当代法律英语

CONTEMPORARY ENGLISH LANGUAGE OF LAW

黄瑶 陈东 主编

樊林波 廖朵朵 副主编

中山大学出版社

当代法律英语

黄　瑶　陈　东　主　编
樊林波　廖朵朵　副主编

中山大学出版社

·广州·

版权所有　翻印必究

图书在版编目（CIP）数据

当代法律英语/黄瑶，陈东主编．—广州：中山大学出版社，2006.9
ISBN 7-306-02706-9

Ⅰ．当…　Ⅱ．①黄…②陈…　Ⅲ．法律—英语　Ⅳ．H31

中国版本图书馆CIP数据核字（2006）第082236号

责任编辑：熊锡源
封面设计：楚　天
责任校对：易　正
责任技编：黄少伟
出版发行：中山大学出版社
　　　　　编辑部电话：（020）84111996，84113349
　　　　　发行部电话：（020）84111998，84111160
地　　址：广州市新港西路135号
邮　　编：510275　　传真：（020）84036565
印 刷 者：广州市新明光印刷有限公司
经 销 者：广东新华发行集团
规　　格：787mm×960mm　1/16　19.25印张　456千字
版次印次：2006年9月第1版　2006年9月第1次印刷
定　　价：39.80元

本书如有印刷质量问题影响阅读，请与承印厂联系调换

前　言

20 世纪 80 年代中期，中山大学法学院（原法律系）李斐南老师出版了她编写的《法学英语》，该书被许多兄弟院校采用为教材。使用过该教材的学生，在移家海外后还不忘带着这本书。到了 90 年代，李斐南和黄瑶两位老师合作编著《现代法律英语》，以其自然朴实的风格赢得中山大学法学院数届学子的赞誉。新版的《当代法律英语》除了贴近时代脉搏外（如涉及美国前总统克林顿弹劾案的国会辩论材料），也试图延续这种朴实清新的传统。

本书所精选的 38 篇课文源自 20 世纪 90 年代以来欧美国家的教科书或专著，编者对原作进行了必要的删减。通过学习这些课文，读者不仅能提高法律英语水平，而且能对相关法律制度和法律文化有大致的了解。

本书的篇章布局包括课文、课文之后的注释部分和练习题以及书末的两个附录、课文听力材料等内容。其中，课文的选材涉及当代各主要法律部门。在课文编排顺序上，编者既考虑到法律体系的逻辑，也照顾到由易到难的学习规律（如较艰深的宪法课文放在较后的位置）。课后的注释部分除了解释说明有关的法律术语外，还介绍有关外国法律的背景知识，并对部分长句、难句或关键句进行分析或汉译。为了兼顾自学者，有相当部分的课文作了较为详细的注释。练习题则形式多样。书末附录包括常见法律词汇英汉对照表和练习参考答案。

值得注意的是，课后注释的译文部分不一定都是“信、达、雅”皆备的，而附录的练习“参考答案”也不一定是“标准答案”，建议读者带着批判的眼光，先自行理解、自己动手翻译，再参考相应的注释或答案，效果会更好——课后注释之所以没有采用脚注的形式，也是出于相同的考虑。读者在学习每篇课文之前先花一个小时左右听几遍听力材料，最好是采用听写的方式，能听多少就写多少，然后再与课文进行对比，定能取得事半功倍之效。需注意的是，录音材料中的男声以英音为主，而女声则以美音为主，所以有些单词发音并不完全一致，这是正常现象，并有助于读者掌握两种英语的不同特点。

读者也可留意书后所列“主要参考书目及网上资源”，特别是 Bryan A. Garner 所著《牛津现代法律用语词典》（*A Dictionary of Modern Legal Usage*，法律出版社 2003 年版，牛津大学出版社 1995 年版影印本），编者认为正如其出版说明所说“最可信赖、最具吸引力”，值得向读者推荐。

本书可供法律专业的本科高年级学生作为教材之用，亦适用于从事或有志于涉外法律工作的人士以及对法律英语感兴趣者。鉴于法学理论和法律实践两者间的紧密关系，李斐

南、黄瑶、曾报春和任崇正编译的《法律英语实务——中外法律文书编译》（中山大学出版社2005年版）可作为本书的姊妹篇相互补充使用。

本书的编著由四位从事法律英语教学多年的教师共同完成，具体分工情况如下：

黄　瑶　负责本书的策划、组织、统稿等事宜，并负责本书10篇课文的编写，其内容包括：公法、私法、刑法、合同法、知识产权法、行政法、国际法、冲突法、国际商事仲裁等。

陈　东　负责本书的统稿和审校，编写附录一“法律词汇英汉对照表”，朗诵及灌制部分听力材料，并负责本书10篇课文的编写，包括：公司法、破产法、WTO法、国际货物买卖法、国际投资法、宪法等。

樊林波　负责编写本书的8篇课文，内容涉及法律教育、世界法系、美国商法、电子商务法、证券法、国际人权法、反垄断法、法律研究（检索）等。

廖朵朵　负责编写本书的10篇课文，内容包括：侵权法、法律职业、英美法基本原则、普通法、雇佣法、土地法、信托法、司法组织、刑事和民事司法程序等。

本书的出版得到中山大学出版社的大力支持，责任编辑熊锡源为本书付出了辛勤的劳动，谨此致以衷心的感谢！

主　编

2006年5月于广州康乐园

目 录

Unit One Preparation for Legal Education ···································· (1)
Unit Two The Legal Profession ···································· (9)
Unit Three World Legal Systems ···································· (16)
Unit Four Public Law ···································· (22)
Unit Five Private Law ···································· (28)
Unit Six Basic Principles of Common Law ···································· (38)
Unit Seven Common Law and Equity ···································· (46)
Unit Eight The English and the American Court System ···································· (53)
Unit Nine The Sources of Criminal Law ···································· (60)
Unit Ten Criminal Procedure ···································· (69)
Unit Eleven Civil Procedure ···································· (76)
Unit Twelve Nature and Classes of Contracts ···································· (81)
Unit Thirteen Introduction to American Uniform Commercial Code ···································· (91)
Unit Fourteen Law of Torts ···································· (98)
Unit Fifteen What is Trust? ···································· (107)
Unit Sixteen Trademarks, Service Marks and Copyrights ···································· (112)
Unit Seventeen Patents, Secret Business Information, Protection of Computer Software and Mask Work ···································· (121)
Unit Eighteen A Comparative Analysis of Spam Laws: the Quest for Model Law ········ (130)
Unit Nineteen Law of Corporations ···································· (136)
Unit Twenty Law of Bankruptcy ···································· (145)
Unit Twenty-one Securities Regulation ···································· (152)
Unit Twenty-two Employment Law ···································· (159)
Unit Twenty-three Land law ···································· (166)
Unit Twenty-four Administrative Law ···································· (170)
Unit Twenty-five Sources of International Law ···································· (177)
Unit Twenty-six The World Trade Organization(I) ···································· (187)
Unit Twenty-seven The World Trade Organization (II) ···································· (194)

Unit Twenty-eight The World Trade Organization(III) ······ (200)
Unit Twenty-nine The Evolution of the Meaning of the Term 'Investment' ······ (205)
Unit Thirty The OECD Guidelines for Multinational Enterprises ······ (210)
Unit Thirty-one Nature and Scope of the Conflict of Laws ······ (218)
Unit Thirty-two International Sales Transaction (I) ······ (224)
Unit Thirty-three International Sales Transaction (II) ······ (230)
Unit Thirty-four Types and Rules of International Commercial Arbitration ······ (236)
Unit Thirty-five International Human Rights Law ······ (244)
Unit Thirty-six The Changing Balance in Antitrust Law ······ (252)
Unit Thirty-seven Constitutional Law ······ (258)
Unit Thirty-eight The Legal Research Process ······ (266)
主要参考书目及网上资源······ (277)
附录 1 法律词汇英汉对照表 ······ (278)
附录 2 练习参考答案 ······ (287)

Unit One

Preparation for Legal Education

Students who are successful in law schools, and who become accomplished lawyers or use their legal education successfully in other areas of professional life, come to their legal education from widely differing educational and experiential backgrounds. As undergraduate students, some have majored in subjects that are traditionally considered paths to law school, such as history, English, philosophy, political science, economics or business[1]. Other successful law students, however, have focused their undergraduate studies in areas as diverse as art, music theory, computer science, engineering, nursing or education. Many law students enter law school directly from their undergraduate studies and without having had any substantial work experience. Others begin their legal education significantly later in life, and they bring to their law school education the insights and perspectives gained from those life experiences.

Thus, the ABA[2] does not recommend any particular group of undergraduate majors, or courses that should be taken by those wishing to prepare for legal education; developing such a list is neither possible nor desirable. The law is too multifaceted, and the human mind too adaptable, to permit such a linear approach to preparing for law school or the practice of law. Nonetheless, there are important skills and values, and significant bodies of knowledge that can be acquired prior to law school and that will provide a sound foundation for a sophisticated legal education. This Statement presents the recommendations of the American Bar Association Section of Legal Education and Admissions to the Bar concerning preparation for a good law school experience.

There are numerous skills and values that are essential to success in law school and to competent lawyering[3]. There also is a large body of information that law students, and attorneys, should possess. The three or four years that a student spends in obtaining a quality legal education can and do provide much of the information that a lawyer needs. Good legal education also aids in developing the many skills and values essential to competent lawyering. Sound legal education, however, must build upon and further refine skills, values and knowledge that the student already possesses. Even though a student may well be able to acquire in law school some specific fundamental skills and knowledge that the student's pre-law school

experience has not provided, the student who comes to law school lacking a broad range of basic skills and knowledge will face an extremely difficult task.

Skills and Values

Analytic and Problem Solving Skills

Students should seek courses and other experiences that will engage them in critical thinking about important issues, that will engender in them tolerance for uncertainty, and that will give them experience in structuring and evaluating arguments for and against propositions that are susceptible to reasoned debate. Students also should seek courses and other experiences that require them to apply previously developed principles or theories to new situations, and that demand that they develop solutions to new problems. Good legal education teaches students to "think like a lawyer"[4], but the analytic and problem-solving skills required of lawyers are not fundamentally different from those employed by other professionals. The law school experience will develop and refine those crucial skills, but one must enter law school with a reasonably well developed set of analytic and problem solving abilities.

Critical Reading Abilities

Preparation for legal education should include substantial experience at close reading and critical analysis of complex textual material, for much of what law students and lawyers do involves careful reading and sophisticated comprehension of judicial opinions, statutes, documents, and other written materials[5]. As with the other skills discussed in this Statement, the requisite critical reading abilities may be acquired in a wide range of experiences, including the close reading of complex material in literature, political or economic theory, philosophy, or history. The particular nature of the materials examined is not crucial; what is important is that law school not be the first time that a student has been rigorously engaged in the enterprise of carefully reading and understanding, and critically analyzing, complex written material of substantial length. Potential law students should also be aware that the study and practice of law require the ability to read and assimilate large amounts of material, often in a short period of time.

Writing Skills

Those seeking to prepare for legal education should develop a high degree of skill at written communication. Language is the most important tool of a lawyer, and lawyers must learn to express themselves clearly and concisely. Legal education provides good training in writing, and

particularly in the specific techniques and forms of written expression that are common in the law. Fundamental writing skills, however, should be acquired and refined before one enters law school. Those preparing for legal education should seek as many experiences as possible that will require rigorous and analytical writing, including preparing original pieces of substantial length and revising written work in response to constructive criticism.

Oral Communication and Listening Abilities

The ability to speak clearly and persuasively is another skill that is essential to success in law school and the practice of law. Lawyers also must have excellent listening skills if they are to understand their clients and others with whom they must interact daily. As with writing skills, legal education provides excellent opportunities for refining oral communication skills, and particularly for practicing the forms and techniques of oral expression that are most common in the practice of law. Before coming to law school, however, individuals should seek to develop their basic speaking and listening skills, such as by engaging in debate, making formal presentations in class, or speaking before groups in school, the community, or the workplace.

General Research Skills

Although there are many research sources and techniques that are specific to the law, an individual need not have developed any familiarity with these specific skills or materials before entering law school. However, the individual who comes to law school without ever having undertaken a project that requires significant library research and the analysis of large amounts of information obtained from that research will be at a severe disadvantage. Those wishing to prepare for legal education should select courses and seek experiences that will require them to plan a research strategy, to undertake substantial library research, and to analyze, organize and present a reasonably large amount of material. A basic ability to use a personal computer is also increasingly important for law students, both for word processing and for computerized legal research[6].

Task Organization and Management Skills

The study and practice of law requires the ability to organize large amounts of information, to identify objectives, and to create a structure for applying that information in an efficient way in order to achieve desired results. Many law school courses, for example, are graded primarily on the basis of one examination at the end of the course, and many projects in the practice of law

require the compilation of large amounts of information from a wide variety of sources, frequently over relatively brief periods of time. Thus, those entering law schools must be prepared to organize and assimilate large amounts of information in a manner that facilitates the recall and application of that information in an effective and efficient manner. Some of the requisite experience can be obtained through undertaking school projects that require substantial research and writing, or through the preparation of major reports for an employer, a school, or a civic organization.

The Values of Serving Others and Promoting Justice

Each member of the legal profession should be dedicated both to the objectives of serving others honestly, competently, and responsibly, and to the goals of improving fairness and the quality of justice in the legal system. Those thinking of entering this profession would be well served by having some significant experience, before coming to law school, in which they devoted substantial effort toward assisting others. Participation in public service projects or similar efforts at achieving objectives established for common purposes can be particularly helpful.

Knowledge

There are generic types of knowledge that one should possess in order to have a full appreciation of the legal system in general, to understand how disputes might be resolved, to understand and apply various legal principles and standards, and to appreciate the context in which a legal problem or dispute arises. Some of the types of knowledge that are most useful, and that would most pervasively affect one's ability to derive the maximum benefit from legal education, include the following:

A broad understanding of history, particularly American history, and the various factors (social, political, economic, and cultural) that have influenced the development of the pluralistic society that presently exists in the United States[7];

A fundamental understanding of political thought and theory, and of the contemporary American political system;

A basic understanding of ethical theory and theories of justice;

A grounding in economics, particularly elementary micro-economic theory, and an

understanding of the interaction between economic theory and public policy;

Some basic mathematical and financial skills, such as an understanding of basic pre-calculus mathematics and an ability to analyze financial data;

A basic understanding of human behavior and social interaction; and

An understanding of diverse cultures within and beyond the United States, of international institutions and issues, and of the increasing interdependence of the nations and communities within our world.

As law has become more woven into the fabric of our society, and as that society is increasingly influenced by disparate national and global forces, a broad knowledge base is essential for success in law school and for competence in the legal profession. Knowledge of specific areas of law can and will be acquired during a good legal education, but students must come to law school with much fundamental knowledge upon which legal education can build. Thus, those considering law school should focus their substantive preparation on acquiring the broad knowledge and perspectives outlined above.

—The STATEMENT Prepared by the Pre-Law Committee of the ABA
Section of Legal Education and Admissions to the American Bar Association.
http: //www. abanet. org/legaled/prelaw/prep. htm, 2005-07-18

Notes to the Text

[1] **As undergraduate students, some have majored in subjects that are traditionally considered paths to law school, such as history, English, philosophy, political science, economics or business.** 有些本科生早已主修传统上被认为是上法学院所必修的课程，诸如历史、英语、哲学、政治学、经济学或商学。Economics 这里指西方经济学，主要分支是微观经济学（Micro-economics）和宏观经济学（Macro-economics）。Business 相对于 Economics，除了研究对象有差异外，前者还偏重于实务操作和技巧，后者则理论性很强。

[2] **“ABA”**：美国全国律师协会（the American Bar Association）。该协会是世界上最大的自愿性专业协会，拥有 40 多万会员。美国律协的职能是：认定法学院的适格、负

责法学继续教育、提供法学信息以及主办律师与法官的在职培训项目等。

[3] **There are numerous skills and values that are essential to success in law school and to competent lawyering.** 有许多技能和价值观是学生在法学院阶段学业成功及之后胜任律师执业的关键。

[4] **"Think like a lawyer"**: 像法律人那样去思考。此乃美国法学教育，特别是 J. D. (Juris Doctor 可以译为"法律科学博士"，属美国的法学第一学位，相当于法学学士) 三年法学教育之目的所在——以案例为导向培养未来法律人的职业思维方式。

[5] **Preparation for legal education should include substantial experience at close reading and critical analysis of complex textual material, for much of what law students and lawyers do involves careful reading and sophisticated comprehension of judicial opinions, statutes, documents, and other written materials.** 鉴于法科学生的大量学习和律师所从事的大量工作涉及对司法意见、法规、文件和其他书面材料的仔细阅读与全面理解，法学教育的准备应包括在仔细阅读和批判分析复杂课文材料方面的实质性经验。本句中的 judicial opinions 指法官在某一案件审理后所得出的意见、见解或裁决，常译为司法裁决（法官意见）。statute 指"法律，法规，制定法，成文法；章程"。在此句中意为"制定法"。制定法又可以表示为 enacted law 或 statutory law。documents 指"法律文件"，"公文"，"文件"，"单证"，"诉讼案卷"等，常写为 legal documents。

[6] **A basic ability to use a personal computer is also increasingly important for law students, both for word processing and for computerized legal research.** 对于文字处理和电脑化法律检索而言，法科学生使用个人电脑的基本技能亦越来越重要。本句中的 computerized legal research 也可称作 computer-assisted legal research 或 advanced legal research（ALR），指电脑辅助下的法学综合检索与研究。

[7] **A broad understanding of history, particularly American history, and the various factors (social, political, economic, and cultural) that have influenced the development of the pluralistic society that presently exists in the United States** 对历史，尤其是美国历史，以及影响美国现存多元社会发展的各种因素（社会、政治、经济和文化）的广泛理解。句中的"pluralistic"一词意为"多元的"。同段下文 pre-calculus mathematics 预算微积分数学。

Exercises

1. *Which of the following statements are **NOT** true according to the text?*

(1) The ABA tries to recommend groups of undergraduate majors, or courses that should be taken by those wishing to prepare for legal education, as developing such a list is both possible and desirable.

(2) Good legal education aids in developing the many skills and values essential to competent lawyering. Sound legal education must build upon and further refine skills, values and knowledge that the student already possesses.

(3) The essential skills and values for competent lawyering are the following: analytic and problem-solving skills, critical reading abilities, writing skills, oral communication and listening abilities, general research skills, task organization and management skills, and the values of serving faithfully the interests of others while also promoting justice.

(4) The analytic and problem-solving skills required of lawyers are fundamentally different from those employed by other professionals.

(5) Those wishing to prepare for legal education should select courses and seek experiences that will require them to plan a research strategy, to undertake substantial library research, and to analyze, organize and present a reasonably large amount of material.

(6) Not all the members of the legal profession should be dedicated both to the objectives of serving others honestly, competently, and responsibly, and to the goals of improving fairness and the quality of justice in the legal system.

2. *Read the following passage and then translate the underlined sentences into Chinese.*

Today's law students grew up immersed in digital media for entertainment, communication, and shopping. Tomorrow's lawyers will work in a powerful information culture. Increasingly students will demand that institutions of higher education provide technology-rich learning environments. This passage discusses the technology-infused curriculum of the Advanced Legal Research (ALR) course at the University of Denver College of Law. (1) <u>The ALR Course has enhanced the legal research, technology, and analytical skills of many law students.</u> (2) <u>ALR is uniquely positioned to provide a number of critical skills necessary for success in law practice: information literacy, digital literacy, and critical thinking skills.</u>

Information literacy

(3) Prior to any argument made in a brief or before the court, a lawyer must find all the mandatory and persuasive authority that exists on the issue at hand. Information currently resides in a number of formats: print; commercial online services; and free Internet sites. A cost-effective legal researcher learns to appreciate the relative benefits of information in each of these formats, develops the skills to work easily in each, and blends the results seamlessly into his/her argument.

Digital literacy

The ALR course is taught in a technology-rich learning environment. The ALR E-Curriculum is innovative, interactive, and paperless. Students work in an Internet environment during each class session. (4) In law practice today, presentation software skills are critical for presentations to juries, boards of directors, and potential clients. Web authoring skills are highly valued. Most legal employers maintain a web site for marketing their business. Lawyers who understand web authoring can either create and maintain their own sites or work more easily with those with whom they contract to do the work.

Critical thinking skills

For each research problem they encounter, lawyers need to create a research strategy for completion of that project. Research strategies include selection of the appropriate research tools to find an answer, an understanding of the time it will take to do the work, and a clear idea of the cost involved with the research. (5) Comprehensive coverage of legal research resources, strong focus on developing research strategies, and exposure to legal publishers and pricing are covered in the ALR course.

Selected from Debra S. Austin, *Educating the Lawyers of Tomorrow Using E-Curriculum*

3. *Debating Questions.*

(1) How much do you know about Western Legal Teaching and Researching Methodologies?
(2) What lawyering skills should we possess?

Unit Two

The Legal Profession

Solicitor[1]

In most countries there is only one legal profession. This means that all the lawyers have roughly the same professional education leading to the same legal qualifications, and they are permitted to do all the legal work that has to be done. In England the system is different. Here the profession is divided into two types of lawyers, called Solicitors and Barristers[2]. They both are qualified lawyers[3], but they have a different legal training; they take different examinations to qualify, and once they have qualified they usually do different types of legal work.

Solicitors have direct contact with their clients. In most cases, barristers do not. The solicitor's relationship with a client is therefore usually more personal. In almost all cases, a client who needs the services of a barrister must go first to a solicitor, who will then instruct, or brief[4] the barrister. This means that the solicitor will choose the barrister who is right for the case, and help to prepare the case for court. In simple cases the solicitor will usually leave the barrister to get on with the case in court on his own; in more difficult cases, the solicitor will sit behind the barrister in court and assist in the presentation of the case[5].

A solicitor's practice is called a firm of solicitors[6]. There are a great many firms, and they range from small country practices employing perhaps one or two solicitors to large city practices employing scores, even hundreds, of partners (solicitors entitled to say how the firm is managed, and to a share in its profits) and associate solicitors (salaried employees without these rights).

Anyone who wishes to take legal advice or have legal work done will usually go to a solicitor's office, where he will see the solicitor and tell him what he requires. This is called giving a solicitor instruction[7]. Many solicitors deal with a range of legal work. Here are some of the types of work they do:

- Litigation[8]: preparing cases to be tried in the civil or criminal courts.
- Commercial: giving legal advice in the field of business, and drawing up contracts.

- Conveyancing[9]: making all the legal arrangements for the buying and selling of land, and houses or other buildings.
- Employment: assisting employees and employers in cases involving allegations of unfair dismissal, or claims for redundancy payments[10].
- Family: such as divorce and child care.
- Immigration: representing foreign nationals or those without any national status at all, who are claiming asylum[11] in this country, or permission to stay or work.
- Licensing: arranging to apply for licences that have to be granted by the courts or other bodies (such as licences for pubs and clubs).
- Probate: making wills for clients who, when they die, wish to leave their property to certain persons or charities; and making sure that their wishes are carried out[12].

Barrister

The full title of a barrister is Barrister-at-law. Barristers are also known as counsel. The term 'barristers' derives from the fact that when they qualify they are 'called to the Bar', an expression which dates from the days when each courtroom was fitted with a rail or bar dividing the area actually used by the court from the general public[13]. Only barristers were allowed to step up to the bar to plead their clients' cases.

Students who wish to become barristers must first become members of one of the four Inns of Court[14]. These are in London. They are called Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn. In order to become a barrister, a student must pass all the necessary law exams; but he or she must also attend 'qualifying sessions', which include 'dining in Hall' and other educational activities. Dining in Hall literally means eating a number of dinners in the Great Hall of their Inn of Court. The tradition dates from the days when students received their legal education by attending lectures which were given while they were dining in Hall.

Although solicitors and barristers are all members of the legal profession, there are many important differences between them. Here are some of the main ones:

- Barristers are mainly litigation or 'courtroom lawyers' who actually conduct cases in court. Unlike solicitors, they have rights of audience[15] (rights to appear) in any court in the land, and so barristers are those lawyers who appear in the more difficult cases in the Crown Court, the High Court and the various courts.
- Clients who need to go to court cannot go to see a barrister directly. They can only arrange to be represented by a barrister or to take his advice by first going to a solicitor. The solicitor will then instruct or 'brief' the barrister to help the client.

- Unlike solicitors, barristers cannot work in partnership with one another. All professional barristers are self-employed, although normally a number of barristers will as a matter of convenience share offices, which are known as barristers' chambers[16], and have their work organized by the same manager, who is called a barrister's clerk. A barrister's clerk arranges court appearances and meetings between clients, solicitors, and barristers (these meetings are known as conferences). He or she also negotiated the barristers' fees.
- Another well-known and very obvious difference is the robes barristers wear. In the magistrates' courts and tribunals, such as the Employment Tribunals, they wear their business suits, like solicitors. In all other courts they wear wigs and gowns.

Law Officers

Two of the most important lawyers in the country are the Law Officers. They are the Attorney-General and his deputy the Solicitor-General[17]. The law officers are now appointed by the Prime Minister, and are the chief legal advisers to the Government. They also have other important responsibilities such as prosecutions for certain offences, including terrorist offences and corruption, which cannot be commenced without their consent[18]. By tradition, whenever the security of the State is involved-when, for example, a person is charged with high treason[19]—the case is prosecuted personally by the Attorney-General. Also by tradition, the Attorney-General is the 'leader of the Bar'. Until recently, the Solicitor-General was always a barrister, but Harriet Harman is the first solicitor, and the first woman, to hold this office. The Attorney-General is also responsible for appointing the head of the prosecution service: the Director of Public Prosecutions[20] (DPP), who is the head of the Crown Prosecution Service, the department responsible for conducting most prosecutions in England and Wales. By statute he carries out their duties under the superintendence of the Attorney-General.

Adapted from Geoffrey Rivlin, *Understanding the Law*, 2004

Notes to the Text

[1] **Solicitor** 事务律师，主要办理一般的法律及业务咨询、财产转让、信托、公司业务、为出庭律师准备案件和提供说明等。

[2] **Barrister** 出庭律师，指已被授予出庭律师资格并被准许在高级法院执业和在诉讼中代表当事人出庭者。另一近义词是 Attorney，在英国，多指代理人；在美国，一般指律师（attorney-at-law）。

[3] **qualified lawyer** 具有执业资格的律师。

[4] **brief** 律师代理意见书，律师向法庭提交的表明其对案件的观点的书面辩论文件。*v.* 下达指令。

[5] **In simple cases the solicitor will usually leave the barrister to get on with the case in court on his own; in more difficult cases, the solicitor will sit behind the barrister in court and assist in the presentation of the case.** 在简单案件中，事务律师通常不需要出庭律师，而是自己出庭；在一些比较复杂的案件中，事务律师会坐在法院出庭律师的后面，协助出庭律师陈述案情。

[6] **a firm of solicitor** 律师事务所。因律师事务所多为合伙组织，所以用firm较为准确。

[7] **instruction** 案情介绍、说明。

[8] **litigation** 诉讼。关于“诉讼”的表述还有：action，suit，lawsuit等。

[9] **conveyancing** 不动产转让业务，主要包括土地权利调查、准备协议、办理抵押等与不动产转让有关的业务。conveyance 财产（权）转移；财产（权）转移证书；运输；运送。

[10] **redundancy payment** 遣散费。

[11] **asylum** *n.* 庇护。

[12] **Probate: making wills for clients who, when they die, wish to leave their property to certain persons or charities; and making sure that their wishes are carried out.** 遗嘱检验：为希望在过世后将财产留给特定人或者慈善机构的顾客制订遗嘱；并且要确保他们这些遗愿可以实现。probate 遗嘱的认证；经认证的遗嘱；遗嘱检验程序。will 遗嘱。

[13] **The term 'barristers' derives from the fact that when they qualify they are 'called to the Bar', an expression which dates from the days when each courtroom was fitted with a rail or bar dividing the area actually used by the court from the general public.** “出庭律师”这个词来源于当他们具备资格时他们将会被“召唤到围栏内”，法庭的围栏指每个法庭都装有围栏以用来将公众和法庭所实际需要使用的地方划分开来。

[14] **Inns of Court** （英）出庭律师公会。泛指各自治性的、自愿组合的非法人的出庭律师社团。现存四个律师公会（见课文）。其成员分为三个等级：主管（bencher）、出庭律师、和学徒。

[15] **rights of audience** （英）出庭陈述权。指案件当事人以外的人出席法庭和进行陈述的权利。英格兰和爱尔兰的出庭律师、苏格兰律师（advocate），除制订法另有规定外，有权在各种程序中陈诉其意见。在较低级别的法院中，事务律师也有此权利。

[16] **chamber** 国库，库房；法官办公室；出庭律师办公室。

[17] **Attorney-General/ Solicitor- General** （英）总检察长/副总检察长。

[18] **They also have other important responsibilities such as prosecutions for certain offences, including terrorist offences and corruption, which cannot be commenced without their consent.** 他们的其他重要职责就是检控特别的犯罪，包括恐怖主义犯罪和贪污罪，这些犯罪的检控只有在得到他们的批准后才可以进行。prosecution 刑事诉讼；控诉方、公诉方。corruption 堕落，腐化；徇私舞弊；（利用关系或其他方法）影响司法程序。

[19] **treason** 叛国罪。

[20] **Director of Public Prosecutions** 一般简称为 DPP，（英）公诉局长。刑事起诉处负责人，该处负责提起所有的公诉案件。公诉局长由总检察长任命，不带有政治色彩。

Exercises

1. *Compare solicitor with barrister, what are the main differences between them? Do you think Barristers is 'superior' to Solicitors?*

2. *Read the following supplementary materials; tell the differences between the English judges and the judges in our country.*

Judges in the UK

There are several different types of judge. Most judges are full-time judges; but there are also many part-time judges who, when they are not sitting as judges, carry on their careers as solicitors or barristers. Part-time judges are solicitors or barristers who are appointed to sit between 20 and 50 days a year as judges. Generally, the men and women who are chosen to sit as part-time judges will be at least 35 years of age. They are in fact normally in their forties. They will have had at least ten years' experience in legal practice. Almost every judge who becomes a full-time judge will first have had experience as a part-time judge, and will have proved that he or she is competent to try cases, and has the right qualities to sit as a judge.

In this country almost all the judges are appointed by the Queen on the advice of the Lord

Chancellor[①]. He has a special department known as the Judicial Appointments Group, which collects information about judicial candidate and 'screens' them to ensure their suitability. There are very few exceptions to this, but they are extremely important ones. The most senior judges in the land, including the Lord Chief Justice[②], the Master of the Rolls[③], and the Law Lords[④], are appointed by the Queen on the advice of the Prime Minister.

Until June 2003, the Lord Chancellor was the only judge to be a political appointment. He sat as a judge only during the continuation of his appointment. He no longer sits as a judge. All other judges are permanent appointments. As we will see, the Lord Chancellor has announced that there is to be a new way in which judges are to be appointed.

The American tradition of democracy established the idea that State judges, at least, should be directly elected by the people. In this way, judges will be chosen who are truly representative of the people. In American a judge standing for office may well canvass for votes on the strength of his or her record of being tough with criminals, or support for the death penalty. The British system follows a different line. Unlike many American judges, they do not stand for election, and their decisions cannot therefore be influenced by the desire to catch votes by popular appeal. The argument is that judges should not have to court popularity in order to be appointed; and that it would be dangerous if, once in office, they could be accused of giving way to pressure on popular causes; and that their judgment in individual cases should never be wrongly influenced by such matters.

Since the Act of Settlement of 1700, a High Court or Court of Appeal judge can only be dismissed upon the address of both Houses of Parliament[⑤]. This means that both the House of Commons and the House of Lords must vote their agreement to remove a judge from office. Other judges can be dismissed only by the Lord Chancellor. There have been cases where judges have resigned following misconduct or have been removed from office, but this has happened very rarely.

These days all judges must have gained very considerable experience in the law before they

---

① Lord Chancellor *n.* （英）御前大臣，又译大法官。中世纪其地位类似于首相，今日其职责基本是司法性质的。他是内阁成员，又是上议院（House of Lords）议长，枢密院（Privy Council）当然成员，上诉法院（Court of Appeal）当然成员。

② Lord Chief Justice *n.* （英）首席大法官。

③ The Master of the Rolls *n.* （英）上诉法院民事庭庭长。

④ The Law Lords *n.* （英国）上议院高级法官。

⑤ Parliament *n.* 议会、国会。议会两院：在英国尤指由上议院（House of Lords）和下议院（House of Commons）构成的国家立法机关。

are appointed. The government has now stated new 15-member Judicial Appointments Commission, which will consist of five judges, five lawyers, and five non-lawyers and be independent of any political persuasion.

The judiciary as a whole has often been criticized as being too 'white, male, and middle-class'. There may be some justification for this criticism, although the problem is largely accounted for by the fact that until the last twenty years most of the barristers, from whom judges tend to be drawn, could be described in that way. Many more women lawyers and lawyers from different ethnic groups are now becoming eligible for appointment to the bench, and recent appointments suggest that the Lord Chancellor is anxious to see that they are.

Unit Three

World Legal Systems

General Presentation

The initial idea to create this Website on "World Legal Systems" stems from a particular interest: the fact that both civil law and common law are taught at the Faculty of Law of the University of Ottawa[1].

Certainly the creation of such a tool posed quite a challenge, such as determining the criteria for classifying the different legal systems when faced with a large number of mixed legal systems, or ascertaining the status of the law in countries undergoing a complete transformation, particularly in Eastern Europe, Asia or Africa. However, it is becoming increasingly difficult to function without such a guide in the context of globalization. Thus, fully aware of the pitfalls and hence in all modesty, we nevertheless decided to take up the challenge.

Six categories were selected for the creation of this Website on World Legal Systems: Civil law, Common law, Customary law, Muslim law, Talmudic law[2], and Mixed law systems, the latter referring not to a single system but to a combination of systems.

You will note that the headings in the chapter entitled "Classification of Legal Systems and Corresponding Political Entities" refer to the legal systems in the plural rather than in the singular form (e. g. civil law systems, common law systems, etc.). Thus we wanted to account for the fact that each legal system (as a classification category) tends to acquire particular characteristics according to the territories and populations it serves. Need we be reminded that, despite their affiliation to the same legal family, there are significant differences between the positive laws of the United States, the United Kingdom and Australia[3], for example (common law countries) and that the differences between the positive laws of France, Germany and Chile, for example (civil law countries) are no less substantial!

Civil Law Systems

In this category you will find political entities that, apart from other sources, have drawn their inspiration largely from the Roman law heritage and which, by giving precedence to written law, have resolutely opted for a systematic codification of their general law. However, you will also find political entities, generally with mixed legal systems, which may not have resorted to the technique of codification but which have retained, to varying degrees, a sufficient number of elements of Roman law, in written form, to warrant their inclusion in the civilian tradition (e. g. Scotland). On the other hand, this category also includes political entities less influenced by Roman law but whose law, whether codified or not, is founded on a perception of the role of statute law which, in many regards, approaches that of countries with a "pure" civilian tradition (e. g. Scandinavian countries, which occupy an original position in the "Romano-Germanic" family). [4]

Common Law Systems

Like that of civil law, the common law system has taken on a variety of cultural forms throughout the world. Notwithstanding the significant nuances that such diversity can sometimes create, and which political circumstances further accentuate, this category includes political entities whose law, for the most part, is technically based on English common law concepts and legal organizational methods which assign a pre-eminent position to case-law, as opposed to legislation, as the ordinary means of expression of general law. Thus this category includes countries or political entities that may not always have close ties with the English tradition and that sometimes possess an abundance of codes, legislation and non-jurisprudential normative instruments, but for which common law jurisprudence retains its character as the fundamental law (e. g. California).

Customary Law Systems

Hardly any countries or political entities in the world today operate under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law (as a system, not merely as an accessory to positive law) still plays a sometimes significant role, namely in matters of personal conduct, in a relatively high number of countries or political entities with mixed legal

systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example.

Muslim Law Systems

The Muslim legal system is an autonomous legal system which is actually religious in nature and predominantly based on the Koran[5]. In a number of countries of Muslim persuasion it tends to be limited to personal status, although personal status can be rather broadly defined.

Mixed Legal Systems

The term "mixed", which we have arbitrarily chosen over other terms such as "hybrid" or "composite", should not be construed restrictively, as certain authors have done. Thus this category includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.

Development of the Two Major Legal Systems

Development of Civil Law

Civil Law, or code law, is one of two major legal systems currently in use in the Western world. It is based primarily on the written codes of Justinian and Napoleon[6]. The predominant feature of civil law is the attempt to establish a body of legal rules in one systematized code, a single comprehensive legislative enactment. In this system, judicial decisions, case law, are not a source of law, although judicial precedents may be useful in the decision of cases. Civil law remains the basis of the legal system in Italy, France, Spain, Germany, and other parts of the Western world that were once included in the Roman Empire.

Development of Common Law

One country did not follow the comprehensive code approach to law. In England, disputes were resolved on a case-by-case basis, binding the arbiter of a dispute to the rule elicited from the determination of an earlier, similar dispute—hence common law[7]. Common law is the second of the two major legal systems currently in use in the Western world.

Today England (together with the United States and other former British colonies, including

Canada, Australia, and New Zealand) follows the common law. An understanding of the concepts underlying the common law of England is thus vital to any discussion of American law, including American business law. Sir William Blackstone's Commentaries[8], published just before the American Revolution, are generally considered to be the best statement of English common law as it existed when the United States became an independent nation.

According to Blackstone, the common law is that "ancient collection of unwritten maxims and customs" which have "subsisted immemorially in this kingdom." These principles are revealed by the courts of law "through experience in the rendering of judicial decisions," Common law is, therefore, the overall accumulation of judicial decisions, known as case law.

Adapted from http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde-large.html, 2005-7-19; Mary A. Glendon, etc., *Comparative Legal Traditions in a Nutshell*, and John W. Hardwicke, etc., *Business Law*

Notes to the Text

[1] **... the fact that both civil law and common law are taught at the Faculty of Law of the University of Ottawa**: 事实是在渥太华大学法学院既讲授大陆法又讲授普通法。在英国及英联邦国家,"法学院/系"以及"法学院的教师"用 Faculty of Law 表示;在苏格兰,律师学院也用 Faculty of Advocates 表示。美国"法学院"则用 School of Law 表示。然 School 一词也可表示学派或流派,例如:School of comparative jurisprudence 比较法学派;School of judicial realism 实在主义法学派;School of natural law 自然法学派。

[2] **Talmudic law**: 犹太教法;Talmud 犹太教法典;Talmudic (al), *adj.*;Talmudist 犹太教法典编纂者。

[3] **Need we be reminded that, despite their affiliation to the same legal family, there are significant differences between the positive laws of the United States, the United Kingdom and Australia...** 需提醒我们的是,尽管其属于同一法系(普通法系),但美国、英国和澳大利亚的实在法却有着很大的差别。

本句的主句中采用部分倒装结构,省略了 should 一词,表示"倘若要提醒我们的话"。Legal family 直译为法律家族,实指法系;Positive 意指"实证的;确定的;积极的",例:~ causal relationship 必然因果关系;~ coexistence 积极共存;~ evidence 直接证据;~ guaranteed 积极担保。

[4] **On the other hand, this category also includes political entities less influenced by Roman law but whose law, whether codified or not, is founded on a perception of the role of statute law which, in many regards, approaches that of countries with a "pure" civilian tradition (e. g. Scandinavian countries, which occupy an original position in the "Romano-Germanic" family).** 另一方面，本分类也包括了那些受罗马法影响较少，但却（无论是否法典化）在许多方面与"纯粹"大陆法传统国家相同的政治实体，对其成文法作用的认识接近那些国家的成文法观念（例如：有着"罗马－日尔曼"大陆法系原有地位的斯堪的纳维亚半岛诸国家）。
本句中的 Romano-Germanic Family 意指大陆法系，或直译为"罗马－德意志法系"，即传统法系分类中的最古老的"大陆法系"（Civil Law Family）。另一大法系为英美法系，即最盛行的"盎格鲁－美利坚法系"（Anglo-American Law Family）。

[5] **The Muslim legal system is an autonomous legal system which is actually religious in nature and predominantly based on the Koran.** 穆斯林法制是指具有宗教本质并主要依据《古兰经》的自治法律制度。文中的 Muslim 或 Muslem 指伊斯兰教；the Koran 指伊斯兰教的《古兰经》或《可兰经》。

[6] **Civil Law, or code law, is one of two major legal systems currently in use in the Western world. It is based primarily on the written codes of Justinian and Napoleon.** 民法法系或法典法系是西方世界现采行的两大法律制度（法律体系）之一。该法系主要是以成文的《查士丁尼法典》和《拿破仑法典》为基础。句中的 Code of Justinian（Roman）指东罗马皇帝查士丁尼一世下令编纂的法典，该法典分自然法、万民法和民法三个部分，制定于公元 533 年（A. D. 533）。Code of Napoleon（France）公元 1804 年颁布的法国民法典，亦称 Code Civil，是对法国革命民主成果的总结，如民事权利平等（civil equality）和陪审团参与审判（jury trial），对现代法治影响深远。

[7] **In England, disputes were resolved on a case-by-case basis, binding the arbiter of a dispute to the rule elicited from the determination of an earlier, similar dispute—hence common law.** 在英格兰，争端是逐案解决的，前争端的解决过程中所得出的规则对后争端的公断人在处理相似争议具有拘束力——因此称普通法。
common law 普通法，有四种含义：（1）作为英国法的概念，指在英国普遍适用的法律；（2）作为法系的概念，指"普通法系"，与"大陆法系"和其他法系相区别；（3）作为法律形式的一种类型，指判例法，或称法官造法，与成文法相区别；（4）指判例法中的一种类型，与衡平法相区别。

[8] **Sir William Blackstone's Commentaries:** 威廉姆·布莱克斯通爵士的法律评注。
Sir William Blackstone 英国法学家，生卒年份为 1723—1780，其主要著作是根据其在

牛津大学讲授英国法律制度与原则的内容所撰写的《英格兰法评注》（The Commentaries on the Laws of England）（1765—1769）。此书成为英美法学教育中介绍英国法律的重要著作。英文中姓名或名字前冠以 Sir 表示“爵士”头衔。

Exercises

1. *Debating questions.*

(1) Enlisting the Striking Characteristics of the Civil and Common Law Systems by the Comparison of the Two Major Legal Systems.

(2) What is the Mixed Legal System?

Unit Four

Public Law

A fundamental distinction is made in all civil law systems between public and private law. That classification, which is only latent or implicit in the common law, is basic to an understanding of the civil law. For one thing, as we have seen, it produced the distinctive patterns of organization of the court systems of civil law countries. As public law disputes became justiciable in the nineteenth century, separate tribunals were created to handle them. The jurisdiction of ordinary courts today remains limited to disputes governed by private law, with the one major exception of criminal matters. [1] Besides these jurisdictional consequences, the public-private distinction has produced a characteristic division of labor within the legal profession. The members of law faculties tend to identify themselves as either "publicists" or "privatists". Courses and treatises tend to focus on one or the other area, despite the fact that today any given subject matter is likely to have at least some public law aspects.

Though a distinction between public and private law is universally recognized within the civil law world, there is no agreement among civil law lawyers on its theoretical basis or justification, and no uniformity among countries as to its scope and effects. Generally speaking, however, public law concerns relations among organs of the state and between citizens and the state. It includes at least constitutional law, administrative law and criminal law. Private law, dealing with relations among citizens or private groups, includes at least civil law and commercial law. The classification of several other areas is the subject of dispute. Civil procedure, for example, is included by some systems within the private group of subjects, and treated by others as belonging to the field of public law. Labor law, agricultural law, social security, as well as a number of other modern regulated areas, are sometimes said to be "mixed" public and private areas, and sometimes described as *sui generis*. [2]

Although the public-private law distinction has roots in Roman law, public law remained a relatively undeveloped category until modern times. It was the preserve of the sovereign, prudently left aside by jurists. As we noted in our historical introduction to the civil law tradition, nearly all the Roman legal literature that has come down to us is concerned with private law, and

continental legal science traditionally concentrated on private law. We observed too, that in the localism and legal diversity of the Middle Ages, there was little place for public law. But when the centralized state and its administrative organs began to emerge on the continent (coinciding with the growing influence of legally trained professionals), conditions were favorable to the development of administrative law. In the nineteenth century, as administrative law began to flourish, it seemed to civil law lawyers that the ordinary private law rules that applied to disputes involving private individuals or associations could not simply be carried over to relationships in which the state was a party. In France it seemed, too, that the ordinary courts could not be entrusted with the task of resolving disputes involving the state. The French view of the separation of powers led, as we have seen, to the establishment of a separate set of public law courts within the administration. [3]

In Germany, it was otherwise. There, concern about administrative oppression was more prevalent than mistrust of the judiciary. So, to avoid having disputes between citizen and administration adjudicated by the latter, Germany created a separate system of administrative law courts within the judiciary.

Today, as the French Council of State has established its independence from the administration, advanced the protection of individual rights, and extended its own control over the administrative process, the fact that it is technically not a court is of diminished importance. In modern civil law states, whether on the French or German model, the tendency has been toward increasingly effective review of the legality of administrative action. [4]

Today, when one speaks of public law in the civil law systems, what is meant is often merely administrative law. Constitutional law, as it pertains to the form and structure of the state and its organs, is still thought of as being akin to political science. As we have seen, it is only in relatively recent times that courts or other institutions have acquired the power to review the constitutionality of the acts of government. [5] As for criminal law, though technically classified as public law, it has traditionally been the concern of the "privatists" and everywhere falls within the jurisdiction of the ordinary courts. Thus, the bulk of public law in civil law countries in fact consists of administrative law.

It is hard to specify precisely what is included within the concept of administrative law, even within a single country. Generally speaking, it consists of the norms which regulate the organization, functions, and interrelations of public authorities other than the political and judicial authorities, and the norms which govern the relationships between the administrative authorities and citizens. [6] Tax law has become a major specialty within this field. Administrative law does not completely coincide with the jurisdiction of the administrative courts, because, in all

civil law countries, certain administrative matters are relegated by special legislation to the jurisdiction of the ordinary courts.

As might be expected, public and private law often arrive at similar solutions to similar legal problems. Nevertheless, the student of comparative law must always be aware of the possibility that the classification of a dispute as private or public will bring into play a quite different substantive rule or a different method of interpretation. For example, in France during the severe inflations after World War I, the private law courts refused to grant relief to creditors whose fixed contractual claims had become practically worthless, while the Council of State developed a doctrine of unforeseeability to come to the aid of obligees in contracts governed by public law. [7] Administrative law is said, too, to be set apart from private law by its susceptibility to frequent change; by the wider scope it allows for official discretion and the little room it leaves to the discretion of the parties; and by its more vague and fluid legal concepts. However, it should be noted that the general principles of private law are often carried over to supplement or to fill gaps in administrative law.

Adapted from Mary A. Glendon, Michael W. Gordon and Paolo G. Carozza,
Comparative Legal Traditions, 1999

Notes to the Text

[1] **The jurisdiction of ordinary courts today remains limited to disputes governed by private law, with the one major exception of criminal matters.** 在今天，普通法院的管辖权限于那些受私法调整的纠纷，但刑事案件是一种主要的例外情况。jurisdiction 是一多义词：管辖；管辖权；法域。需根据上下文找出其贴切的含义。criminal matters 刑事案件，刑事事件。ordinary court 普通法院。在民法法系（大陆法系）国家中，一般有两个法院系统并存，即普通法院和行政法院。普通法院受理一般民事（包括商事）和刑事案件，统称为私法案件。行政法院（administrative law court）受理行政诉讼，称为公法案件。需注意的是，刑法一般被认为是公法，但在划分法院管辖时，刑事案件却被认为是私人纠纷（即加害人同被害人或其家属之间的纠纷），所以也受普通法院管辖。justiciable 可受法院裁判的。如：justiciable disputes 可裁判的争端（纠纷）；non-justiciable disputes 不可裁判的争端。

同段下文的 legal profession，意即“法律职业”。在西方法学著作中，它指从事直接与法律有关的各种工作的总称，通常又指从事这些工作的人员，其中主要包括法

官、检察官、私人开业律师、法律顾问、公证员和法学教师等。publicist 公法学者（学家）；反之，privatist 私法学者（学家）。subject matter 主题；诉讼事由；标的（物）。subject matter of a case 案由。

[2] **Labor law, agricultural law, social security, as well as a number of other modern regulated areas, are sometimes said to be "mixed" public and private areas, and sometimes described as *sui generis*.** 劳动法、农业法、社会保险和许多其他现代规范化的领域，有时被认为是公私法领域的混合，有时又被说成是自成一类的。social security 社会保险，社会保障；*sui generis* ［拉丁文］自成一类的，独特的。

（同段上文）constitutional law 宪法，administrative law 行政法，criminal law 刑法，civil law 民法，commercial law 商法，civil procedure 民事诉讼程序。

[3] **The French view of the separation of powers led, as we have seen, to the establishment of a separate set of public law courts within the administration.** 正如我们所知道的，法国对权力分立学说的理解，导致了其在行政机关内建立起一批独立的公法法院。separation of powers 权力分立，分权。这种学说认为，只有当国家的三项基本功能（即立法、行政和司法）由不同的和独立的机构行使时，个人的自由才能得到保障。西方三权分立的权力机构为：the legislative (body) 立法机关（同 legislature)，the executive (body) 行政机关，the judicial (body) 司法机关（同下文的 judiciary)。本句中的 the administration 同 administrative organ 行政机关。

（同段上文）sovereign 君主，元首（*n.*）；拥有最高权力的（*adj.*），如：a sovereign state 主权国家，此时其名词为 sovereignty 主权。lawyer 一词有多种译法，包括：律师，法学家，法律工作者，法律人。此处采用"法学家"这一说法。dispute 纠纷，争端。如：legal dispute 法律纠纷，international dispute 国际争端；（下文）adjudicate disputes 裁决纠纷（争端）。

[4] **review of the legality of administrative action** 对行政行为的合法性进行审查。legality 合法性。其形容词为：legal 合法的。

（同段上文）council of state（法国等的）参政院；国务委员会。administrative process 行政诉讼。administrative 与 executive 两词有相同也有相异之处。相同的是，两者都可作"行政"解；相异的是，administrative 可指"管理"，而 executive 则不能。如"工商行政管理局"可译为 administrative bureau for industry and commerce，而不可译为 executive bureau。process 诉讼；程序；过程，进程。如：civil process 民事诉讼；judicial process 司法程序。

[5] **... it is only in relatively recent times that courts or other institutions have acquired the power to review the constitutionality of the acts of government.** 只是在相对较近的时代，法院及其他机构才获得了审查政府行为是否违宪的权力。constitutionality 合

宪性，符合宪法。

[6] **Generally speaking, it consists of the norms which regulate the organization, functions, and interrelations of public authorities other than the political and judicial authorities, and the norms which govern the relationships between the administrative authorities and citizens.** 一般而言，行政法包括调整除了政治和司法机构以外的公共机构的组织、职能和相互关系的规范，以及规定行政机构和公民之间关系的规范。

[7] **... the private law courts refused to grant relief to creditors whose fixed contractual claims had become practically worthless, while the Council of State developed a doctrine of unforeseeability to come to the aid of obligees in contracts governed by public law.** 私法法院拒绝准许债权人免除已没有实际意义的合同规定，而参政院则发展了不可预见性原则来帮助由公法调整的合同债权人。

(同段上文) interpretation 解释，阐释（同 construction）。如：interpretation clause 解释条款。

Exercises

1. *Fill in the blanks with correct legal terms within this text.*

(1) The jurisdiction of the ________ is limited to disputes governed by private law except criminal matters.

________ adjudicate the disputes between citizen and administration.

(2) ________ is a general classification of law, which consists generally of constitutional, administrative, criminal, and international law.

________ means all that part of the law which is administered between citizen and citizen.

(3) The governments of states and the United States are divided into three departments of branches: ________, which is empowered to make laws, ________, which is required to carry out the laws, and ________, which is charged with interpreting the laws and adjudicating disputes under the laws.

2. *Translate the following into Chinese.*

(1) This classification, which is only latent or implicit in the common law, is basic to an understanding of the civil law.

(2) The members of law faculties tend to be either “publicists” or “privatists”.

(3) Courses and treatises tend to be in one or the other area, despite the fact that today any given subject matter is apt to have public law aspects.

(4) There is no agreement among civil law lawyers on its theoretical basis or justification, and no uniformity among countries as to its scope and effects.

(5) The proper classification of several other areas is the subject of dispute.

(6) Nearly all the Roman legal literature that has come down to us is concerned with private law, and legal science traditionally has concentrated on private law.

(7) As for criminal law, though technically classified as public law, it has traditionally been the concern of the "privatists" and everywhere falls within the jurisdiction of the ordinary courts.

(8) It should be noted that the general principles of private law are often carried over to supplement or to fill gaps in administrative law.

Unit Five

Private Law

Just as the term "public law" is commonly used to designate administrative law, "private law" is often used interchangeably with civil law. In civil law systems, however, private law comprises two grand divisions of its own: civil law and commercial law. Civil law, in principle, applies to everyone and its basic provisions are found in the civil codes, supplemented by auxiliary statutes. [1] Commercial law, which concerns specific groups of persons and/or specific types of activities, is in most civil law countries contained in a separate commercial code. In Italy and Switzerland, there are no commercial codes, but commercial law nevertheless is considered and taught as a separate private law subject. Besides commercial law, there are a number of other fields which are usually classified as separate from civil law, but within the domain of private law: literary and artistic property, maritime law, insurance and industrial property. Labor law developed from the civil law of the individual employment contract. However, today it is variously classified as a special category of private law; as mixed public and private law; or as being a field unto itself, neither public nor private.

A. Civil Law

Civil law (droit civil, Burgerliches Recht or Zivilrecht) is traditionally arranged in treatises and for teaching purposes under the following major headings: the law of persons; family law; marital property law; property law; succession law and the law of obligations. These categories are not exhaustive, nor do they precisely correspond with the way the subjects are distributed within the civil codes of various countries. In Switzerland, for example, there is a separate Code of Obligations[2], and in France, family law is included within the law of persons.

The law of persons consists of all the norms concerning the status of the individuals and legal entities which are the subjects of the law. It includes the legal rules relating to such matters as names, domicile, civil status, capacity and protection of persons under legal incapacities of various sorts. [3] Most legal entities have long been subjected to special regulation by administrative, commercial and labor law, so that only a few associations are now left within the

domain of the civil codes.

Family law covers marriage formation; the legal effects of marriage; marriage termination by divorce, separation, and annulment; filiation; and family support obligations. [4] In the first of these areas, which has remained quite stable, the civil law systems have taken from the French the requirement of a civil ceremony for the formation of a valid marriage. In all the other parts of family law, extensive code revision has taken place under the influence of three major trends: the liberalization of the grounds for divorce; the equalization of the positions of women and men in the areas of family decision-making and property rights; and the assimilation of the status of children born outside legal marriage to that of children born to parents who are married to each other.

Marital property law, with close links to family law, property law and succession law, is traditionally treated as a separate area of civil law. The civil codes establish and regulate a "legal marital property regime," the system that governs the property relations of all spouses who do not choose an alternative regime by marriage contract. The legal regime is typically a form of community property, usually with pre-marital property and property acquired through gift or inheritance kept separate if it can be identified as such. [5] The modern trend favors forms of the so-called "deferred community" in which the spouses are treated as separate owners of whatever they respectively acquire during the marriage, but property acquired during the marriage is divided equally upon termination of the marriage by divorce or death. In addition to establishing the legal regime, the marital property provisions of the civil codes typically establish and regulate a number of alternative regimes which may be chosen by contract, as well as the procedures for making and altering marriage contracts.

Property law in civil law systems makes a distinction between movable and immovable property[6], which roughly corresponds to the common law distinction between personal and real property. Historically, as in the common law, land was of greater importance than chattels, and the law of the older codes, especially, reflects that state of affairs. In the liberal tradition, the right of ownership was considered virtually absolute, and the protection of private property, was regarded as an important function of the state. In practice, the absoluteness of property right as described in the civil codes has long since been extensively limited by public law legislation, by new constitutions and by judicial interpretation.

Another traditional attribute of civil law ownership, not found in the common law, is its unitary character. Although the civil law recognizes certain forms of co-ownership, it is hard for a civil law lawyer to conceive of ownership as a "bundle of rights" that can be parcelled out in various ways, or divided over time (as is the case with common law present and future interests). The distinction between legal and equitable title[7] is unknown. Thus it is difficult for civil law

nations to develop institutions which perform all of the useful social functions of the flexible common law trust. Property is thought of as having one owner (or one set of concurrent owners) and other interests affecting it are generally thought of as restrictions or encumbrances on the title of the owner. Leases of real estate are not considered property at all, but fall within the contractual area of the law of obligations. In modern civil law, however, the idea of unitary ownership seems to be eroding somewhat as new forms of shared ownership gain in popularity.

Succession law covers the disposition of property upon death by will or by intestate inheritance. Freedom of testation in civil law systems is typically limited in favor of the testator's children who are entitled to a "reserved share" of their parent's estate. [8] Unlike American law, civil law systems do not traditionally accord such a forced share to the surviving spouse, whose economic interests are thought to be sufficiently protected by the division of marital property upon death. The modern trend everywhere, however, has been to improve gradually the successoral position of the surviving spouse, and in some countries, Germany for example, this has brought about a reserved share in his or her favor.

Two typical aspects of civil law succession have attracted considerable interest in the United States. The first is the practice of having a will authenticated before a notary during the lifetime of the testator, a procedure which dispenses with the need for probate. The second is the fact that, in the normal situation, there is nothing corresponding to our period of administration of a decedent's estate. An inheritance simply vests upon death in the persons designated by the will or the laws of intestate succession, subject to their right of renunciation. [9] Another idea from the civil law of succession has already been widely incorporated into American probate law reforms. This is the inclusion of certain types of *inter vivos* transfers within the decedent's estate for purposes of calculating the forced share.

The law of obligations is the most technical, abstract and (at first sight) stable part of the civil law. It covers all acts or transactions which can give rise to rights or claims and is customarily divided into three parts: the law of contracts, the law of tort (delict), and the law of unjust enrichment. [10] The contract law sections of the codes typically begin with a few general rules which are applicable to all contracts, and then set forth special rules for particular sorts of contracts: sales, leases, agency, loans, etc. The civil law conception of tort liability is a unified one: in contrast to the common law which developed separate pigeonholes for different kinds of harms, it is a law of tort rather than torts. The civil law of unjust enrichment has been built up from general principles with a heavy component of case law.

Chief among the convergence factors within the law of obligations are the expanded range of facts that modern courts everywhere consider legally relevant, the movement away from formalism,

and trends toward protecting reasonable reliance and expectations. However, at the very time that contractual and delictual responsibility appear to be converging, the scope of the field of obligations appears to be diminishing. [11] The law of obligations is at first sight the most stable area of the civil law. If one looks only at the civil codes, the parts containing the law of obligations have been little changed, and they are recognizably related to the oldest parts of the civil law tradition. Legislation outside the codes, however, has altered both the substance and the underlying philosophy of the law of obligations.

B. Commercial Law

Commercial law (droit commercial, Handelsrecht) generally includes corporations and other business associations, securities, banking, and negotiable instruments, as well as other commercial transactions. [12] We noted in our historical introduction that commercial law had developed from mercantile customs and the practice of merchants' courts into a well-established separate branch of private law even before the codification period. The dichotomy between civil and commercial law survived both codification and the centralization of justice, thanks mainly to France which adopted the Code de Commerce in 1807 and established separate commercial courts within the first level of jurisdiction. [13] Most other civil law countries followed suit.

The division between civil and commercial law is not, however, absolute or clear-cut. First, all systems have found the concepts of "merchant" or "commercial act" difficult to define for purposes of determining whether a transaction is governed by civil or commercial law. Second, the commercial codes lack the general principles and internal coherence of the civil codes. Thus, civil law is frequently brought in to fill the gaps in the commercial codes and their supplementary laws. [14] This is so much the case that some writers speak of the "civilization of commercial law", by which they mean that commercial law is becoming a special field within the civil law. Third, the differences are further diminished by a countertrend toward "commercialization of the civil law." The commercial law influence on the civil law has manifested itself in a reduction of unnecessary formality, increased protection of reliance by third parties, and a tendency to view transactions as parts of on-going relationships, rather than as isolated legal events. Finally, in Switzerland, Italy, and The Netherlands, the decision has been made to dispense with a separate commercial code, a development which may represent the wave of the future.

However, at the same time that civil and commercial law, through mutual enrichment are coming to resemble parts of a unified field within private law, another legal trend is operating to remove much of commercial law from private law altogether. Originally based on custom, then codified on the liberal principle of individual freedom of contract, commercial law has increasingly

been shaped by a body of legislation regulating commercial and corporate activity. One aspect of this movement has been the development in civil law countries, as in common law nations, of a separate body of consumer law in which the distinction between merchant and non-merchant is significant. Another aspect is the subjection of commercial activity generally to requirements for official licenses, permits, and so on. Where state economic planning is extensive, it is hard to distinguish some parts of commercial law from administrative law. To take account of the role of public regulation of the market, French and German writers have renamed the classification. Instead of "commercial law", they refer to the field of "commercial and economic law," economic law being the regulatory law of the state. [15]

C. Labor Law

If commercial law now lies somewhere along the border between public and private law, it is clear that labor law, for most practical purposes, has escaped the private law domain entirely. The employment contract, once a civil law relation, is heavily regulated by rules which are of a public law nature. The "labor codes" which exist in some countries are not codes of the classical variety, but rather collections of diverse statutes pertaining to employment relationships. [16] With general statutory protection against discharge without cause in most civil law countries, and with mandatory employee participation in shop-floor decision-making as well as in the actual control of the enterprise, the role of private autonomy is reduced mainly to the decision whether or not to enter into an employment relationship. The question arises whether labor law is, as is sometimes said, a special field unto itself, or whether it is in fact increasingly typical of law in modern states where the public-private distinction is increasingly difficult to maintain.

Adapted from Mary A. Glendon, Michael W. Gordon and Paolo G. Carozza,
Comparative Legal Traditions, 1999

Notes to the Text

[1] **Civil law, in principle, applies to everyone and its basic provisions are found in the civil codes, supplemented by auxiliary statutes.** 原则上，民法适用于每个人，其基本的规定均见于民法典中，并由辅助性的制定法加以补充。provision 规定，条款。（同段下文的）property 表示"财产，财产权；物（物权）；所有权"。如：industrial property 工业产权（如专利和商标）；literary property 版权，著作权（同 copyright）。maritime law 海商法。

[2] **Code of Obligations** 债法典。obligation 义务，责任，债。

同段上文的 law of persons 表示“人法”。marital property law 婚姻财产法。succession law 继承法。law of obligations 债法。

[3] **It includes the legal rules relating to such matters as names, domicile, civil status, capacity and protection of persons under legal incapacities of various sorts.** 它包括有关诸如姓名、住所、民事地位、能力以及对法律上无行为能力的各种人的保护之类的问题的法律规则。capacity（行为）能力，资格；legal incapacities 法律上无行为能力。

（同段上文）legal entities 法律实体；subjects of the law 法律主体。

（同段下文）subject to 作为法律英语中最常见的短语，可以有多种翻译方法，如“隶属的、从属的、受…支配的；易受…的；须依照的、顺从的；附条件的；依据、依照；可以…；可能会…”等，具体的翻译方式应依上下文定夺。例如，be subject to ratification 须经批准方可生效；to subject to the law of the land 受国家法律的管辖。regulation 规则，管理规定，条例。文中 have long been subjected to special regulation 长久以来受特别规定的约束。association 社团；合伙。

[4] **Family law covers marriage formation; the legal effects of marriage; marriage termination by divorce, separation, and annulment; filiation; and family support obligations.** 家庭法包括婚姻成立，婚姻的法律效力，由于离婚、分居、宣告婚姻无效所致的婚姻终止，私生子父亲的确定，以及家庭成员的扶养义务。annulment 废除，无效；如 annulment of marriage 注销婚姻，宣告婚姻无效。

（同段下文）**the requirement of a civil ceremony for the formation of a valid marriage** 要求一个有效婚姻的成立需举行世俗仪式。其中的 civil 一词有多种含义：（1）民事的，与“刑事的（penal, criminal）”相对称：civil law 民法；（2）公民的：civil right 公民权；（3）文职的：a civil servant 文职人员，公务员；（4）非宗教的：a civil ceremony 世俗结婚（指不采用宗教仪式而由政府官员证婚的结婚）。the assimilation of the status of children born outside legal marriage to that of children born to parents who are married to each other 非婚生子女与婚生子女地位平等。其中的 assimilation to... 视同……。

[5] **The legal regime is typically a form of community property, usually with pre-marital property and property acquired through gift or inheritance kept separate if it can be identified as such.** 这种法律制度的典型形式是共同财产制，通常来说，婚前财产，以及若能证明一方通过赠与或继承获得的财产，仍为各自所有。

（同段下文）deferred community 延迟的共同财产制。... is divided equally upon termination of the marriage 婚姻关系终止时……均分（……财产）。其中的 upon 为介词

(= on)，它常用于法律文件上，表示时间 (= at the time/ moment of)。

[6] **movable property, personal property** 动产。immovable property, real property 不动产。

(同段下文) chattel 动产，有形财产。right of ownership 所有权；private property 私有财产。

[7] **legal title** 普通法上的所有权，法定所有权（产权）。与之相对者：equity title 衡平法上的所有权。这种分类在信托法最为典型。

(同段上文) co-ownership 财产共有（权），共同所有制（同下文的 shared ownership）。

(同段下文) unitary ownership 单一所有权。

[8] **Freedom of testation in civil law systems is typically limited in favor of the testator's children who are entitled to a "reserved share " of their parent's estate.** 在大陆法系国家，遗嘱自由总是受到有利于立遗嘱人子女的限制，他们有权获得其父母遗产的"保留份额"。reserved share 保留份额。与之相关者是下一段落的 forced share 特留份额，法定分配份额。

(同段上文) intestate inheritance 无遗嘱继承，即法定继承。intestate 没有留下遗嘱的。与此有关的词有：testate 留有遗嘱的；testator 留有遗嘱而死的男人；已立遗嘱的男人（如果为女性，则是 testatrix）；testament 遗嘱（同 will）；estate 遗产，财产。inheritance 继承（同 succession）。

[9] **An inheritance simply vests upon death in the persons designated by the will or the laws of intestate succession, subject to their right of renunciation.** 被继承人死亡后，继承权仅授予那些通过遗嘱指明的或者无遗嘱继承下依法律规定的人，且他们可以放弃继承权。to vest in sb. 授权某人。

(同段上文) having a will authenticated before a notary 在公证人面前进行遗嘱认证。authenticate 认证，确定；notary 公证人，公证员。administration of a decedent's estate 死者遗产的管理。

(同段下文) *inter vivos* [拉丁文] 生前，在世时。

[10] **It covers all acts or transactions which can give rise to rights or claims and is customarily divided into three parts: the law of contracts, the law of tort (delict), and the law of unjust enrichment.** 债法包括能引起权利或求偿的所有行为或交易，它习惯上分为三个部分：合同法、侵权法和不当得利法。claim 权利要求，求偿，诉讼，索赔；unjust enrichment 不当得利。tort (*delict*) 侵权行为，不法行为（括号内的单词为该词的拉丁文）。

(同段下文) tort liability 侵权行为的赔偿责任；case law 判例法。

[11] **However, at the very time that contractual and delictual responsibility appear to be**

converging, the scope of the field of obligations appears to be diminishing. 然而，当合同责任与侵权行为责任呈现出趋同之势时，债法领域的范围似乎在缩小。

[12] **Commercial law (droit commercial, Handelsrecht) generally includes corporations and other business associations, securities, banking, and negotiable instruments, as well as other commercial transactions.** 商法通常包括公司及其他商业联合、证券、银行、流通票据以及其他商事交易。droit commercial 和 Handelsrecht 分别为 commercial law 的法文和德文。

(同段下文) mercantile customs 商业习惯。此处 custom 的复数形式不要和"海关"(customs) 相混淆。

[13] **The dichotomy between civil and commercial law survived both codification and the centralization of justice, thanks mainly to France which adopted the Code de Commerce in 1807 and established separate commercial courts within the first level of jurisdiction.** 民法与商法的二分法能在法典编纂和司法集中化运动中得以保存下来，主要是由于法国在 1807 年通过了商法典并在初审管辖范围内设立了独立的商法法院。

[14] **Thus, civil law is frequently brought in to fill the gaps in the commercial codes and their supplementary laws.** 因此，民法经常被用来填补商法典及其补充性法律的空缺。

(同段下文) civilization of commercial law 商法的民法化，commercialization of civil law 民法的商法化。

[15] **Instead of "commercial law", they refer to the field of "commercial and economic law," economic law being the regulatory law of the state.** 他们以"商事与经济法"来取代"商法"作为这个部门法的名称，经济法成为国家的管理法。

(同段上文) a body of legislation regulating commercial and corporate activity 规范商业和公司活动的法律的总体。

[16] **The "labor codes" which exist in some countries are not codes of the classical variety, but rather collections of diverse statutes pertaining to employment relationships.** 某些国家具有的劳动法典并非传统类型的法典，而是关于雇佣关系的各类法规的汇编。

(同段下文) statutory protection against discharge without cause 法律保护不得无故开除工人（雇员）; the role of private autonomy 私人自治的作用。

Exercises

1. *Which of the following statements are NOT true according to the text?*

(1) "Private law" is often used to designate civil law.
(2) Labor law is doubtlessly within the domain of private law.
(3) Commercial law is arranged in a separate commercial code in every civil law country.
(4) The law of persons concerns the status of the subjects of the law.
(5) Most parts of family law have remained stable.
(6) The status of illegitimate children is not equal to that of legitimate children.
(7) All spouses may choose an alternative legal regime by marriage contract under marital property law.
(8) Under the deferred community property, the spouses can divide equally the property acquired during the marriage at the time of marriage termination by divorce.
(9) Property law in civil law countries makes a distinction between personal and real property.
(10) The absoluteness of property right is not limited by public law legislation.
(11) Freedom of testament is limited by a "reserved share" in civil law systems.
(12) Successors may renounce their rights of succession.
(13) The law of unjust enrichment is a part of the law of obligations.
(14) The division between civil and commercial law is distinct.
(15) Labor law is in most civil law countries arranged in a separate labor code.
(16) The division between public and private law has been challenged.

2. *Translate the following sentences into English.*

(1) 正如"公法"这个词普遍用来指行政法一样，"私法"这个词也常与民法交替使用。
(2) 在意大利和瑞士是没有商法典的，但商法仍然被认为是并且在教学中也被当作是一门独立的私法学科。
(3) 人法由所有关于作为法律主体的个人和法律实体的地位的规范组成。
(4) 与家庭法、财产法和继承法有着密切联系的婚姻财产法，传统上被视为是民法的一个独立领域。
(5) 民法法系中的财产法承认动产和不动产的划分，这大致相当于普通法系中关于动产和不动产的区分。

(6) 在自由资本主义时期，所有权被认为是绝对的，保护私有财产被看作是国家的重要职能。

(7) 大陆法系继承法的两个典型方面已在美国引起了相当大的兴趣。

(8) 典型的法典中的合同法部分，是以可适用于所有合同的规则开始的，接着阐明适用于特定种类合同的特殊规则：销售、租赁、代理、借贷等。

(9) 瑞士、意大利以及荷兰都决定不单独制定商法典，这代表了未来的一个发展潮流。

(10) 在国家广泛实行计划经济之时，人们很难将商法的某些部分与行政法区分开来。

Unit Six

Basic Principles of Common Law

A thousand years ago the only sources of law were the basic dictates of humanity and local customs. After the Norman Conquest of 1066 the Royal judges attempted to apply a common law to the whole country. The law was based partly on the Norman law. They brought with them from France and partly on English customs which they found to be widespread or 'general'.

The creation of this common law, however, was strictly on an *ad hoc*[1] basis, each problem being settled as it arose. No one actually sat down to compile a list of the laws. How then were people to know what was a crime, or in the event of a dispute between citizens, what were the respective rights of each citizen? Indeed, how are they to know these things now?

The answer is two fold.

Firstly, a small number of very old legal textbooks, compiled from the twelfth century onwards, have survived into the present day.

Secondly, and very much more important, there is the doctrine of judicial precedent[2]. Stated simply, this means that in their work of settling disputes, judges are guided by the decisions of judges in earlier similar cases. So, if a case which is to be tried today is similar to a case tried last week, its result is likely to be the same. In this way a body of legal principles has been built up, which may be discovered by examining the judgments in all cases tried to date. For this reason 'precedent' is often referred to as 'case-law' or as *stare decisis*[3].

It is sometimes said that in reaching his decision a judge is merely declaring what the common law has always been. But where a judge has to make a decision on a point of law which has never arisen before in any court, this view seems a little unrealistic, and the judge appears actually to be creating law—hence the expression 'judge-made law' for judicial precedent.

When a judge simply applies to the facts of one particular case a legal rule previously enunciated in an earlier trial, his decision is known as a declaratory precedent, because it declares existing law. On the other hand, if the case is unlike any previous one, so that it is without precedent, then the judge must make up his own mind what the common law is or should be. His decision will then be known as an original precedent because a new legal rule originates

from it. In this way the common law continues to grow and consolidate on its *ad hoc* basis. Today, there are so many decided cases on almost every conceivable legal topic, that the direct importance of general custom, once the foundation of our law, has been reduced.

Two factors have been especially important in the development of precedent as a source of law.

Firstly, the development of printing in the sixteenth century led to many more reports of decided cases becoming readily available. The growth of precedent as a source of law obviously depended on those decisions becoming widely known, for clearly the judges could not 'follow' earlier decisions without knowing what they were.

Secondly, the hierarchy of the English courts became more clearly established. (See Table below)

The Hierarchy of the Courts

<table>
<tr><td>1</td><td>House of lords</td><td>Binds</td><td>all lower courts (2-5 below)</td></tr>
<tr><td rowspan="2">2</td><td>(a) Court of Appeal (Civil Division)</td><td>Binds</td><td>all lower courts (3-5 below) and usually itself</td></tr>
<tr><td>(b) Court of Appeal (Criminal Division)</td><td>Binds</td><td>all lower courts (3-5 below)</td></tr>
<tr><td>3</td><td>High Court</td><td>Binds</td><td>All lower courts</td></tr>
<tr><td>4</td><td>County Court</td><td>Binds</td><td>Nobody</td></tr>
<tr><td>5</td><td>Magistrates' courts and all others</td><td>Binds</td><td>Nobody</td></tr>
</table>

To understand Table above properly, it is necessary to realize that there are two kinds of precedent: binding precedent, where the judge is bound to apply the legal rule enunciated in the earlier case, and persuasive precedent, where the judge will often follow the earlier decision but may refuse to be persuaded if he chooses[4]. For example, the High Court is bound to follow the House of Lords. The Court of Appeal (Criminal Division), however, may choose whether or not to follow its own decision in an earlier case, though it will always give it serious consideration as a persuasive precedent. The decisions of the Privy Council[5] are persuasive precedent, as are the decisions of one High Court judge on another.

Under the doctrine of judicial precedent, a judge trying a case may be obliged to apply a legal principle laid down in an earlier case. The principle is usually known by the Latin phrase *ratio decidendi*[6] (the reason for the reason). The *ratio decidendi* must be a legal principle and only the principle of law which was actually applied by the judge in the case can be its *ratio*

decidendi. Any hypothetical example postulated by the judge is not part of the *ratio decidendi*, but is known by another Latin tag: *obiter dictum*[7] (plural, dicta) – 'a thing, or things, said by the way'. Also, if three or more judges are sitting together and one of them takes a different view of the law from that of the others, then his dissenting judgment is obiter, as the view of the law which it expresses was not in fact applied in the case[8].

Adapted from Richard H. Bruce, *Success in Law*, 1991.

Notes to the Text

[1] ***ad hoc*** 为此，特别的，专门的，临时的。

[2] **judicial precedent** 司法判例/先例。

[3] ***stare decisis*** [拉丁文] 因循前例/遵循先例，指较高级的法院在处理某一类事实确立一项法律原则后，在以后该法院或同级法院、下级法院在处理案件中碰到同类事实时应遵循该已确立的法律原则。英国在 1966 年前，英格兰各级法院都严格遵守"因循先例"原则，之后上议院对这一原则稍微放松。美国法院特别是最高法院则较为灵活，它可以拒绝遵循或者废止其先例。

[4] **... binding precedent, where the judge is bound to apply the legal rule enunciated in the earlier case, and persuasive precedent, where the judge will often follow the earlier decision but may refuse to be persuaded if he chooses.** 有约束力的先例下，法官必须适用先前案例所确立下来的规则；在只具有说服力的先例下，法官尽管经常遵循这些决定，但是他们也可以选择拒绝适用。

binding precedent 有拘束力的（法律）先例，指法官在裁决案件时必须加以考虑的判例。

persuasive authority 有说服力的法律根据，指对法庭没有拘束力但对判决的做出具有参考、借鉴意义及某种说服力的判例或其他法律根据。

[5] **Privy Council** 枢密院，是管辖英联邦殖民地案件的最高上诉法院。

[6] ***ratio decidendi*** 判决依据（理由），指判决案件的法律依据。

[7] ***obiter dictum*** （法官的）附带意见，法官在做出判决的过程中就某一与案件并不直接相关的法律问题所作的评论，他并非为本案判决所必要，因此不具有判例的拘束力，但是往往具有借鉴的意义。

[8] **if three or more judges are sitting together and one of them takes a different view of the law from that of the others, then his dissenting judgment is obiter, as the view of**

the law which it expresses was not in fact applied in the case. 如果三个或者更多的法官开庭审理案件，其中一个有不同的意见，那么他的不同意的意见是“附带意见”，因为他的法律意见实际没有适用到本案当中。

Exercises

1. *Explain the position where a previous decision by a court is:*

(i) reversed;
(ii) overruled;
(iii) approved;
(iv) distinguished;
(v) affirmed;
(vi) applied;
(vii) considered;

2. *Based on your common knowledge of civil law and common law system, say something about the advantages and disadvantages of the judicial precedent principle.*

3. *Supplementary readings: how to read a case.*

(1) The structure of a case report (on the right side we give you a case example, which is a real case called Wilkinson v. Downton, a very famous case, to have a better understanding.)

• the name of the case	Wilkinson v. Downton
• citation	[1897] 2 Q. B. 57
• the court	Queen's Bench Division (Court of Appeal)
• judges	Wright J.
• dates	1897 May 8
• catchwords in italics	***Action-Cause of-Nervous Shock -Practical Joke-Remoteness of Damages***
• headnote : saying what the effect of this decision is on existing case law	Held, that these facts constitute a good cause of action.

• list of cases cited or referred	Victorian Railways Commissioners v. Coultas, (1888) 13 App. cas. 222 and Allsop v. Allsop, (1860) 5 H. &N. 534, considered.
• history of the cases	On April 9, 1896, Thomas Wilkinson, the husband of the plaintiff, went to a race-meeting, and on the evening of the same day the defendant came to the plaintiff's house and represented to her husband, while returning with some friends from the races, had met with an accident and had both his legs broken, that he was lying at the Elms public-house at Leytonstone... These statements were false. The plaintiff so believed them, with the result that she became seriously ill from a shock to her nervous system. She also on the faith of the defendant's statement incurred a small expense for railway fares of persons whom she sent to see after her husband. The jury assessed the expense of the railway fares at 1s. 10 1/2 d., and the damages for the injury caused by nervous shock at1001.
• names of the counsel	Warburton, and A. N. Talbot, for the plaintiff Abinger, for the defendant
• the judgment	
* account of the facts	Judgment ...
* account of the issues raised by counsel	...
* analysis of relevant authority	It is argued that...
* background reasoning	...
* conclusion as to the relevant law	...
* application of the relevant law to the facts	...
* decision/order of the court	... There must be judgment for the plaintiff.
• the names of the solicitors	Solicitors: for the plaintiff: J. S. Waters. Solicitor for defendant: G. E. Philbrick

(2) Case citations:

a. United States

Court cases are generally cited in a uniform format, beginning with the name of the parties (generally in italics or underlined) followed by the volume number of the reporter, the abbreviated name of the reporter, the pager number, and the date of the decision (in parentheses). For example: *Meritor Savings Bank v. Vinson*, 477 U. S. 57 (1986)

This citation tells you that this case will be found in Volume 477 of *United States Reports* at page 57, and the case was decided in 1986.

Since more than one publisher compiles cases into reporters, often a case name will be followed by several citations. These are called parallel citations. The above case, including the parallel citations, would look like this:

Meritor Savings Bank v. Vinson, 477 *U. S.* 57, 106 *S. Ct.* 2399, 91 *L. Ed. 2d* 49, 54 *U. S. L. W.* 4703 (1986).

In this example, United States Reports is the official (government) publication, Supreme Court Reporter is put out by West Publishing Company, United States Supreme Court Reports, Lawyers Edition is put out by Lawyer's Cooperative Publishing Company, and United States Law Week is published by BNA. The case will be the same in all versions, but the commercial publishers add various editorial enhancements to their reports of cases.

b. U. K

A typical English case citation may look like:

Smith v. Weston, [1987] 2 Q. B. 135 (if there were more than one volume of Queen's Bench reports for1987) or *Weston v. Remington*, 1986 A. C. 135 (if there were only one volume of Appeal Cases for 1986)

Examples:

The Diechland [1990] 1 QB 361.

In re Connan: ex parte Hyde 20 QBD 690.

Grobbelaar v News Group Newspapers Ltd [2002] 1 WLR 3024.

Explanation:

Cases are cited by the name(s) of the parties followed by the reference of the publication in which the report of the case appears. Proprietary references do not tell you in which jurisdiction or court the case was heard, and it is good practice to add a suffix to indicate the court e. g. CA for Court of Appeal.

Year	Volume number	Series	Page	Suffix
[1990]	1	QB	361	CA
(1888)	20	QBD	690	CA
[2002]	1	WLR	3024	HL (E)

Notes:

- **Abbreviations**

  The series of the report is always abbreviated. Consult Current Law or Halsbury's Laws for fuller lists.
- **Page Numbers**

  refers to printed pages.
- **Volume Numbers**

  At the time In re Connan was decided (1888), only volume numbers were used, so the year was not necessary. You should include the year, but it must be in round brackets.
- **Brackets**

  In legal citation [ ] and ( ) round the year have special significance. [ ] means the year is an essential part of the reference so it must be included and in such cases the use of [ ] is compulsory. ( ) means the year is not part of the reference. It should be included but it must be in round brackets.

There is a list of common abbreviations:

The Law Reports (This is the normally more accurate than other series)	
AC	Appeal Cases from House of Lords Privy Council
QB	Queens Bench High Court and Appeals to CA
Ch	Chancery High Court and Appeals to CA
Fam	Family High Court and Appeals to CA

WLR	Weekly Law Reports	Issued in three annual volumes. Cases in Vols 2 and 3 (but not 1) will be reported in the Law Reports.

All ER	All England Law Reports	Butterworths. Reports of cases of general interest.
Cr App R	Criminal Appeal Reports	Sweet and Maxwell. Major criminal appeal cases decided in all English criminal appellate courts.
CMLR	Common Market Law Reports	Sweet and Maxwell. European Union case law.
Lloyd's Rep	Lloyd's Law Reports	LLP Professional Publishing. Maritime and commercial cases.

Unit Seven

Common Law and Equity

The common law was one of the three main historical sources of English law. The other two were legislation and equity. The common law evolved from custom and was the body of law created and administered by the king's courts.

In very early times—before King Alfred the Great (reigned 871-99) – there was no system of justice that applied to the whole of the country. It was not ruled by a single monarch. Different parts of the country had different laws. The courts were the communal courts of the Shires. There are hundreds of courts held by land owners and the King's court was one among many.

When William the Conqueror invaded England in 1066, he took over the most efficiently governed kingdom in Europe, but he soon grasped the need to reinforce its system of central or national government[1]. This meant trying to provide some central system of justice over which the king had control, for William understood that it was only by making laws which had to be obeyed and could be enforced throughout the land that he could exercise real power and control over all his subjects[2].

For centuries English monarchs had governed the outer reaches of their kingdoms through sheriffs and their officials, but to secure their authority they would have to travel, or 'progress' through the country, taking their court and courtiers with them. When William's court progressed, he and the most powerful courtiers attached to his *Curia Regis* would listen to those who came to him with their 'grievances' —their complaints or accusations—and they would give judgment[3]. Almost all the main courts we have today can trace back to William's *Curia Regis.*

King Henry II (reigned 1154-89) was particularly interested in law and order, and played an outstanding part in the development of the legal system. He understood to a greater extent than his predecessors that a single system of justice for the whole land under the control of the king would not only help to unify the country, but give him great power.

Henry set the foundations of 'professional' judges, members of the clergy or laymen 'learned in the law' upon whom he could depend to uphold his laws. There were then 18 judges in the country. He ordered five of them to remain in London and take over from him the task of

deciding cases. This resulted in the creation of the King's Bench of judges, who sat at Westminster.

In 1166 Henry issued a Declaration at the Assize of Clarendon (an assize was an early form of King's Council; it later became a 'sitting' or session of the court) that the remaining judges should be sent out on circuits to travel different parts of the country[4]. When they did so they had to apply the laws that had been made by the judges at Westminster. In this way many local customary laws were replaced by new national laws. As these national laws would apply to everyone, they would be 'common to all'. These laws therefore became known as the common law. There are three main common law courts at Westminster and, by the end of the fourteenth century, they were staffed by professional judges.

The common law emerged as a system because of the doctrine of *stare decisis*. When a judge decided a new problem in a case before him, that decision would be followed in subsequent cases by judges as a legal rule. In time judicial precedent became binding on the courts rather than simply helpful guidance.

...

The common law is certainly one of the glories of England. But by the late fifteenth century the courts were in a bad way. The procedure of the common law courts was slow, highly technical and very expensive: a trivial mistake in pleading could lose a good cause. Another serious problem was that the use of juries became widespread, even in civil cases, and juries could be intimidated, bribed, and 'packed' (filled with the friends of one of the parties).

How could people obtain justice, if not in the common law courts? The answer seems almost to echo the beginnings of the common law courts. Even after the formation of the common law courts it was always open to those who felt that they could not receive justice, or afford the expense of going to court, to appeal to or petition the king to 'redress their grievances'. This meant pleading with him directly to hear their complaints and provide a remedy for them. At first kings would consider these petitions themselves, or leave it to their Councils, or 'parliaments', to decide them, but during the fifteenth century this work was delegated to one of the Council members. This was the Chancellor—later to receive the title Lord High Chancellor.

Because the Lord Chancellor decided petitions addressed to the king, he became known as the 'Keeper of the King's Conscience'; and because there were so many petitions, he came to preside over his own court. It was called the Court of Chancery[5]. The Chancellor did not try criminal cases. He dealt only with civil disputes concerning, for example, matters of property and breaches of contract. He set out to do justice in these cases where the parties (people involved in a case) were able to show that the common law courts were not able or prepared to do justice.

The law that was applied in the Court of Chancery was known as equity, a word meaning even handedness and fairness.

Eventually, the work of the Court of Chancery grew to the point where it became a rival to the common law courts. No one knows precisely when it first came into being, but it was well established by the time of Henry VIII—and it too came to occupy a space in Westminster Hall.

The essential principle by which the Court of Chancery acted was that everyone should receive fairness and justice. There were three important conditions that a person seeking justice from the Court of Chancery had to meet:

- He had to show that he could not receive justice in the common law courts.
- He had to show that he was himself without blame. This was called 'coming to court with clean hands'[6].
- He had to show that he had not delayed in bringing his case before the court.

If he was able to do these things, and to satisfy the court that he had suffered as a result of some wrongdoing by another person, the court would give him a remedy, meaning that it would devise some way to ensure that if possible something was done to put right the wrong that had been done to him. In this way, to use an expression well known to lawyers, it was able to 'redress his grievance'. This example may help to illustrate how the Common Law courts and the Court of Chancery could differ.

As equity began to develop into a system of rules, conflict necessarily arose between it and the common law. The Court of Chancery started to issue common injunctions[7] which restrained a litigant from proceeding with an action in the common law courts, or from enforcing an order which had been obtained in the common law courts. In 1615 these disputes came to a head. In the common law case of *Courtney v Glanvil* in the Court of the King's Bench, Sir Edward Coke, the chief justice, held that, where a common law court had decided a case, Chancery had no power to intervene, and parties who appealed to the Chancellor would be imprisoned. However, the Lord Chancellor in the *Earl of Oxford's* Case of that year declared that the Court of Chancery could set aside common law courts' decisions. The dispute was referred to James I who issued a decree[8] confirming that Chancery could intervene, even though judgment had been given at common law. Equity therefore prevailed over the common law and it still does.

As the years went by the Court of Chancery (now the Chancery Division of the High Court) tended to specialize in certain areas of the law. The work of the Chancery Division is now confined mainly to cases of company law, partnership, conveyancing (transfer of land and buildings), wills and probate (administration of the property of persons who have died), patent and copyright

law, and revenue (taxation).

There were, however, serious problems with the old Court of Chancery too—the reverse side of the legal coin. In contrast with the common law courts, where judges were obliged to follow the decisions of their predecessors, the Lord Chancellors in their Court of Chancery were free to do as they thought right in each individual case. This depended entirely on their own personal ideas of justice—their own 'conscience'. This meant that although lawyers who had to advise people of their rights at least knew what the common law courts were likely to do in a particular situation, it was much more difficult to predict what the Lord Chancellor would do in his court. In the Court of Chancery the law had no certainty, and lawyers therefore felt unable to advise their clients properly. Besides, despite its good intentions and early popularity, as the work of the Court of Chancery grew, it earned a bad reputation for expense and delay.

...

In 1873, the Judicature Act 'merged' common law and equity, and although one of the divisions of the High Court is still called the Chancery Division, since that time both legal and equitable rights and remedies were to be administered in the Supreme Court. S. 25 of the Act provides that where there is a conflict between common law and equity, equity should prevail. In most instances, in fact, there is no conflict, as equitable rules developed as a supplement to the common law rather than as a direct challenge.

Adapted from Geoffrey Rivlin, *Understanding the Law*, 2004

Notes to the Text

[1] **When William the Conqueror invaded England in 1066, he took over the most efficiently governed kingdom in European, but he soon grasped the need to reinforce its system of central or national government.** 当征服者威廉于公元1066年侵占英格兰时，他接管了这个在欧洲最为有效统治的国家，但他很快领会到增强中央集权的需要。

[2] **This meant trying to provide some central system of justice over which the king had control, for William understood that it as only by making laws which had to be obeyed and could be enforced throughout the land that he could exercise real power and control over all his subjects.** 这意味着尽可能提供一种适用于全国的中央司法系统，因为威廉知道只有制订全国都遵守并可强制执行的法律，才能使其权力得以

真正行使并让民众臣服。

[3] **When William's court progressed, he and the most powerful courtiers attached to his Curia Regis would listen to those who came to him with their 'grievances'—their complaints or accusations—and they would give judgment.** 当威廉的法院发展的时候，他和他的最有权势的王室法庭的朝臣会倾听那些来向他们诉说冤屈的人的申诉或指控，然后给出他们的判决。

grievance 委屈，冤情，不平。

Curia Regis 王室法庭，它对国王的直属封臣之间或其他显贵之间的纠纷有一审裁判权，并享有上诉管辖权，普通民众可以将在郡法庭或百户区法庭审理的案件移至这里。

[4] **In 1166 Henry issued a Declaration at the Assize of Clarendon (an assize was an early form of King's Council; it later became a 'sitting' or session of the court) that the remaining judges should be sent out on circuits to travel different parts of the country.** 在1166年亨利发布了《克拉伦登诏令》（审判庭是早期国王的议会形式；它后来成为法院会议），诏令宣布现有的法官应该被派往全国各地进行巡回审判。

assize 巡回审判、巡回法庭；法令。circuit 巡回审判区。

[5] **Court of Chancery** 衡平法院。

[6] **He had to show that he was himself without blame. This was called 'coming to court with clean hands'.** 他必须表明他自己没有任何过失。这在衡平法上被称为"在衡平法院提起诉讼者必须自身清白无暇"。

[7] **injunction** 禁令（法院强制被告从事或不得从事某项行为的正式命令）。

[8] **decree** 判决；裁定。该词尤指衡平法院的判决，即法庭根据公平（equity）和良知（good conscience）原则确定诉讼各方权利而做出的裁决或命令。在普通法诉讼与衡平法诉讼的程序合而为一之后，一般用 judgment 代替 decree。当今，该词的使用范围广泛，可指任何形式的法庭命令。

Exercises

1. *Answer the following questions.*

(1) Is the term 'common law' in our text the same as the 'common law' with whom we compare 'civil law' system?

(2) Why did equity emerge in English legal history?

(3) How to deal with the problem when there is a conflict between Equity and Common Law?

2. *Supplementary readings.*

The Maxims of Equity（衡平法格言）

You may still often meet with those maxims when you study English law. Some equitable principles can be found in the maxims of equity which came to be applied in the Court of Chancery and are still relevant today.

Equity Looks to the Substance Rather Than the Form

Court of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that by insisting on the form, the substance will be defeated. It holds it inequitable to allow a person to insist on such form, and thereby defeat the substance. This maxim is in the nature of a general principle only, which implied that equity is generally less concerned with precise forms than the common law.

Equity Acts in Personam

It is in the nature of equitable remedies that they generally operate against the person of the defendant, being enforceable by imprisonment for contempt. It is in this way that, as discussed above, equity could claim not to be interfering with the common law. The judgment at law in effect was binding on the whole world and equity only intervened against the individual defendant who was prevented from enforcing his legal rights.

He Who Comes to Equity Must Come With Clean Hands

Though it is indicated that equity's willingness to intervene where the common law will not, it should not be thought that equity will automatically intervene whenever a certain situation arises. In general, one can say that wherever certain facts are found and a common law right or interest has been established, common law remedies will be available whether that produces a fair result or not. By contrast equitable remedies are discretionary and the court will not grant them if it feels that the plaintiff is unworthy, notwithstanding that prima facie he has established an equitable right or interest.

The rather picturesque language of this maxim means that a party seeking an equitable remedy must not himself be guilty of unconscionable conduct. The court may therefore consider the past conduct of the claimant. Most cases concern illegal or fraudulent behavior on the part of the claimant and it is not clear to what extent the maxim is applicable outside such behavior.

Delay Defeats Equity

Two matters must be noted. First, the time in which an action for equitable relief sought may be governed by the Limitation Act 1980 and second, even where there is no statutory limitation, it will be governed by the equitable principle of laches. Whether the court will regard the claim as barred with be a matter to be determined on the facts. As with all equitable principles, flexibility is important.

Equity Will Not Assist a Volunteer

A volunteer in this context is a person who has not given consideration for a bargain. For an instance, unless consideration is given, an undertaking to give something is unenforceable, being a mere gratuitous promise.

Unit Eight

The English and the American Court System

The English Court System

The English legal system is concerned with courts which have jurisdiction over England and Wales and reference will not be made to the rest of the United Kingdom or British Isles[1]. There are many different types of court, each with its own particular function and responsibilities. In some courts judges sit[2] (try cases) alone. In others they sit with juries. The courts are arranged from the highest court in the land, the House of Lords, to the magistrates' courts and tribunals.

House of Lords
Appeals from the Court of Appeal and High Court (also Scotland and Northern Ireland)

Court of Appeal	
Criminal Division	**Civil Division**
Appeals from the Crown Court	Appeals from the High Court, County Courts and tribunals

High Court		
Queen's Bench Division Contract and tort, etc. Commercial Court Admiralty Court[3] Appeals from Crown Courts and magistrates'courts	**Family Division** Matrimonial proceedings[4], and relating to children probate service Appeals from magistrates'courts	**Chancery Division** Equity and trusts, tax partnerships, bankruptcy, Companies Court, Patents Court Appeals from county courts

Crown Court
Divided into six circuits for administrative convenience
Almost exclusive criminal litigation

County Courts
Majority of civil litigation

Magistrates' Court
Trials of summary offences
Committals to the Crown Court
Family proceedings courts
Youth courts

Tribunals
Hear appeals from decisions on immigration, social security, children support, pensions, tax and lands

Now we give a basic introduction on these courts:

The House of Lords and The Privy Council[5]

The story of two of the most senior courts, the House of Lords and the Privy Council, is a tale of two committees.

The House of Lords is the final court of appeal in England, Wales, and Northern Ireland in both civil and criminal matters, and from the Court of Session in Scotland on civil matters. It will only deal with cases of real public importance. It is not possible for anyone to take his or her case to the House of Lords. The Judges who sit in the House of Lords are the 12 Lords of Appeal in Ordinary. They are commonly known as the Law Lords.

The Privy Council was established by statute in 1833 to hear appeals from 'any dominion or dependency of the Crown in any matter, civil or criminal'. It is therefore a relic of the colonial days of the British Empire, when it sat as the supreme court of appeal for all the colonies and dominions. It still tries appeals from some of the 'dependent' territories. For example, although it no longer hears cases from Canada, India, and Australia, it still hears cases from New Zealand, Jamaica, and Trinidad and Tobago.

The ruling of the House of Lords are always binding (must be followed by the lower courts). The rulings of the Privy Council are normally not binding on other courts, but they are of strong persuasive authority (the rulings do not have to be followed, but should be given attention and great respect when courts are deciding what the law is).

The Court of Appeal[6]

The Court of Appeal hears most of the important civil and criminal appeals from courts in

England and Wales. Very few cases go on appeal from the Court of Appeal to the House of Lords. The Court of Appeal has two main functions: to hear appeals in civil cases from the High Court and county courts, and to hear appeals in criminal cases from the Crown Court.

The High Court of Justice[7]

There are three divisions of the High Court of Justice. The Queen's Bench Division consists of about 80 High Court Judges, and about 20 in Chancery Division and 20 in the Family Division. The judges of the Queen's Bench Division and the Family Division in particular work a rota, trying cases in London, but also traveling throughout the country to the major court centres on each of the circuits, to try cases there. This practice of going out on circuit is a living relic of a system which dates back to the twelfth century.

The Crown Court[8]

The Crown Court is one court but the country is divided into 6 circuits. In each circuit there are several trial centres. There are three tiers of court centre which hear different classes of case, depending on the gravity and complexity of the alleged offence.

The County Court[9]

A large majority of civil actions are heard by the judges of the county court (no criminal jurisdiction). They almost always sit alone—without juries—and they deal with a great variety of civil work. There are approximately 300 county courts all over the country.

The Magistrates' Court

There are about 700 magistrates' courts in the country. The vast majority of all criminal cases are dealt with in the magistrates' courts by magistrates. The magistrates try the huge number of criminal cases which are brought for relatively 'petty crimes[10]' such as motoring offences, petty theft, drunkenness, and minor offences of violence and other breaches of public order. They also play an important role as judges in the youth courts and hear certain civil cases, and sit in Family Courts.

The American Court System

The U. S. court system is divided into two administratively separate systems, the federal and

the state, each of which is independent of the executive and legislative branches of government[11]. Such a dual court system is a heritage of the colonial period. By the time the U. S. Constitution had first mandated (1789) the establishment of a federal judiciary, each of the original Thirteen Colonies already had its own comprehensive court system based on the English model. Thus, the two systems grew side by side and came to exercise exclusive jurisdiction in some areas and overlapping, or concurrent, jurisdiction in others.

Federal Court System

Of the two systems, the federal is by far the less complicated. According to Article III of the Constitution, the federal judiciary is divided into three main levels.

At the bottom are the federal district courts, which have original jurisdiction in most cases of federal law. Made up of 92 districts, the federal district court system has at least one bench in each of the 50 states, as well as one each in the District of Columbia and Puerto Rico. There are from 1 to more than 20 judges in each district, and, as with most federal jurists, district court judges are appointed by the President and serve for life. Cases handled by the federal district courts include those relating to alleged violations of the Constitution or other federal laws, maritime disputes, cases directly involving a state or the federal government, and cases in which foreign governments, citizens of foreign countries, or citizens of two or more different states are involved.

Directly above the district courts are the United States courts of appeals, each superior to one or more district courts. Established by Congress in 1891, the court of appeals system is composed of 11 judicial circuits throughout the 50 states plus one in the District of Columbia. There are from 6 to 27 judges in each circuit. In addition to hearing appeals from their respective district courts, the courts of appeals have original jurisdiction in cases involving a challenge to an order of a federal regulatory agency, such as the Securities and Exchange Commission.

The highest court in the federal system is the Supreme Court of the United States. The Supreme Court sits in Washington, D. C., and has final jurisdiction on all cases that it hears. The high court may review decisions made by the U. S. courts of appeals, and it may also choose to hear appeals from state appellate courts if a constitutional or other federal issue is involved. The Supreme Court has original jurisdiction in a limited number of cases, including those that involve high-ranking diplomats of other nations or those between two U. S. states.

State Court System

The system of state courts is quite diverse; virtually no two states have identical judiciaries.

In general, however, the states, like the federal government, have a hierarchically organized system of general courts along with a group of special courts[12]. The lowest level of state courts, often known generically as the inferior courts[13], may include any of the following: magistrate court, municipal court, justice of the peace court, police court, traffic court, and county court. Such tribunals, often quite informal, handle only minor civil and criminal cases. More serious offenses are heard in superior court[14], also known as state district court, circuit court, and by a variety of other names. The superior courts, usually organized by counties, hear appeals from the inferior courts and have original jurisdiction over major civil suits and serious crimes such as grand larceny[15]. It is here that most of the nation's jury trials occur. The highest state court, usually called the appellate court, state court of appeals, or state supreme court, generally hears appeals from the state superior courts and, in some instances, has original jurisdiction over particularly important cases. A number of the larger states, such as New York, also have intermediate appellate courts between the superior courts and the state's highest court. Additionally, a state may have any of a wide variety of special tribunals, usually on the inferior court level, including juvenile court, divorce court, probate court, family court, housing court, and small-claims court[16]. In all, there are more than 1,000 state courts of various types, and their judges, who may be either appointed or elected, handle the overwhelming majority of trials held in the United States each year.

Adapted from Geoffrey Rivlin, *Understanding the Law*, 2004
and Paul Lagassé, *The Columbia Electronic Encyclopedia*, 2005

Notes to the Text

[1] **The English legal system is concerned with courts which have jurisdiction over England and Wales and reference will not be made to the rest of the United Kingdom or British Isles.** 英国法律系统所关注的只是对英格兰以及威尔士有管辖权的法院，提及内容不会涉及联合王国的其余部分（主要指苏格兰和北爱尔兰）和不列颠群岛。

[2] **sit** *v.* （官方团体）开会；开庭；参加考试。

[3] **Admiralty Court** 海事法院。

[4] **matrimonial proceedings** 与婚姻有关的诉讼。

[5] **The House of Lords** 上议院/贵族院。上议院对涉及具有普遍意义的重大法律问题的案件进行审理，它是民事、刑事案件最高的上诉审级，是英国国内的最高法院

(the highest court)。

[6] **The court of Appeal** 上诉法院。

[7] **The High Court of Justice** 高等法院。

[8] **The Crown Court** 刑事法院。英格兰和威尔士及北爱尔兰的刑事法院系统由四级组成，从下至上依次是：(1) the Magistrates Courts 治安法院，它是刑事审判系统的最低审级 (the lowest level)；(2) the Crown Court 刑事法院，它是在治安法院之上审理刑事案件的法院；(3) the Court of Appeal (Criminal Division) 上诉法院 (刑事分庭)，它处理刑事法院的上诉案件；(4) the House of Lords 上议院。

[9] **The County Court** 郡法院，是受理民事诉讼的下级法院。

[10] **petty crime** 轻罪。

[11] **The U. S. court system is divided into two administratively separate systems, the federal and the state, each of which is independent of the executive and legislative branches of government.** 美国法院系统被分为两个相互独立的行政系统：联邦系统和州系统，这两个法院系统与政府的行政和立法部门相互独立。

[12] **In general, however, the states, like the federal government, have a hierarchically organized system of general courts along with a group of special courts.** 可是通常来说，和联邦政府一样，州法院有一个分等级组织的普通法院系统，同时并存一些特殊法院。

[13] **inferior court** 初级法院/低级法院。

[14] **superior court** 高级法院。

[15] **grand larceny** 重偷盗罪。

[16]... **a state may have any of a wide variety of special tribunals, usually on the inferior court level, including juvenile court, divorce court, probate court, family court, housing court, and small-claims court.** 一个州可以有范围非常广的不同种类的特别法庭，通常为初级法院的级别，包括少年法庭、离婚法庭、遗嘱法庭、家庭法庭、住宅法庭和小额索偿法庭。

Exercises

1. *Tell whether each of the following statements is true or false, if it is false, give the reason.*

(1) The English court system introduced by this chapter also applies to Scotland.

(2) The ruling of the Privy Council is always binding.

(3) There are several high courts all over the England.

(4) There is only one Crown Court in England.

(5) The magistrate court only deals with the crimes which are not serious.

(6) There are two court systems in the US. The person who wants to start the litigation can choose either system.

(7) The appellant can appeal to the supreme court of the US from the supreme state court.

2. *Can you make a basic introduction on our Chinese court system?*

Unit Nine

The Sources of Criminal Law[1]

There are two sources of English criminal law: common law and legislation.

Common Law

Common law is that part of English law which is not the result of legislation, i. e., it is the law which originated in the custom of the people and was justified and developed by the decisions and rulings of the judges.

Common Law Offences

From the twelfth to the fourteenth centuries the judges of the Court of King's Bench elaborated the rules relating to the more serious offences which came to be known as 'felonies'. In the fourteenth century less serious offences known later as 'misdemeanours' were similarly evolved. A few misdemeanours were subsequently created by the rulings of the judges in particular cases and by the Court of Star Chamber.[2] After the Restoration some of the latter were developed by the common law judges, who 'always claimed the right of defining given acts as misdemeanours, although they never attempted to do so in the case of felonies', but in modern times statute has played a preponderant part in the criminal law.

There is still a small number of offences which exist at common law only. This means that their definition cannot be found in an Act of Parliament, but must be sought in the rulings of the judges. *Prima facie*[3], not only the definition of the offence itself but also the punishment to be awarded is contained in the common law, but several statutes prescribe specific punishments for certain common law offences. For example, murder is an offence at common law; in no statute is there to be found a definition of it, but by reason of the wealth of judicial pronouncements it is possible to construct a comprehensive definition of the offence. The punishment for murder is, however, governed by statute; it is a mandatory sentence of life imprisonment. Manslaughter also remains an offence at common law; imprisonment for life is laid down as the maximum punishment by statute but, by way of contrast with the case of murder, a lesser sentence of imprisonment, a

fine, or even a conditional or absolute discharge is possible. The relevant statutes content themselves with naming the offences of murder and manslaughter and assume the existence of these offences without giving any definition. Other examples of common law offences described in this book are public nuisance, perverting the course of justice, outraging public decency, incitement to commit an offence and conspiracy to defraud, for all of which (besides the last) the punishment on conviction on indictment is still prescribed by the common law.

In Morris the Court of Criminal Appeal affirmed the rule that, where the punishment for a common law offence is not laid down by statute, the judge may sentence the accused to be imprisoned for a period or fined an amount, or both, to be fixed at his discretion.[4] In theory, the decision in Morris could lead to some very anomalous results. This is because, in the case of a common law offence for which no maximum punishment is provided by statute, the court could impose a longer sentence than it could in the case of a more serious offence, the punishment of which is dealt with by statute. There is, however, an overriding requirement that the punishment should not be excessive, and there is no reason to suppose that the decision in Morris gives rise to any injustice in practice.

Legislation

Statute

The vast majority of offences are defined and regulated by statutes, i. e., Acts of Parliament which have been duly passed through both Houses and received the Royal Assent. Of the 540 indictable offences (i. e., those triable in the Crown Court) recorded in the 1995 edition of Archbold, 520 were regulated by statute and 20 were common law offences. All summary offences, of which there are at least 7,000, are regulated by statute or by subordinate legislation.[5]

Particularly in modern times Parliament's response to a perceived social problem has been to make its manifestation an offence. Since 1990, for example, a range of offences has been introduced to deal with raves, collective trespasses, stalkers and keepers of dangerous dogs.

Statute may create an entirely new offence. For example, before the passing of the Punishment of Incest Act 1908, it was not an offence for a man to have sexual intercourse with an adult female whom he knew to be his granddaughter, daughter, sister or mother, although such incestuous intercourse had generally been regarded as morally abhorrent. The Act made such conduct criminal. This is an instance of a serious offence which has been created by statute and there are many others since, from time to time in the history of the criminal law, Parliament has

found it necessary to punish acts which were not punished by the common law. It is in the sphere of the less morally reprehensible offences, however, that Parliament has been most active.

Apart from the creation of new offences by statute, it is also necessary to bear in mind, in order to have a full and proper understanding of the criminal law, that many offences which now exist by virtue of statute were originally common law offences. Many statutes have replaced common law offences and in so doing have changed the common law very considerably.

It follows from what has been said that in England we have no single criminal code such as exists in many countries. The result is that, with the exception of common law offences and those created by subordinate legislation, the criminal law of England is contained in a number of statutes. The Offences Against the Person Act 1861, for example, covers a variety of offences which are broadly defined as being committed against the person and, besides prescribing the punishment for murder and manslaughter, includes such crimes as wounding with intent to do grievous bodily harm, administering poison, using explosives, assaults, bigamy and abortion. The Theft Act 1968 and the Criminal Damage Act 1971 cover most offences against property. [6]

In addition to Acts of the kind mentioned in the last paragraph, there is a large number whose main object is to set up public services of some description, or to control certain activities such as road traffic, but which contain offences for which punishments are prescribed. They are not essentially concerned with the criminal law, but they certainly create offences and as far as they do so must be regarded as one of the sources of the criminal law. This already large category is increasing because in modern times the State has assumed the responsibility for controlling and curtailing a range of activities which previously anyone was free to undertake.

Thus the field which is covered by criminal Offences created by statute at the present day is very wide indeed. A glance at the Table of Statutes in *Stone's Justices' Manual* is a clear demonstration of the fact that, to comprehend the extent of the criminal law, the student must not confine himself merely to those statutes which appear to be immediately concerned with it. As well as being aware of the Theft Act 1968 and the Criminal Damage Act 1971, he must remember that there are penal provisions in the Insolvency Act 1986, the Licensing Act 1964 and a host of others. [7]

Subordinate Legislation

A statute may give power to some body such as the Queen in Council, a Minister or a local authority to make regulations and prescribe for their breach.

This method of creating criminal offences is of increasing importance at the present day, although it is not new. A good example is the power of the Secretary of State for Transport under the Road Traffic Acts to make regulations. Acting under this power, he has made regulations

which cover a very large number of different subjects and prosecutions are regularly instituted for breach of them. Such matters as the efficiency of brakes and the use of car horns are to be found not in the Acts themselves, but in the regulations.

Subordinate legislation made under statutory powers, otherwise known as delegated legislation, is of two kinds. The more important kind are Orders in Council made by the Queen in Council and regulations made by Ministers.[8] Generally, these must be made by statutory instrument and are subject to the rules governing publication and procedure contained in the Statutory Instruments Act 1946. The other kind of subordinate legislation, bylaws, are made by local authorities and certain other bodies authorised by statute. Although general in operation, they are restricted to the locality or undertaking to which they apply.

Adapted from Card, Cross and Jones, *Criminal Law*, 15th ed., 2001

Notes to the Text

[1] 本文阐述的是英国刑法的两个渊源（source）：普通法（common law）和立法（legislation）。本文所指称的“立法”包括了制定法（statute）和从属立法（subordinate legislation，又译“次级立法”）。subordinate legislation 也称 subordinated legislation，指由法律授权制定的立法。

[2] **From the twelfth to the fourteenth centuries the judges of the Court of King's Bench elaborated the rules relating to the more serious offences which came to be known as 'felonies'. In the fourteenth century less serious offences known later as 'misdemeanours' were similarly evolved. A few misdemeanours were subsequently created by the rulings of the judges in particular cases and by the Court of Star Chamber.** 从 12 世纪到 14 世纪，王座法庭的法官们详述了关于被称之为“重罪”的较严重犯罪的规则。相似地，在 14 世纪，后来被称为“轻罪”的较轻犯罪的规则也逐渐形成。尔后，一些轻罪罪名经由法官们在一些特定案件的裁决和星室法庭的活动而得以创设。

标题 common law offence 指普通法上的犯罪。这些犯罪的定义不能从议会制定的法令（Act of Parliament，又称“议会立法”）中去找，而必须从法官的判决中去找。与 common law offence 相对的是 statutory offence，“制定法上的犯罪”或“法定罪行”。在英国，大多数犯罪由制定法规定和调整，即由上、下两院正式通过并得到王室批准的议会法令加以规定和调整。

Court of King's Bench，简称 King's Bench，（英国）王座法庭，或指（英国高等法院）王座分庭。Court of Star Chamber（英国）星室法庭（又译"秘密法庭"），其因在威斯敏斯特宫的星室（Star Chamber）开庭而得名。该法庭在审理案件时不采用陪审团（jury），其主要处理普通法法庭无法审理的刑事案件或特殊性质的案件。1641 年星室法庭被撤销。

felony 重罪，misdemeanour 轻罪。ruling 裁决，裁定，其近义词有：decision 判决；judgment（民事案件的）判决；sentence（刑事案件的）判决，刑罚，科刑。sentence 一词亦可做动词，例如：be sentenced to imprisonment 被判处徒刑（或监禁）。

同段下文的"the Restoration"是指英国历史上查理二世在 1660 年的王政复辟。

[3] ***prima facie*** ［拉丁文］*表面上看来；初步看来*。典型的搭配如：prima facie case 表面上证据确凿的案件。*prima facie* evidence 初步证据；表面上确凿的证据。manslaughter 非预谋杀人，非蓄意杀人罪，即一时起意或由于过失杀人；murder 谋杀，蓄意预谋杀人。imprisonment for life（或称 life imprisonment）终身监禁，无期徒刑。fine 罚金；conditional or absolute discharge 附条件或无条件释放。public nuisance 妨害公众罪。与之相对的是 private nuisance 妨害私人行为或对私人的干扰行为，这属于民事侵权行为。perverting the course of justice 破坏司法罪（泛指诸如制造伪证、干扰证人作证等妨害或阻碍司法公务的犯罪行为）。commit an offence（a crime）犯罪；indictment 控诉，（刑事）起诉书，公诉书。

[4] **In Morris the Court of Criminal Appeal affirmed the rule that, where the punishment for a common law offence is not laid down by statute, the judge may sentence the accused to be imprisoned for a period or fined an amount, or both, to be fixed at his discretion.** *在莫里斯一案中，刑事上诉法院确认了这样一项规则：如果制定法没有对一种普通法上犯罪的刑罚做出规定，那么法官可以自行决定判处被告一定期限的监禁或一定数目的罚金，或者同时判处监禁与罚金。*the accused（刑事案件的）被告，民事案件的被告人为 defendant。discretion（法官的）自由裁量权，又称 discretionary power。

[5] **The vast majority of offences are defined and regulated by statutes, i. e., Acts of Parliament which have been duly passed through both Houses and received the Royal Assent. Of the 540 indictable offences (i. e. those triable in the Crown Court) recorded in the 1995 edition of Archbold, 520 were regulated by statute and 20 were common law offences. All summary offences, of which there are at least 7, 000, are regulated by statute or by subordinate legislation.** *大多数犯罪由制定法规定和调整，即由上、下两院正式通过并得到王室批准的议会法令加以规定和调整。记录在 1995 年版的* Arcbbold *里的 540 种可起诉的罪行（即那些可在刑事法院审判的犯罪）*

当中，有520种是由制定法调整的，其余20种属于普通法上的犯罪。在所有按简易程序处理的犯罪中，至少有7000种犯罪是由制定法或从属立法所调整。

indictable offence 可起诉的罪行，公诉罪。其指的是只能以大陪审团起诉书(indictment)起诉的犯罪。在普通法上，公诉罪包括叛国罪、可判死刑的犯罪和重罪。summary offences 按简易程序审理的犯罪，可迅速判决的犯罪（或简称“速决罪”），亦称 offences triable summarily。相关的术语如 summary proceeding 简易程序。与 summary offences 相对的犯罪，是依公诉书按正式起诉程序审理的犯罪：offences on indictment。

[6] **It follows from what has been said that in England we have no single criminal code such as exists in many countries. The result is that, with the exception of common law offences and those created by subordinate legislation, the criminal law of England is contained in a number of statutes. The Offences Against the Person Act 1861, for example, covers a variety of offences which are broadly defined as being committed against the person and, besides prescribing the punishment for murder and manslaughter, includes such crimes as wounding with intent to do grievous bodily harm, administering poison, using explosives, assaults, bigamy and abortion. The Theft Act 1968 and the Criminal Damage Act 1971 cover most offences against property.** 从人们所认为的可得出结论：我们英格兰没有像许多国家所拥有的那种单一刑法典。因此，除了普通法上的犯罪和从属立法所创设的那些犯罪之外，英格兰的刑法体现为许多制定法。例如，《1861年侵犯人身罪法》，它适用于广义上的侵犯人身的各种犯罪。该法除了规定对谋杀和非蓄意杀人罪的刑罚外，还包括如下类型的犯罪：故意重伤身体、投毒、爆炸、殴打、重婚和堕胎。《1968年盗窃罪法》和《1971年刑事损害法》则包括了大多数的侵犯财产罪。

offence against the person 侵害人身罪。其相对者为 offence against property 侵犯财产罪。act 是个多义词，其意思包括：法（例），条例，法案；行为。本句中的含义为前者，其同义词为 law 法律。law 和 act 一般都是指立法机构制定的法。但在美国，人们习惯于把立法机构制定的法称为 law，而英国则习惯于称为 act。administering poison 投毒（罪）。criminal damage 故意毁坏他人财物罪，（英国）刑事损害。

[7] **Thus the field which is covered by criminal Offences created by statute at the present day is very wide indeed. A glance at the Table of Statutes in Stone's Justices' Manual is a clear demonstration of the fact that, to comprehend the extent of the criminal law, the student must not confine himself merely to those statutes which appear to be immediately concerned with it. As well as being aware of the Theft Act 1968 and the Criminal Damage Act 1971, he must remember that there are penal provisions in the**

Insolvency Act 1986, the Licensing Act 1964 and a host of others. 因而，由制定法创设的刑事犯罪所涵盖的领域在今天确实很宽广。只要看一看斯通的《法官手册》中的法律目录就足以说明这一事实，即要了解刑法所涉及的范围，学生们决不能仅仅局限在那些与刑法直接相关的制定法上，他应知道《1968 年盗窃罪法》和《1971 年刑事损害法》，他还应谨记，在《1986 年破产法》、《1964 年许可经营法》以及许多其他法律中，均有关涉刑事犯罪的规定。

criminal offence 刑事犯罪；与之相关者 criminal offender 刑事犯。justice 一词在法律上有多种含义：正义，公正（同 fair）；司法，裁判；（较高级的）法官（同 judge）。例如，civil justice 民事审判；chief justice 首席法官，Chief Justice of the United States 美国最高法院首席大法官。又如，The overall purpose of law may be thought of as the achievement of justice. 实现正义被认为是法律的总目的。penal 刑事的，刑法上的；惩罚性的。例如，penal laws [总称] 刑事立法，刑事法规；penal clause 处罚条款；penal damages 惩罚性损害赔偿金。其名词 penalty 处罚，惩罚。

[8] **Subordinate legislation made under statutory powers, otherwise known as delegated legislation, is of two kinds. The more important kind are Orders in Council made by the Queen in Council and regulations made by Ministers.** 依据法定权力制定的从属立法，又称授权立法，其有两大种类。较为重要的一类，是女王会同枢密院制定的枢密院君令和由各大臣制定的规章。

under 是法律文书中的一个常用介词，主要有三种意义：按照，根据（= according to）；由于（= because of）；考虑到（= taking into consideration）。statutory power 法定权力；delegated legislation 授权立法。Queen in Council 女王会同枢密院（即女王主持的枢密院会议）；Order in Council（英）国王会同枢密院令（指国王由枢密院建议并据此建议发布的命令，亦称“枢密院君令”）。

（同段下文）bylaw 意为“细则”，“规章”。

Exercises

1. *Match each of the following numbered definitions with correct term in the list below. Write the letter of your choice in the answer column.*

a. murder　　b. manslaughter　　c. felony

d. theft　　e. misdemeanour　　f. bigamy

g. assault　　h. abortion　　i. public nuisance

(1) A serious crime such as murder or arson. ________

(2) A less serious crime such as driving without a valid license and creating a disturbance. ________

(3) An unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property. ________

(4) Unlawful killings of another human being with malice aforethought. ________

(5) The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact. ________

(6) The act of marrying one person while legally married to another, which is a criminal offence if it is committed knowingly. ________

(7) The taking of another's property unlawfully, with the intention of depriving the owner of its use. ________

(8) The unlawful killing of a person without malice. ________

(9) At common law, the misdemeanor of causing a miscarriage or premature delivery of a fetus by means of any instrument, medicine, drug, or other means. ________

2. *Translate the following into Chinese.*

Treason is considered a felony in the United States, and severe penalties[1] attend convictions for such disloyalty. A difference between felonies and misdemeanors is the severity of punishment for the crime. Felonies are punishable[2] by at least a year's imprisonment in a state or federal prison (and in some instances by loss of life[3]), accompanied by the loss of civil rights[4]. Misdemanours are punishable by fines, shorter terms of incarceration[5], or both.

The traditional theory of punishment was that it should fit the crime[6], and penalties were rigidly fixed. That theory still has some validity in practice, for it is customary to fix maximum and minimum limitations on punishments for particular crimes.

Nevertheless, it has been partly superseded by the view that punishment should fit the criminal[7], with the objective of reforming him or keeping him from committing further crimes, and deter others from following his example.

Notes

[1] severe penalties 重刑

[2] be punishable by... 用……处罚，罚以……

[3] loss of life 死刑（又称 death penalty，capital punishment）

[4] loss of civil rights 剥夺政治权利，剥夺公权

[5] *incarceration* 监禁（同 imprisonment）

[6] it（指 punishment）should fit the crime 刑罚应与罪行相适应

[7] punishment should fit the criminal 刑罚应与犯罪者相适应

Unit Ten

Criminal Procedure

In many countries one or more judges try criminal cases alone, without juries. They have an inquisitorial system[1]. In this system the judges themselves try to get at the truth by inquiring into the case, directing investigations, and questioning witnesses. In England, the system is an adversarial system. This involves two sides, the prosecution and defence, as opponents or adversaries, fighting the case out before a jury—each side producing the best evidence it can in support of its case, and doing the best it can to destroy the case for the other side. The one very important qualification to this general approach is that if in a criminal case the prosecution know of any information or evidence which might assist the defendant to present his case, they are duty bound to disclose it to the defence, and make it available to them.

The judge's responsibilities in a criminal trial are great, but the jury's role is even more important. It is the jury who must weigh up the evidence given by the witnesses and decide who to believe or disbelieve. In this way the jury actually decide all the facts of the case. As it is their duty to decide these facts 'according to the evidence', they (not the judge) must therefore say whether the defendant is guilty or not guilty.

Before trial a defendant will be charged with an offence, and then he will be remanded either in custody or on bail[2]. A remand in custody means that he will be detained in prison or a young offender institution pending[3] his trial. A remand on bail means that he will remain free, but bail may be 'unconditional', or 'conditional' —the court will impose certain conditions such as residence at a particular address, reporting to the police, or surrendering a passport. Bail should only be refused if there are good reasons to believe that the defendant will abscond, commit further offences, or interfere with (intimidate) witnesses connected with his case.

Almost all criminal cases are those in which the state prosecutes someone who is alleged to have committed a crime. This means that the prosecution is conducted on behalf of society as a whole, and not by an individual. There are rare cases in which private prosecutions (commenced by individual citizens) have been brought.

In all criminal cases the person accused is called the defendant, and his or her trial will

result in a verdict (decision) of either guilty or not guilty. If the verdict is 'guilty', the defendant has been convicted. He will now have a criminal record for that crime, and will be sentenced (punished) by the court. If the verdict is 'not guilty' the defendant has been acquitted, he will be allowed to leave court without punishment.

In a criminal trial the prosecution brings the case against a defendant, and the prosecution must prove the case. The duty to prove the case is called the burden of proof[4]. The duty to make the jury sure of guilt, is called the standard of proof. A defendant never has to prove his innocence[5]. If the court is not sure of guilt (this used to be called proving the case beyond reasonable doubt) he must be acquitted[6].

All criminal offences are either indictable offences or summary offences. Indictable offences are the more serious offences, which must be tried[7] in the Crown Court by a judge and jury[8]. Summary offences are less serious offences, tried by magistrates[9].

INDICTABLE OFFENCES

Offences that a defendant in the Crown Court is alleged to have committed are set out in a document known as an indictment. This lists the charges against him, which must be set out in sufficient detail to enable him to know what he is said to have done. An indictment must be signed by a court clerk. It will contain only charges for offences which may be tried in the Crown Court by a judge and jury. All serious crimes such as murder, wounding, rape, robbery[10], and causing death by dangerous driving are indictable offences which can only be tried in the Crown Court.

Appeals from convictions[11] in the Crown Court go to the Court of Appeal (Criminal Division). At this point the defendant becomes known as the appellant[12]. If appeals in criminal cases involve difficult points of law of real public importance they may go further to the House of Lords. These appeal courts will not re-try cases themselves, although the Court of Appeal may sometimes agree to hear further evidence to help it decide if the conviction is safe. The appeal courts will decide if the original trial was conducted properly. If it was, the appeal will be dismissed (unsuccessful), and the conviction will stand[13]. If they decide that for whatever reason the appellant was wrongly convicted or there is doubt about whether he was rightly convicted, the conviction would be regarded as unsafe, and the appeal will be allowed (successful)[14]. In this case the Court of Appeal will quash[15] (cancel) the conviction altogether, or order a re-trial.

Untill recently the prosecution was never allowed to appeal against a jury verdict of 'not guilty'. If a defendant is acquitted by a jury, he can normally never be tried again for the same offence-even if he later admits that he committed it. This is the historic principle against 'double

jeopardy'.

Double Jeopardy

Until recent times, if a defendant was acquitted, he could not be placed in 'double jeopardy' and tried again on the same charge, even if after his trial further and better evidence of his guilt was found—even if he later admitted the offence[16]! There is now an exception to this rule, for if the prosecution can satisfy the Court of Appeal that the acquittal was 'tainted' because a juror or witness has been intimidated, the court may order that the defendant should be re-tried. It has also been proposed (by the Law Commission) that where, after an acquittal, entirely 'new' evidence comes to light (such as DNA, or fingerprint testing) which is 'compelling evidence' of a defendant's guilt, the Court of Appeal should be able to order his re-trial. Some recent Act (Criminal Justice Act 2003) has now made this law: in the case of certain very serious offences (such as murder, manslaughter, rape, and robbery involving firearms). When this law comes into force, the DPP must first give his consent to a second prosecution. The Court of Appeal will be able to quash an acquittal and order a re-trial if it is satisfied that there is new and compelling evidence of guilt and that it is in the interests of justice to do so.

SUMMARY OFFENCES

Summary offences are less serious crimes, which Parliament has said must be tried by magistrates. They are called summary offences, because they are tried summarily, which means speedily by the most convenient court, and with the minimum of formality. Almost all motoring offences are summary offences, as are offences involving minor thefts and assaults, criminal damage, prostitution[17], and drunk and disorderly behavior in a public place.

Usually a person charged with a summary offence will have to appear before the magistrates in person. Persons convicted by the magistrates may appeal to the Crown Court, when a Circuit Judge or Recorder will sit with two magistrates to hear the whole case afresh. A defendant may also appeal to the Crown Court, when a Circuit Judge or Recorder will sit with two magistrates to hear the whole case afresh. A defendant may also appeal to the Crown Court against his sentence.

EITHER-WAY OFFENCES

There are certain offences that may be tried either in the magistrates' court or by the Crown Court. Because they can be dealt with in either court they have been nicknamed 'either-way' offences. Offences of burglary and handling stolen goods are good examples of these. In these

cases, a defendant may choose to be tried by a judge and jury in the Crown court. He may feel that he will have a better chance of being acquitted if his case is heard by a jury. Equally the magistrates may choose to send the case to the Crown Court if they consider it is so serious that they do not have sufficient powers to deal with it properly.

Adapted from Geoffrey Rivlin, *Understanding the Law*, 2004

Notes to the Text

[1] **Inquisitorial system** 审问制；纠问制。指大陆法系国家中由国家而非私人主动追究犯罪的刑事诉讼制度，一般特征是法官主导审判活动的进行，法官可以依职权主动决定要进行的所有的必要的调查活动。这种制度与文章下面所提到的对抗制（adversarial system）相对，对抗制是英美法上的诉讼制度，这种诉讼程序强调双方当事人的对抗性，当事人有很大的主动权，且基本不受阻碍，法官作为中立的裁判者，听取双方的陈述和辩论而不是积极介入。

[2] **Before trial a defendant will be charged with an offence, and then he will be remanded either in custody or on bail.** 开庭之前被告会被指控一项罪行，然后将会被拘留或者保释。custody 羁押/拘留/监禁/监视 。bail 保释/保证/担保。

[3] **pending** 未决的。

[4] **burden of proof** 证明责任。

[5] **innocence** 无罪。

[6] **If the court is not sure of guilt (this used to be called proving the case beyond reasonable doubt) he must be acquitted.** 如果法院不肯定被告的罪行成立（这过去被称为排除合理怀疑的证明责任），他必须被宣告无罪。acquit 释放/宣告无罪。

[7] **try** 审问；通过法律程序审查和审理（证据或案例）；审判（受指控的人）。

[8] **jury** 陪审团。

[9] **Magistrate** 治安法官/基层司法官员，一般指具有有限管辖权的、地方性的初级法官。

[10] **robbery** 抢劫罪。

[11] **conviction** 定罪/有罪判决。

[12] **appellant** 上诉人。

[13] **stand** *v.* 维持不变。

[14] **If they decide that for whatever reason the appellant was wrongly convicted or there is doubt about whether he was rightly convicted, the conviction would be regarded**

as unsafe, and the appeal will be allowed (successful). 如果他们决定，无论任何原因，上诉人被错误定罪或者对于是否合法定其罪尚有疑问，之前的有罪判决将会被认为是不安全的，从而上诉请求被接受（上诉成功）。

[15] **quash** *v.* 撤销/推翻/使无效/终止。

[16]... **if a defendant was acquitted, he could not be placed in 'double jeopardy' and tried again on the same charge, even if after his trial further and better evidence of his guilt was found-even if he later admitted the offence.** 如果被告被宣告无罪，他不可以有遭到双重追诉的危险，也就是在宣判其无罪后即使找到进一步和更充分的证据去证明他的罪行，即便是他后来承认罪行，也不能再针对同一指控进行审理。Double jeopardy *n*. 双重危险/双重追诉。指对实质上同一罪行给予两次起诉、审判、定罪或科刑。禁止对当事人的同一罪行进行双重追诉是英美法上一项重要的诉讼原则。

[17] **prostitution** 卖淫罪。

Exercises

1. *Let's assume you are charged with offence by the police in London. You will have to go to court. Read the following passage and tell your friends what happen to you.*

You will be able to see a solicitor or legal representative privately in the police station, free of charge. You can also ask for the solicitor to be present during any police questioning. You may also be photographed and have your fingerprints taken.

The police will give you a charge sheet giving the details of the offence you are being charged with and when and where you must go to court. If bail is refused, you will be held in custody until your first court appearance. This may be the first of many court appearances, not necessarily all in the same building.

You have the right to speak to a solicitor who will give you advice on what is happening throughout the process.

A solicitor can be very useful, as they will be able to help you understand what is happening, what you are accused of, and what you need to do. They will also help you decide whether you should plead guilty or not guilty, speak on your behalf and defend you in court.

You may have already seen a solicitor or a legal representative when you were arrested. They are independent from the police, and may have been your own solicitor or the police station duty solicitor. You may want to keep the same solicitor to represent you throughout the court process. You might prefer to choose your own solicitor.

Make sure you know which court you have to go to each time you have a hearing—it may not be the same courtroom or courthouse that you have been to before. Make sure you know how to get to the court.

At the court you will find clear signs to help you find your way around. Tell the receptionist or usher that you have arrived. This usher is the person responsible for checking people have arrived and showing them where to go.

The receptionist or usher will tell you which courtroom your case will be heard in and where to wait. Cases are listed by your surname in magistrates' courts. In Crown Courts, cases are listed in the format 'R v Defendant's Name'. (R stands for Regina and means that it is the Crown who are prosecuting you).

Speaking to a solicitor can help you to understand what's happening and what to expect. If you have a solicitor, arrange to meet them at the court. If you don't have a solicitor, there will be a duty solicitor in the court who you can talk to at your first appearance. Ask the usher if you need help.

If there is some time to wait before your case starts, you can sit in the waiting area or in the public gallery of the courtroom and listen to other cases. If you do this, tell the usher where you have gone.

You may see people who have been called to be witnesses for you or against you. If a prosecution witness approaches you, tell a court official immediately. You and your family and friends must not approach prosecution witnesses, as this can be seen as intimidation (you putting pressure on them, frightening them or trying to influence what they may say in court). Intimidation is a very serious offence.

You should not leave the court as this can be an offence. If you have to leave the court for any reason, you must tell the usher. You should tell them where you are going, and how you can be contacted if you are needed back in court.

There are three kinds of court that you may be called to: a Magistrates' Court, a Crown Court, and a youth court (which may be held in a magistrates' court building).

Who is in court and how it is set up depends on what type of hearing it is. For the first hearing, there are likely to be you, the defence and prosecution solicitors and the magistrates. If your case then goes to trial in the Crown Court, there may be a jury and witnesses at later hearings.

Magistrates' Courts and Crown Courts are usually open to the public (including friends and relatives of those involved in the case) and often have a section for the public to sit in. In a youth court, members of the public are only allowed if a court official invites them and the court agrees.

If your case goes to trial, the prosecution will present the evidence against you. You or your solicitor will be able to challenge the prosecution's evidence and present your own evidence.

Under the legal system we have in England and Wales, you are 'innocent until proven guilty'. This means that the prosecution must prove 'beyond all reasonable doubt' that you committed the alleged offence. If they do so, you will be found guilty, if they don't, you will be found not guilty and be free to leave.

In a Magistrates' Court, magistrates or a district judge decide whether you are guilty based on the evidence given. In a Crown Court, a jury made up of 12 people who represent 'the general public' decide. If you know anyone on the jury, tell the court and that person will be replaced.

If you want to, you may choose to give evidence yourself. You will also have to promise to tell 'the truth, the whole truth, and nothing but the truth', and either affirm or make an oath on a holy-book of your choice.

Your lawyer will usually ask you questions first, followed by the prosecution lawyer. You may also be asked questions by a magistrate, the clerk or the judge. Your lawyer can ask the judge or magistrate to stop the questioning if it is not relevant to the case.

When you give your evidence, be as clear and polite as you can. If you think you might have any language difficulties, discuss this with your lawyer so they can arrange translation or interpreting services.

Once the jury or magistrates have heard all the evidence, they talk in a private room until they all agree on a verdict. If the jury cannot all agree, the judge can accept a 'majority verdict' as long as at least 10 of the jurors agree. The verdict is announced in open court for everyone to hear.

There may be several hearings between your making a plea and the end of a trial. You may be released on bail during this time, but it is important that you go to all the hearings you are told to attend.

If you are convicted (found guilty of the offence), you might be sent to prison, fined or given one of the many community sentences that are available. A wide range of factors will influence what sentence you get.

You may be sentenced at the time you are found guilty, or you may be called back to court for sentencing at a later date. If your case has been heard in the Magistrates' Court, you may be sent to a Crown Court for sentencing. Your solicitor can give you advice on appealing against your conviction or sentence.

For more information, please see *http://www.cjsonline.gov.uk/*

Unit Eleven

Civil Procedure

Most civil claims concern disputes between individuals or companies who are asking the court to provide some kind of legal remedy to put right, or compensate them for some harm which has been done to them. Money compensation is known as damages. Civil claims are usually private matters-the State is not involved.

Since April 1999 the whole process of civil litigation has undergone a major change, as a result of recommendations made by Lord Woolf, then Master of the Rolls (now Lord Chief Justice). Civil litigation had become very expensive, with the costs of going to court far too high and out of proportion to the amount at stake in the case. It had also become very slow, with the hearing of cases sometimes being delayed, even deliberately delayed by one of the parties. For many years, Lord Woolf's recommendations were designed to tackle these evils and resulted in a new procedural framework for the conduct of civil cases known as Civil Procedure Rules ('CPR').

The CPR introduces new, up-to-date expressions. The person making a claim (formerly 'bringing an action') is now called a claimant, instead of the plaintiff. The person against whom the claim is brought is still called the defendant. Until 1999, many claims began with the issue of a formal legal document known as a writ[1]. Now proceedings are commenced with a claim form, stating the nature of the claim and the remedy that the claimant is seeking. The claim form must be served upon the defendant, and that activates a number of options:

- If a defendant wishes to defend the claim he too must file[2] a document with the court setting out his answer to the claim. If he also wishes to make a cross-claim[3] against the claimant, he may do this by filing a document called a counterclaim[4].
- If a defendant does not reply to the claim, the claimant may obtain a default judgment[5], and the court will award judgment in his favour without the need of going to trial.
- If a defendant states that he wishes to defend the claim, but it appears that he has no real defence to it, again the court may decide the claim without a trial by giving summary judgment in his favour[6].

- The court may also give summary judgment against the claimant himself, if it appears that his claim has no reasonable prospect of succeeding.

During the court's 'case management' of a civil action, all civil cases are allocated to one of three 'tracks':

- The small claim track is normally for claims of up to £ 5,000 in value. Claims on this track are usually dealt with swiftly and informally by a District Judge.
- The fast track. This is normally for cases in which the amount involved does not exceed £ 15,000 and the trial is not likely to last longer than one day. Cases on this track are usually heard by a District Judge or a Circuit Judge.
- The multi-track. This is for all other claims. Cases on this track, which include all the most complicated and valuable claims, are usually heard by a Circuit Judge or a High Court Judge.

The CPR also contain various provisions designed to encourage the parties to settle their differences by negotiation and compromise, rather than pursue them to the bitter and in a contested hearing.

In civil cases the claimant or applicant who brings the case has the burden of proving that his or her claim is a good one, but does not have to make the court sure about it (as the prosecution must when they bring a criminal case)[7]. The standard of proof a claimant has to meet is to show that it is more probable than not that his or her case is right. This is called proving something on a balance of probabilities. This is how the burden of proof in criminal and civil cases may be contrasted:

- The first is a criminal case in which the charge is theft. The prosecution must make the court sure that the defendant is guilty. If the court is not sure, it must acquit the defendant, even if it finds that he was probably guilty.
- The second is a civil case in which a female claimant, who has been injured in a road accident, is claiming damages against the male defendant who caused her injury because his driving was negligent (careless). Here, in order to win her case she does not have to make the court sure that the defendant was negligent. She only has to show that he was probably negligent.

Almost all civil cases are tried by judges alone. Juries do try some civil cases, but this usually only happens when the action concerns the liberty of the subject, or his reputation. An illustration of the first is when a claimant claims compensation against the police for assault and wrongful imprisonment. An example of the second is when the claimant claims damages for defamation of character.

Jury trials in defamation cases

- Jury trials in case of defamation have themselves acquired a bad reputation, because not only do juries have to decide whether the claimant has been defamed, but they also have to decide how much money should be awarded as compensation for the defamation. Jurors have no experience in this area of assessing damages, and from time to time have made some extraordinarily high awards, which have been heavily criticized[8]. For example, when Sonia Sutcliffe, the wife of Peter Sutcliffe (the serial killer) successfully sued the magazine Private Eye for defamation of her character—it had been suggested that she might have known something of her husband's activities—a jury awarded her £ 60,000 damages. This huge award was later reduced on appeal.
- Juries now rarely try these cases, and it is thought that one day they will not do so at all. In a case heard in December, 1995, concerning an award of damages to the singer Elton John, the Court of Appeal made an important alteration to the common law, stating that judges are now allowed to give guidance to juries to help them assess the proper level of damages.
- In January 2001 the Court of Appeal set aside altogether a jury award of £ 85,000 damages to the footballer Bruce Grobelaar. The goalkeeper had sued the Sun Newspaper for defamation after it had accused him of accepting corrupt payments to 'throw matches'; but the Court of Appeal held the jury had reached a 'perverse decision', and reversed the decision. This unprecedented ruling was strongly criticized as undermining the jury system. The case went to the House of Lords. The Law Lord allowed this appeal; they did not disturb the jury's finding that Grobelaar had been defamed, but reduced the damages to a nominal sum of £ 1.

If someone breaks the criminal law and commits a crime he or she may be prosecuted and punished. How does the law ensure that anyone who is ordered by a court to repay a debt, or pay compensation, or stop committing a trespass or nuisance, will do as the court says?

In the case of an order to pay money, the court may order that the defendant's property should be seized and sold, or there may be an order declaring him bankrupt. More generally, if a person deliberately disobeys any court order either to do something or not to do something, he or she will be guilty of a contempt of court[9] and the punishment for contempt is a fine or committal to prison.

Adapted from Geoffrey Rivlin, *Understanding the Law*, 2004

Notes to the Text

[1] **writ** 书面命令/令状。诺曼王朝时开始使用令状，在国王和王室法庭干预地方法庭时使用，后逐渐固定下来，成为王室司法中的一种习惯做法。自由人若欲在王室法庭提起诉讼，必须先取得（主要是购买）相应的令状。常见搭配如：~ for arrest 逮捕令；~ of delivery 归还财产令；~ of detention 拘押令；~ of execution 执行令；~ of *habeas corpus* 人身保护令（状）。

[2] **file** *v.* 提交（法律文书）；提起诉讼。

[3] **cross-claim** 交叉请求，指诉讼中的共同当事人之一对其他共同当事人提出的请求。

[4] **counterclaim** 反诉/反请求。

[5] **default judgment** 缺席判决。

[6] **If a defendant states that he wishes to defend the claim, but it appears that he has no real defence to it, again the court may decide the claim without a trial by giving summary judgment in his favour.** 如果被告声称他想进行抗辩，但是看上去他没有真正的抗辩理由，同样法院可能作出一个不需要开庭审理的对被告有利的简易判决。summary judgment 简易判决。指当事人对案件的主要事实不存在争议，或案件仅涉及法律问题时，法院不经开庭审理而及早解决的一种方式。

[7] **In civil cases the claimant or applicant who brings the case has the burden of proving that his or her claim is a good one, but does not have to make the court sure about it (as the prosecution must when they bring a criminal case).** 民事案件中，提请诉讼的原告或者申请人有证明他（她）的诉求为正当的责任，但是他（她）不需要令法院确信他（她）的诉求（检控方则必须在刑事案件中做到这一点）。

[8] **Jurors have no experience in this area of assessing damages, and from time to time have made some extraordinarily high awards, which have been heavily criticized.** 陪审团在评估损害赔偿额的时候，由于缺乏经验不时会作出一些异常高的赔偿额，这些做法已经遭到严厉谴责。

[9] **contempt of court** 藐视法庭（的行为或罪行）。指故意妨碍、阻止法庭执行司法职务或故意贬低、损害法庭或法官的权威和尊严的行为。

Exercises

1. *Complete the following questions.*

(1) Why there is a need to reform the process of civil litigation?
(2) What is the difference of the burden of proof between civil and criminal procedure?
(3) What are the problems, in your opinion, with jury system?

2. *Supplementary reading.*

Role of Jurors:

Civil Trials:

The use of the jury in civil trials is now very limited: there is a right to trial by jury in cases involving fraud, defamation, malicious prosecution and false imprisonment only. Juries are most frequently used in defamation cases. The right to a jury is qualified even in those four cases if the judge considers that the case requires investigation of documents etc which cannot conveniently be made with the jury.

Criminal Trials:

Trial by jury takes place in the Crown Court, but only approximately 3% of all criminal cases reach the Crown Court. Of these less than a third are jury trials as there are many pleas of guilty without a trial taking place. There are normally twelve jurors. Since 1967 it has been possible for a majority verdict to be accepted. Now if there are not less than eleven jurors and ten agree the verdict (or ten jurors and nine agree the verdict), the majority verdict will be accepted.

Unit Twelve

Nature and Classes of Contracts

Practically every business transaction affecting anyone involves a contract.

A. Nature of Contracts

1. Definition of a Contract

A contract is a legally binding agreement. By one definition, "a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[1] Contracts arise out of agreements, so a contract may be defined as an agreement creating an obligation.

The substance of the definition of a contract is that by mutual agreement or assent the parties create enforceable duties or obligations.[2] That is, each party is legally bound to do or to refrain from doing certain acts.

2. Elements of a Contract

The elements of a contract are (1) an agreement (2) between competent parties (3) based on the genuine assent of the parties (4) that is supported by consideration, (5) made for a lawful objective, and (6) in the form required by law, if any.[3]

3. Subject Matter of Contracts

The subject matter of a contract may relate to the performance of personal services, such as contracts of employment to work on an assembly line, to work as a secretary, to sing on television, or to build a house. A contract may provide for the transfer of ownership of property, such as a house (real property) or an automobile (personal property), from one person to another.[4] A Contract may also call for a combination of these things. For example, a builder may contract to supply materials and do the work involved in installing the materials, or a person may contract to build a house and then transfer the house and the land to the buyer.

4. Parties to a Contract

The person who makes a promise is the promisor, and the person to whom the promise is made is the promisee. If the promise is binding, it imposes on the promisor a duty or obligation,

and the promisor may be called the obligor. The promisee who can claim the benefit of the obligation is called the obligee. The parties to a contract are said to stand in privity with each other, and the relationship between them is termed privity of contract. [5]

In written contracts, parties may be referred to by name. More often, however, they are given special names that serve to better identify each party. For example, consider a contract by which one person agrees that another may occupy a house upon the payment of money. The parties to this contract are called landlord and tenant, or lessor and lessee, and the contract between them is known as a lease. Parties to other types of contracts also have distinctive names, such as vendor and vendee for the parties to a sales contract, shipper and carrier for the parties to a transportation contract, and insurer and insured for the parties to an insurance policy. [6]

It takes two parties to make a contract. Consequently, when the board of directors of a bank voted in favor of merging with another enterprise, the vote did not constitute a contract between the bank and that enterprise to merge.

A party to a contract may be an individual, a partnership, a corporation, or a government. A party to a contract may be an agent acting on behalf of another person. [7]

One or more persons may be on each side of a contract. Some contracts are three-sided, as in a credit card transaction, which involves the company issuing the card, the holder of the card, and the business furnishing goods and services on the basis of the credit card.

If a contract is written, the persons who are the parties and who are bound by it will ordinarily be determined by reading what the paper says and seeing how it is signed. A contract binds only the parties to the contract. It cannot impose a duty on a person who is not a party to it. Ordinarily, only a party to a contract has any rights against another party to the contract. In some cases, third persons have rights on a contract as third-party beneficiaries or assignees. [8] But a person cannot be bound by the terms of a contract to which that person is not a party.

5. How a Contract Arises

A contract is based on an agreement. An agreement arises when one person, the offeror, makes an offer and the person to whom the offer is made, the offeree, accepts. There must be both an offer and an acceptance. [9] If either is lacking, there is no contract.

6. Intent to Make a Binding Agreement

Because a contract is based on the consent of the parties and is a legally binding agreement, it follows that the parties must have an intent to enter into an agreement that is binding. [10] Sometimes the parties are in agreement, but their agreement does not produce a contract. Sometimes there is merely a preliminary agreement, but the parties never actually make a contract, or there is merely an agreement as to future plans or intentions without any contractual

obligation to carry out those plans or intentions.

7. Freedom of Contract

In the absence of some ground for declaring a contract void or voidable, parties may make such contracts as they choose. The law does not require parties to be fair, or kind, or reasonable, or to share gains or losses equitably. [11]

B. Classes of Contracts

Contracts are classified according to their form, the way in which they were created, their binding character, and the extent to which they have been performed.

8. Formal and Informal Contracts

Contracts can be classified as formal or informal contracts.

(a) Formal Contracts. Formal contracts are enforced because the formality with which they are executed is considered sufficient to signify that the parties intend to be bound by their terms. [12] Formal contracts include (1) contracts under seal, (2) contracts of record, and (3) negotiable instruments.

(1) Contracts under Seal. A contract under seal is executed by affixing a seal or making an impression on the paper or on some adhering substance, such as wax, attached to the document. Although at common law an impression was necessary, the courts now treat various signs or marks to be the equivalent of a seal. Most states hold that there is a seal if a person's signature or a corporation's name is followed by a scroll or scrawl, the word seal, or the letters L. S. In some jurisdictions, the body of the contract must recite that the parties are sealing the contract in addition to their making a seal following their signatures. [13]

A contract under seal was binding at common law solely because of its formality. In many states, this has been changed by statute. The Uniform Commercial Code[14] makes the law of seals inapplicable to the sale of goods. In some states the law of seals has been abolished generally without regard to the nature of the transaction involved.

Unless expressly required by statute or administrative regulation, a seal is not needed to make a binding contract. The parties have the freedom of choice to use or do without a seal.

(2) Contracts of Record. A contract of record is an agreement or obligation that has been recorded by a court. One form of contract of record arises when one acknowledges before a proper court the obligation to pay a certain sum unless a specified condition is met. [15] For example, a party who has been arrested may be released on a promise to appear in court and may agree to pay a certain sum on failing to do so. An obligation of this kind is known as a recognizance.

Similarly, an agreement made with an administrative agency is binding because it has been

so made. For example, when a business agrees with the Federal Trade Commission that the enterprise will stop a particular practice that the commission regards as unlawful, the business is bound by its agreement and cannot thereafter reject it.

(b) Informal Contracts. All contracts other than formal contracts are called informal (or simple) contracts without regard to whether they are oral or written. These contracts are enforceable, not because of the form of the transaction, but because they represent agreement of the parties.

9. Express and Implied Contracts

Simple contracts may be classified as express contracts or implied contracts according to the way they are created.

(a) Express Contracts. An express contract is one in which the agreement of the parties is manifested by their words, whether spoken or written.

(b) Implied Contracts. An implied contract (or, as sometimes stated, a contract implied in fact) is one in which the agreement is shown not by words, written or spoken, but by the acts and conduct of the parties. For example, such a contract arises when one person renders services under circumstances indicating that payment for them is expected and the other person, knowing such circumstances, accepts the benefit of those services. Similarly, when an owner requests a professional roofer to make repairs to the roof of a building, an obligation arises to pay the reasonable value of such services, although no agreement has been made about compensation.

In terms of effect, there is no difference between an implied contract and an express contract. The difference relates solely to the manner of proving the existence of the contract. However, in the case of an implied contract, the plaintiff has the burden of proving the value of the services performed or property sold.

An implied contract cannot arise when there is an existing express contract on the same subject.[16] However, the existence of a written contract does not bar recovery on an implied contract for extra work that was not covered by the contract.

No contract is implied when the relationship of the parties is such that, by a reasonable interpretation, the performance of services or the supplying of goods was intended as a gift. The fact that the services are rendered by a neighbor does not show that the services were rendered as a gift.

10. Valid and Voidable Contracts and Void Agreements

Contracts may be classified in terms of enforceability or validity.[17]

(a) Valid Contracts. A valid contract is an agreement that is binding and enforceable.

(b) Voidable Contracts. A voidable contract is an agreement that is otherwise binding and

enforceable, but because of the circumstances surrounding its execution or the lack of capacity of one of the parties, it may be rejected at the option of one of the parties. [18] For example, a person who has been forced to sign an agreement that that person would not have voluntarily signed may, in some instances, avoid the contract.

(c) Void Agreements. A void *agreement* is without legal effect. An agreement that contemplates the performance of an act prohibited by law is usually incapable of enforcement; hence it is void. Likewise, it cannot be made binding by later approval or ratification.

11. Executed and Executory Contracts

Contracts may be classified as executed contracts and executory contracts according to the extent to which they have been performed.

(a) Executed Contracts. An executed contract is one that has been completely performed. In other words, an executed contract is one under which nothing remains to be done by either party. [19] A contract may be executed at once, as in the case of a cash sale, or it may be executed or performed in the future.

(b) Executory Contracts. In an executory contract, something remains to be done by one or both parties. For example, if a utility company agrees to furnish electricity to a customer for a specified period of time at a stipulated price, the contract is executory. If the entire price is paid in advance, the contract is still deemed executory, although, strictly speaking, it is executed on one side and executory on the other.

12. Quasi Contracts

In some cases, a court will impose an obligation even though there is no contract. Such an obligation is called a quasi contract, which is an obligation imposed by law. A quasi contract is a contract that is implied in law as distinguished from a contract implied in fact. A contract that is implied in law is not a contract at all. It is merely a fictitious promise that the law assumes in order to do justice by enforcing a duty or righting a wrong. [20]

Adapted from Ronald A. Anderson, Ivan Fox, David P. Twomey
and Marianne M. Jennings, *Business Law and the Legal Environment*, 1999

Notes to the Text

[1] **A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.**

合同是一个或一组承诺，若违反承诺法律会给予救济，而履行承诺是法律以某种方式认可的义务。remedy 补救，救济。

同段上文的 binding 意为“承担义务的，有约束力的”。如：binding force 拘束力，约束力。

[2] **The substance of the definition of a contract is that by mutual agreement or assent the parties create enforceable duties or obligations.** 合同定义的本质，是合同双方当事人通过相互的协议或同意，创设可强制履行的义务。enforceable 可实施的；可强制履行的。与之有关的词：enforce 强制执行，实施，强迫；enforcement 实施，执行，强制执行；enforceability 可强制执行性。obligation 与 duty，liability，responsibility 都有“义务、责任、职责”的意思，有时可通用，有时各有其固定用法。如：tort liability 侵权行为赔偿责任；state responsibility 国家责任；the rights and duties of citizens 公民的权利和义务；moral obligation 道义上的义务。

[3] (4) **supported by consideration**, (5) **made for a lawful objective**, **and** (6) **in the form required by law**, **if any.** （合同的要素）(4) 为对价所支持，(5) 订约目的合法，(6) 如有要求，以法律要求的形式订立合同。consideration 对价，约因。对价指订立合同的当事人互为给付。这种互为给付的对价通常是付款、付货、履行劳务或放弃某种权利。普通法法系的合同法以对价原则作为基础。除了正式盖章合同（contract under seal）以外的任何合同，必须有对价，否则无效。

（同段上文）competent parties 表示“有签约能力的订约人，适格的当事人”。

[4] **A contract may provide for the transfer of ownership of property, such as a house (real property) or an automobile (personal property), from one person to another.** 合同可以规定财产所有权的转移，如房屋（不动产）或汽车（动产）从一人转让给另一人。ownership of property 财产所有权。

（同段上文）subject matter of a contract，意即“合同的标的”。

[5] **The parties to a contract are said to stand in privity with each other, and the relationship between them is termed privity of contract.** 合同的当事人被认为是站在彼此利益的立场上，而它们之间的关系被称为合同的利害关系（合同的相对性）。party 当事人，当事方；一方。如：injured party 受害方，受损害的人。parties to a contract 合同的当事人。party 后面不能用 of，同类情况如：the answer to the questions，amendment to a constitution（宪法修正案），均不用 of。privity of contract 合同的相对性，合同的利害关系，亦即合同当事人之间存在的关系或联系。原则上，提起有关合同的诉讼，原告和被告之间必须就争议事项存在利害关系。privity（当事人间产生的）相互关系，如：privity in law 法律上的相互关系。

（同段上文）promisor 允诺人，promisee 受允诺人；obligor 义务人，债务人；obligee

权利人，债权人。to impose on... 把……强加（施加）给……。文中 it imposes on the promisor a duty or obligation 它给允诺人施加了某种义务。

[6] **written contracts** 书面合同。与其相对的是 oral contract 口头合同。landlord and tenant 房东与房客（房主和房客）；lessor and lessee 出租人与承租人；vendor and vendee 卖方与买方；shipper and carrier 托运人与承运人；insurer and insured 承保人（即保险商、保险人）与被保险人。lease 租赁；租赁权；（动产）租借。lease contract 租赁合同，租契。insurance policy 保险单，保单。

[7] **partnership** 合伙，伙伴关系。agent 代理人，代表，官员。文中 an agent acting on behalf of another person 代他人行事的代理人。与之相关的词 agency 代理，代理关系。

[8] **Only a party to a contract has any rights against another party to the contract. In some cases, third persons have rights on a contract as third-party beneficiaries or assignees.** 只有合同的一方当事人才有权对抗另一方当事人。在某些情况下，第三人作为第三方受益人或受让人也享有合同规定的权利。beneficiary 受益人。assignee 受让人，与之相对者 assignor 转让人；assign 让与，转让（同 transfer）。

（同段上文）paper 文件，证书（本句中指合同文本）。

[9] **offer** 要约，发盘。acceptance 承诺。offeror 要约人，发盘人；offeree 受要约人，受盘人。

[10] **Because a contract is based on the consent of the parties and is a legally binding agreement, it follows that the parties must have an intent to enter into an agreement that is binding.** 由于合同是基于当事人的同意，而且是有法律拘束力的协议，因此，当事人各方必须有订立有约束力协议的意图。enter into 缔结，订立。其同义词有：make，conclude。如：make a contract 订合同；conclude a treaty 缔约。

[11] **In the absence of some ground for declaring a contract void or voidable, parties may make such contracts as they choose. The law does not require parties to be fair, or kind, or reasonable, or to share gains or losses equitably.** 在缺乏宣告合同无效或可撤销的根据时，当事人可自由订立合同，法律不要求当事人应做到公平、友好、合理或者平分利益和均担损失。

[12] **Formal contracts are enforced because the formality with which they are executed is considered sufficient to signify that the parties intend to be bound by their terms.** 正式合同可被强制履行，是因为人们认为这种可被履行的合同的格式足以表明当事人意欲受合同条款的约束。formal contract 正式合同，要式合同。其对应词为：informal contract 非正式合同，非要式合同。formality of contract 合同格式。execute 履行，执行，实行；execution 执行，处决。term 术语；期间；（复数）条件，条款。

（同段下文）contract under seal 盖印合同，盖章合同；contract of record 登记合同，记

录合同；negotiable instrument 流通票据，流通证券。

[13] **In some jurisdictions, the body of the contract must recite that the parties are sealing the contract in addition to their making a seal following their signatures.** 在有的法域，除了要在当事人签名后面盖章以外，还要求必须在合同的正文中详细陈述当事人盖章的事实。L. S. [拉丁文] *Locus Sigilli* 的缩写：书面文件上盖印的地方。

[14] **the Uniform Commercial Code** 指美国20世纪60年代的《统一商法典》。简称UCC或U. C. C.，它涉及商业交易的各个方面，本书第十三课有初步介绍。

[15] **One form of contract of record arises when one acknowledges before a proper court the obligation to pay a certain sum unless a specified condition is met.** 当一个人在法院承认，除非满足特定条件否则有义务支付一定金额时，一种形式的登记合同就产生了。

(同段下文) recognizance 保释金，保证金。

[16] **An implied contract cannot arise when there is an existing express contract on the same subject.** 在同样的问题上，若有既存的明示合同存在，则默示合同不能产生。implied contract 默示合同，与其相对者 express contract 明示合同。这两种合同均属于简式合同 simple contract。

[17] **Contracts may be classified in terms of enforceability or validity.** 合同可以根据可强制性和有效性进行分类。in terms of... 按照，根据；用……措词；从……方面(说来)。此处取其第一个意思（同 according to…）。validity 为 valid 的名词，意为"有效性，合法性"。根据合同的强制性或有效性，合同可分为有效合同（valid contract）、无效协议（void agreement）和可撤销合同（voidable contract）。

[18] **A voidable contract is an agreement that is otherwise binding and enforceable, but because of the circumstances surrounding its execution or the lack of capacity of one of the parties, it may be rejected at the option of one of the parties.** 可撤销合同是在其他情况下有约束力和可强制履行的协议，但由于签订合同时存在瑕疵或一方当事人缺乏签约能力，因而可以被一方当事人选择废弃。reject 撤销，拒绝，否决，驳回。

[19] **An executed contract is one under which nothing remains to be done by either party.** 已履行合同是这样的合同：根据该合同，任何一方当事人已经没有要履行的义务了。executed contract 已履行的合同；其对应词为：executory contract 待履行的合同。

[20] **A contract that is implied in law is not a contract at all. It is merely a fictitious promise that the law assumes in order to do justice by enforcing a duty or righting a wrong.** 法律上暗含的合同根本不是真正的合同，它只是法律采取的通过强加义务

或者纠正过错的方式，来实现正义的一种拟制的承诺。quasi contract 准合同；do justice 公平对待，伸张正义，实现正义。wrong（*n.*）过错行为，过失；不法行为，非法行为（同 wrongful act）。

Exercises

1. *Which of the following statements are NOT true according to the text?*

(1) A contract is a binding agreement.
(2) A contract can involve any lawful transaction.
(3) Parties to a contract may be described generally as offeror and offeree.
(4) A contract is created when an offer is accepted.
(5) Third persons have any rights against parties to a contract.
(6) Sealed contracts, contracts of record, and negotiable instruments are formal contracts.
(7) The law of seals is applicable to the sale of goods in the U. S. A.
(8) Contracts under seal also require consideration.
(9) In contracts under seal, the seal may be actual, or impressed on the paper, or merely recited by the word "seal" or "L. S."
(10) A seal is essential to make a binding contract.
(11) All contracts other than formal contracts are informal or simple.
(12) Contracts may be expressed by words or implied from conduct.
(13) An agreement that cannot be enforced is void.
(14) A contract is executed when it is fully performed. It is executory if anything is yet to be done.
(15) Quasi contracts are obligations imposed by law.

2. *Match each of the following numbered definitions with the correct term in the list below. Write the letter of your choice in the answer column.*

a. competent party　　b. consideration
c. express contract　　d. formal contract
e. implied contract　　f. legality of purpose
g. oral contract　　h. written contract

(1) A contract which in all its terms is in writing. Commonly referred to as a formal contract.

(2) A person who is legal age（法定年龄）and normal mentality（正常智力）. ________

(3) The promises exchanged by parties to a contract. ________

(4) A contract that is created entirely through conversation of the parties involved. ________

(5) A contract that is understood from the acts or conduct of the parties. ________

(6) A written contract that bears a seal. ________

(7) The requirement that a contract cannot violate the law. ________

(8) A contract whose meaning is not determined by the conduct of the parties. ________

Unit Thirteen

Introduction to American Uniform Commercial Code[1]

History of the UCC

The present law concerning commercial transactions—the subject of the Uniform Commercial Code—had its modern origins in the law merchant, that is, the system of rules, customs and usages generally recognized and adopted by merchants and traders which constituted the law for the regulation of their transactions and the solution of their controversies. By the end of the seventeenth century the law merchant had become assimilated by the common law. It should be noted that in the eighteenth century many landmark commercial law cases were decided by Lord Mansfield, England's foremost commercial judge[2].

In 1882, the English Bills of Exchange Act was enacted by Parliament, followed in 1893 by the English Sale of Goods Act[3]. These two acts were the inspiration for the Uniform Negotiable Instruments Law promulgated by the Commissioners for adoption by the legislatures of the several states as follows:

Act	Promulgated
Uniform Warehouse Receipts Act	1906
Uniform Bills of Landing Act	1909
Uniform Stock Transfer Act	1909
Uniform Conditional Sales Act	1918
Uniform Trust Receipts Act	1933

While these Uniform Acts had wide acceptance they were not collectively adopted by every American State.

In the early 1940's it was recognized that the above uniform acts needed substantial revision to keep them in step with modern commercial practices. Further, since each of the above uniform acts had become a segment of the statutory law relating to commercial transactions, there was a

need to integrate each of such acts with the others.

Accordingly, the preparation of the Uniform Commercial Code (UCC) was begun as a joint project of The American Law Institute and the National Conference of Commissioners on Uniform State Laws in 1942[4]. The chief Reporter of the Code was Professor Karl N. Lleweellyn; the Associate Chief Reporter was Professor Soia Mentschikoff. This project resulted in the 1952 Official Text of the UCC. A 1978 Official Text was promulgated to permit issuance of corporate stock in uncertificated form. After that, further official texts were promulgated.

This nutshell will be based on the 2001 Official Text. Remember, though, that the whole Code has been enacted in 50 states (Louisiana adopted Articles 1, 3, 4, 5, 7, 8 and 9), the District of Columbia, Guam and the Virgin Island[5], it is important to localize your information as to the Code language of your jurisdiction. Not only might your jurisdiction have enacted a prior Official Text of the UCC, your jurisdiction might have enacted a non-uniform amendment. Also, the UCC itself in instances has alternative provisions, e. g., § §2-318, 4-106(b), 7-403 (1) (b).

Rationale for the UCC

The concept of the Uniform Commercial Code is that "commercial transactions" is a single subject of the law, notwithstanding its many facets, that is:

1. A single transaction may well involve a contract for sale of goods followed by a sale. This is the subject of Article 2 Sales. This supersedes the Uniform Sales Act.
2. The transaction may well involve the giving of a check or draft for all or part of the purchase price. The check or draft may be negotiated and will ultimately pass through one or more banks for collection. This is the subject of Article 3 Commercial Paper (renamed Negotiable Instruments) and Article 4 Bank Deposits and Collections. These articles supersede the Uniform Negotiable Instruments Law and acts regulating bank collections, such as the American Bankers Association Bank Collection Code.
3. If the goods are shipped or stored, the subject matter of the sale may be covered by a bill of lading or warehouse receipt or both. This is the subject of Article 7 Documents of Title. This supersedes certain sections of the Uniform Sales Act, the Uniform Bills of Lading Act and the Uniform Ware-house Receipts Act.
4. Further, the transaction may involve not only a contract for sale of goods followed by a sale, the giving of a check or draft for a part of the purchase price, but also the acceptance of some form of security for the balance. This is the subject of Article 9 Secured Transactions. This supersedes the Uniform Conditional Sales Act, Uniform Trust

Receipts Act and acts regulating chattel mortgages, conditional sales, factor's liens, assignments of accounts receivable, and similar transactions.[6]

5. Or it may be that the entire transaction was made pursuant to a letter of credit either domestic or foreign. This is the subject of Article 5 Letters of Credit. Except for a few provisions of the Uniform Negotiable Instruments Law, letters of credit have not previously been the subject of statutory enactment.

Obviously, every phase of commerce involved, as above outlined, is but part of one transaction, namely, the sale of and payment for goods. Accordingly, the Uniform Commercial Code purports to deal with all the phases which may ordinarily arise in the handling of a commercial transaction, from start to finish. See the General Comment to the UCC, § 10-102. Note that the above five phases of a commercial transaction form the organizational basis for this nutshell. Note also, there is a new Part Six which deals leases of goods under Article 2A. This Article borrows from both Article 2 Sales and Article 9 Secured Transactions.

Purpose and Construction of the UCC

The Code is to be liberally construed and applied to promote its underlying purposes and policies, which are:

a. to simplify, clarify and modernize the law governing commercial transactions.

b. to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.

c. to make uniform the law among the various jurisdictions.

In addition, the text of each section of the UCC should be read in the light of the purpose and policy of the rule or principle in question (as also of the Code as a whole) and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved. § 1-102 (1), (2) and Comment 1[7].

The official Comments of the National Conference of Commissioners on Uniform State Laws and The American Law Institute will be of considerable assistance in determining purposes and policies of the UCC among the several jurisdictions. Further, the Permanent Editorial Board for the UCC (PEB) issues supplemental commentary on the UCC from time to time.

In order to permit the continued expansion of commercial practices the drafting philosophy of the Code was: open-ended drafting, with room for courts to move in and readjust over the decades.

Illustrative of open-ended drafting are Code references to:

1. "Usage of trade." § 1-205.

2. "Good faith" which means honesty in fact and in the case of a merchant includes the observance of reasonable commercial standards of fair dealing. See, e. g., § § 2-403 (1), 2A-304 (1), 2A-305 (1), 3-302, 7-501 (4), 9-331.

3. "Commercially reasonable." See, e. g., § § 2-706, 2A-527, 7-210, 7-308, 9-610, 9-627.

The Code, accordingly, encourages construction in Llewellyn's "Grand Style" of the common law which "rests on the court's overt recourse to situation-sense to shape the deciding rule and on constant retests of the rule in the light of reason as it evolves from the situation."

But what if a fact situation appears to fit the factual preconditions of a Code rule but is not within the reason of the rule? Instead of misconstruing the language of the rule to exclude the fact situation, the Code gives authority to a court not to mishandle the textual Code rule but to say this is a factual situation which is different in terms of its reason and therefore the court need not apply the rule.

Freedom of Contract

Freedom of contract is a principle of the Code. The effect of its provisions may be varied by agreement. Thus, many Code sections contain gap-filling rules which apply unless the parties otherwise agree[8]. See, e. g., § § 2-307, 2-308, 2-310, 2-509 (4). Note that the presence in certain Code provisions of the words "unless otherwise agreed" does not imply that the effect of other provisions may not be varied by agreement. § 1-102 (3), (4) and Comments 2 and 3.

This principle of freedom of contract is subject to exceptions. First there is the general exception that the obligations of good faith, diligence, reasonableness and care prescribed by the Code may not be disclaimed by agreement[9]. Second, certain sections explicitly preclude variance. Third, some sections are not explicit but it is implicit that they not be varied. Further, certain contracts and clauses thereof may not be enforceable due to unconscionability.

Adapted from Bradford Stone, *Uniform Commercial Code*,
US West Nutshell Series, China Law Press, 2004

Notes to the Text

[1] 本文节选自由 B. 斯通所著的《统一商法典》第五版，美国西部法律精要丛书。该丛

书可直译为“坚果壳系列丛书”（Nutshell Series），其特点是通俗易懂，在美国法学教育界和律师实务界广受欢迎。

[2] **By the end of the seventeenth century the law merchant had become assimilated by the common law. It should be noted that in the eighteenth century many landmark commercial law cases were decided by Lord Mansfield, England's foremost commercial judge.** 到十七世纪末商人法已融入普通法系中。需要指出的是，在十八世纪许多里程碑式的商法判例由英格兰最有名的商事法官曼斯菲尔德勋爵做出。句中 the law merchant 指有关商事与海事方面的商人国际习惯，其早期影响到海商法，并在地方法院得以实施，部分商人法早已被英国的普遍法所吸收，例如有关流通票据及提单的转让等方面的法律规定。

[3] **the English Bills of Exchange Act was enacted by Parliament, followed in 1893 by the English Sale of Goods Act.** 英国的《汇票法》是由国会制定的，随后在 1893 年又颁行了英国的《货物销售法》。汇票在英文中又可称为“Draft”，本票称为“Promissory Note”，支票则称为“Check（美）/Cheque（英）”。Act 一词应作“法”；“法律”；“条例”翻译，国内常译作“法案”并未表达英文原本含义，在英美国家一项议案（Bill）经各自国会两院通过并由总统或女王签署生效后方称为“…法”（Act）。

（同段下文）The Uniform Negotiable Instruments Law：统一流通票据法。negotiable 可转让；可流通的；可兑现的（支票等）；Instruments（pl.）票据。

[4] **Accordingly, the preparation of the Uniform Commercial Code (UCC) was begun as a joint project of The American Law Institute and the National Conference of Commissioners on Uniform State Laws in 1942.** 据此，在 1942 年“美国法学会”和“统一各州法律全国专员大会”共同负责着手准备《统一商法典》(UCC)。

[5] **This nutshell will be based on the 2001 Official Text. Remember, though, that the whole Code has been enacted in 50 states (Louisiana adopted Articles 1, 3, 4, 5, 7, 8 and 9), the District of Columbia, Guam and the Virgin Island,** “坚果壳”丛书虽然将以 2001 年官方文本为基础，但切记该整部法典已被 50 个州（路易斯安那州采行第 1、3、4、5、7、8 和 9 章），哥伦比亚特区、关岛和维京岛通过。本句中的 Article 一词译作“章”是因为在美 UCC 和 USC（美国法典）中作为“部分”（Part）之下的分类使用，而非法规的“条”。

[6] **chattel mortgages** 动产抵押。Chattel(s) 物；动产；有形财产。例：~ lien 动产留置权；~ paper 动产（证明）文件；~ personal 私人动产；~ real 准不动产。mortgage（*n.* / *v.*）抵押。factor's lien 代理商留置权。

[7] **In addition, the text of each section of the UCC should be read in the light of the**

purpose and policy of the rule or principle in question (as also of the Code as a whole) and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved. § 1-102 (1), (2) and Comment 1. 此外，《统一商法典》的每一部分正文应根据其相关原则或规则之目的阅读，并且视具体情况，以与相关政策和目的相一致的狭义或广义方式对其所适用的语言进行解释。见第 1-102 条第（1）、（2）款以及评注 1。在美国法律诠释（Restatement）中，常在某一法条之后通过典型判例加以评注（Comment），以方便对其理解和适用。

[8] **Thus, many Code sections contain gap-fillings rules which apply unless the parties otherwise agree.** 因此，许多《商法典》条款含有可适用的填补空缺的规则，除非当事方另有协议。本句中 Section 表示法律的“节”；“条”或“款”，即英文的“Sec.”或“§”。

[9] **First there is the general exception that the obligations of good faith, diligence, reasonableness and care prescribed by the Code may not be disclaimed by agreement.** 首先，总的例外原则是《商法典》所规定的诚信、勤勉、合理与谨慎义务不应经协议而被否认。

Exercises

1. *Translate the following provisions of UCC into Chinese.*

§ 1-102. Purposes; Rules of Construction; Variation by Agreement.

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

Unit Fourteen

Law of Torts

1. What Is Tort?

A tort is a civil wrong. Tort takes many forms. It includes, for example, negligence, nuisance, libel, slander, trespass, assault and battery[1]. If, while you are sitting in your car waiting for the traffic lights to change, a van impales itself on your rear bumper, the van driver (or his employer) will have to compensate you for the tort of his negligent driving. If during the ensuing[2] pleasantries, he punches you on the nose, he has committed[3] the tort of assault and battery. Finally, if, as he leaves you, he loudly airs his views on your driving, your morality and your family history (and gets at least some of it wrong!). He may have committed the tort of defamation. Each tort has its own particular characteristics. Some torts, such as negligence require proof of damage, whilst others, such as trespass and libel, are actionable without proof of damage. [4] Whilst the tort of negligence obviously requires "negligent" behavior, other torts, such as trespass, require intentional behavior or at least recklessness[5].

2. The Distinction Between Tort and Contract

Traditionally contract lawyers and tort lawyers have taken little interest in the details of each other's subjects but this aloofness[6] can no longer be safely practiced since over the last twenty years the area of overlap between tort and contract has significantly increased.

The role of contract law is, put simply, the enforcement of promises. Liability is therefore centred around the contract itself: has it been formed? What are its terms? Have they been breached? Contractual remedies seek to place the claimant in the position, so far as money can do it, that he or she would have been in had the contract been performed[7]. By contrast, tort is concerned with compensating the victim who has suffered injury as a result of conduct classified as a civil wrong by law. The aim here is not to enforce a bargain, but to compensate the victim for

his or her out-of-pocket expenses, thereby placing the victim in the same position as he or she would have been in had the victim not sustained the wrong for which compensation is being awarded[8].

Readers should be wary of attempts to distinguish contract and tort on the basis that contract consists of obligations imposed by consent and tort consists of obligations imposed by law. Contract law is subject to considerable legislative and judicial intervention and terms may be imposed by statute or by the courts. Equally, the defendant in tort law may, in a sense, agree to undertake certain tortious responsibilities, for example by inviting a guest into his or her household or by undertaking to advise the claimant on the merits of a particular business transaction. Such a theory, therefore, is really too general to be of much use. In practice, the distinction between contract and tort is determined simply by asking the question: "have the rules of contract law been complied with?" If the answer is "no", the obligation or wrong in question cannot be classified as contractual, but may be classified as tortious.

Whether there is a concurrent liability in contract and tort is answered by Lord Goff and the answer is 'yes'. There was a careful consideration of French law which, in general, prohibits concurrent liability in contract and tort through the doctrine of *non cumul*[9] and it was noted that the other great civil law system, the German civil code, did not have a similar doctrine. There was a careful consideration also of some Commonwealth cases, including the important decision of the Supreme Court of Canada in *Central Trust Co. v. Rafuse* where Le Dain J said 'a concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.' The position now seems clear. The question is resolved by considering, in each case, whether the ingredients of a tort action and a contract action are present. The mere fact that all the ingredients for a contract are present does not prevent there being a tort duty nor, presumably, vice versa[10]. Of course, the terms of the contract may, in particular cases, make it clear that the parties intended to exclude or limit liability in tort. They are certainly entitled to do unless the case is one of those in which there is a statutory restriction on the ability of the parties to contract out of tort liability. A plaintiff who wants to argue that there is wider liability in tort than in contract may have greater difficulties.

3. Interests Protected by Tort

Tort law does not protect all interests from harm, and certain interests, such as personal safety, receive better protection than others. As tort law has developed, the nature of protection

offered to each interest has reflected the importance of that interest to society at the relevant period in history. Thus, whilst in feudal[11] times trespass to land was the most sophisticated and important tort, in the modern industrial age protection against personal injury has dominated the agenda.

(1) Personal harm

The industrial revolution brought with it new threats to the safety of individual with the introduction of heavy machinery, motor vehicles and railways. Tort law responded by developing the tort of negligence. This supplemented the existing protection provided by trespass to the person, where the torts of assault, battery and false imprisonment[12] serve to protect individuals from interference with their personal freedom and bodily integrity. Yet, whilst tort law has clearly offered protection against physical injury, the judiciary has been reluctant to offer protection against other forms of personal harm, such as psychiatric illness and distress. Considerable skepticism was expressed in the nineteenth century towards claims for "nervous shock", on the basis that they would leave "a wide field open for imaginary claims". Although claims for psychiatric illness may now be brought, the law still adopts a restrictive regime of recovery.

(2) Harm to property

Protection against harm to property remains important, but no longer has the primacy accorded to it during feudal times. "Property" here is used to signify both personal property and land (real property[13]). Personal property[14] is protected by the torts of trespass to goods and conversion[15] (civil theft). Real property is protected by a number of torts, including trespass to land, nuisance. Property loss is also recoverable in other torts such as negligence.

(3) Harm to reputation

Reputation is protected by the tort of defamation[16], which creates liability for untrue statements which diminish the claimant's reputation in the eyes of right-thinking members of society. It should be noted that defamation protects the claimant's *reputation* and not his or her *feelings*, so that there will be no action for defamation if the claimant is insulted in private or if the statement fails to diminish his or her reputation[17]. As will be discussed, protection of reputation must be weighed against the public interest in free speech. In practice, this balance is far from easy to achieve.

(4) Harm to financial interests

In this area, tort law is particularly conscious of the potential number of claims and the threat of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". Whereas the cost of compensating physical injury tends to be limited, the potential for "crushing liability", resulting from a flood of claims for financial loss, presents a problem for the law. Courts are therefore reluctant to impose liability for negligent infliction of financial loss, save in the specific situations where the defendant has voluntarily assumed responsibility[18] for the claimant's interests, or where the loss is consequential on physical damage.

4. Main Types of Torts

4.1 Negligence

The tort of negligence is the most frequently used of all the torts and is therefore perhaps the most important. It has flourished in the latter part of the twentieth century, rising to a dominant position because of the flexible nature of its rules, which have allowed the judges to expand the tort to protect many claimants who would otherwise have been left unprotected by the law.

To establish the tort of negligence, the claimant must prove three things:

(i) the defendant owes the claimant a duty of care;

(ii) the defendant has acted in breach of that duty, and

(iii) as a result, the claimant has suffered damage which is not too remote a consequence of the defendant's breach.

For the purpose of learning the law, it is convenient to consider each element of the tort of negligence in turn. Rarely in practice, however, will disputes ever involve all three elements. In a dispute involving a carelessly driven car, for example, the court will not embark on a detailed inquiry as to whether the defendant motorist owes a duty not to be careless, because the duty of care owed in this situation is well established. Rather, the question for the court is likely to be whether the defendant was, in fact, careless (breach of the duty of care), or perhaps the crucial question will be whether the defendant's carelessness was the legal cause of the claimant's loss (causation and remoteness of damage).

It should also be noted that in practice the courts have a tendency to blur the distinctions between each of the separate elements of negligence. Quite often, therefore, a judgment may indicate that the defendant is not liable but may fail to make it entirely clear which of the three

separate requirements of the tort has not been fulfilled. This difficulty stems from the fact that, as we shall see, the concept of "reasonable foreseeability" is used by the courts in establishing all three of the elements of the tort.

4.2 Employers' Liability

We concentrate here on an employer's liability in tort. This can take three forms:

(i) personal liability in negligence;

(ii) liability for breach of statutory duty;

(iii) vicarious liability[19] for the torts of employees committed in the course of their employment.

Employers are popular targets for tort claims. As insurance is compulsory, claimants know that if they succeed, the employer is likely to be able to meet their claim and may, for the sake of labour relations or to avoid adverse publicity, be willing to settle. We concentrate on vicarious liability, since it plays a significant role in distributing loss and ensuring that claimants receive adequate compensation.

Vicarious liability is a different concept from the two forms of liability. It is not a tort in its own right, but a rule of responsibility which renders the defendant liable for the torts committed by another. The commonest example is that of an employer for its employees. To establish vicarious liability against an employer, the claimant must show all three of the following:

(i) the employee committed a tort;

(ii) the existence of an employer/employee relationship;

(iii) the employee acted in the course of his or her employment when committing the tort in question.

4.3 Occupiers' Liability

An occupier of premises may be liable in tort to a claimant who, whilst on those premises, suffers personal injury or property damage because the premises are in a defective or dangerous condition. As in a common law negligence action, the claimant must prove the existence of a duty of care, breach of that duty, causation[20], and that the loss suffered is not too remote.

4.4 Defamation

Defamation protects the reputation of the claimant. On this basis, while abuse of the claimant in private can only give rise to liability for harassment[21] or possibly assault, unjustified criticism of the claimant to another, which makes society think less of the claimant, gives rise to the tort of

the defamation. It is the claimant's reputation, not injured feelings, which the tort aims to protect.

Defamation is divided into two parts: libel and slander. Both are examples of defamation, but for historical reasons are treated separately. These two types are generally distinguished on the basis that libel takes permanent form, for example, words shouted across a classroom or gestures made to a crowd. The permanency of libel is deemed to make it more serious-more people will possibly see it and it will not be forgotten. Damage is presumed, and libel is therefore actionable *per se*[22] (i. e. without proof of damage). Slander, in contrast, requires proof of special damage, which can be proved by evidence of financial loss or any other material loss capable of estimation in financial terms. The damage must not be too remote, as that the loss is such as might fairly and reasonably on the facts of the case have been anticipated and feared to result. Libel, unlike slander, is also a crime, although few prosecutions are made.

The law of defamation must attempt to balance the competing rights of freedom of expression and protection of one's reputation. This is a far from easy task and, unfortunately for the reader, has led to a complex and frequently confusing area of law. The only way to approach defamation is logically and in stages: (a) Is the statement defamatory? (b) Does it refer to the claimant? (c) Has it been published? (d) Do any of the defences apply?

4.5 Nuisance

The legal meaning of this word is that we have the right to keep it without its value to us being disturbed or spoiled. A person who does spoil another's enjoyment of his or her property can be ordered to pay damages. He can also be ordered to stop committing the nuisances-by an injunction.

Adapted from *Paula* Giliker & Silas, Beckwith, *Tort*, 2000;
Michael Furmston, *Law of Contract*, 2001

Notes to the Text

[1] **negligence** 过失，过失行为。其在法律上的含义指未达到一个通情达理人在当时的情况下根据法律所应达到的注意标准。如其不承担"注意"的法律义务，则其缺乏注意并不构成过失，不产生法律责任。在英格兰法中，该词在侵权法上亦指一种独立的侵权行为。英格兰法律在对侵权行为分类时，并不依照逻辑分为故意的侵权行为与

过失的侵权行为，而是根据诉讼形式（forms of action）进行分类。
nuisance 妨害。一般指一个人在使用其财产时的不合理、不正当或不合法的行为，损害或者妨碍社会公众共同享有的人身或者财产权利，或者妨碍他人使用土地或享受与土地有关的权利。例如在自己的土地上排放毒物、烟等，损害他人身体健康，或任凭自己位于公共道路旁边的房屋有坍塌之危险，从而妨碍公众通行。
libel/slander *n.* 书面（libel）或者口头（slander）诽谤。书面诽谤不仅仅是一种可以被起诉的侵权行为，而且也可以构成犯罪，口头诽谤则只是一种民事侵权行为。
trespass 侵害之诉。英格兰中世纪的一种诉讼形式，指因自己的身体、财产、权利、名誉或人际关系被侵害而索赔的诉讼。
assault *n.*（刑法、侵权法）威胁、恐吓。battery 殴击罪，是普通法上和制定法上的轻罪。assault 指企图实施武力伤人，battery 指对这种威胁的实际实施。

[2] **ensue** 跟着发生，继起。

[3] **commit** 犯（罪），干（坏事），把……交托给，提交，答应负责。

[4] **Some torts, such as negligence require proof of damage, whist others, such as trespass and libel, are actionable without proof of damage.** 一些侵权行为，例如“过失”侵权，需要对损害进行举证，而另外一些，例如“侵害”侵权和“书面诽谤”侵权，则不需要证明损害的存在而可径行起诉。
actionable 可提起诉讼的。action 可以指各种诉讼，但是更多的应用于民事诉讼，而刑事诉讼则更多的被称为 prosecution。

[5] **recklessness** 放任；轻率；粗心大意。指人们实施某行为时的一种心理状态。

[6] **aloofness** 超然的态度

[7] **Contractual remedies seek to place the claimant in the position, so far as money can do it, that he or she would have been in had the contract been performed.** 在金钱的救济方式可以行得通的前提下，只要合同被忠实的履行，那么原告就可以得到这种合同救济。/合同救济寻求用金钱补偿的方式使原告获得合同得到忠实履行时可以获得的利益。

[8]**... thereby placing the victim in the same position as he or she would have been in had the victim not sustained the wrong for which compensation is being awarded.** 因此（侵权）赔偿的评估方式为如果受害人没有遭受到这种不法行为的话他应该是何种境地。

[9] ***non cumul*** 不能竞合。这里指在法国侵权责任和合同责任不能竞合。

[10] **vice versa** *adv.* 反之亦然。

[11] **feudal** 世仇的，封建制度的，封地的，领地的。

[12] **false imprisonment** 非法拘禁。在普通法上属刑事犯罪行为及民事侵权行为。

[13] **real property** 不动产

[14] **personal proerty** 个人财产

[15] **conversion** *n.* 侵占。

用于侵权法和刑法中，指非法地将他人财产当作自己的财产进行占有或者处分；或没有合法根据而侵犯他人动产权利，并导致剥夺了财产权利人对动产之占有和使用的行为。

[16] **defamation** 诽谤。

[17] **It should be noted that defamation protects the claimant's reputation and not his or her feelings, so that there will be no action for defamation if the claimant is insulted in private or if the statement fails to diminish his or her reputation.** 需要指出的是，诽谤罪仅仅保护原告的名誉而不是他（她）的感受，因此如果原告被私下侮辱或者这些陈述没有损害他（她）的名誉，就不可以提起诉讼。

[18] **voluntarily assumed responsibility [voluntary assumption of risks]** 自愿承担责任。可以成为侵权法上的抗辩（defense）。

[19] **vicarious liability** 替代责任；雇主责任。

[20] **causation** 因果关系。

[21] **harassment** 骚扰；烦扰。

[22] ***per se*** [拉丁文] 本身；自身；固有的。

Exercises

1. *Answer the following questions.*

(1) Tort and contract are both concerned with civil obligations. Can circumstances arise where a claim may be brought in both? Give an example for your answer.

(2) What are the constituent parts of a claim in the tort of negligence?

(3) The burden of proving the constituent parts of negligence rests upon whom.

(4) Is vicarious liability imposed where the employer is at fault or is it a case of his strict liability?

(5) What reasons are given by the courts for imposing vicarious liability on the employer for torts of his employees committed in the course of employment?

2. *Debating Questions.*

(1) The following article was published by Daily Star. Give your own opinion on the possible

liability of defamation:

Police investigating drug-smuggling gangs today raided the home of Mr. Chen Jun who is now a national people's representative. Mr. Chen was not available for comment but there is no obvious explanation for the fact that he has luxury homes in the suburb of Beijing and Barcelona.

(*Background: in fact the police did raid the home of Mr. Chen in connection with a company of which he is a managing director. But his houses in Beijing and Barcelona are legitimately owned by his family as a result of his wife's business and were bought with wholly innocent money.*)

The answer is not fixed but flexible. Consider both sides (defamatory or not) and which side is more possible in your mind.

(2) *Simon is playing cricket for his local club. A fence, the top of which is seventeen feet above the level of the pitch, surrounds the ground. The fence is* 78 *yards from Simon. Simon hits the ball for six. The ball clears the fence and strikes Paul who is outside the round approximately* 100 *yards from Simon. Paul is injured. The evidence is that a ball has been hit out of the ground six times in* 28 *years and each time without causing injury.*

Do you think whether the cricket club has committed a tort of negligence and therefore liable for Paul?

Unit Fifteen

What Is Trust?

There have been many attempts to produce a definition of a trust[1] but such definitions are long, amounting to descriptions rather than definitions, or shorter but susceptible to criticism. It is not considered worthwhile either to attempt yet another definition or to criticize existing definitions; rather the concept of a trust will be described.

If a settlor, Simon, transfers property to trustee 1 and trustee 2 (Tim and Tom) to hold on trust for Ben, the legal ownership of the property is vested in Tim and Tom and the equitable ownership is vested in Ben[2]. It will be recalled that this division of ownership was the invention of equity and is the basis of the trust. Tim and Tom hold the property not for their own benefit but for the benefit of Ben. Tim and Tom's technical, legal, ownership brings only burdens and responsibilities which make their position very onerous. The duties and responsibilities of Tim and Tom will be imposed by the settlor and by the general law of trusts. The beneficial ownership which rests with Ben brings with it, as the name suggests, the positive advantages of ownership. Any income which the trust property generates will belong to Ben. Any profit made from the trust property will accrue for the advantage of Ben.

Any property may be the subject-matter of a trust and although the nature of the property may affect the formalities for setting up or running the trust the essential elements remain constant whatever the type of property involved. Property both real and personal can be the subject-matter of a trust. The property may be tangible or intangible[3]. Shares in companies (choses in action) can as readily be trust property as land or money.

If Tim and Tom deal with the trust property in a way that is contrary to the terms of their trust this will constitute a breach of trust, and Ben will be able to seek various remedies through the courts, including damages. If trust property has improperly been transferred to a third party it may be possible for Ben to 'follow' or trace the trust property into the hands of third parties and recover it. In *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] 2 ALL ER 961, Lord Browne-Wilkinson made two fundamental points that relate to the underlying nature of the trust and of equitable interest. First, he stated that trusts were based on conscience. This

means that they operate on the conscience of the (usually legal) owner. Equity will require the legal owner to carry out the terms of the trust where his conscience is affected. Secondly, Lord Browne-Wilkinson said that for there to be an equitable interest there must be a separation of the legal title from the equitable title.

Today the trust has moved out of the restricted area of the family into the commercial world. The concept which began as a way that a knight could protect his family while he was away, perhaps on a crusade, is now used in a wide variety of commercial and financial contexts[4]. The longevity of the trust, then, is due to the fact that it is flexible, adaptable and versatile, and although of considerable antiquity the concept is still being developed and refined in exciting and creative ways.

Some Uses of the Trusts:

1. Provision for family or dependants

The traditional application of the trust is in the context of family provision and this remains a very common use of the express trust. The motive behind the trust could be simply to provide for the family. The settlor may try to make provision over a long period of time and may give a life interest in the property to his wife with the remainder to his children[5]. This may be seen as a dynastic use of the trust, whereby the settlor seeks to control his wealth for a long period. Equally the main object of the settlor could be to try to ensure that the family's financial affairs were managed and overseen by a group of selected trustees.

2. Tax saving

One of the very first applications of the trust in its original forms, the use, was to avoid feudal dues, which was a form of taxation. In its modern guise, the trust is often used to avoid or minimize present-day taxes, especially income tax, capital gains tax and inheritance tax.

3. Pension

In most cases the pension scheme will be set up as a trust with the contributions being paid to the trustees and being invested for the benefit of the employed beneficiaries. The advantages of using a trust are two-fold. First, this will separate the pension funds from other funds of the employer which will be particularly important should the employer encounter financial difficulties. The second reason why pension schemes are often set up as trusts is because the tax/pension legislation requires an irrevocable trust to be used if the important and generous tax advantages are to be obtained[6]. As it is these tax advantages which allow the employer to offer such attractive pension plans to employees, it is almost inevitable that a trust will be used.

4. To provide security for lenders of money

It is possible to have a loan and a trust existing side by side. The effect of this is that a well

advised lender can ensure security for his loan by attaching a trust to it. He then becomes a beneficiary under the trust, which, as was seen, provides very useful protection, particularly if the borrower becomes bankrupt.

5. Retaining legal title

Where a supplier of materials (A) to another (B) fears for the financial future of B he may use a 'Romalpa' clause or a reservation of title clause in the contract under which the materials are supplied. (*Aluminium Industrie Vaassen B v Romalpa Aluminium Ltd.* [1976] 2 *ALL ER* 552). The plaintiffs (A) supplied aluminium foil. Under the terms of the contract title was not to pass until the defendants (B) had paid all debts owed to the plaintiff. The defendants were required to store the foil in such a way that the foil supplied by the plaintiff could be identified. (The defendants bought foils from a number of suppliers.) When the defendants became insolvent it was held that the plaintiffs were entitled to the foil held by the defendants that could be identified as having been supplied by the plaintiffs the title to which remained with the plaintiff under the terms of the contract of supply[7].

6. Clubs and unincorporated associations

Unless a club has been incorporated it is not a legal person and cannot hold property, yet in the vast majority of cases there will be 'club' property. This may be money and in some cases land. It is common for this property to be vested in trustees for the benefit of the club members. They will normally hold the property for the members, to be dealt with according to the rules of the club. The trustees will usually be members of the committee of the club.

7. Charities

One of the earliest uses of the trust was to enable property to be given for a charitable purpose specified by the donor. The property would be transferred to trustees to hold on trust for the charitable purposes described by the transferor.

8. Minors

It is often not possible or desirable to be owned outright by minors. The Law of Property Act 1925 s. 1 (6) provides that a minor cannot own the legal estate in land, but of course the legal estate could be vested in adults to hold on trust for the minor.

9. Protective trusts

A parent may be considering setting up a trust for the benefit of an adult, but financially inexperienced son who is married and has a family. The prospective settlor is aware that once a trust is set up the son will have a saleable or mortgageable interest. The father fears that the son will not act responsibly and may sell the interest or raise money on it, with the possible result that the benefit will be wasted away. The settlor could decide to create a discretionary trust with the

trustees having the discretion to make such payments to the son as they, the trustees, think fit. This would protect the trust funds and prevent the son from having the control over his interest.

10. Non-charitable purpose trusts

As a general rule it is only possible to create trusts with human beneficiaries and in the main trusts for non-charitable purposes are invalid. There are, however, a number of exceptions to this general rule. It is possible to create a trust by will for the maintenance of particular animals or for the erection of maintenance of a specified tomb. Additionally, a trust for the saying of masses for the dead is valid. These trusts while of comfort to the testator, are of limited application and although valid are not enforceable. The result of this is that if the trustees carry out the trust there is no problem, but if they will not there is no mechanism for enforcing the trust. These trusts are generally regarded as anomalous and the categories will not be extended.

Adapted from Richard Edwards, Nigel Stockwell, *Equity and Trust*, 1999.

Notes to the Text

[1] **trust** 受托人基于委托人的信任，以名义所有人身份，就委托人授予的财产为受益人的利益进行管理和处分的行为。

[2] **If a settlor, Simon, transfers property to trustee 1 and trustee 2 (Tim and Tom) to hold on trust for Ben, the legal ownership of the property is vested in Tim and Tom and the equitable ownership is vested in Ben.** 如果一个叫西蒙的人创立一个信托，信托内容为“由信托人蒂姆和汤姆为本持有信托财产”，那么这意味着蒂姆和汤姆为普通法上的信托财产所有人，本为衡平法上信托财产所有人。settlor 信托创立人；财产授予者。

[3] **Tangible/intangible property** 有形财产；无形财产（如债权、股票、知识产权、特许权等）。

Chose in action 权利动产，指并未实际占有，而只能通过诉讼才能取得金钱或其他动产的权利。（区别于占有动产 chose in possession，例如税收和关税，如果已经缴纳，则为占有动产；如尚未缴纳，则为权利动产。）

[4] **The concept which began as a way that a knight could protect his family while he was away, perhaps on a crusade, is now used in a wide variety of commercial and financial contexts.** 这个概念从当初中世纪的骑士在他们远离家乡的时候，可能在十字军远征的时候，用来保护家庭的手段，到现在已经被广泛运用于各种商业金融领

域。

[5] **... may give a life interest in the property to his wife with the remainder to his children.** （信托创立人）可以将信托财产的终生权益授予他的妻子，将信托财产的剩余权益留给他的孩子。

Life interest 终生权益，对不动产或者动产享有的权益或请求权，并以权益享有人或相关他人的生存期为限。

[6] **The second reason why pension schemes are often set up as trusts is because the tax/pension legislation requires an irrevocable trust to be used if the important and generous tax advantages are to be obtained.** 退休金计划总是使用信托的方式的第二个原因是，如果可以获得重要的或者大量的税务上面的好处的话，税收或者退休金法规就会要求设立一个不可撤销的信托基金。

[7] **when the defendants became insolvent it was held that the plaintiffs were entitled to the foil held by the defendants that could be identified as having been supplied by the plaintiffs the title to which remained with the plaintiff under the terms of the contract of supply.** 法院判决被告破产，原告对那批被告持有的箔享有权利，因为根据供货合同，那批原告供给被告的货物被原告保留了所有权从而被特定化下来。

Exercises

1. *Give your own definition of "trust".*

2. *What did Lord Browne-Wilkinson make his points related to the underlying nature of the trust and of equitable interest?*

3. *What is the use of trust in the contract of sales?*

4. *What trust can offer in family affairs?*

Unit Sixteen

Trademarks, Service Marks and Copyrights

Intellectual property comes in many forms: the writings of an author, the new product or process developed by an inventor, the company name Microsoft, and the secret formula used to make Coca-Cola. Federal law provides rights to owners of these works, products, company names, and processes called copyrights, patents, trademarks, and trade secrets. [1] State laws provide protection for trade secrets. Federal laws and trade secrecy laws protect the special category of intellectual property rights relating to computer software development and use. Here discusses the federal and state laws governing these areas of intellectual property.

A. Trademarks and Service Marks

The Lanham Act, a federal law, grants a producer the exclusive right to register a trademark and prevent competitors from using that mark. [2] This law helps assure a producer that it, and not an imitating competitor, will reap the financial, reputation-related rewards of a desirable product.

A mark is any word, name, symbol, device, or combination of these used to identify a product or service. If the mark identifies a product, such as an automobile or soap, it is called a trademark. If it identifies a service, such as a restaurant or dry cleaner, it is called a service mark.

The owner of a mark may obtain protection from others using it by registering the mark in accordance with federal law. To be registered, a mark must distinguish the goods or service of the applicant from those of others. [3] Under the federal statute, a register, called the Principal Register, is maintained for recording such marks. Inclusion on the Principal Register grants the registrant the exclusive right to use the mark. Challenges may be made to the registrant's right within five years of registration, but after five years the right of the registrant is incontestable.

An advance registration of a mark may be made not more than three years before its actual use by filing an application certifying a *bona fide* "intent-to-use". [4] Fees must be paid at six-month intervals from the filing of the application until actual use begins.

Registrable Marks. Marks that are coined, completely fanciful, or arbitrary are capable of

registration on the Principal Register. The mark Exxon, for example, was coined by the owner. The name Kodak is also a creation of the Owner of this trademark and has no other meaning in English, but it serves to distinguish the goods of its owner from all others.

A suggestive term may also be registered. Such a term suggests rather than describes some characteristics of the goods to which it applies and requires the consumer to exercise some imagination to reach a conclusion about the nature of the goods. [5] For example, as a trademark for refrigerators, Penguin would be suggestive of the product's superior cooling and freezing features. As a trademark for paperback books, however, Penguin is arbitrary and fanciful.

Ordinarily, descriptive terms, surnames, and geographic terms are not registrable on the Principal Register. A descriptive term identifies a characteristic or quality of an article or service, such as color, odor, function, or use. Thus, Arthriticare was held not to be registrable on the Principal Register because it was merely descriptive of a product used to treat symptoms of arthritis. Boston Beer was denied trademark protection because it was a geographic term.

Generic terms—that is, terms that designate a kind or class of goods, such as *cola* or *rose wine*—are never registrable. [6]

Trade Dress Protection. Firms invest significant resources to develop and promote the appearance of their products and the packages in which these products are sold so that they are clearly recognizable by consumers. Trade dress involves a product's total image and, in the case of consumer goods, includes the overall packaging look in which each product is sold.

When a competitor adopts a confusingly similar trade dress, it dilutes the first user's investment and goodwill and deceives consumers, hindering their ability to distinguish between competing brands. The law of trade dress protection has been settled by the U. S. Supreme Court, and courts have subsequently become more receptive to claims of trade dress infringement under section 43 (a) of the Lanham Act. In order to prevail, a plaintiff must prove its trade dress is distinctive and non-functional and the defendant's trade dress is confusingly similar to the plaintiff's. Thus, a competitor who copied the Marlboro cigarettes package for its Gunsmoke brand of cigarettes was found to have infringed the trade dress of the Marlboro brand. [7] Trade dress protection under the Lanham Act is the same as that provided a qualified unregistered trademark and does not provide all of the protection available to the holder of a registered trademark.

Injunction against Improper Use of Mark. [8] A person who has the right to use a mark may obtain a court order prohibiting a competitor from imitating or duplicating the mark. The basic question in such litigation is whether the general public is likely to be confused by the mark of the defendant and to believe wrongly that it identifies the plaintiff. If there is danger of confusion, the court will enjoin the defendant from using the particular mark.

In some cases, the fact that the products of the plaintiff and the defendant did not compete in the same market was held to entitle the defendant to use a mark that would have been prohibited as confusingly similar if the defendant manufactured the same product as the plaintiff. For example, it has been held that Cadillac as applied to boats is not confusingly similar to Cadillac as applied to automobiles; therefore, its use cannot be enjoined.

Abandonment of Exclusive Right to Mark. An owner who has an exclusive right to use a mark may lose that right. If other persons are permitted to use the mark, it loses its exclusive character and is said to pass into the English language and become generic. Examples of formerly enforceable marks that have made this transition into the general language are aspirin, thermos, cellophane, and shredded wheat.

Prevention of Dilution of Famous Marks. The Federal Trademark Dilution Act of 1995 provides a cause of action against the "commercial use " of another's famous mark or trade name when it results in a "dilution of the distinctive quality of the mark." [9] The act protects against discordant uses, such as Du Pont shoes, Buick aspirin, and Kodak pianos. Unlike an ordinary trademark infringement action, a dilution action applies in the absence of competition and likelihood of confusion. The act exempts "fair use" of a mark in comparative advertising as well as uses in news reporting and commentary.

B. Copyrights

A Copyright is the exclusive right given by federal statute to the creator of a literary or an artistic work to use, reproduce, and display the work. Under the international treaty called the Berne Convention, copyright of the works of all U. S. authors is protected automatically in all Berne Convention nations, who have agreed under the treaty to treat nationals of other member countries like their own nationals. [10]

A copyright prevents not the copying of an idea but only the copying of the way the idea is expressed. That is, the Copyright is violated when there is a duplicating of the words, pictures, or other form of expression of the creator but not when there is just use of the idea those words, pictures, or other formats express. [11]

Duration of Copyright. Article 1, section 8 of the U. S. Constitution empowered Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The first U. S. copyright statute was enacted soon after in 1790 and provided protection for any "book, map or chart" for 14 years, with a privilege to renew for an additional 14 years. [12] In 1831, the initial 14-year term was extended to 28 years, with a privilege for an additional 14 years. Under the 1909

Copyright Act, the protection period was for 28 years, with a right of renewal for an additional 28 years.

Under the presently applicable copyright law, enacted in 1976, the duration of a copyright is the life of the creator of the work plus 50 years. The Copyright Act of 1976 brought the duration aspect of U. S. copyright law into harmony with that of most comparable nations. Also under present law, if a work is a "work made for hire," —that is, a business pays an individual to create the work—the business employing the creator registers the copyright. [13] This copyright runs for 100 years from creation or years from publication of the work, whichever period is shorter. After a copyright has expired, the work is in the public domain and may be used by anyone without cost.

Copyright Notice. Prior to March 1, 1989, the author of an original work secured a copyright by placing a copyright notice on the work, consisting of the word copyright or the symbol ©, the year of first publication, and the name or pseudonym of the author. [14] The author also was required to register the copyright with the Copyright Office. Under the Berne Convention Implementation Act of 1988, a law that adjusts U. S. copyright law to conform to the Berne Convention, it is no longer mandatory that works published after March 1, 1989, contain a notice of copyright. However, placing a notice of copyright on published works is strongly recommended. This notice prevents an infringer from claiming innocent infringement of the work, which would reduce the amount of damages owed. In order to bring a copyright infringement suit for a work of U. S. origin, the owner must have submitted two copies of the work to the Copyright Office in Washington, D. C., for registration.

What is Copyrightable. Copyrights protect literary, musical, dramatic, and artistic work. Protected are books and periodicals; musical and dramatic compositions; choreographic works; maps; works of art, such as paintings, sculptures, and photographs; motion pictures and other audiovisual works; sound recordings; and computer programs.

Rights of Copyright Holders. A copyright holder has the exclusive right to (1) reproduce the work; (2) prepare derivative works, such as a script from the original work; (3) distribute copies of recordings of the work, (4) publicly perform the work, in the case of plays and motion pictures; and (5) publicly display the work, in the case of paintings, sculptures, and photographs.

The copyright owner may assign or license some of the rights listed above and will receive royalty payments as part of the agreement. The copyright law also assures royalty payments. The principal payers of mechanical royalties are record companies, and the rate is set by the Copyright Royalty Tribunal. The statutory rate is based on the greater of a flat fee or a per-minute, per-song, or per-record fee. [15]

In addition to rights under the copyright law and international treaties, federal and state laws prohibit record and tape piracy[16].

Limitation on Exclusive Character of Copyright. A limitation on the exclusive rights of copyright owners exists under the principle of fair use, which allows limited use of copyrighted material in connection with criticism, parody, news reporting, teaching, and research.[17] Four important factors to consider when judging whether the use made in a particular case is fair use include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.

Adapted from Ronald A. Anderson, Ivan Fox, David P. Twomey and Marianne M. Jennings, *Business Law and the Legal Environment*, 1999.

Notes to the Text

[1] **Federal law provides rights to owners of these works, products, company names, and processes Called copyrights, patents, trademarks, and trade secrets.** 联邦法律规定给予这些作品、产品、公司名称和方法的所有人以权利，这些权利分别称之为版权、专利权、商标和商业秘密。copyright 版权；著作权；patent 专利，专利权；trademark 商标；trade secrets 商业秘密，行业秘密。这些可统称为知识产权（intellectual property）或无形财产权（intangible property）。process（专利法上的）"方法"，如：process patent 方法专利。

[2] **The Lanham Act, a federal law, grants a producer the exclusive right to register a trademark and prevent competitors from using that mark.** 联邦法律《拉纳姆法》给予生产者注册商标的专有权，并禁止竞争者使用这种商标。exclusive right 独占性权利，专有权，专属权利，排他性的权利。register 注册，登记；登记簿；登记官，注册官（与之相对者 registrant 注册人，登记人）。这里述及的 mark 包括产品商标 trademark 和服务商标 service mark（亦称"服务业标志"）两种。而广义的商标（trademark）还包括商号 trade names、商品外观装潢 trade dress（又称"产品外观"），等等。

[3] **To be registered, a mark must distinguish the goods or service of the applicant from those of others.** 为了获得注册，标记必须能够将申请者的产品或服务与其他人的产

品或者服务区别开来。

同段下文的 Principal Register（美国）主登记簿，指根据美国联邦商标法（即1946年《拉纳姆法》）设立的联邦商标登记簿。它既是对符合规定条件的商标提供全国范围法律保护的依据，也构成商标权人就其商标专有权对所有后来使用者的推定告知(constructive notice)。

[4] **An advance registration of a mark may be made not more than three years before its actual use by filing an application certifying a *bona fide* "intent-to-use".** 一种标记可以在实际使用之前的3年以内进行预先注册，方法是提交一份证明确有真诚使用该标记意图的申请。*bona fide*［拉丁文］善意，诚实（=good faith）。

[5] **Such a term suggests rather than describes some characteristics of the goods to which it applies and requires the consumer to exercise some imagination to reach a conclusion about the nature of the goods.** 这种名称暗示而不是描述其所标志的产品的某些特征，它需要消费者通过某种联想才能推知此产品的性质。

上一段的 registrable marks 表示"可注册的标记"。

[6] **Generic terms—that is, terms that designate a kind or class of goods, such as *cola* or *rose wine*—are never registrable.** 通用名称（即表示一种或一类产品的名称，如可乐或红葡萄酒）任何情况下都是不可注册商标的。generic term 通用名称，亦作"generic name"，"generic mark"，"common descriptive name"，它不能作为商标而受到保护。

[7] **Thus, a competitor who copied the Marlboro cigarettes package for its Gunsmoke brand of cigarettes was found to have infringed the trade dress of the Marlboro brand.** 例如，一个仿制万宝路的 Gunsmoke 牌的卷烟包装的竞争者，被裁决侵犯了万宝路卷烟的产品外观。find（*v.*）裁决，做出裁决。如：find innocent 裁决无罪，finding of fact 事实的裁决。infringe（*v.*），侵犯，侵害；其名词为 infringement，infringer 侵权者；copyright infringement 版权侵权，侵犯版权的行为。

(同段上文) goodwill 商誉。trade dress protection 产品外观保护。

(同段下文) unregistered trademark 未注册商标；反之，registered trademark 注册商标。

[8] **injunction against improper use of mark** 针对不正当使用商标的禁令。

[9] **The Federal Trademark Dilution Act of 1995 provides a cause of action against the "commercial use" of another's famous mark or trade name when it results in a "dilution of the distinctive quality of the mark."** 1995年《联邦商标淡化法》规定，如果对他人驰名的商业标识或商号的"商业性使用"导致了"淡化该标识的独特性"，那么可以对这种使用行为提起诉讼。

dilution 淡化，稀释。这在商标法上指的是他人使用某一强势商标（驰名商标），虽未

导致相同或类似商品的混淆，但对该商标的显著性（独特性）造成损害，或因其使用产生令人讨厌的联系而对该商标的形象造成损害。商标的淡化是一种对强势商标的侵权行为。dilution doctrine 反淡化原则。cause of action 诉讼原因（诉因），诉讼事由（案由）。

（同段上文）prevention of dilution of famous marks 防止淡化驰名商业标识。

（同段下文）trademark infringement action 商标侵权诉讼；dilution action 淡化之诉；fair use 合理使用。

[10] **Under the international treaty called the Berne Convention, copyright of the works of all U. S. authors is protected automatically in all Berne Convention nations, who have agreed under the treaty to treat nationals of other member countries like their own nationals.** 根据《伯尔尼公约》这一国际条约，所有美国作者的作品在所有《伯尔尼公约》的缔约国都自动受到版权保护，这些缔约国同意根据该公约，给予其他缔约国的国民与本国的国民相同的待遇。

[11] **... the Copyright is violated when there is a duplicating of the words, pictures, or other form of expression of the creator but not when there is just use of the idea those words, pictures, or other formats express.** 复制创作者的著述、绘画或其他表达形式构成侵犯版权，但若仅仅是使用这些著述、绘画或其他表达形式所表达的思想，则不构成侵犯版权行为。

[12] **The first U. S. copyright statute was enacted soon after in 1790 and provided protection for any "book, map or chart" for 14 years, with a privilege to renew for an additional 14 years.** 美国第一部版权法于1790年颁布，该法规定对任何"书籍、地图或图表"给予为期14年的保护，另给予续展保护期限亦为14年的权利。renew（动词）更新，续展，展期。其名词 renewal，如：renewal of copyright 版权保护期限的延长。

（同段上文）duration of copyright 版权的保护期（限）。

[13] **Also under present law, if a work is a "work made for hire,"—that is, a business pays an individual to create the work—the business employing the creator registers the copyright.** 现行版权法还规定，如果一件作品是"雇佣作品"（即企业雇佣个人创作的作品），雇佣创作者的企业享有作品的版权。work made for hire 雇佣作品（也译"职务作品"），亦作"work for hire"，包括两种情况：一是雇员在其受雇工作范围内完成的作品；二是某些特定种类的委托作品，当事人书面约定将其视为雇佣作品。美国版权法规定，这种作品的版权由雇主或委托人享有。

（同段下文）expire 期满，到期，终止；public domain 公有财产，无版权、无专利权状态。

[14] **Prior to March 1, 1989, the author of an original work secured a copyright by placing a copyright notice on the work, consisting of the word copyright or the symbol ©, the year of first publication, and the name or pseudonym of the author.**

1989年3月1日之前，原创作品的作者需要通过在作品上登载版权声明来获得版权，版权声明包括单词 copyright 或符号©、首次出版年份和作者的姓名或笔名。secure a copyright 取得著作权；copyright notice 版权声明，版权通知。

（同段下文）register a copyright 版权登记；copyright infringement 版权侵权，侵犯版权的行为。the Berne Convention Implementation Act 伯尔尼公约施行法。to bring a suit 提起诉讼，亦称 bring a lawsuit，bring legal action。

[15] **The statutory rate is based on the greater of a flat fee or a per-minute, per-song, or per-record fee.** 法定的费率是按照一个统一费率或每分钟、每首歌或每盘磁带的费用计算，取其较高者。

（同段上文）royalty 版税，使用费，特许使用费。the Copyright Royalty Tribunal 版税裁判所。tribunal 法庭，审判庭，裁判庭。如：tribunal of arbitration 仲裁庭，tribunal of economic adjudication 经济审判庭。

[16] **record and tape piracy** 盗录唱片和磁带行为，侵害音像制品权行为。piracy 海盗（行为）；剽窃，非法翻印，侵犯著作权、专利权或商标权的行为。

[17] **A limitation on the exclusive rights of copyright owners exists under the principle of fair use, which allows limited use of copyrighted material in connection with criticism, parody, news reporting, teaching, and research.** 根据合理使用原则对版权人的专有权进行限制，该原则允许对受版权保护的作品进行与批评、滑稽模仿、新闻报道、教学和研究有关的有限使用。copyright owner 版权人，版权所有人；copyrighted material 对受版权保护的作品（= copyrighted work）。copyrighted 受版权保护的，有版权的。

（同段上文）exclusive character of copyright 版权独占性。

Exercises

1. *Answer the following questions.*

(1) How many types does intellectual property have?

(2) What is a trademark and service mark?

(3) What kind of marks can be registered on the Principal Register?

(4) Under which law is trade dress protected?

(5) What remedies are available to owners for infringement of copyrights?

(6) What is the difference between a dilution action and an ordinary trademark infringement action?

(7) How long is the duration of the protection afforded owners of copyrights?

(8) What law brings the aspect of copyright notice of U. S. copyright law into harmony with that of the Berne Convention?

(9) What is copyrightable?

(10) What exclusive rights does a copyright holder have?

(11) What allows the limited use of copyrighted material for teaching, research, and news reporting?

2. *Translate the following sentences into English.*

(1) 如果一种标记用以识别一种服务，例如一家餐馆或干洗店，它就称之为服务商标。

(2) 根据联邦法律，标记的所有人将该标记进行了注册，即可获得保护，别人不得使用。

(3) 著作权并不阻止对思想的复制，而仅仅阻止对思想的表现方式的复制。

(4) 对注册人权利的异议必须在标记注册后5年内提出，经过5年之后，注册人的权利就成为不可争辩的了。

(5) 根据现行的1976年制定的版权法，版权保护期是作者有生之年加死后50年。

(6) 为了在美国提起版权侵权诉讼，来源国为美国的作品的所有权人必须向位于哥伦比亚特区华盛顿的版权局提交该作品的两份复制品进行登记。

(7) 版权人可以将某些权利转让或许可他人行使，并根据协议收取版税。

(8) 在具体案件中判断一种对受版权保护的作品的使用是否属合理使用时，要考虑的一个因素是：所使用的部分在受版权保护作品整体中的分量和重要性。

Unit Seventeen

Patents, Secret Business Information, Protection of Computer Software and Mask Work

A. Patents

There are three types of patents, the rights to which may be obtained by proper filing with the Patent and Trademark Office (PTO) in Washington, D. C. The types and duration of patents are as follows.

(a) Utility Patents. Utility or functional patents grant inventors of any new and useful process, machine, manufacture, or composition of matter or any new and useful improvement of such devices the right to obtain a patent. [1] Prior to 1995, these utility patents had a life of 17 years from the date of grant. Under the Uruguay Round Trade Agreement Act, effective June 8, 1995, the duration of U. S. utility patents was changed from 17 years from the date of grant to 20 years from the date of filing to be consistent with the patent law of General Agreement on Tariffs and Trade (GATT) member states.

(b) Design Patents. A second kind of patent exists under U. S. patent law that protects new and nonobvious ornamental features that appear in connection with an article of manufacture. These patents are called design patents and have a duration of 14 years. Design patents have limited applicability, for not only must they be new and have nonobvious ornamental features but they must be nonfunctional as well. [2] Thus, when the "pillow shape" design of Nabisco Shredded Wheat was found to be functional, the design patent was held invalid as the cereal's shape was not capable of design patent protection.

(c) Plant Patents. A third type of patent, called plant patents, protects the developers of asexual reproduction of new plants. The duration is 20 years from the date of filing, the same as applied to utility patents.

(d) Notice. The owner of a patent is required to mark the patented item or device using the word patent and must list the patent number on the device in order to recover damages from an

infringer of the patent. [3]

Patentability and Exclusive Rights. To be patentable, an invention must be something that is new and not obvious to a person of ordinary skill and knowledge in the art or technology to which the invention is related. Whether an invention is new and not obvious in its field may lead to highly technical proceedings before a patent examiner, the PTO's Board of Patent Appeals, or the U. S. Court of Appeals for the Federal Circuit (CAFC). [4] For example, Thomas Devel's application for a patent on complementary DNA (cDNA) molecules encoding proteins that stimulated cell division was rejected by a patent examiner as "obvious" and affirmed by the PTO's Board of Patent Appeals. However, after a full hearing before the CAFC, which focused on the state of research in the field as applied to the patent application, Devel's patent claims were determined to be "not invalid because of obviousness."

The invention itself is what is patented. Thus, new and useful ideas and scientific principles by themselves cannot be patented. There must be an actual physical implementation of the idea or principle in the form of a process, machine, composition of matter, or device.

Under the Supreme Court's "doctrine of equivalents," [5] infringers may not avoid liability for patent infringement by substituting insubstantial differences for some of the elements of the patented product or process. The test for infringement requires an essential inquiry: Does the accused product or process contain elements identical or equivalent to each claimed element of the patented invention?

The patent owner has the exclusive right to make, use, sell or import into the United States the product or process that uses the patented invention. It is a violation of U. S. patent law to make, use, sell, offer to sell, or import any patented invention within the United States without authority from the patent owner.

B. Secret Business Information

A business may have developed information that is not generally known but that cannot be protected under federal law. Or a business may want to avoid the disclosure required to obtain a patent or copyright protection of computer software. As long as such information is kept secret, it will be protected under state law relating to trade secrets. [6]

A trade secret may consist of any formula, device, or compilation of information that is used in one's business and is of such a nature that it provides an advantage over competitors who do not have the information. It may be a formula for a chemical compound; a process of manufacturing, treating, or preserving materials; or, to a limited extent, certain confidential customer lists.

Courts will not protect customer lists if customer identities are readily ascertainable from

industry or public sources or if products or services are sold to a wide group of purchasers based on their individual needs.

When secret business information is made public, it loses the protection it had while secret. This loss of protection occurs when the information is made known without any restrictions. In contrast, there is no loss of protection when secret information is shared or communicated for a special purpose and the person receiving the information knows that it is not to be made known to others.

When a product or process is unprotected by a patent or a copyright and is sold in significant numbers to the public, whose members are free to resell to whomever they choose, competitors are free to reverse engineer (start with the known product and work backwards to discover the process) or copy the article.[7] For example, Crosby Yacht Co., a boat builder on Cape Cod, developed a hull design that is not patented. Maine Boatbuilders Inc. (MBI) purchased one of Crosby's boats and copied the hull by creating a mold from the boat it purchased. MBI is free to build and sell boats utilizing the copied hull.

Defensive Measures. Employers seek to avoid the expense of trade secret litigation by limiting disclosure of trade secrets to employees with a "need to know." Employers also have employees sign nondisclosure agreements, and they conduct exit interviews when employees with confidential information leave, reminding the employees of the employer's intent to enforce the nondisclosure agreement. In addition, employers have adopted industrial security plans to protect their unique knowledge from "outsiders," who may engage in theft, trespass, wiretapping, or other forms of commercial espionage.[8]

Criminal Sanctions. Under the Industrial Espionage Act of 1996, knowingly stealing, soliciting, or obtaining trade secrets by copying, downloading, or uploading via electronic means or otherwise with the intention that it will benefit a foreign government or agent is a crime. This act also applies to the stealing or purchasing of trade secrets by American companies or individuals who intend to convert trade secrets to the economic benefit of anyone other than the owner. The definition of trade secret is closely modeled on the Uniform Trade Secrets Act and includes all forms and types of financial, business, scientific, technical, economic, and engineering information. The law requires the owner to have taken "reasonable and proper" measures to keep the information secret. Offenders are subject to fines of up to $500,000 or twice the value of the proprietary information involved, whichever is greater, and imprisonment for up to fifteen years. Corporations may be fined up to $10,000,000 or twice the value of the secret involved, whichever is greater. In addition, the offender's property is subject to forfeiture to the U.S. government, and import-export sanctions may be imposed.[9]

C. Protection of Computer Software and Mask Works

Computer programs, chip designs, and mask works are protected from infringement with varying degrees of success by federal statutes, restrictive licensing, and trade secrecy. [10]

Copyright Protection of Computer Programs. Under the Computer Software Copyright Act of 1980, a written program is given the same protection as any other copyrighted material regardless of whether the program is written in source code (ordinary language) or object code (machine language). For example, Franklin Computer Corp. copied certain operating-system computer programs that had been copyrighted by Apple Computer, Inc. When Apple sued Franklin for copyright infringement, Franklin argued that the object code on which its programs had relied was an uncopyrightable "method of operation." [11] The Third Circuit held that computer programs, whether in source code or in object code embedded on ROM chips, are protected under the act.

Patent Protection of Programs. Patents have been granted for computer programs; for example, a method of using a computer to carry out translations from one language to another has been held patentable.

Patenting a program has the disadvantage that the program is placed in the public records and may thus be examined by anyone. [12] This practice poses a potential danger that the program will be copied. To detect patent violators and bring legal action is difficult and costly.

Trade Secrets. While primary protection for computer software is found in the Computer Software Copyright Act, industry also uses trade secret law to protect computer programs. When software containing trade secrets is unlawfully appropriated by a former employee, the employee is guilty of trade secret theft. [13]

Restrictive Licensing. To retain greater control over proprietary software, it is common for the creator of the software to license its use to others, rather than selling it to them. [14] Such licensing agreements typically include restrictions on the use of the software by the licensee and give the licensor greater protection than that provided by copyright law. These restrictions commonly prohibit the licensee from providing, in any manner whatsoever, the software to third persons or subjecting the software to reverse engineering.

Semiconductor Chip Protection. The Semiconductor Chip Protection Act of 1984 (SCPA) created a new form of industrial intellectual property by protecting "mask works" and the semiconductor chip products in which they are embodied against chip piracy. [15] Mask work refers to the specific form of expression embodied in chip design, including the stencils used in manufacturing semiconductor chip products. A semiconductor chip product is a product placed on

a piece of semiconductor material in accordance with a predetermined pattern that is intended to perform electronic circuitry functions. This definition includes such products as analog chips, logic function chips like microprocessors, and memory chips like RAMs and ROMs.

Duration and Qualifications for Protection. The SCPA provides the owner of a mask work fixed in a semiconductor chip product the exclusive right for ten years to reproduce and distribute the products in the United States and to import them into the United States. These rights fully apply to works first commercially exploited after November 8, 1984, the date of the law's enactment. However, the protection of the act applies only to those works that, when considered as a whole, are not commonplace, staple, or familiar in the semiconductor industry.

Application Procedure. The owner of a mask work subject to protection under the SCPA must file an application for a certificate of registration with the Register of Copyrights within two years of the date of the work's first commercial exploitation. Failure to do so within this period will result in forfeiture of all rights under the act. Questions concerning the validity of the works are to be resolved through litigation or arbitration.

Innocent infringers are not liable for infringements occurring before notice of protection is given them and are liable for reasonable royalties on each unit distributed after notice has been given them. However, the continued purchasing of infringing semiconductors after notice has been given can result in penalties of up to $250,000.

Remedies. The SCPA provides that an infringer will be liable for actual damages and will forfeit its profits to the owner. As an alternative, the owner may elect to receive statutory damages of up to $250,000 as determined by a court. [16] The court may also order destruction or other disposition of the products and equipment used to make the products.

Adapted from Ronald A. Anderson, Ivan Fox, David P. Twomey and Marianne M. Jennings, *Business Law and the Legal Environment*, 17th ed., 1999.

Notes to the Text

[1] **Utility or functional patents grant inventors of any new and useful process, machine, manufacture, or composition of matter or any new and useful improvement of such devices the right to obtain a patent.** 实用或功能性专利授予下列发明的发明者以专利权：任何新颖而有用的方法、机械、产品、组合物或任何新颖而有用的对上述发明的改进。utility patents 实用专利。utility（专利法上的）实用性。它与新颖性

(novelty) 和非显而易见性 (non-obviousness) 共同构成发明可获得专利的条件。
composition of matter (专利法上的) 组合物，指由两种或两种以上物质组成的混合物或化合物。若该物质是从未有过的，那么专利权可包括组合物及其制作方法。
同段下文的 duration of patents 意为“专利的保护期”。
上段的 Patent and Trademark Office 指美国的“专利商标局”，它是商务部属下的一个联邦机构，主要负责审查专利和商标申请，授予专利，登记注册商标。

[2] **Design patents have limited applicability, for not only must they be new and have nonobvious ornamental features but they must be nonfunctional as well.** 外观设计专利的适用是有限的，因为它们不仅要具有新颖和非显而易见的装饰性外观特征，而且该专利覆盖的必须是有关产品的非功能性方面。design patent 外观设计专利；ornamental features 装饰性 (外观) 特征。下段的 plant patents 指的是“植物专利”。

[3] **The owner of a patent is required to mark the patented item or device using the word patent and must list the patent number on the device in order to recover damages from an infringer of the patent.** 为了向专利侵权人要求损害赔偿，法律要求专利权人在受专利保护的事项或者发明物上以 patent 一词作标记，而且要在发明物上写明专利号。owner of a patent 专利人，专利权人 (同 patentee 专利权人)；recover damages 获得损害赔偿。

[4] **Whether an invention is new and not obvious in its field may lead to highly technical proceedings before a patent examiner, the PTO's Board of Patent Appeals, or the U. S. Court of Appeals for the Federal Circuit.** 一项发明在它所属的领域内是否是新颖的和非显而易见的，这个问题需要由专利审查员、PTO 专利上诉委员会或美国联邦巡回上诉法院进行高度技术性的审查。Board of Patent Appeals 专利上诉委员会，现更名为 Board of Patent Appeals and Interferences 专利上诉与争议委员会。U. S. Court of Appeals for the Federal Circuit 美国联邦巡回上诉法院。
同段上文的 patentability，即 patentability conditions 授予专利 (权) 的条件。

[5] **doctrine of equivalent = equivalents doctrine** (专利法上的) 等同原则。指如果两项发明的功能相同 (即以实质上相同的方式进行使用并产生实质相同的结果)，那么即使它们在名称、形式或外形上有所差异，也应认定该两项发明是相同的。该原则旨在阻止他人以对专利发明进行轻微改动的方式逃避专利侵权处罚。

[6] **Or a business may want to avoid the disclosure required to obtain a patent or copyright protection of computer software. As long as such information is kept secret, it will be protected under state law relating to trade secrets.** 或者一家企业不愿意申请专利或得到计算机软件的版权保护，以避免公开有关信息。只要这样的信息处于秘密状态，它就受到有关商业秘密的州法律的保护。

（同段上文）secret business information 商业秘密信息。

[7] **When a product or process is unprotected by a patent or a copyright and is sold in significant numbers to the public, whose members are free to resell to whomever they choose, competitors are free to reverse engineer (start with the known product and work backwards to discover the process) or copy the article.** 如果一种产品或方法不受专利或版权的保护，并且大量地向公众出售，公众就可以自由地将其转售给他们选择的任何人，那么竞争者就能自由地反向制作（由已知产品或作品开始而反向研究以发现其制作方法）或者复制该物品。reverse engineering 分解产品技术。

[8] **... employers have adopted industrial security plans to protect their unique knowledge from "outsiders," who may engage in theft, trespass, wiretapping, or other forms of commercial espionage.** 雇主采取行业安全计划来保护他们的独特信息免遭外人知晓，这些"圈外之人"可能在从事窃取、侵入、窃听或其他形式的商业间谍活动。trespass 侵害（侵犯）行为，侵入行为；wiretapping 搭线窃听，窃听电话电报；espionage 间谍行为（活动），间谍罪。

（同段上文）defensive measures 防御性措施；sign nondisclosure agreements 签署不透露（商业秘密）协议，签订保密协议。

[9]... **the offender's property is subject to forfeiture to the U. S. government, and import-export sanctions may be imposed.** 违法者的财产将被美国政府没收，并可能受到进出口的制裁。forfeiture 没收，没收物。如：forfeiture of property 没收财产，forfeiture of right 丧失权利；sanction 制裁，如：（同段上文）criminal sanctions 刑事制裁。

[10] **Computer programs, chip designs, and mask works are protected from infringement with varying degrees of success by federal statutes, restrictive licensing, and trade secrecy.** 联邦法律、限制性许可协议和商业秘密法保护计算机程序、集成电路块设计图和掩模作品不受侵犯，并已在不同程度上取得了成功。mask works 掩模作品；licensing 许可，许可贸易（交易）。

[11] **When Apple sued Franklin for copyright infringement, Franklin argued that the object code on which its programs had relied was an uncopyrightable "method of operation."** 当 Apple 起诉 Franklin 侵犯版权时，Franklin 辩称，这些程序所依赖的目标代码是不受版权保护的"操作方法"。

（同段上文）copyright protection of computer programs 对计算机程序的版权保护。

[12] **Patenting a program has the disadvantage that the program is placed in the public records and may thus be examined by anyone.** 对程序提供专利保护的不利方面是，该程序将被公开，因而任何人都可以对其进行审查。patenting a program，亦即 patent

protection of programs 对程序的专利保护。

[13] **When software containing trade secrets is unlawfully appropriated by a former employee, the employee is guilty of trade secret theft.** 如果包含商业秘密的软件被一个前雇员非法挪用，该雇员就犯了盗窃商业秘密罪。guilty（形容词），犯罪，有罪；其反义词 innocent 无罪，清白。

[14] **To retain greater control over proprietary software, it is common for the creator of the software to license its use to others, rather than selling it to them.** 为了对专有软件保持更多的控制，软件开发者通常将软件许可给他人使用，而不是出售给他人。proprietary（*n.* /*adj.*）所有（权）人；所有权，财产。如：proprietary article 专利产品，proprietary information（商业秘密法中的）专有信息。

（同段下文）licensor 许可人，licensee 被许可人。

[15] **The Semiconductor Chip Protection Act of 1984 created a new form of industrial intellectual property by protecting "mask works" and the semiconductor chip products in which they are embodied against chip piracy.** 1984 年《半导体集成电路块保护法》创造了一种新的工业知识产权保护方式，即保护"掩模作品"和体现掩模作品的半导体集成电路块产品免遭侵权。industrial intellectual property 工业知识产权。

[16] **As an alternative, the owner may elect to receive statutory damages of up to $250,000 as determined by a court.** 另一种救济方式是，如果案件由法院解决，权利人可以选择得到法定的最高 250 000 美元损害赔偿。

上一段的"innocent infringers"意为"不知情的侵权人，善意侵权人"。

Exercises

1. *Which of the following statements are* **NOT** *true according to the text?*

(1) The duration of utility patents, plant patents and design patents is 20 years from the date of filing.

(2) An invention must be new and not obvious to a person of ordinary skill and knowledge in the field in question in order to be patentable.

(3) Trade secrets are protected under state law for an unlimited period of time, as long as the secrets are not made public.

(4) Competitors may, through reverse engineering, discover the secret behind unpatented goods sold to the public.

(5) Owners who take reasonable and proper measures to protect their trade secrets can only rely

on the civil protections provided in the Industrial Espionage Act.

(6) Computer software can not be protected by trade secrecy.

(7) Computer software can be protected by restrictive licensing.

(8) The Semiconductor Chip Protection Act of 1984 gives copyright protection to mask works.

2. *Translate the following sentences into English.*

(1) 发明本身是专利保护的对象。因此，新颖而有用的思想和科学原理本身都不受专利保护。

(2) 未经专利权人许可，在美国境内制造、使用、销售、提供销售或者进口任何专利发明，都违反了美国专利法。

(3) 商业秘密可以是一种化学合成物的配方，一种制造、治疗或保存物质的方法，或者在有限的范围内的某些保密的客户名单。

(4) 违法者将被处以最高 500 000 美元或所涉专有信息价值两倍的罚金，取其较高者，并处最高 15 年的监禁。

(5) 第三巡回法院裁定指出，计算机程序不论是用源代码写成还是用嵌在 ROM 集成电路块上的目标代码写成，都受 1980 年《计算机软件版权法》的保护。

(6) 查出专利侵权人和提起诉讼，是既费力又代价很高的事。

(7)《半导体集成电路块保护法》为固定在半导体集成电路块产品上的掩模作品所有权人，提供在美国复制和销售这些产品以及将其进口到美国的为期 10 年的专有权。

(8) 有关作品有效性的问题应当通过诉讼或仲裁来解决。

(9) 不知情的侵权人对发生在给他们保护通知之前的侵权行为不承担责任，但在接到保护通知之后，有义务按照所销售产品的数量缴纳合理的使用费。

Unit Eighteen

A Comparative Analysis of Spam Laws: the Quest for Model Law[1]

Executive Summary

Spam presents a significant challenge to users, Internet service providers, states, and legal systems world wide. The costs of spam are significant and growing, and the increasing volume of spam threatens to destroy the utility of electronic mail communications.

The Chairman's Report from the ITU WSIS Thematic Meeting on Countering Spam in July 2004 emphasized the importance of a multi-faceted approach to solving the problem of spam and named legal governance as one of the necessary means. Our paper focuses on the potential nature of the legal regulation of spam, specifically the importance of harmonizing regulations in the form of a model spam law. We agree with the Chairman that the law is only one means towards this end and we urge regulators to incorporate other modes of control into their efforts, including technical methods, market-based means, and norm-based modalities.

Spam uniquely challenges regulation because it easily transverses borders. The sender of a message, the server that transmits it, and the recipient who reads it may be located in three different states, all of which are under unique legal governance. If spam laws are not aligned in these states, enforcement will suffer because the very differences between spam laws may mean that a violation in one state is a permissible action in another[2]. Moreover, spammers have an incentive to locate operations in places with less regulation, and the opportunity to states to create a domestic spam hosting market may engage them in a race to the bottom.

Harmonizing laws that regulate spam offers considerable benefits, insofar as a model law could assist in establishing a framework for cross-border enforcement collaboration. To those enforcing the regulation of spam, harmonization as a model law effort offers: clear guidelines, easy adoption, enhanced enforcement, stronger norms, fewer havens for spammers, and the increased sharing of best practices. If such regulators then agree that harmonization can aid legal regimes intent on curbing spam, they must initially address four critical tasks: defining prohibited

content, setting default rules for contacting recipients, harmonizing existing laws, and enforcing such rules effectively[3]. This legal approach must be concurrently matched by efforts that employ other modes of regulation, such as technical measures, user education, and market-based approaches.

Our analysis of existing spam legislation gathered by the ITU Strategy and Policy Unit evaluated these laws' elements to determine whether they were commonly included or not, and whether provisions were uniformly implemented or varying when present. Our research documents seven instances in which extant laws strongly converge: a focus on commercial content, the mandatory disclosure of sender/advertiser/routing, bans on fraudulent or misleading content[4], bans on automated collection or generation of recipient addresses, the permission to contact recipients where there is an existing relationship, the requirement to allow recipients to refuse future messages, and a mix of graduated civil and criminal liability. Also documented are five key areas of disagreement which are vital to a harmonized spam law but which have evaded consensus thus far: a prior consent requirement for contacting recipients, a designated enforcer, label requirements for spam messages, the definition of spam (whether it is limited to e-mail communication, or includes other applications, such as SMS), and the jurisdictional reach of the system's spam laws. Naturally, a harmonization effort must tackle and narrow these zones of divergence in order to succeed.

Initial Recommendations

Though legal reform alone will not end spam, it is worthwhile for countries to align their legal regulations regarding spam to the degree possible and to collaborate on anti-spam enforcement. We emphasize that each state or regulatory system must create a response to spam that accords with its priorities, its existing regulations for advertising, and its technical infrastructure. With this baseline assumption, though, congruence in laws increases the opportunity to combat spam's problems effectively and decreases the challenges inherent in the cross-border nature of electronic advertising. Accordingly, we make some tentative recommendations for regulators considering a model spam law or, indeed, any spam legislation concordant with our analysis of the four key questions in the following.

A. Defining Prohibited Content

Existing laws governing spam show considerable unity in defining the content they proscribe, despite the thorny challenge of widely divergent views about what constitutes prohibited

expression. Anti-spam laws around the world concentrate on content with a commercial, for-profit purpose. This focus recognizes both the financial incentives in commercial messages that drive their proliferation and also concerns about suppressing (often protected) dialogue on issues such as politics, religion, and culture. They also generally prohibit communications that seek to defraud or mislead the recipient, that conceal the identity of the sender or the advertiser on whose behalf the message is transmitted, or that disguise information about the path that the message took in reaching a user. There is variation in whether laws apply only to one specific application (such as e-mail) or to on-line communication more generally. We believe that regulating communications more generally economizes regulatory effort and provides a framework for controlling spam on emerging applications such as Voice over Internet Protocol (VoIP) (known as "SPIT" (Spam over Internet Telephony)), in bloc formats, such as Really Simple Syndication (RSS) feeds, in Wikis, and on mobile devices[5].

B. Setting Default Rules for Contacting Recipients

There is considerable divergence in the default rules that different legal structures establish for contacting recipients. The greatest difference is between opt-in and opt-out approaches. The core question is whether it is lawful to contact a recipient who has not previously consented to such communication (Nearly all regimes make it unlawful to contact recipients who have indicated to a sender that they do not wish to receive messages.) Given that this default rule is at the core of spam regulation in most systems and that there are a significant number of regimes in each camp, the clear message is that any effort to draft a model law must squarely face this challenge[6].

Labeling requirements also vary and differences may result in complications for any model law. Some systems require labels while others do not. Even among the former, the labels prescribed differ. This can make compliance difficult for legitimate advertisers who may have difficulty determining where a recipient resides and, thus, which labeling scheme applies. Thus, we believe that this is an area where harmonization would be of significant benefit: senders could comply more easily with requirements and legal systems could help citizens identify and filter more messages if labeling schemes were aligned.

C. Enforcing Rules

Enforcement is the most critical factor in the success of spam legislation. Harmonizing laws on spam, such as through a model law approach, can provide consistent responsibilities, penalties, and jurisdiction, but each legal system must carry the burden of enforcing these dictates.

Different regimes allocate responsibility for enforcing laws in varying ways. It is common to

have one or more national-level bodies, such as a spam authority or telecommunications agency, as the chief enforcer. However, many systems have multiple enforcement bodies, including some that are involved only in a tertiary fashion (such as competition regulators). The way that these entities interact varies as well. It is obvious, though, that a clear division of responsibilities and a strong commitment to coordinated effort is vital.

A significant difference among systems is the role permitted to private actors in enforcement—for example, whether entities affected by spam (such as end users or service providers) may bring suit against senders or the parties that advertise in the offending messages. While allowing private suits can save governmental resources and can permit these parties to recover economic harm from spam, there are concerns that suits may target legitimate senders who make inadvertent errors rather than more egregious offenders (in part because legitimate senders are easier to identify and hale into court). This tension is one that a body working to harmonize laws or to draft a model law will be forced to confront.

Jurisdiction also varies. Some regimes have a circumscribed view of jurisdiction that requires that the sender be located within their borders for their rules to apply. Others take an expansive position, applying (at least in theory) their laws to any message that passes across a computer or network link inside their boundaries. We feel that harmonization of jurisdiction provisions could provide a number of benefits, including greater notice to senders as to which rules may apply, reduced potential for conflicts of law, and probably a greater willingness by different enforcers to cooperate.

The penalties for violating spam laws, while differing in specific levels, show greater similarity. Administrative fines imposed by regulatory agencies are common, as are criminal penalties for more egregious offenses (such as those involving minors or particularly sensitive content like pornography). Regimes that allow suit by private entities typically provide for civil damages either at a defined level or based on actual harm.

Adapted from *The Draft for the ITU WSIS Thematic Meeting on Cyber-security*, by Derek E. Bambauer, Etc., Berkman Center for Internet & Society, Harvard Law School, 2005-06

Notes to the Text

[1] **This text is adapted and abridged from the Preface and the last two Parts (Parts V and VI) of the Draft report filed for the ITU WSIS Thematic Meeting on Cyber-**

security to be held by ITU in Geneva on 28th June to 1st July, 2005. The author just wants to give readers a comprehensive yet simple general introduction to the current Spam law in the E-commerce and to arouse readers' attention to this issue. 本文节选的报告是专为国际电讯联盟（ITU）有关计算机安全的专题会议所提交的。本课编作者意图给读者既简要而又综合地介绍当今电子商务中的反垃圾邮件立法并意图唤起读者对此问题的注意。ITU（INT'L TELECOMMUNICATION UNION）“国际电讯联盟组织”于1865年成立于巴黎。句中Cyber-security一词中的Cyber-前缀表示“计算机；计算机的”。例：cyber-culture. 电脑化社会（文明）；（对社会、政治、文化等的）电脑化影响。spam *n.* 非索要信息，垃圾邮件（义同junk mail）；*v.* 兜售信息［邮件，广告，新闻，文章］。spammers 兜售非索要信息的人；垃圾邮件发送人。model spam law 非索要信息示范法。anti-spam laws 反垃圾邮件法。

[2] **If spam laws are not aligned in these states, enforcement will suffer because the very differences between spam laws may mean that a violation in one state is a permissible action in another.** 如果反垃圾邮件法在这些国家不相一致，执法将遇困难，因为正是这些反垃圾邮件法相互间的区别可能导致在一国的违法行为在另一国便是合法的。

[3] **If such regulators then agree that harmonization can aid legal regimes intent on curbing spam, they must initially address four critical tasks: defining prohibited content, setting default rules for contacting recipients, harmonizing existing laws, and enforcing such rules effectively.** 如果这些规则制定者同意法律的协调将有助于制止垃圾邮件的法律体系之宗旨得以实现，他们必须首先完成四项关键任务：界定禁止的内容；就联系（邮件的）接收确定缺省规则；协调现有法规及有效地执行此类规则。这里的default并非法律意义上的default（违约；疏忽；缺席），而是计算机专业术语。

[4] **bans on fraudulent or misleading content:** 对诈欺性或误导性内容的禁止。ban *n.* / *v.* 禁止，禁令，公告，查禁。fraudulent adj. 诈欺的；欺骗的。例：~ act（conduct）诈欺行为；~ agreement 恶意同谋；~ assignment 诈欺性转让；~ bankruptcy 诈欺性破产；~ proof 诈欺性证明。fraudulence n.

[5] **We believe that regulating communications more generally economizes regulatory effort and provides a framework for controlling spam on emerging applications such as Voice over Internet Protocol (VoIP) (known as "SPIT" (Spam over Internet Telephony)), in bloc formats, such as Really Simple Syndication (RSS) feeds, in Wikis, and on mobile devices.** 我们相信，更普遍地规制通讯将节约规制的成本，并提供控制不断增多的垃圾邮件使用的法律框架，此类应用模式诸如“互联网语音协议”（VoIP）（众所周知的互联网电话技术垃圾邮件“SPIT”）、诸如以集团形式在移

动设施上、在 Wikis 网页上的“真简单辛迪加”(RSS) 的馈送。

[6] **Given that this default rule is at the core of spam regulation in most systems and that there are a significant number of regimes in each camp, the clear message is that any effort to draft a model law must squarely face this challenge.** 假设此缺省规则是绝大多数制度中反垃圾邮件法规的核心所在，且在每一阵营中有为数不少的体制存在，此处一个显然的信号便是，任何试图起草反垃圾邮件法的努力均会直接地面对此挑战。本句中的 given that 表示一种设定条件句，有时出现在法律英语中，作“假设”;“设定”等解释。

Exercises

1. *Debating Questions.*

(1) How much do we know about the E-commerce law in China?

(2) Why nations need to legislate the spam law?

Unit Nineteen

Law of Corporations

A corporation joins the efforts and resources of a large number of individuals for the purpose of producing greater returns than those persons would have obtained individually. This chapter focuses on corporate directors, managers, and shareholders (those who own stock in the corporation) and ways in which conflicts among them can be resolved.

I. Corporate Management: Directors and Officers

Every corporation is governed by a board of directors. The number of directors is set forth in the corporation's articles of incorporation or bylaws[1].

1. Election of Directors

The first board of directors is normally appointed by the incorporators[2] on the creation of the corporation, or directors are named by the corporation itself in the articles. The first board serves until the first annual shareholders' meeting[3]. Subsequent directors are elected by a majority vote of the shareholders.

The term of office for a director is usually one year—from annual meeting to annual meeting. Longer and staggered terms are permissible under most state statutes. A common practice is to elect one-third of the board members each year for a three-year term. In this way, there is greater management continuity.

A director can be removed for cause[4] (breach of duty or other misconduct), either as specified in the articles or bylaws or by shareholder action[5]. Even the board of directors itself may be given power to remove a director for cause, subject to shareholder review. In most states, unless the shareholders have reserved the right at the time of election, a director cannot be removed without cause.

Sometimes, vacancies occur on the board of directors due to death or resignation. New positions may be created through amendment of the articles or bylaws. When a vacancy exists,

either the shareholders or the board itself can fill the position, depending on state law or on the provisions of the bylaws.

2. Directors' Qualifications

Few legal qualifications exist for directors. Only a handful of states have minimum age and residency requirements. A director is sometimes a shareholder, but this is not a necessary qualification unless, of course, statutory provisions or corporate articles or bylaws require ownership[6].

3. Board of Directors' Forum

The board of directors conducts business by holding formal meetings with recorded minutes[7]. The date at which regular meetings are held is usually established in the articles and bylaws or by board resolution. No further notice is customarily required. Special meetings can be called with notice sent to all directors.

Quorum requirements vary among jurisdictions.[8] Many states leave the decision to the corporate articles or bylaws. If the articles or bylaws do not state quorum requirements, most states provide that a quorum is a majority of the number of directors authorized in the articles or bylaws.

Voting is done in person. The rule is one vote per director. Ordinary matters generally require a majority vote. Certain extraordinary issues may require a greater-than-majority vote.

4. Directors' Responsibilities

Directors have responsibility for all policymaking decisions necessary to the management of all corporate affairs. The directors must act as a body in carrying out routine corporate business.

The general areas of responsibility of the board of directors include the following:

1. Authorization for major corporate policy decisions (for example, the determination of new product lines and the overseeing of major contract negotiations and major management-labor negotiations).

2. Appointment, supervision, and removal of corporate officers and other managerial employees and the determination of their compensation.

3. Financial decisions, such as the declaration and payment of dividends to shareholders or the issuance of authorized shares (stocks) or bonds[9].

The board of directors can delegate some of its functions to an executive committee or to

corporate officers[10]. In doing so, the board is not relieved of its overall responsibility for directing the affairs of the corporation. Corporate officers and managerial personnel, however, are then empowered to make decisions relating to ordinary, daily corporate affairs within well-defined guidelines.

5. Role of Corporate Officers

The officers and other executive employees are hired by the board of directors or, in rare instances, by the shareholders.[11] Corporate officers carry out the duties articulated in the bylaws. They also act as agents of the corporation. The ordinary rules of agency apply.[12]

Qualifications are determined at the discretion of the corporation and are included in the articles or bylaws. In most states, a person can hold more than one office and can be both an officer and a director of the corporation.

The rights of corporate officers and other high-level managers are defined by employment contracts, because officers and managers are employees of the company. Corporate officers, however, normally can be removed by the board of directors at any time with or without cause and regardless of the terms of the employment contract, although it is possible for the corporation to be held liable for breach of contract.

6. Duties of Directors and Officers

Directors and officers are deemed fiduciaries of the corporation[13]. A *fiduciary* is a person with a duty to act primarily for another's benefit. A fiduciary relationship involves trust and confidence. The relationship of directors and officers with the corporation and its shareholders is one of trust and confidence. The fiduciary duties of the directors and officers include the duty of care and the duty of loyalty.

Duty of Care. Directors are obligated to be honest and to use prudent business judgment in the conduct of corporate affairs. Directors must exercise the same degree of care that reasonably prudent people[14] use in the conduct of their own personal affairs. Directors must carry out their responsibilities in an informed, businesslike manner and act in accordance with their own knowledge and training.

Directors can be held answerable to the corporation and to corporate officers for breach of their duty of care. When directors delegate work to corporate officers and employees, they are expected to use a reasonable amount of supervision. Otherwise, they will be held liable for negligence or mismanagement of corporate personnel.

Duty of Loyalty. Loyalty can be defined as faithfulness to one's obligations and duties. The

essence of the duty of loyalty is the subordination of self-interest to the interest of the entity to which the duty is owed. [15] The duty presumes constant loyalty to the corporation on the part of the directors and officers. In general, the duty of loyalty prohibits directors from using corporate funds or confidential corporate information for their personal advantage.

Sometimes a corporation enters into a contract or engages in a transaction in which an officer or director has a material interest. The director or officer must make a full disclosure of that interest and must abstain from voting on the proposed transaction.

The Business Judgment Rule. Directors are not insurers of business success. Honest mistakes of judgment and poor business decisions on their part do not make them liable to the corporation for resulting damages. This is the business judgment rule. The rule immunizes directors and officers from liability[16] when a decision is within managerial authority, as long as the decision complies with management's fiduciary duties and as long as acting on the decision is within the powers of the corporation. Consequently, if there is a reasonable basis for a business decision, it is unlikely that a court will interfere with that decision, even if the corporation suffers thereby[17].

II. Corporate Ownership: Shareholders

The acquisition of a share of stock makes a person an owner and shareholder in a corporation. Shareholders thus own the corporation. [18] As a general rule, shareholders have no responsibility for the daily management of the corporation. They are, however, ultimately responsible for choosing the board of directors, which does have that control.

1. Shareholders' Powers

Shareholders must approve fundamental changes affecting the corporation before the changes can be effected. Hence, shareholders must approve amendments to the articles of incorporation and bylaws, they must approve a merger or the dissolution of the corporation[19] and they must approve the sale of all or substantially all of the corporation's assets. Some of these actions are subject to prior board approval.

Election and removal of directors are accomplished by a vote of the shareholders. As explained earlier, the first board of directors is either named in the articles of incorporation or chosen by the incorporators to serve until the first shareholders' meeting. From that time on, selection and retention of directors are exclusively shareholder functions.

Shareholders have the inherent power to remove a director from office *for cause* by a majority vote. Some state statutes even permit removal of directors *without cause* by the vote of a majority of

the holders of outstanding shares[20] entitled to vote. Some corporate charters expressly provide that shareholders, by majority vote, can remove a director at any time without cause.

2. Shareholders' Forum

Shareholders' meetings must occur at least annually. Additionally, special meetings can be called to take care of urgent matters. Because it is usually not practical for owners of only a few shares of stock of publicly traded corporations[21] to attend shareholders' meetings, such shareholders normally give third parties a written authorization to vote their shares at the meeting. This authorization is called a proxy[22].

Shareholder Voting. Shareholders exercise ownership control through the power of their votes. Each shareholder is entitled to one vote per share. The articles of incorporation can exclude or limit voting rights, particularly to certain classes of shares. For example, owners of preferred stock[23] are usually denied the right to vote.

For shareholders to act, a quorum (a minimum number of shareholders, in terms of the number of shares held) must be present at a meeting. Generally, a quorum is more than 50 percent. Corporate business matters are presented in the form of resolutions, which shareholders vote to approve or disapprove. Some state statutes set forth voting limits. Corporations' articles or bylaws must remain within these statutory limitations. Some states provide that the unanimous written consent of shareholders is a permissible alternative to holding a shareholders' meeting.

Once a quorum is present, a majority vote of the shares represented at the meeting is usually required to pass resolutions. At times, a larger-than-majority vote will be required either by statute or by corporate charter. Extraordinary corporate matters, such as a merger, consolidation, or dissolution of the corporation, require a higher percentage of the representatives of all corporate shares entitled to vote, not just a majority of those present at that particular meeting.

3. Shareholders' Rights

Stock Certificates. A stock certificate is a certificate issued by a corporation that evidences ownership of a specified number of shares in the corporation. In jurisdictions that require the issuance of stock certificates, shareholders have the right to demand that the corporation issue a certificate and record their names and addresses in the corporate stock record books.

Stock is intangible personal property. The ownership right exists independently of the certificate itself. A stock certificate may be lost or destroyed, but ownership is not destroyed with it. A new certificate can be issued to replace one that has been lost or destroyed. Notice of shareholder meetings, dividends, and operational and financial reports are all distributed

according to the recorded ownership listed in the corporation's books, not on the basis of possession of the certificate.

Preemptive Rights. A preemptive right[24] is a preference given to a shareholder over all other purchasers to subscribe to or purchase a prorated share of a new issue of stock. This allows the shareholder to maintain his or her portion of control, voting power, or financial interest in the corporation. For example, a shareholder who owns 10 percent of a company and who has preemptive rights can buy 10 percent of any new issue (to maintain his or her 10 percent position). Thus, if the shareholder owns 100 shares of 1,000 outstanding shares, and the corporation issues 1,000 more shares, the shareholder can buy 100 of the new shares.

Dividends. A dividend is a distribution of corporate profits or income ordered by the directors and paid to the shareholders in proportion to their respective shares in the corporation. Dividends can be paid in cash, property, stock of the corporation that is paying the dividends, or stock of other corporations.

State laws vary, but every state determines the general circumstances and legal requirements under which dividends are paid. Generally, dividends are allowed so long as the corporation can continue to pay its debts as they come due or the amount of the dividends does not exceed the corporation's net worth (the corporation's total assets minus its total liabilities). Once declared, a cash dividend becomes a corporate debt enforceable at law like any other debt.

Shareholder's Derivative Suit. When those in control of a corporation—the corporate directors—fail to sue in the corporate name to redress a wrong suffered by the corporation, shareholders are permitted to do so "derivatively" in what is known as a shareholder's derivative suit.[25] Some wrong must have been done to the corporation, and any damages recovered by the suit usually go into the corporation's treasury. The right of shareholders to bring a derivative action is especially important when the wrong suffered by the corporation results from the actions of corporate directors or officers, because in such cases the directors and officers would probably want to prevent any action against themselves.

4. Liability of Shareholders

One of the hallmarks of the corporate organization is that shareholders are not personally liable for the debts of the corporation. If the corporation fails, shareholders can lose their investments, but that is generally the limit of their liability. In certain instances of fraud, undercapitalization, or careless observance of corporate formalities, a court will "pierce the corporate veil" (disregard the corporate entity) and hold the shareholders individually liable.[26] But these situations are the exception, not the rule.

Adapted from R. L. Miller & W. E. Hollowell, *Business Law*, Thomson Learning, 2005

Notes to the Text

[1] **articles of incorporation** 公司章程。这是美国的说法，英国类似的说法是 memorandum of association。bylaws 公司章程细则/附则。

[2] **incorporator** 公司创办人，公司发起人。incorporate 作为动词一般是指“设立法人”。

[3] **annual shareholders' meeting** 年度股东会。

[4] **for cause** 法律上十分充分的理由。

[5] **shareholder action** 股东发起的诉讼。

[6] 公司法上的 ownership 是否应该翻译成“所有权”，经济学界和法学界之间、以及法学界内部是存在很大争议的。编者建议在文中应翻译为（当董事兼股东的双重身份时）“对股权的持有”。

[7] **minutes** 公司会议记录（这里特指董事会会议记录）。注意其拼写及发音。

[8] **Quorum requirements vary among jurisdictions.** 董事会会议的法定人数要求在各州间是有区别的。quorum 法定人数（A quorum is the minimum number of members of a body of officials or other group that must be present before business can validly be transacted）

jurisdiction 本意指“法域”，美国法论述一般指各州。

[9] **dividend** 红利；股息。bond（公司）债券。

[10] **corporate officer** 公司经理（注意不是 corporate official；此外，董事不属于 corporate officer）。

[11] 此句显示公司经理属于公司雇员的法律地位。

[12] 这两句又显示公司经理被视为公司的“代理人”，并适用英美代理法的一般规则。

[13] **fiduciary** 受信人；受信的。

[14] **reasonably prudent people** 理性而谨慎的人。“理性人”的判定标准在英美商法很常见。

[15] **The essence of the duty of loyalty is the subordination of self-interest to the interest of the entity to which the duty is owed.** 忠实义务的要义在于将其自身的利益置于他所承担忠实义务的实体的利益之下。

[16] **immunize... from liability** 使……免除责任。

[17] 这里的 thereby = by that business decision 法律英语中的诸如 thereof, therein, thereafter, herein 等等，是常见的表述，结合上下文不难理解。

[18] 这个观点同样存在很大争论。

[19] **merger** 合并；兼并。相对应的词是“收购（acquisition）”，两个词多数情况下合并为 merger & acquisition ，简称 M&A，译为“公司并购”。dissolution 解散。

[20] **outstanding shares** 已发行股票；净发股本；在外股票数（指发行股票减库存股票的差额）。

[21] **publicly traded corporation** 公开上市公司（在英国称 public company）。

[22] **proxy** 表决权代理；表决权委任代理书。

[23] **preferred stock** 优先股（这种股票持有者有权优先领取股息，在公司清算时有权优先领回股金，但没有表决权）。

[24] **preemptive right** 股份优先购买权。

[25] **When those in control of a corporation—the corporate directors—fail to sue in the corporate name to redress a wrong suffered by the corporation, shareholders are permitted to do so "derivatively" in what is known as a shareholder's derivative suit.** 当那些控制着公司运营的董事们未能以公司的名义就公司所遭受的不法侵害提出救济之诉时，法律允许股东们“派生地”这样去做，这被称之为股东派生诉讼。

[26] **In certain instances of fraud, undercapitalization, or careless observance of corporate formalities, a court will "pierce the corporate veil" (disregard the corporate entity) and hold the shareholders individually liable.** 在某些诈欺、资本不足、或者未能遵守公司的法律形式要件的情形下，法院可能会“揭开公司面纱”（否认公司法律人格）进而对股东个人课加责任。

Exercises

1. *Translate the following articles into Chinese.*

(1) Limited liability companies and joint stock limited companies are enterprise legal persons.

In the case of a limited liability company, the shareholders are liable thereto to the extent of their capital contribution, and the company is liable for its debts to the extent of all of its assets.

In the case of a joint stock limited company, its total capital is divided into stocks of equal value, and the shareholders are liable thereto to the extent of their share holdings, and the company is liable for its debts to the extent of all of its assets.

(2) Shareholders may assign in whole or part their respective shares of capital contribution amongst themselves. Transfer of his share of capital contribution by a shareholder to anyone other than another shareholder is subject to consent by a majority of all the shareholders; shareholders who do not consent to the transfer shall purchase the share of capital contribution to be assigned, and failure by those shareholders to make such purchase is deemed to be their consent to the assignment. Where the shareholders consent to the assignment of share of capital contribution, other shareholders have the preemptive right of purchase under the same conditions.

(3) A director or the general manager may not misappropriate company funds or loan company funds to other person (s). A director or the general manager may not deposit company assets into an account in his own name or in any other individual's name. A director or the general manager may not give company assets as security for the debt of a shareholder or any other individual.

(4) A director or the general manager may not engage in the same business as the company in which he serves as a director or the general manager either for his own account or for any other person's account, or engage in any activity detrimental to company interests. If a director or the general manager engages in any of the above mentioned business or activity, any income so derived shall be turned over to the company. Unless otherwise provided in the articles of association or otherwise agreed by the shareholders' committee, a director or the general manager may not execute any contract or engage in any transaction with the company.

Unit Twenty

Law of Bankruptcy

The extension of credit from creditors to debtors in commercial and personal transactions is important to the viability of the American and world economies. On occasion, however, borrowers become overextended[1] and are unable to meet their debt obligations.

Years ago in Britain and Europe, persons who could not meet their debts were sentenced to debtors' prisons or indentured to[2] their creditor until the debt was "worked off." To avoid such harsh results, many countries adopted bankruptcy laws that were intended to achieve a better balance between debtors' rights and creditors' rights.

The founders of our country thought the plight of debtors was so important that they included a provision in the US Constitution giving Congress the authority to establish uniform bankruptcy laws. The goal of federal bankruptcy law is to give debtors a "fresh start" by relieving them from legal responsibility for past debts.

I. Federal Bankruptcy Law

Article I, section 8, clause 4 of the US Constitution provides that "The Congress shall have the power... to establish ... uniform laws on the subject of bankruptcies throughout the United States." Federal bankruptcy law establishes procedures for filing for bankruptcy[3], resolving creditors' claims, and protecting debtors' rights. Bankruptcy law is exclusively federal law; there are no state bankruptcy laws.

1. Jurisdiction of the Bankruptcy Courts

Bankruptcy judges decide core proceedings[4] (e.g., allowing creditor claims, deciding preferences[5], confirming plans of reorganization[6]) regarding bankruptcy cases. Noncore proceedings concerning the debtor (e.g., decisions on personal injury, divorce, and other civil proceedings) are resolved in federal or state court. The jurisdiction of the bankruptcy courts became effective on July 10, 1984.

2. Types of Bankruptcy

The Bankruptcy Code is divided into chapters. Chapters 1, 3, and 5 include definitional provisions and provisions for the administration of bankruptcy proceedings. They apply to all forms of bankruptcy. The most common forms of bankruptcy are provided by Chapter 7 (liquidation) and Chapter 11 (reorganization). The remaining chapters of the Bankruptcy Code govern the bankruptcies of municipalities, stockbrokers, and railroads.

3. The "Fresh Start"

The primary purpose of federal bankruptcy law is to discharge[7] the debtor from burdensome debts. The law gives debtors a fresh start by freeing them from legal responsibility for past debts by (1) protecting debtors from abusive activities by creditors in collecting debts, (2) preventing certain creditors from obtaining an unfair advantage over other creditors, (3) protecting creditors from actions of the debtor that would diminish the value of the bankruptcy estate, (4) providing for the speedy, efficient, and equitable distribution of the debtor's nonexempt property to claim holders[8], and (5) preserving existing business relations.

II. Chapter 7 Liquidation Bankruptcy

Chapter 7 liquidation bankruptcy (also called straight bankruptcy) is the most familiar form of bankruptcy. In this type of proceeding, the debtor's nonexempt property is sold for cash, the cash is distributed to the creditors, and any unpaid debts are discharged. Any person, including individuals, partnerships, and corporations, may be a debtor in a Chapter 7 proceeding. Certain businesses, including banks, savings and loan associations[9], credit unions[10], insurance companies, and railroads, are prohibited from filing bankruptcy under Chapter 7.

1. Bankruptcy Procedure

The filing and maintenance of a Chapter 7 case must follow certain procedures. The following paragraphs outline the major steps in the liquidation process.

Filing a Petition. A Chapter 7 bankruptcy is commenced when a petition is filed with the bankruptcy court. The petition may be filed by either the debtor (voluntary) or one or more creditors (involuntary).

Voluntary petition only have to state that the debtor has debts; insolvency (i.e., that debts

exceed assets) need not be declared. The petition must include the following schedules: (1) a list of secured and unsecured creditors[11], including their addresses and the amount of debt owed to each, (2) a list of all property owned by the debtor, including property claimed to be exempt by the debtor, (3) a statement of the financial affairs of the debtor, and (4) a list of the debtor's current income and expenses. The petition must be signed and sworn to under oath.[12] Married couples may file a joint petition.

An involuntary petition can be filed against any debtors who can file a voluntary petition under Chapter 7 except farmers, ranchers, and nonprofit organizations. An involuntary petition must allege that the debtor is not paying his or her debts as they become due. If the debtor has more than 12 creditors, the petition must be signed by at least three of them. If there are 12 or fewer creditors, any creditor can sign the petition. The creditor or creditors who sign the petition must have valid unsecured claims of at least $ 10,000 (in the aggregate).

Order for Relief. The filing of either a voluntary petition or an unchallenged involuntary petition constitutes an order for relief[13]. If the debtor challenges an involuntary petition, a trial will be held to determine whether an order for relief should be granted. If the order is granted, the case is accepted for further bankruptcy proceedings. In the case of an involuntary petition, the debtor must file the same schedules filed by voluntary debtors.

Meeting of the Creditors. Within a reasonable time (not less than 10 days nor more than 30 days) after the court grants an order for relief, the court must call a meeting of the creditors (also called the first meeting of the creditors). The judge cannot attend this meeting. The debtor, however, must appear and submit to questioning by creditors. Creditors may ask questions regarding the debtor's financial affairs, disposition of property prior to bankruptcy[14], possible concealment of assets, and such. The debtor may have an attorney present at this meeting.

Appointment of a Trustee. A trustee[15] must be appointed in a Chapter 7 proceeding. An interim trustee is appointed by the court when an order for relief is entered. A permanent trustee is elected at the first meeting of the creditors. Trustees, who are often lawyers or accountants, are entitled to receive reasonable compensation for their services and reimbursement for expenses. Once appointed, the trustee becomes the legal representative of the bankrupt debtor's estate.

Generally, the trustee must:

- Take immediate possession of the debtor's property.
- Separate secured and unsecured property.
- Set aside exempt property.
- Investigate the debtor's financial affairs.
- Employ disinterested professionals (e. g., attorneys, accountants, and appraisers) to assist in

the administration of the estate.

- Examine proof of claims.
- Defend, bring, and maintain lawsuits on behalf of the estate.
- Invest the property of the estate.
- Sell or otherwise dispose of property of the estate.
- Distribute the proceeds of the estate.
- Make reports to the court, creditors, and debtor regarding the administration of the estate.

Proof of Claims. Unsecured creditors must file a proof of claim stating the amount of their claims against the debtor. The form of the statement is provided by the court. The proof of claim must be "timely filed," which generally means within six months of the first meeting of the creditors. Secured creditors are not required to file proof of claim. A secured creditor whose claim exceeds the value of the collateral[16], however, may submit a proof of claim and become an unsecured claimant as to the difference.

The claim must be allowed by the court before a creditor is permitted to participate in the bankruptcy estate. Any party of interest may object to a claim. If an objection to a claim is raised, the court will hold a hearing to determine the validity and amount of the claim.

2. Automatic Stay

The filing of a voluntary or involuntary petition automatically stays—that is, suspends—certain action by creditors against the debtor or the debtor's property. This is called an automatic stay. The stay, which applies to collection efforts of both secured and unsecured creditors, is designed to prevent a scramble of the debtor's assets in a variety of court proceedings. The following creditor actions are stayed:

- Instituting or maintaining legal actions to collect prepetition debts.[17]
- Enforcing judgments obtained against the debtor.
- Obtaining, perfecting, or enforcing liens against property of the debtor.
- Attempting to set off debts owed by the creditor to the debtor against the creditor's claims in bankruptcy.
- Nonjudicial collection efforts, such as self-help activities (e.g., repossession of a car).

The court also has the authority to issue injunctions preventing creditor activity not covered by the automatic stay provision. Actions to recover alimony and child support are not stayed in bankruptcy. The automatic stay does not preclude collection efforts by creditors against co-debtors and guarantors[18] of the bankrupt debtor's debts, except (1) in a Chapter 13 bankruptcy or (2) if the co-debtor is also in bankruptcy.

Relief from stay. A secured creditor may petition the court for a relief from stay, which usually occurs in situations involving depreciating assets where the secured property is not adequately protected during the bankruptcy proceeding. The court may opt to provide adequate protection rather than granting relief from stay. In such cases, the court may (1) order cash payments equal to the amount of the depreciation, (2) grant an additional or replacement lien, or (3) grant an "indubitable equivalent"[19] (e. g., a guarantee from a solvent party).

Adapted from Henry R. Cheeseman, *Business Law: Legal, E-Commerce, Ethical, and International Environments*, Upper Saddle River, N. J., 5th ed., 2004.

Notes to the Text

[1] **overextended** 业务过度扩张的。

[2] **be indentured to** 以合同约束；对……承担合同义务。

[3] **file for bankruptcy** 提出破产申请。另外的表达方式是 a petition is filed with the bankruptcy court，见下文，注意介词的用法。

[4] **core proceedings** （破产清算）核心程序。

[5] **preferences** （破产清算）优先受偿顺序。

[6] **reorganization** 破产重组。

[7] **discharge** 债务解除。

[8] **nonexempt property** 破产法上的非豁免财产。反义词为 exempt property，其意为：依据法律债务人有权在破产程序开始后继续占有、并不划入破产财团的财产（见下文）。
claim holders 权利持有人（指破产债权人）。

[9] **savings and loan associations** （美国）储蓄贷款协会。

[10] **credit unions** 信贷协会。

[11] **secured and unsecured creditors** 有担保权益的债权人以及无担保权益的债权人。

[12] **The petition must be signed and sworn to under oath.** 该破产申请须经签名和宣誓证言。

[13] **order for relief** 救济令。relief 原为衡平法上的救济（如"equitable relief"），而 remedy 原为普通法上的救济（如 legal remedy）；随着历史的发展，这两个词可以通用。

[14] **disposition of property prior to bankruptcy** 破产程序开始之前的一段时间内，债务人对其财产的处置（因这种处置直接影响债权人的利益，所以受到破产法的严格

规制)。

[15] **trustee (in bankruptcy)** 破产财产管理人(或译为"受托人")。

[16] **collateral** 抵押物;担保物。

[17] **Instituting or maintaining legal actions to collect prepetition debts.** 为追偿原债务而提起或者维持法律行动。institute /take legal proceedings against ... 对……提起诉讼; institute an action 起诉。

[18] **guarantor** 担保人;保证人。

[19] **indubitable equivalent** 不容置疑的替代品。

Exercises

1. *Read the following passage and answer the questions.*

Bankruptcy Fraud: Voidable Transfers

Often, a debtor who knows in advance that he or she is heading for bankruptcy will try to get assets out of his or her possession. That way, when bankruptcy comes, the only things left are the debts.

Sometimes the assets are transferred to relatives or friends with a promise to give them back once the bankruptcy is over. Other times, they are transferred to businesses or entities in which the debtor has a secret interest. Debtors usually rationalize these transfers on the grounds that it does not matter if "faceless" creditors—such as banks and trade creditors—lose out. But are these transfers unethical or illegal? Or both? Consider the following case.

Blair and Marie Woodfield and Parley and Deanna Pearce (Debtors), as partners, operated two "Wendy's Famous Hamburger" restaurants in Washington and Oregon pursuant to a franchise from Wendy's International, Inc. On March, 10, 1989, Debtors filed their petitions for bankruptcy under Chapter 7.

Within 10 days prior to filing for bankruptcy, Debtors had formed a new corporation called Quality Foods, Inc. (QFI), in which they each held a 50 percent interest. They then transferred the franchise operating rights, equipment, fixtures, inventory, and restaurant supplies of the two restaurants to QFI. In addition, Woodfield transferred $ 10,000 cash and Pearce $ 6,954 cash to QFI within this 10-day period.

Prior to their bankruptcy filings, Debtors somehow ascertained that Wade Bettis Jr., would be their trustee in bankruptcy. They discussed all the foregoing transactions with him prior to filing bankruptcy. At the creditors' meeting on April 25, 1989, Bettis certified that the Debtors had no

assets and had abandoned the assets of the two Wendy's franchises. A creditor, Emmett Valley Associates (EVA), objected. Nevertheless, the bankruptcy court approved the abandonment, and the district court affirmed.

The court of appeals, however, asked, "Where's the beef?" The court stated: "The transaction here carried many badges of fraud. The relationship between the Debtors and QFI could not have been closer, the Debtors created and operated the transferee corporation. The transfer was admittedly made in anticipation of the bankruptcy filing. The partnership was admittedly in poor financial condition at the time, having defaulted on several obligations. Substantially all of the partnership's property relating to the Wendy's franchises was transferred, leaving nothing to satisfy the judgments." The court of appeals held that Debtors transferred property with the in tent to hinder, delay, and defraud their creditors. Because of this fraud, the court denied the Debtors' discharge. [In re Woodfield, 978 F. 2d 516 (9th Cir. 1992)]

1. Did the Debtors act unethically in this case? Did they act legally?
2. Did the trustee act unethically?
3. Do you think many debtors engage in insider and fraudulent transfers prior to declaring bankruptcy?

Adapted from Henry R. Cheeseman, *Business Law: Legal, E-Commerce, Ethical, and International Environments*, Upper Saddle River, N. J., 5th ed., 2004

Unit Twenty-one

Securities Regulation

General Introduction

Securities differ from most other commodities in which people deal. They have no intrinsic value in themselves—they represent rights in something else[1]. The value of a bond, note or other promise to pay depends on the financial condition of the promisor. The value of a share of stock depends on the profitability or future prospects of the corporation or other entity which issued it; its market price depends on how much other people are willing to pay for it, based on their evaluation of those prospects.

The distinctive features of securities give a distinctive coloration to regulation of transactions in securities, in contrast to the regulation of transactions in other types of goods. Most goods are produced, distributed and used or consumed; governmental regulation focuses on protecting the ultimate consumer against dangerous articles, misleading advertising, and unfair or non-competitive pricing practices. Securities are different.

First, securities are created, rather than produced. They can be issued in unlimited amounts, virtually without cost, since they are nothing in themselves but represent only an interest in something else. An important focus of securities laws, therefore, is assuring that, when securities are created and offered to the public, investors have an accurate idea of what that "something else" is and how much of an interest in it the particular security represents[2].

Second, securities are not used or consumed by their purchasers. They become a kind of currency, traded in the so-called "secondary markets" at fluctuating prices. These "secondary" transactions far outweigh, in number and volume, the offerings of newly-created securities. A second important focus of securities law, therefore, is to assure that there is a continuous flow of information about the corporation or other entity whose securities are being traded, with additional disclosure whenever security holders are being asked to vote, or make some other decision, with respect to the securities they hold.

Third, because the trading markets for securities are uniquely susceptible to manipulative and deceptive practices, all securities laws contain general "antifraud" provisions[3]. These have been interpreted to apply not only to manipulation of securities prices, but also to trading by "insiders" on the basis of non-public information and to various kinds of misstatements by corporate management and others.

Fourth, since a large industry has grown up to buy and sell securities for investors and traders, securities laws are concerned with the regulation of people and firms engaged in that business, to assure that they do not take advantage of their superior experience and access to overreach their non-professional customers.

Finally, securities laws provide for a variety of governmental sanctions against those who violate their prohibitions, as well as civil liability to persons injured by such violations. In addition, the courts have implied the existence of civil liabilities in situations where they are not expressly provided by statute.

The Securities Markets

The principal focus of securities regulation is on the markets for common stocks. There are two types of stock markets now operating in the United States— "exchange" markets, of which the New York Stock Exchange (NYSE) is by far the largest, operates in a physical facility with a trading "floor" to which all transactions in a particular security are supposed to be directed[4]. The NYSE (and, to a lesser extent, the other exchanges) has traditionally operated in a very rigid manner, prescribing the number and qualifications of members, the functions each member may perform, and (until 1975) the commission rate to be charged on all transactions. The over-the-counter (OTC) market[5], on the other hand, has traditionally been completely unstructured, without any physical facility, and with any qualified firm being free to engage in any types of activities with respect to any securities.

As far as the individual buyer or seller of stocks is concerned, the significant difference between an exchange and OTC transaction is the function performed by the firm with which she deals[6]. In the case of an exchange transaction, her firm acts as a "broker" —that is, as an agent for the customer's account—and charge her a commission for its services. The only person permitted to act as a "dealer" or "make a market" in the stock on the exchange floor (that is, to buy and sell the security for his own account) is the registered "specialist" in that stock. The broker transmits the customer's order to the exchange floor where it is generally executed by buying from or selling to either the specialist or another customer whose broker has left his order on the specialist's "book."

In the OTC market, on the other hand, there is no exchange floor, only a computer and telephone communication network. The principal market for the stocks of large companies traded in the OTC market is the NASDAQ (National Association of Securities Dealers Automated Quotation) National Market System[7].

Since the passage in 1933 of the Glass-Steagall Act[8], prohibiting banks from dealing in securities (except government bonds), the securities business has consisted of a relatively separate and well-defined group of firms. However, with the increasing tendency for individuals to make their equity investments indirectly through institutions, rather than trading directly in stock for their own account, and with the development of many new and complex forms of "hybrid" financial instruments, securities firms have come increasingly into competition with banks, insurance companies, and other providers of financial services. This competition has placed severe strains on the existing regulatory structure, under which different categories of firms are regulated by different agencies with entirely different concerns and approaches.

Efforts by banks to broaden their range of activities with respect to securities have precipitated a large number of lawsuits by securities industry groups alleging violations of the Glass-Steagall Act. As of 1997, proposals were pending in Congress to repeal or substantially modify that Act.

State and Federal Securities Laws

Securities Transactions are subject to regulation under both federal and state law. Since the federal securities laws are based on Congress' power to regulate interstate commerce, they generally apply only to transactions involving "the use of any means in interstate commerce or of the mails." The courts have been willing to find the requisite use of interstate commerce facilities in doubtful situations. Use of the mails to accomplish any part of the transaction, including payment or confirmation after a sale, is sufficient to support federal jurisdiction. An intrastate telephone call has also been held to involve the use of interstate facilities.

Prior to 1996, federal securities laws specifically preserved the jurisdiction of state commissions to regulate securities transactions and securities professionals, so long as their regulation did not conflict with federal law. However, in that year, the federal laws were amended preempt certain types of state regulation.

State Securities laws, commonly known as "blue sky" laws[9], generally provide for registration of broker-dealers, registration of securities to be offered or traded in the state, and sanctions against fraudulent activities. A Uniform Securities Act (USA), promulgated in 1956 and revised in 1985, has been substantially or partially adopted in more than 30 states, but state securities laws is still characterized by great diversity of language and interpretation.

Federal securities law basically consists of six statues enacted between 1933 and 1940, and periodically amended in the intervening years, and one statue enacted in 1970. The statutes are:

Securities Act of 1933 (SA)
Securities Exchange Act of 1934 (SEA)
Public Utility Holding Company Act of 1935 (PUHCA)
Trust Indenture Act of 1939 (TIA)
Investment Company Act of 1940 (ICA)
Investment Advisers Act of 1940 (IAA)
Securities Investor Protection Act of 1970 (SIPA)

The Securities Act of 1933 regulates public offering of securities. It prohibits offers and sales of securities which are not registered with the Securities and Exchange Commission (SEC), subject to exemptions for enumerated kinds of securities and transactions. It also prohibits fraudulent or deceptive practices in any offer or sale of securities.

The Securities Exchange Act of 1934 extended federal regulation to trading in securities which are already issued and outstanding. Unlike the 1933 Act, which focuses on a single regulatory provision, the 1934 Act contains a number of distinct groups of provisions, aimed at different participants in the securities trading process. The Act established the Securities and Exchange Commission and transferred to it the responsibility for administration of the 1933 Act (which had originally been assigned to the Federal Trade Commission). Other provisions of the Act impose disclosure and other requirements on publicly-held corporations; prohibit various "manipulative or deceptive devices or contrivances" in connection with the purchase or sale of securities; restrict the amount of credit that may be extended for the purchase of securities; require brokers and dealers to register with the SEC and regulate their activities; and provide for SEC registration and supervision of national securities exchanges and associations, clearing agencies, transfer agents, and securities information processors.

During the 1970's, the American Law Institute drafted and promulgated a "Federal Securities Code", designed to replace the seven laws listed above. The Code would not have made any major substantive changes in the law, but was designed to deal with certain "problems" under existing law, including (a) the "complications" arising from inconsistent definitions, as well as procedural and jurisdictional provisions, in the different acts, (b) the overemphasis in the disclosure provisions on "public offerings" rather than periodic reporting requirements, and (c) the "chaotic" development of civil liabilities resulting from "broad judicial implication of private

rights of action" under various provisions of existing law. The Institute gave its final approval to the proposed Code in May 1978, but Congress showed no interest in even considering the Code, and it was never formally introduced. It has nevertheless had considerable influence on the development of the law. Some of its approaches have been incorporated in new SEC rules, or utilized by the courts to resolve ambiguous provisions of current law, a process which the Reporter for the Code has described as "cannibalizing it for spare parts."

The Securities and Exchange Commission

The Securities and Exchange Commission (SEC) is the agency charged with principal responsibility for the enforcement and administration of the federal securities laws. The 1934 Act provides that the SEC shall consist of five members appointed by the President for five-year terms (the term of one Commissioner expires each year), not more than three of whom shall be members of the same political party.

Among lawyers, and among students of governmental process, the SEC generally enjoys a high reputation. It has been noteworthy for the level of intelligence and integrity of its staff, the flexibility and informality of many of its procedures, and its avoidance of the political and economic pitfalls in which many other regulatory agencies have found themselves trapped. Its disclosure and enforcement policies have also been credited with making an important contribution to the generally favorable reputation which American corporate securities and American securities markets enjoy, not only among American investors, but also in foreign countries. On the other hand, it has been subject to frequent criticism for failing to give adequate consideration to the economic costs of its rules and requirements.

"**Self-Regulation**": Rather than relying solely on regulation by the SEC, the federal securities laws reserve a unique important role for "self-regulation" by industry and professional groups. Stock exchanges had been regulating the activities of their members for more than 140 years prior to the passage of the Securities Exchange Act of 1934, and that Act incorporated the exchanges into the regulatory structure, subject to certain oversight powers in the SEC. When Congress decided to impose more comprehensive regulation on over-the-counter securities dealers in 1938, and on municipal securities dealers in 1975, it adopted a similar approach, authorizing the establishment of the National Association of Securities Dealers (NASD) and the Municipal Securities Rulemaking Board (MSRB) as self-regulatory organizations for those respective groups.

Adapted from David L. Ratner, *Securities Regulation*,
West Nutshell Series, China Law Press, 1999

Notes to the Text

[1] **Securities differ from most other commodities in which people deal. They have no intrinsic value in themselves—they represent rights in something else.** 证券不同于人们交易的绝大多数商品。其本身并不具有内在价值——它们代表的是它物中的权利。

[2] **An important focus of securities laws, therefore, is assuring that, when securities are created and offered to the public, investors have an accurate idea of what that "something else" is and how much of an interest in it the particular security represents.** 因此，证券法所关注的一个重点便是，在创设证券并向公众报价时，应确保投资者能够准确了解到"它物"的意思以及与某一特定证券所代表的该"它物"中的利益是多少。

[3] **Third, because the trading markets for securities are uniquely susceptible to manipulative and deceptive practices, all securities laws contain general "antifraud" provisions.** 第三，由于证券交易市场极易出现操纵和欺骗行为，所有证券法均含有一般性"反诈欺"条款。

[4] **There are two types of stock markets now operating in the United States—"exchange" markets, of which the New York Stock Exchange (NYSE) is by far the largest, operates in a physical facility with a trading "floor" to which all transactions in a particular security are supposed to be directed.** 现在美国营运的有两种证券市场——（一种是）"交易"市场，某支证券的全部交易过程均应在其管理之下的有着物理设施的交易"场地"的运作，其中最大的当属"纽约证券交易所（NYSE）"。

[5] **Over-the-counter (OTC) market:** 柜台市场。有价证券不在集中交易市场上市以竞价方式买卖，而是在证券商的营业柜台以议价方式进行的交易市场，常简称"OTC"。

[6] **As far as the individual buyer or seller of stocks is concerned, the significant difference between an exchange and OTC transaction is the function performed by the firm with which she deals.** 就个体股票购买者或出售者而言，交易所与柜台交易的最大区别在于（证券）公司在交易中所起作用的不同。

[7] **The principal market for the stocks of large companies traded in the OTC market is the NASDAQ (National Association of Securities Dealers Automated Quotation) National Market System.** 在柜台市场交易的大公司股票的主要市场是"纳斯达克（NASDAQ 全国证券交易商自动报价协会）"国家市场体系。句中 NASDAQ 原指不能

在美国正常交易所（Regular Stock Exchanges）上市而只在柜台交易（OTC）上交易证券的证券市场。其现在是以电脑为基础、有造市商制度（Market-makers System）的市场。当今世界除纽约证交所外，还有三大证交所：伦敦证交所（LSE）、东京证交所（TSE）和我国香港证交所（HSE）。

[8] **Since the passage in 1933 of the Glass-Steagall Act,...** 自1933年的《格拉斯－斯蒂格尔法》通过以来……。The Glass-Steagall Act 即指常称的1933年美国《银行法》，其主旨是巩固商业银行而把证券业隔离出来，规定了“美国版”的金融“分业经营”原则。美国1999年11月12日颁布的《金融服务现代化法》（Financial Services Modernization Act，简称 Gramm-Leach-Bliley 法）则发生了实质性变化。在美国，常用法案发起人的名字命名或简称所通过的法律。

[9] **State Securities laws, commonly known as "blue sky" laws** 美国的州证券法，常称为“蓝天”法。美联邦有其重要的各种金融与证券立法，如课文中所列的7部重要立法；各州亦有其较为完备的金融证券立法。

Exercises

1. *Debating Questions.*

(1) What Comprises American Federal Securities Code?

(2) How much Do you know about the US Securities and Exchange Commission (SEC)?

(3) What is the relationship between securities markets and Securities Regulations?

Unit Twenty-two

Employment Law

Employment law has evolved as a distinct subject of legal scholarship. It is also investigated under several other labels: labour law, industrial law, and social law.

The main object of labour law has always been to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. No doubt most employers are wealthier than workers. An employer normally represents a collective aggregation of capital, a corporation comprising shareholders and investors, whereas the individual employee bargains alone[1]. Employers come to the bargaining table armed with superior resources such as legal advice and experience. Normally an employer's superior bargaining position usually permits it to offer jobs on a 'take it or leave it' basis.

For consumers buying goods and services, legal regulation addresses the similar problems of 'take it or leave it' standard form contracts in two principal ways[2]. The law promotes transparency in markets and also impose mandatory terms in transactions regarding the safety and reliability of products, in order to protect consumers from their worst mistakes. Employment law has evolved similar legal measures. Arguably regulation is needed more urgently in the context of employment because the risks of economic and psychic disappointment arising from taking an unsuitable job are usually greater than disappointment arising from a mistaken purchase; and, owing to the need to secure an income, a job applicant may have little time to search for and reflect upon the available job opportunities. In promoting transparency and ensuring minimum standards of safety and fairness, employment law, like consumer law, aims to correct a risk of market failure arising from the combination of standard-form contracts and paucity of information.

The primary focus of the subject (and also this article) concerns the contractual relation of employment, which is the legal expression of the economic and social relationship through which work is performed. And after that, we will concentrate on the employment rights, which are essential for the protection of the workers.

I The Contract of Employment

Like other contracts, the contract of employment is a consensual relationship between two parties involving an exchange: in this instance, work in return for pay. The standard rules for the formation of legally binding contracts apply to contracts of employment. A contract of employment can be entered into formally or informally. There must be an offer of employment, and an acceptance of that offer. In addition, there must be an intention to create legal relations, consideration and the absence of vitiating elements (mistake, misrepresentation, illegality, etc.)[3]. If the terms of the contract are designed to avoid or postpone the proper payment of income tax, then the contract is illegal.

Breach of the contract gives the injured party a right to claim a legal remedy such as compensatory damages. To this extent, a legal system regards the employment relation as like other contracts for market transactions. But we need to concentrate here on those features of the contract of employment that render the general law of contract unsuitable for handling disputes that may arise in connection with employment relations.

Occasionally the courts and tribunals are prepared to imply a term into the contract in circumstances where the parties did not expressly insert a term to meet a particular contingency. The theory adopted was that the term in question was so obvious that the parties did not see the need to state it expressly[4]. It is not possible to imply terms which are too vague or unpredictable to be given efficacy, or to which the parties would not have agreed had the matter been drawn to their attention.

A. Implied duty[5] of mutual respect: this duty is implicit in a number of cases which will be considered in due course when dismissal or disciplinary policies are discussed, but it is particularly evident where the employer is alleged to have been carrying out provocative conduct. If there is a breach of contract, damages are to be assessed on the basis of the actual loss suffered, and it is not permissible to make an award of general damages for frustration[6], mental distress[7], injured feelings or annoyance caused by the breach.

B. Duty of confidentiality: the information about the employee is not in the public domain, and is given by the employees to the employers for the purpose of the employment relationship, and for no other purpose. Hence it retained a characteristic of being confidential information, which could not be disclosed without the consent of the employees.

C. Duty to indemnify[8]: any expenses reasonably incurred by the employee in the performance of this contract ought properly to be met by the employer.

D. Duty to insure: in respect of work activities taking place within the United Kingdom, an employer is obliged to take out compulsory employers' liability insurance, for the benefit of his employees.

E. Duty to provide safe plant and appliances: all the equipment, tools, machinery, plant, etc., where the employee works shall be reasonably safe for work. In Bradford v Robinson Rentals, a driver was required to drive an unheated van on a 400-mile journey during a bitterly cold spell of weather. It was held that the employer was liable when the driver suffer frost-bite as a consequence.

F. Safe system of work: it is about the manner in which the work is to be done, such as the layout, the systems laid down, the training and supervision, the provision of warnings, protective clothing, special instructions, and so forth, are all relevant.

G. Provide reasonably competent fellow employees: if an employer engages an incompetent person, whose actions injure another employee, the employer will be liable for failing to take reasonable care.

Ⅱ Statutory Employment Rights (Based on the Statutes of the United Kingdom)

1. Anti-discrimination in employment: it is unlawful to discriminate against women and a married person of either sex on the grounds of that person's marital status and it is unlawful to discriminate against a person on grounds of race. Such discrimination includes not only direct discrimination but also indirect discrimination. For example, to refuse to employ a woman because 'it is a man's job' is an example of direct discrimination (*Batista v Say*); to advertise for a 'Male or female clerk, must have a large beard' would amount to an indirect discrimination, unless the whiskered requirement can be justified[9].

2. Equal pay[10]: it is concerned with the establishment, where necessary, of equal terms and conditions of employment. Men and women are entitled to equal pay if they are employed 'in the same employment'. This means that they must be employed at the same establishments at which common terms and conditions of employment are observed. In Leverton v Clwyd County Council, a nursery nurse was employed by a local authority, and she sought equal pay with male clerical staff employed by the same authority in different establishments. She and her comparators were covered by the same national collective agreement, but they were on different pay scales, with different hours and holiday entitlements. The House of Lords said the terms and conditions, as laid down in the collective agreement, were applied generally, even though there were

differences when applied to individual employees.

3. Maternity rights: this right includes that an employee who is pregnant, and who, on the advice of a registered medical practitioner, registered midwife or registered health visitor, has made an appointment to attend any place for the purpose of receiving antenatal care, shall have the right not to be unreasonably refused time off work during her working hours to enable her to keep that appointment; all women employees, regardless of their length of service or the number of hours worked, are entitled to maternity leave[11] (14 weeks in the UK) and return to work at any time during the period beginning with the end of her maternity leave period.

4. Health and safety at work: it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. In particular, the employer must provide and maintain plant and systems of work that are safe and without risks to health; make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances; ensure the provision of such information, instruction, training and supervision as is necessary to ensure the health and safety at work; ensure the maintenance of means of access and egress from it that are safe and without such risks; ensure the provision and maintenance of a working environment for his employees that is safe.

5. Lawful and unfair dismissal[12]: every employee to whom the Employment Rights Act applies has the right not to be unfairly dismissed, and the remedy for the infringement of that right is by way of a complaint to the industrial tribunal, and not otherwise. Nevertheless, there are several well-recognised grounds on which an employer may dismiss an employee summarily. This includes gross misconduct[13], wilful refusal to obey a lawful and reasonable order, gross neglect, dishonesty and so forth. Whether the conduct in question is serious enough to warrant dismissal is always a question of fact in each case. Where an employer has a legal right to dismiss, the employee will be entitled to a period of notice specified by or implied into his contract of employment.

6. Other miscellaneous legal rights: such as the right to time off work for public duties, the right to refuse permission to his employer who is seeking a medical report on the employee, rights in employer's insolvency, right to sick pay[14], etc.

Adapted from Norman Selwyn, *Law of Employment*, 1996

Notes to the Text

[1] **An employer normally represents a collective aggregation of capital, a corporation comprising shareholders and investors, whereas the individual employee bargains alone.** 一个雇主通常代表着资本的整体积累，一个公司所有股东和投资者的力量，而雇员则在这场交易中势单力薄。

[2] **For consumers buying goods and services, legal regulation addresses the similar problems of take it or leave it standard form contracts in two principal ways.** 对于消费者购买商品或者服务的合同，法律针对这种"要么接受，要么放弃"的格式合同所具有的相类似问题，强调需要注意两个主要方面。standard form contract 格式合同。

[3] **In addition, there must be an intention to create legal relations, consideration and the absence of vitiating elements (mistake, misrepresentation, illegality, etc.).** 另外，还必须具备想缔结法律关系的意图、对价以及不存在使合同无效的因素（错误、虚假称述、非法等）。vitiating elements 使…无效的因素。misrepresentation 虚假陈述。

[4] **The theory adopted was that the term in question was so obvious that the parties did not see the need to state it expressly.** 所采用的判断标准是合同双方认为这个条款应该理所当然存在而根本不需要明确指出来。

[5] **implied duty** 指没有明文规定但是法律推定的默示义务。

[6] **frustration** 合同受挫。在英国合同法上，指非因合约任何一方的过失，发生事故以致无法或不能合法履行合同，而令合约夭折。

[7] **mental distress** 精神上的痛苦。

[8] **indemnify** *v.* 赔偿。

[9]... **to refuse to employ a woman because 'it is a man's job' is an example of direct discrimination (*Batista v Say*); to advertise for a 'Male or female clerk, must have a large beard' would amount to an indirect discrimination, unless the whiskered requirement can be justified.** 因为工作为"男人的活"而拒绝录用妇女是一个直接性别歧视（见判例 *Batista v. Say*）；如果招聘广告上写着："招聘男女办事员，要求必须有大胡子"，则构成了间接的性别歧视，除非这个"胡子"的要求可以被证明其合理性。

[10] **equal pay** 同工同酬。

[11] **maternity leave** 产假。

[12] **unfair dismissal** 不正当地免职、解雇。

[13] **gross misconduct** 严重不当行为。

[14] **sick pay** 病假工资。指在生病缺勤期间付给雇员的工资。

Exercises

1. *Answer the following questions.*

(1) Why are the contracts between employers and employees different from the normal contracts?

(2) Indirect sex discrimination is where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of one sex. Give your own example of possible indirect sex discrimination.

2. *Supplementary readings.*

Leverton v Clwyd County Council [1989] *AC 706*

Issues

When a claimant who is working at a different establishment as her comparator can be described as in the same employment as him.

In looking at whether the claimant is employed on common terms and conditions of employment under S. 1 (6) EqPA, whether the comparison should be made between the terms and conditions at establishment where she is employed and at the establishment where the men are employed, or whether it is simply a comparison between her terms of employment and his.

Facts

Mrs Leverton, a qualified school nursery nurse employed by the local authority, claimed that her work was of equal value to 11 potential male comparators including caretakers, supervisors and administrators. The comparators worked at various Council sites. The conditions of service and pay scales for all these employees emanated from the NJC for Local Authorities' APTCS (the 'Purple Book'). The nursery nurses were on scale 1 while the comparators were on scales 3 and 4.

Held (by the House of Lords)

The comparison of terms and conditions is between the terms and conditions observed at the establishment where the woman is employed and the establishment where the men are employed. The comparison could be between the terms at those establishments generally or between the terms

for the class, or classes, of employees to which both the woman and the men belong. It is necessary to take into account the terms and conditions applicable to a wide range of employees, bearing in mind that individual terms may vary greatly as between each other.

Terms and conditions of employment governed by the same collective agreement represent the best (though not necessarily the only) example of the common terms and conditions contemplated by S. 1 (6).

Therefore Mrs Leverton could compare her work with her comparators at different establishments notwithstanding the differences in hours of work and holiday entitlement between her and her comparators.

Where there is a difference in regular annual working hours (leaving aside additional hours), a notional hourly rate can be calculated. If the hourly rate is not significantly different for the woman and the man, then it can be inferred that the difference is due to their different working hours and is not due to sex.

Unit Twenty-three

Land law

Land law is said to affect every single person throughout their lives. A recurring urge of human nature is a desire to have a stake in society and roots in a particular place, which in many cultures is manifested in a yearning to own immovable property, land or a house, or both.

Land law is a heady, even intoxicating mix of equity, common law and statute. The totally discretionary nature of equitable remedies always ensures an individual decision depending upon the facts of a given case.

As everyone knows, 1066 was the year of the Battle of Hastings[1]. As a result of his victory, William declared himself King and owner of all land. To this day all land belongs ultimately to the Crown. Thus, if a person dies intestate (without leaving a will) and with no relatives to inherit under the intestacy rules, his property goes back—*bona vacantia*[2]—to the Crown (or Duchy of Lancaster or Duke of Cornwall as appropriate). In fact, the property, or its value, goes to the Treasury but, glad though the Treasury is to receive such bounty, it does make strenuous efforts to trace any person who may have a valid claim to the property[3].

If, then, the Crowns owns all the land, what, if anything, can anyone else own? The answer is one or more estates or interests in or over the land. The land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time. Thus, an estate in land has a fourth dimension beyond the purely physical-it can be divided into amounts of time[4]. An estate owner can, in turn, grant lesser estates-lesser amounts of time -or interests to someone else. Interests are rights over someone else's land, though they do not entitle you to occupy the land itself, they do entitle you to restrict the estate owner in his occupation and use of it. Therefore, an estate entitles the holder to the management and enjoyment of the land itself, whilst an interest entitles someone else to a specific right over that land which may reduce the estate owner to his neighbour, the terms of which may well prevent the estate owner building on this land, or using his land for any purpose other than a domestic dwelling.

Land law has a language of its own and it is essential to learn it in order to understand this

subject. First, the word ' estate' in land law has a very particular meaning—it is not the same as a housing estate, for instance. It does not refer to an area of land, but to the time during which one can enjoy the land. Secondly, the word ' interest' has the meaning explained above, but it is also used as a generic term embracing all rights in land, that is, estates and interests.

It is essential to appreciate that interests in land attach to the land itself and not to the owner thereof, just as barnacles attach to the hull of the ship and not to the captain[5]! Thus, as the barnacles go wherever the ship goes regardless of who is steering, only being removed by being chiseled off in dry dock, so too do interests remain attached to the land regardless of who holds the legal estate in it unless and until they are extinguished[6]. Thus, a purchaser will only take the land-or, rather, the legal estate in it-free of those interests which have been removed in the appropriate way. This introduces a third word which has a meaning much wider than in everyday use ' purchaser'. Purchaser is defined by statute that ' a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires and interest in property.

Land law is governed by equity, common law and statute. The interests in land may be legal or equitable: which will depend to a large extent upon certain statutory provisions. A legal right is a right ' *in rem* ', that is, a right in the thing itself, and an equitable right is a right ' *in personam*' —against the person—a right in land which is capable of binding a third party is a ' proprietary', and not merely a personal right[7]. Therefore, a right or interest is only proprietary[8] if it can bind a third party.

Whether or not each interest is capable of binding, or indeed does bind a third party, depends upon its nature and the relevant protection afforded it by statute, at law and in equity. This in turn depends upon whether the title to the land in question is registered or not. It should be mentioned here that land in England and Wales can fall within one of two systems-the ' registered land' system and the ' unregistered land' system. The distinction between the two is relevant mainly to conveyancing practices and the methods of protection for the various interests in or over the land.

In unregistered land, the interest vests upon completion of the relevant formalities; thus the fee simple absolute in possession in the land or even a term of years thereof, will vest in the purchaser as soon as the conveyance to him has been completed[9]. It is possible to acquire an equitable interest where such legal formalities are not complied with.

In the registered land system, on the other hand, even though the transaction has been completed, the legal estate or interest will not pass until the relevant rules as to its protection have been complied with. Therefore, until registered, all proprietary rights in registered land remain

equitable, notwithstanding that they would have become legal in unregistered land upon completion.

Thus, a mortgagee[10] acquires a legal mortgage of unregistered land as soon as a valid mortgage deed has been executed and the transaction has been completed, but a mortgagee will not acquire a legal interest in registered land until the validly executed deed and completed transaction have been registered.

Learning land law is becoming increasingly difficult ... the introduction of recent legislative reforms and judicial re-interpretation of existing principle adds to the complexity of the core content of the subject. The need for further reform is unquestioned, and the central problem is that a legislative framework introduced in 1925, building on earlier reforms of the late nineteenth century, has to be constantly reinterpreted in the light of changing social and commercial concerns to meet the modern needs of conveyancers, land owners, occupiers and mortgagees.

Adapted from Diane Chappelle, *Land Law*, 2001

Notes to the Text

[1] **Hastings** 黑斯廷斯：英国东南部一自治城市，位于多佛海峡入口，靠近征服者威廉战胜萨克森人（1066年10月14日）的遗址。

[2] ***bona vacantia*** 无主物、政府接管物。

[3] **In fact, the property, or its value, goes to the Treasury but, glad though the Treasury is to receive such bounty, it does make strenuous efforts to trace any person who may have a valid claim to the property.** 实际上，虽然财政部很高兴可以得到这些财产或者它的价值，但是它的确施尽全力去寻找任何有主张这笔财产权利的人。

[4] **Thus, an estate in land has a fourth dimension beyond the purely physical - it can be divided into amounts of time.** 因此，土地上的地产在除了它的纯粹的物理特征之外还有它的第四维——它可以被划分为不同的时间段。estate 地产，地产权，财产权；遗产。

[5] **It is essential to appreciate that interests in land attach to the land itself and not to the owner thereof, just as barnacles attach to the hull of the ship and not to the captain!** 关键要认识到土地上的各种利益是附着于土地本身的而不是依附那块土地的所有人的，就像藤壶是紧贴着船壳而非船长一样！

[6]... **as the barnacles go wherever the ship goes regardless of who is steering, only**

being removed by being chiseled off in dry dock, so too do interests remain attached to the land regardless of who holds the legal estate in it unless and until they are extinguished. 除非在干燥的码头被凿掉，藤壶贴着船走向各地，不论谁在驾驶这艘船；同样道理，除非被消灭，土地上的各种利益附属于土地而不论何人拥有这片土地。

[7] **A legal right is a right '*in rem*', that is, a right in the thing itself, and an equitable right is a right '*in personam*'—against the person...** 一个普通法上的权利是一个对物权，也就是，一个事物自身的权利；而一个衡平法上的权利是对人权，也就是一种只对某些人产生效力的权利……

in rem 对物诉讼，指自他人占有下追夺自己的财产诉讼，它总是对占有该财产的人提起。

in personam 对人诉讼，而非对物诉讼，指衡平法上的救济通过对人裁决实现。

[8] **proprietary rights** 所有权权利、专有性权利，指财产所有人基于所有关系而享有的权利。

[9] **In unregistered land, the interest vests upon completion of the relevant formalities; thus the fee simple absolute in possession in the land or even a term of years thereof, will vest in the purchaser as soon as the conveyance to him has been completed.** 在非登记土地系统内，利益归属时间为完成相应的形式要件；这样，一旦产权转让行为完成，绝对非限嗣继承地或者附期限的继承地将会归属于购买者。意思是非登记土地系统内的土地转让不需要登记。

fee simple absolute 绝对非限嗣继承地；绝对自由继承地，在保有期限、处分、可世袭方面无任何限制的非限嗣继承地。

[10] **mortgagee** 抵押权人；取得他人财物产权作为贷出款项的偿还保证的人。mortgagor 则为抵押人（又译为"按揭人"），是将财物产业转移给债权人作为还债保证的人。

Exercises

1. *Answer the following questions.*

(1) The Crown owns the land, then what we get if we purchase a land in the England?

(2) How to become a 'purchaser' in land law ?

(3) What will you do in the first place if you want to buy a house?

Unit Twenty-four

Administrative Law

Administrative law pertains to those agencies of government assigned the task of implementing various social, economic, and quality of life programs within our nation. These agencies include the Social Security Administration, the Environmental Protection Agency, the Federal Aviation Agency, the Securities and Exchange Commission, and many, many more. [1] Agencies are generally created by, and draw their power from, the legislature. By the legislature, they are established by an organic act that both provides for their organization, and transmits, or delegates, electronic media, securities markets, and labor relations, you will of course recognize that Congress has established and delegated a regulatory power to the Commission, and the National Labor Relations Board.

The public sector that is comprised of agencies that is subject to administrative law is huge, which fact is denoted by the federal Administrative Procedure Act as it provides that federal administrative law basically covers the whole federal Structure, excepting Congress and federal courts. [2] But some structures of government, albeit nominally within the scope of a general administrative law, have in practice stayed outside it. Notably, structures pertaining to international relations and to the operation of the military have been excluded from much of the body of law known as administrative law. So has the enforcement of criminal law, but for the different reason, that special constitutional safeguards, those of the fourth, fifth and sixth amendments to the Constitution, pertain to this process. But with the exclusions aside, still we are left with much of government, the part pertaining to the civil affairs of ordinary people, as the range of administrative law. [3]

This public sector, the range of administrative law, is as important as it is large. For a time, courts and judges drew attention to this prominence. In 1952, Mr. Justice Jackson wrote that "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than those of all the courts..." Also, judges described how much administrative law was part of their own work; for the Supreme Court, it was the "largest category of cases decided on the merits." Today, the

position of administrative law, its prominence and how it pertains to government action that affects us daily (by benefactory programs, quality of life programs, social insurance, commercial regulation, and licensing respecting services, trades, and professions) is simply a given. [4]

In the rise of administrative law, the Thirties, the time of the New Deal, are taken to be watershed years. [5] As they were. This is not to say that agencies had not previously been a part of American government. They had. The Interstate Commerce Commission had been established, primarily for rate regulation of railroads, in 1887. In the "Progressive era", the 1890's to about the start of the First World War, other regulatory laws, including the Federal Trade Commission Act, the Meat Inspection Act, and the Pure Food and Drugs Act, were passed. The Federal Radio Commission, the predecessor of the Federal Communications Commission, was established during the Hoover Administration.

Also, certain ideas about government and knowledge—the justifications for administrative government—were already in place at the time of the New Deal. The scientific method had come to be seen as a superior means of solving social problems; it would "place men's relations where they never yet have been placed, under the control of trained human reason." Expertise, that is, specialized and usually compartmentalized knowledge, was part of the method, and so was inductive reasoning and data. These ideas justified a reliance on organization and experts and investigation and data, the basic administrative system. Also, the hope was that placing social programs in bureaus responsive to scientific truth, as opposed to politics, would protect these programs from "the political winds that sweep Washington." [6]

An ideology in support of an administrative state was in place. The facts completed the New Deal commitment to this state of government were the urgency caused by the Great Depression and a strong President, disposed to use any means at hand to end the crisis. Therefore, in the New Deal, agencies were created at an accelerated pace. These new agencies were largely involved in market regulation, (e.g., the Securities and Exchange Commission) and in providing a new measure of personal, economic security (e.g., the Social Security Administration). The more important fact of this period, however, was not the kind or necessarily the number of agencies. Indeed, in terms of quantity, the Nixon administration established as many new agencies as did that of FDR. [7] Rather, the important part of the New Deal was the nature of turn made in coming to agencies. This turn was toward a new commitment by government to act positively, to itself identify and solve economic and social problems as opposed to leaving these matters to a free market and private solutions. The usual form of these governmental solutions were programs roughed-in by Congress and then delegated to agencies.

Today, administrative law is still unfolding. Not all developments, of course, have involved

the Administrative Procedure Act. The constitutional requirement of due process of law has been expanded by the courts, to place them in a supervisory position respecting state and federal adjudications. State practice, while following the same lines as federal practice, has developed some of its own wrinkles. Also, apart from the initial emphasis, on rulemaking, adjudication, and judicial review, another dimension has been added to the Administrative Procedure Act.

This additional dimension is about information, the value in it and the harm. In 1966, the Freedom of Information Act was added to the Administrative Procedure Act, to provide for (subject to certain exemptions) public access to information held by agencies. In 1974, the Privacy Act was added, to limit the agencies respecting information harmful to individuals. To open agency processes to public inspection, the Administrative Procedure Act was amended by the Government in the Sunshine Act of 1976. [8]

Our account of an unfolding administrative law is presented according to the customary distinction between the legislative and judicial functions of agencies. Otherwise, we cover "informal" agency actions. We also devote a major part of the book to judicial review, the timing and availability of review and the scope of review. We also cover a particular remedy offered by the courts, damages actions against public official. Another major part of the book relates to agency information, how to gain access to it and how to be protected from it. [9]

Adapted from Alfred C. Aman, Jr.
and William T. Mayton, *Administrative Law*, 2nd ed., 2001.

Notes to the Text

[1] **Administrative law pertains to those agencies of government assigned the task of implementing various social, economic, and quality of life programs within our nation. These agencies include the Social Security Administration, the Environmental Protection Agency, the Federal Aviation Agency, the Securities and Exchange Commission, and many, many more.** 行政法是关于政府机构的法律，这些政府机构在我们国家内被分派执行各种社会、经济和提高生活质量计划的任务。这些政府机构包括社会保障行政机关、环境保护署、联邦航空署和证券交易委员会，以及许多其他机构。

同段下文的 organic act，意为“组织法”，指立法机关（如美国国会）规定设立政府组织（机构），并授权这些组织权力的法律。例如，在美国，规定哥伦比亚特区（District of Columbia）政府永久体制的 1878 年法律，即属于组织法。政府组织超越

组织法所授予权力范围的任何权力均属无效。

[2] **The public sector that is comprised of agencies that is subject to administrative law is huge, which fact is denoted by the federal Administrative Procedure Act as it provides that federal administrative law basically covers the whole federal Structure, excepting Congress and federal courts.** 由这些机构组成的公共部门非常庞大，它们受行政法的调整，联邦行政程序法对其作了规定，即联邦行政法基本上适用于除国会和联邦法院之外的全部联邦机构。Administrative Procedure Act 指美国 1946 年的联邦行政程序法，它是国会立法中影响最大的行政法。该法适用于全部联邦行政机关的活动，不适用该法必须有法律的明文规定。cover 适用，涵盖。

[3] **But with the exclusions aside, still we are left with much of government, the part pertaining to the civil affairs of ordinary people, as the range of administrative law.** 但除了上述例外情况外，政府中有关普通人的民政事务的大部分职能部门，还是受行政法调整的。civil affairs 民政事务。

[4] **Today, the position of administrative law, its prominence and how it pertains to government action that affects us daily (by benefactory programs, quality of life programs, social insurance, commercial regulation, and licensing respecting services, trades, and professions) is simply a given.** 今天，行政法的地位，从其重要性以及与政府活动的关系对我们日常生活的影响（通过捐助计划、提高生活质量计划、社会保险、商业管理以及给予有关服务、贸易和专门职业的经营许可）来看，就可略见一斑。

[5] **In the rise of administrative law, the Thirties, the time of the New Deal, are taken to be watershed years.** 在行政法兴起之时，30 年代，即新政时期，被认为是划时代的年代。the New Deal 新政，指 20 世纪 30 年代，美国总统罗斯福为摆脱经济危机所推行的复兴经济的新政。

(同段下文) the Interstate Commerce Commission，即“州际商业委员会”。the Meat Inspection Act 肉类检验法。the Pure Food and Drugs Act 食品和药品净化法。the Hoover Administration 胡佛政府，即美国胡佛总统当政时期的政府。

[6] **These ideas justified a reliance on organization and experts and investigation and data, the basic administrative system. Also, the hope was that placing social programs in bureaus responsive to scientific truth, as opposed to politics, would protect these programs from "the political winds that sweep Washington."** 这些观念证明了将基本的行政制度构架于组织、专家、调查和数据等基础之上是正确的。而且，希望将社会计划交托于那些关注科学真理而非政治的政府机构，以保护这些计划免受“横扫华盛顿的政治风”的影响。responsive to 对……反应迅速（或敏感）

的。

[7] **The more important fact of this period, however, was not the kind or necessarily the number of agencies. Indeed, in terms of quantity, the Nixon administration established as many new agencies as did that of FDR.** 然而，这段时期更为重要的事实，不是新设立的行政机构的种类，也不一定是机构的数量。实际上，在数量方面，尼克松政府新设的行政机构与罗斯福政府设立的一样多。文中的 FDR 系指美国第 32 任总统富兰克林·罗斯福 Franklin Delano Roosevelt（1882 – 1945），他于 1933 年任美国总统，以后连续三次当选，打破了美国惯例。

[8] **Freedom of Information Act** 《信息自由法》。这是美国国会为加强行政的透明度，保证个人、团体知悉并取得联邦行政机关的档案资料和其他信息而制定的有关行政公开的重要法律。该法是第一次在制定法中保障个人取得政府信息的权利。Privacy Act《隐私权法》。美国的这项联邦法律，对行政机关搜集利用和传播个人信息做出了明确规定，以保护个人私生活权利。Sunshine Act of 1976，1976 年制定的美国联邦《阳光法》（会议公开法）。该项法律是美国行政公开的一项重要法律制度，它要求政府机关和部门的会议公开进行，公众可以观察会议进行并可通过合理途径获得会议信息和记录。

[9] **Our account of an unfolding administrative law is presented according to the customary distinction between the legislative and judicial functions of agencies. Otherwise, we cover "informal" agency actions. We also devote a major part of the book to judicial review, the timing and availability of review and the scope of review. We also cover a particular remedy offered by the courts, damages actions against public official. Another major part of the book relates to agency information, how to gain access to it and how to be protected from it.** 我们按行政机关的立法和司法职能的习惯划分，来阐述发展中的行政法。此外，我们还涉及"非正式的"行政行为。我们在本书中也用主要篇幅来谈司法审查，包括审查的时间、资格及范围。我们也论及法院提供的特定救济，即针对政府官员的损害赔偿诉讼。本书的另一个主要内容是关涉政府信息，包括如何获取及保护信息。

agency action 行政行为（指行政机构的规则、命令、许可、批准、救济等以及这些行为的拒绝或不作为）。agency 是一个多义词，其含义包括：代理，代理关系；代理机构；（政府或国际组织的）专业行政部门；行政机关，亦称 government agency，administrative agency，public agency，regulatory agency。

Exercises

1. *Translate the following sentences into English.*

(1) 这些政府机构一般由立法机关创设，其权力来源于立法机关。
(2) 显然，有关国际关系和军事活动的机构，行政法体系中的大部分法律对其都没有效力。
(3) 这些由行政法所调整的公共部门，不仅组织庞大，而且非常重要。
(4) 在新政时期，人们对于有关政府和政府行政的公正性问题已有了适当的观念和理解。
(5) 今天，行政法仍在继续发展。诚然，并非所有的发展都反映在行政程序法中。

2. *Read the following passage and then translate the underlined sentences into Chinese.*

Values of Administrative Process

There is something useful to be gained from the effort to view the administrative process as a whole. It is important to remember that, despite their many differences, agencies also share several broad challenges. (1) One is to design procedures (制定程序) that will strike a workable compromise among important and potentially conflicting public values. These values can be grouped into four categories.

Fairness. (2) Concern with the fairness of government decision-making procedures is a primary feature of Anglo-American legal systems. The basic elements of fairness, embodied in the concept of due process (正当程序), are assurances that the individual will receive adequate notice and a meaningful opportunity to be heard before an official tribunal makes a decision that may substantially affect her interests.

Accuracy. The administrative decision-making process should also attempt to minimize the risk of wrong decisions. The real difficult, however, is in defining and measuring accuracy. Since the goals of many regulatory programs are not simple or clearly stated, and the consequences of agency decisions may be difficult to identify, there will often be differences of opinion as to whether a particular decision was accurate or wise—and how the procedures may have influenced the result. Nevertheless, there is widespread agreement that different procedures are more suitable for some kinds of decisions than for others. For example, (3) trial procedures (审判程序) are generally considered most useful for resolving disputes over specific facts concerning past events,

and least useful for making general predictions or policy judgments about the future.

Efficiency. (4) Since agency resources are always limited and usually insufficient to accomplish the full range of duties imposed by statute, it becomes necessary to consider the efficiency of decision-making procedures. Typically, this takes the form of an inquiry into whether additional procedural safeguards are likely to increase the fairness or accuracy of decisions enough to warrant the costs and delays they will create.

Acceptability (可接受性). Because the legitimate exercise of official power ultimately depends upon the consent of the governed (被管理者), it is necessary to consider the attitudes of constituency groups and the general public toward the regulatory process. That is, administrative procedures should be judged not only on their actual effects, but also on the ways they will be perceived by affected interest groups. (5) A widespread feeling that a government bureaucracy makes decisions arbitrarily or unfairly can undermine the public's confidence in the agency and the regulated industry's willingness to comply with its decisions.

(6) The administrative law system does not rely solely on procedural controls to ensure that officials will perform their functions satisfactorily. It also expects the legislative, executive, and judicial branches (立法、行政和司法部门) to supervise the substance of what agencies do. For example, the President appoints officeholders and chooses the overall goals of his Administration; Congress conducts oversight hearings and, when necessary, rewrites enabling statutes; courts enforce legal requirements and place outer limits on agencies' use of discretion.

Adapted from Ernest Gellhorn and Ronald M. Levin,
Administrative Law and Process in a Nutshell, 4th ed., 1997

Unit Twenty-five

Sources of International Law

The situation is very complicated with regard to sources of international law. Viewed in terms of law-making, international law is a primitive legal system. The international community lacks a constitution that can be viewed as a fundamental source of law. There exists no institution comparable to a national legislature with power to promulgate laws of general applicability, nor administrative agencies to produce regulations. Moreover, the International Court of Justice (I. C. J.) lacks plenary jurisdiction over disputes arising under international law, and the decisions of the Court are legally binding only on the parties to the dispute. They have no precedential value in a formal sense because the doctrine of binding precedent (*stare decisis*) is not a rule of international law. [1]

I. Primary Sources

Article 38 (1) **of the I. C. J. Statute.** [2] This provision is generally considered to be the most authoritative enumeration of the sources of international law. It reads as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d.... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38 was included in the I. C. J. Statute to describe the nature of the international law that the Court was to apply. Article 38 (1) indicates that international law consists of or has its basis in international conventions (treaties), international custom, and general principles of law. It follows that a rule cannot be deemed to be international law unless it is derived from one of these

three sources.

"Judicial decisions" and the "teachings" of the publicists are not sources of law as such; they are "subsidiary means" for finding what the law is. International lawyers look to these authorities as evidence to determine whether a given norm can be deemed to have been accepted as a rule of international law. [3]

Customary international law. Under I. C. J. Statute Article 38 (1) (b), "a general practice accepted as law" is an international custom. [4] Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. Hence, a rule or principle, reflected in the practice or conduct of states, must be accepted by them, expressly or tacitly, as being legally binding on the international plane in order to be considered a rule of international law.

Customary international law develops from the practice of states. To international lawyers, "the practice of states", means official governmental conduct reflected in a variety of acts, including official statements at international conferences and in diplomatic exchanges, formal instructions to diplomatic agents, national court decisions, legislative measures or other actions taken by governments to deal with matters of international concern. Inaction can also be deemed a form of state practice.

A practice does not become a rule of customary international law merely because it is widely followed. [5] It must, in addition, be deemed by states to be obligatory as a matter of law. This test will not be satisfied if the practice is followed out of courtesy or if states believe that they are legally free to depart from it at any time. The practice must comply with the "*opinio juris*" requirement (short for the Latin *opinio juris sive necessitatis*—a conviction that the rule is obligatory) to transform it into customary international law.

Although the *opinio juris* requirement may be implied from the fact that a rule has been generally and consistently followed over a long period of time, it is much more difficult to know how widely accepted a practice must be to meet this test. That it does not have to be universal seems to be clear. Equally undisputed is the conclusion that, in general, the practice must be one that is accepted by the world's major powers and by states directly affected by it. There must also not be a significant number of states that have consistently rejected it. [6] Beyond that, it is difficult to be more specific. It should not be forgotten, however, that there exists a vast body of customary international law whose legal status is not disputed. Problems of proof arise primarily in areas of the law affected by ideological disputes or technological advances.

Conventional international law. In its enumeration of the sources of international law, Article 38 (1) (a) of the I. C. J. Statute speaks of "international conventions, whether general

or particular, establishing rules expressly recognized by the contesting states". The reference here is to international agreements or treaties, both bilateral and multilateral.[7]

Although a bilateral treaty between State A and State B would be a source of law in a dispute between them concerning an issue governed by the treaty, it is not a source of international law for the international community in general.

Some treaties, however, can give rise to or be a source of customary international law. These treaties can perform a function comparable to legislation on the national plane. Resort to this type of international law-making has increased in recent years, in part because customary international law usually develops much too slowly to meet the contemporary needs of the international community for new law. In a formal sense, these legislative or law-making treaties bind only the states parties to them. But if a very large number of states informally accepts the provisions of the treaties as law even without becoming parties to them, to that extent they can be viewed as an independent source of international law for those states as well.[8]

General principles of law. Among the sources of international law listed in Article 38 (1) are "the general principles of law recognized by civilized nations." Today we speak of general principles of law recognized by or common to the world's major legal systems. Historically, general principles of law played an important role in the evolution of international law. The rules derived from them were often the only norms available and acceptable to states to regulate their international relations. They were accepted as a source of law on the theory that where states have universally applied similar principles in their national law, their consent to be bound by those same principles on the international plane could be inferred.[9] The legal rules governing the responsibility of states for injuries to aliens were at one time based almost exclusively on that source.

Modern international law relies less on general principles of law as a source of law. This is so in part because of the extraordinary growth of treaties and international institutions as a means of regulating interstate relations, and in part because many of the norms that were originally derived from general principles have over time become customary international law. The process of law-making by so called "legislative treaties" has also reduced the need for general principles of law to fill substantive lacunae in the international legal system.

General principles are still used to fill gaps, primarily for procedural matters and problems of international judicial administration.[10] An international tribunal might resort to general principles, for example, to rule that the doctrine of *res judicata* or laches is part of international law, or that international judges have to conduct themselves in a manner that does not cast doubt on their impartiality or independence.

Character of modern international law. The discussion in the preceding sections indicates that modern international law consists principally of conventional and customary international law. The fact that legislative treaties now play an important role in the law-making process is beginning to transform international law into a more dynamic legal system. The development of customary international law is, on the whole, more cumbersome and consequently less suited for the fast pace of modern life. General principles perform an even more marginal role as a source of law.

II. Secondary Sources or Evidence

Article 38 (1) (d) of the I. C. J. Statute lists judicial decisions and the views of duly qualified publicists "as subsidiary means for the determination of rules of law." This provision is generally understood to mean that the existence of a rule of international law may be proved by reference to the above mentioned "subsidiary means." These sources are cited by international lawyers as authoritative evidence that a given proposition is or is not international law.

Although judicial decisions and the teachings of publicists appear to be treated in Article 38 as being of equal weight, this seems not to be true in practice. Certain judicial decisions enjoy much greater status as legal authority than the views of the publicists. Thus, I. C. J. decisions are by far the most authoritative of these "subsidiary means" on the international plane. For example, if the I. C. J. concludes that a given proposition has become a rule of customary international law, that holding, while not binding precedent in theory, is "the law" for all practical purposes. It would be extremely difficult, if not impossible, to refute such a holding on the international plane. Similarly, decisions of other modern international tribunals, particularly permanent ones, are deemed to be highly authoritative. Much less importance attaches to decisions of national courts applying international law. What weight they will be given depends on the prestige and perceived impartiality of the national court, on whether the decision is in conflict with decisions of international courts, and on the forum where the decision is being cited.[11] A decision of the U. S. Supreme court interpreting international law is conclusive in the United States, despite a contrary opinion even of the I. C. J. ; but in Belgium, for example, the U. S. decision will most certainly be less authoritative than a decision of an international arbitral tribunal. The result would probably be the same in a U. S. Court, if it had to choose between a decision of the Belgian Supreme Court and that of an international tribunal.

The meaning of the phrase, "teachings of the most highly qualified publicists," must also be clarified. The reference is not only to individual publicists or writers, although that is what was probably meant at one time. Today it includes entities such as the International Law Commission

(I. L. C.), which was established by the United Nations to encourage " the progressive development of international law and its codification. " U. N. Charter, art. 13(1) (a). [12] The I. L. C. is composed of distinguished international lawyers from all regions of the world. On the international plane, its conclusions would undoubtedly be considered more authoritative than the judicial opinions of national courts, for example. The "teachings" of prestigious private scholarly institutions having a membership consisting of lawyers from all major legal systems of the world, such as, for example, the Institut de Droit International, would also be accorded greater respect than some types of judicial opinions. Note too that international lawyers trained in states whose legal systems follow the civil law tradition are more likely to give greater weight to scholarly writings than are common law lawyers, who tend to view judicial decisions as more authoritative. In a U. S. court, furthermore, Restatement of the Foreign Relations Law of the Untied States (Third) would likely be given greater weight as evidence of international law than many types of foreign and international judicial opinions.

In recent decades, resolutions and similar acts of intergovernmental international organizations have acquired a very significant status both as sources and as evidence of international law. [13] Some of these resolutions are legally binding on the member states of the organizations. That is true, for example, with regard to some U. N. Security Council resolutions. It is also true of various legislative measures promulgated by the International Civil Aviation Organization. The binding character of these enactments is provided for in the treaties establishing the organizations. The resolutions in question consequently are a form of treaty law and, to that extent, a source of law.

The vast majority of resolutions of international organizations are not, however, formally binding in character. This is true, for example, of resolutions of the U. N. General Assembly. Some of these resolutions (declarations, recommendations, etc.) can and do become authoritative evidence of international law. To understand how acts of international organizations acquire this status, it is important to recall that customary international law evolves through state practice to which states conform out of a sense of legal obligation. How states vote and what they say in international organizations is a form of state practice. Its significance in the law-making process depends upon the extent to which this state practice is consistent with the contemporaneous conduct and pronouncements of states in other contexts. Thus, for example, if a U. N. General Assembly resolution declares a given principle to be a rule of international law, that pronouncement does not make it the law, but it is some evidence on the subject. If the resolution is adopted unanimously or by an overwhelming majority, which includes the major powers of the world, and if it is repeated in subsequent resolutions over a period of time, and relied upon by

states in other contexts, it may well reach the stage where its character as being declaratory of international law becomes conclusive.[14] When that stage is reached is difficult to determine, but that these resolutions play an important part in the international lawmaking process can no longer be doubted. The following pronouncement of the International Court of Justice is particularly relevant on this entire subject:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value.[15] They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

Adapted from Thomas Buergenthal and Sean D. Murphy,
Public International Law, 3rd Edition (2002).

Notes to the Text

[1] **They have no precedential value in a formal sense because the doctrine of binding precedent (stare decisis) is not a rule of international law.** 由于遵循先例原则并不是国际法规则，因此，从正式的意义来说，国际法院的判决不具有先例的价值。
(同段上文) sources of international law 国际法的渊源，它可分为主要渊源 (primary sources) 和辅助渊源 (secondary sources) 两种。the International Court of Justice 国际法院 (简称 I. C. J.)，它为联合国的主要司法机关。其前身是国际联盟 (League of Nations) 的主要司法机关国际常设法院 (the Permanent Court of International Justice, 简称 P. C. I. J.)。plenary jurisdiction 完全管辖权。

[2] **Article** 38 (1) **of the I. C. J. Statute** 《国际法院规约》第38条第1款。
(同段下文) international convention 国际公约。contesting state 诉讼当事国。international custom 国际习惯。general principles of law 一般法律原则。judicial decision 司法判例。teachings of publicists 公法学家的学说。

[3] **International lawyers look to these authorities as evidence to determine whether a given norm can be deemed to have been accepted as a rule of international law.** 国际法学者将这些权威观点视为证据，用以确定某一特定规范是否已被接受为国际法规则。

[4] **"a general practice accepted as law" is an international custom** "被接受为法律的通例"就是国际习惯。practice 实践；惯例；常例（=usage）；general practice 通例。
（同段上文）customary international law 国际习惯法。
（同段下文）... from a sense of legal obligation 出于法律义务的意识。

[5] **A practice does not become a rule of customary international law merely because it is widely followed.** 一种国家实践并不能仅仅因为被广泛遵从而成为国际习惯法规则。follow 遵循，遵从。其近义词如 observe，comply with 等。
（同段下文）*opinio juris* 法律确信，该词是拉丁文 *opinio juris sive necessitatis*（法律必要确信）的缩写；a conviction that the rule is obligatory 确信（体现于惯例中的）规则是法律上有拘束力的。

[6]... **the practice must be one that is accepted by the world's major powers and by states directly affected by it. There must also not be a significant number of states that have consistently rejected it.** 此惯例必须为世界上的主要国家和直接受其影响的国家所接受，而且并不为多数国家所一贯地反对。

[7] **The reference here is to international agreements or treaties, both bilateral and multilateral.** 这里提及的是国际协定或条约，包括双边条约和多边条约。
（同段上文）conventional international law 协定国际法。

[8] **But if a very large number of states informally accepts the provisions of the treaties as law even without becoming parties to them, to that extent they can be viewed as an independent source of international law for those states as well.** 但如果许多国家虽不是条约的成员国却都非正式地接受条约的规定为法律，这样，这些条约对那些国家来说也可被视为是一种独立的国际法渊源。
（同段上文）resort to 求助，诉诸。如：resort to force（war）诉诸武力（战争）。其近义词：have recourse to 求助于，求援于。如：have recourse to law 诉诸法律。law-making 立法，制定法律，造法活动。legislative treaty 或 law-making treaty 造法性条约，与之相对应的是 treaty contract 契约性条约（又作 contractual treaty）。

[9] **They were accepted as a source of law on the theory that where states have universally applied similar principles in their national law, their consent to be bound by those same principles on the international plane could be inferred.** 它们被接受为法律渊源的理论依据在于，如果各国在它们的国内法中已普遍适用相似的原则，那么可以推论它们同意在国际层面上受同样的原则所约束。

[10] **General principles are still used to fill gaps, primarily for procedural matters and problems of international judicial administration.** 一般法律原则仍然用来填补空白，主要适用于程序性问题和国际司法问题。

(同段下文) *res judicata* [拉丁文] 已判事项，既判案件。laches 长期延误不行使权利，迟误。这是衡平法上的一项制度，类似于普通法上的时效制度。

[11] **What weight they will be given depends on the prestige and perceived impartiality of the national court, on whether the decision is in conflict with decisions of international courts, and on the forum where the decision is being cited.** 国内法院的判决具有多大的份量取决于该法院的威望和公正性，取决于其判决是否与国际法院的判决冲突，以及其判决被引用的法院。

(同段上文) binding precedent 约束性先例。international tribunal 国际法庭。

(同段下文) international arbitral tribunal 国际仲裁庭。

[12] **Today it includes entities such as the International Law Commission (I. L. C.), which was established by the United Nations to encourage "the progressive development of international law and its codification." U. N. Charter, art. 13(1)(a).** 现在它还包括诸如国际法委员会（简称 I. L. C.）这样的机构，该委员会由联合国建立，用以推动"国际法的逐渐发展与编纂"（见《联合国宪章》第 13 (1) (a) 条）。the International Law Commission 国际法委员会；codification 法典编纂（codify *v.*）。U. N. Charter《联合国宪章》，又作 Charter of the United Nations。

(同段下文) the Institut de Droit International [法文] 国际法研究院（Institute of International Law），是世界性、非官方的纯粹学术性团体。

Restatement of the Foreign Relations Law of the Untied States (Third) 指 1987 年的《美国对外关系法诠释》（第三版），该书由美国法学会（American Law Institute）主办和负责修订。虽然该《诠释》不是官方出版物，也没有约束作用，但它具有很强的权威性和说服力，美国法院和律师们经常援用《诠释》，将其视为当代国际法最权威的学术评述。

[13] **In recent decades, resolutions and similar acts of intergovernmental international organizations have acquired a very significant status both as sources and as evidence of international law.** 在近几十年，政府间国际组织的决议和类似的文件已获得了作为国际法渊源和证据的非常重要的地位。intergovernmental international organizations 政府间国际组织（简称 IGO），与之相对应的是 non-governmental international organizations 非政府国际组织（简称 NGO）。

(同段下文) U. N. Security Council resolution 联合国安理会决议。类似地，U. N. General Assembly resolution 联合国大会决议。the International Civil Aviation Organization 国际民航组织。

[14] **If the resolution is adopted unanimously or by an overwhelming majority, which includes the major powers of the world, and if it is repeated in subsequent**

resolutions over a period of time, and relied upon by states in other contexts, it may well reach the stage where its character as being declaratory of international law becomes conclusive. 如果该决议是全体一致通过的或是由包括世界上主要国家在内的绝大多数票通过的，如果该决议在一段时期内被嗣后各项决议所重申，并且被各国在其他场合所遵循，那么该决议可能达到了这样的阶段：它确实具有宣告国际法的特征。

adopt 一词有多种含义：（1）通过。如 The Contract Law of P. R. China, adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, shall go into effect as of October 1, 1999.《中华人民共和国合同法》已由第九届全国人民代表大会第二次会议于1999年3月15日通过，自1999年10月1日起施行；（2）收养。如：adopted child 养子（女）；（3）采用，采纳。如：Article 38 of the I. C. J. Statute is adopted from the same article in the Statute of P. C. I. J. 国际法院规约第38条的规定是采纳了国际常设法院规约的同条规定而来的。

context 上下文，语境，各种有关情况，场合。

[15] **The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value.** 国际法院指出，联合国大会决议即使没有法律约束力，在某些时候也可能具有规范的价值。

Exercises

1. *Which of the following statements are NOT true according to the text?*

(1) The decisions of International Court of Justice are binding precedents.

(2) Judicial decisions and the teachings of the publicists are derived from Article 38 of the Statute of ICJ, therefore they can be regarded as sources of international law.

(3) A practice, which is general and consistent one followed by states, becomes a rule of customary international law.

(4) The legal status of a lot of customary international law is undisputed in the international community.

(5) Bilateral treaties are also sources of general international law.

(6) Today law-making treaties are increasingly important sources of international law.

(8) The principle of res judicata is a general principle of law.

(9) General principles of law are main sources of modern international law.

(10) Today I. C. J. decisions are the most authoritative of secondary sources of international

law on the international plane.

(11) Acts of the U. N. General Assembly have no formal legal effect.

2. *Answer the following questions.*

(1) What is the meaning of Article 38 of the I. C. J. Statute?

(2) Why is it said that international law is a primitive legal system?

(3) What requirements must a practice satisfy to become a rule of customary international law?

(4) Why has law-making treaties increased in the international community in recent years?

(5) What is general principle of law?

(6) What is evidence of international law?

(7) What does the phrase "teachings of the most highly qualified publicists" mean?

(8) What about the status of resolutions or acts of international organizations as sources or evidence of international law?

Unit Twenty-six

The World Trade Organization (I)

Introduction to the Law of WTO

1. Origins of the New Charter

Although there was substantial realization that GATT was handicapped in many ways because of the circumstances surrounding its origins, there was no indication during the 1980's and during the preparations for the Uruguay Round negotiations[1] that there would be a proposal for a new organization during the round. There seemed to be a fear that such a proposal would attract too much opposition, especially in the U. S. Congress, which had twice before struck down such proposals in the trade area.[2] The agenda and negotiating structure that resulted from the ministerial meeting[3] launching the new round at Punta del Este, Uruguay, in September 1986, did not include any indication that a new charter would be considered. It did include a negotiating topic on, and a group charged with considering, the "Future of the GATT System" (the acronym[4] "FOGS" was considered appropriate).

Only later did the ideas for a new organization begin to emerge. The Government of Canada first put forth a formal proposal (in May of 1990) for a WTO—World Trade Organization. Later that year, the European Union indicated it favored a similar organization, but preferred the name MTO—Multilateral Trade Organization. At the December 1990 Brussels Ministerial Meeting (which resulted in an impasse[5]), the draft documents only mentioned the possibility of future exploration of a new organization.

After regrouping from the Brussels impasse, the then GATT Director-General[6], Arthur Dunkel, spurred the negotiators to produce in December 1991 a complete rough draft of the negotiation results, passing together tentative texts of the entire package (with many holes and text in square brackets indicating unresolved matters). In this draft, for the first time, the world saw a draft charter for a new organization—an MTO. During 1991 and 1993 the negotiators worked on

this draft in the face of various objections, particularly from the United States, to revise it and make it more acceptable. Finally, in the final hours of the December 1993 negotiations, there was agreement (including the United States) to a charter proposal, but the name was changed back to WTO, as it now stands. This proposal was then finalized in Morocco in April 1994, and submitted to governments for ratification.

It is important to realize that the WTO is not the ITO (the 1948 International Trade Organization[7]). The ITO Charter included five sizeable chapters filled with substantive rules concerning international economic behavior, plus a chapter with an elaborate set of institutional clauses. The WTO Charter by comparison, is a "mini-charter," relatively spare regarding institutional measures and containing no substantive rules, although large texts of such matter are included in Annexes. This overall structure of the WTO is itself significant. It suggests a spirit of flexibility, which allows for texts to be added or subtracted over time and for the evolution of institutions necessary for implementation of the rules.[8]

2. The Structure of the WTO

The WTO Charter is confined to institutional measures, but the charter explicitly outlines four important annexes that technically contain thousands of pages of substantive rules. Indeed it is reported that the total "package" of the text of the Uruguay Round results weighs 385 pounds and consists of over 22,000 pages, including annexes and schedules.

The annex structure is important; the different annexes have different purposes and different legal impacts:

Annex 1 contains the "Multilateral Agreements," which comprise the bulk of the Uruguay Round results and which are all "mandatory," in the sense that these texts impose binding obligations on all members of the WTO. This reinforces the single package idea[9] of the negotiators, departing from the Tokyo Round approach of "pick and choose" side texts. The Annex 1 texts include the following:

Annex 1A consists of GATT 1994, which includes the revised General Agreement with new understandings, side agreements on 12 topics ranging from agriculture to preshipment inspection, and the vast "schedules of tariff concessions"[10] that make up the large bulk of pages in the official treaty text. The schedule for each of the major trading countries, the United States, Japan, and the European Union, constitutes a volume of printed tariff listings. There are a number of "side agreements," some originating from the Tokyo Round results (as revised in the Uruguay Round). These are as follows:

Agriculture

Application of Sanitary and Phytosanitary Measures
Textiles and Clothing
Technical Barriers to Trade (Standards)
Trade-Related Investment Measures (TRIMs)
Implementation of Article VI of GATT 1994 (Dumping)
Implementation of Article VII of GATT 1994 (Valuation)
Preshipment Inspection
Rules of Origin
Import Licensing Procedures
Subsidies and Countervailing Measures
Safeguards

Annex 1B consists of the General Agreement on Trade in Services (GATS), which also incorporates a series of schedules of concessions.

Annex 1C consists of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

Annex 2 has the dispute settlement rules, which are obligatory on all members, and which form (for the first time) a unitary dispute settlement mechanism covering all the agreements listed in Annex 1, Annex 2 and Annex 4 (i. e., all but the TPRM procedures).

Annex 3 establishes the Trade Policy Review Mechanism (TPRM), by which the WTO will review the overall trade policies of each member on a periodic and regular basis, and report on those policies.

Annex 4 contains the four agreements that are "optional," termed "plurilateral agreements."[11] This is a slight departure from the single package idea, but the agreements included tend to be either targeted to a few industrial countries, or to be more "hortatory" in nature without real legal impact. The four agreements deal with government procurement, trade in civil aircraft, bovine meat and dairy products. The latter two have been terminated. Clearly this annex, which may be added to, leaves open some important flexibility for the WTO to evolve and redirect its attention and institutional support for important new subjects that may emerge during the next few decades.

3. Legal Personality and Organizational Attributes

Unlike the General Agreement, the WTO Charter clearly establishes an international organization, endows it with legal personality, and supports it with the traditional treaty organizational clauses regarding "privileges and immunities," secretariat, director general,

budgetary measures, and explicit authority to develop relations with other inter-government organizations and, important to some interests, non-government organizations. The charter prohibits staff of the Secretariat from seeking or accepting instructions from any government "or any other authority external to the WTO".

4. Continuity with the GATT

There is strong indication in various parts of the WTO Charter to promote a sense of legal and practice continuity with GATT. Except as otherwise provided, the WTO and the Multilateral Trade Agreements shall "be guided by the decisions, procedures and customary practices followed by [GATT 1947]." The secretariat of the GATT 1947 became the WTO secretariat.

5. Impact on National Laws

An interesting new clause is included in the WTO Charter, which reads:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

6. Governing Structure

The governing structure of the WTO follows some of the GATT 1947 model, but departs from it substantially. At the top there is a "Ministerial Conference," which meets not less often than every two years. Next there is not one, but four "Councils". The "General Council"[12] has overall supervisory authority, including responsibility for carrying out many of the functions of the Ministerial Conference between Ministerial Conference sessions[13]. Presumably, the "General Council" will meet at least as often as the GATT Council, which met monthly (with some exceptions). In addition, however, there is a Council for each of the Annex 1 agreements, thus:

Council for Trade in Goods

Council for Trade in Services, and

Council for Trade-Related Aspects of Intellectual Property Rights

A "Dispute Settlement Body" (DSB) is established to supervise and implement the dispute settlement rules in Annex 2. The General Council is authorized to perform the DSB tasks. Likewise there is a TPRM Body for the Trade Policy Review Mechanism.

Adapted from J. H. Jackson, *Legal Problems of International Economic Relations*, 4th ed., 2002

Notes to the Text

[1] **the Uruguay Round negotiations** （关贸总协定）乌拉圭回合谈判。

[2] 此句显示，历史上，美国国会对建立”国际贸易组织”或”世界贸易组织”是持反对立场的。

[3] **ministerial meeting** 部长级会议。

[4] **acronym** 只取首字母的缩写词。

[5] **impasse** 僵局。

[6] **the then GATT Director-General** 当时的关贸总协定总干事。

[7] **the 1948 International Trade Organization** 1948年的国际贸易组织（根据哈瓦那宪章建立，后流产）。

[8] **It suggests a spirit of flexibility, which allows for texts to be added or subtracted over time and for the evolution of institutions necessary for implementation of the rules.** WTO规则体系体现了一种灵活的精神，可对规则随时增减，并可为执行规则的需要而推进制度的演变。

[9] **the single package idea** 一揽子（强制性规则的）理念。

[10] **schedules of tariff concessions** 关税减让表。

[11] **plurilateral agreements** 可以译为“复边协议”，是选择性加入的协议，只对参加国有效。而WTO体系中的“多边协议”（multilateral agreement）则对所有成员方都有强制拘束力。

[12] **General Council** 总理事会。

[13] **between Ministerial Conference sessions** 在部长级会议休会时。

Exercises

1. *Read the following passage and translate the underlined sentences into Chinese.*

Appraising the New Chapter

John H. Jackson,

Testimony Before The Senate Finance Committee,

March 23, 1994

First, the WTO essentially will continue the GATT institutional ideas and many of its

practices, in a form better understood by the public, government officials and lawyers. To some small extent, a number of the GATT "birth defects" are overcome in the WTO. The WTO Charter expressly states the intention to be guided by GATT practices, decisions, and procedures to the extent feasible.

Second, the WTO structure offers some important advantages for assisting the effective implementation of the Uruguay Round. For example, a "new GATT 1994" is created and thus countries effectively withdraw from the old GATT and become members of the new GATT. (1) This procedure avoids the constraints of the amending clause of the old GATT that might make it quite difficult to bring the Uruguay Round into legal force.

(2) Third, the WTO ties together the various texts developed in the Uruguay Round and reinforces the "single package" idea of the negotiators, namely, that countries accepting the Uruguay Round must accept the entire package (with a few exceptions).

Fourth, another important aspect of the WTO structure is that it facilitates the extension of the institutional structure (GATT-like) to the new subjects negotiated in the Uruguay Round, particularly services and intellectual property. Without some kind of legal mechanism such as the WTO, this would have been quite difficult to do since the GATT itself only applies to goods. The new GATT structure separates the institutional concepts from the substantive rules. The GATT 1994 will remain a substantive agreement (with many of the amendments and improvements developed throughout its history, including in the Uruguay Round.) The WTO has a broader context.

Fifth, similarly the WTO will be able to apply a unified dispute settlement mechanism, and the Trade Policy Review Mechanism to all of the subjects of the Uruguay Round, for all nations who become members.

Sixth, the WTO Charter offers considerably better opportunities for the future evolution and development of the institutional structure for international trade cooperation. (3) Even though the WTO Charter is minimalist, the fact that there is provision for explicit legal status, and the traditional organizational privileges and immunities to improve the efficiency of an organization helps in this regard. With the WTO focusing on the institutional side, it also offers more flexibility for future inclusion of new negotiated rules or measures which can assist nations to face the constantly emerging problems of world economics. For example, already mentioned for such attention are environmental policies and competition policies.

There is some confusion about the effect of a WTO and its actions on U. S. law. It is almost certain to be the case (as Congress has provided in recent trade agreements) that the WTO and the Uruguay Round treaties will not be self-executing in U. S. law. Thus they do not

automatically become part of U. S. law. Nor do the results of panel dispute settlement procedures automatically become part of U. S. law. (4) Instead the U. S. feels it is so important to deviate from the international norms that it is willing to do so knowing that it may be acting inconsistently with its international obligations, the U. S. government still has that power under its constitutional system. This can be an important constraint if matters go seriously wrong. It should not be lightly used of course. In addition, it should also be noted that governments as members of the WTO have the right to withdraw from the WTO with six months notice (XV: 1). Again, this is a drastic action that would not likely be taken, but it does provide some checks and balances to the overall system.

Adapted from J. H. Jackson, *Legal Problems of International Economic Relations*, 4th ed., 2002

Unit Twenty-seven

The World Trade Organization (II)

Exceptions to GATT obligations: Article XIX

The main Article of the GATT which might be invoked to justify export-restraint measures[1] is Article XIX:

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party[2] under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products[3], the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) ……

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.[4]

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless,

be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove. [5]

......

Three aspects of this Article, in relation to export-restraint arrangements, are examined below.

Policies on safeguards

While liberal trade may benefit an importing country as a whole, it may also harm its domestic industry which produces similar or competing products. In order to give the domestic industry of the importing country time to adjust to the new situation, and also to release some of the political pressure against liberal trade, Article XIX of the GATT allows contracting parties to take safeguard measures temporarily to restrain imports of a particular product and to protect the corresponding domestic industry for a short period of time.

GATT Article XIX includes language which, when a member country can show that Article XIX prerequisites[6] are met (not too hard), allows a member country to "suspend" its obligations under the GATT if these have led to injury to the domestic industry. The rules of the GATT so suspended would include Article XI. [7] Indeed, current practice amply confirms that import quotas are used under Article XIX, in spite of the prohibition contained in Article XI. Thus countries could also use "other measures" or export restraints. Since most export-restraint arrangements are probably imposed in the context of a claim for "safeguards" purposes—this is to restrain import competition affecting an injured competing domestic industry—Article XIX could be the prime candidate to support an assertion that restraint arrangements are consistent with the GATT in spite of Article XI prohibitions.

The conceptual problem is that Article XIX allows the importing country to suspend its obligation and says nothing about the exporting country. At first sight it appears that Article XIX may not assist either participant in the export-restraint arrangement, for the action (that is, the need for the suspension of the GATT rule) is performed by the exporting country, not the importing country as Article XIX implies. The question then becomes one of whether the language

of Article XIX in such circumstances could be interpreted as authorizing the exporting country to take such measures, at least when the importing country (alleging injury to its industry) has sought and asked for them.

Perhaps such an argument could be sustained. It might go as follows: if, in certain cases, a safeguard measure under Article XIX of the GATT would have been possible, but the countries involved prefer an export-restraint arrangement, such a measure should be allowed if it would not affect third parties.

Selectivity and MFN in Article XIX

One of the important debates of recent years about Article XIX of the GATT is whether measures taken under this Article must be imposed in a manner consistent with the most-favored-nation principle. The principal argument in favor of selective safeguard measures[8] is that there is no explicit MFN requirement in Article XIX, so that this provision does not prevent the suspension of the MFN requirement of Article I as part of the "escape clause"[9] authority. Supporters of a nondiscriminatory application of safeguards argue that Article XIX allows the suspension of an obligation in respect of a product, as opposed to a country. They refer to an interpretative note to Article 40 of the Havana Charter[10], equivalent to Article XIX of the GATT, which provides that safeguards "must not discriminate against imports from any member country." It is also argued that, as a matter of economic policy, the MFN requirement is much to be preferred. Clearly a specific export-restraint arrangement with just one exporting country (when more than one exists) would seem to contravene the MFN requirement of Article XIX. Thus, if Article XIX can be deemed to provide an exception for export-restraint measures, it may be argued that it does so only when a network of such measures is put in place, thereby closely approximating an MFN approach (if tariffs or quantitative import restrictions were used instead).

Compensation requirement of Article XIX

Article XIX (2) of the GATT provides for consultation between the country which wants to take safeguard action and "the contracting parties having a substantial interest as exporters of the product concerned". Since Article XIX (3) authorizes a retaliatory response for the affected parties, it is accepted that the parties entitled to consultation can accept compensatory "concessions" by the safeguard-acting country. Alternatively, the harmed country can implement compensatory trade restraints on the products of the safeguard-acting country. Providing protection for the domestic industry through the use of export-restraint arrangements may tacitly allow an avoidance of this compensation requirement.

Compensation is not always given in practice. An explanation for this may be the costs of a retaliatory withdrawal of concessions for countries depending on imports and the fact that, as a result of the already extensive tariff reductions made during successive GATT rounds of multilateral tariff negotiations, there is often very little left with which to compensate, particularly if the trade in the item on which safeguard action is being taken is very large, as is the case with steel or automobiles.

As noted previously, however, economists have observed that an export-restraint arrangement may increase the profitability of the exporting firms. These "monopoly rents"[11] thus function partly as a replacement for the "compensation requirement."

Recently, it has been suggested that auctioning the available import quotas[12] would enable the importing country's government to capture these rents, thereby reducing the cost of the protection. Since these monopoly rents can be an important inducement for the cooperation of the exporting countries, the use of such auctioned quotas may lead the exporting countries to refuse "voluntary" restriction of their exports[13]. Moreover, since auctioned quotas would appear to be administered by the importing country, they would probably amount to "normal" quantitative import restrictions instead of an export-restraint arrangement.

Adapted from J. H. Jackson, *The Jurisprudence of the GATT & the WTO: Insights on Treaty Law and Economic Relations*, 2000

Notes to the Text

[1] **export-restraint measures** 出口限制措施。

[2] 在WTO成立之前，GATT的成员被称为“缔约方”（contracting party），如果是指缔约方全体，则英文要全部用大写；WTO成立之后则统称为“成员”（member）。

[3] **like or directly competitive products** 类似或直接竞争产品。like products 一般译为“相似产品”、“类似产品”或者“同类产品”。关于like products的界定，存在相当大的争议，是很多国际贸易案件的争讼焦点。

[4] **In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action** 在迟延会造成难以补救的损害的紧急情况下，可不经事先磋商而临时采取本条第一款规定的行动，但条件是在采取行动后立即进行磋商。

[5] 此句的核心词可以精简为：**If agreement ... not reached, the contracting party ... shall... be free to do so,... the affected contracting parties shall then be free,... to suspend... the application ... of such substantially equivalent concessions or other obligations ....**

[6] **prerequisites**　先决条件（法律文件常见用语）。

[7] 关贸总协定第11条，关于取消数量限制的一般规则，该规则在协定框架内存在若干例外，这篇课文谈的第19条说的就是这种例外。

[8] **selective safeguard measures**　选择性的保障措施（这种措施可能违反非歧视原则，包括最惠国待遇原则）。

[9] **escape clause**　例外条款，豁免（义务）条款。

[10] **Havana Charter**　哈瓦那宪章，涉及建立"国际贸易组织"的议题，在20世纪40年代末期流产。

[11] **monopoly rents**　垄断租金，这里的含义指政府间就出口数量限制所作出的安排给予出口商带来的好处。

[12] **auctioning import quotas**　依据拍卖或竞价以分配配额或发放进口许可证。

[13] **"voluntary" restriction of exports**　所谓"自愿"出口限制，在日本与美国的汽车贸易发展史最为典型。

Exercises

1. *Read the following passage and translate the underlined sentences into Chinese.*

If one were asked in the early years of the General Agreement on Tariffs and Trade (GATT) whether or not it would survive long, the answer no doubt would have been very pessimistic. (1) With scarcely any institutional framework, with no provision for a secretariat, and with legal ties to an organization that failed to materialize, the GATT would hardly have qualified as "most likely to succeed" among the international organizations set up in the years immediately following World War II. Indeed, in theory at least, GATT was not an "international organization" at all - merely an "agreement." Despite the lack of an institutional framework, despite lack of financial support except of the most meager sort, and despite the powerful forces for trade protectionism which killed the International Trade Organization (ITO) and tried to kill GATT, GATT survived. The fact that GATT did survive, and that it has become a major force in international relations today, is not only surprising but instructive.

(2) It is instructive because it tends to indicate that legal structures or institutions have less

to do with the development of affairs than dimly understood political or economic forces. One could argue that, despite the apparent obstacles, GATT survived and developed because history "required" it to do so. These explanations, more appropriate for the historian, the political scientist, or the economist than for the lawyer, suggest that constitutional form may not be as significant in international institutions as it seems.

These reflections suggest the danger of a "legal approach" to the GATT. This is reinforced when one observes GATT work at close hand. Lawyers' considerations seem to play a small part. The secretariat which serves GATT presently has no position for a lawyer. Delegates and secretariat members often express an attitude such as "Let's not be concerned with legal technicalities." (3) The GATT has consciously abandoned an attempt to solve some legal problems which seemed perplexing and irreconcilable, proceeding on to other business.

Yet legal problems there are. The GATT is being invoked before national courts. Certain provisions of GATT have proved very confining and yet have been respected. (4) Some delegates to GATT have expressed a plea to "know where we stand, to know our rights," and others have been pushing for greater sanctions in the event of breach.

Adapted from J. H. Jackson, *The Jurisprudence of the GATT & the WTO: Insights on Treaty Law and Economic Relations*, 2000.

Unit Twenty-eight

The World Trade Organization (Ⅲ)

Countervailing Measures and the GATT

Why the GATT system should provide for any sort of response to the international trade of subsidized[1] products? Many have argued that subsidized imports represent a benefit to the importing country, which substantially exceeds the potential detriments (on a welfare basis), and thus that the best response would be a "thank you note" sent to the subsidizing government that exported the goods. Further, it has been argued that levying a countervailing duty[2] in response to such a subsidy would have the same welfare damaging effects as any tariff. These arguments, however, seem inadequate. Since economists demonstrate persuasively that subsidies can have a considerable distorting effect[3], it seems clear from a global perspective that many subsidies in international trade reduce overall world welfare.

On the other hand, it can be argued that the principal welfare reduction occurs in the economy of the subsidizing government, and that, therefore, no retaliatory or recompensating response need be levied by the importing countries. This argument also is inadequate. There are a number of market and political factors which illustrate why governments may choose to respond. The unfettered use of subsidies in international trade can lead to counter-subsidies, and counter-counter-subsidies in an escalating progression, all of which can seriously damage world welfare. This has already been demonstrated in the agricultural sector. In some cases, the countries whose welfare is damaged can ill afford the costs[4]. Thus, it can be argued there is a reason for the international system to intervene, and in some way to try to inhibit the use of subsidies generally. Game theorists[5], such as Robert Axelrod, would suggest that a "tit for tat"[6] policy of counter-measure can have desirable effects in circumstances such as these.

The GATT system provides two approaches for disciplining subsidies in international trade. The first, embodied in GATT Article VI, is to permit countervailing duties by national governments. The second, contained in GATT Article XVI, is to provide substantive international

law rules that prohibit certain kinds of government subsidies.

Article VI

Anti-dumping and Countervailing Duties

. . .

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise. [7]

Article XVI

Subsidies

Section A—Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. [8] In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

. . .

Perhaps in a perfect world, only the second of these measures would be used, and countervailing duties would never be permitted because they can substantially distort the welfare in the importing country. International rules, however, often do not work satisfactorily. Thus, an argument can be made for a fall-back or second best approach which would allow governments to

utilize countervailing duties, in the general hope that the use of such countervailing duties will in the long run tend to discourage the use of subsidies, or at least those that affect internationally traded goods. This approach can be countenanced even though the motives of governments in applying countervailing duties are really not to maximize world welfare, but are instead to maximize the welfare of the producers who constitute important political constituencies within the country. Nevertheless, if the use of countervailing duties also has a beneficial effect on world welfare, then arguably[9] such countervailing duties should be permitted.

This conclusion, of course, avoids the empirical question concerning whether or not countervailing duties do in fact tend to discourage the use of subsidies. A cursory study, primarily based on anecdotal evidence and some direct observations and discussions with officials, suggests that the use of countervailing duties by the United States has had some effect in discouraging the use of subsidies. Indeed, at the conference at which the articles contained in this publication were presented, private and government practitioners noted the decreasing frequency of complaints about foreign subsidies. Perhaps US countervailing duty actions have already had some impact.

Adapted from J. H. Jackson, *The Jurisprudence of the GATT & the WTO: Insights on Treaty Law and Economic Relations*, 2000.

Notes to the Text

[1] **subsidize** *v.* （政府）补贴

[2] **countervailing duty** 反补贴税。"征收"一般用 levy。

[3] **distorting effect** （对国际贸易所产生的）扭曲作用。

[4] 此处的 ill 是副词，表示"困难地，几乎不可能地"。

[5] **Game theorist** 博弈论学者。

[6] **tit for tat** 针锋相对。

[7] **The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.** "反补贴税"一词应理解为旨在抵消对制造、生产或出口所直接或间接给予的任何津贴或补贴而征收的一种特别税。

[8] **If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of**

any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. 如任何缔约方给予或维持任何补贴，包括任何形式的收入或价格支持，以直接或间接增加自其领土出口的任何产品或减少向其领土进口的任何产品的方式实施，则该缔约方应将该补贴的范围和性质、该补贴对自其领土出口、向其领土进口的受影响产品的数量所产生的预计影响以及使该补贴成为必要的情况向缔约方全体作出书面通知。

[9] **arguably** 有商榷余地地，可辩论地，可论证地（法学著述中比较常见这种委婉的表述）。

Exercises

1. *Fill in the blanks with the given words or terms in proper form.*

(1) pass (2) apply (3) under (4) withdraw (5) effective

(6) waive (7) comply with (8) enter into

China's Accession to The WTO

The potential accession and integration of China to the WTO is one of the most important challenges and opportunities for the WTO and its Members. China's accession differs in scope and in political implications from the normal process of accession, but nevertheless provides a clear example of how accession works in practice.

China was one of the original 1948 GATT Contracting Parties, but the government representing China at GATT, the "Nationalist Chinese" or Taiwan, (a) China from the GATT in 1950. Over time the PRC government assumed China's seat in many international organizations, including the United Nations and the International Monetary Fund. In more recent years, the PRC joined the Multifiber Arrangement[1] associated with the GATT, and became an observer at GATT. Some argue that the withdrawal of China from GATT was attempted by a government that was not in control, and therefore was not (b). However, several counterarguments have been made, such as China's decade-long absence from GATT. It was nevertheless agreed that for the PRC's "reentry" into the GATT the accession procedures would be used. When the Uruguay Round terminated the GATT and created the WTO, it was clear that the WTO accession procedures would (c).

Nicholas Lardy has indicated a number of reasons why WTO accession is of great importance to China, the United States, and the world trading system in general. He observes that China has become a major player in international investment and trade but that it needs to be further integrated into the global economic system. China's leaders, he says, have staked their legitimacy on their ability to create economic growth. Continued economic growth has thus become a *sine qua non*[2] to stay in power. Especially after the Asian crisis, many Chinese leaders have seen globalization of production as the only viable alternative, and, indeed one that China could benefit from. Chinese leadership has also started to realize that further integration into the world economy requires development of a market economy. WTO Membership will oblige China to (d) the rules of the world trade system. Reform-minded Chinese leaders can use the WTO obligations as a lever to complete transition to a market-oriented economy.

A substantial barrier to overcome for China's WTO accession in the United States was parts of the 1974 Trade Act relating to trade relations with communist countries (so called Non-Market Economies or NMEs). (e) these statutes, the United States cannot grant MFN treatment (or as it has been termed in U. S. law since 1998 "normal trade relations") to products of an NME that denies its citizens the right to emigrate, or imposes sanctions on emigration. Section 402 of the Trade Act of 1974, the so-called Jackson-Vanik Amendment, allows the President to (f) these requirements, subject to annual review. Although the United States and the PRC (g) a bilateral trade agreement in 1979, the PRC was subject to this annual review process. In light of China's WTO accession, several arguments were made that it was important for the United States to allow Permanent Normal Trade Relations (PNTR) with China. The most important was that it would ensure compliance with the WTO requirement of "unconditional most favored nation treatment," and would ensure that the United States reap the full benefits of China's WTO accession. In September 2000 the U. S. Congress (h) a bill giving the President the right to decide, after accession of the PRC to the WTO, that trade relations with China will no longer be subject to annual review and will be granted MFN treatment on a permanent basis.

Adapted from J. H. Jackson,
Legal Problems of International Economic Relations, 4th ed., 2002.

Reading Notes

[1] Multifiber Arrangement 一般译为“多边纤维协定”，是涉及纺织品及服装的主要国际协定，长期游离于 GATT 体制之外。

[2] *sine qua non* [拉丁文] 必具的资格；（绝对）必要的条件。

Unit Twenty-nine

The Evolution of the Meaning of the Term 'Investment'

It is clear that from early times the meaning of investment in international law was confined to foreign direct investment. [1] The evolution of the international law was towards the idea that the responsibility of the state would arise if it did not treat the alien in accordance with a minimum standard of treatment. [2] This standard of treatment was extended to his physical property. The early discussion of the law on state responsibility for injuries to aliens took place in the context of either physical abuse or the violation of the rights of the alien to physical property held by him in the host state. The genesis of the international law on foreign investment was in the obligation created by the law to protect the alien and his physical property and state responsibility arising from the failure to perform that obligation. In terms of customary international law, the obligation was largely created through the practice of the United States which asserted the existence of such an obligation in its relations with its Latin American neighbours. [3] As foreign investments grew, the law was extended to protect the tangible assets of the foreigner from governmental interference by way of taking[4] of such property. The early cases dealt with the destruction of property or the taking of land belonging to the foreigner. The concept of taking was also narrow, for only tangible assets could be taken by the state. This original feature of an economic asset in the form of physical property protected by a legal right under the law of the host state has always remained the starting point of the definition of an 'investment' for the purposes of this area of the law.

Progressively, consistent with this essential feature, the term 'investment' was extended to include intangible assets. These initially consisted of contractual rights[5] in pursuance of[6] which the foreign investor took his assets, such as machinery and equipment into the host state. The rights associated with the holding of property such as leases, mortgages and liens came to be included. There are cases that indicate that loans also fell into this category. There was difficulty in the case of shares in companies. In the Barcelona Traction Case, the International Court of Justice held that a shareholder's rights in a company that was the vehicle of foreign investor could not be protected through the diplomatic intervention of the home state of the shareholder. The

much criticised view taken by the Court was that only the state in which the company was incorporated could intercede on behalf of the company and that the shareholders of the company had no independent interests that were protected by international law. It indicated a problem as to the protection of the rights of the shareholder which continues to befuddle international law. [7] The situation becomes more difficult where the foreign investor operates his investment through a company that is incorporated under the laws of the host state or is a minority shareholder[8] in such a company. The International Convention on the Settlement of Investment Disputes seeks to overcome this through the requirement that the host state specifically agrees to regard the company as a foreign company despite its incorporation as a local company. [9]

In response to the Barcelona Traction Case, the issue of shareholder protection was addressed directly in the bilateral investment treaties by including shares in companies within the meaning of the term 'investment'. The shares that are referred to in such treaties are shares in a company that is to serve as a vehicle for the investment that is contemplated and presumably not portfolio investments[10].

There were further developments which took place in the area since the Barcelona Traction Case and the inclusion of shares in corporations established by the foreign investor within the meaning of foreign investment. There are now statements in publications which state that shares are investments that are protected by investment treaties, without having regard to the specific history that led to the inclusion of shares in investment treaties. These statements give the impression that portfolio investments are protected by international investment law the same way foreign direct investments are. This view, which is expansive, does not accord with the context in which the law was developed. Some treaties expressly counter the possibility of such a view being adopted by excluding portfolio investments from the definition of protected investments.

The next phase was the inclusion of intellectual property rights within the meaning of foreign investment. Widespread copying of inventions made in developed states was the reason for the extension of protection to intellectual property rights. Many of these rights were associated with the making of foreign investments. When a new invention was to be manufactured in the developing state or when new technology was to be transferred by a foreign investor to a local partner within a joint venture[11], it would be necessary to provide for the protection of the intellectual property rights associated with the venture. When such a need for the recognition of intellectual property rights arose, the treaties extended the meaning of foreign investment to include intangible rights associated with intellectual property thus making a leap in the meaning of foreign investment which had hitherto been confined to the physical assets of the foreign investor. Analytically too, the situation was different, for the intellectual property was created by the local law through the

recognition of the right by an act of the host state. So, technically, it was property that was created by the host state in the foreigner that was being protected.[12] The types of intellectual property that are to be recognized are often elaborately spelt out in the treaties to include patents and copyright which are rights technically granted to the foreign investor by the host state laws, as well as lesser rights such as know-how. The policy justification[13] for the protection of intellectual property rights through investment treaties is that there will be more technology transferred to developing countries if such intellectual property is protected through investment treaties. When a state interferes with these intellectual property rights it is interfering with property it had itself created in the foreign investor. The treaty internationalised the rights once they had been created and required them to be protected in accordance with the standards of the treaty. The argument that the state can control the property it had created can no longer apply as a result of the operation of the treaty. This process of the internationalisation of the property that was created under the local law is the basis of the protection of intellectual property which is adopted in the field of both foreign investment and international trade. It is clear that, in the area of international trade, the TRIPS instrument attached to the World Trade Organization operates on the basis of the same technique. As a result of this internationalization, any state interference with intellectual property thereafter becomes a breach of treaty which amounts to an expropriation[14] and has to be compensated. Wide interpretations are sometimes given to the concept of taking of property in treaties. As a result, there is a danger that compulsory licensing of patents[15] and parallel imports[16] by the state can amount to takings and involve the state in liability for breach of the treaty standards. This danger arises in areas such as pharmaceuticals. The parallel import of an AIDS drug manufactured cheaply in another state stands in danger of being regarded as a violation of treaty standards as a result of this widening of the meaning and scope of the term 'foreign investment' and of the notion of 'taking'.[17]

The protection of intellectual property under bilateral and multilateral investment treaties, the WTO regime and the earlier regimes will mean that there will be an absence of coordination as to how the law in the area will be developed. The remedies provided and the mechanisms employed are different. The investor may have a unilateral remedy under an investment treaty whereas only a state could invoke the dispute settlement mechanism of the WTO. The substantive law on protection may also be differently stated. No real claims have yet arisen in which the law has been considered.

Adapted from M. Sornarajah,
The International Law on Foreign Investment, 2nd ed., 2004

Notes to the Text

[1] **foreign direct investment** 外国直接投资，一般缩写为 FDI。

[2] **minimum standard of treatment** （外国人/外国投资的）最低待遇标准。这种待遇标准与“国民待遇”及“最惠国待遇”都属于外国人民事法律地位的主要待遇制度。但“最低待遇标准”的确切内涵在发展中国家和发达国家学者之间存在较大争议。

[3] 依传统国际法原则，国家有属人优越权，在本国国民的人身和财产在外国受到非法侵害时，有正当的外交保护权。但是，自 20 世纪初，拉丁美洲国家针对美国滥用外交保护权，也曾长时期坚持“卡尔沃主义”。正文的论断是存在争议的。

[4] **taking** （财产）占有；强占；征收。

[5] **contractual rights** 合同性权利；依据合同关系而产生的权利。

[6] in pursuance of = in accordance with; in prosecution or fulfillment of

[7] 该案评述可见曾华群著《国际经济法导论》，法律出版社 1997 年版，第 69 – 70 页。

[8] **minority shareholder** 持有少数股权的股东（一般简称为“少数股东”）。

[9] 相关规定见《解决国家与他国国民间投资争端公约》（即《华盛顿公约》）第 25 条第 2 款第 2 项。

[10] **portfolio investment** 间接投资；证券投资。下一自然段进一步主张，部分投资条约明确地将 portfolio investment 排除在条约所定义的“投资”之外。

[11] **joint venture** 合资企业（一般缩写为 JV）。

[12] 这两句的核心意思是强调知识产权在权利取得上的地域性特征。

[13] **policy justification** 这里指投资条约将知识产权纳入投资定义的“立法理由”。policy 一词在英美法学著作中通常是涵盖法律和政策在内的广义概念。

[14] **expropriation** 征用；没收。
与下文的 taking of property 是近义词。对外资的征收问题，是国际投资法传统上的论争焦点之一。

[15] **compulsory licensing of patent** 专利的强制许可。

[16] **parallel import** 平行进口。指在国外合法制造的专利产品，向专利权人获得了专利的国家进口，又未获权利人向这里进口的许可。

[17] 该论断的主要理由是，这种情形的平行进口降低了专利权人的可得利润；进口国对这种平行进口的允许，其效果可能等同于“征收”。

Exercises

1. *Fill in the blanks with proper prepositions, then translate the underlined sentences into Chinese.*

(1) Once the idea that the concept of foreign investment need not be confined to tangible assets took hold, there were further inclusion of intangible rights in the list of matters which are to be included in the definition of the term foreign investment (a) the treaty. One such inclusion is the contractual rights which the foreign investor acquires as a result of its relationship with the state and its agencies. (2) It is generally conceded that a breach of a contract which the state has made (b) a foreign investor does not by itself give rise to an international remedy. There are obvious reasons for this. There may be good reasons for the breach by the state, for example defective performance by the foreign investor. There is also the possibility of settling the claims that arise through domestic litigation. (3) The treaty inclusion of contractual rights in the definition of the term ' foreign investment ' would mean that upon the breach of a contract by the state an international obligation arises (c) the state that cause the breach of contract. As a result a right arises in the foreign investor to seek remedies (d) the treaty. Again, the contract which is ordinarily subject to the laws of the host state becomes effectively internationalized as a result of this technique being adopted in the treaty. (4) This internationalization enables the foreign investor to have recourse (e) the remedies that are provided for him in the event of a violation of his rights (f) the treaty. So, crucial to the strategy of protection is the definition of foreign investment to include the contractual rights of the foreign investor in the definition of foreign investment.

Adapted from M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., 2004

Unit Thirty

The OECD Guidelines for Multinational Enterprises

I. Concepts and Principles

The *OECD Guidelines for Multinational Enterprises* contain non-binding recommendations by governments to multinational enterprises operating in or from the 33 adhering countries[1]—the OECD members as well as Argentina, Brazil and Chile. They are complemented by implementation procedures whereby[2] adhering governments agree to promote observance of the Guidelines.

The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises[3]. The Declaration is a balanced framework of OECD instruments designed to improve the international investment climate and to strengthen the basis of mutual confidence between multinational enterprises and the societies in which they operate.

The Guidelines are recommendations jointly addressed by adhering countries to multinational enterprises operating in their territories. They lay down standards for the activities of multinational enterprises and, where relevant, of national enterprises in the different adhering countries. Observance of the Guidelines is voluntary and not legally enforceable[4]. They represent, nevertheless, adhering countries' firm expectations for multinational enterprise behaviour. Although compliance with national law is necessary, this is not necessarily sufficient to observance of the Guidelines. Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and the international agreements to which it subscribes. [5]The Guidelines are not a substitute for national laws, to which multinational enterprises are fully subject. They represent supplementary standards of behaviour of a nonlegal character, particularly concerning the international operations of these enterprises.

The Guidelines do not define the term "multinational enterprises", a concept which embraces a diversity of situations found throughout the business world. Rather, they describe

some general criteria covering a broad range of multinational activities and arrangements. These arrangements can include traditional international direct investment based on equity participation[6], or other means which do not necessarily include an equity capital element. Majority ownership[7] is not the exclusive form of linkage between two companies in different countries which allows one to exercise a significant influence over the activities of others. Accordingly, an entity may be considered part of a multinational enterprise without necessarily being a majority owned subsidiary. The sharing of knowledge and resources among companies or other entities does not in itself indicate that such companies or entities constitute a multinational enterprise.[8]

All entities, including parent companies, local subsidiaries, as well as intermediary levels of the organization[9], are expected to cooperate and assist, as necessary, in observing the Guidelines. To the extent that parent companies actually exercise control over the activities of their subsidiaries, they have a responsibility for observance of the Guidelines by these subsidiaries. Consultation between the parent and its local entities would undoubtedly assist in achieving the purposes of the Guidelines. As long as enterprises can ensure this co-operation and assistance, it would be up to the various entities to decide the division of responsibilities between parent companies and local entities.

The question whether parent companies should assume responsibility for certain financial obligations of subsidiaries as part of good management practice raises complex problems in view of the limited liability principle embodied in adhering countries' national laws. The Guidelines cannot supersede or substitute for national laws governing corporate liability. They do not therefore imply an unqualified principle of parent company responsibility. Nonetheless, in certain cases, parent companies have assumed on a voluntary basis financial responsibility for a subsidiary, and such behaviour may actually be considered good management practice under the Guidelines. This question is especially relevant when discussing changes in the operations of a firm and cooperation between the entities to mitigate resulting adverse effects.

II. General Policies (Commentary)

1. Obeying domestic law is the first obligation of business. The Guidelines are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation

where it faces conflicting requirements.

2. Enterprises are encouraged to co-operate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders[10] in society, which includes the local community as well as business interests, can enrich this process. It is also recognised that governments should be transparent in their dealings with enterprises, and consult with business on these same issues. Enterprises should be viewed as partners with government in the development and use of both voluntary and regulatory approaches (of which the Guidelines are one element) to policies affecting them.

3. There should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development, and the Guidelines are meant to foster complementarities in this regard. Indeed, links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development①.

4. Enterprises should refrain from[11] seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.

Governments recommend that, in general, enterprises avoid efforts to secure exemptions[12] not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation and financial incentives among other issues, without infringing on[13] an enterprise's right to seek changes in the statutory or regulatory framework. The words "or accepting" also draw attention to the role of the state in offering these exemptions. While this sort of provision has been traditionally directed at governments, it is also of direct relevance to MNEs. Importantly, however, there are instances where specific exemptions from laws or other policies can be consistent with these laws for legitimate public policy reasons. The environment and competition policy chapters are examples.

5. Enterprises should support and uphold good corporate governance principles and develop and apply good corporate governance practices.

The paragraph devoted to the role of MNEs in corporate governance gives further impetus to the recently adopted OECD Principles of Corporate Governance. Although primary responsibility for improving the legal and institutional regulatory framework lies with governments, enterprises also have an interest in good governance.

---

① One of the most broadly accepted definitions of sustainable development is in the 1987 World Commission on Environment and Development (the Brundtland Commission): "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

6. Finally, it is important to note that self-regulation and other initiatives in a similar vein, including the Guidelines, should not unlawfully restrict competition, nor should they be considered a substitute for effective law and regulation by governments. It is understood that MNEs should avoid potential trade or investment distorting effects of codes and self-regulatory practices when they are being developed. [14]

Available at http://www.oecd.org/dataoecd/56/36/1922428.pdf

Notes to the Text

[1] **adhering countries** （条约/国际组织的）参加国。

[2] **whereby** 因此；由是。这种连接词有时可以省略不译。

[3] **OECD Declaration on International Investment and Multinational Enterprises** 经济合作发展组织关于国际投资与多国公司的宣言。

[4] **legally enforceable** 在法律上具有强制执行力的。enforce 通常应该翻译为“强制执行”或“强制实施”；只有在少数情形下，才简单翻译为“执行”或“实施”。

[5] **Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and the international agreements to which it subscribes.** 在符合国际法以及国家所签署的国际协定的前提下，各国有权就多国企业在其境内运营的各项条件作出（法律）规定。prescribe 规定（一般为及物动词）；subscribe 签署（文件）。

[6] **equity participation** 股权参与。

[7] **majority ownership** 多数股权持有。

[8] 这一句和上一句从相反的层面展示“多国企业”（一般称为“跨国公司”，相应的英文是 transnational corporations）的判定标准。

[9] **intermediary levels of the organization** 多国企业集团中的中间层公司，比如界乎母公司和孙公司之间的子公司。

[10] **stakeholders** 利益相关者；利害关系人。

[11] **refrain from** 抑制；禁止；尽量克制（做某种事情的冲动）。

[12] **exemption** （法律义务的）豁免。

[13] **infringe on = infringe** 多数情况下。infringe 为及物动词，不加 on 更好，特别是在使用被动语态时。

[14] **It is understood that MNEs should avoid potential trade or investment distorting effects of codes and self-regulatory practices when they are being developed.** 作为

一个共识，在有关规章及企业内部规制的惯例性做法的发展进程中，多国企业应尽力避免这些规章及做法对贸易或投资潜在的扭曲性效果。

Exercises

1. *Fill in the blanks with the given words or terms in proper form (please note that some of the words or terms should NOT be used).*

a. in	b. within	c. restrict	d. power
e. contemplate	f. prescribe	g. provide	h. subject to
i. impinge on	j. circumscribe	k. right	

The relevance of taking into account established policies of the government in the countries where enterprises operate is clear when a decision is taken to close down a local subsidiary of a multinational enterprise. While not affecting the right of the enterprise to reach decisions with respect to cutting back or terminating operations in a given plant, a prudent company should seek clarification of government policies through advance consultations with the government concerned.

On their part, governments should make sure that their aims and objectives are clear, stable and understandable to management. Although the right of each State to (1) the operating conditions for multinational enterprises (2) its jurisdiction remains unchanged, such laws and policies are (3) international law and international agreements and should respect contractual obligations. They should also be consistent with adhering countries' responsibilities to treat enterprises equitably.

This Guidelines also recommends that multinational enterprises cooperate closely with the local community and business interests and that they allow their various entities freedom to develop and exploit their potential, consistent with the need for specialisation and sound commercial practice (paragraph 3). This argues for a certain amount of integration of the various entities of a multinational enterprise into the economic context of the countries in which they operate. It does not mean that existing structures of multinational enterprises may not be changed, nor does it (4) the freedom of such enterprises to divest as part of global strategies, if this is considered in the best interests of the firm as a whole. However, this freedom is (5) by national law and by a firm's contractual obligations.

The question has been raised whether the Guidelines imply that special consideration be given in cases where an enterprise is considering the closing down of a subsidiary or the transfer of its activities abroad, especially if the particular subsidiary is a profitable one. In practice, the

profitability of a particular entity may be difficult to evaluate due to the different accounting standards and practices used to determine value and future profitability. However, whenever there is clear evidence of the profitability of a particular subsidiary, the company should give special consideration to this fact when (6) the closing down of that subsidiary. This does not restrict the company's (7) to make such a decision which may take account of other factors besides profitability.

2. *Read the following text and translate the underlined sentences into Chinese.*

Adhering Governments

Considering:

- That international investment is of major importance to the world economy, and has considerably contributed to the development of their countries;
- That multinational enterprises play an important role in this investment process;
- That international cooperation can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic, social and environmental progress, and minimise and resolve difficulties which may arise from their operations;
- (1) That the benefits of international co-operation are enhanced by addressing issues relating to international investment and multinational enterprises through a balanced framework of inter-related instruments;

Declare:

Guidelines for Multinational Enterprises	I.	That they jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines, set forth in Annex 1 hereto, having regard to the considerations and understandings that are set out in the Preface and are an integral part of them;
National Treatment	II. 1.	(2) That adhering governments should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or

indirectly by nationals of another adhering government (hereinafter referred to as "ForeignControlled Enterprises") treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as "National Treatment");

2. That adhering governments will consider applying "National Treatment" in respect of countries other than adhering governments;

3. That adhering governments will endeavour to ensure that their territorial subdivisions apply "National Treatment";

4. (3) That this Declaration does not deal with the right of adhering governments to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises;

Conflicting Requirements

III. That they will cooperate with a view to avoiding or minimising the imposition of conflicting requirements on multinational enterprises and that they will take into account the general considerations and practical approaches as set forth in Annex 2 hereto.

International Investment Incentives and Disincentives

IV. 1. That they recognise the need to strengthen their cooperation in the field of international direct investment;

2. (4) That they thus recognise the need to give due weight to the interests of adhering governments affected by specific laws, regulations and administrative practices in this field (hereinafter called "measures") providing official incentives and disincentives to international direct investment;

3. That adhering governments will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available;

Consultation Procedures

V. That they are prepared to consult one another on the above

matters in conformity with the relevant Decisions of the Council;

Review

VI. That they will review the above matters periodically with a view to improving the effectiveness of international economic co-operation among adhering governments on issues relating to international investment and multinational enterprises.

Unit Thirty-one

Nature and Scope of the Conflict of Laws

Ⅰ. The Subject Defined

The conflict of laws is that part of the private law of a particular country which deals with cases having a foreign element. "Foreign element" means simply a contact with some system of law other than that of the "forum", that is the country whose courts are seized of the case. [1] Such foreign elements in the facts of a case are quite commonplace: a contract was made with a foreign company or was to be performed in a foreign country, or a tort was committed there, or property was situated there, or one of the parties is not English.

If a claim is made for damages for breach of a contract made in England between two English companies and to be performed in England, there is no foreign element: the case is not a case in the conflict of laws. It will be dealt with by the English court applying the English internal or domestic law of contract. But if the contract had been made in France between two French companies and was to be performed in France, then the case would be (for an English court, but not for a French court) a case in the conflict of laws, and an English court (in the unlikely event of litigation taking place in England) would apply French law to most of the matters in dispute before it, just as a French court naturally applies French law to all such matters. [2]

If we change the facts once more, and assume that the contract was made in France between an English company and a French company and was to be performed in Belgium, then the case is a case in the conflict of laws not only for an English Court but also for a French court and a Belgian court, and indeed for any court in the world in which the contract is litigated. That court will have to use its "choice of law" rules to decide whether to apply English, French or Belgian law, deciding in effect whether the French or English or Belgian elements are the most significant. [3]

Meaning of "country"

In the conflict of laws, a foreign element and a foreign country mean a non-English element and a country other than England. From the point of view of the conflict of laws, Scotland and Northern Ireland are for most (but not all) purposes as much foreign countries as are France or Germany. More generally, a State in the political sense, or as understood in public international law, may or may not coincide with a country (or "law district" as it is sometimes called) in the sense of the conflict of laws. [4] Unitary States like Sweden, Italy and New Zealand, where the law is the same throughout the State, are "countries" in this sense. England or Scotland, New York or California, although merely component parts of the United Kingdom and the United States, are each a country in the sense of the conflict of laws, because each has a separate system of law.

"Private international law"

The conflict of laws is sometimes known as private international law. This alternative title is potentially misleading, for the conflict of laws is not an international system of law. Public international law is a single system seeking primarily to regulate relations between sovereign States; in theory at any rate, it is the same everywhere. [5] But the rules of the conflict of laws differ from country to country. Nevertheless some overlap exists between public international law and the conflict of laws: for instance, the topics of sovereign and diplomatic immunity from suit and of governmental seizure of private property are discussed in books on the conflict of laws as well as in books on public international law, and many rules of the conflict of laws are derived from international treaties or conventions.

The differences are much greater between the common law countries on the one hand and those in the civil law tradition. Civil law countries include most of the countries of continental Europe, whose law is derived from Roman (and Napoleonic) sources; many of their former colonies in Latin America and elsewhere; and other countries which have chosen to use continental codes as models for their own. The common law uses "domicile" as a personal connecting factor; the civil law tradition prefers nationality. [6] The civil lawyers' devotion to the separation of powers leads to a distrust of judicial discretion, much relied on by common lawyers in the context of jurisdiction. As we shall see, the development of European law is leading to a reception of civil law ideas in some parts of the English conflict of laws.

Ⅱ. The Questions to Be Answered

The questions which the rules of the conflict of laws seek to answer are of two main types: first, has the English court jurisdiction to determine this case? And secondly, if so, what law will it apply?[7] Logically they must be addressed in that order, for if the English court has no jurisdiction it follows that the second, choice of law, question cannot arise. In practice this logical purity does not quite hold: it can often make sense to ask the question "what law governs this contract" quite independently of any jurisdictional issue.

There may sometimes be a third question, namely, will the English court recognise or enforce a foreign judgment purporting to determine the issue between the parties?[8] Of course this third question arises only if there is a foreign judgment, and thus not in every case. But the first two questions arise in every case with foreign elements, though the answer to one of them may be so obvious that the court is in effect concerned only with the other. The law of every country has rules for dealing with these questions, the rules of the conflict of laws (or, less formally "conflicts rules"), in contrast to its domestic or internal law. In current academic debate and in litigation practice, the issues as to jurisdiction feature very prominently. One reason is to be found in the fact that the rules of the conflict of laws found in England (and in many other common law countries) differ from those adopted in many continental European countries (and others in the civil law tradition) in one important respect. There are many situations in which, if the English court has jurisdiction, it will apply English domestic law. This is true, for example, of most issues in the field of family law. Conversely, there are many situations in which, if a foreign court has jurisdiction according to English rules of the conflict of laws, its judgment or decree will be recognised or enforced in England, regardless of the grounds on which it was based or the choice of law rule which it applied. Thus, in the English conflict of laws, questions of jurisdiction frequently tend to overshadow questions of choice of law. Or, to put it differently, it frequently happens that if the question of jurisdiction (whether of the English or of a foreign court) is answered satisfactorily, the question of choice of law does not arise.

More modern developments have heightened awareness of the importance of jurisdictional issues. The negotiation of international conventions on jurisdiction and the recognition and enforcement of judgments, notably the Brussels and Lugano Conventions to which most European countries are party, has led to a re-examination (and in some cases the abandonment) of some of the more extensive assertions of jurisdiction which once passed largely unquestioned. The complexity of much civil litigation, which may involve a number of corporate parties each

operating in many different countries, provides claimants with a range of possible fora and much consideration has to be given in practice to the relative advantages of one forum over another.[9]

Adapted from the late J. H. C. Morris and David McClean,
The Conflict of Laws, 5th ed., 2000

Notes to the Text

[1] **"Foreign element" means simply a contact with some system of law other than that of the "forum", that is the country whose courts are seized of the case.** "涉外因素"仅仅意味着与法院地法以外的某种法律体系的一种联系，法院地即受理案件的法院所在国。forum 法庭，诉讼地。其复数为 fora 。

本文讲述的是英国的冲突法规则。冲突法 conflicts law，或称法律冲突法（law of conflict of laws），其另一名称为国际私法（private international law）。

[2] **But if the contract had been made in France between two French companies and was to be performed in France, then the case would be (for an English court, but not for a French court) a case in the conflict of laws, and an English court (in the unlikely event of litigation taking place in England) would apply French law to most of the matters in dispute before it, just as a French court naturally applies French law to all such matters.** 但若此合同是由两个法国公司在法国签订并在法国履行，那么该案件（对英国法院而不是对法国法院而言）就是一起冲突法案件，英国法院（在诉讼不可能发生在英国的情况下）将适用法国法来处理它受理的这起纠纷的大多数问题，正如法国法院对该案件自然会将法国法适用于所有这些问题一样。

（同段上文）internal law 和 domestic law，均可译为"内国法"。damages 表示"损害赔偿（金）"，注意其单复数的区别。如：civil damage 民事损害，civil damages 民事赔偿金。在法律英语中，名词单复数形式具有不同含义的词还有：security 安全，担保；securities 证券；equity 公平，衡平法；股票，股本；equities 证券，等等。

[3] **That court will have to use its "choice of law" rules to decide whether to apply English, French or Belgian law, deciding in effect whether the French or English or Belgian elements are the most significant.** 该法院得适用其法律选择规则，来判断实际上法国因素、英国因素还是比利时因素最为重要，从而决定适用英国法、法国法或者比利时法。choice of law 法律的选择，choice of law rules 法律选择规则。

[4] **From the point of view of the conflict of laws, Scotland and Northern Ireland are for most (but not all) purposes as much foreign countries as are France or Germany.**

More generally, a State in the political sense, or as understood in public international law, may or may not coincide with a country (or "law district" as it is sometimes called) in the sense of the conflict of laws. 从冲突法的角度来说，苏格兰和北爱尔兰在大多数（但并不是所有）情况下如同法国、德国那样被视为外国来对待。更一般地来讲，一个政治意义上或者国际公法意义上的国家与冲突法意义上的国家（有时也被称为"法域"）可能一致，也可能不一致。law district 法域，等同于 jurisdiction。

同段下文的 unitary state 指"单一国（单一制国家）"，与其相对应的是 composite state 复合国家。

[5] **Public international law is a single system seeking primarily to regulate relations between sovereign States; in theory at any rate, it is the same everywhere.** 国际公法是试图主要调整主权国家之间关系的单一体系；在理论上，它在世界任何地方都是相同的。

（同段下文）immunity 意为"免除，豁免，豁免权"，如：immunity from suit 诉讼豁免，sovereign immunity 主权豁免，diplomatic immunity 外交豁免权。governmental seizure of private property，即政府没收私人财产。

[6] **The common law uses "domicile" as a personal connecting factor; the civil law tradition prefers nationality.** 普通法系使用"住所"作为属人法的连接因素；而大陆法系则使用"国籍"作为连接因素。domicile 住所（即久住之处），与之相关的词是 residence 居所（暂住或客居之地）。connecting factor 连接因素（同"连结点" point of contact）。

[7] **The questions which the rules of the Conflict of laws seek to answer are of two main types: first, has the English court jurisdiction to determine this case? And secondly, if so, what law will it apply?** 冲突法规则要回答的问题有两大类：第一类问题是英国法院有无裁定这一案件的管辖权？第二类问题是如果有管辖权，英国法院将适用什么法律来判案？

[8] **There may sometimes be a third question, namely, will the English court recognise or enforce a foreign judgment purporting to determine the issue between the parties?** 有时可能会出现第三个问题，即英国法院是否承认或执行一份旨在裁决当事人间争议的外国判决？

[9] **The complexity of much civil litigation, which may involve a number of corporate parties each operating in many different countries, provides claimants with a range of possible fora and much consideration has to be given in practice to the relative advantages of one forum over another.** 涉及许多跨国公司作为当事方的民事诉讼相

当复杂，这使得原告有了许多可以选择的诉讼地，在实践中也不得不考虑选择在哪个法院主张权利会更为有利的问题。

Exercises

1. *Which of the following statements are **NOT** true according to the text?*

(1) The conflict of laws is that part of the public law of a country which handles cases with a foreign element.

(2) If a claim is made for damages for breach of a contract made in France between two French companies and to be performed in England, the case is not a case in the conflict of laws.

(3) England or Scotland, New York or California are each a country in the sense of the conflict of laws, because the law is the same throughout the county or state.

(4) Although private international law differs from public international law, there is some overlap between them.

(5) Questions of choice of law often make questions of jurisdiction less important in the English conflict of laws.

(6) Each of the American and Australian states and each of the Canadian provinces is each a separate country in the conflict of laws.

(7) Private international law is not an international system of law because their rules differ from country to country.

(8) The question of recognition and enforcement of foreign judgments doesn't sometimes arise in cases of private international law.

(9) Today jurisdictional issues are more and more important in cases with a foreign element.

2. *Answer the following questions.*

(1) If a case is the one in the conflict of laws not only for an English Court but also for a French court and a Belgian court, what rules will that court have to use to decide whether to apply English, French or Belgian law?

(2) What main difference is there between private international law and public international law?

(3) Give some examples to explain the differences between the English conflict of laws and the French conflict of laws.

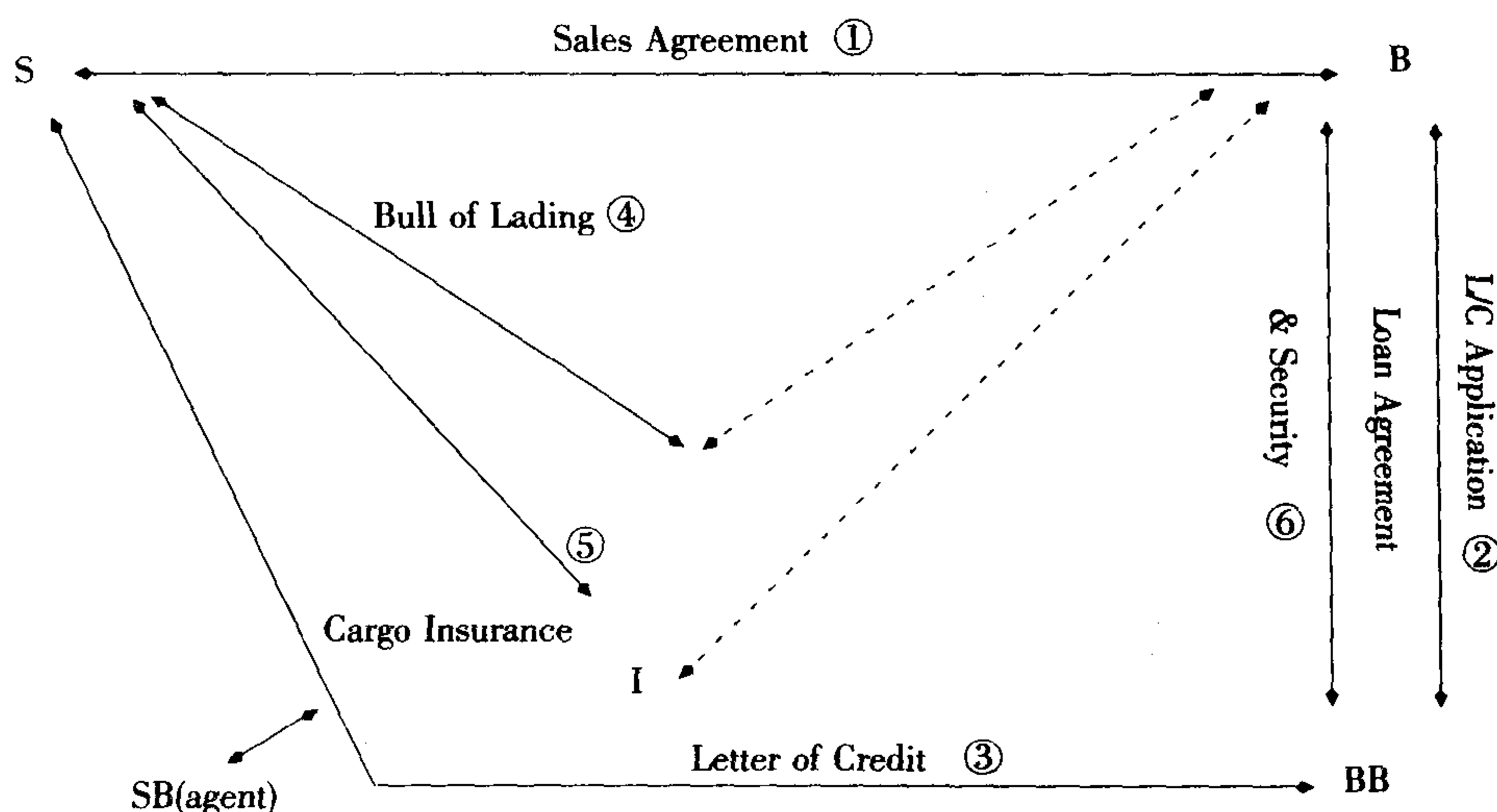
(4) What is the scope of the English conflict of laws?

Unit Thirty-two

International Sales Transaction (I)

I. Outline of the International Sales Transaction

When a seller sells to a buyer located in the same country, the transaction is often quite simple, especially if the seller delivers the goods or the buyer picks them up and the price is then paid immediately. In a sale across national boundaries, however, a number of factors usually complicate the transaction, which typically involves a cluster of contracts. For example, when a buyer in New York purchases shirts from a seller in Sri Lanka, a simultaneous exchange[1] is unlikely to be practicable and there may be doubts about the viability of a court action to enforce the contract. Consequently, the seller may be afraid to ship before getting paid, and the buyer may be afraid to pay before the goods are shipped. To rescue the transaction, international business has evolved the letter of credit, requiring the seller to ship before payment, but then assuring the seller of payment by a local bank immediately on presentation of acceptable proof of shipment[2]. Such a typical international sales transaction might be diagrammed as follows:



S = Seller; B = Buyer; SB = Seller's Bank; BB = Buyer's Bank; C = Carrier; I = Insurer. Solid lines indicate direct contractual relationships, dotted lines indicate beneficiaries of a contract.

Here we see at least six separate contracts:

(1) The basic sales agreement between Seller in Country A and Buyer in Country B;

(2) The agreement between Buyer and Buyer's Bank for the issuance[3] of a letter of credit on Buyer's behalf;

(3) The letter of credit itself, whereby Buyer's Bank commits itself to pay Seller for the goods upon certain conditions; this letter is probably forwarded through Seller's Bank (or a bank near Seller) which will act as the agent of Buyer's bank[4];

(4) Seller's contract with Carrier[5] for shipping the goods to Buyer, which is usually in the form of a bill of lading[6];

(5) Seller's contract with Insurer[7] for insurance of the cargo;

(6) Perhaps a loan agreement between Buyer and Buyer's bank to provide Buyer with the funds to pay for the goods, which likely gives a security interest[8] in the goods Buyer is buying to the bank.

In addition to the arrangements depicted in the diagram, Seller will forward a "draft" (bill of exchange)[9] with the bill of lading, which will create further contractual obligations[10] when accepted by Buyer or Buyer's Bank. Furthermore, Seller may have its own financing arrangements related to the transaction (e. g., Seller may have borrowed money on the strength of[11] Buyer's order in order to process and ship the goods). Buyer may have contracted for an independent inspection company to certify the quality of the goods at the time they are shipped. Finally, several carriers or intermediaries such as freight forwarders[12] may be involved in shipping the goods. Each additional participant raises the possibility of additional contractual relations.

To add to the complexity of transaction, there may be governmental requirements and regulations that affect the various contracts mentioned above. For instance, tariff levels obviously affect Buyer's purchase decision. But in addition, government quotas may prohibit Buyer from importing, or Seller from exporting. Laws may affect the shipping contract and the power of banks to issue letters of credit and to finance international trade. Exchange controls[13] may limit Buyer's ability to pay for the goods. Special certificates may be required by customs authorities to enable them to enforce applicable laws, such as health and safety regulations. Finally, it should be obvious that conflict of laws questions arise with respect to many potential areas of dispute.

II. The Sales Contract

The Convention on Contracts for the International Sale of Goods (CISG) is an important development in international sales law for U. S. companies. It applies automatically to all contracts for the sale of goods between two countries that are parties to the Convention unless the parties to the contract expressly opt out of having it apply[14] or choose another applicable law. Among the important differences between the Convention and the UCC are (i) a contract is formed at the time the acceptance is received by the offeror, not when it is transmitted by the offeree;[15] (ii) if the price is not specified, no contract is formed;[16] (iii) an acceptance must mirror the terms of the offer for a contract to be formed, otherwise the acceptance will be viewed as a counteroffer;[17] (iv) the extent and conditions under which an offer may be treated as irrevocable differ; (v) certain provisions regarding risk of loss when goods are changing hands differ; and (vi) certain aspects of the seller's right to cure[18] differ. Article 6 of the Convention permits the parties to a contract subject to the Convention's rules to agree to vary any particular provision of the Convention.

The Convention is an effort to standardize the basic rules of contract law for international transactions, thereby to increase the predictability of dispute outcomes and to reduce the costs to parties of negotiating and drafting international contracts. Similar efforts have been undertaken to standardize the terms of international contracts, so that parties can without great ado[19] invoke a sensible allocation of risks and responsibilities between them simply by referring to a standardized terminology. The International Chamber of Commerce (ICC) has been the forefront of this effort, publishing detailed definitions of some of the principal terms used in these transactions, most recently as Incoterms 2000. They may be adopted expressly by the parties, and are often accepted in any event by courts in diverse countries as representing the common meaning of a particular term. Perhaps the best known, if not the most common, type of sales contract is the CIF contract.

A CIF contract is a shipment contract, not a destination contract.[20] As the Incoterms definition makes clear, the seller's obligation under a CIF contract is to arrange for insurance and freight and to deliver the goods to the carrier. The seller takes the risk that shipping or insurance costs will be higher than anticipated, but the seller is not responsible for seeing that the goods actually reach their intended destination. If they are lost, the risk of loss falls on the buyer (and is hopefully covered by the insurance arranged by seller). A CIF contract is often framed as a contract for the delivery of documents rather than one for the delivery of goods.[21] When the seller

presents to the buyer or the buyer's agent evidence of insurance and a document of title[22] from the carrier covering the goods, the buyer is normally obligated to pay for the goods even though they have not arrived and the buyer has had no opportunity to inspect them. If non-conforming goods are shipped, the buyer will be out-of-pocket until a settlement is reached. Buyers sometimes try to reduce this risk by requiring, as a condition to payment, a certificate from an independent inspection agency that the goods conform to the contract. In light of the many events—wars, embargoes, etc. —that may prevent delivery of goods after shipment in an international transaction, the risk-of-loss allocation to the buyer may be significant. These risks occur not infrequently. Indeed many of the classic cases in contract law on impossibility or frustration involve international sales contracts.

Adapted from J. H. Jackson,
Legal Problems of International Economic Relations, 4th ed., 2002

Notes to the Text

[1] **simultaneous exchange** 即时交易。

[2] **but then assuring the seller of payment by a local bank immediately on presentation of acceptable proof of shipment** ……在卖方出示银行可接受的装运证据（这里主要指"已装船清洁提单"——编者注）时即刻由一家当地银行向卖方保证付款。

[3] **issuance** 开具（信用证）。

[4] **this letter is probably forwarded through Seller's Bank (or a bank near Seller) which will act as the agent of Buyer's bank...** 该信用证很可能是通过卖方所在地的银行（或一家距离卖方较近的银行）以买方银行的代理人的身份发送给卖方。

[5] **carrier** 承运人。

[6] **bill of lading** 提单，一般简写为 B/L。

[7] **insurer** 保险人（多数情形为法人，即保险公司）。

[8] **security interest** 担保利益（指以货物为担保物以融资）。

[9] **draft (bill of exchange)** 汇票。

[10] **contractual obligations** 合同性义务；合同性责任；合同之债。在英美法上，"义务"与"责任"之间的区分并不严格；obligation 可有"义务"、"责任""债"等译法。

[11] **on the strength of = on the basis of; relying on** 依赖……，凭借……。

[12] **freight forwarder** 运费代理人；货运代理人；货运转运人。

[13] **exchange control** 外汇管制。

[14] **opt out of having it apply** 选择不适用该公约。

[15] 此句展示的是英美法与大陆法在承诺生效（暨合同成立）方面所采取的到达主义与投邮主义之争。

[16] 此句展示的是所谓“开口价”合同的效力问题。多数人主张 CISG 与 UCC 在这方面是有区别的。

[17] 此句展示的是合同法上著名的所谓“镜像原则”。

[18] **right to cure** （违反合同的）救济权利。

[19] **ado** 纷乱，忙乱。这里的 without great ado 是插入语。

[20] 装船合同（shipment contract）与到货合同（destination contract）之间的区别在于前者卖方履行合同义务的地点在装运港，而后者则在目的地。

[21] 这句展示的是所谓“象征性交货”，即，卖方交单即为履行了交货义务，即使货物在运输途中灭失或受损，买方也不能拒绝付款赎单。Incoterms 中的 FOB、FCA 和 C 组术语即属于“象征性交货”术语。

[22] **document of title** 权益凭证（这里一般指已装船清洁提单）。

Exercises

1. *Read the following passage, fill in the blanks with proper prepositions, and translate the underlined sentences into Chinese.*

The Vienna Convention on Contracts for the International Sales of Goods, which was adopted (a) a United Nations Conference in 1980 and came (b) force for the United States in 1988, seeks to set the substantive law governing the sale of goods between one country and another. (1) The provisions were laid down after years of negotiation and attempt to strike a balance between the different national solutions for questions.

The Convention applies when the places of business of the buyer and the seller are in different Contracting States or when the rules of private international law lead to the application of the law of a Contracting State. An important fact to note about the CIGS is that (c) Article 6, the (2) "parties may exclude the application of this Convention or... derogate from or vary the effect of any of its provisions." Thus, use of the Convention is (d) effect an option of the contracting parties rather than a mandatory term.

Another issue is that the arbitrator (s) should apply lex mercatoria. This term suggests that

there is out there a sort of common law of commercial practice (e) which operative rules can be derived. It harks back to pre-modern times when merchants operated under generally shared commercial understandings, such as the rules of admiralty and also rules about sales and other transactions. Before the nineteenth century, there was no very sharp division between international law as the law governing relations between states and international law as including rules that bound private parties in their international dealings. (3) Critics say that there simply is not a sufficiently uniform practice on rules likely to be seriously disputed by the parties to support such an exercise and that attempts to develop such a set of rule will lead to indeterminacy and confusion.

Unit Thirty-three

International Sales Transaction (II)

III. Financing Exports: The Letter of Credit

If a seller of goods trusts the buyer, the seller may ship the goods to the buyer and bill the buyer on open account[1]. Within the United States most ordinary sales are made this way. But in the international trade transaction this mode of business is much riskier. A seller can minimize those risks in this way: require the buyer to arrange for a bank, which the seller is willing to trust, to promise the seller that the bank, on its own account, will pay the seller when the seller presents acceptable shipping documents. This describes the typical letter of credit transaction. It is easy to see how the letter of credit enables the parties to overcome their fears about dealing with each other in an environment where a lawsuit against one by the other is impractical—the buyer does not have to worry that the foreign seller will take the money and ship nothing because the obligation to ship is a condition precedent to payment; the seller does not have to worry that the buyer will refuse to pay after the goods have been shipped because the letter of credit represents a promise of payment enforceable against a local bank. The convenience and relative safety of this mode of dealing has made it the backbone of international commerce.

The steps involved in the typical letter of credit transaction are as follows: Seller (S) and Buyer (B) contract for S to ship widgets, and B to pay for them, and as part of this contract B promises to open an irrevocable letter of credit (L/C) in S's favor. The following occurs:

(1) B goes to its bank in Paris and asks it to open the L/C. If the bank does not trust B it may ask for a deposit, but usually B is a regular customer of the bank. The bank will then open the L/C and advise S that the credit is open.

(2) S, thus assured, ships the goods and prepares the documents.

(3) S will want to present the documents in its own locale. If B's bank has a branch there, fine. If not, B's bank can send the L/C to a correspondent bank[2] in S's locale to handle the presentment. In this case only B's bank in Paris stands behind the L/C.

(4) If S prefers to trust only its local bank, B may open the L/C at a distance with S's bank. But often, S's bank doesn't know B. So B opens the L/C at its own bank, and then B's bank opens a new L/C with S's bank, in favor of S. This is a "confirmed" letter of credit.

(5) S is called the "beneficiary" in this transaction.

(6) The banks involved charge a modest commission for their various services. The higher the risk that the bank assumes, the higher the commission (e. g., to confirm an L/C is riskier than merely transmitting an advice of credit.)

In an effort to standardize practices in the letter of credit area, the ICC has published and from time to time updates the Uniform Customs and Practice for Documentary Credits ("UCP"). The vast majority of letters of credit incorporate the UCP. [3] Key provisions of UCP are as follows:

Article 2 Meaning of Credit

For the purposes of these Articles, the expressions "Documentary Credit(s)" and "Standby Letter(s) of Credit" (hereinafter referred to as "Credit(s)"), mean any arrangement, however named or described, whereby a bank (the "Issuing Bank") acting at the request and on the instructions of a customer (the "Applicant") or on its own behalf,

i. is to make a payment to or to the order of a third party (the "Beneficiary"), or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary,

or

ii. authorizes another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)),

or

iii. authorizes another bank to negotiate. [4]

For the purposes of these Articles, branches of a bank in different countries are considered another bank. [5]

Article 3 Credits v. Contracts

a. Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any references whatever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defenses by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.

b. A Beneficiary can in no case avail himself of the contractual relationships existing between

the banks or between the Applicant and the Issuing Bank. [6]

Article 4 Documents v. Goods /Service /Performances

In Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate. [7]

Article 7 Advising Bank's Liability

a. A Credit may be advised to a Beneficiary through another bank (the "Advising Bank") without engagement on the part of the Advising Bank, but that bank, if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the Credit which it advises. If the bank elects not to advise the Credit, it must so inform the Issuing Bank without delay.

b. If the Advising Bank cannot establish such apparent authenticity, it must inform, without delay, the bank from which the instructions appear to have been received that it has been unable to establish the authenticity of the Credit, and if it elects nonetheless to advise the Credit, it must inform the Beneficiary that it has not been able to establish the authenticity of the Credit. [8]

Article 9 Liability of Issuing and Confirming Banks

a. An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with[9]:

i. if the Credit provides for sight payment—to pay at sight[10];

ii. if the Credit provides for deferred payment—to pay on the maturity date(s) determinable in accordance with the stipulations of the Credit;

iii. if the Credit provides for acceptance:

a) by the Issuing Bank—to accept Draft(s) drawn by the Beneficiary on the Issuing Bank and pay them at maturity[11], or

b) by another drawee bank[12]—to accept and pay at maturity Draft(s) drawn by the Beneficiary on the Issuing Bank in the event the drawee bank stipulated in the Credit does not accept Draft(s) drawn on it, or to pay Draft(s) accepted but not paid by such drawee bank at maturity;

iv. if the Credit provides for negotiation—to pay without recourse to drawers and/or bona fide

holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as an additional Document (s).[13]

……

Adapted from J. H. Jackson,
Legal Problems of International Economic Relations, 4th ed., 2002

Notes to the Text

[1] **bill the buyer on open account** 在往来帐户上给买方开列帐单。

[2] **correspondent bank** 联系行；往来行；通知行。与信用证有关的术语还包括下文的 issuing bank 开证行；confirmed letter of credit 保兑信用证；irrevocable letter of credit 不可撤销信用证；beneficiary 受益人；commission 佣金；advice of credit 通知信用证，等等。

[3] 信用证适用 UCP 的方式一般是列明"根据 UCP 开立"的字样，如"The credit is subject to UCP 1993 Revision ICC Publication No. 500."预计 2007 年 UCP600 将取代现行 UCP500，相应的条文也将有所改动。

[4] 第 2 条是关于信用证性质的条款。可译为：信用证是指一项约定，根据此约定，银行（开证行）依照客户（申请人）的要求和指示，或代表它自己，在符合信用证条款的情况下，凭规定的单据，向第三人（受益人）或其指定人付款，或承兑受益人开立的汇票并且付款；或授权另一银行凭规定的单据付款，或承兑这种汇票并且付款；或授权另一银行议付。

Documentary Credit，商业跟单信用证；Standby Letter of Credit，备用信用证；arrangement，此处译为"约定"比较妥帖；the "Applicant"，开证申请人，即基础合同中的买方；the "Beneficiary"，受益人，即基础合同中的卖方。

[5] 此句与公司法中"总公司——分公司"之间法律关系的原理是相违背的；但这也恰恰是信用证业务和国际银行业运作的必需。

[6] 第 3 条规定的是著名的信用证独立性原则。该条阐释的要点包括：（1）信用证独立于开证申请人与受益人之间的基础买卖合同；（2）信用证独立于开证申请人与开证行之间的合同；（3）信用证中含有关于基础合同的任何援引，也不能使该基础合同约束信用证交易的当事人；（4）受益人不能利用其他当事人之间存在的合同关系寻求信用证规定之外的权益。"undertaking"在 UCP 中一般译为"承诺"、"保证"。

[7] 第4条规定的是著名的信用证抽象性原则，说明信用证交易是纯粹的单证交易。

[8] 第7条的要点包括：（1）通知行应合理谨慎地核验信用证的表面真实性；（2）通知行与受益人之间不存在合同关系，无须受信用证允诺的约束。

engage，保证；约束；允诺。apparent authenticity 表面真实性。establish 证实。

[9] **An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with:** 不可撤销信用证，在规定的单据提交给被指定银行或开证行，并且信用证条款和条件在符合下列……情形时，构成开证行的一项确定承诺。

[10] **pay at sight** 即期付款。

[11] **if the Credit provides for acceptance: a) by the Issuing Bank—to accept Draft (s) drawn by the Beneficiary on the Issuing Bank and pay them at maturity** 若信用证由开证行承兑——则承兑受益人开立的以开证行为付款人的汇票，并于到期日付款。

[12] **drawee bank** 票据付款行

[13] **if the Credit provides for negotiation—to pay without recourse to drawers and/or bona fide holders, Draft (s) drawn by the Beneficiary and/or document (s) presented under the Credit. A Credit should not be issued available by draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as an additional Document(s).** 如系议付信用证——则支付受益人开立的汇票及/或信用证项下提交的单据，并对出票人及/或善意持有人无追索权。信用证不应规定开立以开证申请人为付款人的汇票，如果信用证要求以开证申请人为付款人的汇票，银行将视该汇票为附加的单据。

"信用证不应规定开立以开证申请人为付款人的汇票"，直接体现的是信用证基本法律特征是彻底地以银行信用替代买方的商业信用。negotiation 议付。议付行（negotiating bank）的地位很特殊，议付行对受益人的付款，在中国的银行实务中称为"押汇"；议付行有权不议付，受益人在这种情况下只能向开证行直接交单。

Exercises

1. *Read the following articles and translate them into Chinese.*

The Application and Issuance of the Credit

(1) The terms of a credit are independent of the underlying transaction even if a credit

expressly refers to that transaction. To avoid unnecessary costs, delays, and disputes in the examination of documents, however, the applicant and beneficiary should carefully consider which documents should be required, by whom they should be produced, and the time frame for presentation.

(2) The applicant bears the risk of any ambiguity in its instructions to issue or amend a credit. Unless expressly stated otherwise, a request to issue or amend a credit authorizes an issuer to supplement or develop the terms in a manner necessary or desirable to permit the use of the credit.

(3) The applicant should be aware that the UCP contains Articles such as Articles 13, 20, 21, 23, 24, 26, 27, 28, 39, 40, 46 and 47 that define terms in a manner that may produce unexpected results unless the applicant fully acquaints itself with these provisions. For example, a credit requiring presentation of a marine bill of lading and containing a prohibition against transhipment will, in most cases, have to exclude UCP 500 sub-Article 23 (d) to make the prohibition against transhipment effective.

(4) A credit should not require presentation of documents that are to be issued and/or countersigned by the applicant. If a credit is issued including such terms, the beneficiary must either seek amendment or comply with them and bears the risk of failure to do so.

(5) Many of the problems that arise at the examination stage could be avoided or resolved by careful attention to detail in the underlying transaction, the credit application, and issuance of the credit as discussed.

Unit Thirty-four

Types and Rules of International Commercial Arbitration

Dispute resolution in international business transactions runs the gamut from friendly consultations to litigation everywhere. In between nonbinding conciliation and mediation do their best at facilitating a compromise, an approach common to Asia. [1] In between also lies international commercial arbitration (ICA), a binding alternative to days in court. The volume of ICA has grown enormously in recent decades, particularly in the Americas, Europe and the Middle East.

The ultimate forum selection clause is one that chooses no Court at all, but selects an alternate dispute resolution mechanism, such as an arbitration tribunal. [2] For a long period of time, the courts resisted validating such clauses, holding that they deprived the parties of due process of law (a reaction one might expect toward a competitor). However, legislatures were far more sympathetic to arbitration, and around the turn of the century began to enact statutes validating arbitration clauses. The issue now is firmly settled. In addition to arbitration, there are many other even less formal alternative dispute resolution mechanisms. The mini-trial, for example, comes in a variety of packages, each with a different impact on resolution of the dispute. It can be nonbinding if used with a "neutral advisor"; it can be semi-binding if its results are admissible in later judicial proceedings; or it can be binding before a court appointed master.

Types of International Commercial Arbitrations. There are two distinct types of international commercial arbitrations: *ad hoc* and institutional. *Ad hoc* arbitrations involve selection by the parties of the arbitrators and rules governing the arbitration. [3] The classic formula involves each side choosing one arbitrator who in turn chooses a third arbitrator. The *ad hoc* arbitration panel selects its procedural rules (such as the UNCITRAL Arbitration Rules). *Ad hoc* arbitration can be agreed upon in advance or, quite literally, selected *ad hoc* as disputes arise.

Institutional arbitration involves selection of a specific arbitration center or "court," often accompanied by its own rules of arbitration. [4] Institutional arbitration is in a sense prepackaged, and the parties need only "plug in" to the arbitration system of their choice. There are numerous

competing centers of arbitration, each busy marketing its desirability to the world business community. Some centers are longstanding and busy, such as the International Chamber of Commerce "Court of Arbitration" in Paris which has its own Rules of Arbitration. Other centers are more recent in time and still struggling for clientele, such as the Commercial Arbitration and Mediation Center for the Americas (CAMCA).

Ad hoc arbitration presupposes a certain amount of goodwill and flexibility between the parties. It can be speedy and less costly than institutional arbitration. The latter, on the other hand, offers ease of incorporation in an international business agreement, supervisory services, a stable of experienced arbitrators and a fixed fee schedule. The institutional environment is professional, a quality that sometimes can get lost in *ad hoc* arbitrations. Awards from well established arbitration centers (including default awards) are more likely to be favorably recognized in the courts if enforcement is needed. Many institutional arbitration centers now also offer "fast track" or "mini" services to the international business community.

Uncertainty about identity of the country and the court in which a dispute may be heard, about procedural and substantive rules to be applied, about the degree of publicity to be given the proceedings and the judgment, about the time needed to settle a dispute, and about the efficacy which may be given to a resulting judgment all have combined to make arbitration the preferred mechanism for solving international commercial disputes. Some Western European countries long have been accustomed to arbitration (e. g., see English Arbitration Act of 1889 and English Arbitration Act of 1950, as amended by Arbitration Act of 1979); the London Court of Arbitration, a private arbitration institution, has existed since 1892. The United States has had a Federal Arbitration Act since 1947. Arbitration in international commercial contracts is favored by the People's Republic of China, if mediation and conciliation falls, either through the Chinese International Economic and Trade Arbitration Commission (CIETAC) or the Chinese Maritime Arbitration Commission (MAC). [5] Most of the nations of the former Soviet Union also favor arbitration, and have organizations similar to the Chinese CIETAC and MAC. In terms of volume, CIETAC is now the world's largest arbitration center.

The Japan Commercial Arbitration Association has been active since 1953. Virtually all countries in Africa have arbitration statutes. Latin America, historically disadvantaged in many arbitral awards, increasingly is accepting arbitration. For example, the 1975 Inter-American Convention on International Commercial Arbitration provides, in part, that "The Governments of the Member States of the Organization of American States... have agreed that... an agreement in which parties undertake to submit to arbitral decision any differences... with respect to a commercial transaction is valid." The 1979 Inter-American Convention on Extraterritorial Validity

of Foreign Judgments and Arbitral Awards expands upon the scope of the 1975 Convention. [6]

Arbitration Rules and Local Law: The Swedish Example. Centers for international arbitration include Geneva, London, New York, Paris, and Stockholm; arbitration associations at such places have adopted fairly settled rules for conducting arbitrations. Some typical considerations surrounding an arbitration may be illustrated by traditional Swedish arbitral rules. Sweden is a party to the New York Convention.

A valid arbitration in Sweden, whether or not involving foreigners, may proceed only in accordance with applicable Swedish law (including the 1929 Arbitration Act and the 1929 Act Concerning Foreign Arbitration Agreements and Awards). Swedish law has granted parties considerable leeway in deciding whether to create their own "ad hoc" rules for arbitration, whether to use the rules of the Swedish Chamber of Commerce Arbitration Institute, or whether to use some other set of preexisting arbitral rules. [7]

However, Swedish law has also provided that there are limitations upon the power of persons to specify for themselves what rules should govern their contractual relationship (including aspects of dispute settlement). As between two contracting parties, many provisions of Swedish law may be excluded from usual applicability to a commercial relationship (such excludable legal rules are called "*jus dispositivum*"), but the applicability of certain legal rules may not be excluded by the parties (such non-excludable legal rules are called "*jus cogens*"). [8]

The *jus cogens/jus dispositivum* dichotomy is found in the law of many European countries. It is also found in the United States Uniform Commercial Code and lies underneath the rationales of United States cases which had held that issues of antitrust liability could not be arbitrated. The dichotomy's relevance to arbitration results in a conclusion that any arbitration rules chosen by parties to govern their dispute may not be honored in Sweden if such rules contravene a non-excludable provision of Swedish law. [9] For example, notwithstanding that parties may desire otherwise, in Sweden it has been a non-excludable rule that "when there are several arbitrators, one of them shall be chairman of the tribunal".

Swedish law has permitted an arbitration to be held in Sweden if the parties specify Sweden as the locale for arbitration even though (subject to overriding *jus cogens*) the parties have specified that some procedural rules other than those of the Stockholm Chamber of Commerce should apply or have specified that substantive law other than Swedish law should govern the resolution of a dispute. [10] To the extent that issues of substantive law may raise further "conflict of laws" (choice of law) issues, Swedish law has usually given effect to a choice of law clause drafted by the parties. If the parties have not drafted such a clause into their contract, Swedish conflict of laws rules may determine the applicable substantive law.

A Swedish arbitration begins with a written "request for arbitration" (the demand), which must include an unequivocal statement that the party desires arbitration and which must serve clear notice of the issues upon which an arbitration decision is requested. Service of the request must be made upon the other party in accordance with law. Qualified arbitrator(s) next must be chosen. If there is an issue about the validity of the underlying contract which provides for arbitration, that issue may be addressed properly to the arbitrators although the question may be raised concurrently in an appropriate Swedish court. [11] Other preliminary steps, such as an attachment of property in aid of execution pending outcome of the arbitration or a challenge to the competence of an arbitrator, may occur before the arbitration commences.

Adapted from Ralph H. Folsom, Michael Wallace Gordon and John A. Spanogle, Jr., *International Business Transactions*, 2nd. ed., 2001

Notes to the Text

[1] **In between non-binding conciliation and mediation do their best at facilitating a compromise, an approach common to Asia.** 亚洲普遍采用的方法，是在没有约束力的和解与调停之间尽可能达成妥协。

[2] **The ultimate forum selection clause is one that chooses no Court at all, but selects an alternate dispute resolution mechanism, such as an arbitration tribunal.** 最终的"选择法庭条款"根本没有选定法庭，而是选择一种解决纠纷的机制，如仲裁庭。
(同段下文) dispute resolution mechanism 争端解决机制。arbitration clause 仲裁条款。judicial proceedings 法律诉讼，司法程序。due process of law 正当法律程序。

[3] ***Ad hoc* arbitrations involve selection by the parties of the arbitrators and rules governing the arbitration.** 临时仲裁需要由当事人选择仲裁员及调整仲裁的规则。
ad hoc [拉丁文] 特设，专设，临时。如：*ad hoc* arbitration 临时仲裁，*ad hoc* agreement 特别协定，*ad hoc* court 特设法院（法庭），*ad hoc* judge 专案法官。
(同段下文) panel 小组；procedural rule 程序规则，与之相对的是 substantive rule 实体规则。
UNCITRAL Arbitration Rules 联合国国际贸易法委员会仲裁规则，UNCITRAL 的全称为 United Nations Commission on International Trade Law。

[4] **Institutional arbitration involves selection of a specific arbitration center or "court," often accompanied by its own rules of arbitration.** 机构仲裁需要选择特定的仲裁中

心或“仲裁院”，这些仲裁机构经常附有自己的仲裁规则。

institutional arbitration 机构仲裁。

（同段下文）the International Chamber of Commerce “Court of Arbitration” 国际商会“仲裁院”。

下段的 default award 表示“缺席裁决”。

[5] **Arbitration in international commercial contracts is favored by the Peoples Republic of China, if mediation and conciliation falls, either through the Chinese International Economic and Trade Arbitration Commission (CIETAC) or the Chinese Maritime Arbitration Commission (MAC).** 中华人民共和国赞成就国际商事合同争议进行仲裁，在调停与和解失败的情况下，可以通过中国国际经济与贸易仲裁委员会或中国海事仲裁委员会来进行仲裁。

（同段上文）the London Court of Arbitration 伦敦仲裁院。

[6] **The 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards expands upon the scope of the 1975 Convention.** 1979 年《关于外国法院判决和仲裁裁决的域外效力的美洲公约》扩大了 1975 年公约的范围。extraterritorial validity 域外效力；arbitral awards 仲裁裁决。

（同段上文）arbitration statute 仲裁法规，关于仲裁的内国成文法。

[7] **Swedish law has granted parties considerable leeway in deciding whether to create their own “ad hoc” rules for arbitration, whether to use the rules of the Swedish Chamber of Commerce Arbitration Institute, or whether to use some other set of preexisting arbitral rules.** 瑞典法给予当事人相当多的自由来决定是否要制定他们自己的特别仲裁规则，是否要适用瑞典商会仲裁院的规则，或是否适用其他一些已有的仲裁规则。

[8] **such excludable legal rules are called “*jus dispositivum*”, but the applicability of certain legal rules may not be excluded by the parties (such non-excludable legal rules are called “*jus cogens*”).** 这种可排除的法律规则称之为“任意法”，但某些法律规则的适用是不可被当事人排除的（这些不可排除的法律规则被称为“强行法”）。*jus dispositivum* [拉丁文] 任意法；*jus cogens* [拉丁文] 强制法，强行法。

[9] **The dichotomy's relevance to arbitration results in a conclusion that any arbitration rules chosen by parties to govern their dispute may not be honored in Sweden if such rules contravene a non-excludable provision of Swedish law.** 有关强行法和任意法的二分法与仲裁的关联导致这样一个结论：当事人所选择的任何支配其争议的仲裁规则，若违反了瑞典法的“不可排除”规定，则可能在瑞典得不到承认。

[10] **Swedish law has permitted an arbitration to be held in Sweden if the parties specify**

Sweden as the locale for arbitration even though (subject to overriding jus cogens) the parties have specified that some procedural rules other than those of the Stockholm Chamber of Commerce should apply or have specified that substantive law other than Swedish law should govern the resolution of a dispute. 在下列情况下，瑞典法允许仲裁在瑞典进行：如果当事人指定瑞典为仲裁地，即使（受强制法的约束）当事人已确定一些程序规则而非斯德哥尔摩商会适用的程序规则，或已指明了非瑞典法的实体法来支配纠纷的解决。locale for arbitration 仲裁场所，仲裁地；Stockholm Chamber of Commerce 斯德哥尔摩商会；substantive law 实体法。

[11] **If there is an issue about the validity of the underlying contract which provides for arbitration, that issue may be addressed properly to the arbitrators although the question may be raised concurrently in an appropriate Swedish court.** 若规定仲裁的基础合同存在是否合法的问题，尽管此问题可同时提交给一个合适的瑞典法院，该问题仍可适当告知仲裁员。

(同段上文) request for arbitration 仲裁请求书。service of the request 送达请求书。service（程序法上的）送达，如：service by publication at court 在法院公告送达；service of summons 送达传票（= service of process）。

(同段下文) attachment of property 扣押财产，attachment of property in aid of execution 扣押财产以执行判决（= attachment execution）。

Exercises

1. *Which of the following statements are NOT true according to the text?*

(1) International commercial arbitration is a non-binding dispute resolution mechanism.

(2) There are many less formal alternative dispute resolution mechanisms, including mini-trial and arbitration.

(3) Arbitration in international commercial contracts is favored by the P. R. China.

(4) The "Forum Selection Clause" is one which chooses a court.

(5) Institutional arbitration is one of types of international commercial arbitrations selected by the parties of the arbitrators and rules governing the arbitration.

(6) Arbitration is a popular method to solve international commercial disputes.

(7) Stockholm is one of centers for international arbitration.

(8) Swedish law has no limitations upon the power of persons to specify for their own what rules should govern their contractual relationship.

(9) The issues of antitrust liability can be arbitrated in the United States.

(10) Swedish law has recognized ordinarily the validity of a "choice of law clause" by the parties.

2. *Read the following passages and then translate the underlined sentences into Chinese.*

Elements of an Agreement to Arbitrate

Some considerations should be weighed for inclusion in any agreement to arbitrate regardless of the rules or locale chosen for the arbitration. The Swedish example illustrates considerations such as:

(1) the locale for arbitration (in Sweden visas can be obtained easily, physical facilities for arbitration are available, and communications facilities are good),

(2) the jus cogens problem,

(3) choice of governing substantive rules.

Other considerations include:

(4) scope of the arbitral clause—some countries may not consider a clause about arbitration to apply in future unless it is made expressly applicable to existing and to future disputes. The clause should include a reference to any actions by a party that constitute a waiver of the right to invoke the clause, and also should include, if desired, reference to conciliation efforts that must occur before arbitration becomes appropriate.

(5) selection of arbitrators—a minimum number of three may be required; an odd number usually is required. Countries may require that all arbitrators be drawn from an approved list of arbitrators who are nationals of that country, while other countries may prohibit more than one arbitrator of the same nationality as a party litigant.

(6) payment of arbitrator fees—in some instances arbitrators are paid a flat fee or per diem fee, while in other instances arbitrators are paid a fee based upon a percentage of the value of the dispute.

(7) language to be used—common languages for arbitrations are English and French. If interpreters are to be used, their payment and their number should be settled. The authoritative language of documentary evidence and of the arbitral award should be specified.

(8) nature of the proceedings—in the People's Republic of China arbitration proceedings may be public, while in other countries they are private. In some countries the proceedings may not last longer than a specific time, unless extended for good reason, after which the authority to

conduct the proceeding will be considered to have lapsed. In many countries parties may be represented by counsel.

(9) procedure to be followed—in some places the arbitration is decided customarily upon submission of documents without a hearing. Other places permit hearings, allow oral testimony (including testimony under oath), allow cross examination, allow limited "discovery", issue subpoenas, take written submissions from counsel, permit arbitrators to make personal investigations or to introduce evidence, and permit a written record of the proceedings to be taken.

……

Notes

party litigant 诉讼当事人；proceeding 程序，诉讼程序；counsel 律师，代理律师，顾问；hear 听审，审理；cross examination 交叉询问，反询问；discovery（民事诉讼上的）披露，开庭前向诉讼对方提供材料；issue subpoena 签发传票；written submission 书面意见。

Unit Thirty-five

International Human Rights Law

Introduction

As was stated previously, the present system of international law has developed from the law of nations that governed the relations between sovereign States[1]. Prior to World War One, it was a clear principle of international law that a State's treatment of its own nationals was a matter exclusively within its domestic jurisdiction. The only exception to this was the concept of humanitarian intervention to prevent large scale atrocities but the concept is one of dubious legality. As has already been noted early, the mistreatment of aliens can give rise to State responsibility.

Following World War One, and with the establishment of the League of Nations, widespread concern was expressed about the protection of 'minorities'. The mandate system obliged the mandatory powers to ensure the just treatment of the native populations of the mandate territories and a number of specific arrangements dealt with the position of racial linguistic and religious minorities in Eastern Europe and the Balkans. The League of Nations Council was given the task of monitoring the rights of minorities and there was also a right of petition procedure by minorities to the League of Nations. However, such protections only applied to the minorities expressly mentioned and there was no attempt at the creation of any binding obligations of general application.

The atrocities committed before and during World War Two exposed the need for some comprehensive system of protection of fundamental human rights and this was recognized in the preamble to the Charter of the United Nations, which states:

We the peoples of the United Nations determined to save succeeding generations from the scourge of war ... and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... have resolved to combine our efforts to accomplish these aims[2].

Article 1 (3) of the Charter pledged Member States to achieve international cooperation in

promoting and encouraging respect for 'human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. The obligation to promote respect for and observance of human rights and fundamental freedoms is made express in Article 55 and 56 of the Charter.

Since 1945, a considerable number of rules of international law, both customary and treaty, has been developed with the aim of protecting human rights and fundamental freedoms. Of course, the effectiveness of such rules is open to doubt. The mere existence of rules does not ensure observance of them and, over the years, it has proved far easier to identify particular rights than to provide effective enforcement mechanisms. More has been achieved on a regional basis than at a global level and many human rights experts look to developments regionally as the way forward rather than hoping for great things on the global plane. It is worth noting, however, that the mere existence of human rights agreements can have a beneficial role by giving publicity to abuses and by raising expectations and standards of behavior and treatment. The role of publicity in the sphere of human rights enforcement should not be underestimated.

One final introductory point can be made. Human 'rights' are extremely difficult to define. Generally speaking, they are regarded as those fundamental and inalienable rights which are essential for life as a human being. Put another way, they are those rights which are inherent, in that they exist by virtue of the human condition[3]. However, the view of what specific rights exist and more importantly the interpretation of the extent of such rights may well differ according to the particular economic, social and cultural society in which they are being defined. Thus while it may be comparatively easy to obtain global agreement that human rights are 'a good thing' the task of reaching consensus on articulation of particular rights has proved, and is still proving, far more difficult.

The Sources of the Law

International human rights law is a combination of customary international law and treaty law. The treaties may be global or regional, general or specialized.

General International Agreements

At the inaugural conference of the United Nations held in San Francisco in April 1946, the representatives of Cuba, Mexico and Panama had proposed that the conference should adopt a Declaration on the Essential Rights of Man. However, there was insufficient time available to discuss the proposal and so, at the first session of UN General Assembly, Panama submitted a Draft Declaration on Fundamental Human Rights and Freedoms. On 11 December 1946, the

General Assembly decided to refer the draft to the Economic and Social Council (ECOSOC) for detailed consideration by its Commission on Human Rights[4]. The commission had been established by ECOSOC under Article 68 of the UN Charter and it spent two years working on a draft International Bill of Rights with the instructions that the bills should be acceptable to all, short, simple and easy to understand. The draft bill was presented to the third session of the UN General Assembly and, on 10 December 1948, resolution 217A was adopted: the Universal Declaration of Human Rights (UDHR)[5]. There was no opposition to the resolution, although eight States did abstain, primarily because of the effect that such obligations could have on State sovereignty. The Declaration contains a list of economic, social, cultural and political rights. Since it was only a resolution of the General Assembly, it could not create binding legal obligations, nor was it intended to do so. Rather, the UDHR serves to provide a guideline of standards for States. The precise effect of the resolution was to urge States to establish procedures for the future protection of human rights. The declaration has, however, provided the impetus for the development of customary law.

As far as substantive rights are concerned, Articles 1-21 of the UDHR deal with the civil and political rights, Articles 22-27 deal with economic, social and cultural rights, and Articles 28-30 recognise that everyone is entitled to a social and international order in which these rights and freedoms may be realized and stress the duties and responsibilities which the individual owes to the community.

Following the adoption of the UDHR, the UN Commission on Human rights began work on drafting two international covenants on human rights: one on economic, social and cultural rights and one on civil and political rights.

The International Covenant on Civil and Political Rights (ICPR) 1966 entered into force in January 1976 and, at present, there are over 100 States party to it. The ICPR is a treaty binding on the parties and each State is obliged to give effect to the provisions. In particular, each State should adopt legislative measure to give effect to the covenant and provide effective remedies for violations. The covenant establishes a code of civil and political rights similar to those found in the UDHR. Derogation in times of emergency is allowed with respect to some rights, but not with respect to those rights expressed to be fundamental, such as the right to life (Article 6) and the right to freedom from torture (Article 7).

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[6] 1966 entered into force in March 1976 and there are now over 100 States that are party to it. Obligations under the ICESCR are less specific than those under the ICPR and the tone of the whole covenant is more promotional than mandatory. Whereas Article 2 of the ICPR provides that:

Each State party to the present covenant undertakes to respect and to ensure to all individual within its territory and subject to its jurisdiction the rights recognised in the present covenant.

Article 2 of the ICESCR provides that:

Each State party to the present covenant undertakes to take steps, individual and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.

Customary Rules

A significant number of the provisions contained in the various human rights treaties are now considered to be rules of customary international law. In particular, many of the provisions of UDHR, which, as a UN resolution, is not binding *per se*, have come to be regarded as expressing customary rules. An important case in this respect is *Filartiga v Pena-Irala* (1980), which was heard by a US court. The defendant in the case was a former chief of police in Asuncion, Paraguay, and the case was brought by two Paraguayan nationals who alleged that Pena Irala had tortured to death a member of their family. In the course of giving judgment, the court had cause to consider whether the torture violated customary international law and it cited with approval the view that UDHR had become, *in toto* [7], a part of binding, international customary law. The third Restatement of US Foreign Relations Law (1987), which commands considerable respect as a statement of general international law, indicates in Paragraph 702 that the following practices, where carried out by or on behalf of States, constitute a violation of customary international law:

(a) genocide;

(b) slavery;

(c) murder or causing the disappearance of individuals (this would not include executions imposed following a fair trial);

(d) torture and other cruel, inhuman or degrading treatment;

(e) prolonged arbitrary detention; and

(f) systematic racial discrimination.

It is suggested that such violations should be considered as breach of jus cogens and that the customary rules protecting human rights are binding *erga omnes*[8]. Some support for this view is found in the judgment of the ICJ in the Barcelona Traction case (1970), in which the court indicated that certain obligations deriving from the outlawing of acts aggression and genocide and

'from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination' were owed to the international community as a whole and could be considered obligations *erga omnes*. In addition, the restatement suggests that consistent gross violations of other generally recognised human rights would be contrary to customary international law, even if isolated violations of such rights were not prohibited except by treaty. The restatement suggests that a gross violation is one which particularly shocking given its particular context.

Adatped from the Principles of Public International Law (2nd Edition), Chapter 14, Human Rights, By Tim Hillier, China People's University Press, March 2005

Notes to the Text

[1] **As was stated previously, the present system of international law has developed from the law of nations that governed the relations between sovereign States.** 正如前文所述，国际法的现行制度发展于调整主权国家间关系的万国法。The law of nations 万国公法；国际法；现多用 International law 表示。

[2] **We the peoples of United Nations determined to save succeeding generations from the scourge of war ... and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... have resolved to combine our efforts to accomplish these aims.** 我们联合国之各族人民，决心欲免后世再遭……战祸，并重申基本人权、人格尊严与价值，以及男女与大小各国平等权利之信念……为达此目的发愤立志，同心协力，以竟厥功。此句为《联合国宪章》序言部分核心内容的略写。

[3] **Generally speaking, they are regarded as those fundamental and inalienable rights which are essential for life as a human being. Put another way, they are those rights which are inherent, in that they exist by virtue of the human condition.** 总而言之，这些权利是被视为人类生活之核心的、基本的和不能被剥夺的权利。换言之，是作为人的存在本身的固有权利。

[4] **On 11 December 1946, the General Assembly decided to refer the draft to the Economic and Social Council (ECOSOC) for detailed consideration by its Commission on Human Rights.** 在1946年12月11日，(联合国) 大会决定将此草案提交"经社理事会 (ECOSOC)"由其"人权委员会"再做仔细考虑。Commission on Human Rights（联合国人权委员会）成立于1946年，是联合国系统内处理一切有

关人权事项的主要机构。

[5] **The draft bill was presented to the third session of the UN General Assembly and, on 10 December 1948, resolution 217A was adopted: the Universal Declaration of Human Rights (UDHR).** 该草案议案被提交给联合国大会第三次会议，并在1948年12月10日，217A号决议通过：《普遍人权宣言》（又译《世界人权宣言》，简称UDHR）。《普遍人权宣言》是联大通过的第一个系统地提出尊重和保护基本人权具体内容的国际文件，它对第二次世界大战后国际人权活动的开展发挥了积极的推动作用。

[6] **ICESCR: The International Covenant on Economic, Social and Cultural Rights 1966.** (1966年) 《经济、社会与文化权利国际盟约》。

[7] ***in toto*:** [拉丁文] 全部；全然；完全。

[8] **It is suggested that such violations should be considered as breathes of jus cogens and that the customary rules protecting human rights are binding erga omnes.** 人们建议，此类违犯应被看作是对强行法的违犯，且保护人权的惯例均应是有拘束力的。The customary rules（国际）惯例；习惯性规则；例：Customary int'l law 习惯国际法。*erga omnes*：[拉丁文] 全体。

Exercises

1. Read the following passage and translate the underlined sentences into Chinese

(1) It has already been indicated that international law distinguishes between civil and political rights and economic, social and cultural rights. The former are often referred to as first generation rights and the latter as second generation rights[1]. According to the classical justification of human rights, which argued that such rights are existed were inherent in the existence of a human being, any rights belonging to entities other than human beings could not be considered as 'human rights' and their justification would have to be found elsewhere. However, with the development of rights such as those of assembly and association which are possessed by individuals but which can only be asserted by collections of individuals, it has become clear that collective rights are recognised by the international community. From this, the idea of peoples' rights has followed. (2) Such rights are seen as belonging to peoples rather than individuals and the principal two such rights are the right to self-determination and the right to development. These rights are often referred to in the literature as 'third generation rights'. The right to development is discussed in the next following chapter in the context of the international law governing economic

relations. In this chapter, discussion will be limited to the right of self-determination.

……

The principle of self-determination certainly now seems to be a part of international law but the problem remains as to who or what constitutes a people capable of possessing and asserting the right. The legal concept was developed during the period of de-colonisation（非殖民化）, when it was easier to identify peoples who did not enjoy full rights to determine their own economic, social and cultural development because of the presence of the colonial government. From the 1970s onwards, the right has been asserted by groups wishing to establish a State in part of the territory of an existing State or States and this has created problems which have yet to be resolved. Article 27 of the ICPR provides that:

> In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This article certainly appears to recognize a peoples' right and echoes some of the minority protection measures that were adopted after World War One, but it does not provide a full blown right of self-determination.

(3) The question of the existence of such a right in a non-colonial situation was considered by the Badinter Arbitration Committee, which was established by the European Union in August 1991 to consider various questions of law arising from events in former Yugoslavia. One of the questions presented was whether the Serbs（塞尔维亚人）living in Bosnia（波斯尼亚）and Croatia（克罗地亚）had the right to self-determination. The Arbitration Committee, after making a study of the international law regarding the issue, came to four main conclusions:

(a) The right to self-determination must not involve changes to existing frontiers at the time of independence, except where the States concerned agree otherwise;

(b) where there are two or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law;

(c) Article 1 of the two 1966 covenants establishes that the principle of the right of self-determination serves to safeguard human rights. By virtue of that right, every individual may choose to belong to whatever ethnic, religious or language community he or she wishes; and

(d) The Serbian population in Croatia and Bosnia is entitled to the rights accorded minorities and such rights must be protected by the governments of Croatia and Bosnia.

The decision is important as it is one of the few, if not the only, occasions in which an international tribunal has been called upon to consider whether a particular group has a right of self-determination and the consequence of that right. It would appear that, although all peoples have the right to self-determination, this should not be understood as a right to independent statehood. Where a identifiable group lives in an existing independent State, it is clear that they are entitled to minority rights but it could be argued that 'the right to recognition of their identity' goes beyond this and suggests that such a group is entitled to some measure of autonomy as well. Certainly, many of the peace proposals that have been made with regard to Bosnia would possess powers in respect of their own government. However, such an interpretation of a limited right of self-determination in a non-colonial situation is not supported by the provisions of the Vienna Declaration 1993 adopted at the UN World Conference on Human Rights Paragraph 2 re-affirms the right of all peoples to self-determination but continues by stating that:

This shall not be constructed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent State conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind.

The extent to which this is applied within the recognized sovereign and independent State of Bosnia remains to be seen.

Adatped from the Principles of Public International Law (2nd Edition), Chapter 14, *Human Rights*, By Tim Hillier, China People's University Press, March 2005

Unit Thirty-six

The Changing Balance in Antitrust Law

The American antitrust experience has featured a fundamental tension between two views of the marketplace. One perspective regards markets as fragile, prone to distortion by private firms, and readily correctable through public intervention. The willingness to intervene often reflects confidence in antitrust's ability to achieve social and political goals beyond efficiency. The second view regards business rivalry as generally robust, doubts the efficacy of public efforts to cure imperfections, and emphasizes the relative ability of market processes to erode privately imposed competitive restraints or privately acquired market power[1]. The second view disavows the use of antitrust to pursue non-efficiency aims and prescribes nonintervention unless behavior clearly harms efficiency.

When the previous edition of this text appeared in 1986, the later view seemed ascendant. In the courts, such a trend was evident in decisions that treated vertical contractual restraints more permissively, imposed tougher evidentiary and standing requirements on plaintiffs, and emphasized reasonableness tests to examine behavior with plausible efficiency rationales. The Supreme Court punctuated this progression in 1986 in Matsushita, which doubted the dangers of predatory pricing and invited lower courts to weed out claims that lacked economic rationality[2]. Even pro-plaintiff's decisions such as Aspen Skiing (1985) focused on efficiency effects and relied prominently on Chicago School commentary such as Robert Bork's Antitrust Paradox.

As the courts moved rightward, so did federal enforcement policy. By 1986, the Justice Department and the FTC had embraced a nearly single-minded focus on prosecuting large horizontal mergers and horizontal output restrictions[3]. New federal guidelines dealing with mergers and non-price vertical restraints departed dramatically from analytical techniques that the Supreme Court had endorsed in the 1960's. Budget cuts at both federal agencies—a decrease of about 50 percent in professional personnel from 1981 to 1988—ensured that federal enforcers would have resources to do little more than prosecute mergers and horizontal restraints. And the state attorneys general had moved only tentatively to fill gaps in traditional enforcement activity.

The future direction of antitrust appears less certain today than it did in 1986. Some recent

Supreme Court decisions—e. g. , Kodak—have downplayed Chicago School principle and have displayed a receptivity to post-Chicago economic analysis[4]. State governments have brought vertical restraints and merger cases that the Reagan Administration and, to a lesser extent, the Bush Administration declined to pursue. And Bill Clinton gained the presidency on a platform that criticized Reagan/Bush economic regulatory policies, including antitrust enforcement.

Three institutional variables will determine how far the antitrust pendulum swings to the left of its mid—1980s equilibrium. The first is how the Clinton Administration changes public enforcement policy. The Clinton Justice Department and FTC are pursuing significant adjustments to the policies of Bush Administration antitrust officials, who adopted a more activist approach than their Reagan predecessors. The Clinton officials are exerting greater efforts to prosecute vertical restraints (such as RPM), single-firm exclusionary conduct, vertical mergers, and horizontal mergers. The federal agencies are relying more extensively on non-efficiency concerns (e. g. , wealth transfer effects) on post-Chicago economic learning dealing with game theory, strategic behavior, and information.

Despite these adjustments, most federal enforcement resources will remain focused on the prosecution of large horizontal mergers and horizontal output restrictions such as price-fixing. This is partly a function of resources; budget constraints promise to foreclose a major expansion of the federal enforcement agencies, leaving relatively few personnel to address matters reaching beyond the Reagan agenda. Experimentation with new enforcement approaches will focus heavily on horizontal conduct such as attempted price-fixing and price-signaling. Moreover, the Clinton Administration's concern with the competitiveness of American industry is producing some loosening of existing antitrust controls, such as more tolerant treatment of cooperative ventures involving direct rivals (such as health care providers) and a more permissive approach to horizontal mergers in industries beset with substantial overcapacity (such as the defense sector).

Whatever their actual policy choices, the Justice Department and the FTC alone will not determine the course of public enforcement. An important issue for the 1990s is how the federal agencies will respond to the emergence of state antitrust agencies as independent sources of antitrust policymaking. Unless the federal agencies completely endorse the states' favored agenda of expansive vertical restraints and merger enforcement—an unlikely development, even as the Clinton Administration broadens federal enforcement horizons—state enforcement will diverge from federal preferences in a number of instances. In state merger enforcement, for example, where the decision to prosecute often seems motivated by local employment concerns, states are likely to continue to bring lawsuits that the federal agencies disfavor.

The possibilities for a lasting divergence between federal and state merger policies raise

broader questions about how the American antitrust laws are enforced. No other scheme of economic regulation in the United States decentralizes prosecutorial authority so extensively, with standing granted to two federal agencies, 50 state attorneys general, and countless private companies and individuals. This splintering of decision making—indeed, policymaking—activity not only is difficult to justify in terms of antitrust's substantive merit, but in areas such as merger enforcement it has become a serious obstacle to devising sensible competition policies. A reassessment of the enforcement system usefully could begin with a reevaluation of the structure of public enforcement of the federal antitrust laws. Given the urgency to reduce federal expenditures and improve the efficiency of public administration, a fresh review of the respective antitrust roles of the Justice Department and the FTC is an appropriate place to start.

The second institutional determinant of change will be the Congress. In the coming years, two types of antitrust-related measures are likely to command serious congressional attention. The first is a group of proposals to repudiate Monsanto and Sharp by easing the burden of proof that plaintiffs in RPM cases must bear to establish the existence of an agreement to set price levels. The second consists of bills to reduce the antitrust exposure of firms which cooperate with rivals to develop and produce new products. Congress recently has extended the protections of the National Cooperative Research Act of 1984 to include joint production ventures, and additional measures for specific industry groups may be forthcoming[5].

A third institutional determinant of change is the federal courts. Next to persuading Congress to amend the antitrust statutes, a president's best means for durably adjusting antitrust policy is to select judges who share the president's vision of competition policy. Elections alter public enforcement policy, scholars propose new rationales for antitrust intervention, and private litigants propose novel theories of liability, but life-tenured judges control the gate through which most doctrinal innovations must pass.

Through 1992, Ronald Reagan and George Bush appointed two-thirds of the nation's federal judges, including five members of the Supreme Court. In the greatest retooling of the federal courts since Franklin Roosevelt's presidency election, and President Clinton has a major opportunity to place his own ideological stamp on the federal courts. By filling vacancies he inherited from his predecessor and filling positions created by retirements, President Clinton could appoint as much as 40 percent of the federal bench by the end of 1996.

In contemplating new appointments, President Clinton faces a judiciary whose antitrust views often reflect Chicago School thinking. This is largely a function of Reagan/Bush appointments, including prominent law and economics scholars such as Robert Bork, Stephen Williams, Ralph Winter and so on. In voting in antitrust cases, Reagan and Bush appointees generally have

adhered more closely to a Chicago School agenda than judges appointed by President Carter. Their presence on the federal bench will operate as an important constraint on the efforts of Clinton Administration antitrust officials to expand the frontiers of public enforcement.

Commentators often attribute the retrenchment of antitrust doctrine since the mid-1970s to the appointment of conservative judges, but the Chicago-oriented retrenchment in antitrust would not have been so strong or widespread without the support of many judges not ordinarily associated with hostility to government intervention. Consider the antitrust votes of two of the Supreme Court's more liberal members in the post-World War II era—William Brennan and Thurgood Marshall. From 1977 onward, these jurists were instrumental in imposing severe restrictions on private antitrust plaintiffs. Justice Marshall introduced the "antitrust injury" requirement in his *Brunswick opinion*, and Justice Brennan's opinions in *Cargill* and *Arco* significantly extended the application of this doctrine. Marshall voted with the Court majority in *Monsanto*, *Matsushita*, *Cargill*, *Sharp*, and *Arco*; Brennan likewise endorsed the results in *Monsanto* and *Sharp*. Modern, judicially-led efforts to curtail the private antitrust suit could not have been so broad and effective if liberals on the Supreme Court and in the lower courts had not given their support.

The crucial significance of judicial appointments is evident in President Clinton's choice of a successor to replace Justice Byron White. Justice White left a mixed antitrust legacy. He authored some of the best and the worst of the Court's antitrust opinions over the past thirty years. Both sets of opinions help define the challenges facing the courts in determining antitrust's future path.

In the debit category, Justice White wrote Utah Pie and Albrecht. Few decisions have attracted more scorn, yet the Court has never overruled them[6]. Instead, they belong to antitrust's "mothball fleet" —a flotilla of dormant cases whose logic or impact the Court has severely undercut, but whose holdings the Court has not overruled. The ideological preferences of President Clinton's appointees will play an important part in determining whether the judiciary eventually scraps the mothball fleet, leaves it moored harmlessly in port, or allows it to sail again on behalf of antitrust plaintiffs.

……

In the near and medium terms, widespread acceptance of Chicago School views throughout the federal judiciary will impede efforts by public enforcement agencies and private plaintiffs to persuade courts to endorse an expansion of existing liability standards or a weakening of prevailing evidentiary and injury requirements[7].

Adapted from Ernest Gellhorn & William E. Kovacic, *Antitrust Law and Economics*, 4th ed., West Nutshell Series, China People's University Press, 2001

Notes to the Text

☆ 本文侧重于介绍美国反托拉斯法理的论争，主要从司法判例的视角，论述了在从里根（Ronald Reagan）、布什（George Bush）到克林顿（Bill Clinton）几任期间，并追溯至卡特（Carter）与罗斯福（Franklin Roosevelt）等各位当政期间所提名（nominations）或任命的美高院大法官（appointees）的判案意见和美国反托拉斯法的发展理念。美国反垄断法最突出的特点是"法经济学分析"方法在司法实践中的广泛运用。读者可以利用有关教材，借此学习西方经济学（特别是微观经济学）的基础知识，以及以芝加哥大学法经济分析学派为权威代表的理论常识。

[1] **The American antitrust experience has featured a fundamental tension between two views of the marketplace. One perspective regards markets as fragile, prone to distortion by private firms, and readily correctable through public intervention. The willingness to intervene often reflects confidence in antitrust's ability to achieve social and political goals beyond efficiency. The second view regards business rivalry as generally robust, doubts the efficacy of public efforts to cure imperfections, and emphasizes the relative ability of market processes to erode privately imposed competitive restraints or privately acquired market power.** 美国反托拉斯实践经验的基本特征体现在关于市场的两种观点的冲突。一种观点视市场为脆弱的、易于被私有企业扭曲的，这样的市场可以通过政府干预加以纠正。对政府干预的愿望常反映出一种信心，即反托拉斯法不仅有助于提高市场效率，更有能力完成其社会与政治目标。第二种观点把商业竞争视为通常是充满活力的，怀疑政府干预在纠正不完备市场方面的功效，并强调市场作用在消减私下施加的竞争抑制或私下获得的市场支配力方面的相对能力。这句话简单地说就是，"政府干预"与"自由市场竞争"的矛盾关系在反垄断法实践中的体现。

[2] **The Supreme Court punctuated this progression in 1986 in Matsushita, which doubted the dangers of predatory pricing and invited lower courts to weed out claims that lacked economic rationality.** 最高法院于1986年在Matsushita一案中中断了这一进程，该案的判决质疑掠夺性定价的危险并请下级法院驳回缺乏经济合理性的起诉。

[3] **By 1986, the Justice Department and the FTC had embraced a nearly single-minded focus on prosecuting large horizontal mergers and horizontal output restrictions.** 到1986年，司法部和联邦贸委会以一种近乎钻牛角尖的态度来仅仅关注指控大规模的水平合并和水平产量限制案。The Justice Department and the FTC 指（美）司法部和联

邦贸易委员会（FTC）。Horizontal mergers and horizontal output：水平合并与水平产量。Horizontal restraints：水平（横向）抑制。Vertical restraints：垂直（纵向）抑制。Vertical mergers and horizontal mergers：纵向合并与横向合并，前者指两公司合并中一方为另一方的主要供货商，而后者指两个处在同等生产水平上的公司的合并。另一相似术语为“Vertical integration and horizontal integration”（垂直结合与水平结合）。

[4] **Some recent Supreme Court decisions—e. g. , Kodak—have downplayed Chicago School principle and have displayed a receptivity to post-Chicago economic analysis.** 有些近期最高法院的判决（例如，柯达案）已轻视了芝加哥学派的原则并显示出了对后芝加哥经济分析的接受力。

[5] **Congress recently has extended the protections of the National Cooperative Research Act of 1984 to include joint production ventures, and additional measures for specific industry groups may be forthcoming.** 最近国会已将《1984年国家合作研究法》的保护范围扩大到涵盖合作生产企业，且适用于某些特殊行业集团的其它措施将会于近期制定。

[6] **In the debit category, Justice White wrote Utah Pie and Albrecht. Few decisions have attracted more scorn, yet the Court has never overruled them** . 在大法官怀特（White）相互矛盾的两类观点中，其中一个例证是他所写的Utah Pie及Albrecht两案的判决意见书。很少有判决书招致了如此多的嘲弄，然而，最高法院却从未推翻这些判例规则。此处的debit不要理解成会计学上的“借项”。Utah Pie and Albrecht是两个判例的简称，而非一个判例。

[7] **In the near and medium terms, widespread acceptance of Chicago School views throughout the federal judiciary will impede efforts by public enforcement agencies and private plaintiffs to persuade courts to endorse an expansion of existing liability standards or a weakening of prevailing evidentiary and injury requirements.** 在未来的短期和中期一段时间，整个联邦法院系统对芝加哥流派观点的广泛接受会妨碍公共执法机关的努力，并妨害私人原告说服法庭认可对现存责任标准的扩展或对优势证据与损害要求的削减。the federal judiciary 联邦法院系统。evidentiary adj.（=Evidential）证据的；提供证据的；例：~ burden 举证责任（Burden of proof）。

Exercises

1. *Debating Questions.*

(1) What Are the Characteristics of American Antitrust law?

(2) What Is the Relationship between the Antitrust Law and Economics?

Unit Thirty-seven

Constitutional Law

1. The Watergate Tapes Case: United States v. Nixon

Though the courts have reviewed actions of executive officials since Marbury[1], in none of these early cases did litigants issue process directly against the President. United States v. Nixon, one of the significant legal aftermaths of the famous Watergate break-in[2], put this issue squarely before the courts because President Nixon claimed that the secret tape recordings (which were subject to subpoena[3]) were directly under his control and solely in his custody. Thus, when the Watergate Special Prosecutor[4] wanted the tapes, he subpoenaed the President directly, rather than subpoena a nominal third party.

The legal issue began on March 1, 1974, when a grand jury sitting in the District of Columbia indicted seven of President Nixon's presidential aides and campaign staff for conspiracy to defraud the United States and to obstruct Justice. The grand jury named the President as an unindicted coconspirator[5]. The Watergate Special Prosecutor moved the District Court to issue a subpoena *duces tecum*[6], requiring the President to produce certain memoranda, papers, and tapes that related to specific meetings between the President and others. Nixon publicly released edited transcripts of 43 conversations, including edited portions of 20 conversations subject to the subpoena, but the President's attorneys moved to quash the subpoena for the actual tapes on the ground of executive privilege.

The district court rejected the presidential arguments and ordered the tapes and documents to be delivered to the court on or before May 31. On May 24 the President asked the court of appeals for a writ of mandamus[7], seeking review of the lower court's action. The same day, the Special Prosecutor filed a petition in the Supreme Court for writ of certiorari[8] before judgment. The Court granted the petition on May 31, 1974, the effect of which was to bypass the Court of Appeals and to bring the case immediately from the district court to the Supreme Court for review. The Supreme Court ordered that the subpoenaed material be produced forthwith, affirming the district court's denial of the President's motion to quash.

Chief Justice Burger, for a unanimous Court, quickly disposed of the procedural issues by holding that the district court's order was "appealable" notwithstanding the finality requirement of the federal statute governing petitions for certiorari. [9]

The Court then addressed the key issue of executive privilege[10]. The Court summarily rejected the President's first line of argument, that the separation of powers doctrine[11] precludes judicial review of a presidential claim of privilege. Quoting the famous declaration in *Marbury v. Madison* that it is the ultimate province and duty of the judiciary to decide what the law is, the Court noted that, "any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government." [12]

President Nixon's second argument was that, as a matter of constitutional law, executive privilege prevails over the subpoena *duces tecum*. For the first time, the Supreme Court gave presidential executive privilege a stamp of approval, though it was a much narrower approval than President Nixon had wished.

The Court agreed that the President has a prima facie privilege to maintain the confidentiality of internal executive communications, because possible public dissemination of such communications could tend to inhibit frank discussion and advice in the decision-making process. The absence of an express constitutional provision was no bar to the assertion of such a privilege, because "certain powers and privileges flow from the nature of enumerated powers[13]; the protection of the confidentiality of presidential communications has similar constitutional underpinnings." To the extent that the presidential interest in confidentiality "relates to the effective discharge of a President's powers, it is constitutionally based."

Although the Court recognized the need for executive privilege, the Court made it clear that such a privilege is not absolute and unqualified. The prima facie privilege must yield to the higher claims of judicial process in any criminal case where either the prosecution or defense has demonstrated a need for the evidence subpoenaed, and the evidence would otherwise be admissible at trial. The Court accorded "great deference" to the felt need of the President for complete objectivity and candor from his advisers. However, the Court reasoned[14]:

When the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation of other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera*[15] inspection with all the protection that a district court will be obliged to provide.

In the next paragraph the Court stated that it would upset the constitutional balance to accept

a generalized claim of confidentiality by the President in "nonmilitary and nondiplomatic discussions. . . . " The Court gave no explanation why this time it eliminated any reference to "sensitive national security secrets." Several pages later the Supreme Court also referred to "military or diplomatic secrets," but did not mention the more open-ended[16] category of national security.

Finally, the Court made it clear that it is for the judicial branch to decide the extent of the duty of the President and other executive officials to produce evidence. Even though it would accord "high respect to the representations made on behalf of the President," the Court would make the final determination.

2. Presidential Appearance in the Aftermath of United States v. Nixon

In the years following United States v. Nixon, various lower courts have approved subpoenas of Presidents or former Presidents, or those Presidents have appeared voluntarily in civil or criminal litigation or before congressional hearings.

Ford. In United States v. Fromme, President Ford was compelled to testify by videotaped deposition[17] at trial of Lynette "Squeaky" Fromme, who had attempted to assassinate Ford. In addition, while President, President Ford voluntarily appeared before a House subcommittee to answer questions that had been raised concerning his pardon of former President Nixon; and on September 15, 1988 Ford voluntarily appeared before a Senate Committee and testified about the War Powers Resolution, which he criticized as "impractical" and "unconstitutional".

Carter. During his presidency, President Carter gave videotaped testimony that was presented at the criminal trial of two Georgia state officials charged with[18] gambling conspiracy. Also while President, he was interviewed under oath by the Counsel on Professional Responsibility pursuant to a Department of justice order to investigate "for criminal, civil and administration purposes" any offenses resulting from his brother Billy Carter's relations with the Libyan Government.

Reagan. In United States v. Poindexter, the district court ordered videotaped deposition of former President Reagan, at the insistence of criminal defendant Poindexter; the former President testified on videotape, which was introduced in the trial.

3. The Presidential Recordings and Materials Preservation Act

Nixon v. Administrator of General Services Administration, was a unique case that focused on a special federal statute dealing with executive privilege. After President Nixon resigned, Congress enacted the Presidential Recordings and Materials Preservation Act. Title I of this Act

directed the Administrator of the General Services Administration to take custody of former President Nixon's presidential papers and tape recordings; provide for their orderly processing and screening; return to the former President those items that were personal in nature; and establish the terms on which public might eventually have access for the remainder of the materials.

The former President brought suit attacking the constitutionality of the Act on a number of grounds. The Supreme Court upheld the Act and in doing so decided some important questions of separation of powers.

Separation of Powers. First the Court rejected the argument that the law violated principles of separation of powers. The executive branch, the Court argued, became a party to the Act's regulation when President Ford signed the bill into law; the new administration of President Carter supported the law; and the materials remained in the executive branch in the custody of a presidential appointee, the Administrator of the General Services Administration.

To determine whether a breach of the separation of powers exists, all of these facts are relevant because the "proper inquiry focuses on the extent to which the Act prevents the Executive Branch from accomplishing its constitutionally assigned functions." The Court concluded that, on its face, the Act does not create undue disruption of the executive branch.

Republication of Audio Tapes Produced at Trial. Various news organizations sought to copy Watergate tapes that had been introduced at the trial of the Watergate defendants. In *Nixon v. Warner Communications, Inc.*, a divided Court held that neither common law, nor the First Amendment[19] guarantee of free speech and press, nor the Sixth Amendment[20] guarantee of a public trial gave the press the right to copy this evidence publicly received at the public trial. The majority specifically relied on the Presidential Recordings and Materials Preservation Act and held that it was a "decisive element" that led the Court to the conclusion that the common law right of access to judicial records was inapplicable. The Administrator, under that Act, was free to design procedures for public access to the tape recordings. The Court also found inapplicable any First or Six Amendment rights of access. Four Justices dissented.

Adapted from J. E. Nowak & R. D. Rotunda, *Constitutional Law*, 5th ed., 1995

Notes to the Text

[1] **Marbury**, 是 Marbury v. Madison 案的简称。该案是美国最著名的宪法判例之一，确立了司法审查制度。

[2] 1972年6月18日凌晨，五个人因潜入美国民主党总部“水门大厦”而被捕，引发了美国历史以及宪法发展史上著名的水门事件——作为共和党主席的尼克松授权部下，在竞争对手民主党的总部内安插窃听装置以便了解竞选对手的备战情况，确保自己连任总统。

[3] **subpoena** 强制到庭的传票；（用传票）传唤。

[4] **the Watergate Special Prosecutor** 水门事件特别检察官。

[5] **unindicted coconspirator** 未被起诉的共谋者。

[6] ***duces tecum*** ［拉丁文］携带证据文件出庭的命令。

[7] **writ of mandamus** 命令状；职务执行令状。

[8] **writ of certiorari** 移送令状（上级法院命令下级法院将案件或记录移送上级法院的令状）。

[9] **Chief Justice Burger, for a unanimous Court, quickly disposed of the procedural issues by holding that the district court's order was "appealable" notwithstanding the finality requirement of the federal statute governing petitions for certiorari.** 首席大法官伯格代表无异议法庭判决迅速处理了该案的程序性问题，认为地区法院的命令是“可以上诉的”，尽管联邦制定法在涉及申请移送令状方面的程序要求是终结性的（首席大法官的意见实际上突破了制定法的一般原则——编者注）。

unanimous Court（所有法官）作出一致判决意见的合议庭。divided Court（存在异议法官的）非一致性判决意见的合议庭。

[10] **executive privilege** 行政特权（这种特权是基于推定而确立——向公众或政府的相关部门发布秘密的政府信息将会破坏分权原则）。

[11] **separation of powers doctrine** 分权原则。

[12] **Quoting the famous declaration in *Marbury v. Madison* that it is the ultimate province and duty of the judiciary to decide what the law is, the Court noted that, "any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government."** 法院援引马伯里诉麦迪逊案中著名的判词“决定法律是什么，是司法者的最终领地和责任”，并声称“分权和制衡的基本理念是三权分立政府体制的自然结果，而任何其他的结论将与这些理念相冲突。”

[13] **enumerated powers** （宪法）列举的各项权力。

[14] **reason** 法律推理（*v.*），判决理由（*n.*）。

[15] ***in camera*** ［拉丁文］禁止旁听的；秘密的；法院非公开审理。

[16] **open-ended** 无限制的，可广泛解释的。

[17] **videotaped deposition** 录象证词。

[18] **be charged with** 因……受指控；被诉犯……罪。

[19] **the First Amendment** 美国宪法第一修正案，在美国宪法发展史以及宪法判例中占据重要地位。其原文是：Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[20] **the Sixth Amendment** 美国宪法第六修正案，关于刑事案件被告人基本权利。

Exercises

1. *Read the following passage, fill in the blanks with the given words in proper form, and translate the underlined sentences into Chinese.*

constitutional; establish; authority convict; presumption; justify; precedent; consensus

December 10, 1998

Remarks of Congressman Robert C. "Bobby" Scott

Committee on the Judiciary

CONSIDERATION OF IMPEACHMENT ARTICLES AGAINST PRESIDENT CLINTON

Thank you, Mr. Chairman.

(1) As a member of the Virginia Congressional delegation, I take great pride in the contributions those of the Commonwealth have made to ensure the viability of our Constitutional form of government. Washington, Jefferson, Madison, Mason and others were Virginians who led the development of our Constitutional form of government, and endeavored to protect and defend it. In that great tradition, a former member of this Committee, fellow Virginian, Caldwell Butler, is someone I hold in very high regard. As a Republican, Mr. Butler faced the daunting prospect in 1974 of voting to impeach a President of his party. After a fair process, he was looking at overwhelming evidence of the President's guilt and had the courage under those circumstances to vote to impeach the president of his own party.

(2) Unfortunately, Mr. Chairman, this Committee has neglected its sobering constitutional responsibilities and engaged in an unprecedented substantive and procedural abuse of Congress'

impeachment powers.

Since the beginning, a number of my colleagues and I have called for a fair, expeditious, and focused process. Such a process would have first specified the allegations. It would have then (a) a standard for determining which, if any, of those allegations constitute an impeachable offense. If any of the offenses alleged might constitute an impeachable offense, the process would then have determined, with a (b) of innocence, whether those allegations were true by using cross-examination of witnesses and other traditionally reliable evidentiary procedures. If any such impeachable allegations were determined to be true, then we would judge whether it had the substantiality to (c) the removal of the President from office.

But we did not proceed in such a logical constitutionally reverent process. Instead we dumped mounds of salacious, uncross-examined or otherwise reliably tested materials on the Internet and then started sorting through boxes of documents to selectively find support for a foregone conclusion.

Mr. Chairman, our first step in a logical process should have been to look at the allegations to determine whether or not they might constitute impeachable offenses even if true, some of those allegations might constitute impeachable offenses. This Committee has completely gutted our country's impeachment precedence. We have been warned repeatedly that these allegations are nowhere near that which is necessary to overturn a national election and to impeach a President. Despite these caution flags, this Committee has turned a deaf ear to hundreds of years of (d) and to the Constitution that has kept this country strong and unified.

Mr. Chairman, we did have a hearing at which we considered the constitutional standard for impeachment. At that hearing, scholars told use that there is no constitutional (e) to impeach the President simply because we dislike him or because we disapprove of his actions when those actions do not constitute "Treason, Bribery or other high Crimes and Misdemeanors." (3) In fact, by proceeding with an inquiry based on allegations that do not meet the high standards required of impeachable offenses, we have done irreparable harm to our system of government by establishing a dangerous and partisan impeach-at-will precedent that will forever weaken the institution of the Presidency. The Presidency was intended to be free from the subversion of the Legislature. Three separate and co-equal branches were envisioned by the drafters of our Constitution. It is for this reason that impeachment is limited to the (f) explicit "Treason, Bribery, or other high Crimes and Misdemeanors." Impeachment was intended to be a mechanism to protect against conduct, as described by Professor Bruce Ackerman, that constitutes "a threat to the very foundation of the Republic." We know from the Nixon impeachment proceedings that it does not cover half million-dollar income tax fraud. In fact at our hearing we heard that all of the

scholars agreed on one panel—ten of them—that "Treason, bribery or other high crimes and misdemeanors" does not cover all felonies. And so, it was not intended to be a crafty way for Congress to be able to remove a president based on a standard of "no confidence."

Furthermore, Mr. Chairman, at the hearing, when I posed the question of whether any of the witnesses on the hearing's second panel believed that the Starr Report's Count 11A, the President's invoking executive privilege, should be considered an impeachable offense, the clear (g) of the panel was that this charge was not an impeachable offense. In fact, one Republican witness, Charles Cooper, added "I do not think that invoking executive privilege, even if frivolously, and I believe it was frivolous in this circumstance, but that does not constitute an impeachable offense". Unfortunately, we have disregarded Mr. Cooper's good advice.

In addition, the scholars have refuted attempts by impeachment supporters to argue that the last three impeachments support lowering the impeachment standard to impeach President Clinton for "perjury" despite the fact that all of these impeachments involved judges and the effects their actions are alleged to have had on their offices and the fact that two of the judges were actually in prison during their impeachment trials. The impeachment cases of Judges Claiborne and Nixon have been referred to several times as cases merely representing private conduct. However, both were tried, (h) and were in prison for crimes based on the use of their offices. The evidence was that Claiborne had lied on his income tax return by not including funds received from bribes, and Judge Nixon for lying about contacting a prosecutor to influence a drug case of a business associate's son.

......

So here we are on the verge of impeaching a U. S. President, overturning a national election, plunging our nation into a constitutional crisis in contradiction of everything the Founding Fathers labored to avoid, on a totally partisan basis. And so, Mr. Chairman, I do not have the heart-wrenching decision of former Virginia Congressman Caldwell Butler who found himself at the end of a fair process, facing overwhelming actual evidence of guilt of the President and actual offenses which were clearly impeachable. I find myself facing allegations which most scholars agree would not be impeachable offenses even if true, and which are presented to us by contradictory, uncross-examined hearsay and dubious inferences. Under these circumstances, it is totally inappropriate to vote to remove the president from office.

Available at http://www.house.gov/scott/press/remarks/remarks_consider_impeachment_PresClinto.html

Unit Thirty-eight

The Legal Research Process

Introduction

Legal research is an essential component of the practice of law. It is the process of identifying the law that governs an activity and finding materials that explain or analyze that law. These resources give lawyers the knowledge with which to provide accurate and insightful advice, to draft effective documents, or to defend their clients' rights in court. Ineffective research wastes time, and inaccurate research leads to malpractice[1].

Determining what law applies to a particular situation is a skill requiring expertise in legal analysis. Lawyers must be able to analyze factual situations, determine the relevant fields of legal doctrine, and apply rules developed by courts, legislatures, and administrative agencies. Finding these rules is a skill requiring expertise in legal research, or the effective use of the law library's extensive array of online and printed resources. Successful research provides the information and knowledge necessary for confidence in one's legal analysis.

Legal research involves the use of a variety of resources, some created by scholars and practicing lawyers. Legal research demands an understanding of which resources to consult in each situation. Experienced researchers know which sources are authoritative or useful for what purpose, and how to use these sources most effectively. Versatility and flexibility are needed, as no single approach can work every time.

The Sources of the Law

The law consists of those recorded rules that society will enforce and the procedures by which they are implemented. These rules and procedures are created in various ways. Statutes are enacted by elected representatives, for example, while common law doctrines are shaped over the course of many years in court decisions. These are just two of many sources of the law, but the

distinction between statutory and common law is one of several dichotomies and classifications that characterize the legal system[2].

The law has numerous sources, from the United States Constitution to the pronouncements of municipal agencies. Both the federal government and states have lawmaking powers, and in each case three branches—legislative, executive, and judicial—share in this responsibility. As the elected voice of the citizens, the legislature raises and spends money, defines crimes, regulates commerce, and generally determines public policy by enacting statutes. Some of these statues are broadly worded statements of public policy, while others regulate activity in minute detail.

The executive branch is charged with enforcing the law, but in doing so it too creates legally binding rules. The president and most governors can issue executive orders, and administrative agencies provided detailed regulations governing activity within their areas of expertise. Agencies also act in a "quasi-judicial" capacity by conducting hearings and issuing decisions to resolve particular disputes. These administrative law sources are less familiar to law students and the public than statutes and court decisions, but they may be just as important in determining legal right and responsibilities. Attorneys in heavily regulated areas such as environmental law or telecommunications may work more closely with agency pronouncements than with congressional enactments.

The judicial branch plays a complex role in this system. Judges apply the language of constitutions and statutes to court cases, often involving circumstances that could not have been foreseen when the laws were enacted. In most instances, these judicial interpretations become as important as the text of the provisions they interpret. The courts have determined, for example, that sexual harassment is a form of employment discrimination under the Civil Rights Act of 1964 even though those words never appear in the statute. Through the power of judicial review, asserted by Chief Justice Marshall in Marbury v. Madison, the courts also determine the constitutionality of acts of the legislative and executive branches[3].

Judges also create and shape the common law. In a common law system such as ours, the law is expressed in an evolving body of doctrine determined by judges in specific cases, rather than in a group of prescribed abstract principles. As established rules are tested and adapted to meet new situations, the common law grows and changes over time.

The first year law school curriculum sorts legal issues another way, into distinct areas of doctrine such as contract, tort, and property. In doing so, it provides law students with a framework for analyzing legal situations and applying a particular body of rules. Real life does not divide so neatly into issues of contract or tort, but legal materials generally follow this paradigm. A lawyer with a case involving injury from a defective product, for example, may need to

research breach of warranty issues in texts and articles on contracts as well as strict liability and negligence issues in the tort literature.

Other distinctions that pervade legal thinking include civil and criminal law, substance and procedure, and state and federal jurisdiction. Law students must learn how legal issues fit into these dichotomies, not only to solve problems but to know where to look for answers. It is necessary, however, to learn how to classify a question without pigeonholing the situation too narrowly. Analysis within a particular doctrinal area can clarify a specific issue, but most situations contain issues from a number of areas. A lawyer who does thorough research on causation issues but forgets about the statute of limitations or service of process is a losing lawyer[4].

The Forms of Legal Information

Effective legal research requires more than knowledge of the nature of the legal system. An understanding of the ways in which legal information is disseminated is also needed. Several characteristics have affected the research process. Laws are published chronologically, requiring tools to provide access by subject. Legal literature comprises both official, primary statements of the law and an extensive body of unofficial secondary writings. Information is accessible both in print and electronically, creating a wide range of choices in research..

A. Access To Chronological Publications

The legal system is created over the course of time, and the law in force today is a combination of old and new enactments and decisions. The United States Constitution has been in force for more than 200 years, and many judicial doctrines can be traced back even farther. Other laws are just days or weeks old, as legislatures, courts and executive agencies address issues of current concern.

These laws have been published as they were issued, whether in volumes of legislative acts or court reports, or through electronic dissemination. They retain their force and effect until they are expressly repealed or overruled. To determine the law that governs a particular situation, the research may need access to all of these sources, no matter how old or how new they may be.

This has led to the creation of a complex collection of resources designed to provide topical access to this vast body of material. Today the most widely used approach is keyboard searching in databases containing the full text of thousands of court decisions or other documents. More traditional means of access to court opinions include digests classifying summaries of points from

cases; texts and reference works summarizing and comparing similar cases; and citators allowing researchers to trace doctrines forward in time. For access to statutes and regulations, laws in force are arranged by subject in codes which are accessible by extensive indexes. Mastering these various means of access to the law is a necessary part of any legal research.

It is just as important for lawyers and others interested in the legal system to keep up with new developments, and an extensive body of resources exists to provide current information. New statutes, regulations, and court decisions are issued by the government and by commercial publishers, both in print and through electronic means. Newsletters, loose-leaf services and websites provide notice of and analyze these new developments. In addition, the codes and texts lawyers use are updated regularly to reflect changes. One of the most common forms of updating print publications is the pocket part, a supplement which fits inside the back cover of a bound volume. Many publications are issued in loose-leaf binders so that they can be updated with supplementary inserts or replacement pages. Electronic updating is even faster and more efficient, as new documents can be added to a database within minutes of their release.

B. Primary and Secondary Sources

Legal sources differ in the relative weight they are accorded. Some are binding authority; some are only persuasive in varying degrees; and some are useful only as tools for finding other material. Each source must be used with a sense of its place in the hierarchy of authority[5]. A decision from one's state supreme court has more authority than a scholarly article, but an influential article may have more persuasive force than rulings of courts in other jurisdictions.

The most important distinction is between primary and secondary sources. Primary sources are the official pronouncements of the governmental lawmakers: the court decisions, statutes, and regulations that form the basis of legal doctrine. Not all primary sources have the same force for all purposes. A decision from a state supreme court is mandatory authority in its jurisdiction and must be followed by the lower state courts. A state statute also must be followed within the state. Other primary sources are only persuasive authority; a court in one state may be influenced by decisions in other states faced with similar issues, but it is free to make up its own mind. A statute or regulation from one state is not even persuasive authority in another state.

Works which are not themselves the law, but which discuss or analyze legal doctrine, are considered secondary sources. These include treatises, hornbooks, restatements, and practice manuals. Much of the most influential legal writing is found in the academic journals known as law reviews. Secondary sources serve a number of important functions in legal research. Scholarly commentaries can have a persuasive influence on the law-making process by pointing out flaws in

current legal doctrine or suggesting solutions. More often, they serve to clarify the sometimes bewildering array of statutes and court decisions, or provide current awareness about developing legal doctrines. Finally, their footnotes provide extensive references to primary sources and to other secondary material.

Some materials, such as digests or citators, are simply finding tools and have no secondary authority at all. Their purpose is not to persuade but to facilitate access to other sources, which must be examined to determine their applicability to a particular situation.

C. Print and Electronic Resources

Most of the resources to be discussed in this text first appeared in printed form, and developed as print publications over several decades or even centuries. Detailed editorial system such as digests, citators, and annotated codes were created to make sense of the jumble of primary sources. In recent years, of course more and more material has become available electronically. The computer has not completely replaced the book, however, and the astute researcher knows how to take advantage of both media.

Electronic research has significantly affected the process of legal research. The computer can integrate a variety of tasks that are conducted with separate print sources, such as finding cases, checking the current validity of their holdings, and tracking down secondary commentary. The ability to search the full text of documents for specific combinations of words has freed researchers from relying solely on the choices of editors who create indexes and digests. Each research situation presents a unique set of factual and legal issues, and the computer makes it possible to find documents which address this specific confluence of issues.

Yet editors have hardly been put out of work. Researchers forced to work only with an uncontrolled mass of electronic data can quickly find themselves drowning in unsorted information. Tools such as digests and indexes continue to provide the invaluable service of sorting material by subject and presenting it in a comprehensible fashion.

Computerized research has also blurred the distinctions among different types of information and broadened the scope of legal inquiry[6]. Research in case law, for example, was traditionally a process quite distinct from research in secondary commentary or social sciences. Using electronic databases, it is much more convenient and natural to switch from one source to another and back again, bringing to legal research more empirical experience and a wider range of scholarly commentary. Hypertext links between documents make it possible to pursue various leads and ideas and as they arise, rather than following one linear research path.

Two major commercial database systems, LexisNexis and Westlaw, are widely used in law

schools and in legal practice as comprehensive legal research tools. Originally designed for access through proprietary software, both of these systems are now used primarily through the World Wide Web (< www. lexis. com > and < www. westlaw. com >). These websites, however, are available only to subscribers and other paying customers. Law students generally have access through their school's subscriptions, but for other researchers these can be expensive tools. (Much, but not all, of the information on lexis. com is available to university faculty and students through LexisNexis < web. lexis-nexis. com/universe/ >.)

Free Internet sites can also be valuable sources of legal information. Some provide access to statues and recent case law, but the Internet is more important as a source of legislative documents and administrative agency materials. It also provides an invaluable means of linking scholars and researchers through websites, discussion groups, and electronic mail.

Legal Language

One of the tasks facing law students is mastering a new way of speaking and writing. The law has developed its own means of expression over the centuries. Latin words and phrases are still prevalent, from the familiar writs of certiorari or *habeas corpus* to doctrines such as *res ipsa loquitur*[7], and even everyday words such as instrument or intent may have specialized meanings in legal documents.

A good law dictionary is needed to understand the language of the law. The leading work, Black's Law Dictionary, edited by Bryan A. Garner, provides definitions for nearly 25,000 terms, and include pronunciations and more than 2,000 quotations from scholarly works. It can be used to find new legal terminology and to define older terms found in historical documents. Black's is also available in a somewhat shorter abridged edition (2000), and a considerably smaller pocket edition (2nd ed. 2001), and it can also be searched on Westlaw.

Several other, shorter dictionaries can also be found in law libraries and bookstores. Among the best are Steven H. Gifis, *Law Dictionary* (4th ed. 1996), and Daniel Oran, *Oran's Dictionary of the Law* (3rd ed. 2000). *Merriam-Webster's Dictionary of Law* (1996) is available both in print and as a free Internet resource < dictionary. lp. findlaw. com >

Bryan A. Garner, editor of *Black's Law Dictionary*, is also author of *A Dictionary of Modern Legal Usage* (2nd ed. 1995), which focuses on the way words are used in legal contexts. It is an entertaining guide to legal language's complexities and nuances, with definitions and essays providing articulate advocacy for clear and simple writing, and is available on LexisNexis. *Mellinkoff's Dictionary of Legal Usage* (1992) is a complementary work providing examples of

usage and distinctions among related terms.

A variety of other language reference works exist. William C. Burton, *Burton's Legal Thesaurus* (3rd ed. 1998) helps writers choose correct terms, and can aid researchers in identifying and choosing words when searching in indexes or preparing online searches. Fred R Shapiro, *Oxford Dictionary of American Legal Quotations* (1993) is the most memorable uses of legal language. It is arranged topically, with precise citations to original sources and indexes by keyboard and author.

Legal Citations

A second hurdle in understanding legal literature is understanding the telegraphic citation form used in most sources. Before reading *Tarasoff v. Regents of the University of California*, a researcher must be able to decipher "551 P. 2d 334 (Cal. 1976)" and understand that "551" is the volume number, "334" the page number, and "P. 2d" the abbreviation for the Pacific Reporter, Second Series, a source for California Supreme Court opinions[8]. This form may seem obscure at first, but in a very succinct manner it provides the information necessary to find the source and to recognize the scope of its precedential value.

This citation form is centuries old, but the standard guides to its present use is *The Bluebook: A Uniform System of Citation* (17th ed. 2000), Published by the Harvard Law Review Association. *The Bluebook* establishes rules both for proper abbreviations and usage of signals such as "cf." and "But see." A few journals follow the somewhat simpler rules in the *University of Chicago Manual of Legal Citation* (1989), known as the Maroonbook[9]. The *Association of Legal Writing Directors' ALWD Citation Manual* (2nd ed. 2003) is used in numerous law schools and by several journals as a more straightforward and easier-to-learn alternative to the Bluebook. Cornell Law School's Legal Information Institute publishes an online Introduction to Basic Legal Citation <www. law. cornell. edu/citation/ >, a handy, concise guide that incorporates both *Bluebook* and *ALWD* rules.

Recent years have seen a trend towards citations to legal authorities that do not depend on reference to a particular volume and page number, and that thus can be used whether documents are retrieved in printed volumes, through subscription databases, or from free Internet Sites. *A public domain citation* system assigns official numbers to documents such as court decisions sequentially as they are issued, and also numbers each paragraph to allow references to specific portions of the text. This approach has been endorsed by the American Bar Association and public domain citations are now required by the *Bluebook*. Only a few jurisdictions, however, have

adopted rules requiring paragraph numbers or other public domain citation features. The American Association of Law Libraries (AALL) has issued a *Universal Citation Guide* (1999) providing rules and examples of these formats. An AALL website <www. aallnet. org/committee/citation/> provides access to the guide and updated information.

No matter what citation rules are followed, part of the puzzle is simply deciphering the abbreviations used. Reference sources such as Black's Law Dictionary and the Bluebook contain tables listing the major abbreviations found in legal literature, but these are hardly comprehensive. Cases and law review articles contain numerous abbreviations and citations that are cryptic even to experienced researchers. Two specialized abbreviations sources, Mary Miles Prince, *Bieber's Dictionary of Legal Abbreviations* (5th ed. 2001) and Donald Raistrick, *Index to Legal Citations and Abbreviations* (2nd ed. 1993) provide extensive coverage of both common and obscure abbreviations. Bieber's Dictionary is also available electronically on LexisNexis.

Adapted from Morris L. Cohen & Kent C. Olson, *Legal Research*, 8th ed., West Nutshell Series, China Law Press, 2004

Notes to the Text

[1] **Ineffective research wastes time, and inaccurate research leads to malpractice.** 低效检索（研究）浪费时间，而粗略检索（研究）也将导致失职。

[2] **These are just two of many sources of the law, but the distinction between statutory and common law is one of several dichotomies and classifications that characterize the legal system.** 这些只是诸多法律渊源中的两种，但成文法与判例法之间的区别则是体现法律制度特征的两分法与各种分类法中典型的一种。

[3] **Through the power of judicial review, asserted by Chief Justice Marshall in *Marbury v. Madison*, the courts also determine the constitutionality of acts of the legislative and executive branches.** 通过对由首席大法官马歇尔（Marshall）在 Marbury v. Madison 一案中所提出的司法审查权的运用，法院亦有权确定立法与行政部门之行为的合宪性。本句中 Chief Justice 特指美国“最高法院院长”或“首席大法官”。英文中法官一词常用 Judge 表示，审判长或庭长则用 Chief judge 表示；Justice 一词常指美英高级法院或最高法院的法官。

[4] **A lawyer who does thorough research on causation issues but forgets about the statue of limitations or service of process is a losing lawyer.** 一个对因果问题进行了彻底的

研究但却忘记了时效法律或送达程序的律师是一位失败的律师。本句中的 causation 指法律上的“因果关系”或“因果律”。statue of limitations 表“诉讼时效法规”。service of process 指法院诉讼进行过程中的各种命令的送达，故译为“送达程序”。

[5] **hierarchy of authority.** 法律渊源的层级/等级。mandatory authority 强制性法源。persuasive authority 说服性法源。authority 此处不作“权威”解。

[6] **Computerized research has also blurred the distinctions among different types of information and broadened the scope of legal inquiry.** 计算机化的（研究）检索模糊了不同类别信息的区别并拓宽了法律探索的范围。

[7] ***Habeas corpus*** [Latin] 人身保护令；人身保护法（= Habeas corpus Act）。*Res ipsa loquitur*：[Latin] 事情不言自明。相当于英文的 The thing speaks for itself. 一般用于因疏忽而引起损害的诉讼中，指事件发生的本身已足以证明疏忽的行为。

[8] **Before reading *Tarasoff v. Regents of the University of California*, a researcher must be able to decipher “551 P. 2d 334 (Cal. 1976)” and understand that “551” is the volume number, “334” the page number, and “P. 2d” the abbreviation for the Pacific Reporter, Second Series, a source for California Supreme Court opinions.** （法律）检索者在阅读 Tarasoff 诉加州大学董事们一案之前，须能够破解案例汇编引证“551 P. 2d 334 (Cal. 1976)”并理解其含义：551 为该判例汇编的卷宗号，334 是为页码号，P. 2d 为加州高院判决之渊源的《太平洋判例汇编第二版》的简写。本句强调的是对美国判例引证表述的解读，其一般简写程式为：案例名称 + 案卷号 + 判例汇编刊物简称 + 本案开始页码 + 案件裁决的法院和日期，等。

[9] **The Bluebook establishes rules both for proper abbreviations and usage of signals such as “cf.” and “But see.” A few journals follow the somewhat simpler rules in the *University of Chicago Manual of Legal Citation* (1989), known as the Maroonbook.**
蓝皮书既对恰当的缩写又对诸如“cf.”和“But see”的符号用法确立规则。有几家刊物采用更为简便的规则，如：被称为栗色书的《芝加哥大学法律引证手册》(1989 年)。在美国因为法学出版社，如西部出版集团的法律书籍常用栗色硬封面，故 Maroonbook 形象地表示法律书籍；而 Bluebook 则指由哈佛法学评论协会出版的《统一引证体系》一书（*A Uniform System of Citation*, 17th ed., 2000, published by the Harvard Law Review Association)。

Exercises

1. *Read the Following Passage and Then Translate the Underlined Sentences into Chinese.*

Often the hardest part of the research process is finding the first piece of relevant information. Once one document is found, it usually can lead to a number of other sources. Cases cite earlier cases as authority; a statute's notes provide useful leads to decisions, legislative history documents, and secondary sources; and law review articles cite a wide variety of sources. Finding the first piece of the puzzle, though, can be a challenge.

(1) It is generally best to begin research by going to a trustworthy secondary source—a legal treatise or a law review article. The mass of primary sources retrieved by keyword searching can be overwhelming, and using a subject index or digest to find cases or statues on point is often frustrating. Primary sources can be confusing, ambiguously worded documents. Access to secondary materials, on the other hand, is usually easier and more straightforward. These materials try to explain and analyze the law. They summarize the basic rules and the leading primary sources and place them in context, allowing the researchers to select the most promising primary sources to pursue. (2) When it is apparent that the issue to be researched is statutory in nature, it may be most efficient to begin with an annotated code. This is particularly the case in areas with substantial governmental regulation, such as antitrust, banking, labor, or taxation. The statutory language may not provide a clear overview of the field, but an annotated code leads directly to most of the other relevant primary sources and may provide references to secondary sources as well, loose-leaf services of then combine the statutory text with editorial explanatory notes.

(3) Resources such as treatises and encyclopedias are usually easier to understand in print, as it is simpler to scan headings, get an overview of an area, and learn about related issues. At times, though, the computer databases of LexisNexis or Westlaw may be more effective starting points. If you are generally familiar with an area of law and are researching a narrow question or a particular combination of issues, an online search may be the best way to focus your research. It is still necessary to choose an appropriate database from the array of cases, statues, law review articles, and other resources.

Free Internet sites are not comprehensive, but they can provide places to start if more thorough resources are not readily available. Several websites provide directories organizing legal material by jurisdiction and topic. Among the most popular are the commercial site Findlaw <

www. findlaw. com > and Cornell Law School's Legal Information Institute < www. laaw. cornell. edu >. These sites provide links to primary sources, directories, journals, and numerous other sources. Google < www. google. com > and other Internet search engines can also find relevant sites, although it may be difficult to evaluate results and weed out superficial or misleading information. Search engines limited to legal sites, such as FindLaw's LawCrawler < lawcrawler. findlaw. com >, may yield more focused results.

These various options are the sorts of choices one must make in any research process. It is important to remember that professional help may be available to guide you in the choice of the first resource. Law librarians are trained to provide just this sort of assistance. (4) While they are not permitted to interpret the law or provide legal advice to library users, librarians can assist patrons in determining how best to track down the relevant sources.

No matter what criteria are used in determining when to stop researching, it is essential to verify that sources to be relied upon are still in force and "good law." (5) No research is complete if the latest supplements haven't been checked, current-awareness sources haven't been searched for new developments, and the status of cases to be relied upon hasn't been determined.

Adapted from *Morris L. Cohen & Kent C. Olson*, *Legal Research*, 8th ed.,
West Nutshell Series, China Law Press, 2004

2. *Debating Questions.*

(1) Which do you think relatively the best by comparing the different legal research methods?
(2) How should we do legal research as a lawyer?

主要参考书目及网上资源

1. 主要参考书目

(1) 薛波主编:《元照英美法词典》，法律出版社2003年版。
(2) 陈公绰主编:《英汉法律政治经济词汇》，中国对外翻译出版公司1997年版。
(3) 彭金瑞等编译，李浩培等审校:《简明英汉法律词典》，商务印书馆1990年版。
(4) 陈忠诚著:《英汉法律英语正误辨析》，法律出版社1998年版。
(5) 陈忠诚编著:《英汉汉英法律用语辨正词典》，法律出版社2000年版。
(6) Bryan A. Garner, *A Dictionary of Modern Legal Usage*，法律出版社2003年版（牛津大学出版社1995年版影印本）。
(7) Bryan A. Garner, *Black's Law Dictionary*, Seventh ed., West Group, 1999.

2. 法律英语学习主要的网上资源

中国法律英语网	http: //www. 51trans. net/
法律英语网	http://www. lawspirit. com/index. asp
法律英语学习网	http://www. lawyeah. cn/
E学论坛（行业英语-子论坛法律英语）	http://bbs. exue. com. cn/
法律英语学习-法律博客网	http://51trans. fyfz. cn/blog/51trans/

附录一

法律词汇英汉对照表

A

accused（刑事案件的）被告
acquit 释放/宣告无罪
act 法，条例，法案；行为，作为
action 诉讼
actionable 可提起诉讼的
ad hoc［拉丁文］特设，专设，临时
adhering countries（条约/国际组织的）参加国
adjudicate 裁决
admiralty court 海事法院
adopt（成文法的）通过；收养；采用，采纳
adversary system（英美法系国家诉讼法上的）对抗制
albeit = although
affirmed 维持（原判决）
amendment 修正；修正案
annulment 废除，无效
answer 答辩状
antidumping duties 反倾销税
appellant 上诉人
applicability 可适用性
applicable 可以适用的
arbitral awards 仲裁裁决
arbitral tribunal 仲裁庭
articles of incorporation（美）公司章程
assign 让与，转让
assignee 受让人
assignor 转让人
asylum 庇护
attachment of property 扣押财产
attachment execution 扣押财产以执行判决
attorney-General（英）总检察长；（美）司法部长
authenticate 认证，确定
authority 权力；权威；当局；机构（机关）；先例；判例；法源；（法律研究中的）权威著述

B

bail 保释/保证/担保
barrister *n.* 出庭律师
be charged with 因……受指控；被诉犯……罪
be indentured to 以合同约束；对……承担合同义务
beneficiary 受益人
bilateral treaty 双边条约

bill 法案；立法议案
bill of exchange 汇票
bill of lading（B/L）提单
binding 有拘束力的
binding precedent 有拘束力的先例
bona fide［拉丁文］善意，诚实
bona vacantia［拉丁文］无主物、政府接管物
breach 违反（合同/条约）
brief *n.* 律师代理意见书
bring a suit/ lawsuit 提起诉讼
burden of proof 证明责任；举证责任
bylaws 公司章程细则/附则
bypass 规避

C

carrier 承运人
causation 因果关系
cause of action 诉讼原因（诉因），诉讼事由（案由）
capacity（行为）能力，资格
capital punishment 死刑（death penalty）
chattel mortgages 动产抵押
checks and balances（宪法）权力制衡
choice of law clause 法律选择条款
chose in action 权利动产
circuit 巡回审判区
claim 权利要求，求偿，诉讼，索赔
claimant 权利请求人；索赔人；（诉讼的）原告；（仲裁的）申请方
codification 法典编纂（codify v.）
collateral 抵押物；担保物
commit（an offence /a crime）犯（罪）
competent consideration 不错的对价
composite state 复合国家
conciliation 和解
concession（关税）减让
confirmed letter of credit 保兑信用证
constitutionality 合宪性，符合宪法
contempt of court 藐视法庭（的行为或罪行）
counterclaim 反诉/反请求
contesting state 诉讼当事国
contract under seal 盖印合同，盖章合同
contracting party 缔约方
contractual rights 合同性权利；依据合同关系而产生的权利
contractual treaty 契约性条约
conversion *n.* 侵占
conveyance 财产（权）转移；财产（权）转移证书；运输；运送
conveyancing 不动产转让业务
convict 证明有罪；宣告有罪；罪犯
conviction *n.* 定罪/有罪判决
corporate officer 公司经理
correspondent bank 联系行；往来行；通知行
Crown Court（英国）刑事法院
Court of Appeal 上诉法院
County Court 郡法院
criminal offence 刑事犯罪
criminal offender 刑事犯
cross examination 交叉询问
custody 羁押/拘留/监禁/监视

D

damages 损害赔偿（金）
defense 抗辩
defendant（民事案件的）被告
decree 判决；裁定；法院命令
default award 缺席裁决
default judgment 缺席判决
defraud 欺骗
deposition 笔录证词；口供；（非公开出庭的）作证
discharge 债务解除
discovery（民事诉讼上的）披露，开庭前向诉讼对方提供材料
discretion 自由裁量权
dissolution（公司）解散
dispute settlement mechanism 争端解决机制
dissenting opinions（法官在判决书上的与多数法院不同的）异议意见
dividend 红利；股息
do justice 公平对待，伸张正义，实现正义
document of title 权益凭证
documentary Credit，商业跟单信用证
domicile 住所
draft v. 起草（法律）n.（法律）草案；汇票
drawee bank 票据付款行
duces tecum［拉丁文］携带证据文件出庭的命令
due process 正当程序

E

enact 制定（成文法）
enforce 强制执行；强制实施
enumerated powers（宪法）列举的各项权力
equity title 衡平法上的所有权
espionage 间谍行为（活动），间谍罪
establish 证实
estate 地产，地产权，财产权；遗产
executive privilege（美国宪法上的）行政特权
exemption（法律义务的）豁免
extraterritorial validity 域外效力
execute 履行，执行，实行
executed contract 已履行的合同
execution 执行；处决
executive privilege 行政特权
executory contract 待履行的合同
expropriation 征用，没收
exchange control 外汇管制

F

factor's lien 代理商留置权
false imprisonment *n.* 非法拘禁。
felony 重罪
file *v.* 提交（法律文书）；提起诉讼

find *v.* 裁决，做出裁决
follow 遵循，遵从
for cause 法律上十分充分的理由
forfeiture 没收，没收物
formal contract 正式合同，要式合同
formality of contract 合同格式
forum 法庭，诉讼地。fora（*pl.*）
forum selection clause 选择法庭条款
fraud 诈欺
freight forwarder 运费代理人；货运代理人；货运转运人
frustration（英美法上的）合同受挫，合同落空

G

guilty *adj.* 犯罪；有罪
good will 商誉
guarantor 担保人；保证人
grand jury 大陪审团

H

habeas copus［拉丁文］人身保护令
hear 听审，审理
High Court of Justice 高等法院
host state 东道国
House of Lords（英国）上议院，作为最高法院的贵族院

I

impasse 僵局
implement 履行，执行，实施
impartiality 公正性
impose on 把……强加（施加）给……
immunity 免除，豁免，豁免权
immunize... from liability 使……免除责任
in camera［拉丁文］禁止旁听的；秘密的；法院非公开审理
in personam［拉丁文］对人诉讼
in rem［拉丁文］对物诉讼
in terms of... 按照，根据；用……措词；从……方面（说来）
in toto［拉丁文］全部；全然；完全
incarceration 监禁（同 imprisonment）
incorporate *v.* 设立法人；设立公司
incorporator 公司创办人，公司发起人
indemnify 赔偿
indict *vt.* 起诉
indictable offence 可起诉的罪行，公诉罪
indictment 控诉，（刑事）起诉书，公诉书
inferior court 初级法院/低级法院
infringe 侵犯，侵害；infringement *n.*
infringer 侵权者
injunction 禁止（令）

innocence *n.* 无罪
inquisitorial system（大陆法系国家诉讼法上的）审问制；纠问制
institutional arbitration 机构仲裁
instruction *n.* 案情介绍、说明
insurance policy 保险单，保单
insurer 保险人
insured 被保险人
intangible property 无形财产
inter vivos［拉丁文］生前，在世时
international commercial arbitration 国际商事仲裁
international custom 国际习惯
irrevocable letter of credit 不可撤销信用证
issuing bank 开证行

J

joint venture 合资企业
judgment（民事案件的）判决
judicial opinions 司法意见，司法裁决
judicial review 司法审查
jurisdiction 管辖；管辖权；法域
jury 陪审团
jus dispositivum［拉丁文］任意法
jus cogens［拉丁文］强制法，强行法
justice 正义，公正（同 fair）；司法，裁判；（较高级的）法官
justiciable 可受法院裁判的

K

King's Bench，（英国）王座法庭，或指（英国高等法院）王座分庭

L

laches 长期延误不行使权利
law-making treaty 造法性条约
lawsuit 诉讼
lease 租赁；租赁权
lessee 承租人
lessor 出租人
legal 法律（上）的；法定的；合法的
legal effect 法律效力
legal incapacities 法律上无行为能力
legal title 普通法上的所有权，法定所有权
legality 合法性
licensee 被许可人
licensor 许可人
lien 留置
limitation period 时效
litigation（民事）诉讼
Lord Chancellor n. （英）御前大臣；大法官

M

Magistrates Court 治安法院
majority ownership 多数股权持有
manslaughter 非预谋杀人，非蓄意杀人罪
mediation 调停，调解
memorandum of association（英）公司章程
merger & acquisition（M&A）（公司）并购
minority shareholder 持有少数股权的股东
minutes 公司会议记录
misdemeanour 轻罪
misrepresentation 虚假陈述
mortgage *n.* /*v.* 抵押
mortgagee 抵押权人
mortgagor 抵押人
multilateral treaty 多边条约

N

negligence 过失，过失行为
NGO 非政府组织
negotiable instruments（*pl.*）流通票据，流通证券
negotiating bank 议付行
norm 规范，标准
notary 公证人，公证员
novelty（专利法上的）新颖性
nuisance *n.* 妨害

O

obiter dictum［拉丁文］（法官的）附带意见
obligation 义务；责任
obligee 权利人；债权人
obligor 负担义务人；债务人
observe 遵守
offender 违法者；犯人；侵权者
offer 要约，发盘
offeror 要约人，发盘人
offeree 受要约人，受盘人
opinio juris［拉丁文］法律确信
outstanding shares 已发行股票；净发股本；在外股票数
ownership of property 财产所有权

P

parallel import 平行进口
party 当事人；当事方
injured party 受害方
patentability 授予专利（权）的条件
patentee 专利权人
pending 未决的

penal 刑事的，刑法上的；惩罚性的
per se［拉丁文］本身；自身；固有的
personal property 动产
persuasive authority 有说服力的法律根据
plenary jurisdiction 完全管辖权
portfolio investment 间接投资；证券投资
preemptive right（股份）优先购买权
prerequisite 先决条件
prima facie［拉丁文］表面上看来；初步看来
privity of contract 合同的相对性；合同的利害关系
preferred stock 优先股
proxy 表决权代理；表决权委任代理书
public nuisance 妨害公众罪
precedent 先例；判例
produce 证据/文件的出示/提交
prescribe 规定
Privy Council（英）枢密院
probate 遗嘱的认证；经认证的遗嘱；遗嘱检验程序
procedural rule 程序规则
prosecutor 检察官
prosecution 刑事诉讼；控诉方、公诉方。
promise 允诺
promisee 受允诺人；受约人
promisor 允诺人；立约人
proprietary（*n.* /*adj.*）所有（权）人；所有权
proprietary rights 所有权权利、专有性权利
provide 规定
provision 规定，条款
public domain 公有财产，无版权、无专利权状态

Q

quash 撤销/推翻/使无效/终止
quasi contract 准合同
quorum 法定人数

R

real property 不动产
reason 法律推理（*v.*），判决理由（*n.*）
recognizance 保释金，保证金
relief 救济
remedy 救济
reject 撤销，拒绝，否决，驳回
renew *v.* 更新，续展，展期 renewal *n.*
reorganization（破产）重组
res ipsa loquitur［拉丁文］事情不言自明
res judicata［拉丁文］已判事项，既判案件
resort to 求助，诉诸(近义短语 have recourse to 求助于，求援于)
right in personam 对人权
right in rem 对物权
rights of audience *n.*（英）出庭陈述权
royalty 版税，使用费，特许使用费
ratio decidendi［拉丁文］判决依据；判决理由

S

safeguard measures 保障措施
sanction 制裁
secured creditor 有担保权益的债权人
security interest 担保利益
sentence（刑事案件的）判决，刑罚，科刑
separation of powers doctrine 分权原则
service（程序法上的）送达
service of summons 送达传票（= service of process）
settlor 信托创立人；财产授予者
sit 开庭
solicitor 事务律师
Solicitor- General *n.*（英）副总检察长
source of law 法律渊源
sovereign 君主，元首；拥有最高权力的
sovereignty 主权
stakeholders 利益相关者；利害关系人
stand 维持不变
standby Letter of Credit，备用信用证
standard form contract 格式合同
stare decisis［拉丁文］遵循先例
statute 法律，法规，制定法；章程
statutory power 法定权力
subject matter 主题；诉讼事由；标的（物）
subject matter of a case 案由
subject to 隶属的、从属的、受……支配的；易受……的；须依照的、顺从的；附条件的；依据、依照；可以……；可能会……；有待于……
subpoena 强制到庭的传票；（用传票）传唤
subscribe 签署（文件）
suspend 中止（法律义务的履行）
substantive law 实体法
substantive rule 实体规则
subordinate legislation 授权立法（delegated legislation）
sui generis［拉丁文］自成一类的，独特的
suit 诉讼
summary offences 按简易程序审理的犯罪
summary proceeding 简易程序
superior court 高级法院

T

tangible property 有形财产
taking（财产）占有；强占；征收
testator 立遗嘱人
testify 作证
testament 遗嘱
tort 侵权行为，不法行为
treason 叛国罪
trespass 侵害（侵犯）行为，侵入行为
tribunal 法庭；仲裁庭
trust 信托
try 审问；通过法律程序审查和审理（证据或案例）；审判（受指控的人）

U

UNCITRAL 联合国国际贸易法委员会
undertaking（信用证交易中银行的）承诺，保证
undue 不适当的；过分的；未到期的
unilateral 单边的
unitary state 单一制国家
unjust enrichment 不当得利
unsecured creditor 无担保权益的债权人
utility（专利法上的）实用性

V

validate 使生效；确认
vendor 卖主
vendee 买主
void 无效的
voidable 可使无效的；可以撤销的
vicarious liability 替代责任；雇主责任
vice versa *adv.* 反之亦然

W

will 遗嘱
without prejudice to . . . 在不影响……的前提下
writ 书面命令/令状
writ of certiorari 移送令状（上级法院命令下级法院将案件或记录移送上级法院的令状）
writ of mandamus 命令状；职务执行令状
wrong *n.* 过错行为，过失；不法行为，非法行为

附录二

练习参考答案

Unit One　Preparation for Legal Education

1.

(1), (4), (6)

2.

(1) 高级法律检索课程增强了许多法科学生的法律检索、法律技术和法律分析技能。

(2) 高级法律检索课程被特别定位为提供培养法律实践中成功所必需的一系列关键技能：信息获取能力、数字认知能力及批判性思维能力。

(3) 律师在代理意见书中或法庭上进行任何辩论之前，均需找到所有与手头案件有关的强制性与说服性的法源资料。（注意不要将“authority”理解成“权威”）

(4) 当今法律实践中，当场运用电脑软件进行展示的技巧是向陪审团、董事会及未来当事人陈述案情的关键。（注意不要将“presentation software skills”翻译为“呈送软件的技巧”）

(5) 高级法律检索课程包括：法律检索资源的综合论述，对提高检索技能的重点关注，以及对法律出版商与资源检索报价的揭示。

3. 略。

Unit Two　The Legal Profession

1.

Read the text and find the differences between them.

Nowadays, the differences between solicitors and barristers become more blurred. Traditionally the Bar has been viewed as the senior branch of the profession, both for its long historic roots and because the more senior judges have been appointed from its members. Until recently only barristers appeared in the High Court, the Court of Appeal and the House of Lords, but the new Act has extended rights of audience in all courts to all those who are licensed on the recommendation of the Lord Chancellor's Advisory Committee on Legal Education and Conduct.

The work of many solicitors is more general to that of a barrister.

2.. 略。

Unit Three　World Legal Systems

1. 略。

Unit Four　Public Law

1. (1) ordinary courts, Administrative law courts

   (2) Public law, Private law

   (3) the legislative, the executive, the judicial; 或 legislature, administration, judiciary

2. (1) 这种在普通法系只是潜在的和默示的分类却是理解民法法系的基础。

   (2) 法学院的教师倾向于或者是公法学家，抑或为私法学家。

   (3) 课程与论文倾向于只能涉及公私法的其中一个领域，尽管事实上现在任何特定的主题都倾向于公法性的方面。

   (4) 民法法系的法学家们对于公私法划分的理论基础和所依据的理由并未达成一致，各国关于这种划分的范围与效果也未取得共识。

   (5) 对其他几个领域的恰当分类尚属争论的问题。

   (6) 几乎所有流传给我们的罗马法律文献都是关于私法的，并且传统上法学的注意力都集中在私法上。

   (7) 至于刑法，虽然从法律技术上被归入公法一类，但它在传统上一直是私法学家所关注的问题，并且，无论在什么地方，它都包括在普通法院的管辖权之中。

   (8) 应当注意的是，私法的一般原则经常被用来补充或填补行政法存在的空白。

Unit Five　Private Law

1. (2), (3), (5), (6), (9), (10), (14), (15)。
2. 略。

Unit Six Basic Principles of Common Law

1.

Reversed: where a higher court on appeal overturns the decision of a lower court in the same case.

Overruled: where the court overturns a decision in a different case of a court of lower, or sometimes equal, status.

Approved: a higher court states that a different case was correctly decided by a lower court.

Distinguished: where a court has no power, or no wish, to overrule an earlier different case and does not wish to apply it.

Affirmed: the court agrees with the decision of a lower court in the same case.

Applied: the court regards itself bound by a decision in an earlier, different case, and has used the same legal reasoning in the present case.

Considered: the court discussed a different case, often one decided by a court of equal status, but did not apply it in this case.

2. Advantages and disadvantages of precedent:

Advantages:

(i) **Certainty** because judges follow earlier decisions, one can predict the likely outcomes of a case.

(ii) **Room for growth** by way of original precedent.

(iii) **Its practical nature.**

(iv) **Scope for detail** if there were only a formal legal code, there would be great difficulty caused by the almost certain arrival of unforeseen situations, events and disputes.

Disadvantages:

(i) **Rigidity** which fetters the judge's discretion in individual cases.

(ii) **Sophistry** which allows a judge to magnify the smallest distinction between the facts of two cases so as to be able to distinguish the precedent.

(iii) **Complexity** which can be seen by visiting a Law Library, where there are hundreds of volumes containing reports of many thousands of individual cases.

Unit Seven Common Law And Equity

1. No. They are different concepts. "Common law" has different meanings: in our reading text,

the word ' common law' has the meaning that it is the general common to the country as a whole and it is the body of law deriving from law courts as opposed to those sitting in equity. When we talk about civil-law system, as distinct from Common-law system, the meaning is ' the body of law based on the English legal system'.

2. Because of the common law became rigid, delayed, expensive and dogged by technicalities.
3. Equity prevails.

Unit Eight The English and the American Court System

1.

(1) False. It only applies to England and Wales.

(2) Not binding. Only persuasive.

(3) Only one high court.

(4) True.

(5) True.

(6) False. They have separate jurisdictions.

(7) False. The supreme state court's judgment is final.

2.

- Two Instance Final Adjudication System: the system whereby the second instance is the last instance
- The courts punish all criminals and settle all kinds of civil and other disputes so as to defend the people's democratic dictatorship, safeguard the socialist legal system, protect socialist property owned by all the people, collective property owned by the working people and the legitimate private property of the citizens, the citizens' right of the person and their democratic and other rights.
- A. The Supreme People's Court (First instance case prescribed by law e. g. cases of national importance; Appeals from higher people's courts and special people's courts)

  B. the Higher People's court

  C. The Intermediate People's Court

  D. the Basic People's Court

Unit Nine The Sources of Criminal Law

1. (1) c; (2) e; (3) I; (4) a; (5) g; (6) f; (7) d; (8) b; (9) h.

2.

叛国罪在美国被认为是一种重罪，且这种不忠行为一旦被定罪便被课以重刑。重罪和轻罪的区别之一是对罪行惩罚的严厉程度。重罪是被处以在各州或联邦监狱服一年以上的徒刑（在有些情形下还会被处以死刑），并附加剥夺政治权利。轻罪会被处以罚金或短期监禁的处罚，或两者并处。

刑罚的传统理论是刑罚应与罪行相适应，并对刑罚作了硬性规定。这一理论在实践中仍然有效，因为人们习惯于对特定犯罪的刑罚定下最高刑和最低刑予以限制。

然而，这一理论已部分地被另一种观点取代，即刑罚应与犯罪者相适应，这种观点的目的在于改造罪犯或阻止他继续犯罪，并以儆效尤。

Unit Ten　Criminal Procedure

1. 略。

Unit Eleven　Civil Procedure

1.

(1) Because the litigation becomes very expensive and time-consuming.

(2) Civil procedure: on the balance of probabilities; criminal procedure: beyond reasonable doubt

(3) Cost; Too complicated to understand; Justice (common understandings/emotions vs legal analysis)

Unit Twelve　Nature and Classes of Contracts

1. (3), (5), (7), (8), (10).
2. (1) h; (2) a; (3) b; (4) g; (5) e; (6) d; (7) f; (8) c.

Unit Thirteen　Introduction to American Uniform Commercial Code

第1条-102 宗旨；解释规则；协议变更

（1）本法应被自由解释使其适用得以促进其基本宗旨和政策。

（2）本法的基本宗旨和政策为：

（a）简化、阐明调整商业交易的法律，并使其现代化；

(b) 允许当事人之间通过惯例、习惯和协议表现的商业实践的继续发展；
(c) 统一不同司法管辖权之间的法律。
(3) 本法条文的效力可以通过协议变更，除非本法另有规定或者除非本法要求的善意、勤勉、合理和谨慎的义务不能用协议排斥，但当事人可经协议确定履行该义务的标准，如果该标准不是明显不合理。
(4) 本法某些条款中“除非有相反约定”或相似的字句不意味其他条款的效力不能被（3）款规定的协议变更。
(5) 除非情况有其他要求，在本法中
(a) 单数单词包括复数，复数单词也包括单数；
(b) 阳性单词包括阴性和中性，且在词义允许时，中性单词可指代任何性别。

Unit Fourteen　Law of Torts

1.
(1) Yes. For instance a solicitor who gives negligent advice to a client could be sued in both contract and tort.
(2) Duty, breach and loss.
(3) Claimant
(4) Strict liability.
(5) The employer takes the benefit of the activity. The employer can insure more early. It is socially convenient.
2.
(1) (a) Is the statement defamatory? Partly false. (b) Does it refer to the claimant? Yes. (c) Has it been published? Yes. (d) Do any of the defences apply? Consider: is it true? Or is it a fair or honest comment on a matter of public interest? If either says yes, then there is a defence and therefore no defamation. If neither, then defamation.
(2) The defendant owes the claimant a duty of care? Yes. The club owns a duty of care to build the fence high enough to prevent the cricket ball hitting passersby by flying over the fence. The defendant has acted in breach of that duty? No. the club need only guard against reasonable probabilities not mere possibilities. (See Bolton v Stone [1951] AC 850 for authority if you are interested.) Therefore the club will not be liable.

Unit Fifteen　What is Trust?

1. Something (as property) held by one party (the trustee) for the benefit of another (the

beneficiary) eg. "he is the beneficiary of a generous trust set up by his father"

2. First, he stated that trusts were based on conscience. Secondly, he said that for there to be an equitable interest there must be a separation of the legal title from the equitable title.
3. Retain the legal title and protect the safety of the transaction.
4. Provision for family or dependants; sometimes it is not possible or desirable to be owned outright by minors. Therefore the property can be vested in adults to hold the trust for the minors ; Protect the trust funds and prevent the son from having the control over his interest.

Unit Sixteen Trademarks, Service Marks and Copyrights

1. 略。
2. 略。

Unit Seventeen Patents, Secret Business Information, Protection of Computer Software and Mask Work

1. (1), (5), (6)。
2. 略。

Unit Eighteen A Comparative Analysis of Spam Laws: the Quest for Model Law

1. 略。

Unit Nineteen Law of Corporations

1.

(1) 有限责任公司和股份有限公司是企业法人。有限责任公司，股东以其出资额为限对公司承担责任，公司以其全部资产对公司的债务承担责任。股份有限公司，其全部资本分为等额股份，股东以其所持股份为限对公司承担责任，公司以其全部资产对公司的债务承担责任。

(2) 股东之间可以相互转让其全部出资或者部分出资。股东向股东以外的人转让其出资时，必须经全体股东过半数同意；不同意转让的股东应当购买该转让的出资，如果不购买该转让的出资，视为同意转让。经股东同意转让的出资，在同等条件下，其他股

东对该出资有优先购买权。

(3) 董事、总经理不得挪用公司资金或者将公司资金借贷给他人。董事、总经理不得将公司资产以其个人名义或者以其他个人名义开立帐户存储。董事、总经理不得以公司资产为本公司的股东或者其他个人债务提供担保。

(4) 董事、总经理不得自营或者为他人经营与其所任职公司同类的营业或者从事损害本公司利益的活动。从事上述营业或者活动的，所得收入应当归公司所有。董事、总经理除公司章程规定或者股东会同意外，不得同本公司订立合同或者进行交易。

Unit Twenty　Law of Bankruptcy

1. 略。

Unit Twenty-one　Securities Regulation

1. 略。

Unit Twenty-two　Employment Law

1.

(1) Inequality of bargaining power.

(2) Such as part-time worker get lower rate and 99% part-time workers are female workers.

Part-time workers (who are predominantly female) only qualify for compensation for unfair dismissal and redundancy payments once they had been employed for five years. Full-time workers qualify after two years.

Unit Twenty-three　Land law

1.

(1) We get the estate (to the time during which one can enjoy the land) and interest in land. An estate entitles the holder to the management and enjoyment of the land itself; an interest entitles someone else to a specific right over that land which may reduce the estate owner to his neighbour.

(2) A purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires and interest in property

(3) a. make sure there is no obstacles interfering your proper use of the house. Ie. There is no binding interests and b. legal formalities have been complied with (and register in case of registered land)

Unit Twenty-four Administrative Law

1. 略。

2.

(1) 挑战之一是制定程序，这些程序可以在各种重要的但可能相互冲突的公共价值当中找到一种切实可行的妥协方案。

(2) 关注政府决策程序的公正性是英美法律制度的一个主要特征。

(3) 审判程序一般被认为对解决涉及过往事件的具体事实之争端最为有利，而对做出综合预测或对未来政策做出评判最为不利。

(4) 由于政府机关的资源（财力）总是有限，且通常不足以完成法律规定的所有职责，因而考虑决策程序的效率成为必需。

(5) 如果人们普遍感觉政府的某一机构武断或有失公正地做出决定，那么这种感觉能够破坏公众对该政府机关的信任和有关行业部门遵守该政府机关决定的自愿性。

(6) 行政法制度并不仅仅依靠程序控制来确保政府官员恰当地各司其职，它也期望立法部门、行政部门和司法部门对各政府机关的活动内容进行监督。

Unit Twenty-five Sources of International Law

1. (1), (2), (3), (5), (9)。

2. 略。

Unit Twenty-six The World Trade Organization (I)

1.

(1) 这种程序避免了原关贸总协定修正条款的限制，而该限制（如果还存在的话）则可能导致乌拉圭回合谈判成果难以生效。

(2) 第三，世界贸易组织将乌拉圭回合谈判成果的各类法律文本捆绑在一起，加强了各谈判方所主张的“一揽子强制性规则”的理念，也就是说，接受乌拉圭回合谈判成果的各国必须接受所有的一揽子规则（除了个别例外）。

(3) 尽管世界贸易组织的宪章规定不过是最低限度的要求，但该宪章所规定的明确的

（组织）法律地位条款以及传统上为增进组织效率而设的国际组织特权与豁免都在这方面有所助益。

(4) 相反地，如果美国知道自己的行为可能与其所承担的国际责任不符，而美国又认为其偏离国际准则的行为又是如此重要，以至于美国政府愿意这样做的话，她依据其（自身的）宪政体制依然有权力去这样做。

Unit Twenty-seven The World Trade Organization (II)

1.

(1) 关贸总协定基本没有任何制度性框架，没有一条规定设立秘书处的条款，它和一个最终没有变成现实的组织有着法律的关联，诸如此类的特征使得它与二战结束后随即成立的那些国际组织相比较，很难有资格称得上是“近乎成功”的国际组织。

(2) 此种现象之所以有启示意义，在于它似乎暗示，与那些或明或暗的政治或经济力量相比，法律的框架或制度似乎对事情的发展助益更小。

(3) 关贸总协定已经有意识地放弃了解决某些似乎令人困惑及难以调和的法律问题的努力，转而去解决其他事项。

(4) 某些关贸总协定成员方的代表已经表达出“需要知道我们所处的地位，需要了解我们自己的权利”这样的诉求，而另一些代表也在其他成员方违约时努力（从关贸总协定）寻求（对违约方）更多的法律制裁。

Unit Twenty-eight The World Trade Organization (III)

1.

(a) withdrew (b) effective (c) apply (d) comply with (e) Under (f) waive

(g) entered into (h) passed

Unit Twenty-nine The Evolution of the Meaning of the Term ‘Investment’

1.

(a) in (b) with (c) in (d) under (e) to (f) under

(1) 外国投资的概念无须局限于有形财产这个观点一经接受，在投资条约的外国投资定义范围中就进一步包括了无形（财产）权利。

(2) 一般承认，国家违反其与外国投资者之间的合同这个行为本身并不导致国际救济的结果。

(3) 投资条约将合同性权利包括在对“外国投资”的定义中，意味着如果国家违反投资合同，那么将引发违反合同一方的国家的国际责任。
(4) 这种（原本国内法上的合同的）国际化使得外国投资者依据投资条约的规定一旦其权利受到侵害会有救济的途径。

Unit Thirty The OECD Guidelines for Multinational Enterprises

1.
(1) prescribe (2) within (3) subject to (4) impinge on (5) circumscribed (6) contemplating (7) right
2.
(1) 相互关联的、涉及国际投资和多国企业事项的法律文件所建立的均衡框架将更有助于扩大国际合作的好处。
(2) 参加国在维持其公共秩序、保护其基本安全利益以及履行国际和平及安全承诺的前提下，应在其法律、规章和行政措施方面给予在其境内运营并由另一参加国的国民直接或者间接所有或控制的企业（以下简称“外国受控企业”）以符合国际法要求的、不低于在类似情况下给予其本国国民的待遇（以下简称“国民待遇）。
(3) 本宣言并不涉及参加国对外国投资的准入或设立外资企业的管制权利。
(4) 他们进而认识到，在投资领域规定官方的国际投资激励或非激励措施（以下简称“措施”）的特定法律、规章及行政行为对参加国政府的利益将产生影响，此种受影响的利益应得到足够的关注。

Unit Thirty-one Nature and Scope of the Conflict of Laws

1. (1)、(2)、(3)、(5)。
2. 略。

Unit Thirty-two International Sales Transaction (I)

1.
(a) at (b) into (c) under (d) in (e) from
(1) 公约条款的制定历经了数年的谈判，目的是为了在各国就相应问题的不同解决方式之间寻求一个平衡。
(2) 双方当事人可以不适用本公约，或…减损本公约的任何规定或改变其效力。

(3) 有评论家声称，在当事各方之间很可能发生激烈争议的规则方面，并不存在一个足够统一的习惯做法能支撑（“商人法”）这样的实践；而发展这样一套规则的企图将导致不确定性和混乱的结果。（这个观点是对“商人法”（lex mercatoria）的否定——编者注）

Unit Thirty-three International Sales Transaction (II)

1. 信用证的申请和开立

(1) 信用证独立于基础交易，即使信用证对该基础交易作了明确的援引。但是，为避免在审单时发生不必要的费用、延误和争议，开证申请人和受益人应当考虑清楚要求任何单据、单据由谁出具和提交单据的期限。

(2) 开证申请人承担其有关开立或修改信用证的指示不明确所导致的风险。除非另有明确规定，开立或修改信用证的申请即意味着授权开证以必要或适宜的方式补充或细化信用证的条款，以使信用证得以使用。

(3) 开证申请人应当知道，UCP 的许多条文，诸如第 13 条、第 20 条、第 21 条、第 23 条、第 24 条、第 26 条、第 27 条、第 28 条、第 39 条、第 40 条、第 46 条和第 47 条，对信用证条款术语的含义作了特别规定，除非申请人对这些术语的含义完全通晓，否则将导致难以预期的后果。例如，在多数情况下，要求提交海运提单而且禁止转运的信用证必须排除 UCP500 第 23 条（d）款的适用，才能使禁止转运发生效力。

(4) 信用证不应规定提交由开证申请人出具及/或副签的单据。如果信用证含有此类条款，则受益人必须要求修改信用证，或者遵守该条款并承担无法满足这一要求的风险。

(5) 如果对基础交易、开证申请和信用证开立的上述细节加以审慎考虑，在审单过程中出现的许多问题都能得以避免或解决。

Unit Thirty-four Types and Rules of International Commercial Arbitration

1. (1), (4), (5), (8), (9).

2.

(4) ……该条款应提及一方当事人所作的构成放弃援引该条款的任何行动。如需要的话，还应提及在仲裁之前所需做出的和解努力。

(5) ……各国可要求所有仲裁员必须选自经批准的仲裁员名单，而且必须是该国国民，而其他国家可能禁止充当一方诉讼当事人的同国仲裁员超过一名。

(8) ……在一些国家，若没有适当的理由，仲裁程序不应超过特定时间，否则进行仲裁的机构将被认为是失职。在许多国家，当事方可由律师代表进行仲裁。

（9）应遵循的程序——在一些地方，仲裁通常在提交有关文书之后无需听审就裁定。其他地方则允许对纠纷进行审理，准许口头证言（包括宣誓证言），允许交叉询问，允许有限的披露、签发传票、获取律师的书面意见……。

Unit Thirty-five　International Human Rights Law

1.

（1）已如前述，国际法是将公民权利和政治权利与公民的经济、社会与文化权利区别对待的。前者常被指称为第一代权利，而后者为第二代权利。

（2）此类权利被视为是属于人民的而非个人的，且其中的两项重要权利是自决权和发展权。这些权利在文字上常被指称为“第三代权利”。

（3）在非殖民地情况下此项权利是否存在的问题，由欧洲联盟在 1991 年 8 月设立的解决前南斯拉夫事件所引发的不同法律问题的巴丁特仲裁委员会处理。其提交的问题之一便是居住在波斯尼亚和克罗地亚地区的塞尔维亚人是否享有自决权。

Unit Thirty-six　The Changing Balance in Antitrust Law

1. 略。

Unit Thirty-seven　Constitutional Law

1.

(a) established (b) presumption (c) justify (d) precedent (e) authority (f) constitutionally (g) consensus (h) convicted

（1）作为美国国会众议院的来自弗吉尼亚州的使团成员，我对那些对确保我们政府宪政体制的活力、从而为联邦作出过杰出贡献的先驱深感自豪。华盛顿、杰非逊、麦迪逊、梅森以及其他先驱都来自弗吉尼亚州，他们领导了我们政府宪政体制的发展，并且致力于维护和保卫这个体制。

（2）很不幸的是，主席先生，（众议院）司法委员会忽视了其担负的重大的宪法责任，参与了一件史无前例的对国会弹劾权在实体和程序上的权力滥用事件。

（3）实际上，众议院司法委员会以不符合（宪法所规定的）可弹劾罪错的高标准要求的那些指控为根据进行审查，这样的做法是通过确立一个危险的、以党派利益为出发点的恣意进行弹劾的先例，此种先例将永久性地削弱（美国宪政体制中的）总统体制，已经是给我们的宪政体系造成了不可挽回的损害。

Unit Thirty-eight The Legal Research Process

1. (1) 通常，最好是寻找可信赖的法学论文或法学评论文章这些次级渊源以开始检索（研究）。
   (2) 如果检索的问题在性质上显属制定法，最有效的途径便是从附注释的法典开始。在涉及诸如反托拉斯、银行业、劳动或税收等这些政府规制程度很高的领域，其情况更是如此。
   (3) 法学文章和百科全书类之渊源的印刷文本通常更容易理解，因为较容易浏览其标题，获得某一领域的概况，便于了解相关问题。
   (4) 图书管理员不允许向读者解释法律或提供法律咨询，但他们可帮助惠顾者以确定其能检索到相关（法律）渊源的最佳途径。
   (5) 一项检索（研究）如未能核对最新补充材料，也未能穷尽现知的渊源以寻找其新的发展，且所依靠的判例地位未得以确定，便是未完成的检索（研究）。
2. 略。

内容提要

新版《当代法律英语》由四位从事法律英语教学多年的教师共同完成，内容涉及各法律部门，并且不局限于特定的国别法（如美国法）。课文附有mp3格式的录音材料。除了贴近时代脉搏和强调专业英语的实际运用外（如普通法判例阅读技巧、法律资料检索及研究技巧、反垃圾邮件的法律规制、WTO法律规则、涉及美国前总统克林顿弹劾案的国会辩论材料、国际人权法等），她延续了原《现代法律英语》朴实清新的传统。

Contemporary English Language of Law

当代法律英语

中山大学出版社

责任编辑：熊锡源
封面设计：楚　天
责任校对：易　正
责任技编：黄少伟

ISBN 7-306-02706-9/H·289
定价:39.80元(含MP3 CD一张)