THREE

The Legal System of the United States

The defining of the scope of the United States court system goes back further than early colonial times and continues into the present day. The Founding Fathers of the United States established a federal legal system that allowed for individual states to comprise their own laws in accordance with their beliefs and ideas. But as slavery was a major divisive factor during the 1700s and 1800s, the legal system eventually diverged between the ideals of the Northern and Southern states, culminating in the U.S. Civil War. However, due to President Lincoln's leadership, the union was restored, slavery was abolished, and the legal system was on its way to being seemingly more liberal, justified, and democratic.

Today, the legal system continues to operate in accordance with the United States' Constitution, which was effectively written to allow for flexibility. The powers of government are separated into three areas: judicial, executive, and legislative branches. The powers are then narrowed down to state and local offices, in which officials and representatives are elected by the citizens of the United States.

The differences and similarities between the state and federal court systems in the United States will be examined shortly, along with the conflicts that arise between laws, equity, and court procedures at the federal, state, and local levels. In addition, global legal perspectives and management strategies shall be evaluated to help determine the relationship that exists between the United States' legal system and global management and entrepreneurship. The federal constitution and its application to business will be discussed in U.S. Constitutional Law and Business chapter.

The United States Court System

The courts in the United States are endowed by the federal and state constitutions with judicial power. The judicial capacity encompasses three powers: 1) adjudication—the application of legal principles and rules to factual disputes in order to settle cases and controversies; 2) judicial review—the power for statutes and other actions to be evaluated by the two other branches of government to ensure that they are constitutional; and 3) statutory interpretation—the power to construe and clarify legislation for exact meaning.

As noted, the United States is a federal system of government with two distinct levels of government—the national/federal government and the state governments—and thus there are two separate court systems. Because the fifty state court systems each have their differences, any detailed explication is beyond the scope of this book. Rather, this book will examine the common elements in the state court systems and compare this general state model to the federal court system.

State v. Federal Court Systems in the United States

At the apex of the state court system is the highest court in the state, typically called the state supreme court. A state supreme court possesses appellate jurisdiction, which is the power to hear and decide judgments of the lower courts of the state. A state supreme court decision is final in all cases not involving federal Constitutional law or statutory law or treaties. Below the state supreme court, the intermediate courts form the next level in the state court system. These courts also possess appellate jurisdiction and hear cases from the "inferior" courts within the state system. These intermediate courts typically are called district courts of appeal, but in larger and more populated states, there will be several courts of appeal established in geographic regions throughout the state. Below the courts of appeal is the level of the original jurisdictional courts. These courts possess both civil and criminal jurisdiction and thus they are usually the first courts to hear and resolve disputes between private parties as well as criminal offenses against the state. Typically, these original jurisdictional courts are referred to as circuit courts. Inferior courts also include the county courts, which hear minor civil and criminal matters, but which also possess the original jurisdiction to decide real estate cases within their jurisdiction. Finally, state inferior courts also include small claims courts, at times called summary procedure tribunals, as well as traffic courts.

At the apex of the federal court system is the U.S. Supreme Court, which is the only federal court expressly created by the Constitution. It is the highest court in the United States. The U.S. Supreme Court possesses both original and primary jurisdiction. The former extends to cases concerning ambassadors and public ministers as well as cases in which two states are parties. This is in contrast to the court's appellate jurisdiction, which extends to all cases brought into the federal court system as well as the appellate jurisdiction of certain cases decided by the state supreme courts. The intermediate level in the federal system is composed of the U.S. Courts of Appeal. The United States is divided into eleven judicial circuits and each circuit has a designated court of appeals. These courts have appellate jurisdiction only, and thus review the final decisions of the courts of original jurisdiction in the federal system. The District Courts are the courts of original jurisdiction in almost all cases maintained in the federal court

system. They are the trial courts for federal, civil, and criminal matters. Finally, there are specialized federal courts created by Congress to determine specialized matters, such as the Patent Court and the Tax Court.

Courts and Jurisdiction

Legal rights are meaningless unless they are enforceable. Accordingly, one major function of government is to provide a system wherein the rights of parties under the law can be determined and enforced. The instrumentality of government so empowered is known in the Anglo-American system as a "court." A court is a tribunal established by the government to hear and decide cases and controversies properly brought before it, grant redress to aggrieved parties, deter wrongdoing, and enforce punishment against wrongdoers. This legal process ordinarily is called a "lawsuit" for civil cases and a "prosecution" for criminal cases. However, it should be noted here that other instrumentalities of government—for example, administrative agencies—have been created to enforce certain distinct areas of law and thereby determine rights and obligations. The topic of administrative law, particularly the judicial power of agencies, will be discussed in the Administrative Law and Business chapter.

Jurisdiction is the power each court has to try cases and to decide certain types of controversies. As mentioned, original jurisdiction is the power a court has to hear a case when it is first brought into the legal system whereas appellate jurisdiction is the authority a court has to review a judgment of a lower court or an administrative agency. The term "jurisdiction," however, should not be confused with the term "venue." Jurisdiction deals with the original authority of a court to hear a case; but once a court has jurisdiction, venue rules will govern where geographically the case will be heard. The venue of a lawsuit usually is the location of the court nearest to where the defendant to the lawsuit resides or where the incident or transaction at issue occurred. Venue assumes that a court has jurisdiction, and "merely" determines where within the court's jurisdiction the case will be heard.

There are two indispensable prerequisites for a court to obtain original jurisdiction. First, the court must have jurisdiction over the subject matter of the lawsuit, i.e. a case must fall within a court's general, special, limited, or monetary jurisdiction. And second, the court must have jurisdiction over the person against whom the lawsuit is being brought. As a general rule, if a court lacks either requirement and enters a judgment, the judgment is void and thus has no legal effect. Regarding subject matter jurisdiction in a federal system such as the U.S., the general rule is that cases begin in the state courts, however, two very important exceptions hold that if a case is a "federal question" case or if there is "diversity of citizenship" between the litigants, the federal courts properly will

assume jurisdiction. A federal question case is any case where the person bringing the lawsuit is basing his or her case on the federal constitution, a federal statute or administrative regulation, or a U.S. treaty. A diversity of citizenship case is when the person bringing the suit, usually called the plaintiff in such a context, and the defendant, the person being sued, are citizens of different states. Significantly, there is no federal question requirement for a "diversity" lawsuit but there is a requirement that the amount in controversy in the lawsuit be over $75,000.

In examining the original jurisdiction of a court, an action *in personam* must be differentiated from an action *in rem*. An action *in personam* is an action wherein the plaintiff is seeking to hold the defendant liable for a personal obligation. To illustrate, this means that the plaintiff is suing the defendant to recover money damages for an alleged breach of contract by the defendant, the plaintiff is suing the defendant to recover a debt allegedly owed by the defendant to the plaintiff, or the plaintiff is suing to recover damages for personal injuries that the defendant purportedly negligently inflicted upon the plaintiff.

When the plaintiff brings an action *in personam*, the court must have jurisdiction over the person of the defendant. A court can acquire *in personam* jurisdiction in a variety of ways. The first method occurs when the defendant resides within the territorial jurisdiction of the court and the defendant is either "served" with a summons and copy of the plaintiff's complaint or the sheriff or other designated court officer leaves the summons and complaint with an adult at the place of the defendant's residence or work. The second method of securing personal jurisdiction occurs when the defendant resides elsewhere but is personally served by the sheriff with a summons and complaint when the defendant resides within the court's territorial jurisdiction.

An action *in rem* is one in which the plaintiff is seeking to enforce a right against certain property owned by the defendant. Such a suit must be brought before the court where the property—the "res"—is located. Ordinarily, there is no need for personal service but there is, however, a service via "publication," wherein a notice of the lawsuit is published in a newspaper which circulates in the geographic area of the lawsuit itself. One such example would be a mortgage foreclosure action against a real estate property, but the suit itself must have been brought in the county court where the property is located. Another example would be a divorce lawsuit. Because a marriage is considered by the law to be a "res," publication usually will be sufficient enough service for a court to obtain jurisdiction over even an out-of-state spouse.

Finally, there are two types of state statutes—Long Arm statutes and Motorist Implied Consent statutes—that directly impact the courts' jurisdiction. A state Long Arm statute permits a cause of action to be instituted against an out-of-state resident defendant in the plaintiff's home state if the defendant

himself does business within the state, thereby impliedly giving his or her consent to be sued on a claim arising from that business. The plaintiff typically serves the Secretary of State for that state and thereby acquires jurisdiction over the out-of-state defendant. However, the U.S. Supreme Court has ruled that in order for an out-of-state defendant to be subject to the jurisdiction of a state court, the state must have "minimum contacts" with the defendant. Of course, doing business and having business operations in the state will satisfy that standard, but a contemporary problem exists due to the advent of the Internet: There is not yet a definitive legal answer as to what type and level of Internet activities will satisfy the "minimum contacts" standard. This issue will be discussed in the chapter dealing with Internet Regulation.

Finally, a Motorist Implied Consent statute is a state statute that maintains that when a non-resident operates a motor vehicle within the borders of the state, he or she impliedly consents to appoint the state's Secretary of State as an agent for accepting service if the non-resident is involved in a motor vehicle accident within the state.

Conflict of Laws

A problem arises in a legal system composed of sovereign legal entities—such as the "states" in the U.S.—when a legal situation occurs due to acts or transactions that affect more than one state and/or parties from different states.

Which states' laws will be applicable in such a multiple state case? As an example, let's say that a plaintiff, a citizen of Florida, makes a contract in Georgia with the defendant, a citizen of New York, with agreement for the rendering of a performance in New Jersey. The defendant refuses to carry out the contract and is then sued in federal court in New York (to satisfy personal and diversity jurisdiction, assuming the requisite amount in controversy). What state laws should the federal court apply? In answering this question, the courts will apply Conflict of Laws rules, of which there are three main categories: 1) If the case is a contract case, as above, and if the issue is the validity of the contract, then the law of the state in which the contract was made will govern the case; but if the issue is the performance of the contract, then the law of the state where performance took place or is to take place will govern; 2) If the case is a tort case, the law applicable is the law of the state where the injury occurred; and 3) In all other cases, the law of the state with the "most significant relationship" to the lawsuit will apply to the case.

One way in which the parties to a contract can eliminate "conflicts" and uncertainties as well as jurisdictional disputes is to have in their contracts "forum selection" clauses to designate the court to hear a potential controversy as well as "choice of law" clauses, which will designate the law of a particular jurisdiction as the controlling law of any possible breach of contract lawsuit.

Law v. Equity

In Anglo-American legal history, after the Norman Conquest of England in 1066, the early English kings established a nationwide system of courts with the kings designating individuals as their personal representatives to settle disputes. The system was originally based on the prevailing customs in the community. Controversies were decided on a case-by-case basis and over time, a body of decisions on a variety of subjects was created. These decisions, as noted, became precedents and formed the foundation of the common law.

However, even early on in English jurisprudence, problems with the common law precedent system developed. There was a tendency for too many cases to be decided in the same way with the result that the common law system became rigid. Moreover, since the primary relief which common law could grant was the payment of money damages, there were certain wrongs for which no adequate remedy existed at common law for a court to enforce. Consequently, the parties began to petition the early English kings for particular types of relief that were not available from the ordinary courts of law, which were themselves bound by the common law. The king, of course, was not bound by recognized legal principles but had the power as well as the duty to decide cases based on conscience, fairness, and justice. Gradually, there were so many of these special appeals to the king that the king turned over such cases to his chancellor, ordering him to decide these cases in the king's name in an equitable manner. When deciding these disputes became too demanding even for the chancellor, he then appointed legal representatives to act in his and the king's name in order to decide these cases in an equitable manner. Thus, eventually there evolved in England an additional and different system of law, called Courts of the Chancery and, later, Courts of Equity, which were empowered to provide relief when there was no adequate remedy at law available.

Several equitable remedies were created to mete out justice, but the two most important remedies were the decree of injunction and the decree of specific performance which are still very important legal remedies even today. The injunction originated when a plaintiff asked a common law court of law to stop the defendant from doing a particular act, such as trespassing on the plaintiff's land or committing a nuisance that hindered the plaintiff's enjoyment of his or her property. The court of law had to deny that request as the only type of relief such a court could grant was money damages for past injury; the court did not have the power to prevent future trespass or nuisance. As a result, the plaintiff asked the king for relief, and if the king or chancellor or his representative deemed the request to be justified, an order in the king's name commanding the defendant to stop committing the wrongful act was issued. This order, called an injunction, was enforced

by the king's inherent power to do justice and maintain law and order and was specifically enforced by the king's "contempt" power, which included imposing fines and imprisonment for refusing an order of the king.

Specific performance started as a request by a plaintiff for an order commanding a defendant to live up to the terms of a contract made with the plaintiff. However, a court of law once again could only order the defendant to pay money damages for the loss caused by the defendant's breach of contract. So a Court of Equity was asked to issue such a decree and would do so if money damages were inadequate to fully compensate the plaintiff (such as in an instance when the subject matter of the valid and breached contract was a rare heirloom). Today, in Anglo-American jurisprudence, there has been a fusion of courts of law and courts of equity. As a result, today the same court administers both legal and equitable remedies, though in the case of equitable remedies it must be noted that there is no right to a jury trial.

The injunction and the decree of specific performance, as well as other equitable remedies, will be covered throughout this book in a modern-day business context.

Court Personnel, Organization, and Procedure

The most important personnel of the courts are the judge, clerk, and jury. The judge is the primary court officer, who is either appointed or elected and whose function is to preside over and manage trials, maintain the order and dignity of the proceedings, decide questions of law, and to instruct the jury on the applicable law of the case at hand. Each court has the power to make rules to transact legal business before the court as well as to preserve order. As mentioned earlier, a violation of an order from a judge, violation of the court's rules, or an affront to the dignity of the court will result in a party being held in "contempt of court," which can be rendered via fine or imprisonment. The clerk of the court is the court officer whose function it is to keep accurate records of cases and to enter cases on the court calendar. The jury is the body of citizens sworn by the courts to decide questions of fact, to apply the law to the facts, and thereby to render a verdict, which the court will convert to a legally enforceable judgment.

Court procedure is a very consequential area of the law. After all, what good are substantive rights if one does not know how to enforce them procedurally? Yet procedure is a very detailed and complex legal matter. There are many precise and specific procedural rules as to how, when, and where a lawsuit may be brought to the courts and how it is to be maintained in the courts. As noted earlier, in a federal system such as that present in the U.S., there are procedural rules for the federal courts as well as for the state courts. Moreover, at the state level, there is

no uniform judicial procedure as the laws of each state differ. Thus, an explication of procedural law is way beyond the purposes of this book. Nevertheless, the authors would like to make some basic and general observations regarding court procedure, using the civil "side" of the courts as the illustration.

A civil lawsuit must be commenced by a party who institutes a cause of action. (A court can only settle disputes between individuals when one of the parties formally requests the court to do so.) A civil suit begins when one party files a written request, called a complaint or a petition. As noted, the plaintiff is the person who initiates the action and the defendant is the person being sued. A person who is contemplating filing a lawsuit must be very careful about the applicable statute of limitations, which establishes the time period within which a lawsuit must be brought forth. Statutes of limitation begin to "run" when the occurrence or transaction first transpires. For example, generally speaking, in a negligence lawsuit, the injured party has two years to bring the lawsuit; in a breach of contract case, the aggrieved party has four years; and in a fraud lawsuit, the victim has six years. If the time period to bring the suit has expired, the statute of limitations is said to "toll" and the plaintiff's lawsuit will then be dismissed.

The ordinary order of civil court events is as follows: 1) The plaintiff files a complaint with the clerk of the court, which sets forth the nature of the claim and the remedy sought; 2) The next step is service of process, whereby the clerk issues a summons with a copy of the complaint attached, which must be served on the defendant. This "service" gives the defendant notice that a cause of action is being brought, and subjects the defendant to the power of the court;) In response, the defendant can file a motion to dismiss the lawsuit for, for example, failing to state a legally recognizable cause of action, or because of a lack of subject matter or personal jurisdiction; 4) If the defendant's motion to dismiss is overruled, or if the defendant did not file one, then the defendant must respond to the complaint. The defendant's response is called the "answer," wherein the defendant either admits to or denies the plaintiff's allegations. If the defendant fails to answer within the prescribed time limits, the defendant is said to "default," resulting in a default judgment being rendered against the defendant and, as a result, the plaintiff winning the case by default. The complaint and the answer are usually called the "pleadings," which are distinguished from "motions," which are "merely" requests to the court for an order.

If the pleadings indicate that the only questions involved in the lawsuit are questions of law, the judge can then decide the case based on the pleadings alone. One party can actually request that the judge decide the case as a matter of law if there are no genuine factual issues to be resolved. This type of request is called a motion for summary judgment. If all parties agree, the case may be

tried by the judge alone, without a jury, thereby leaving the judge to decide both questions of law and questions of fact. However, if there are factual issues to be decided, then the case must be turned over to a jury to determine the facts.

In the case of decision by jury case, an example of the uncertainty of "pure" law arises in a question such as: When does an offer to enter into a contract—with no time period specified—expire? In such a case, the judge will instruct the jury that the law holds that such an offer expires at the expiration of a "reasonable" period of time. The thorny question, however, is what exactly constitutes "reasonable"? This question of "reasonableness"—both in contract law and in the greater context of all Anglo-American jurisprudence—is left to the jury to resolve.

Continuing on, if the lawsuit is not resolved on summary judgment motions alone, the next stage is called the "discovery" process. Discovery encompasses the parties asking for and receiving pertinent factual information regarding the case. Such methods of discovery include interrogatories, which term means asking official questions of the opposition. Other methods include asking for admissions, deposing the parties and witnesses under oath, and requesting physical exams, photos, and documents. The purposes of discovery are both to be sure that each side is made fully aware of the facts at hand as well as to encourage settlement.

After discovery, a jury must be selected. The jury selection process is known as "voir dire," which entails the parties and the judge all asking prospective jurors a series of questions designed to ascertain jurors' qualifications, abilities, and biases. The parties to the case at hand typically can challenge jurors for cause, but challenges must be supported with a reason for a juror's dismissal. There is no limit to the number of challenges that can be made. However, a party can also assert "peremptory" challenges to automatically dismiss a juror—even in most cases—without a reason. The number of peremptory challenges is limited, usually to three.

Once selected, the basis for the jury's factual determination is the evidence. Evidence is presented by both parties in conformity with substantive and procedural evidentiary rules. The "trier of fact," usually the jury, can only decide questions of fact on the basis of the evidence presented.

Evidence consists of testimony, that is, answers by persons made to questions asked in court—and "real" evidence, that is, papers, books, records, and other things tangible. As a general rule, evidence, in order to be admissible, must be relevant, material, and unbiased. For example, presenting evidence that one of the parties involved in a breach of contract dispute was previously divorced would be inadmissible on the grounds of irrelevancy.

A "witness" is a person who testifies in court and who has direct connection with the facts of the case. What this means is that a witness saw events occur or heard one of the parties say something. If a witness did not in fact see or hear

such things directly, the evidence will be deemed to be "hearsay" and is therefore excludable. A person can be subpoenaed and thus compelled to appear in court as a witness.

The party initiating the lawsuit has certain legal "burdens": the burden of persuasion and the burden of proof. The burden of persuasion refers to the obligation to introduce sufficient evidence to keep the lawsuit moving forward. The burden of proof refers to the obligation of a party to convince a jury of a specific issue at hand. For example, in a criminal case, the state has the burden of proof to prove its case "beyond a reasonable doubt"—that is, to a moral certainty. Whereas in a civil case, the usual standard is a "preponderance of the evidence," meaning that there has been presented a greater evidentiary weight for rather than against a particular argument. In certain civil cases such as fraud, for example, there is an intermediate standard established for the burden of proof: "clear and convincing" evidence.

It is also instructive to briefly outline the ordinary trial procedure, again from a civil case perspective. Initially, the attorney for the plaintiff commences legal proceeding by making an opening statement to the jury in which he or she discusses the nature of the plaintiff's cause of action and what the plaintiff expects to prove. The defendant's attorney then makes a rebuttal statement and also states what the defendant expects to prove. The next step is the direct examination, wherein the plaintiff's attorney presents his or her witnesses and asks questions. Next is the cross-examination stage, where the defendant's attorney asks the plaintiff's witnesses other questions in an effort to disprove previously given answers. The defendant is then allowed the same cross-examination process of his own witnesses by the plaintiff. After all witnesses have been examined and cross- examined, the following step is called the summation, wherein the attorneys for each side summarize the evidence, argue legal and factual points, and then suggest to the jury the particular verdict that the attorneys feel is proper and just. At this stage, the parties can make a motion to the judge for a "directed verdict." Such a motion may argue that one of the parties failed to introduce evidence or that the evidence introduced is so weak that the case should not go to the jury, but rather the judge should immediately direct a verdict favoring a particular party.

Assuming that there is no motion for a directed verdict presented or that such a motion is denied, the judge at that time will "charge" the jury. This means that the judge will instruct the jury as to the rules of law governing the particular case. These points of law are called the jury's "instructions." After receiving its "instructions," the jury will deliberate on the weight and sufficiency of the evidence, decide the facts of the case, apply the law to the facts, and thereby render a decision, called a "verdict." The judge then will enter a judgment in accordance with the jury's verdict.

A party who is dissatisfied with the verdict and judgment can appeal the case to the proper appellate court. However, an appellate court will not retry the case and will not hear witnesses. Rather, the appellate court will perform two functions: It will examine the entire record to see if the lower court judge made an error of law; and second, the appellate court will determine whether the jury's verdict was supported by substantial evidence. If there is an error in the law or if there is insufficient evidence to support the verdict, the appellate court will set the verdict aside and the case will have to be retried.

Assuming no appeal is sought or an appeal is unsuccessful, the losing party must comply with the judgment of the court. If there is non-compliance, the prevailing party can take steps to seek to have the court's judgment carried out. This is typically called "execution" and it can have numerous manifestations (such as, for example, asking the court to compel the sale of the defendant's property). Once the legal matter is decided, it is regarded as "res judicata," meaning the case is final and cannot be re-litigated.

Finally, the "full faith and credit" clause of the U.S. Constitution requires that a court judgment rendered in one state be given complete legal effect in "sister" states.

Global Legal Perspectives

Legal systems vary around the world, and managers from multinational companies[4] must comply with laws not only from their home countries, but also with those laws of regions around the world where they conduct business. Therefore, global managers need to constantly keep abreast of current legal statuses of doing business in and relationships between different countries.

For example, the United States has several treaties with countries including Canada, Mexico, countries within the European Union (EU), and so forth, thus allowing for free trade, liberal laws, etc. The United States court system also treats foreign firms conducting business within its borders as domestic businesses, thus providing for an equal and fair opportunity for all.

However, due to political instability, economic crises, and so on, the same is not always true for U.S. firms conducting business in other countries. Therefore, managers of firms belonging to "the state" of various countries are often forced to solve matters that are not governed exclusively by their home country's laws. The international legal system is then applied in conjunction with national states that accuse one another of violating international laws. To address such problems, the International Court of Justice (ICJ) was established by the United Nations (UN) in the Netherlands during the 1940s. The ICJ has dual roles—providing opinions and suggestions regarding legal questions to foreign agencies

[4] Coauthored with Bina Patel, Nova Southeastern University.

and settling court matters that affect different national states. Oftentimes, when state-owned firms have disputes with other firms from foreign countries in areas such as breach of contract law, the ICJ will take over the matter. It is important to note that only national states or member nations of the UN may apply and appear before the ICJ, not private parties.

The World Trade Organization (WTO) also has its own dispute resolution procedure, whereby member nations are entitled to appear before the court in order to solve disputes relating to rules of trade, agreed-upon procedures and other matters. The WTO advises nations to first settle their matters outside of courts due to the simple fact that not all court cases will be heard.

The international legal system is also based upon the morals and ethics shared by various member nations, including adherence to fundamental human rights. In essence, there is no single, defined, superseding international law; however, the rules that do exist are established so as to achieve fairness and equality. Even though the court systems of both the ICJ and WTO vary in comparison to the U.S. legal system, rules and laws are still created in order to provide for a more stable, global, business environment for all.

The European Court of Justice

The European Union (EU) has evolved from a free-trade treaty arrangement organization to an economic union and now to a political power. Fundamental to the formation of the EU as an integrated political union has been the development of a common legal system. Particularly, the role played by the European Court of Justice (ECJ), which was created by the treaty of Rome in 1957, has been indispensable to the formation of this union.

The ECJ was created to resolve disputes concerning European Community (EC) treaties as well as to assist national courts in the consistent interpretation and application of EU treaties and laws. The ECJ is also charged with the legal responsibility to make sure that member states comply with EU laws. According to one commentator,[5] the ECJ has been the "main facilitator" in the legal integration of the European community. The only way, according to this commentator, for the EU to supersede 150 years of different constitutions and civil codes was to grant the ECJ the power to overrule and establish a system of precedents that the national courts would be obligated to follow. Article 234 specifically enables the ECJ, on application by national courts, to provide rulings on the interpretation and validity of EC law. That is, once the ECJ "speaks" on an issue of EC law, a national court is bound by the ECJ's interpretation and therefore "must apply" the Court's ruling to the facts of the particular case at hand.

[5] See Gierczyk, Yvonne (2005).

The Court's decision, as noted, bears precedent-effect and thus will apply to future cases that entail the same or similar facts. So, although the Court is grounded in civil law traditions, Article 234 of the Treaty of Rome nonetheless confers to court decisions the power of precedents. Article 234, therefore, is considered by many to be the most important part of the Treaty of Rome.

So, by borrowing the system of precedents and *stare decisis* from the tradition of common law, the ECJ, by adjudicating cases, has created of system of legal and political integration.

Enforcing Legal Judgments in Brazil[6]

Enforcing legal judgments of one legal system in another country's legal system has always been a challenge in the global legal arena. In Brazil, money judgments on business matters, issued by courts in the United States and elsewhere, are enforceable by the Brazilian legal system. The Brazilian system of recognition of foreign judgments does not analyze whether the decision was fair or in accordance with Brazilian law or in accordance with the law of the foreign country where the decision was rendered. Consequently, a Brazilian court will not confirm or deny the merits of the foreign judgment. Rather, it will only cooperate with a foreign court by ascertaining that the judgment was rendered in a sovereign manner by a foreign country's laws and then acknowledging the judgment as such.

There are four mandatory requirements in Brazil for that country's recognition of foreign judgments: 1) the foreign judgment must be based on a decision by a foreign judge of competent jurisdiction; 2) the parties must have been served with notice of process, or if the judgment was a default one, it must have been legally entered based on a non-answer to a complaint; 3) the judgment must be final with the legal force of *res judicata;* and 4) the foreign judgment must be notarized by the Brazilian consul and be accompanied by a Portuguese translation rendered by a sworn translator in Brazil. However, there are three grounds for non-recognition of foreign judgments—that is, when the foreign judgment contravenes the national sovereignty public policy or good mores of the nation of Brazil. These key non-recognition standards, however, are not precisely defined in the governing law, and thus the scope of their application is subject to some debate in Brazil.

What is most interesting to note is that although the "national sovereignty" and "public policy" legal standards do have some explication in the law, in Brazil, the U.S., and internationally, a "good mores" criterion is more of an ethical term that harkens back to the theory of ethical relativism. Consequently,

[6] See Oliveira, Maria Angela Jardim de Santa Cruz (Winter 2006).

ascertaining the moral norms of Brazilian society may emerge as more than a "mere" philosophical or ethical exercise for the international business person since a legal judgment must comport to those "good" norms in order to be legally enforceable.

Japan and Litigation

Whether disputes are decided by means of formal legal mechanisms, such as trails, or informally through alternative dispute resolution procedures has always been an interesting and important area of global legal and business practice. Japan always has been regarded as a non-litigious society where disputes are amicably resolved through mediation and conciliation, and where suing a person or even a business was considered to be a shameful act.

However, a recent article reported that cultural norms may be changing (Inagaki, 2006), "thanks" perhaps to the influence of the United States and its adversarial legal system. Thus, a shift in social attitudes toward litigation and lawyers is now occurring in Japan. Yet concomitantly, one problem has emerged: a shortage of lawyers in Japan! Japan has approximately 22,000 lawyers—one for every 5,790 people—compared with one for every 278 in the United States. Moreover, under the current Japanese attorney Bar Examination, which is scheduled to be abolished in 2011, fewer than 1,500 candidates were permitted to pass the exam and become attorneys. To compare, in the U.S., which has about twice the population of Japan, that number is close to 75,000.

In response to Japan's shortage of lawyers, the government plans to more than double the number of legal professionals—lawyers, prosecutors, public defenders, and judges—to 50,000 by 2018. More lawyers and, specifically, more *practically* trained lawyers, are needed. Accordingly, the first U.S.-style law school opened in Japan in 2004, and now Japan has 72 law schools. But it is not just the desire to settle disputes in a more formal, adversarial fashion that is prompting these significant changes. Businesses have begun demanding more specialized legal counsel, especially in the areas of tax law and intellectual property law. Furthermore, bankruptcies are increasing in Japan and, consequently, so are bankruptcy legal filings. Even inheritance and divorce disputes are now being brought to court.

In addition to an increase in legal professionals, juries for serious criminal cases will be introduced in 2009 in order to ease the responsibility of the judiciary. This use of lay juries will be a very significant change for Japan and will give the ordinary Japanese citizen his or her first opportunity to participate as a member of the justice system.

Thus, Japan appears to be moving closer to the more formal, adversarial, attorney-oriented legal system used in the United States.

Management Strategies

It is important to remember that legal systems vary across the world. Therefore, management must be trained in advance in order to overcome legal challenges that may hinder company goals and procedures. Due to the many challenges that have been introduced in this chapter, multinational firms must provide their managers, who may work abroad, with courses that specifically deal with strategic decision making, exercising "teamwork," dealing with "locals," adapting to the surrounding environment, and abiding by local laws and customs. This knowledge will not only make managers better aware of the atmosphere of the countries where they conduct business, but it will also compel them to act accordingly should difficult situations arise.

As global firms engage in foreign business, they are often faced with not only different languages, cultures, and business practices, but also variations in the legal systems and interpretations of the rules. Domestic and international managers, as well as entrepreneurs, will encounter both national and foreign laws when conducting business internationally and these laws affect several areas of a firm's structure, such as accounting procedures. In essence, it would be wise for all managers to conduct research of political issues and local laws before engaging in global business agreements. This knowledge will allow for corporations to conduct more streamlined operations that are in line with the legal requirements of host countries in all regions of the world, including those that are politically unstable. However, managers must exercise care in dealing with politically unstable countries as political insecurity continues to be one of the major causes of reduced profits for businesses due to factors such as the seizure of land and property (among other concerns), especially in countries that may become highly nationalistic.

There are resources available to global managers, such as local American Chambers of Commerce in most countries where U.S. companies are active.[7] Their members are knowledgeable about local business practices and can also advise local attorneys who have worked with U.S. companies. Another source of possible help for global managers, especially if there is an issue with a host government agency, is the Commercial Section of the local American Embassies and Consulate Generals, which are staffed by the Foreign Commercial Service of Commerce Department. These Foreign Service Nationals (FSNs), especially those with long service records, know the local business community and bureaucrats. They may be able to provide insights as to the reputation of individuals the company has dealt with before. They

[7] Sources suggested by Dr. Norman Glick, a global educator.

may be able to provide access to government officials who might otherwise be difficult. Initial contact with this resource can be made through a local Commerce District Office, located in 60 cities across the United States. For example, managers and entrepreneurs who live near or travel to South Florida can make use of the office in Miami.

Legal Counsel—Finding and Managing Attorneys[8]

As this book will plainly show in the chapters to come, a company *will* need legal advice and legal counsel. Today, there is simply too much law—substantively, procedurally, as well as domestically and globally—for a company to safely navigate without legal counsel.

Finding the right attorney can be a major challenge for the global manager and entrepreneur. Usually, fellow business managers and business people will make recommendations. National, state, and local bar associations have listings of attorneys according to specialty. In the United States, many states have certification programs whereby an attorney may become certified in the United States in a specialized field and then may be allowed to advertise himself or herself as a legal specialist. Many practicing attorneys also teach on a part-time basis at local business schools as adjunct professors, frequently instructing in business law and government regulation of business subjects or on specialized legal subject matters, such as taxes. Thus, a manager's training—perhaps as an MBA student—typically should bring the student manager into direct contact with practicing attorneys.

When requiring counsel, a company must consider whether it intends to use its own in-house lawyers for routine matters and then retain outside law firms for specialized or trial matters or to use its own employees for these situations as well. The more legal work that can be done in-house, the more money a firm will ultimately save on legal work. Salaried staff lawyers of the firm can perform legal research, provide legal advice, and engage the routine legal tasks, such as compliance reports required by government regulatory agencies.

All legal work that needs to be done at a company, either by its own attorneys or outside counsel, should be condensed and categorized into a readily accessible in-house research "bank" so, for example, the firm will not have to pay to have the same research done by outside counsel and thus have the same legal memos prepared. The expense of legal research, even if done by legal assistants, adds up, and very quickly can turn into one of the most expensive components of legal services. The firm's in-house lawyers will also need to monitor and manage the outside attorneys and in essence "keep them in line." In particular, litigation

[8] See Bagley and Dauchy (2008) and Davidson and Forsythe (2011).

strategies, tactics, and efforts should be very closely guarded and supervised. This legal management role is typically performed in a large company by its general counsel.

But not all companies have a general counsel or, for that matter, a legal department at all. So, if an outside law firm is to be used, a decision has to be made as to whether the outside law firm is to be employed on a retainer basis—meaning that the outside firm will have a continuous relationship with the company for advisement and certain prescribed legal matters—or whether the law firm should be employed on more of a short-term *ad hoc* basis.

Another suggestion would be for a company to seek bids for well-defined types of legal work. If the work is litigation, an option would be to break the litigation down into its major components and then to ascertain the work to be done and the cost for each part of the process: The idea is to negotiate the best possible legal deal. Another suggestion is to seek either a standard fee for billable hours or a discount for a certain number of billable hours, or to try to secure a discount for retaining a law firm for a longer period of time, say a year or two. A company should not be shy in firmly telling a law firm the limit it is willing to spend on legal fees and services, from "billable hours" to photocopying expenses. A company should insist on a detailed accounting of every dollar to be spent for legal fees and legal services.

Also, there is nothing wrong with "comparison shopping," which is just as smart in the legal sector as it is in the retail sector. The company should meet regularly with its attorneys, question their work, and gauge what attorneys from the outside law firm are on the "team." If there is a new member of the law firm on the client-company's "team," it is not unreasonable to demand that the "education" of this new attorney regarding the client's case be borne by the law firm and not by the client's time or "dime." A company also should be wary of a law firm asking for too many extensions for a case, especially if new attorneys are to be "brought up to speed" on the company's case.

Costs should be monitored on a daily basis. Indeed, a company may have the requisite leverage to pressure its outside law firms to cut costs, particularly for "everyday" legal work. Today, computer technology and software exist to enable a company to see exactly how much each research project, deposition, or hearing in a case will, or has, cost. Such technology and software exist so that the company itself may reduce paperwork, lessen research needs, facilitate research, and more closely scrutinize billing practices of outside attorneys. For example, computerized fee-tracking systems exist for a company to compare the costs of using the country's major law firms for various types of legal work.

A company should also consider pressuring a law firm to use different types of billing, such as hourly rates, flat fees, and contingency fees, for different kinds

of legal work. A company should insist that certain legal assistant personnel perform basic legal tasks, such as research, and that these tasks not be done by more established attorneys who, naturally, would charge more for such services. Of course, the more experienced attorneys would appear in court on behalf of the firm and then bill accordingly. Also, efficiency and results should be rewarded.

Negotiation leading to the settlement of a case is always an option, and one that must be discussed by the firm at every stage with its legal counsel. Lawyers, especially trial lawyers, may have a very aggressive and combative attitude, which may turn out to be very expensive in a protracted, litigious legal matter. An early settlement of a case could save the firm a great deal of money in legal costs.

A company should never merely "rubber-stamp" its law firm's legal bills. The basic idea here is for a company to be an "educated consumer" when it comes to legal services. In essence, the client, the company, must get more actively involved in its own cases.

Expert legal counsel is strongly advised for the entrepreneur as the law is very extensive and very complex, and mistakes and omissions can be quite costly. Moreover, a lawyer will be able to discern issues and foresee potential problems that a lay business person might not have even thought of. As such, bringing a lawyer into the process in the beginning will save the entrepreneur time, effort, and money in the long-term. Should the entrepreneur opt for a large or a small law firm? One advantage of a large firm is that it typically would have legal experts in several specialty areas, such as securities law and intellectual property, which may be important to the entrepreneur. Yet large law firms typically charge more per hour but may be able to accommodate an extended payment schedule. Also, large firms may be more bureaucratic in nature and involve many lawyers and legal assistants and administrative assistants so that dealing with all these personnel, especially less experienced ones, may translate into more time, effort, and money spent by the entrepreneur. Small firms characteristically contain generalist attorneys. An attorney in a small firm usually will charge less and there will be more personal contact. If the entrepreneur initially is seeking advice on what type of business entity to form and to achieve the formation, then a business law attorney at a small firm should suffice. Of course, if the entrepreneur asks his or her generalist attorney to act in specialized legal areas, the entrepreneur should be aware that he or she may wind up "paying" for that education.

How does the entrepreneur find an attorney? There are many lawyer referral services and law directories, such as state and local bar associations, but usually these are impersonal and uncorroborated sources, and thus generally not sufficient. A better way is to seek a referral from family, friends, work colleagues, and other business people and entrepreneurs in the locality. Accountants, financial

advisors, and real estate agents and brokers are also good sources for referrals as they regularly work with attorneys. Local universities are another good source of referrals. For example, the professors who teach legal subjects are attorneys, and though most do not practice, they certainly can make recommendations. Also, many universities use adjunct professors, and many of these professors who teach law subjects as adjunct professors are practicing attorneys in the community. Local attorneys often serve as guest speakers at universities and for the local chamber of commerce and local community groups. Whether the attorney works in large or small firm, the entrepreneur must determine the firm's billing procedure. Will the work be billed on an hourly basis or by the project? Charging by the hour is fine if the attorney can efficiently and effectively complete the legal task; yet billing per hour could end up quite costly if there is an educational component for the attorney. Hourly prices can range from $125 to several hundred dollars for each billable hour. If the work is done by the project, the amount asked, for example, to form a limited liability company, would be a "flat fee" and one that can be compared to other attorneys and law firms. It is incumbent on the entrepreneur to ascertain exactly what legal services are included in the flat fee as well as for the billable hour. For example, the entrepreneur must determine how and to what extent travel time, time spent answering emails and phone calls, research and writing of legal memos and documents, and consulting with legal assistants and other attorneys are handled in the fee structure. The entrepreneur should not be shy! That is, ask for price estimates, maximum price limits, and sample bills; ask how long the task is expected to take; ask that administrative and clerical type actions performed by the attorney be billed at a lower rate; ask that telephone calls under a certain number and time not be billed; and review carefully any invoices and challenge any expenditures that the entrepreneur feels are unauthorized, improper, or unreasonable. Of course, as a matter of common sense as well as "good business," the more educated, prepared, organized, and proactive the entrepreneur is when dealing with attorneys, the more efficiently, economically, and effectively will the entrepreneur be able to use the attorneys services. Have the necessary documents readily at hand; explain what is intended and what the situation is clearly and succinctly. "Time is money," thus the advice to the entrepreneur is: "Do not waste the attorney's time, and your money"!

The entrepreneur must be aware of the attorney-client privilege which protects as confidential communications between a lawyer and his or her client who is seeking legal advice. If the client is a corporation, the privilege still exists and protects communications between the company's lawyer and company personnel so long as the nature of the communication relates to the employer's duties and the relationship with the lawyer is directed by the employee's

manager or a corporate officer. Note, though, that the privilege belongs to the corporation and not the employee, and thus the employee cannot claim it if his or her corporation brings a lawsuit against the employee.

A major purpose of hiring an attorney is to secure help in avoiding legal problems. Of course, the more the business person knows about the law and the legal risks therein, and the more information the business person has the more accurate and thorough records he or she keeps, the better prepared the business person is to consult with an attorney in a timely manner in order to prevent serious legal problems. The objective is to prevent "small" legal issues from developing into "large" legal problems, which the attorney still may be able to solve, but at a much greater cost in time, effort, and money.

A determination must be made by the entrepreneur as to how to hire an attorney. That is, should be hired on a case-by-case basis or on a continuing basis by means of a retainer. Hiring an attorney on a retainer basis might make sense for an established business with regular legal work, such as drafting or reviewing leases and contracts. In such a case, the attorney is retained with an "upfront fee" for a certain period of time, and the attorney agrees to provide advice and consultation when needed; but if the attorney must perform legal work, then he or she is paid an hourly fee in addition to the retainer fee. Yet for the business person commencing a business as an entrepreneur the hiring of an attorney on a retainer basis early on in the commencement of the business would typically entail a large expenditure of money, which a new business typically would not have. If the attorney is hired on a case-by-case basis, a determination must be made as to how the attorney is to be paid – with a "flat" fee, on an hourly basis, or on a contingency basis. The flat fee, where the attorney is paid a specific dollar amount for a specific legal task, usually is best for relatively simple and straightforward legal matters, such as incorporating a business or forming a limited liability company. Yet if the legal matter is more complicated, an hourly fee might be preferable, though the business person is well-advised to seek an estimate of what the total legal cost might be. The business person also should ask if the hourly fee will be more for trial work or less for work done by "junior" attorneys and legal assistants. Also, the business person must ascertain how much the attorney will bill for taking a phone call or responding to an email, for example, that does not last a full hour. Most firms typically charge ¼ to ½ hour for these tasks even if they take less than the quarter or one-half hour billing increments. Finally, in lieu of a flat fee or an hourly payment, the parties can agree to a contingency fee arrangement, whereby the attorney agrees to represent the client, usually in a tort case, and accept as payment a percentage of the settlement or judgment obtained for the client. If the client does not prevail, the attorney gets nothing. These percentages typically range from 25% to 40%,

depending on what stage the lawsuit is resolved, that is, in initial negotiations, when a demand is made, when a complaint is filed, after a jury trial, or after an appeal. The business person contemplating hiring the attorney on a contingency basis must ascertain who will pay for the costs of the litigation beyond the legal representation. That is, who will pay for the filing fees, copying of records, courier services, etc? Usually, the attorney will pay all the costs associated with the litigation, but then, assuming the business person prevails, the attorney will then bill the client for the cost of expenses and take the amount from the client's percentage of recovery.

An entrepreneur or any business person has a variety of methods to find an attorney. In the United States, attorneys are admitted to the Bar Associations of the individual states and are licensed by the individual states and are authorized to practice law only in those states. They cannot practice in other states, unless of course they are admitted to other states Bar Associations; and they cannot practice in foreign jurisdictions. State Bar Associations and local Bar Associations have lists of attorneys who practice in the state as well as locally; and these lists typically will indicate legal specialties practiced by certain attorneys. In order to use a "specialist" designation the state Bar Association typically will require that the attorney take a certain number of specialty courses, practice for a certain amount of time in the specialized field, and/or take a special exam. Lawyer Referral services exist to provide recommendations (for a fee) of attorneys who can handle a legal problem confronting the business person. Recommendations are, of course, a very good means of finding an attorney. Recommendations can come from other attorneys (for example, the business person may have a general practice attorney who can recommend a specialist), from other business people, from family and friends, and may law professors and business law professors who teach at local law schools, universities, and colleges. Attorney advertisements are now ubiquitous, though many attorneys still do not advertise; but the prudent business person is well-advised to check out the advertising attorney credentials and claims with the state Bar Association to determine their veracity. The Martindale-Hubbell Law Directory also lists attorneys and provides information as to their areas of practice and backgrounds. Specialized attorneys, of course, charge more, but then the business person is paying for the attorney's specialized knowledge.

Attorneys, regardless of how paid, are expensive! Accordingly, it is incumbent on the business person to utilize his or her time with the lawyer in the most efficient and effective manner. So the business person must be prepared to discuss with the attorney the facts of the case in a succinct manner and to provide key information, such as people, places, dates, in a clear and organized manner. Copies of any pertinent documents should be provided, as well as proposed terms for a

contract or those terms in the articles of incorporation, for example. The attorney, of course, will draft the final legal document. The idea, obviously, is to be prepared so as not to waste the attorney's time and the business person's time and money.

The entrepreneur and business person must be aware of the traditional Attorney-Client Privilege and the protection it affords to communications between the client and the attorney. This privilege protects confidential communications between an attorney and the client for the purposes of obtaining or providing legal representation, advice, and assistance. This privilege prohibits the attorney from revealing any communications between the attorney and the client without the client's permission (unless the client informs the attorney that the client intends to commit a crime in the future). This privilege belongs to the client, and not the attorney, and thus can only be waived by the client.

Summary

The United States legal system was created in order to provide for a fair and equal opportunity for all its citizens as well as to create opportunities for domestic and international businesses. The court system varies at the local, state, and federal levels and elections are held at all levels so that the people can elect representative officials. This chapter provided fundamental information regarding the legl system of the United States as well as extensive guidance to the business person and entrepreneur on how to find and manage attorneys.

Variations among and between the state and federal court systems of the United States, conflicts of laws, equity, and court procedures at all levels have been identified to more clearly illustrate and explain the U.S. legal system. Furthermore, global legal perspectives and managerial strategies were discussed to help clarify the relationship that exists between the United States legal system and other legal systems across the world, as well as to show how this symbiotic relationship influences decisions made by global managers and entrepreneurs. Due to the instability in global political, social, and economic environments, international managers are at times forced to overcome challenges that conflict with the goals of their own companies. Various legal systems have been established in order to help managers resolve such problems.

In addition, the levels of various legal systems from around the world also differ, based on their individual rules. Therefore, foreign managers and entrepreneurs from other countries must learn to abide by the laws not only of their own country, but also the local, state, and federal laws governing business in their host country.