Comparative Private Law
Solution Outline for the exam WS 2013 (January 6th, 2014)
Part A: Questions by Prof. Helmut Heiss

Please explain the concepts of "stare decisis" and "equity" in the English legal system.	
a) "Stare decisis" The methodological principle most important to a case law system such as English private law is that judges have to decide an individual case in the light of the rules set out in previous decisions ("**precedents**").	1 P.
Legal arguments are based on available and relevant precedents which give authoritative statements of the law. While every court will consider any previous decision (precedent), "stare decisis" is a **more narrow principle** which refers to the **duty** of an inferior court to follow the rule of law established by a superior court ("binding precedent").	1 P.
As a consequence, "stare decisis" will oblige the judge to follow the rule set out in a previous judgment by a superior court, **even if** he/she does **not concur** with the legal reasoning of the decision.	1 P.
The decisions of the **Supreme Court** (previously House of Lords) are binding on all other English courts. The House of Lords had considered itself to bound by its own decisions, but later gave up this position. Thus, "**overrulings**" are possible.	1 P.
Decisions of the **Court of Appeal** are binding upon the High Court of Justice as well as all inferior courts. The Court of Appeal considers **itself** to be bound by its own decisions.	1 P.
Decisions by the **High Court of Justice** are binding on inferior courts; decisions of **inferior courts** are not binding at all.	1 P.
Decisions of superior courts will be binding on inferior courts only if certain requirements are fulfilled. **First** of all, only "**propositions of law**" (rulings on points of law) can have binding effect.	1 P.
Secondly, such propositions must be part of the **ratio decidendi** of the decision (whereas **obiter dicta**, i.e. propositions of law not relevant to the decision of the case, will not be binding).	1 P.
Thirdly, the facts of the case to be decided must be the same as, or similar to, those underlying the precedent (a previous decision will have no binding effect if	

the facts of the case decided can be distinguished from those of the case at hand; English courts have developed excellent skills in "**distinguishing**" cases).	1 P.
For instance, in the case **D&C Builders Limited v. Sidney Rees** (Court of Appeal), Lord Denning, Master of the Rolls, applied Pinnel's Case (1602) because it was "accepted … by the House of Lords" in Foakes v. Beer in 1889. At the same time, **he distinguished the case** at hand from the precedents set in cases such as Sibree v. Tripp ("easily distinguishable") and Goddard v. O'Brien ("not so easily distinguishable").	1 P.
b) Equity	
Whereas English common law (at least in a narrow sense) is based on the precedents set out in the decisions of **common law courts**, equity represents the rules developed by the **Court of Chancery**.	1 P.
Equity developed due to shortcomings in the common law system which had been quite **formalistic** and produced **harsh results** in many individual cases. Historically, a party which had lost a case in the common law courts could turn to the **King or Queen** and ask for specific orders to be given to the winning party in order to avoid harsh results.	1 P.
At a certain point in time, the Crown empowered the **Lord Chancellor** to decide in equity and later on the **Court of Chancery** evolved.	1 P.
By then, two sources of law (common law and equity) were applied by competing courts (courts of common law and courts in equity). It was held that in case of conflict "**equity shall prevail**".	1 P.
Following the enactment of the Judicature Acts 1873-1875, the common law courts and the Court of Chancery were incorporated into the **High Court of Justice**. Since then, **both** law and equity are **applied by every court**.	1 P.
Both sources have, however, not been merged and still have to be distinguished even today. For instance, in the case **D&C Builders Limited v. Sidney Rees** (Court of Appeal), Lord Denning, Master of the Rolls, stated the **common law rule** first and then adjusted the result by **applying principles of equity**.	1 P.
While common law principles and equitable principles have not been merged together, i.e. are kept independent one from the other, there are **special principles of equity** which have been integrated into the common law at least in part (for instance: "**estoppel**").	1 P.
The function of equity in softening the harsh results produced by common law was expressed by Lord Denning in D&C Builders Limited v. Sidney Rees as follows: "But a remedy has been found. The **harshness of the common law** has	1 P.

been relieved. Equity has stretched out a **merciful hand** to help the debtor." Equity has been developed on a **case by case** basis. While it does not form a comprehensive system, general principles may be discerned. For instance: "He who comes to equity must come with clean hands". Moreover, some areas of English private law have been developed by equity. The main example is the law of **trusts**.	1 P.
Total A	19 P.

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Part B: Questions by Prof. Anton K. Schnyder

Question 1 **With regard to the Council Directive of 25 July 1985 concerning liability for defective products:** **a) Does the Directive leave any room for a Member State to provide for its own regulations?** **b) What observations - from a comparative law viewpoint - can be made when comparing several EU countries with regard to Article 15 paragraph 1 (b) and Article 16?** **How does the Swiss regulation read in this case?** **c) Are Swiss courts obliged to adhere to the rulings of the ECJ / European Court of Justice regarding the Directive?**	
a) Basically the Directive fully harmonizes the liability for defective products. There is room for Member States to provide own regulations, but only in so far as the Directive provides for such options. Examples for autonomous regulation: Art. 15 para. 1 (b) Art. 16 b) Most Member States haven't made use of the options granted in those articles. This means that the States want to realize the level of consumer protection laid down in the Directive. The Swiss regulation also adheres to the situations provided for in the Directive. c) Switzerland is not a EU Member State and not a partner of the European Economic Area (EEA). Therefore, Swiss Courts are in general not obliged to adhere to those rulings. However, as the Swiss Supreme Court pointed out, it makes sense to take the rulings into account, because Switzerland has adopted the Directive.	1 P. 1 P. 1 P. 1 P. 1 P. 1 P. 1 P. 1 P. 1 P.
Question 2 **What were the issues and the result in the case *Simone Leitner*?** **Is the ruling of the ECJ relevant for Switzerland:** **a) In general?** **b) Within the scope of a special law?**	
In the judgement, the ECJ ruled that the Directive 90/314/EEC must be interpreted as that it confers in principle a right of compensation of non-material	

damage to the consumer, if a corresponding breach of contract is evident.	2 P.
The decision was made based on the interpretation of Article 5 (particularly para. 2 subpara. 4) of the Directive.	1 P.
a)	
Basically the ruling is not relevant for Switzerland,	½ P.
because in general Swiss Law has not implemented the concepts of immaterial damage.	½ P.
b)	
There is a Directive on package travel, which has also been implemented in Swiss Law.	½ P.
Therefore, it is argued that within the special Swiss statute on package travel one might also adhere to the decision of the ECJ.	½ P.
Question 3 **What is the core statement of the ECJ in the so-called "Wood Pulp" case? What can be said from a Swiss legal point of view regarding this case?**	
The ECJ had to deal with legal entities that had no subsidiaries and no branches within the territory of the EU.	1 P.
Therefore, the Court had to decide on the jurisdiction of the EU on other grounds.	–
The Court distinguished and explained two relevant aspects of the contracts involved:	
a) The formation of a contract;	½ P.
b) The implementation of the contract.	½ P.
It was decided that when contracts are implemented in the EU such a "presence" is enough to satisfy the requirements of claiming jurisdiction.	1 P.
Swiss law also follows the approach formulated in this case.	½ P.
Question 4 **Are you aware of a European Directive regarding General Terms and Conditions?** **How does a possible autonomous re-enactment in this case by Switzerland look like?**	
There is the Council Directive [93/13/EEC] on unfair terms in consumer contracts.	½ P.
Switzerland didn't enact that Directive as it has in the area of product liability.	½ P.
However, in a revision of the statute on unfair competition Switzerland has introduced a kind of control in substance of general contract terms that shows similarities to the Council Directive.	½ P.
Total B	19 P.