

A Brief Legal History of the United States

The United States of America, USA or US is a substantial economic and military power in the world today. Furthermore through its economic **and cultural** influence has inadvertently (unintentionally) helped establish English as the major language of business and law throughout the world. Subsequently a brief analysis of the events, trends and factors which **influenced** the development of law in the US is in order here.

Native Americans

The first inhabitants of the Americas were indigenous peoples commonly referred to in American history as Indian', but now more appropriately referred to as Native **Americans**. Unfortunately the great Native American civilizations were largely in south and central America, and were largely decimated by the European, particularly Spanish colonizers. Furthermore, the tribes found in the modern day US did not leave much of a legal legacy, as they lacked written languages for the most part. Therefore, this study **shall** briefly trace the roots of European and subsequent US legal history solely.

The British

The first colonists to the new continents were the Spanish, but they were primarily interested in exploiting the riches of their colonies, and initially not interested in settling the new lands. The French', English and Dutch by contrast came as settlers, but **after** a series of wars ultimately the English were largely **left** as the dominant North American power.

Subsequently, the original 13 English colonies, **all** located on the Eastern seaboard of the US, inherited British common law **from** their colonial master. However, after a series of disputes in the 1760's and 70's ranging from taxation, to the quartering (housing) of troops in private homes, a minority of colonial **leaders** proclaimed independence from Great **Britain**³.

Revolution

These leaders created a revolutionary congress, The Continental Congress, to rule the newly proclaimed country and established a united army. However, **this** congress had very

¹ The name Indians is derived from **Christopher** Columbus's mistaken **belief that** his boat had **landed** in **India**, and not a new continent. **Therefore**, he **referred** to the **inhabitants** of this strange new **land as** Indians, **and the** name **stuck**. Unfortunately, he **never realized his** mistake, and died believing **he** had **discovered a** sea passage **to the** **Indian Subcontinent**.

² A **French** civil law code is **still used** in the State of **Louisiana**, but has been **amended to conform** to us **requirements**.

³ See **the Declaration of Independence**, reproduced in the appendix of **this text**.

little power in reality, and relied upon the cooperation of the individual states to feed and equip its army. Furthermore, the states also appear to have had little regard for the laws promulgated by this national assembly and up until the establishment of the first constitution, the congress was a legislative body whose powers were largely undefined.

The Articles of Confederation

Nonetheless, in spite of numerous hardships the revolutionaries prevailed, and established the first US government under The Articles of Confederation. A very weak constitution, which was incapable of governing the country, or settling the disputes between the states; it was therefore determined by the leaders of the new US to create a new constitution.

The US Constitution

Subsequently, a constitutional drafting assembly was called, and a new constitution was created. Upon ratification by 9 states it became law in 1789. This new constitution strengthened the central government, but still reserved great powers for the individual states. However the new constitution gave the Federal government the right to regulate trade (the Commerce Clause), and established a US Supreme Court as the highest court in the land. Furthermore, it was accompanied by the Bill of Rights, the first ten amendments to the constitution, which proclaim the rights of US citizens, and the procedures for further amending the constitution should the need arise, and it has on several occasions over the course of roughly 200 years of **United States** history.

Civil Rights Legislation

Important amendments to note are the **14th**, 15th and 16th amendments, which freed the **African** American slaves and outlawed slavery. They also guaranteed the slaves citizenship and expanded the rights associated therewith. However, these amendments went largely ignored in many areas of the **rural** south until the civil rights movement of the 1950's and **60's**, coupled with an activist US Supreme Court, which brought about rapid changes in the traditional discriminatory system that had still existed in southern US society.

Another important amendment was the 19th amendment, ratified in 1920, which guaranteed women the right to vote. This amendment emancipated (**freed**) the last section of society, who had not previously enjoyed **full** rights of citizenship before the law.

Expansion of Federal Regulation

Finally, the great depression of the 1930's and World War **II** 1941-45 forced the federal government into an activist role. Previously the state governments had exercised greater control over their citizen's lives, and the federal **government** had stood back and observed. However, in response to these events the federal government assumed the mantle of

leadership, as of yet unprecedented except in times of war, and passed volumes of legislation regulating everything from the workplace to consumer goods.

Power Returned to the States

In recent years, conservative legislators have criticized the growth of big government for inefficiency, and sought to downsize the role of **the** federal government, and return a considerable share of the powers of government to the states and the private sector. **Subsequently**, the federal government has deregulated industries, and returned control of a considerable amount of its regulatory power to the states. Thus **it** is hoped, that more decisions will be made directly by the people involved at a local level.

Conclusions

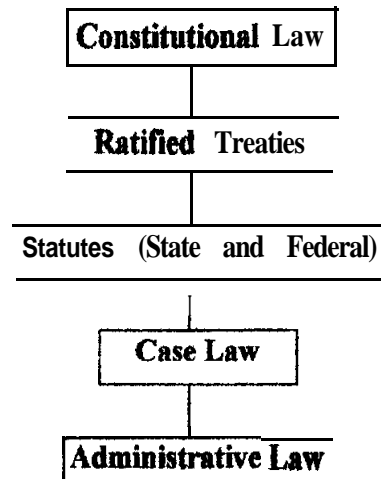
American law is an ongoing **and** constantly changing edifice (structure), but the consistency of the institutions to accept and tolerate change is one of its most redeeming features. The actual constitution, which can be found in the appendix to the text is a small and largely imprecise document, which has been able to grow to fit **a** changing nation.

Please answer the following questions regarding the passage above.

1. Who were the original inhabitants of the US?
2. What was the first Constitution of the US called?
3. What are the first 10 amendments to the US Constitution Called?
4. When were women in the US guaranteed the right to vote?
5. What caused the expansion of federal **regulation** in the 1930's and **40's**?

Sources of Law in the American Legal System

There are various sources and levels of law which can govern any situation within the American legal system. These sources include, Constitutional Law, ratified treaties, statutes, case law, and Administrative Law, and are listed above in general order of descending importance (see the diagram below).



Constitutional Law

The American legal system is a common law system, loosely based on its British predecessor. What this means is that the Founding Fathers (**drafters** of the American Constitution) sought to emulate the best aspects of the British legal system while retaining judicial independence. This was done by creating an **elaborate** system of Check and Balances upon power, which **left** the Judiciary largely free of political control by the Congress or President,

Neither Congress nor the President has the power or authority to overturn decisions of the American judiciary. **In fact** their only source of control involves the president's ability to appoint new judges and the sole right of **congresss** to control the approval process. These checks on the power of the Judiciary are the executive and legislative branches only means of **influencing** the **rulemaking** of the Judiciary. The right to appoint and **aprove** judges is **further** diminished by the life-time tenure given to Justices **who** serve on the US Supreme Court.

The constitution itself, is given **preeminece** over all other American laws and can not be violated by the US government. However, the American constitution is a very brief document of only a few pages and is thus subject to a considerable amount of interpretation, thus we return to the powers of the judiciary, who have the **sole** right and

power to interpret the exact meaning of the constitution and **all** other laws of the United States as applied to any particular situation. Subsequently we have also defined the Judiciary's principal powers within the American legal system.

Some examples of constitutional law which can not be violated by any other law are the rights to **free** speech and freedom of religion. As a result no laws can be created which prohibit the right to speak out against the government or worship as **any** individual so desires. An important example of free speech was the issue of flag **burning** during the 1980's and early 1990's. **Individuals** wishing to protest against the American government **would** frequently burn American flags as a sign of protest. This action was generally against local law in many cities and states, but the **preeminence** of Constitutional Law super-ceded, and forced the overturning of all laws prohibiting flag burning.

Another important element is the so called "Commerce Clause," which reserves for the federal government the right to regulate commerce (trade) with foreign countries and even among the states themselves. Thus only the national government may **make** treaties with foreign countries and regulations governing interstate trade. Thus local state governments can not prohibit the **sale** of goods **from** other states or the travel of individuals from other states to their state. They also may not create discriminatory taxes designed to protect local businesses or industry. For example, the state of Kansas can not put a sales tax on all TV's sold in **Kansas**, which are manufactured in **Missouri**. However, Kansas does have the right to put a tax on the **sale** of **all** TV's in Kansas, so long as it does not discriminate against products **from** other states,

Treaties

Below the constitution in a descending level of importance are treaties concluded by **the** executive branch of the government and **ratified** by the Senate. A treaty which is not deemed contrary to the constitution, **is** enforceable in **all** American **courts**, and supercedes contradictory state and federal law. Only the constitution of the United States is deemed more important than ratified treaties.

Treaties regulate a diverse field of relations among nations from international trade, environmental concerns, to matters of extradition of criminals between nations. There are numerous treaties to which the US is a member, and the number is far too high to list them all here. However some good examples include trade treaties, like the General Agreement on Trade and Tariffs or GATT as it is more commonly known. Under the GATT the United States can not pass Protective **Tariffs** against foreign products of **friendly** nations.

The United States can not pass laws, which violate its treaty commitments, subsequently the US, as are most countries, is very reluctant to enter into such relationships, and thus surrender a portion of its sovereignty.

Statutes

Statutes are divided into both Federal and State statutes, which are the third level of law within the American legal system. Federal statutes regulate interstate activities and those involving foreign countries, whereas state statutes regulate activities strictly conducted within the state (ie. the sale of alcohol, sales tax and numerous other areas of regulation reserved for the states).

The federal or national government may not regulate strictly (entirely) intrastate **activities** as this power is reserved in the constitution for the states. However any activity which occurs between more than one state is subject to federal law. For example the sale of goods **from** one state to consumers within another. Or simply the transport of goods **from** one state across a state and to another, where they are finally sold.

Case Law

Case Law or law derived **from** the rulings of previously decided cases, is an integral (important) part of the American legal system. The common law system, unlike the civil code legal system predominant throughout much of the world, does not assume that **all** legal decisions can be reached simply by evaluating the existing statutory or written law. Therefore, the American **judiciary** examines previous case decisions (rulings) to supplement the existing written law. Where no relevant statutory law exists, case law is also used to define the rights and responsibilities of the individuals involved. Thus it is believed by advocates of the common law legal system, that continuity of decisions is reached on a much more **frequent** basis.

Administrative Law

Administrative Law is meant to **define** the area of law (rules) created by executive agencies to enable them to carry out their functions. For example, Congress gives the president the power to collect income tax **from** all citizens of the US. The tax is to be collected at rates outlined in the congressional legislation, but does not **specify** how it is to be collected and in what manner the law is to be enforced. These areas are **left** to the discretion of the executive branch (the office of the president). The president, for his part, does not go out himself and collect the taxes, or for that matter send out his personal aids, instead he creates an administrative agency under his overall supervision tasked with the enforcement of the law. This agency then creates rules for the enforcement of the law to include: a date for all taxes to be paid, investigation procedures to ensure **all** citizens pay their taxes on time, and procedural guidelines to ensure honesty. Furthermore, as these agencies are under the supervision of the president, when a new president comes into office he may appoint new people to administer the agency, and new **rules** for the collections and enforcement of the taxes. Subsequently, executive agencies are generally considered efficient vehicles for the administration of congressional laws.

Other examples of administrative agencies include the Equal Employment Opportunity Commission, which regulates employment discrimination in line with its congressional mandate, and the various branches **of the** military, which provide for the nation's defense needs. Congress retains a considerable amount of control over **all** of these agencies through its sole constitutional power to approve or disapprove **all** governmental spending allocations. In other words if Congress disagrees with how the executive branch is **running** these programs it can simply cease (stop) funding them.

Please answer the following questions.

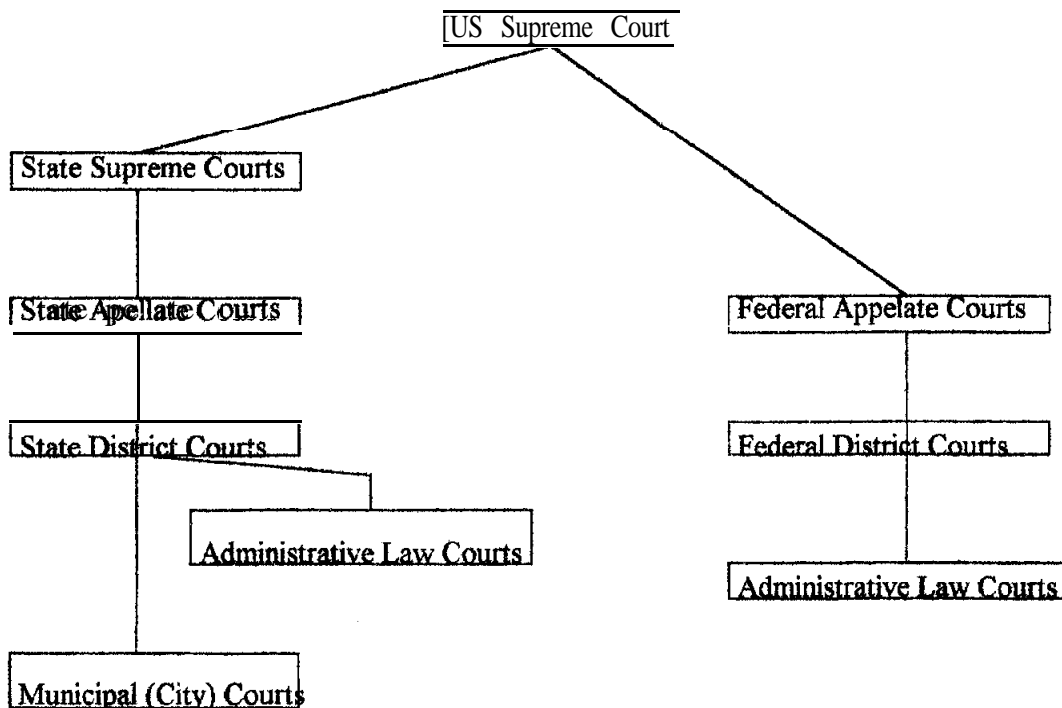
1. What is the most powerful source of law in the American legal **system**? What is the least **powerful**?
2. When examining a foreign trade question, should one **first** look to applicable treaties or US statutes? Why?
3. What are some rights **guaranteed** in the US constitution? What in your opinion are the most important rights guaranteed and why?
4. What are some examples of administrative agencies in the US.
5. Who is in overall charge of all US federal administrative agencies?
6. What is case law, and how is it used?

Please define the following terms. Use the legal glossary at the end of this book, or a legal dictionary if necessary.

1. Intrastate (the opposite of interstate):
2. Treaty:
3. Statute:
4. Constitution:
5. Common Law:
6. Case

The Judicial System In America

Just as there are two levels of government in America (state and federal), the American judiciary is **also** a two tiered system, with parallel court systems at both the state and national level. State courts have precedence over matters **occurring** strictly within the state, and those which do not involve an issue of federal or constitutional law. State courts also have precedence over issues concerning their citizens (both corporate and real) with citizens **from** other states (so long as the issue in question does not exceed a certain dollar amount, currently \$65,000). This latter type of jurisdiction is called diversity jurisdiction, and when the amount sought exceeds the court proscribed dollar amount, then federal courts may claim jurisdiction. Nonetheless, the US Supreme Court remains the final court of appeal in both state and federal court systems (see the diagram below).



Federal courts exist throughout the US often times alongside their state counterparts, and in some cities quite literally across the street from each other. This parallel system may seem a bit **confusing**, but the foreign student must understand that the court systems do not compete with each other as they hold separate **realms** (areas) of jurisdiction. This can loosely be defined as jurisdiction over national problems for the federal courts, and jurisdiction over local problems for the state courts. While this **explanation** is a bit over simplified it is largely accurate and more than adequate for the foreign student attempting to understand the American judicial system.

Administrative Law Courts

Administrative law judges are not true members of the judiciary, but rather officials within administrative agencies (state or federal), who conduct **investigations**, and issue **rulings** in a **quasi-legal** environment. Their rulings generally have the same power of law as administrative laws or rules, and are subject to appeal through the regular court system. Administrative law judges are chosen for their expertise in certain **fields** (ie. employment discrimination, labor law and numerous other areas). These professionals are generally appointed and serve as members of the executive branch. Often times they are chosen by the **executive** branch in line with their support for one particular political parties views on issues at hand, and their decisions are much more likely to be criticized for political motivation. Nonetheless, their factual findings are given considerable deference upon appeal by the normal courts due to their designation as experts. However, issues of procedural law are likely to be examined upon appeal, and these issues will be given a **full** review upon request, as the administrative law judges presumed expertise in the particular **field** of endeavor does not preclude an overall review of the procedures used.

Please answer the following questions.

1. What is the most important court in the United States?
2. If an appeal is made from the California Supreme Court, what court is the appeal made to?
3. Appeals **from** administrative law courts are made to what kind of court?
4. Justices of the US supreme court are appointed for how long?

Please define the following. Consult your the glossary or a legal dictionary if necessary

1. appeal:
2. court:
3. judge:

The American Jury System

Juries **where** originally introduced to the American legal system by the British before independence, but grew in strength and power after independence. The role of the Jury is to ensure a fair outcome in any given court case by ensuring the defendant the right to a jury trial (trial before his peers), and an outcome that will be decided by private citizens. The founders of the United States were very much concerned about the threat of big government and an overpowerful governing **authori**ty, so the jury system was used to further restrict the power of the government, and insure **impartiality** and fairness in **judgements**

Jurors are usually selected **from** the eligible voters **from** the area over which the **court** in question has jurisdiction. Said jurors are usually private citizens chosen from a pool of **perspective** jurors by the opposing parties, and usually number 12. The attorney for the two opposing parties use a certain number of strikes (legal exclusionary decisions) to eliminate jurors whom they feel are predisposed (**prejudiced**) against their client. The remaining jurors are then assigned to the case. Jurors who subsequently engage in conduct in violation of their duties as jurors may be dismissed upon request by the parties, and the decision to dismiss is left to the discretion of the presiding judge.

In criminal cases decisions of the jurors must be unanimous, but in civil cases (those not involving imprisonment, and usually concerned with money) juries can **often** times rule by majority, but the exact ratio is determined by the laws of the relevant jurisdiction. Once a decision has been reached, and short of some gross misconduct on the part of the jurors (ie. the acceptance of bribe money, . . .) a jury decision will generally be held to be law regardless of how absurd it may seem to the vast majority of Americans. When the jury's decision has been found to be a clear violation of the existing laws, it may be **overturned** upon appeal, but there is a very strong bias towards acceptance of the jury's **decision**⁴.

Please answer to following questions.

1. How many jurors must you have in a criminal trial?

2. Can a jury convict a man by simple majority in a criminal case?

⁴ As an example of just how strong a bias there is towards **accepting** jury decisions, I was **told** by a **former** law **professor** of a case he argued before the US Supreme **Court**, in which the **court** upheld a civil award given by a **jury**, who after rendering **their decision** had been found to have been **under** the **influence** **cocaine** during the deliberation **process**. Nonetheless, despite **overwhelming** evidence, **the** court upheld **the decision upon appeal**.

3. Is it easy to overturn a jury decision'?

Please define the following terms.

Overturn:

Unanimous:

Hung-Jury:

Acquittal:

Crime In The American Legal System

Criminal Law in the American legal system is divided into two major areas of crime. Common law, or traditional crimes (Le. **robbery, murder, assault** and **battery**, to name a few of the more common ones), and statutory crimes which are created and **fin**ed by **statute**. Statutory crimes are traditionally created in areas of modern or rapidly developing criminal law. Some examples would include the US. Foreign Corrupt Practices Act (which **governs** the payment of bribes to foreign officials), **Securities Laws** designed to govern mimes committed on the stockmarkets (Le.. **insider trading**), laws punishing **eoncustodial parents who** fail to **pay childsupport** and other areas of law which did not exist in a traditional legal system. As in all other areas of the common law, when contradictory statutes and case law exists, the legal interpreter should first look to the statute and secondly at any relevant case law which can be used to interpret the statute.

All modern common law systems are a mixture of these two areas of law, and thus are the focus of this brief introduction into the English vocabulary used in the American criminal legal process. Subsequently in light of the vast nature of the subject, this section shall focus primarily on the vocabulary associated with Business related crimes and to a much lesser extent a general introduction to the broad areas of Criminal English vocabulary.

It is the belief of the author based upon several years spent working abroad, that the vast majority of foreign lawyers and businessmen need only acquire a basic **familiarity with** the vocabulary associated with this area of the law, and primarily in response to business oriented subjects. Therefore, an attempt has been made to limit the scope of examination to pertinent (relevant) areas of study. A more detailed analysis shall be **left** to those intending to continue their legal education in an English speaking country, or simply those who have a unique interest in this area of the law.

The Facts

Imagine that you are the prosecutor in a case against the **accused perpetrator**. **You are** given the following **evidence** and you must determine if any crimes have been committed, and if so which ones.

David **Gertz** a well known New York corporate president, has mysteriously resigned and **left** the **country** for Brazil after informing his staff that, he is **suffering** from health problems associated with his corporation's **financial** problems. His executive officers were not aware, that the company had financial problems. In fact, the corporation had attained record profits the year before, so the company's vice-president Mr. Rek summoned **independent auditors** to examine the corporation's books. **After** a detailed study of the **company's books (financial records)**, they determine that 100 million dollars of corporate funds (money) is missing, and that the corporation also owes the Internal **Revenue**

Service, IRS, another **20** million dollars **in back** taxes. Furthermore, the corporation is rapidly nearing **bankruptcy** with only about two million dollars **left** in its treasury, and several million dollars in bank loans **coming due** in three weeks. **Mr.** Rek understood that within **weeks** the company would go **under unless** he **acted** swiftly.

In a panic, **Mr.** Rek ordered **the** auditors not to make **a public disclosure** about the companies financial problems. In addition, he offered them ten thousand dollars each to lie and make a favorable **public statement,** but they **refused** and instead demanded the same amount in order not to tell (a duty that was already required of them by the ethics of their profession). **Mr.** Rek understanding their threat agreed, and wrote them **company** checks. Furthermore, he decided to convene a secret meeting of the other high executive officers he: knew he could trust **Mr.** Slimey, the **chief** corporate counsel, and **Mr.** Digit, the chief financial **officer.** He did not invite **Ms.** Steno the corporate secretary because he did not trust her.

Together the three officers discussed the situation and concluded it was probably too late to save the company **from** bankruptcy, and that they should instead **cover-up** the problems for as long as possible, so that they could sell their **stock** in the corporation at its current high market price. **In** addition they wished to receive their annual Christmas **bonuses** out of the companies remaining meager **funds,** before its bank loans came due. **Mr.** Digit and **Mr.** **Slimey** **justified** their deception by arguing that they shouldn't trouble the employees with their inevitable unemployment until **after** the Christmas season. **Mr.** Rek agreed and further justified their actions with the remark that the company was so far into debt that a couple million **dollars** more or less would not be missed.

Therefore, for the next couple of weeks **all** three executives sold their **stock** at the artificially high current market prices, and avoided millions of **dollars** in potential losses. They also lied to company employees and claimed that **Mr.** **Gertz** was merely on a three week vacation Christmas bonuses were paid as usual and the company seemed outwardly normal.

Ms. Steno, the corporate secretary, became suspicious, and thought something illegal was happening, but decided to do nothing, because she did not want to postpone her three week vacation to **Phuket,** Thailand. Therefore, she decided to wait until her return to investigate the strange **(unusual)** behaviour of her fellow corporate **officers.**

However, **government** **investigators** became concerned, at the large amount of **suspicious trading** involving the company's stock and sent **a** team of expert investigators to examine the unusual dealing. They quickly discovered the true nature of the company's **financial** status and confronted **Mr.** **Rek,** **Mr.** Slimey and **Mr.** Digit. Before being arrested, **Mr.** Rek offered the investigators large sums of money to **let** them go, but **the** investigators **refused** to accept the **offer.** They were taken to jail, and **held without bond,** as it was felt by the judge that they were likely to flee the country if allowed out on **bail.** In addition, preliminary contacts were made with the Brazilian government to **extradite** **Mr.** **Gertz,** but as no formal **extradition** treaty existed between the two countries there

was very little that could be done to bring him back within **US jurisdiction** for prosecution. None the less, a warrant was issued for his arrest by an American court, in the event he returned to the US.

Questions For Discussion

Now, what crimes if any are the above people guilty of?

Mr. Gertz?

Mr. Rek?

Mr. Slimey?

Mr. Digit?

The auditors?

Ms. Steno?

Please define the following terms.

1. extradite (extradition):
2. bankrupt (bankruptcy):

Tort Law

Many have probably heard of the recent American case in which a woman spilt a hot cup of McDonald's coffee in her lap while driving a car, and was awarded several million dollars by a jury, even though in the eyes of most Americans she was primarily at fault. How could such a seemingly absurd decision have been reached one might ask? To answer **this** question we must look at the foundations of **the** American Tort law.

The law of tort or personal injury in America has traditionally been a **field** of common law. However with the development of numerous state and federal statutes (i.e. workmen's compensation laws), statutory inroads have been made into this former reserve of the common law. None the less, it is primarily governed by the reasonable person standard, and is the focus for considerable debate about legal reform.

The importance of this area of law to the foreign student studying the American legal system surrounds the long-arm provisions of most American jurisdictions, which will claim jurisdiction over cases involving injuries to American citizens, and injuries occurring inside the U.S.. An example of this might be a case involving an American citizen, who is injured by a defective or dangerous piece of equipment manufactured in Thailand, but where the injury occurs (happens) in America or in a third country (like Laos). If the Thai company had **assets** in America (and most **large** companies do), then it could be forced to defend the case in America. This will be a point of growing importance as Thailand becomes economically more developed and thus interdependent with America.

The Reasonable Person Standard Defined

The reasonable person standard asks the jury should a reasonable **person** have acted as the defendant acted in the circumstances in question? If not, then the **defendant** is deemed to have been negligent, and thus liable to the plaintiff for **his/her** injuries. Or in other words, should the defendant have been aware that his/her conduct was likely to cause harm to the **plaintiff**? These are the questions that **an** American Jury or judge (in the event the parties do not seek a jury trial) is asked to decide, and **often** times can lead to quite surprising results.

In the aforementioned case the (defendant, McDonald's Corporation,, sold the plaintiff (a customer) **coffee** heated to, what the plaintiff claimed were "extreme temperatures", in an effort to provide its customers with satisfactorily hot coffee, **which would** not rapidly become cold (and thus undrinkable). Now it should be said at this juncture in defense of McDonald's **actions**, that **probably** most coffee drinkers in America, even the plaintiff under normal circumstances, desire their coffee not just warm, but hot. Furthermore, it was out of a desire to provide excellent service to its customem, and thus avoid complaints about cold co&e, that McDonald's provided "exceedingly" hot coffee to its customers. Its rationale being that people who buy coffee presumably are aware of its hot nature, and **thus** should be considered to **'be on notice** (aware) of its potentially hazardous

(dangerous) nature if spilt upon oneself or others, Subsequently, McDonalds claimed to have presumed no **further** warning was necessary under the circumstances.

Plaintiff, the customer, asserted however, that the coffee was so ‘exceedingly’ hot as to be a menace (danger) to the public. Furthermore, McDonalds should have been on notice of the potential danger involved in giving people “exceedingly” hot **coffee**, who were likely to drive away and drink it while driving. **Plaintiff** produced evidence showing that McDonalds had received complaints before regarding the temperature of the coffee, but chose to ignore the complaints in an effort to provide hot coffee in the way the vast majority of its customers liked it.

The case was presented to a jury in roughly the format I have given you, and a jury of 12 presumably reasonable persons choose to agree with the **plaintiff**, that **McDonalds** had neglected the welfare of its customers in favor of customer **satisfaction** (profits). Subsequently, the **plaintiff** was awarded several million dollars.

The award was trimmed down a bit upon appeal by McDonalds, but none the less, this cases demonstrates the power of the American jury system, and in some circumstances the unpredictability of applying the reasonable person standard. It is difficult to say what **factors** motivated the jury to reach their decision, but it stands as law, and this case introduces us to some of the problems associated with American Tort law.

Cases such as the McDonald’s case described above, have increased calls in recent years for a reform of American Tort law. Some reforms include the inclusion of workmen’ compensation laws, which provide state funds for people injured on the job, and a **few** variations upon the theme. However in a time of general budget cuts, and gro**wing** claims upon the system, coupled with the high cost of medical treatment in America⁵, many Americans are calling for substantial reforms in this area of law.

However, the outcome of these calls for reform is unpredictable at this stage, and students of American tort law should thus focus their attention upon understanding the reasonable person standard, and how it determines the issue of negligence. It is important for the foreign student to understand this subject because American courts will claim jurisdiction over any injuries occurring in America or to its citizens abroad, when no better forum (jurisdiction) exists (in the court’s opinion).

⁵ **The cost of a singel nights stay in an American hospital can run into the thousands of dollars irrespective of the treatments undertaken. With substantial treatment the figure can be well over 10,000 for a singe night in the hospital. While hospitals can net tam away poor patients suffering life threatening ailments, they can refuse service to patients whose conditions are not deemed serious enough to warrant immediate treatment. Welfare recipients are guranteed health care by the government, but individuals, who are working class and lower middle dass do not qualify for this government assistance, and thus sometimes “fall through the cracks” of the American health care system. This is a major delirrima facing America today, but has been answered to a large extent by private healthcare providers HMO’s, and group health insurance. Nonethdess, problems still remain within the American system.**

Questions For Discussion

1. **What** is the burden of proof to convince a jury or judge that the defendant has been negligent?

2. Was the McDonald's (decision correct? Why?

3. Under what circumstances might a Thai company be forced to defend a tort law claim in **the U.S.**? Is this fair?

4. What possible reforms **can** you suggest to fix American tort law?

Please Define the following terms and phrases.

1. Reasonable person standard:

2. Tort:

3. **Negligence:**

4. Victim:

Criminal v. Civil Actions In the US Legal System

Double Jeopardy

Double Jeopardy is defined as the constitutional right of the defendant to only be tried once for any given legal action. In other words, if a criminal or civil defendant in the US legal system defends him/herself to a **successful** conclusion against charges or claims brought against him/her, he/she can not be retried on the same charges ever again under US law. This maxim (rule) of US law is guaranteed in the constitution, and is strictly enforced, barring the commission of major irregularities at the trial (i.e. the defendant bribed, threatened the jurors . . .). However, short of such extreme irregularities on the part of the defense or prosecution, the decision of the jury will be respected no matter how absurd it may **seem** to the vast majority of Americans.

Nonetheless, this does not prevent a defendant **from** having to defend himself in court against both criminal and civil actions. **This** separation of legal actions occurs as a result of the separate and distinct burdens of proof found in both criminal and civil suits. In the criminal **trial** the state must prove that the defendant is guilty beyond a reasonable doubt, a very difficult standard to prove in court. This high burden of proof is insisted upon in criminal trials because of the likelihood that the defendant will be sentenced to imprisonment (loss of freedom), or the death penalty (loss of life), where permitted by law. However in civil suits (actions), the defendant only risks monetary (money) damages, and therefore, the **plaintiff** (party claiming damages) must only prove the defendant's culpability (responsibility), so that a reasonable person (juror) could conclude that the defendant is responsible for the **plaintiffs** injuries (based upon a preponderance of the evidence) and should therefore compensate **him/her**.

For example, **while** these terms are not defined for the **jury** in overly simplistic form, a strict interpretation of the English by the jury, could likely lead them **to** conclude when given the criminal "beyond a reasonable doubt," that this instruction could be interpreted to mean that they must be as much as 99 or even 100 percent sure **that** the defendant is indeed guilty of the crime **he/she** is accused of, whereas the civil burden of proof "only requires that the jury believe **the** defendant is **liable** based upon a preponderance of the evidence," which could be interpreted to be as low as a 50 or 60 percent likelihood that the defendant was responsible for the plaintiffs injuries or perhaps even **less**⁶. Subsequently defense counsel in the criminal trial need not prove the innocence of the defendant, but merely convince the jury that there is another plausible (possible) cause of

⁶ Some states allow **juries** to apportion liability according to **the defendant's** fault in **figures well below 50%**, and will **find** them proportionately **liable**. However, where the other defendants **are** unable to pay, the **defendant** with a deep pocket (money enough **to** compensate the defendant's injuries can **be forced to cover the full sum, in lieu of the other defendants**. **This can occur even when the plaintiff is also primarily at fault**. However, many states only **permit recovery** when **the defendant's** liability for the **plaintiff's** injuries is above a certain percentage, and **there** are other state by state **formulas** designed to make **such** rulings **more** equitable.

the **crime**', or that the defendant did not have a great enough opportunity to commit the crime, even though it still appears likely that he may have indeed committed the crime he is accused of.

Therefore, in **the** criminal trial the defense counsel must only sow (place) doubt in the minds of the jurors, and need not prove the innocence of his/her client. Under these circumstances the job of the prosecutor is made very **d.ifficult**, and thus the prosecutor seldom takes an individual to court unless he/she believes that **irrefutable** (undeniable) evidence exists to establish the defendant's guilt.. Thus, some **criminals** unfortunately go free, but even fewer innocent **people** are wrongly placed in prison as a **result** of this institutional safeguard. Furthermore as explained above, **once** a jury acquits the defendant in a fair trial (finds the defendant not guilty), **he/she** can never be prosecuted again for the same crime(s), even though new evidence may be discovered **after** the trial, which **irrefutably** establishes the defendant's **guilt**.

In contrast, in the civil trial the plaintiff (usually a private individual **seeking** monetary damages) need only prove that the defendant is more likely than not or even partially responsible for **his/her** damages. Therefore, even though a criminal defendant may have been found innocent of the murder of a crime victim, the victim's estate can sue the same individual in a **later** civil action for the victim's **wrongful** death. Of course this scenario can be extended, to almost any crime and its accompanying civil action, and therefore even though the defendant **may** be found not guilty (his/her guilt can not be established) there is no guarantee that his/her legal troubles are over.

The OJ Simpson Trials Explained (Criminal v. Civil Actions)

Two recent cases in America, **which** illustrate this principle of the American legal system well, were the **O.J.** Simpson criminal and civil trials, concerning the **murder**, and thus **wrongful** death (the civil action claim) of his former wife Nicole Brown Simpson, After a brief investigation following the brutal murder of Ms. Simpson and her **friend** **Mr.** Ronald Goldman in front of her house, Ms. Simpson's former husband, the American sports legend **O.J.** Simpson, was arrested and tried for the murder of his ex-wife: and her friend,

The Criminal Trial

⁷ The defense claimed during the criminal **trial**, without any supporting evidence, that the killings were the work of Colombian **drug** lords attempting to strike out at a house guest of **Nicole** Brown Simpson's, Faye **Resnick**, a **female** friend who admitted to having a cocaine problem, but strongly denied having any involvement with any drug lords, and this seems to be supported by police testimony at trial. However, this **claim** was not permitted in the civil trial as the defense had not been **able** to provide any evidence in support of its claim in **spite** of the passing of two **years** since it had **made** such claims.

Police became suspicious of Mr. Simpson for a variety of reasons, including a trail of blood, which appeared to lead **from** the murder scene to his nearby estate (house). Furthermore, Mr. Simpson's white Bronco was found to have traces of the **victim's** blood within the vehicle. These clues, coupled with Mr. Simpson's legal history of **spousal** abuse (wife beating) and others led the police and prosecution to deduce that Mr. Simpson had indeed been responsible for the deaths of his former wife and her male friend.

When the police moved to arrest Mr. Simpson he initially **refused** to surrender and instead attempted to flee (escape) once it became clear that the police were to press charges against him for murder. In the well publicized "low speed chase" of Mr. Simpson's white Bronco by the Los Angeles police force Mr. Simpson acted in an erratic manner, which included threatening suicide, and ultimately surrendered to police in the driveway of his home after being talked out of suicide by **friends**, family and police, both in person and over his cellular phone.

Transcripts of his cellular phone conversations, not given to the jurors in the criminal trial would appear to indicate Mr. Simpson's guilt, but this information was not made available to the jurors, presumably based upon California rules of evidence. Therefore, this valuable piece of evidence was excluded and could not be used to foster (aid) Mr. Simpson's conviction. Nonetheless, it was believed by the prosecution that the evidence was still overwhelming, when one evaluated the totality of all the forensic* and circumstantial **evidence**⁹.

Upon his arrest, Mr. Simpson sought expert legal advice, and obtained this under the auspices of his "Dream Team" of lawyers, a collection of some of the most famous criminal defense lawyers in the country. However initially few believed even these great attorneys would be able to convince a jury, that OJ Simpson was not guilty

Jury Selection

The prosecution was so certain of a conviction that they even allowed the defense to almost choose their jury, one which largely consisted of African-American jurors, who generally are distrustful of police officers, and therefore less **likely** to give credence to their testimony. In defense of the prosecution however, this decision must be weighed against the background of the recent LA riots largely by **African** Americans, **after** the acquittal by a **predominately** white jury of several police officers accused of wrongfully beating a black motorist, Rodney King. The beating had been caught on video, unbeknownst to the officers. When viewing the video, it appeared to most who viewed it,

⁸ Evidence of a scientific medical nature based upon laboratory tests, ie. DNA blood tests **identifying** the victims blood, time of death,...

⁹ Evidence based upon the circumstances surrounding the commission of the crime, i.e. where was the defendant at the time of the commission of the crime, did the defendant have reason to desire the victims' death,.

to be proof positive of the officers' guilt, but, as previously mentioned, a largely white jury believed the **officers** to be merely defending themselves from an aggressive man. Regardless of your feelings on the outcome of that trial, it is **established** that the acquittal of the police officers involved, led to severe rioting and looting in South Central Los Angeles (the predominately black section of Los Angeles), by countless residents. Furthermore numerous people were injured in the ensuing **riots**¹⁰, and it was against this recent backdrop, and in conjunction with their belief in the overwhelming nature of their evidence, that the prosecutors made the decision to ignore the advice of their jury expert, and **allow** a predominately black jury to be selected for **Mr. Simpson's** criminal trial.

At this juncture I also feel it is important to note that under US law it is illegal to exclude jurors exclusively on the basis of race, but there were numerous other measures that could have been employed to exclude jurors for cause and thus obtain a more ethnically **balanced** jury, which more accurately reflected the racial composition of the **Los Angeles area**. Furthermore, **allegations** that race **plays** an important part in the jury decision is not limited to minorities alone, as it is by contrast **often** claimed that predominately white juries tend to generally **find** for the **prosecution**, and place great trust in the testimony of the police. This point has been vigorously argued, **particularly** when an African American defendant is accused of a crime, presumably **based** upon racial prejudice. This claim is upheld by polls, which found most **African** Americans believed **OJ Simpson** to be innocent, but on the contrary, most Whites believed him to be guilty. Subsequently, when discussing this issue, you **will often** hear arguments that the decision was based **solely on** race from both sides of the spectrum.

The Criminal Verdict

Ultimately, in spite of seemingly **overwhelming** evidence of his guilt and an estimated expenditure of **9 million dollars** by the city of Los Angeles to prosecute the case"; his dream team of lawyers **were** able to **successfully** create "a reasonable doubt" in the minds of a Los Angeles **jury**¹², which found Mr. Simpson not guilty of the murder?. Against allegations of racism and rich man's justice, Mr. Simpson was irrefutably, and

¹⁰ **Most** notably being **Reginald** Denning, a white truck driver, who had the unfortunate luck to be driving **through** the area of the rioting, when he was dragged from his vehicle **and** almost beaten **to** death by an **angry** African American mob, Fortunately an African American risked his **life** to rescue him **and** protect him until the police **could** take him to **safety**. Furthermore, a television news helicopter (camera) was hovering overhead and reported **the** incident, so **that** several of his attackers were later brought to **trial** and convicted of the beating.

¹¹ "Simpson Trial Statistics," Associated Press, the Internet.

¹² The Jury had been in enforced **isolation** from the outside media (sequestered) for 266 days by **the** end of the trial. Furthermore, out of the original **twelve jurors** and twelve alternates selected (an unusually large number of **alternates**), ten were removed from the jury during the course of the trial for misconduct **and** various other reasons (ibid.).

¹³ **Interested** readers **will find** a copy of **the jury** instructions issued in the criminal trial by Judge Lance **ito** in the **appendix** of this text.

forevermore, found not guilty of the double murders after less than four hours of jury deliberations, and 474 days in prison". Subsequently, he may never be tried again for the murders of Ms. Simpson and Mr. Goldman, but he was later tried in a civil suit for **wrongful** death for the murders of the two forenamed victims.

The Civil Suit (Wrongful Death Suit)

The wrongful death suit mirrored the criminal trial in almost all facets, except for the absence of court room cameras and a predominately white jury. Essentially the same evidence was presented to the new jury¹⁵, which found Mr. Simpson to be liable for damages in the wrongful death suits, and thus indicated that they believe him to be responsible for the deaths based upon a "**preponderance** of the evidence." Mr. Simpson **was** required to pay monetary damages (compensatory and punitive) to the respective estates of the deceased, but as this was only a civil trial, and not designed to punish, he was not subject to any other form of legal sanction (punishment).

Compensatory Damages

In the American legal tradition, compensatory damages as the name implies are intended to compensate the victims for their loss. The measure of that loss is an issue for the jury to determine, and there is not generally a set formula for determining the value of injuries or the loss of life. Subsequently there is not much consistency in the award of damages, and the size of the award can **often reflect** the amount of sympathy the victim generates,

Punitive Damages

Punitive damages, as their name indicates are designed to punish, but not destroy a defendant, who has injured a plaintiff in a particularly loathsome or depraved manner. **Subsequently**, the court does not generally put **limits** upon such awards, unless they are deemed to be exceedingly high and largely unwarranted. However, in making such determinations the court will **frequently** look to the jury's opinion as a strong pillar of support for said award, will rarely overturn, and only reduce where said **awards are deemed** to be largely out of **line** with the actions of the defendant, the scope of the injuries, and the intention of the law (i.e. to punish but not destroy, with respect to

¹⁴ Jbid.

¹⁵ The **plaintiffs** produced **several pictures** of Mr. Simpson wearing **the** brand of **black** dress shoes **used** by **the** murderer (as **identified** by numerous **bloody** footprints at **the crime** scene), **but** which Mr. Simpson had denied **ever** owning. The **plaintiffs also** introduced transcripts of **the cellular** phone **conversations** Mr. Simpson made **while** involved in the "**low** speed chase," **which** tended to insinuate his responsibility for the murders. However, **perhaps** the most **crucial** (important) piece of new evidence was **OJ** Simpson's **testimony** at the civil **trial**, and subsequently, the issue of **his credibility**. Under **the** US constitution, a **defendant can** not be compelled to **testify** against himself in a **criminal trial**, **however** the same protections are not **available** in a civil trial.

punitive damages). Nonetheless, as previously mentioned, the courts prefer to uphold jury rulings, and look with considerable disfavor upon attempts to do **otherwise**.

The Awarding of Damages

Issues to be considered by a jury in determining the size of an award, are the lost earning potential of the victims, and **intangible** concerns, such as loss of companionship, pain and suffering (for injuries sustained) and other criteria, which are largely the province of the jury's personal beliefs and values. Subsequently, there has been some attempt to rein in "run away jury's" but in this instance the large sums awarded appear to have been fairly in line with what **mainstream** American opinion believed the injuries to be worth. **Nonetheless**, as is the norm in most big cases in America, the defense has appealed both the decision and the award, and hope to have it reduced as excessive upon appeal, if not overturned outright for various technical and substantive errors the defense **claims the** court made in reaching its ruling.

Conclusion

In summation, criticisms of the trials abound, with most being **levelled** at the criminal trial. Critics in my opinion justifiably argue that Judge Lance **Ito**, for whatever reason, allowed the Defense and Prosecution to turn his courtroom into a media circus. Furthermore, the judge allowed far too many sidebars, motions and unsubstantiated **frivolous** claims to enter into the proceedings, and should have instead taken a firmer band in upholding Mr. Simpson's constitutional right to a speedy and fair trial (although presumably Mr. Simpson was not upset with the outcome, he was nonetheless forced to languish in prison awaiting the verdict, **as** he had been denied bail). In contrast the Judge in the civil case **excluded** the cameras from the courtroom, **frivolous** (unsubstantiated) arguments and motions, and brought **the** civil trial to a rapid yet seemingly fair outcome.

Nonetheless, two views have emerged regarding the outcomes of the two trials. The first being that **racism** (African American v. White American), incompetence (on the part of Judge Lance **Ito**, LA Police and the prosecution) and **Mr.** Simpson's wealth (rich man's justice in the form of his dream team of lawyers) were all motivating factors in the different outcomes. The second view, proclaimed by a person no less important than President Bill Clinton, is that both decision were correct, and presumably the differing burdens of proof were the motivating factors behind the juries decisions. Both views have compelling arguments, but the truth probably falls somewhere between the two positions. Nonetheless, the trial has highlighted the growing demand for reform of the American legal system.

Ultimately, some might argue **Mr.** Simpson paid a steep price in the wrongful death suits **to** the victim's estates, but he managed to avoid spending the majority **of** the rest of his **life** in prison and a possible death sentence, had the jury found the murders to be premeditated. Furthermore, if he is **an** astute businessman and manages to hide a

to be proof positive of the officers' guilt, but, as previously mentioned, a largely white jury believed the officers to be merely defending themselves from an aggressive man. Regardless of your feelings on the outcome of that trial, it is established that the acquittal of the police officers involved led to severe rioting and looting in South Central Los Angeles (the predominately black section of Los Angeles), by countless residents. Furthermore numerous people were injured in the ensuing riots¹⁰, and it was against this recent backdrop, and in conjunction with their belief in the overwhelming nature of their evidence, that the prosecutors made the decision to ignore the advice of their jury expert, and allow a predominately black jury to be selected for Mr. Simpson's criminal trial.

At this juncture I also feel it is important to note that under US law it is illegal to exclude jurors exclusively on the basis of race, but there were numerous other measures that could have been employed to exclude jurors for cause and thus obtain a more ethnically balanced jury, which more accurately reflected the racial composition of the Los Angeles area. Furthermore, allegations that race plays an important part in the jury decision is not limited to minorities alone, as it is by contrast often claimed that predominately white juries tend to generally find for the prosecution, and place great trust in the testimony of the police. This point has been vigorously argued, particularly when an African American defendant is accused of a crime, presumably based upon racial prejudice. This claim is upheld by polls, which found most African Americans believed O.J. Simpson to be innocent, but on the contrary, most Whites believed him to be guilty. Subsequently, when discussing this issue, you will often hear arguments that the decision was based solely on race from both sides of the spectrum.

The Criminal Verdict

Ultimately, in spite of seemingly overwhelming evidence of his guilt and an estimated expenditure of 9 million dollars by the city of Los Angeles to prosecute the case¹¹; his dream team of lawyers were able to successfully create "a reasonable doubt" in the minds of a Los Angeles jury¹², which found Mr. Simpson not guilty of the murders¹³. Against allegations of racism and rich man's justice, Mr. Simpson was irrefutably, and

¹⁰ Most notably being Reginald Denning, a white truck driver, who had the unfortunate luck to be driving through the area of the rioting, when he was dragged from his vehicle and almost beaten to death by an angry African American mob. Fortunately an African American risked his life to rescue him and protected him until the police could take him to safety. Furthermore, a television news helicopter (camera) was hovering overhead and reported the incident, so that several of his attackers were later brought to trial and convicted of the beating.

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¹² The Jury had been in enforced isolation from the outside media (sequestered) for 266 days by the end of the trial. Furthermore, out of the original twelve jurors and twelve alternates selected (an unusually large number of alternates), ten were removed from the jury during the course of the trial for misconduct and various other reasons (ibid.).

¹³ Interested readers will find a copy of the jury instructions issued in the criminal trial by Judge Lance Ito in the appendix of this text.

The American Common Law Legal System

The American common law legal system is comprised of a combination of Statutes, Case law **as** well as executive implementation rules (administrative law). These are **listed** in descending order of importance, but are all integral elements of a common law legal system.

When faced with a common law legal problem in the United States, one must first determine if there are any treaties or statutes that apply directly to the problem. In the case of a US sale of goods **contract** generally the Uniform Commercial Codes Article 2, enacted throughout the US in the past 20 years, will be controlling. This statute has been adopted in some form or another in **all** 50 US states with only slight discrepancies (differences) separating the various state versions.

If a controlling treaty or international law covers the area of dispute, it **would** take precedence over national law, and its terms, if binding upon the states involved, would then be subject to interpretation by the country's case law defining ambiguous areas, or providing insight into the application of the law through the **precedential** value of the relevant case law. However, for the purpose of this brief study of the common law legal system let us assume that US law is controlling.

TLYS v. MWE

32 Ca. 389, 185 p.2d 712 (19%)

The Facts of Sample Case 1, TLPS v. MWE

Two companies Mr. **Whipple** Enterprises, Inc. a US company incorporated in the state of California, a manufacturer of party supplies (**hereinafter** referred to as "**MWE**") and **T. Leary Party Supplies a New York company**, a distributor of party supplies (hereinafter referred to as **TLPS**), enter into an agreement for the sale and purchase of **MWE's** party supplies. **The** contract sets out the quantities involved, the types, sizes and two delivery dates, as **well** as the mode and method of payment. The agreement is signed and performance begins. However., this is when the problems begin

Mr. **Whipple**, the president of **MWE** has been **secretly embezzling** company **funds** to pay off his **gambling** debts, therefore in order to **fulfill** his orders on time, principally those involving **TLPS**, he has been forced to purchase substandard (poor quality) materials for the manufacture of the aforementioned **party supplies**. However, the inadequacy (unsuitability) of the materials was not readily apparent (not likely to be noticed in an ordinary inspection), and **TLPS** accepted delivery of the first **truckload** of party supplies and rendered payment to **MWE**

However, shortly **after** delivery and the subsequent distribution of the goods among NY City retail shops, TLPS began to receive complaints about the quality of the goods. The snack foods, cigarettes and drinks were not properly preserved during the manufacturing process due to the use of substandard preservatives. Furthermore, upon closer examination in an independent laboratory it was revealed that many of the goods, which had not already spoiled or gone stale, were preserved with a chemical listed as potentially hazardous to the health of humans by the US Food and Drug Administration (a US governmental agency tasked with identifying hazardous substances).

Once TLPS learned this last bit of evidence, it **refused** to accept the second batch of goods as likely to be of a similar substandard quality as those already received, unless MWE agreed in writing that the replacement goods would not contain the disputed preservative, in addition, it also refused to tender the second payment as is required under the contract. Furthermore TLPS demanded its initial payment refunded, and has attempted to return to TLPS the **first** shipment of goods it recalled from the shopkeepers shelves. **MWE not only refuses** to return the money or accept the return of the goods, but also demands that TLPS accept the second shipment of goods awaiting delivery and provide payment for said goods. While acknowledging **TLPS's** right to reject substandard goods in theory, it demands its right to **cover** (or replace) the spoiled goods under the UCC. Furthermore, MWE claimed that the second batch of goods conformed (to the terms of the agreement) to the contract, even though it will not grant assurances that the preservative in question was not used. **MWE** also insists its continued use of the preservative would not make the goods **nonconforming** under the terms of the contract, and therefore TLPS must accept them. TLPS **refuses MWE's** demands and responds by replacing the goods already recalled with competing goods of the quality TLPS **claims** to have expected from **MWE**. Thus **TLPS** is able to **fill** its orders from distributors at roughly the same price by diverting the **funds** for the second shipment **plus** additional **funds** equal to those already paid to **MWE** for the first shipment of goods. None the less, TLPS hopes to regain the money it paid for the **first** shipment of goods from MWE.

After an exchange of letters demanding satisfaction of each sides claims, separate suits were filed for **breach of contract in** the federal courts of New York and California. These suits **were** then consolidated into one suit in the Federal District Court of California **after TLPS** agreed to accept the **jurisdiction** of a California Federal court.

In other words, TLPS claims that the goods submitted to it :

1. were nonconforming (either substandard, spoiled, or containing a hazardous preservative that violates the agreed terms or unwritten terms of the contract).
2. that based upon **MWE's** conduct, and its **refusal** to give assurances that a replacement **shipment** of goods **will** not contain the hazardous chemical, it has a right to refuse to accept **MWE's** offer to cover (replace) the substandard goods.

MWE claims:

1. that the Law (UCC) is clear and absolute that TLPS must accept the second shipment of goods and render the **agreed** upon second payment.
2. furthermore, MWE argues that it is under no legal obligation to return the money from the first shipment, as it has offered to replace the spoiled goods, and their offer has been refused by **TLPS**.

Please define the following **t erms**; if necessary consult the glossary or a **legal** dictionary.

1. embezzle:
2. Cover:
3. nonconforming:
4. jurisdiction:

The Trial

MWE argued that Under **California's** version of the **Uniform Commercial Code, UCC** MWE had the right to replace the nonconforming goods (defective goods or goods which do not meet the specifications of the contract) before TLPS could reject the **second** shipment of their products and deny payment for the goods.

The relevant text of California's UCC states, "**Sellers providing nonconforming goods have the right to replace them with conforming goods within a reasonable time period**".

TLPS while **generally** agreeing that the articles of the UCC **superseded local** common law (case **law**) it retorted (**replied**) that the rule which WE referred to **was** still open to interpretation by the relevant case law as to its exact meaning, so long as it did not contradict the meaning of the rule **outright**. In support of its position it cited a recent case **where** the court **upheld** the **rejection** of an entire shipment of meat products, citing public health concerns, after the distributor received government reports that some of the meat might be **infected** with mad **cow** disease; a disease potentially fatal to humans. In the facts of that case, the seller had been aware of the diseased nature of his **animals** before the sales agreement had been made, but concealed (hid) this fact from the buyer **knowing ordinary** inspection **methods** would not **reveal** the diseased state (condition) of **some** of his cows.

MWE continued to maintain that the wording of the WCC was absolute, and **further** argued that even if case law **was** relevant, no comparisons could be drawn **from** the livestock case as they were too dissimilar (**diferent**) **from** the present case, but if they could then it attempted to counter (**refute**) this argument by **introducing** a hundred year

old case from 1896, which preceded the UCC and TLPS's supporting case, and which stated that diseased livestock must be accepted "as is" when delivered and payment rendered. The cattle in this case had been noticeably sick with a disease that caused arthritis, or inflammation of the joints, in **cattle**, but was not harmful to humans, when the buyer negotiated the purchase contract in person. The purchaser later sought to get out of the deal when he realized he could not resell the **arthritic** cattle easily due to a down-turn (slump) in the cattle industry, and would therefore lose money.

In addition, **MWE** provided **evidence from** the American Alar Society, a **lobbying group** fighting attempts in the US congress to make the use of certain preservatives in the US illegal, that there was **no** 100% conclusive proof that the preservative in question was indeed harmful to human health. **Furthermore**, it introduced evidence that the **preservative** was regularly used in the manufacture of foodstuffs in China, North **Korea**, Laos and several former communist countries, and that these countries had not identified **health** hazards associated with the use of the preservative in question. **MWE** also pointed out, that while the use of the preservative in question was officially discouraged in the US, it was not yet illegal to use it, and thus **MWE** had violated no US laws by substituting the cheaper preservative. Finally, MWE submitted the contract itself as evidence, and pointed to the fact that TLPS had made no specific request as to what preservative **MWE** must use in the manufacturing process, and therefore it was free to choose a preservative of its own choice.

In response to the evidence given by MWE regarding the potential health hazard related to the consumption of the preservative in question, **TLPS** retorted that the American Alar society and its scientists were entirely funded by manufacturers of the suspect preservatives, and that they are currently fighting in congress to prevent their complete ban in the US market. Furthermore, it challenged the claims that no negative side effects could be proven in the countries mentioned, by pointing out that none of these countries had done any known studies on the consequences associated with the use of these preservatives, and thus any evidence that could be drawn from their continued use was of no probative (persuasive) value. None the less, TLPS was forced to concede that there was no **evidence** in existence that could prove with 100% certainty that the preservative in question **was** indeed **harmful**, but instead pointed to the weight of the evidence proving its hazardous effects on **humans**, and the FDA's warning in particular.

Define the following terms and phrases; if necessary consult the **glossary** or a legal dictionary.

1. Uniform Commercial Code, UCC:
2. superseded:
3. case law:
4. cite :
5. ordinary inspection methods:
6. evidence:
7. lobbying group:

TLPS Submits Expert Testimony as to Industry Standards

TLPS sought to counter these additional arguments by submitting evidence as to the **standard usages of trade**, through **expert testimony by** representatives of other companies in the same line (kind) of business as MWE. These experts argued that the **normal standard of** industry, based upon the prices agreed upon in the contract for the goods, required the use of high quality preservatives, and that such a distinction as to the use of preservatives were as an industry rule never identified in a contract, as this was the sole area of expertise of the manufactures and not the distributors.

MWE Challenges TLPS's Expert Testimony

In response to the expert testimony provided by TIPS, MWE's President Mr. Whipple took the stand himself as his own expert witness, and put forth the argument that, the so called experts were his competitors, and were thus unduly biased against him. Furthermore, Mr. Whipple alleged that various competitors in **conjunction** with TLPS were involved in a conspiracy against MWE. To support this contention he introduced documents to the courts, **whose** authenticity were not denied, that several of TLPS's expert witnesses who testified as to the "industry standards" worked for its direct competitors. He also claimed that he had conducted numerous **similar** agreements without complaints before, but was unable to produce documentary evidence supporting this statement upon cross examination by TLPS's lawyers. Furthermore, he argued that as they were not scientists or lawyers they could not be considered experts in a legal sense, and thus their evidence was of no probative value, and should be stricken **from** the record.

Define the following terms, if necessary consult the glossary or a dictionary.

1. standard usages of trade:
2. expert testimony:
3. normal standard of industry:

JUDGE WHIMPNER'S OPINION (DECISION)

The Judge deciding the case **after** hearing all the evidence and arguments of the parties retired to his chamber, and read the relevant section of the **UCC**, which generally supported MWE's position. The Judge also examined the case law, weighed (evaluated) the evidence and testimony presented, and then thought about his decision. After some time he came to a conclusion and wrote down the following opinion:

I Judge Whimpner of the **10th** Circuit Federal District Court of **California** have reached the following conclusions in the **case MWE v. TLPS**. With respect to MWE's argument that the provisions of California's version of the UCC are controlling and thus inviolable,

the court agrees with this position to the extent that the UCC, in so far as it is the guiding law of the case, is important, but **alone** does not define the relative legal positions of the parties. Where there remains ambiguity, or when an issue is not directly addressed by the provisions of the UCC, there is room **left** for interpretation through the application of relevant case law. In the case before us, **MWE** first contends that the statute clearly prohibits **TLPS** from rejecting its goods outright and **refusing** to grant it the right to cover (or replace the damaged goods). While this interpretation of the law would seem to coincide with the position of the UCC, it does not take into account the precedent set by the Mad Cow Case submitted to this tribunal by TLPS.

The Mad Cow Case Explained

The Mad Cow Case similarly involves a legitimate threat to the public health, **albeit** a remote one. Furthermore, the cases are similar in that in neither instance was the **sale** prohibited by state or national law, but merely discouraged for **health** reasons. Furthermore, in neither case were the buyers aware when the purchase was made that the goods were **potentially** hazardous to the health of its consumers. Therefore, the court must acknowledge the precedential **value** of the Mad Cow Case, when making its decision as to the correct interpretation of the UCC, as applied to the facts in this case.

The Arthritic Cow Case Distinguished

With respect to the Arthritic Cow Case, the court distinguishes it on one or **all** of several different grounds discussed below. First of all, the case not only predates the Mad Cow Case, but also the UCC provisions it was cited to support by almost 50 years, thus limiting its precedential **value**. Furthermore, the facts of the case are not nearly as close to those of the present case because the Animals were not a threat to public health, but merely damaged goods in the sense that their resale **value** was reduced due to their diseased status. In addition, in the Arthritic Cow Case, the buyer was aware or should have been aware of the obviously diseased state of the animals upon purchase, but through his own negligence **failed** to inspect or simply failed to notice, unlike the circumstances as to the unhealthy status of the goods in both the Mad Cow Case and in our present case. In addition, in this case the seller did not appear to attempt to hide the damaged status of the goods, but merely offered to sell “as is”.

The Judge’s Analysis of TLPS’s Expert Testimony

With respect to **TLPS’s** expert testimony as to the applicable industry standards, which should be used to clarify the provisions of the contract (or its ability under the UCC and common law to fill in the blanks where ambiguity is involved), it is the opinion of this court that MWE has not effectively repudiated the weight of the expert testimony presented by TLPS. **MWE’s** contention that the expert testimony introduced by TLPS

was biased against it was outweighed by the sheer number of industry experts TLPS presented from a range of different companies involved in the **trade**, and all of whom support its position, and **MWE's** inability to produce any reasonably independent experts to testify on its behalf, that it was indeed following normal industry practice. In fact the only expert **MWE** did provide was its president Mr. Whipple, **who** was clearly biased in the outcome of the proceeding.

Next I shall deal with his other assertion, that as none of the experts introduced were scientists or lawyers they could therefore, not be classified as experts in a legal proceeding. To **this** final assertion by **Mr. Whipple**, I must point to the definition of "expert" provided in the UCC itself, which states that the "expert" in question must only have specialized knowledge with respect to the questions asked, as they were only asked to answer questions regarding the normal business practices in their field of industry, and not scientific questions or legal questions beyond the scope of their knowledge, then their testimony was of probative value and must stand.

The Court's Ruling

Therefore, this court decides in favor of TLPS on both counts and **denies MWE's** requests for relief

MWE shall return the amount TLPS has already paid for the first delivery of goods, and either accept the return of the previously delivered goods, or **TLPS** shall be authorized to dispose of the goods it still has in its possession **with** the proceeds, if any, From such sale *being* applied towards **MWE's** debt to TLPS.

As **MWE** was able to purchase replacement goods of suitable quality at the same price from a competitor of **MWE's** with little or no sign **of further** loss, **MWE** will not have to pay additional compensatory amounts to **TLPS**, but will be held liable for **TLPS's** court costs as **well**, in light of the frivolous (baseless) nature of some of **MWE's** arguments and counter claims.

Thus is decided Case No. 89003 of the California Federal District Court, Judge Whimpner presiding.

(signed)
Judge Whimpner

American Business Organizations

When creating a new business entity, both the businessman and lawyer must determine what type of legal entity best suits (serves) the needs of the parties. With that in mind, we must first point out that in most jurisdictions there are three main types of legal entities, The first is the **sole proprietorship**, the second the **partnership** and finally the **Corporation**. These have traditionally evolved in most jurisdictions in precisely that order, and each **offers** the participants varying degrees of decision making power, legal protection and **liability**. They are also separated by the degree of ownership retained by the various actors involved, the organizations ability to raise investment **capital**, and their respective levels of taxability.

The Sole Proprietorship

Now let us introduce the **first** and probably oldest type of business organization, the sole proprietorship. In this organization, in most jurisdictions, there is only a minimal amount of **state intervention** with respect to the sole proprietor's (owner's) decision making power. In other words, the success or failure of the business is entirely the responsibility of the owner, and he alone derives the primary **benefits** and **detriments due** from his labors, or those of his employees. Some common examples of this type of basic business organization include **the independent** farmer, the independent shopkeeper and factories entirely owned by a single individual and without the use of incorporation. Clearly this is the simplest type of business organization, and is generally only used in the lowest levels of industry and commerce, especially in those areas with the least amount of **sophistication**.

There are many shared traits, which distinguish the sole proprietorship. One common factor of sole proprietorships is the simplicity with which they are created. In most jurisdictions they are simply created by beginning business operations, and no **special** government registration or approval is required. Furthermore, the sole proprietor, or owner, generally derives no special legal protections **from** the law based upon the actions of his managers or employees. He or she is thus **susceptible** to the maximum amount of **liability** available for his firm's actions under the law. In other words **if his** business is sued for bad debts, creditors can generally **attack** his own personal possessions (i.e. car, house jewelry etc.), barring (excluding) some special **personal bankruptcy protections** available under local law¹⁷. Therefore, while the owner in this organization retains the maximum possible decision making power, his personal risk, with respect to liability for his company's actions, is also the greatest under this system of business organization. Furthermore, as the business is considered the owner's personal property, it is also directly liable to the owner's personal creditors, and such creditors **can attach the businesses**

¹⁷ In most US jurisdictions, an individual declaring bankruptcy is allowed to retain one car and his/her house free and clear of the creditors rights, to assist in his/her economic rehabilitation. The law is designed to prevent people from becoming entirely destitute, and thus dependent upon welfare (the government).

assets. Subsequently, this type of organization is **also** distinguished as being possibly the least stable **of the** three types of business organization.

Another distinguishing factor **of** the sole proprietorship is that the owner is only allowed to raise **funds** through the mortgaging of the business assets as **security** for bank loans, or whatever money **he/she** is personally able to contribute. In other words, the sole proprietorship is limited to the -use of the owner's personal assets, and **his/her** personal **creditworthiness**. This **factor** is very important, unless the owner is exceedingly wealthy, as the **inability** to raise large sums of money can inhibit (slow) the firm's **expansion** (growth).

One final advantage however, is that the money earned by the **sole proprietorship** is only taxable as the owner's personal income, and thus there is no element **of double taxation** as found in corporations.

The Partnership

The **partnership**, the second type of major business organization, **is** probably the second oldest form **of private enterprise**. Its evolution probably followed a short time after the creation **of the** sole proprietorship, and was probably created out of **mutual** necessity.

The partnership involves two or more people who each possess ownership of the company. Their **duties** to the company and towards each other can generally be **delineated** in the **partnership agreement**, the contract which is often times the basis of the relationship. However, **these** duties and **responsibilities can also** be **left** to oral **agreement** among the **partners** in most jurisdictions, but an **oral** agreement is **potentially** very dangerous with respect **to the long-term stability** of the organization for **all** the reasons generally associated **with the enforcement and interpretation** of unrecorded oral agreements,.

Under the partnership system of ownership, both parties can **retain (keep)** the power to act independently on behalf of the business, and share in the **profits** either equally or according to their partnership agreement. This allows for **considerable flexibility when** engaging in business, and when successful can be a very **lucrative** system of conducting business. However, as a general rule, under traditional partnership agreements, **all** partners **to** the agreement were **usually** found liable for the actions of any partner. Therefore, if one partner was guilty of exercising (using) poor business judgment and entered into a ruinous agreement on **behalf** of the partnership, **the** other partners in the course of the business relations **&p** were **all** bound by **the** agreement as well. Furthermore, as **all** partners were considered owners of the business, their creditors could generally attack the assets of the business as well as their privately held assets.

However, some of these potential difficulties (problems) associated with partnerships have been addressed (solved) in **modern legislation** creating **limited liability partnerships** and

other variations upon the original model, but a discussion of these here would go beyond the scope of this brief introduction to **business** organizations. None the less, I will inform the reader that limited **liability** partnerships, as the name implies, do impose legal restrictions *upon* the liability of partners who are so designated, and who **also** do not actively engage in the routine conduct of business.

The major advantage of a partnership is that it allows for the expansion of the business enterprise, and its capital base by including others in the ownership structure with full rights of ownership. If one partner has the expertise but not the capital, through a partnership agreement he can acquire (find) a partner with the necessary capital to do business. Furthermore, as security for his investment in the partnership, the capital contributing partner is able to maintain maximum control over the use of his money. For example, one partner has the expertise (**knowledge** and **skill**) to manage a construction company, but not the money to capitalize the business. The **other** partner has the necessary capital (money), but does not have the technical knowledge to run the company. Together the two are able to create a viable (**successful**) construction company, which can provide them both with a profit.

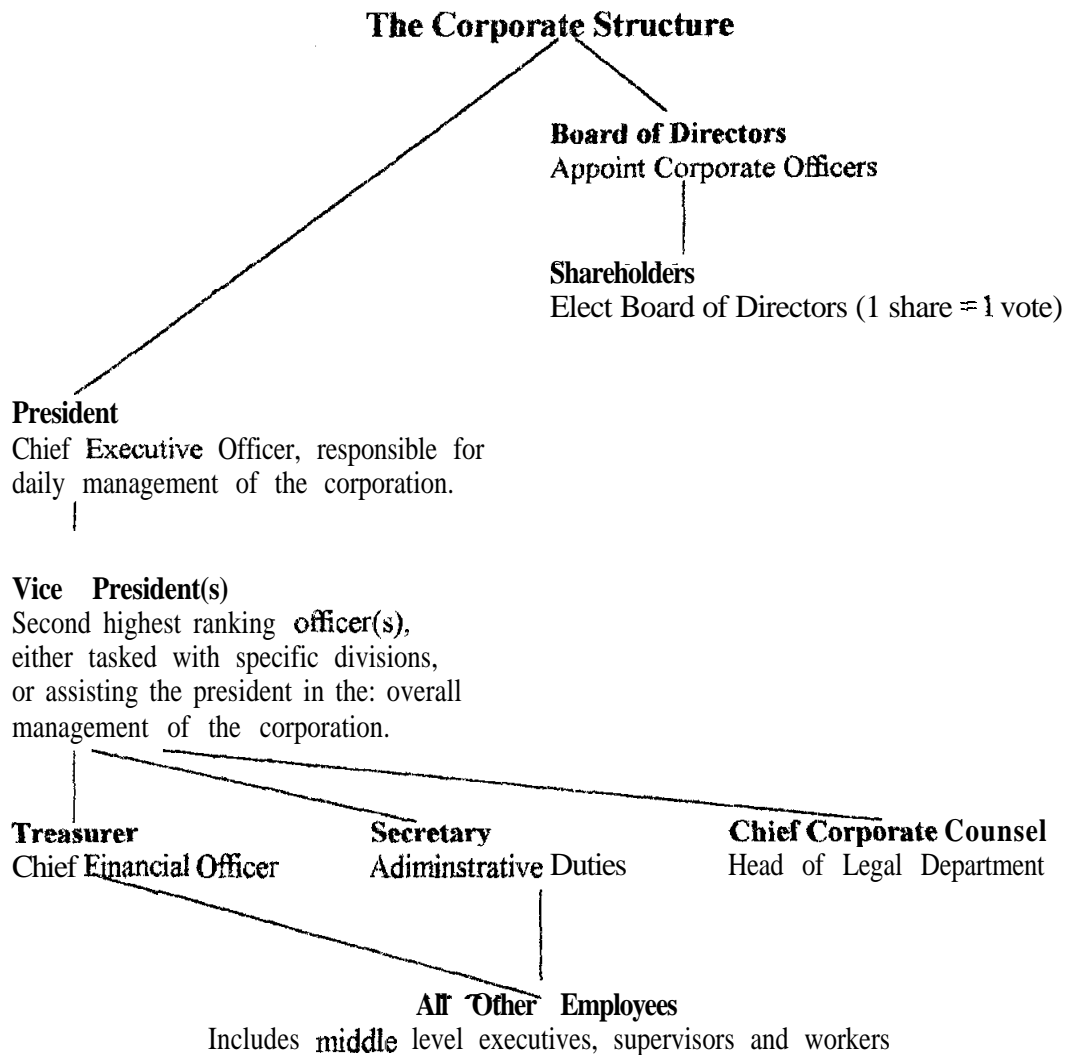
Another major advantage of partnerships, and a reason they are frequently chosen over corporate structures is that for purposes of determining tax liability, in most jurisdictions partnership income is usually not separately taxable. The income is generally considered to be the partner's personal income, and is thus only taxed once as personal income. This **effectively** eliminates the double taxation **generally** associated with corporations, and which will be discussed below.

The Corporate Structure

Corporations are perhaps the most complicated of the three main business structures available to individuals desiring to conduct business. They generally require **formal registration** with the local or national government, **incorporation**, and are governed by their **articles of incorporation**.

The daily operations of the corporation are generally supervised by a group of corporate officers designated (appointed) by the corporation's board of directors, and these officers retain control over the conduct of business operations.

In addition because the ownership of the corporation is separated in theory from the management of the corporation, courts maintain the legal **fiction** of corporate independence. This legal fiction argues that the corporation is an independent **actor** and therefore, is an entirely separate entity **from** its owners (shareholders). This legal fiction is even **generally** maintained when the corporate officers are the shareholders, so long as they maintain a degree of **separability** between the corporate assets and their own **personal** assets.



Closed Corporations

In most small corporations and a few large ones, the corporate officers retain a large share if not all of the stock (shares of ownership) in the corporation. When the majority of the stock is controlled by a small closed group of people (often times a single family or person), this is called a **closed corporation**, because the stock is generally not publicly traded. Furthermore in the articles of incorporation of many closed corporations strict guidelines are present to prevent the transfer of stock, and thus the dilution of the controlling groups majority share position. Such measures are designed to insure the continued closed nature of the corporate structure. Therefore, unless you are in the majority, the closed corporation can be an exceedingly restrictive type of business organization with respect to the shareholder's ownership rights.

Another potential problem associated with the closed corporation is that it is often **difficult** to ascertain (determine) the true value of the stock in closed corporations, and short of an absolute majority of **the** stock it makes poor collateral for a bank loan. Thus, the closed corporation can generally only pledge its capital assets as **collateral** for loans, or go public (issue for **sale** a controlling share of its **stock**, and thus effectively terminate its closed status) assuming its articles of incorporation will allow it to do so. However, some jurisdictions **allow** closed corporations, once again articles of incorporation **permitting**, to issue special nonvoting shares of stock. Assuming someone is interested in purchasing said shares, this could provide another way for the closed corporation to raise investment **capital** while allowing the management to maintain control of the corporation.

Publicly Held Corporations

On the contrary, in large, more sophisticated corporations, generally the corporate officers are chosen **from** a class of professional business managers, and rarely have more than nominal shares in the corporation. Their principal sources of income usually come from their corporate salaries and **bonuses attached** to the **performance of the** company.

Shares in a Publicly Held Corporation

The shares in large corporations are **usually** publicly traded and thus the ownership of these companies is widely held (owned) by the public (and subsequently the name publicly held corporations). The shareholders (actual owners of the corporation) retain the right to vote their shares at the normally annual stockholders meetings, and directly elect the board of directors, who loosely oversee the performance of the corporate **officers**, and select new ones when necessary.

A shareholder's voting rights (**in** both closed and publicly held corporations) are **generally** proportionate to the amount of shares he or she owns or controls. The right **to** vote shares can be transferred by proxy (an agreement granting the right to vote one's shares) to another party. Proxy rights are generally given when **minority shareholders** wish to unite to gain control of the board of directors, and thus **indirectly** the operations of the corporation, or when a creditor has rights to the stock in question. In this final instance banks generally require that shareholders **who** use **their** stock as collateral for loans give them **irrevocable proxy** rights to vote the subject **shares**, and said irrevocable proxy will not be revocable **until** the debt is repaid

The Corporate Structure Distinguished

Thus as you can see ownership in large corporations can be quite complex and divided with the real owners (shareholders) having very **little control** over the operation of the

corporation. However, the advantage of the separation of control from ownership, is that in the event the company becomes insolvent (bankrupt), the shareholder only loses the value of his or her shares, and their other assets are not attachable. In other words the shareholder's personal liability ends with the value of the share, unlike in sole proprietorships and partnerships. This is also true in closed corporations, with the exception being that the shareholders are liable in lawsuits to the extent that their actions as corporate officers contributed to the damages being sought. However, short of gross misconduct in their official capacities, or the breakdown in the legal fiction of a corporate being (the corporation as an independent actor), courts will rarely pierce the corporate veil and find the shareholder/officer liable.

In addition, as it is doubtful that a large corporation could function efficiently if it were constantly required to consult with its shareholders before undertaking daily or even major business decisions, subsequently the corporate structure ensures that small shareholders are generally guaranteed expert management in publicly held corporations. In the case of publicly held corporations, most small and institutional (banks, pension funds and mutual funds) shareholders almost always prefer to leave the running of the corporation to the experts hired to be officers. In closely held corporations the shareholders, as mentioned previously, retain a large share of control similar to that available in both sole proprietorships and partnerships, but without the same degree of exposure to liability (as discussed above).

Another advantage of the corporate structure is that investment capital can be easily raised as previously mentioned, by selling shares in the company to the public, as well as borrowing money from banks and other lending institutions.

In addition, as briefly mentioned above, publicly held corporations can issue different classes of stock (i.e. preferential, nonvoting etc.) to raise additional money, or simply to award stock to executives or employees in lieu (instead) of cash bonuses. The awarding of stock is frequently used in American companies to encourage the employees to work harder, thus further strengthening the ties between employee and corporation. The award of stock has the added advantages of encouraging the employees to identify more closely with the company, and does not directly deplete the company's cash reserves.

Double Taxation Explained

Unfortunately, because the corporation is legally deemed to be a separate independent actor, the corporation is subject to corporate income tax. In addition, any dividends (cash payments) made (paid) to the shareholders by the corporation, are also considered to be the shareholder's personal income and thus taxable for a second time. Therefore, when choosing a business organization this downside to corporations must be weighed against the major benefits of limited liability and the increased ability to raise investment capital. However, in most jurisdictions a modern variant known as an S corporation is available, which tempers (alleviates) some of these concerns regarding double taxation.

Conclusions

Each of the three distinct types of business organizations are available to the investor wishing to conduct business operations. A decision as to which one holds the most advantages should only be made after a careful examination of the local law governing the various types of business organizations, and an evaluation of their accompanying modern variations, which combine some of the benefits associated with all three types of organizations

Prepare the following questions for discussion.

What factors distinguish a soleproprietorship from a partnership? from a corporation?

What factors distinguish the partnership from the corporation?

What is meant by double taxation?

What is meant by classes of stock (shares)?

Which business organization is the best in general (in your opinion)? in Thailand? Why?