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## Introduction to US Business Law

25. June 2019

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**Duration:** 120 minutes

- Please check at receipt of the exam the number of question sheets. The examination contains 12 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	4.55%
Question 2	4 points	4.55%
Question 3	4 points	4.55%
Question 4	4 points	4.55%
Question 5	4 points	4.55%
Question 6	4 points	4.55%
Question 7	4 points	4.55%
Question 8	4 points	4.55%
Question 9	4 points	4.55%
Question 10	4 points	4.55%
Question 11	4 points	4.55%
Question 12	4 points	4.55%
Question 13	4 points	4.55%
Question 14	4 points	4.55%
Question 15	4 points	4.55%
Question 16	4 points	4.55%
Question 17	4 points	4.55%
Question 18	4 points	4.55%
Question 19	8 points	9.05%
Question 20	8 points	9.05%

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Total	88 points	100 %
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**We wish you a lot of success!**



### Question 1

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

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

(für jede korrekte Nennung je ein Punkt)

### Question 2

The US Constitution is based on a so-called „checks and balances“-system. Please provide one example of how this works:

between President and Parliament?

1. Legislation: Parliament decide about a statute, the Signature of the President is needed to enter into force
2. Legislation: if President vetos a statute, Parliament can overrule it by qualified majority
3. Appointment of Federal judges and Cabinet members: President nominates a candidate, needs consent by Senat.
4. Treaties with foreign nations: President negotiates treaties needs consent by the Senat

between President and Supreme Court?

1. President appoints justices (with Consent by the Senat)
2. USS can check each act by President upon constitutionality (constitutional review)

(for each of the two required examples 2 points.)



### Question 3

Some people say that the most powerful branch of the US Government is the US Supreme Court (USS). Give reasons why they say that.

1. The USS can control all acts taken by the two other branches upon their constitutionality and nullify them.
2. Neither Congress nor President can control or nullify the decisions taken by the USS.
3. Any statute or decision by Congress and/or President taken to correct a prior decision taken by the USS can again be checked and nullified by the USS.
4. The only way Congress and President could do something about a decision taken by the USS which they don't like (f.e. abortion) would be to amend the US Constitution, because that is the only document that is binding and limiting the USS. However, that is very difficult and almost impossible and needs qualified majorities in Congress and in the Parliaments of the States.

(4 points if all of the above reasons are mentioned. For each missing argument one point minus)

### Question 4

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

1. Discovery is part of the pre-trial phase of a civil procedure.
2. During discovery each of the involved parties has the right to claim from the other partie(s) all relevant evidences that the other party may possess (documents, testimonies, etc.)
3. If one party refuses to hand over the requested evidence the judge has to decide whether that evidence is relevant or not.
4. At the end of the discovery all involved parties should know what they can proof and what the other party has at hand (if they did discovery well).

(for each of the 4 explanations 1 point)



### Question 5

What is „diversity jurisdiction“?

1. The second form of jurisdiction for US Federal Courts.
2. It needs parties involved in a civil litigation from at least two different states.
3. There is a minimum amount in dispute required of USD 75'000.
4. Federal Courts apply state laws.

(for each of the four answers one point)

### Question 6

Mention two of the three most important US antitrust laws?

1. Sherman Act 1890
2. Clayton Act 1914
3. Federal Trade Commission Act 1914

(for mentioning one of the three Acts 2 points, for mentioning 2 Acts 4 points in total)

### Question 7

What is „consideration“? Give one example:

1. A bargain, an exchange for something in a contract. Both parties to an agreement have to give in something, have to bind themselves somehow. Only with consideration an agreement turns into a contract which can legally be enforced.
2. Consideration can only be given for something in the presence or in the future, not in the past; something that would be done anyway cannot be a consideration.
3. Consideration has to be of some (legal) value, but not of adequate value.
4. Example: John promises to Eve to give her his old car if she promises to walk his dog every Monday for one year.

(for each point or a similar example one point, totally 4)



### Question 8

What is the so-called „Delaware effect“?

1. More than 50% of all corporations in the USA are registered in Delaware.
2. Why? Because Delaware established in an early time a very business friendly regime (not tax on out of state business, no jury, more room for internal regulations, specialist and experienced courts, online creation of corporations, etc.)
3. Other states also want to get corporations to register in their territory. They also try to be business friendly.
4. It is feared, that this might lead to a race to the bottom with regards to regulations for corporations. This is called the Delaware effect.

(for each of the 4 elements one point)

### Question 9

Please explain what the so-called „Business Judgement Rule“ is. Give one example:

1. When a court has to decide about business decisions taken by a board/management of a corporation (mostly in the context of a liability law suit) the court is confronted with the problem how much scrutiny they want apply to this business decision.
2. Challenges: Are judges better managers and after a decision has been taken it is always easier to know whether that decision was a good or bad one.
3. Courts apply in such cases the so-called business judgement rule which means they are only checking whether the business decision has been made in good faith, after evaluation all pros and cons and a discussion about that. But they are not deciding whether the decision as such was good or bad.
4. Example: The board of company A decides to buy company B without in-depth discussions. Later it turned out the decision was a failure. Could the board members be held liable. Under the business judgement rule basically yes. (or similar example)

(for each of the four answers one point)



### Question 10

Give four specialties of a US civil procedure?

1. Jury system (live testimony)
2. Discovery
3. Class actions
4. No loser pays all rule/attorney fees
5. Punitive damages
6. Extensive pretrial motions

(for 4 out of this above 6 each one point)

### Question 11

Name two requirements for taking the bar exam in NY.

1. 4 years of college
2. 3 years of US law school (or for foreign lawyers 1 year LL.M.)

(for each answer two points)

### Question 12

What does it mean in antitrust litigation to get “triple damage”?

1. The Clayton Act provides for an explicit legal provision which permits courts to triple the amount of damages.
2. Parties who sue other companies for violation of antitrust regulations can be entitled not only for damage compensation but three times damage compensation.
3. This provision makes it attractive for private parties to sue potential antitrust violators as they can not only compensate their losses but make money.
4. Together with the often very aggressive plaintive bar and a contingency fee based compensation model private parties take almost no risks to lose but sometimes good chances to make money which leads to a general increase of private litigation and additional risks for companies doing business in the US market.



(for each of the above arguments one points, total 4 points)

### Question 13

Why is it said that US federal judges are more independent than most of the state judges?

1. They do not have to run for elections.
2. Therefore they do not depend on donations from local people to whom they might afterwards feel obliged.
3. They are appointed for life, once in office they cannot be removed unless they commit a crime.
4. They are comparatively well paid; their salary cannot be reduced by Congress.

(for each of the above 4 answers one point)

### Question 14

Mention two of the three elements that have to be established in a tort case.

1. Obligation to care (legal duty to care, standard of care)
2. Breach of this obligation to care.
3. Injury/Damage as a direct result of this breach (causation)

(for each of the above answers 2 points up until 4 in total)

### Question 15

In which area of law did the US Supreme Court establish the so-called „rule of reason“ and what does it mean.

1. Antitrust law (Sherman Act)
2. If one would take section 1 or section 2 of the Sherman Act literally every restraint in trade would be illegal and punished with a fine and eventually imprisonment.
3. The rule of reason provides that only the most severe violation of the Sherman Act are per se illegal and cannot be given reasons. They are always illegal like price fixing, territorial division of markets, etc.
4. All other infringements of the Sherman Act can be justified, that means are evaluated under the rule of reason-principle and therefore do not have “per se” lead to sanctions.



(for each of the above for answers one point)

### **Question 16**

What is strict liability? Give one example.

1. In the field of torts: Liability without fault for activities that result in dangerous risks
2. The claimant needs only to prove that the tort occurred and that the defendant was responsible.
3. Absolute duty to make something safe. Often liability for reasonable foreseeable damage of ultra hazardous activity
4. Example: product liability, ownership of wild and dangerous animals, running of potentially risky enterprises like a nuclear power station.

(for each correct answer one point)

### **Question 17**

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

1. File certificate of corporation/formation
2. Acquire employer identification number
3. Open bank account
4. Sign in the name of the corporation

(for each of the four answers one point)

### **Question 18**

What is UCC? Can one sue somebody else directly based on UCC?

1. The Uniform Commercial Code is a model law
2. Its purpose is to harmonize state business regulations all over the US.
3. The UCC is not a "law" but rather soft law (standards)
4. One cannot sue somebody directly based on UCC

(for each answer 1 point)

### Question 19

Switzerland might soon start official negotiations with the US on a free trade agreement between the two countries. Give 2 reasons why this might be a good idea and in addition indicate 2 major challenges.

Good idea:

1. A free trade agreement would promote business between the USA and Switzerland because it would remove additional restrictions in market access.
2. As WTO seems in a crisis FTA seem to be the way to reduce trade barriers bilaterally.
3. If Switzerland could conclude a FTA with the USA ahead of the EU we could be trendsetter, otherwise we probably just have to hope to copy the US-EU FTA.
4. Although Switzerland and the USA are strong trading partners there are still areas where we could do more.

Challenges:

5. Agriculture sector
6. Intellectual property rights
7. Dispute resolution
8. Banking

(for each of 2 good idea reasons and 2 challenges two points, in total 8)

### Question 20

If you were about to open a law firm in the USA, which legal structures could you choose and which one would you choose? Give reasons.

1. Sole proprietorship, general partnership, limited partnership (LLP). Corporation are under US bar regulations not possible for law firms.
2. As a sole practitioner the form sole proprietorship would probably be adequate. However, here we do have full personal liability.
3. If more than one lawyer are practicing in that firm either general partnership or LLP would be preferable.
4. Meanwhile the general partnership is the traditional form for doing legal business it comes with full personal liability for everything the other partner are doing. That can be risky, especially the bigger the firm gets and the less the partner know each other. Therefore, the



LLP is today the most often used legal structure for (larger) law firms, as it provides a partnership structure without personal liability (which is replaced by an insurance).

(for each of the 4 answers two points, in total 8)