowing their work to be freely distributed in the public domain, to completely disallowing their work to be adapted in any way. The latter applies to open education resources.

Punishment for copyright infringement is typically a civil matter and not a criminal one. Copyright laws, like all intellectual property laws are quite necessary, but have recently become the subject of heavy criticism due to innovations like the Internet. On the Web, copyright laws are extremely difficult to enforce within such a massive and relatively anonymous medium, making copyright infringement very easy.

This is in fact a major issue within copyright law today, as artists are forced to adopt the prevailing attitude that a more liberal stance should be taken towards more relaxed copyright law, chiefly brought upon by the prevalence of works now widely disseminated on the Internet. As technology makes it easier and easier to break copyright laws, the debate will likely continue to evolve, and the future of copyright law will remain uncertain.

The concept of copyright, therefore, is vitally important in that it can protect irreplaceable intellectual property from being stolen. Despite the ubiquity of the copyright symbol, though, the legal concept of copyright unfortunately defies easy understanding.

What Can BE Copyrighted?
A look at the US, regarding copyright and intellectual property gives further insight into this aspect of business practice. Read what follows in conjunction with the website www.copyright.gov/laws/

In the US, the Copyright Act of 1976 granted expanded legal powers to creators of original works in the areas of literature, music, cinema and architecture. Original works gain copyright protection at the moment of their creation,
though content creators can still register works with the Copyright Office to gain additional statutory protection.

Copyright law has an impact on all businesses because the US Copyright Office's definition of "original work" extends well beyond music recordings and book manuscripts. Almost everything on your website is protected by copyright laws; original marketing communications, blogs, photographs, articles and even podcasts enjoy protection. In the Internet age, every business produces some sort of content, and that original work cannot be used, copied or sold by other parties. By the same token, your business cannot use the original work of others (such as blog entries, logo designs, online photos and movie clips) unless you obtain their express permission.

In addition to your Web content, computer programmes are protected by copyright. If you design a programme for your own business use, it is copyrighted; employees, partners and the general public are not allowed to copy it without your permission. Additionally, anything that an employee creates for you on company time is your property. It is a best practice to specify this in the contracts of any employees who will be producing intellectual property for you, otherwise it may be more difficult to litigate against someone who reuses that intellectual property in their own business. What implications does this have on a business? Respond to this activity in order to express your views.

Activity 4.3 C

In what way can an employee who work for you create for your company intellectual property and then re-uses that property in his/her own business?

Examples will differ from one business situation to another. For example, somebody writes a module for a distance education college and is remunerated for it. That module is legally intellectual property of the college. However, should the employee/writer decide to sell the same to a different education provider without express permission to do so from the employer, the person is in violation of copyright law, and can be litigated against.

Record your responses in your course journal.

WHAT IS NOT COPYRIGHTED?

Copyright law excludes just as much as it covers. For example, it does not protect the name of your business, your marketing slogans or product names. This kind of intellectual property is protected through the US Patent and Trademark Office. According to the US Copyright Office, copyright also fails to protect "ideas, concepts, systems, or methods of doing something."

Finally, copyright laws do not cover products. According to the US Patent and Trademark Office, "a description of a machine could be copyrighted, but this
would only prevent others from copying the description. It would not prevent others from writing a description of their own or from making and using the machine." This explains why any company can manufacture, for example, computers.

**INTELLECTUAL PROPERTY AND THE SMALL BUSINESS**

Having clarified the key concepts, it is needful to reflect on some thoughts about the small business and the laws discussed above.

For a small business, paying attention to intellectual property - including considerations of copyright, patents and trademarks - is of the utmost importance. If you infringe on another’s intellectual property rights, you can be sued in a civil court or found guilty of a felony. This kind of risk can sink a small business, which typically lacks the legal resources and war chest of a larger company. Meanwhile, if you fail to be vigilant about protecting your own intellectual property, you can give up advantages to your competitors.

As an entrepreneur, you need to be clear about patents and trademarks. What are they, in the first instance?

**Industrial Properties**

The second category of intellectual property law is called industrial properties, which deals with work created for commercial purposes. A design for a new piece of technology, for instance, is commonly protected by patent and/or trademark, and will give the creator the right to protect the invention from being unlawfully used by others, and also to license it so that others may use it under certain terms and conditions. Like copyright law, the point of industrial properties law is to provide a financial incentive for the creation of intellectual property and simultaneously, protect the creator from having his or her invention duplicated without consent.

In [http://www.copyrightservice.co.uk/copyright/intellectual_property](http://www.copyrightservice.co.uk/copyright/intellectual_property) a trademark is a name, word, slogan, design, symbol or other unique device that identifies a product or organisation. Trademarks are registered at a national or territory level with an appointed government body and may take anywhere between six and eighteen months to be processed.

Registering in countries such as the US, the UK, or Japan, will protect your mark in that country only, but within the European Union, there now exists a Community Trade Mark (CTM) which covers the mark in all EU countries.

Registered trademarks may be identified by the abbreviation ’TM’, or the ® symbol. (It is illegal to use the ® symbol or state that the trademark is registered until the trademark has in fact been registered). In the US there is also a differentiation between marks used for products or services, with a
classification called service-marks used for services, though they in fact receive the same legal protection as trademarks.

Patents, on the other hand, apply to industrial processes and inventions, and protect against the unauthorized implementation of the invention. Patents are grants made by national governments that give the creator of an invention an exclusive right to use, sell or manufacture the invention. Like trademarks, patents are registered at a national or territory level with an appointed government body. Patents typically take two to three years to be granted.

**Things to Keep in Mind**

*Copyright:* There is nothing you need to do now to copyright your original work. Since 1978, the mere act of creating it makes it yours. However, you should occasionally comb the Web and perform other kinds of diligence to ensure that your copyrights are not being violated. If you find what you suspect is a violation, consult an attorney.

*Trademark:* You have probably spent a lot of time thinking about your name, marketing slogans, product titles, and the like. Trademark everything that you don't want to lose to another company.

*Patent:* As far as the courts are concerned, what you do not patent does not belong to you; therefore, pay close attention to patent law and file on behalf of any invention unique to your business. This can be an extremely important investment, as it can prevent even the largest of companies from using your intellectual property (without paying you, of course), and it builds credibility for you and your business.

**Franchising**

Another business concept closely linked with trademarks, patents, and ultimately with intellectual and copyright law is franchising. **Franchising** is the practice of using another firm's successful business model. The word 'franchise' is of Anglo-French derivation - from *franc* - meaning free, and is used both as a noun and as a (transitive) verb. For the franchisor, the franchise is an alternative to building 'chain stores' to distribute goods that avoids the investments and liability of a chain. The franchisor's success depends on the success of the franchisees. The franchisee is said to have a greater incentive than a direct employee because he or she has a direct stake in the business[http://www.entrepreneur.com/franchise500/index.html](http://www.entrepreneur.com/franchise500/index.html)

Thirty three countries, including the United States, China, and Australia, have laws that explicitly regulate franchising, with the majority of all other countries having laws which have a direct or indirect impact on franchising.
Mid-sized franchises like restaurants, gasoline stations and trucking stations involve substantial investment and require all the attention of a businessperson. There are also large franchises like hotels, spas, or hospitals.

Two important payments are made to a franchisor:

- a **royalty** for the trademark, and
- reimbursement for the training and advisory services given to the franchisee.

These two fees may be combined in a single 'management' fee. A fee for "disclosure" is separate and is always a "front-end fee".

A franchise usually lasts for a fixed time period (broken down into shorter periods, which each require renewal), and serves a specific territory or geographical area surrounding its location. One franchisee may manage several such locations. Agreements typically last from five to thirty years, with premature cancellations or terminations of most contracts bearing serious consequences for franchisees. A franchise is merely a temporary business investment involving renting or leasing an opportunity, not the purchase of a business for the purpose of ownership. It is classified as a wasting asset due to the finite term of the license.

Although franchisor revenues and profit may be listed in a [franchise disclosure document](#) (FDD), no laws require an estimate of franchisee profitability, which depends on how intensively the franchisee 'works' the franchise. Therefore, franchisor fees are typically based on 'gross revenue from sales' and not on profits realized.

Various tangibles and intangibles such as national or international [advertising](#), [training](#) and other support services are commonly made available by the franchisor.

Franchise brokers help franchisors find appropriate franchisees. There are also main 'master franchisors', who obtain the rights to sub-franchise in a territory.

So, when operating your business as a franchisee, the need to be aware of what is involved or what the legal basics are should be a must. You do not want to be caught up in legal wrangles, which you can easily avoid if you possess the right knowledge.

We shall sum up our discussion with an activity.

**Activity 4.3 D**

The entrepreneur should be closely familiar with terms used in business and how they relate with intellectual property and copyright law. In your own words explain what each of the following terms mean. Write your responses first, and
then revisit the content covered above to confirm your personal definitions of the following terms:

1. Franchising
2. Trademark
3. Patent
4. Intellectual Property

Record your responses in your course journal.

**SUMMARY**

Intellectual Property and Copyright are key concepts in business operations. Law have been created, worldwide, to ensure fair business practice. The present topic endeavoured to give brief explanation of basics, which the entrepreneur should be familiar with. Below are the main areas covered.

- Definition of Intellectual Property.
- Explanation of what copyright Law is and how it is universally practised.
- A distinction of what is copyrighted and what is not copyrighted.
- Linking ideas of Intellectual Property with the small business.
- Trademarks, patents, and franchising as they link with business law.
- Franchising.

**REFERENCES**

[www.copyrightservice.co.uk/copyright/intellect](http://www.copyrightservice.co.uk/copyright/intellect) (Retrieved 10-09-2012)


[http://www.copyrightservice.co.uk/copyright/intellectual_property](http://www.copyrightservice.co.uk/copyright/intellectual_property) (Retrieved 10-09-2012)

FINAL ASSIGNMENT/MAJOR PROJECT

Each institution and assigned instructor must identify an appropriate final assignment or major project for their learners to complete.
COURSE SUMMARY

A sound knowledge of business law is a must for the entrepreneur. Law is a broad area, and aspects, which are directly linked with business were selected for discussion. The discussion itself was not exhaustive, but dwelt on the types of legal frameworks required to run a business. Obviously, there are variations in business law from one nation to the other, so students were to relate content to their respective business environments. Key terms/concepts were defined, and the area of recruitment and labour relations was given coverage. It is expected that on the basis of fuller understanding, students will be able to apply law of contract, recruitment and contracting, law of sale, law of lease and law of agency in their day-to-day business practice.