



Introduction to US Business Law

24.6.2022

Duration: 120 minutes

- Please check at receipt of the exam the number of question sheets. The examination contains 6 pages and 20 questions.

Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	4 points	5.71 %
Question 2	4 points	5.71 %
Question 3	2 points	2.87 %
Question 4	2 points	2.87 %
Question 5	4 points	5.71 %
Question 6	2 points	2.87 %
Question 7	4 points	5.71 %
Question 8	4 points	5.71 %
Question 9	4 points	5.71 %
Question 10	2 points	2.87 %
Question 11	4 points	5.71 %
Question 12	4 points	5.71 %
Question 13	4 points	5.71 %
Question 14	4 points	5.71 %
Question 15	4 points	5.71 %
Question 16	4 points	5.71 %
Question 17	4 points	5.71 %
Question 18	2 points	2.87 %
Question 19	4 points	5.71 %
Question 20	4 points	5.71 %
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Total	70 points	100 %

We wish you a lot of success!



Question 1 – US Constitution (4 points)

1. What does it take to “change” the US Constitution?

Art. V:

An amendment may be proposed by a two-thirds vote of both Houses of Congress. The amendment must then be ratified by three-fourths of the State legislatures

2. Does the US Constitution know fundamental rights and if so, where?

The Constitution itself does not know fundamental rights. Those rights were added (later) through amendments to the Constitution.

3. According to the US Constitution, which are the most important powers of the US President?

Art. II, Section 2

Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States

he may require the Opinion, in writing, of the principal Officer in each of the executive

Departments, upon any Subject relating to the Duties of their respective Offices,

he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other

Officers of the United States, whose Appointments are not herein otherwise provided for,

and which shall be established by Law

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

4. What is the relevance of the “interstate commerce clause”?

The Commerce Clause refers to Article 1, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.



Congress has often used the Commerce Clause to justify exercising legislative power over the activities of states and their citizens, leading to significant and ongoing controversy regarding the balance of power between the federal government and the states. The Commerce Clause has historically been viewed as both a grant of congressional authority and as a restriction on the regulatory authority of the States.

Question 2 – Punitive damage (4 points)

1. What is “punitive damage”?

Compensation more than damage to teach the accused a “lesson”

2. Who benefits from punitive damage?

Plaintiff

3. Based on what can courts grant punitive damage?

Legal statutes

Common Law principles

4. Give one area of law where punitive damage is granted from time to time.

Antitrust

Question 3 – Civil procedure (2 points)

Please write down the four stages of a civil procedure in US federal courts.

1. Pleading
2. Pre-trial stage
3. Trial stage
4. Post-trial stage

Question 4 – Discovery (2 points)

Please explain what in a US civil procedure „discovery“ is all about.

Discovery, in the US civil procedure, is a pre-trial procedure in a lawsuit in which each party, through the law of civil procedure, can obtain all relevant evidence from the other party or parties by means of discovery devices such as interrogatories, requests for production of documents, requests for admissions and depositions.[https://en.wikipedia.org/wiki/Discovery_\(law\)](https://en.wikipedia.org/wiki/Discovery_(law)) - cite note-2 There is an obligation to provide the requested evidence on each party. When a discovery request is



objected to, the requesting party may seek the assistance of the court by filing a motion to compel discovery.

Question 5 – Checks and balances (4 points)

The US Constitution is based on the so-called „checks and balances“-system. Please explain:

1. Which are the branches of US Federal Governments in between that system works?
The Legislative branch (Congress)

The Executive branch (President)

The judicial branch (Supreme Court)

2. What circumstances are risks for the functioning of that system (give reasons)?

It basically works but not always very well. Especially when several of the branches of government are in the hands of the same political party it may not work properly. Then party arguments may be more important than limiting each others powers.

3. Are in your opinion all involved branches of the Federal Government equally powerful (give reasons)?

Basically yes. All branches can use their powers to limit other branches. The exception might be the Supreme Court. Since the decision Marbury vs. Madison in 1803, by which the Court gave itself the power to control whether the two other branches behave within their constitutional boundaries, the court put itself a bit above the two other branches. This is the case, because the court this way can nullify all acts be the other branches anytime, whereas the other branches cannot directly control resp. change the decisions taken by the court. They have to wait until a vacancy occurs and then – by appointing a new member – they indirectly and only for the future can try but with no guaranty to influence the court.

4. Which is the decision by which the Supreme Court granted itself Constitutional review?

Marbury vs. Madison 1803

Question 6 – Jurisdiction (2 points)

Please write down the two main areas of jurisdiction of Federal Courts.

Federal question jurisdiction – questions of federal laws are decided by federal courts

Diversity jurisdiction – cases in which parties from different states are involved

Question 7 – Delaware (4 points)

1. Why are so many companies registered in Delaware?



Because its company laws are in general very management friendly
Because it has the best company law courts with the largest collection of cases, what provides legal certainty
Creation of companies is very easy (online)
Internal affairs doctrine applies
Taxis only on inside Delaware business
Etc.

2. What is the so-called “Delaware effect”?

Delaware is very attractive to companies in the whole US because of its relaxed management friendly company laws. As there is a competition among the different states to attract companies to register under their laws, there is a risk that a race to the bottom might occur, that means that all states over time do know less and less regulations for companies.

In reality this has proven to be true somehow but not as dramatic as many were afraid.

3. Which courts are the best qualified for company law cases?

State courts (best in Delaware)

Company law is state law, so the state courts deal with such questions all the time, federal courts only under special circumstances.

4. Give an example for which the “internal affairs doctrine” is applied.

Internal affairs doctrine = on all disputes which concern internal matters of a company the laws of Delaware (or other states if they know the same law) has to be applied regardless where in the US the law suit has been filed.

Question 8 – Business judgement rule (4 points)

1. What is the so-called „Business Judgement Rule“?

The business judgment rule helps to guard a corporation's board of directors against frivolous legal allegations about the way it conducts business. The rule states that boards are presumed to act in "good faith"—that is, within the fiduciary standards of loyalty, prudence, and care directors owe to stakeholders. Absent evidence that the board has blatantly violated some rule of conduct, the courts will not review or question its decisions. That means, as long as a board can prove that a certain matter has been widely discussed and alternatives looked at before a specific decision has been taken, the board will not be held liable for «wrong» business decisions.

2. Do we know a similar rule in Switzerland?

The rule was developed in the USA but is nowadays somehow also used in many other countries, also in Switzerland.



3. Give one example.

Board has to decide whether to buy another company. In order to do that the board has to review all circumstances carefully and has to check also alternatives. If it can be proofed (based on a protocol) that the board did carefully decide then its members will not be held liable if the decision at the end of the day will prove to be a bad one.

4. What do board of companies have to make sure under the “Business Judgement Rule” when taking decisions?

The board has to act in “good faith”, that means evaluating decisions carefully and with prudence and discuss the pros and cons of a decisions; finally this has to be documented (protocol) in order to prove it in case.

Question 9 – Bar exam (4 points)

1. Who regulates bar exams in the USA?

The states do that. Each state independently for itself. In each state there is a Bar Association which does organize the exams.

2. Can an attorney admitted in Louisiana also practice in Florida?

Only if this attorney also takes the bar exam in Florida. There is no admission to the bar fit for all states.

3. What are the requirements to take the bar exam (for example in NY)?

J.D.

4. How do most candidates prepare for the bar exam?

After graduating from law school they take a crash course offered by private firms during which all topics relevant for the bar exam get repeated in a concentrated form during a couple of weeks.

Question 10 – Civil procedure (2 points)

Give four specialties of the US civil procedure.

1. Extensive pretrial discovery
2. Heavy reliance on live testimony (jury)
3. Aggressive pretrial motions
4. Class actions
5. Punitive damages
6. Lawyers fees (no „loser pays“ rule)



Question 11 – Federal courts (4 points)

1. Please give the most important reason why many people say the US federal judges are the most independent judges maybe in the world.

They are appointed by the President and confirmed by the Senate for life.

2. Who appoints a federal judge?

President

Confirmed and consent by Senate

3. With regards to the appointment of federal judges, how do state judges usually become judges?

Election

4. What is the difference in becoming a first instance federal judge and a US Supreme Court justice?

Basically none, both have to be nominated by the President and confirmed by the Senate. However, it is in reality much more difficult to become a Supreme Court Justice and all the hearings, back checking and political pressure is much bigger.

Question 12 – Class action (4 points)

1. What is the purpose of class actions?

A class action is a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or "class".

Put simply, the device allows courts to manage lawsuits that would otherwise be unmanageable if each class member (individuals who have suffered the same wrong at the hands of the defendant) were required to be joined in the lawsuit as a named plaintiff.

2. What is the problem with class actions in the USA?

It is often used as some kind of "blackmail" against big companies.

There is a kind of "industry" where law firms which are specialist in class actions go out and try to find potential victims in order to persuade them to join a class action what they otherwise might not have done. Because those "victims" can only win doing so (no loser pay rule, success-based honorarium for the law firm) they might easily do that. In most cases it is primarily the law firm that gets a lot of money, not so much the many members of a class action.

3. Should Europe/Switzerland also introduce class actions?



The EU and Switzerland have both been thinking of introducing some kind of class action as well. What does exist is not of the same quality. Both, the EU and Switzerland, also see the negative aspects of this system and want to avoid that. Such a middle solution is not easy as the class actions might really only work in combination with the US legal specialties.

4. What are class action attorneys often accused for in the US?

Just want to make a lot of money for themselves. Therefore, having created a greedy industry which is "blackmailing" big corporations.

Question 13 – Antitrust (4 points)

1. Why did the US introduce the Sherman Act?

Historically preventing big corporations (trusts) to gain too much influence on politics.

From a competition point of view the goal has been to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

2. What does Sherman Act Section 1 regulate?

Anticompetitive agreements

«every contract, combination, or conspiracy in restraint of trade»

3. What does Sherman Act Section 2 regulate?

Monopolization and the attempt to monopolize

any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."

4. What is the most important provision of the Clayton Act?

Merger control (Section 7A)

Question 14 – Antitrust (4 points)

1. Why did the US Supreme Court establish the so-called „rule of reason“?

Because Section 1 Sherman Act is written very broadly and can not be applied literally otherwise almost all agreements might conflict with antitrust laws.

2. What does it mean?

Only unreasonable restrictions of competition are illegal (hardcore, per se) like price fixing, geographical division of markets, etc., all other restrictive agreements can be justified (give reasons).



3. For which behavior do courts apply the so-called “per se” rule?

Price fixing, Division of (territorial) markets, output restrictions
Horizontal restraints

4. Who does enforce US antitrust laws?

Either two federal agencies (Department of Justice and Federal Trade Commission) or through private law suits. In both cases federal courts have the power to decide (not agencies).

Question 15 – Consideration (4 points)

1. What is consideration?

Consideration is the central concept in the common law of contracts and is required, in most cases, for a contract to be enforceable. Consideration is the price one pays for another's promise or any kind of promise to do resp. not to do something. With consideration each party is

. It can take a number of forms: money, property, a promise, the doing of an act, or even refraining from doing an act. In broad terms, if one agrees to do something he was not otherwise legally obligated to do, it may be said that he has given consideration.

- > mutually bargained-for exchange between the parties
- > Idea of «do ut des»
- > Each side has to receive something in exchange for what they give

2. In which agreements/contracts is consideration most important?

In promises to do something in the future.

3. Under civil law do we have something equivalent to consideration?

no

4. Does consideration have to be of equivalent value?

no

Question 16 – Tort law (4 points)

1. What is tort?

Tort is a civil wrong, recognized by law as a ground for a civil lawsuit.

2. Which three elements have to be established in a tort case?



Plaintiff must establish that defendant was under a legal duty to act in particular fashion (standard of care)

- > Plaintiff must demonstrate that defendant breached this duty
- > Plaintiff must prove that he/she suffered injury or loss as a direct result of defendant's breach of duty
 - > causation

3. Give an example for intentional tort.

Intentionally hitting a person (battery)

Other intentional torts

- Assault (Drohung)
- False imprisonment (Freiheitsberaubung)
- Intentional infliction of emotional distress
- Malicious prosecution
- Abuse of process
- Trespass to land (Grundstückbetretung)
- Trespass to chattels (Besitzentziehung)
- Conversion (Zerstörung von Eigentum/Besitz)

4. Give an example for strict liability.

Product liability
Liability to run a nuclear power station
Etc.

Question 17 – Impeachment (4 points)

1. For what kind of offences can a US President be impeached?

Article II, Section 4:

«The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanours»

2. What is the procedure?

Three steps:

- > First, the Congress investigates. This investigation typically begins in the House Judiciary Committee, but may begin elsewhere.
- > Second, the House of Representatives must pass, by a simple majority of those present and voting, articles of impeachment, which constitute the formal allegation or allegations. Upon passage, the defendant has been "impeached".



- > Third, the Senate tries the accused. In the case of the impeachment of a president, the Chief Justice of the United States presides over the proceedings. For the impeachment of any other official, the Constitution is silent on who shall preside, suggesting that this role falls to the Senate's usual presiding officer, the President of the Senate, who is also the Vice President of the US. Conviction by Senate requires the concurrence of two thirds supermajority of those present. The result is removal from office.

3. What were the reasons President Trump got impeached the first time?

1. abuse of power

Military assistance to Ukraine only under condition to open investigation into a Ukraine company on the board of which the son of Joe Biden was sitting

2. obstruction of Congress

To forbid his aids, secretaries, chief of staff, etc. to cooperate with the House of Representatives

4. What were the reasons President Trump got impeached the second time?

"Incitement of insurrection", alleging that he had incited the January 6 attack of the U.S. Capitol.

These events were preceded by numerous unsuccessful attempts by Trump to overturn the 2020 presidential election, as well as his pushing of voter fraud conspiracy theories on his social media channels before, during, and after the election.

Question 18 – Delaware (2 points)

Provide the four steps which are necessary to create (register) a corporation in Delaware.

1. File Certificate of Corporation
2. Acquire Employment Identification Number
3. Open Bank Account
4. Sign om the name of the company

Question 19 – UCC (4 points)

1. What is UCC?

Model law

Specifically relevant for interstate sales contracts

Art. 2 UCC applies whenever there is a sale of goods, even if the sale is between no merchants
Has to be transmitted into state law!

2. Can one sue somebody else directly based on UCC?



No – model law, not law, has to be transmitted into state law

3. Why was the UCC created?

First published in 1952

Idea: to harmonize the law of the sale and other commercial transactions

Secure interstate trade

Not binding, only recommendation

4. Who did enact the UCC?

Created by the American Law Institute (private organization), has to be transmitted (enacted) into state law.

Question 20 – Switzerland – USA (4 points)

1. Do Switzerland and the USA have a free trade agreement?

No

They had talked about one some years ago but negotiations failed because of agriculture issues.

There are evaluations going on whether those talks should restart.

2. Give one branch of business in which Swiss firms are important investors in the USA.

Pharma

Food

Financial services

3. How important are US firms in investing in Switzerland?

Very important.

FDI from US to CH USD 155 billion, strong growth

Switzerland European hub for many international US firms

4. What is the most important trade area where the US wants free access to Swiss markets?

Agriculture products (most other areas are already basically free)