

SYLLABUS FOR COURSE ON U.S. BUSINESS LAW

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MARCH 23, 24, 25, 30, 31, APRIL 3
EACH CLASS TO BE 90 MINUTES LONG

Background and Experience of Robert W. Edler

Academic Credentials

DePauw University, B.A. (1954-56; 1957-58) [liberal arts]
Durham University, England (1956-57) [history and economics]
University of Chicago, M.A. (1958-59) [history]
Stanford University, LL.B. (1959-62) [law]

Professional Experience

Practice of law in Chicago 1962 to present, concentrating practice in following areas:

Corporation and securities law; mergers and acquisitions; business finance, both public and private; representation of issuers, brokers and dealers and underwriters in connection with public and private offerings of securities; representation of public and private corporations in general corporate matters; representation of national banks and bank holding companies in connection with offerings of capital notes and preferred stock; acting as special counsel to litigation firms relative to securities law issues; organization of various types of new businesses; serving as arbitrator for Financial Industry Regulatory Authority Dispute Resolution and Cook County Circuit Court Mandatory Arbitration Program; testifying as expert witness regarding securities and corporate law matters.

“Ground rules” for Classes and Teaching Concepts

There is no such thing as a stupid question. Questions will always be encouraged. This will help students learn more about what they want to learn, and will help me discover whether or not I am communicating effectively with the students or getting into too much detail or too much complexity and making too many assumptions about what the students already know.

Students should let me know if something I say is not clear or not understood.

It is likely that I will use some words that will not be clear. There is likely to be some communication problem due to the course being taught in English, no matter how good the students' command of English may be (in part because many of us U.S. lawyers suffer from the "big word disease" – the use of an unusual and complex word when a simple word would be quite adequate).

Students should attempt to learn more about English language terminology, usage, sentence structure, grammar, etc. The more effectively you can communicate, the more effective lawyer you will be. I would like to help students improve their English communication skills. Never hesitate to ask about the best way to express an idea in English.

If you disagree with any assumption I make or any conclusion I reach, raise your hand and let me and your classmates hear your argument. This could lead to a dialogue that might be interesting and educational to all class members. Also, it will give you a chance to express yourself orally in English in a legal context.

[Example of an English language problem: my embarrassment as a student in a University of Chicago graduate program seminar: pronunciation of "Magdalen"]

Do not ever be embarrassed to challenge me; I will appreciate the challenge. I want students to learn as much as possible, and challenging me can assist in reaching that goal. Most people, including me, fear, or have feared, speaking up in class, in groups, and in court -- because they are afraid of sounding stupid or being ridiculed for the position they take. To become a successful lawyer, one must overcome this fear; and there is no better time to begin that process than in class. Your attitude should be: "I must have the courage of my convictions, and I must trust my own instincts. If I make a mistake, or appear to be stupid, I have simply proved that I am human. Everyone makes mistakes; everyone appears to be stupid sometimes."

Example: My first appearance in court: the \$500 fence case.

When challenging me or a fellow student, be courteous and pleasant, not just because that is the proper thing to do, but also because it is good training for you as a lawyer. When you are in a court or arbitration proceeding, the judges will like you better, listen to you more intently, and probably lean toward accepting your arguments to a greater extent, if you are pleasant and courteous. It seems that judges and arbitrators do not like unpleasantness and lack of courtesy; therefore, they prefer lawyers who are courteous and, at least subconsciously, tend to want the more pleasant and more courteous lawyer to win the case. Although this is not

how cases should be decided, it is a fact of life, it is human nature; and, of course, the principle also applies to getting along with clients and handling oneself in a conference with one's client and opposing parties and their counsel.

If a student misses a class, he or she should obtain copies of the notes taken by another student and copies of any documents handed out in class. I will not repeat any lectures or portions of lectures for anyone who misses a class.

As a matter of courtesy to me and to one's classmates, no student should make or receive a telephone call or send a text message during class. All students should put away and turn off all cell phones before entering the classroom. This rule extends to all iPods, MP3 players, headsets, CD players, Blackberries, calculators and any other similar device.

No food or drink (other than water) will be permitted in the classroom during class.

A Bit of U.S. History

Native Americans (? to the present)

English Colonies (1609 to 1776)

Revolutionary War (1775-1783)

Articles of Confederation (1781 to 1789)

Like E.U., power of the states was greater than the power of the central government: central government was too weak to be effective.

U.S. Constitution (1789 to the present)

Central government's power is stronger than states' power.

Powers not specifically delegated to the central government were reserved to the States [10th Amendment to U.S. Constitution].

Separation of powers concept (fear of kings?)

Basis of U.S. law: English law (exception: State of Louisiana)

Common law versus statutory law versus La Code Napoleon.

Why do U.S. drivers drive on the right side of the road?

General Overview of U. S. law

Federal Constitution and the Federal system

The basic allocation of power between the federal government versus state and local governments

The U. S. Civil War 1861-65 (Causes: disputes over each State's right to decide the slavery question and to decide whether to remain part of the Union)

Pres. Lincoln's Emancipation Proclamation – 1863

Was it worth 600,000 lives to preserve the Union?

Should any governmental subdivision of a nation or a state be able to secede and form an independent country?

Federal Government and Federal laws

Federal court system

Judges are appointed by the President and confirmed by the Senate. Result: excellent judges.

District Courts (trial courts)

Circuit Courts of Appeal (appellate courts)

U.S. Supreme Court (the ultimate authority on the law)

Does it ever act as a trial court?

What do 5-4 decisions indicate that will be extremely significant in your legal career?

Example: “scienter” under Section 10(b) of the Securities Exchange Act of 1934; one of my first research assignments as a beginning lawyer in 1962

Example: Brown v. Board of Education: Are “separate but equal” facilities equal?

Concept of “Preemption” of state and local law by Federal law

Example: Federal versus state securities laws

Example: Banking laws

The current “tug of war” between a potentially more efficient system of law that is the same throughout the 50 states, and the U.S.

Constitution’s preservation of states’ rights (apparently less efficient but with certain positive factors, such as local control and local knowledge of local conditions)

Totalitarianism’s efficiency (e.g., China) versus Democracy’s inefficiency.

Is it possible that apparent inefficiency is actually more efficient if viewed over a long period of time?

State Governments and state laws

State court systems

Elected judges: result: poor quality compared with Federal court judges (appointed by the President)

Why is this so?

County Governments and laws

City and Village Governments and laws

Never-ending controversy in legal and political circles: “strict

construction” of statutes (courts are not legislatures and should only enforce the law as written by legislatures) versus “loose construction” of statutes (“courts should give effect to the intent of the legislature even if the law is ambiguous – and, if necessary to make the law effective, courts should add provisions the legislature probably intended but failed to state”)

Example: Section 10(b) of the Securities Exchange Act of 1934:
private right of action

General Overview of U.S. Business Law: Need To Consider Both Federal and State Business Laws When Both Are Applicable to the Legal Problem You Are Addressing

Laws Providing for Organization (i.e., creation) of New Business Entities: largely state law (one of few exceptions: national, as opposed to state, banks)
Corporation statutes in each of the 50 States

Delaware Corporation Law is the most famous and most respected.

Why is this so? How can this be the case when New York, California, Illinois and other commercial states are so much larger and more economically significant?

Partnership statutes in each of the 50 States

Limited liability company statutes in each of the 50 States

Contract law: Is this the most basic of all laws? Underlies both Federal and state law

Anachronism: seal. (What if a mouse ate the seal in old English law?)

Securities laws: both Federal and state

Federal: emphasis is disclosure of all “material facts” to the buyer

State law: emphasis is on “merit” [fundamental value and fairness] of the securities being offered and sold

Anti-trust laws: largely Federal; some state “restraint of trade” laws

Intellectual property laws (patent, trademark, copyright laws): largely Federal

Labor and employment laws: both Federal and state

Taxation laws: Federal, state and local

Real estate laws: largely state and local

School laws: Federal, state and local

Criminal laws: Federal, state and local

Consumer protection laws: Federal, state and local

How the Practice of U.S. Business Law has changed since 1950 (When I was 14 and my Father was practicing law in a small “Midwestern” U.S. town)

General practitioners versus specialists

One person representation versus team of lawyers
Gentlemen/lady lawyers versus “Rambo” lawyers (“take no prisoners”) approach
Would you have lunch with your opposing counsel during a trial?

Some Basic Ethical Problems U.S. Lawyers Frequently Face

How often does a U.S. Attorney or a State’s Attorney in a criminal matter place the interests of justice and fairness above his or her desire to “win” the case and establish a personal reputation as a “winning” attorney?

If you were prosecuting someone for an alleged criminal act, such as bribing a foreign official in violation of the U.S. Foreign Corrupt Practices Act, would you turn over evidence (that comes into your hands) that shows that the defendant is innocent – even though it means you will “lose” the case?

If you are mediating a case and you decide that one party is intelligent, crafty and strong-willed, and the other party is uneducated, naïve, and weak, would you advise the parties to cease mediation and go to litigation (where the court process would be more likely to do justice)? Even though your “failure” to cause the parties to reach a settlement would hurt your “success” record as a mediator?

Is law a business, or a profession, or both?

Is professionalism always more important than making money?

Is it realistic to expect a lawyer to resist the values of his fellow citizens when they are inconsistent with professionalism?

Ethics codes of American Bar Association, state bar associations (e.g., Illinois Bar Association), and city bar associations (e.g., Chicago Bar Association)

Are these codes adequately enforced?

What are some examples of violations of these codes that can lead to a disbarment of a U.S. attorney?

Use of client’s funds?

Commingling of client’s funds with law firm’s funds?

Romantic relationship with a client?

Inattentiveness to client’s problem?

How U.S. Businesses Are Formed and How the Form of the Entity is Chosen

Corporations

Why is this the most common business entity?

Cost

History and availability of precedent

Is limited liability the most important reason for the corporate form?
Corporation laws provide for what corporation can do, must do, may do,
and must not do. Are such laws usually workable for the average
U.S. business?

Why are Delaware corporations the most popular?

Why I almost always suggest the corporate form for a new business.

Tax disadvantage if there is income to be taxed (double taxation)

S Corporation solution for smaller corporations

What is cost, including legal fees, of setting up a new corporation?

My firm's fixed fee for a one shareholder corporation, that includes
preparing, filing and recording the articles of incorporation,
preparing the by-laws, preparing the stock certificate and
receipt therefor, preparing the initial shareholder resolutions
(electing directors, et al.) and initial directors' resolutions:
\$1,000 [out of pocket costs: about \$500. Legal fee: about
\$500]

Is there any difference between a "stockholder" and "shareholder"?

Is there any difference between a "lawyer", an "attorney", a "counsel"?

Limited Liability Companies ("LLC's"): "New Kid on the Block"

Also provides for limited liability for members (counterparts of
stockholders)

Much more flexible than corporations in terms of what members and
managers can and cannot do; in effect a lawyer can write a legal
code (the "Operating Agreement") governing the internal affairs of
the LLC to fit the particular situation. Practical result: much higher
legal fees. Typical cost: \$2,500 for simple LLC; \$25,000 for
complex LLC with many unique features to be drafted into the
Operating Agreement.

Disadvantages of being a new form of business organization.

Membership interests cannot be traded publicly and/or listed on a
stock exchange

Lack of reported cases, i.e., lack of clarity of the law

Tax advantage

Partnerships (General and Limited)

General Partnerships

No limited liability

Why law firms have been partnerships historically.

Tax advantage

Limited Partnerships

Limited liability for limited partners

No limited liability for general partners

Use of corporate general partner to avoid problem, so long as it has substantial net worth

Tax advantage

Corporations, Partnerships, LLCs as “Persons”

What would you do if you were asked by the President of a U.S. corporation to “represent” (act as the lawyer for) both the corporation and the President in a problem involving the proper compensation to be paid to the President pursuant to an ambiguous provision of his employment contract with the corporation?

What would you do if you were asked by the President of a U.S. corporation to represent both the corporation and the President in a problem involving the issuance of 1,000 separate, new stock certificates in exchange for the President’s single stock certificate for 59,000 shares of the corporation’s common stock?

“Piercing the ‘Corporate Veil’” [Losing Limited Liability]

Examples of how this potential disaster can occur.

Where corporation is under complete domination of stockholder and corporation commits a fraudulent act against plaintiff.

Where corporation and its controlling stockholder commingle their funds, thereby not respecting the separate entities, and this causes damage to plaintiff.

Effects of Successfully Piercing the Corporate Veil

A U.S. subsidiary of a Czech Republic parent corporation could have the limited liability of the corporate parent destroyed, making the parent liable for the U.S. debts of its subsidiary.

A shareholder of a corporation whose veil is pierced can be held liable for all of the debts and obligations of that corporation, a potential tragedy.

U.S. Corporate “Democracy”; Rights and Obligations of Stockholders, Directors, Officers, and Employees

Rights of Stockholders

Election of directors

Approval of mergers, consolidations, sales of all or substantially all of

corporation's assets outside its ordinary course of business,
amendment of articles of incorporation, dissolution and liquidation

Right to examine corporation's books and records

Right to be informed of "material" developments affecting corporation:

If corporation is private?

Fiduciary obligation of directors and officers to stockholders:

Does this obligation generally result in correct
behavior by directors and officers of the typical
private company? If not, why not?

If corporation is public?

Annual report, 8Ks, 10Ks, 10Qs, etc.

Are stockholders generally treated fairly in U.S. corporations?

Salaries, fringe benefits, retirement plans of officers

Directors' fees and perquisites

Stock options

Dividends

Do stockholders have any duties to corporation?

Any fiduciary duties?

Any other duties?

Rights and Duties of Directors

Election of officers

Oversight of officers and employees and corporation in general

Business plans and strategies

Fiduciary duty to stockholders

Do U.S. boards of directors generally fulfill their responsibilities?

Rights and Duties of Officers

Duty to carry out directions and business plan of the directors

Duty to hire, fire, oversee and supervise employees

Fiduciary duty to stockholders?

Should it be the same as directors' fiduciary duty?

Recent (2009) Delaware case

Rights and Duties of Employees

Duty to carry out directions of their bosses

Any fiduciary duties?

Any duties of loyalty to their employer?

"At will" employees

Union members; union contracts

What is happening to U.S. labor unions?

The Detroit experience

Minimum wages

Are they good for employees: the pros and the cons

Dissenters' Appraisal Rights

Example: my personal investment in a private company in 1990, silence for 19 years, then a dissenters' rights bonanza.

U.S. Laws Regarding the Financing of U.S. Businesses (Federal and State Securities Laws)

Where does a U.S. business obtain financing?

Bank loans (short term, medium term, long term)

"Private placements" to institutional investors (such as insurance companies)

A personal story: how I got hired right out of law school to work on private placements without having taken any course about securities law in law school.

Stanford Law School?

My father's insurance company?

"Private placements" to individuals (this applies to small companies primarily)

Public offerings of debt securities

What is/was the difference between "bonds", "debentures", "notes"?

Public offerings of equity securities

Common stock and preferred stock

To which of foregoing sources of money do Federal and state securities laws apply?

General Overview of Federal and State Securities Laws

A Bit of History:

Prior to the Great Depression (1929 to ?) [Buyer beware!]

Is the "Buyer beware!" philosophy workable in our world?

Without the protection of securities laws, the common law of fraud is available. [Proof of intent to deceive: an essential element.]

Sophisticated, highly educated people believing Bernard Madoff

could pay them over 10% interest year after year after year

Educated (but obviously unsophisticated) Americans who believed

a company could pay 250% interest per year (Not a typo: 250% a year!)

President Franklin Delano Roosevelt's 1933 and 1934 Federal securities acts

State securities laws: how different from Federal securities laws

Disclosure versus merit regulation

Harvard Professor Louis Loss (most famous securities law academician in U.S. history): OK to sell "hole in the ground" if you describe it properly

Under this approach, the 250% annual return offering would be legal if properly disclosed, but the problem is that the issuer would have to state in the prospectus that the offering was a "Ponzi scheme"

Why are state securities laws called "Blue Sky Laws"?

Civil remedies and criminal penalties for violations

Under Federal securities laws:

Criminal:

Fines up to \$5,000,000 for natural persons and \$25,000,000 for businesses, and
Prison terms up to 20 years.

Civil:

Rescission
Damages

Under State "Blue Sky Laws":

Criminal:

Fines and prison terms, generally less severe than
Federal

Civil:

Rescission
Actual damages
Punitive damages in some cases
Attorneys' fees in some cases

Why so important to businesses

Ability to raise capital

Ability to have shares traded in a fair and transparent market

Ability to use shares to make payment of purchase price in acquisitions of
businesses

Registration requirements

Disclosure requirements

What are "material facts" that must be disclosed to purchasers of

securities?

Are disclosure requirements separate and different from registration requirements?

Projections and forecasts: why so dangerous

The Securities and Exchange Commission ("SEC") and its significance

Registration of Securities

How it works: the process from beginning to end

Decision by board of directors of "issuer" to raise capital by making a public offering of its securities.

Putting together a team to accomplish the public offering

Members of the team

Initial meeting of the team

Selection and negotiation with underwriter or group of underwriters

Function of the underwriter(s)

The registration statement

How is non-financial part prepared?

How does securities lawyer know what to include?

Who prepares financial statements?

What is the "Prospectus"? Is it part of the registration statement?

Who reviews the registration statement before it is filed with the SEC?

Directors, officers, internal counsel, accountants, outside counsel

Do stockholders have any liability with respect to the public offering?

Effect of recent Sarbanes-Oxley Federal legislation

Filing with "SEC" (Securities Exchange Commission) in Washington, D.C.

Filings with State "Blue Sky" Commissions in every state in which securities will be offered for sale

After about a six week waiting period during which the SEC reviews the registration statement, the SEC sends its "comment letter" to issuer's counsel

Team prepares amendments to registration statement to meet SEC's comments and objections

Review of Amendment No. 1 to Registration Statement by all members of Team

Filing with SEC

Preparation of final registration statement once SEC has no further comments

SEC "effectiveness" order

Commencement of sales

If underwritten, issuer sells all securities directly to underwriter for resale to public

If not underwritten, issuer sells directly to public through its officers, employees, and agents

Delivery of Prospectus to every purchaser

Why should it be called a “retrospectus”?

Ranges of costs of registration process

Legal fees -- \$100,000 to \$1,000,000

Accounting fees -- \$50,000 to \$500,000

Filing fees -- \$1,000 to \$50,000

Underwriting fees – 8% to 15% of sales price

Printing costs -- \$50,000 to \$1,000,000

Executive time – hundreds of hours

How would the process be different if a Czech Republic business were to register its securities for offering and sale in the U.S.?

Different SEC rules for financial statements of foreign registrants; not quite as strict as U.S. “generally accepted accounting principles” (“GAAP”)

Disclosure requirements are similar to U.S. issuer disclosure requirements, but not quite as rigorous

Post registration reporting requirements are less than those applicable to U.S. issuers

Generally, a similar process

Regarding fraud and material misrepresentations and omissions of material facts, the same as for a U.S. issuer

What if an offering of securities by a U.S. issuer is to be made in Czech Republic and other foreign countries in addition to the U.S.?

Do U.S. laws apply?

Does a Czech Republic citizen who buys a security of a U.S. issuer have a right to sue in a U.S. court for violation of U.S. laws regarding fraudulent issuance of securities or failure to properly register the securities with the SEC? Answer: Yes.

What is the theory behind this?

Use of U.S. as a basis for fraudulent offering and sale of securities abroad cannot be permitted.

Right of Czech Republic, and every sovereign state, to protect its citizens against fraud by foreign issuers of securities.

Could a Czech Republic citizen bring a suit against a U.S. issuer based

upon U.S. securities laws in a Czech Republic court?

Securities exempt from registration requirements

Federal government securities, e.g., Treasury bonds, notes, "TIPS"

"Munis", i.e., municipal securities

General obligation bonds ("GO's")

Revenue bonds

Bank securities [After recent financial debacle, one wonders about this one.]

Securities of religious, charitable, and educational organizations

Certain International Authorities

International Bank for Reconstruction and Development

International Finance Corporation

Asian Development Bank

African Development Bank

Regulation of Brokers, Dealers, and Investment Advisors

Both Federal and state registration required, with some exemptions

Supervisory responsibility by broker-dealer entity of its agents ("registered representatives" and "financial advisors")

"Suitability" requirement

Anti-churning rules

Record keeping requirements

Net capital rules

"Front running" rules

Margin rules (My German grandfather's story: rags to riches to rags)

Financial Institutions Regulatory Authority ("FINRA")

Permits arbitration clauses in customer agreements to be binding

Regulation of commissions and investment advisory fees (recent U.S.

Supreme Court holding regarding investment advisory fees)

Regulation of Mutual Funds (Investment Company Act of 1940)

"Evergreen" prospectuses

European opinion of U.S. securities laws:

Too extensive, too restrictive, too expensive

The Ralston Purina case

The case of a CEO of a U.S. subsidiary of a Czech Republic company

Is such regulation the *sine qua non* to a free marketplace in securities?

The "Greater Fool Theory"

Or, "A fool is born every minute" theory

The China securities marketplace

What is the largest, most trusted securities marketplace in the world?

Despite all of the U.S. regulation, how could the Bernard Madoff “Ponzi scheme” happen?

Offerings Exempted from Registration

Regulation D [the “Private Placement” Exemption]

What does “private placement” indicate?

Why should such offerings be exempted from registration?

Can some persons “fend for themselves”?

Should issuers be able to sell to “sophisticated investors” without registration?

The insurance company paradigm.

Warren Buffett types.

The Bernard Madoff “Ponzi scheme”

What are the conditions that must be met for the exemption to be perfected?

Purchasers must be “accredited investors” plus 35 non-accredited investors.

What are accredited investors? [“Fat cats”]

Why the 35 person exception? Does it make any sense?

“Purchaser Representatives”

Must be no “integration” with any other offering.

Must furnish all “material facts” to all non-accredited investors.

Why not to accredited investors?

What is a “material fact”?

Must be no “general solicitation” and no “advertising”.

Must be limitations on resale by the purchasers.

How is this accomplished?

Must file a notice of sales with the SEC. Why?

How it works: the process from beginning to end

Decision by Board of Directors of issuer that issuer needs to raise capital and would prefer to do so by a private placement

Putting the team together

Initial meeting of the team and allocation of responsibilities

Selection and negotiation with placement agent (similar to underwriter in a public offering)

[No registration statement; this offering is exempt from registration]

Preparation of a disclosure document to disclose all “material facts” to each investor (other than accredited investors)

Usually called a “Confidential Private Placement Memorandum” (as opposed to a Prospectus in a public offering), “CPPM” for short.

How does lawyer for issuer know what “material” facts must be included in the CPPM?

Looks at form of registration statement that would be used if offering were a public offering

Looks at prospectuses that have been used in public offerings for similar types of issuers.

Asks executives of issuer.

Relies on accounting firm to prepare financial statements in accordance with SEC guidelines.

CPPM goes through several iterations before all members of team agree it is complete and accurate.

While CPPM is being prepared, lawyers also prepare:

“subscription documents”, namely:

Purchase Agreement

Investor Questionnaire (helps issuer and its counsel to determine whether proposed investor is “accredited”)

Confidentiality Agreement

Shareholders’ Agreement (in some cases)

Blue Sky Memorandum (regarding state exemptions)

Offering commences

What is a “mini-max” offering?

How does offering get sold if there is no placement agent?

Filings with certain Blue Sky Commissions

Stock certificates are prepared with legends and delivered to purchasers.

Ranges of costs of this Private Placement Process:

Legal fees – \$50,000 to \$150,000

Accounting fees -- \$15,000 to \$150,000

Filing fees -- \$500 to \$5,000

Underwriting fees – 8% to 15% of sales price

Printing costs -- \$1,000 to \$50,000

Executive time – 50 to 250 hours

Advantages and Disadvantages of Public Offerings and Private Placements

Costs of offering

Ongoing costs of being a public or private company

Time to complete offering documents and to complete the offering

Confidentiality and privacy aspects

Intrastate Offerings

Exempt from Federal Registration

Requirements

Must be registered in the one state in which offering is made

Historical significance: states' rights; state's right to regulate an offering within its borders only

Three Principal Ways U.S. Businesses Resolve Their Disputes: Litigation, Arbitration and Mediation

Litigation

What is it? What are the steps in its process from beginning to end?

How costly is it?

How long does it take to complete?

How much executive time does it take?

What percentage of litigated cases are settled before trial?

What are considerations by plaintiff and by defendant in settling cases?

Why is litigation the preferred method of resolving disputes?

Is the U.S. a "litigious" society?

If so, is that good or bad?

Is it realistic to expect more disputes to be settled by reason, negotiation, mediation?

Would anyone prefer that disputes be settled by fists, guns, bombs or terrorism?

The "Old West"

If the courts are not available to solve disputes that people cannot solve themselves, how would the "little guy" fare?

"Small Claims Courts" and "Pro Se Courts" for the "little guy"

Arbitration

What is it? What are the steps in its process from beginning to end?

How costly is it?

Who are the arbitrators?
How long does it take to complete?
How much executive time does it take?
What percentage of these disputes are settled before trial?
Why is it used less than litigation, as a general rule?
Example of an arbitration: a FINRA securities law case.
Pre-dispute arbitration agreements versus post-dispute arbitration agreements: what are the pros and cons of each approach?
The proposed Arbitration Fairness Act

Mediation

What is it? What are the steps in its process from beginning to end?
Who are the mediators?
How costly is it?
How long does it take to complete?
How much executive time does it take?
Why is it used less than litigation, as a general rule?
Why I do not like it as a general rule
 Is it more important to settle disputes or to settle disputes in an manner that is fair to all parties and in compliance with the law?
When do I like mediation?

The “American Rule” versus the English/German/Czech(?) Rule regarding the payment of legal fees in lawsuits and arbitrations
 Pros and cons of each approach

“M&A” (Mergers and Acquisitions): What is Typical Process for a Czech Republic Business to Acquire a U.S. Business or a U.S. Business to Acquire a Czech Republic Business?

Why is “M&A” a misnomer? It should be “Sales and Acquisitions” [“S&A”].

Three typical ways to acquire a business:

Purchase all or a majority of its voting equity shares
Purchase all or substantially all of its assets
Merge the acquiring company with the acquired company and issue cash or shares, or both, in the acquiring company to stockholders of the acquired company

Usual steps in a friendly acquisition [as opposed to an unfriendly takeover such as an unfriendly “Tender Offer” – which is quite a different scenario]:

Parties’ senior executives have discussions about a possible acquisition/sale.

Parties enter into a “letter of intent” – it should always be, and usually is, a non-binding letter agreement of 5 to 10 pages, covering the crucial business terms, such as price; “holdback”; “earnout”; form (assets sale, merger, or stock purchase); confidentiality; “lock-up” period; due diligence by purchaser time period; due diligence by seller time period (if seller is taking stock in purchaser); who pays expenses if deal falls apart (typically each party pays its own expenses); and any other terms either party considers to be crucial to the deal.

Major mistake that is common: parties (business people) think that they know how to prepare a letter of intent without consulting their lawyers. As a result they sometimes enter into a binding contract, which at least one of the parties, usually the buyer, does not want.

[My “war story” as an expert witness with respect to such a letter of intent.]

Challenge of drafting a letter of intent

If too detailed, can kill the deal before parties get committed to the deal.

If your client only wants deal if it gets certain provisions, be sure to put them in letter of intent very clearly [Better for deal to end early if crucial term is unacceptable to other side].

If your client wants deal badly, even if client has to “give” on crucial issues, draft letter of intent with as little detail as possible, hoping that other party will get “invested” in the transaction as it spends legal and executive time in pursuing it.

Is this dishonest business practice or effective representation of your client?

Due diligence efforts commence, typically by purchaser sending in team of its lawyers, accountants, acquisition business people, etc. to check the financial integrity of the business of the seller to be sure it is as solid and profitable as anticipated and to see whether there are any “skeletons in the closet” [hidden problems].

If due diligence investigation uncovers any hidden problem that makes seller materially less attractive as an acquisition, negotiations are held to lower the purchase price. If problem is extremely serious, buyer make terminate the acquisition. [This is main reason why letter of intent must be non-binding.]

Buyer's attorneys prepare a lengthy, detailed purchase agreement (Asset Purchase Agreement if it is an asset deal; Stock Purchase Agreement if it is a stock deal; or Merger Agreement if it is an acquisition by merger). Typical sections of these Agreements include:

- Definitions

- Description of [Assets] [Stock] [Merger]

- Description of Excluded Assets

- Purchase Price and Earnout Provision, if any

- Description of Assumed Liabilities

- Description of Excluded Liabilities

- Sellers Representations and Warranties to Buyer (very extensive usually)

- Buyer's Representations and Warranties to Seller (not extensive usually)

- Seller's Indemnity of Buyer

- Buyer's Indemnity of Seller

- Obligations of the Parties During Interim Period [Between Signing of Agreement and Closing]

- Governmental Consents (if any are required; this would include anti-trust clearance if there are anti-trust questions]

- Conditions Precedent to Each Party's Obligation To Close Closing [Place of Closing and What Each Party Must Deliver to Other Party]

- Post-Closing Matters

- Right of Termination of Agreement Prior To Closing

- Procedures if either Party has a claim against the other party

- Choice of law and forum

- Miscellaneous matters

Negotiations Regarding Both Business and Legal Terms of the Purchase Agreement [These negotiations sometimes get tense, heated, and difficult.]

- Example of typical battleground: seller wants all of its representations qualified by a "materiality" standard.

Why is this such a problem for buyer?

Final changes made in Purchase Agreement

Execution and delivery of Purchase Agreement by both Parties

Preparations for Closing

Legal opinions

Closing

Typical Legal Problems in Acquisitions

Choice of law and choice of forum:

Can parties that have no contact whatsoever with State of Delaware make Delaware law apply to their acquisition and provide for jurisdiction in Delaware courts?

Extent of Representations and Warranties by Seller

Seller wants to minimize; wants Buyer to rely on its due diligence

Buyer feels due diligence cannot be perfect, so it must have extensive representations and warranties by Seller to protect itself against Seller's fraud.

Environmental liability

Seller wants to avoid; and Buyer wants to avoid.

Typical compromise: Seller remains liable for any environmental liability discovered before Closing; Buyer accepts liability for later discovered problems; but Buyer insists on environmental study by experts before Closing.

Another typical compromise: Seller agrees to assume first \$_____ of environmental liability; Buyer agrees to assume the rest.

Example of how one Seller handled this problem:

"The sale makes no sense to me if I have to accept more than \$5,000,000 of liability."

"Holdback Provision"

Buyer wants to hold back part of purchase price so it can set off any claims it has against Seller for breach of representations and warranties.

Seller wants all of purchase price at Closing.

There is no typical resolution of this problem. It all depends on who wants the deal most and who is the best negotiator. There is nothing worse for the lawyer working on this kind of deal than having a weak client, who will not stand up for its rights and interests. It happens more often than you might expect.

Governmental Approval

What if the assets to be acquired are in China, the government of which must approve any sale of assets to a foreigner?

Example of a 2009 Asset Purchase Agreement (“German APA”) prepared by German counsel for the Buyers, compared with a 2009 Asset Purchase Agreement (“U.S. APA”) prepared by U.S. counsel (R.W. Edler) for same transaction (after we pointed out deficiencies in the German APA)

Buyers: Netherlands and Singapore companies (my firm’s clients)

Sellers: Israeli and Chinese companies

Language: English

Applicable Law: Delaware

Choice of Forum (to litigate disputes): Delaware

Problems with German APA under Delaware law

If you were asked by your law firm employer to identify these problems, how many could you find? [A copy of the German APA will be given to each student for analysis, with Parties’ names removed.]

Benefits of U.S. APA under Delaware law and otherwise

[A copy of the U.S. APA will be given to each student for review, with Parties’ names removed; and we will go through the agreement page by page, pointing out the reasons for the detailed provisions from both the Buyers’ and Sellers’ perspectives.]

Rule 10b-5 Litigation in connection with the purchase and sale of securities [if time permits]

Dissenters’ Appraisal Rights [if time permits]

A ‘war story’ of a recent, successful challenge by a Texas stockholder: how a \$55.80 offer became a \$2,550 per share offer.

Some Non-Academic Questions I Would Enjoy Discussing With Students Who Are Interested Enough To Get Together Over a Cup of Coffee After Class

What are the most prestigious U.S. law schools?

How important is it to get a degree from one of the most prestigious schools if you want to get a job in the U.S.?

What is the importance of an LL.M. or doctorate, versus the J.D. (also sometimes

called an LL.B.)?
How does the study of law in the U.S. work? What is the Socratic Method?
How does one become a lawyer in the U.S. (bar examinations and bar review courses)?
How does one become a judge in the U.S. (appointed judges and elected judges)?
What is the status of women in the legal profession?
What are the chances of a Czech Republic lawyer finding a job in the U.S. with a U.S. law firm? And what would I recommend for a Czech lawyer to do to maximize his/her potential to get a good job with a U.S. law firm?
What are the starting salaries for beginning lawyers in the U.S.?
Are there too many lawyers in the U.S. (supply and demand economics)?
How ethical are U.S. lawyers?
How competent are U.S. judges?
How ethical are U.S. judges?
What are the advantages and disadvantages of starting one's law career by taking a job in government (such as the Securities and Exchange Commission, or a State's Attorney's Office, or the U.S. Patent Office, or the Department of Labor, or the Internal Revenue Service, etc.)?
As a general rule, who makes the most money as a practicing lawyer: the brilliant legal expert and most accomplished practitioner, or the "rainmaker" (the lawyer who brings the most new business and new clients to his/her firm)?
What does it take to become a rainmaker?

The Final Examination on April 3, 2010

Will be in writing (please use a pen – not a pencil) and graded by the Professor.
Some true and false questions
Some multiple choice questions
Some short answer questions
Possibly a short answer essay question
Questions will be based primarily on lectures and, to a lesser extent, on class discussion and documents provided to the students by the Professor.