Final Exam for IMUNE International Law School

Part 1 International Business Law

Written part

It starts with a written part when students work on two hypotheticals related to the following courses:

- Introduction to International Business Law,
- International Sale of Goods

You should refer to applicable laws that led you to the conclusion. It is an open book exam. You may use all study materials related to the above-mentioned courses, more specifically ppt slides distributed to support oral exam preparations and the text of the CISG. Handwritten notes, lecture notes, digests and books on case law shall not be used! Also, use of computers, tablets, smartphones and internet capable devices are strictly prohibited!

Thesis defense

The second part of the exam is the oral defense of the thesis when students summarize the most important observations, critics related to their thesis topic. Committee may ask questions and a conversations is formed around the thesis topic.

Colloquial part

The third part is the oral exam, a conversation formed around pre-listed topics related to courses on:

- International Business Law
- European Company Law
- International Sale of Good

Upon entering the room, you pick one of the topic sheets (written side of the sheet faces down) – blind choice. You have max. 15 minutes to gather your thoughts before starting the exam. You may take notes. Oral exam is colloquial (after summarizing the topic you should answer to questions).

Topics for the oral exam:

1. Sources and principles of international business law
2. Settlement of disputes in international tribunals (WTO, ICSID)
3. Settlement of disputes in municipal courts (jurisdiction, immunities, governing law)
4. Carriage of goods by sea
5. Law of bills of exchange, promissory notes and checks
6. Letters of credit in international commerce
7. ECJ case law related to freedom of establishment
8. Company law directives in the EU
9. CISG I.: Scope, interpretation, formation
10. CISG II.: Standards for performance, obligations, risk, remedies
Prerequisite / Demonstrate Knowledge

The topics to discuss of the introductory portion are:

1. Foundations of Contract
2. Offer and Acceptance
3. Consideration, Capacity, and Form
4. Genuineness and Discharge
5. Performances and Discharge
6. Remedies
7. Third-Party Rights
8. International Contracts

All students should own a dictionary of legal terms and have it on hand.

Part 1: International Law – General (target duration 4-6 weeks)

The following discussion points for the exam are from:

- International Law (Malcolm N. Shaw or Antonio Cassese)

1. The nature and development of international law;
2. International law today;
3. Sources;
4. International law and municipal law;
5. The subjects of international law;
6. The international protection of human rights;
7. The regional protection of human rights;
8. Recognition;
9. Territory;
10. Air law and space law;
11. The law of the sea;
12. Jurisdiction;
13. Immunities from jurisdiction;
14. State responsibility;
15. International environmental law;
16. The law of treaties;
17. State succession;
18. The settlement of disputes by peaceful means;
19. Interstate courts and tribunals;
20. International law and the use of force by states;
21. International humanitarian law;
22. The United Nations;
23. International institutions.
After reading the SHAW or CASSESE, students must prepare a review and paper assignment to give to their mentor. Discuss these points

Part 2: Law of Treaties (target duration 4-6 weeks)


2. What is a treaty?
3. MoUs;
4. Capacity to conclude treaties;
5. Full powers;
6. Adoption and authentication;
7. Consent to be bound;
8. Reservations;
9. Entry into force;
10. Treaties and domestic law;
11. Territorial application;
12. Successive treaties;
13. Interpretation;
14. Third states;
15. Amendment;
16. Duration and termination;
After reading the ‘AUST,’ students must contact their assigned faculty mentor for a review and paper assignment.

Course Objectives:

Upon completion of this course, the student is expected to display a clear understanding of the principles, applications, actors, methods and mechanisms related to the practice of public international law.

Exam discussion essays:

Upon completion of this course, the student is expected to able to:

1) Understand the foundation concepts of contract law (foundation)

2) Understand the difference between domestic and international law
3) Understand the instruments, mechanisms and agents of international law

4) Understand modern treaty law and instruments

5) Be able to analyze and draft an international agreement

Part 2 – Concepts of American Civil Law to display proficiency if required by your mentor

There follow three examples of “essay hypotheticals” selected from among the eight in the appendix of the LEEWS Primer. Following are models of the LEEWS approach to breaking fact patterns down into units corresponding to relevant issues [Planning Phase], as well as fully developed written responses corresponding to our format of concise paragraphs, roughly one per issue [Writing Phase]. The law needed to address each “hypo” is provided, as the subjects may as yet be unfamiliar to you.

You may want to attempt a response before looking at the models. Standard exam writing advice posits that you follow “IRAC.” I.e., identify the Issue, state the applicable Rule, Analyze, Conclude. (Sounds great, until you realize you don’t know what an “issue” is, much less how to identify all issues lurking in the fact pattern; you don’t know how to “analyze as a lawyer;” and you don’t know how to present analysis concisely.)

Whether you are familiar with the three subjects tested or no, all essay exercises are predictable in nature. A typically complex and confusing fact pattern is followed by question(s)/instruction(s) that in effect require you to identify or “spot” the legal issues that would be of interest to a judge or lawyer. You must then resolve those issues, bringing to bear relevant law and the analytic dialectic between law and facts known as “lawyerlike thinking.”
Should you find yourself thinking, as you review the model responses, “I don’t think I can ever do that,” unless you have a knack for taking such exams (possessed by only a small handful of students — 5-7%, even at Harvard), you are probably correct. Which is why so few law students manage even a single A on final exams. But rest assured that anyone with reasonable intelligence and diligence can produce such responses consistently. Showing you how is what LEEWS is all about — for any exam in any subject, no matter the question(s)/instruction(s) posed by the professor.

Civil Procedure Hypothetical

Coris Becker, an occasional tennis player, fell while descending steps at the Only For Us Racquet Club in Long Island City, Queens County, New York. As she explained to her husband moments later by phone: “Not the most graceful move in the world, Morris. I got so mad, I smashed Mommy’s new titanium Stroker. Be a dear and bring home din-din. I’m going to be in the hot tub for hours.” As she limped out to her Lexus, Coris ran into the club owner, Jett Setter. He grinned and remarked, “I saw that spill, Coris. Not the most graceful move in the world.” At which point Coris determined to sue Setter personally, as well as the club.

Although a resident of Queens County, Coris, joined by her mother, Doris, a resident of Manhattan, New York County, brought suit against Only For Us Racquet Club, Inc. (OFU, Inc.) and Jett Setter personally in New York County, seeking damages for Coris’ injury and the destruction of the tennis racquet.

Thereupon followed, *inter alia*, the following events and motions:

1 — OFU, Inc. and Setter moved for a change of venue to Queens County.

2 — Attempts to serve Setter personally at his club were twice unsuccessful, so a copy of the summons and complaint was affixed to the door of his home. Another was mailed to him. [So-called “nail and mail” service.]

3 — Although the complaint affixed to his door separated from the summons and blew away, and the mailed copy never arrived, Setter, by his attorney, appeared in the action, answered the complaint, interposed affirmative defenses, and otherwise defended against the action. Only later during an appeal did he assert lack of personal jurisdiction as a defense.
4 — OFU, Inc. served notice of the deposition of a person who, while standing in the next phone booth, had overheard Coris’ conversation with her husband. Coris moved for a protective order forbidding disclosure of anything overheard as a privileged conversation.

5 — OFU, Inc. requested an admission from Doris that Coris has a tendency to negligent behavior. Doris ignored it.

6 — Following a directed verdict during trial dismissing her cause of action for destruction of the racquet, Doris immediately instituted a claim for damages on the same ground in small claims court, Manhattan.

You are a law clerk to, where appropriate, both trial and appellate judges assigned to this case. Prepare a memorandum of law respecting the issues raised in the above. Majority state law applies.

RELEVANT LEGAL PRINCIPLES FOR CIVIL PROCEDURE HYPO
(Such legal knowledge should be in your head as well as your course outline.
Note: The law provided herein may or may not be currently accurate.)

Discovery (scope of) — Generally, all information not otherwise privileged that is relevant to the subject matter of the action is discoverable, whether or not the material would be admissible as proof.

Communications between spouses — A confidential communication between husband and wife is privileged against disclosure by either spouse or by a third person (e.g., an eavesdropper).

Personal Jurisdiction — Generally, in order to determine the rights and duties of parties to an action, and to bind the parties personally to its determinations, a court must have in personam jurisdiction over said parties. Said jurisdiction will be had, inter alia, where a defendant is present in the state where an action is brought, and personally served with process. Where personal service on a defendant cannot be effected through due diligence, a plaintiff is entitled to substitute such service by affixing a copy of the summons and complaint to the door or other conspicuous place at the defendant’s last known address, and also mailing a copy of same by regular mail to said address (so-called “nail and mail”). A court has held that three attempts at “in hand” service at a defendant’s place of business, without attempting to serve the defendant at home or leave the summons
and complaint with a person of suitable age and discretion at the place of business does not satisfy the requirements of due diligence.

**Waiver of** — Where a defendant appears, answers the complaint, interposes defenses, and at no time during or after trial moves to dismiss based on, nor claims lack of personal jurisdiction, the defense will be deemed waived on appeal.

**Requests for admission** — A request for admission imposes a duty on the party served to acknowledge the existence of facts that are not in doubt and that should not be necessary to prove at trial. The party served normally has 30 days to respond. Failure to timely respond results in the matter being deemed admitted.

*Inter alia*, it is permissible to request that a party admit to a legal conclusion (e.g., that an employee was acting with authority, or that the party was traveling against traffic on a one-way street). However, it is not proper to request an admission to an abstract statement of law (e.g., that allowing a minor without a license to drive is negligent, per se).

**Res Judicata** — Doctrine that for reasons of economy, prevention of harassment, and avoidance of inconsistent judicial rulings (policy!), the relitigation of claims and issues is generally prohibited.

**Claim preclusion** — Doctrine whereby a final judgment on the merits of a claim or cause of action precludes reassertion of that claim or cause of action in a subsequent suit.

**Venue** — Refers to the proper place for trial of a lawsuit. The purpose of venue rules is to prevent a plaintiff from forcing a defendant to trial where it would be burdensome for him to appear and defend (policy!). Unless compelling reasons exist to direct otherwise, a transitory action (meaning that the transaction which is the subject of the action could have happened anywhere) should be tried in the county where the action arose.
MODEL RESPONSE TO CIVIL PROCEDURE HYPOTHETICAL

PLANNING PHASE
(1/4 – 1/3 of allotted time divided into 10-15 minute intervals)

Preliminary Overview — Six distinct events/motions. Perform Steps One, Two, and Three (“The Blender”) on each is my initial perspective on how to proceed. [Always the Steps, always the Steps — a constant way of thinking.]

Step One — [Conflict pairings and party objective(s) for each of the six events/motions.]

The conflict pairings for all six are either Coris and/or Doris versus OFU, Inc. and/or Jett Setter.

[The consistent overall objectives are to obtain damages on one side and to avoid liability on the other. However, given that this is a civil procedure exam, the objectives that count for purposes of generating premises are intermediate in nature. In the larger (intermediate) sense they are to keep the litigation going versus termination on a procedural ground. More immediate to the six events/motions:]

1 = Change venue to Queens County vs. keep it in Manhattan County.

2 = Establish personal jurisdiction vs. not.

3 = Have lack of personal jurisdiction defense ruled moot vs. exists and viable.

4 = Preclude disclosure of overheard conversation vs. have it ruled discoverable.

5 = Have fact admitted vs. not admitted.

6 = Have claim heard in small claims court vs. dismissed.

[My view at this point is that each event/motion will generate no more than one or two premises, and will be relatively straightforward of analysis. Therefore, the time to be allotted each will be roughly the same. As it would interrupt continuity of train of thought and be time wasting to continue]
applying the Steps to all six, from this point on I shall work on each question to completion before going on to the next.]

Step Two — [Consider each pairing, party, and objective. Cull facts (and course outline) for relevant premises.]

1 = Venue of transitory action is **overriding**, *(i.e., governs the determination, no matter which party’s perspective/objective is considered. See definition of Step Two and footnote, page 104.)*

2 = “Nail and mail” service vs. due diligence rule.

*[Complete analysis/discussion of No.2 (7-8 minutes??), then on to No.3; . . . No.4; . . . 5; . . . 6.]*

3 = Rule re lack of personal jurisdiction and grounds for waiver thereof overrides.

4 = Rule re discovery of spousal communication overrides.

5 = Requests for admission, and failure to respond thereto overrides.

6 = *Res judicata* rules override.

**Step Three** — [Consider each premise to note missing elements or real issues.]

*[Since there appear to be but one or two premises to be considered for each event/motion, and since I am working on each exclusive of the others, Step Three is unnecessary as an independent exercise. It is part and parcel of inspecting the law giving rise to the premise under consideration to determine whether it is necessary to state all of the law to begin the first paragraph of analysis, or whether one or more elements can be focused on as pivotal.]*

**Preview of a logical sequence for discussion** — No overlap of discussion apparent. No reason apparent not to proceed in the chronology given.
[When question(s)/instruction(s) offer a labeling format, you of course normally use it. The professor/bar grader will likely be looking for it (Here — 1, 2, 3, etc. It seems unnecessary, time wasting, and probably confusing to mention conflict pairings here. However, I am thinking of and guided by them.)]

[Discussion]

Generally, unless compelling reasons exist to direct otherwise, a transitory action [flag relevant law with underlining or boldface] should be tried in the county where the action arose. “Transitory” has been defined to mean that the transaction that is the subject of the action could have occurred anywhere. Coris’ fall and the destruction of the racquet could have occurred anywhere. [Concludes statement of relevant premise, i.e., controlling legal precept, that abruptly begins every paragraph.] Moreover, Coris, Only For Us, Inc. (OFU), and Jett Setter all reside in Queens County. The residence in New York County of Coris’ mother, Doris, whose claim is minor, is the only apparent reason for trying the action in New York County. It is hardly “compelling.” [Concludes “lawyerlike analysis” — application of law to relevant facts.]

Conclusion: The motion should be granted. [No hedging, as this seems open and shut.]

2

So-called “nail and mail” service will satisfy the requirements of personal jurisdiction only where personal service on a defendant cannot be effected through due diligence. [Law.] It has been held that three attempts at “in hand” service at a defendant’s place of business, without attempting to serve the defendant at home or leave the summons and complaint with a person of suitable age and discretion at the place of business does not satisfy the requirements of due diligence. Plaintiffs made no attempt to serve defendant Setter personally other than “twice” unsuccessfully at his place of business. [Analysis.]

Conclusion: The attempted “nail and mail” service was likely [Hedging!] ineffective for lack of due diligence.
Where a defendant who has not been properly served nevertheless appears in an action, answers the complaint, and interposes affirmative defenses, but never moves to dismiss for lack of personal jurisdiction, nor at any time claims lack of personal jurisdiction, the defense of lack of personal jurisdiction will be deemed waived upon the taking of an appeal. [Law.] Setter, as concluded above, was never properly served. Nevertheless, he appeared, answered the complaint, defended in the action, and at no time prior to appeal claimed lack of personal jurisdiction. Arguably, raising the claim on appeal is “after trial.” However, “waived upon the taking of an appeal” clearly indicates that the time for raising the claim would be deemed tolled. [Analysis.]

Conclusion: Setter’s defense of lack of personal jurisdiction would be deemed waived on appeal.

Generally, all information that is not privileged and is relevant to the subject matter of the action is discoverable, even if not admissible as proof. Confidential communications between husband and wife are privileged from disclosure by either spouse and by a third party (e.g., an eavesdropper). [Law.] Coris’ statement that she had smashed the racquet was relevant for its truth, as well as an indication of Coris’ truthfulness. “Confidential” normally implies private or secret. [Add clarification, or law, where needed, and appropriate.] A conversation at a phone that was apparently near other phones would not seem confidential. Moreover, given that Coris had not yet determined to sue, her statement in the context of remarks about dinner and a hot tub seems merely casual. [Analysis.]

Conclusion: The motion will fail. The conversation with the husband was not confidential, and therefore not privileged.

A request for an admission imposes a duty on the party served to acknowledge the existence of facts that are not in doubt and that should not be necessary to prove at trial. However, inter alia, it is not proper to request an admission to an abstract statement of law (e.g., that allowing a minor without a license to drive is negligent, per se). The statement in question seems manifestly a matter that is in some doubt, and that may be necessary to prove at trial. Moreover, in that “negligence” is a legal
Conclusion: Doris’ disregard of the request is of no consequence, as said request imposed no duty of acknowledgment.

6

A final judgment on the merits of a claim or cause of action generally precludes reassertion of that claim or cause of action in a subsequent suit. Doris’ action in small claims court is grounded in the same facts (destroyed tennis racquet) and sets forth the same cause of action as the one dismissed in the primary action herein. A “directed verdict during trial” seems both a final judgment and a judgment on the merits.

Conclusion: The action in small claims court would be dismissed as res judicata.

Corporations Hypothetical

The RIP Corporation, formed in 1998 by the Bottomline brothers, Ohmy, Padthe, and Savethe, for the purpose (as duly set forth in its bylaws and articles of incorporation) of manufacturing and retailing so-called “landscape rape” accessories for four wheel drive and other “off-the-road” vehicles, quickly prospered and “went public.” Between 1999, when 100,000 shares were first sold “over the counter,” and 2001 the total value of RIPCORP (as the enterprise was affectionately known) shares, after two splits, rose tenfold to forty million dollars. Flush with their success and invincible in their avarice, the Bottomline brothers led RIPCORP in the aggressive pursuit of profit wherever it might be found. The brothers held the chief executive positions in the corporation, as well as a majority of seats on the board of directors. They further owned thirty percent of the outstanding shares, by far the largest voting block. Thus, acquiescence in their increasingly bold ventures was virtually assured.

Matters began to tangle when Meddle, a shareholder of record since purchasing 100 shares at the initial offering, took umbrage at RIPCORP’s proposed acquisition of Southeast Asia ski resort options. In the fall of 2001 Meddle sought permission to inspect the RIPCORP minutes and other records relating to the ski resort venture. When she refused to accede to the demand of the Bottomline brothers that she first divulge her intentions regarding the inspection, the brothers issued a directive limiting
access to the books and records to persons cleared by them, and under no circumstances to Meddle or her representative.

Thereupon Meddle brought suit in her own right and on behalf of RIPCORP against the corporation and the Bottomline brothers personally to gain access to the books and records, to block the ski resort venture as an ultra vires act, and for repayment by the RIPCORP board of directors of any expenses incurred in connection with the pursuit of said venture. 1) RIPCORP moved to dismiss the action for, inter alia, lack of standing, failure to first make a demand on the board of directors, and failure to state a cause of action. 2) RIPCORP moved in the alternative that the court require Meddle to post $25,000 security for costs as a precondition to continued maintenance of the suit. 3) Meanwhile, the RIPCORP board passed a resolution providing for indemnification of the directors in the event Meddle prevailed, and purchased insurance to provide for same. Meddle immediately moved to quash these actions.

How should the court decide the motions under 1, 2, and 3 above?

**RELEVANT LEGAL PRINCIPLES FOR CORPORATIONS HYPO**

Ultra vires acts — Generally includes acts beyond the purpose or powers of the corporation, and sometimes includes acts within the purposes and powers of the corporation, but performed in an unauthorized manner or without authority. Many jurisdictions now restrict ultra vires challenges to the following: 1) the right of a shareholder to enjoin unauthorized corporate acts; 2) the right of the attorney general of the state to enjoin such activities; 3) the right of the corporation to recover damages from the officers and/or directors (present or former) responsible for the ultra vires act(s). Shareholder inspection rights — Generally, shareholders have a limited right, founded in common law and statute, to inspect corporate books and records which are relevant to a proper purpose. Courts will determine whether a purpose is proper. A shareholder may examine the stock book and minutes of stockholder meetings on demand if 1) he has been a stockholder of record for at least six months immediately preceding the demand; or 2) he is a holder of 5 percent of any class of outstanding shares.

**Shareholder rights of action** — Generally, a shareholder may sue the corporation in his own name to enforce his rights as a shareholder, and/or on behalf of the corporation to procure a judgment in favor of the
The latter “derivative action” may be maintained only if 1) the plaintiff is a shareholder when the action is brought; 2) the plaintiff was a shareholder when the alleged wrong to the corporation occurred; and 3) the plaintiff shows in his complaint that he has demanded that the board of directors commence the action, or that there are sufficient reasons for not making the demand (e.g., the board members are the defendants). Note that in order to minimize the possibility of derivative actions without merit being brought merely for “nuisance value” settlements or counsel fee awards, the corporation may require the plaintiff to post security for costs, unless 1) the plaintiff or plaintiffs hold at least 5 percent of any class of outstanding shares; or 2) the value of their shares exceeds $50,000.

Indemnification — Generally, a director or officer may not be indemnified (reimbursed) against a judgment obtained against him in a direct action by the corporation, or a derivative action on behalf of the corporation, or for amounts paid in settlement thereof. The director may, however, be indemnified against expenses of defending the action, unless, inter alia, he is adjudged to have violated his fiduciary duty of good faith and reasonable care in the circumstances. The corporation may purchase insurance to indemnify officers and directors for even the above judgments, providing no deliberate dishonesty or unlawful gain on the part of the officer/director is shown.

MODEL RESPONSE TO CORPORATIONS HYPOTHETICAL

PLANNING PHASE

Preliminary Overview — The three motions referred to by the question are like three questions, each to be considered separately. [Note the enormous benefit here of skipping over the facts.]

Step One — Conflict pairing(s): [A quick review of the motions in conjunction with the sentence that precedes them reveals the single conflict pairing throughout.] RIPCORP, Inc. v. Meddle, etc., or vice versa for each motion (i.e., question).

Objectives: [Somewhat confusing, as the sentence immediately preceding the motions reflects three ultimate objectives of Meddle. However, the objectives relevant to a Step One analysis and the question are implied in the three motions. Note that motion #1 also provides Movant RIPCORP’s
premises (!!). Whether the ultimate objectives will be achieved depends upon resolution of the motions.]

1) dismiss the action versus keep it going;

2) $25,000 security be required to be posted, versus not;

3) board indemnification resolution and purchase of insurance be quashed, versus maintenance of same.

Step Two — [RIPCORP is movant for motions 1 and 2, Meddle for 3. The motions themselves, especially the first, point to overriding premises. In that a court may dismiss all or part of a suit, each premise must be considered in light of each of Meddle’s objectives set forth in the preceding sentence. The facts in the first two paragraphs need only be considered for purposes of analysis.]

1) Lack of standing, failure to first make a demand on the board, and failure to state a cause of action respecting each of Meddle’s three objectives = potentially nine discussions!!, but probably not.

2) [Must refer to relevant portions of corporations toolbox.] The law [Noted in toolbox only. Don’t write it in your outline.] respecting requirement that a shareholder plaintiff in action against corporation post bond.

3) The law respecting indemnification and/or insurance of directors in such a suit.

Step Three — [The motions seem more or less equivalent in weight. Given the complexity of the relevant premises noted in Step Two, the effort necessary for a Step Three analysis seems needlessly duplicative of the analysis to be performed in writing the actual response. Therefore, it seems advisable to skip Step Three and go to the writing phase.]

Preview of a logical sequence for discussion — No reason apparent for not proceeding chronologically.
WRITING PHASE

Motion No. 1

Lack of standing/failure to state a cause of action

Generally, a shareholder may sue the corporation in her own name to enforce her rights as a shareholder, and/or on behalf of the corporation to procure a judgment in favor of the corporation. Inter alia, the latter “derivative action” can be maintained only if the plaintiff is a shareholder when the action is brought and when the alleged wrong to the corporation occurred. Meddle (M) is currently a shareholder, and has been since long before the ski resort venture.

Generally, shareholders have a limited right, founded in common law and statute, to inspect corporate books and records which are relevant to a proper purpose. Courts will determine whether a purpose is proper. A shareholder may examine the stock book and minutes of stockholder meetings on demand if she has been a stockholder of record for at least six months immediately preceding the demand; or she is a holder of five percent of any class of outstanding shares. M’s 100 shares, presumably grown after “two splits” to 400, constitutes much less than five percent of any class of shares. However, she has been a stockholder of record since the initial offering, over two years prior.

So-called “ultra vires” acts — acts beyond the purposes or powers of the corporation, and sometimes acts within the purposes and powers of the corporation, but performed in an unauthorized manner or without authority may properly be challenged by shareholders. Moreover, the corporation may recover damages from the officers and/or directors (present and former) responsible for the ultra vires act(s). Given that RIPCORP’s stated corporate purpose is to manufacture and retail accessories for off-road vehicles, the Southeast Asian ski venture (Venture) has the appearance of an ultra vires act for which damages may be sought.

Failure to first make a demand on the board

Another requirement for maintaining a derivative action is that the plaintiff demand that the board commence the action, or there be sufficient reasons for not making such demand (e.g., the board members are the defendants). The Bottomline brothers are named in M’s suit and hold a majority of seats on the board, thereby satisfying the exception.
Conclusion: The motion should be denied, as all of RIPCORP’s challenges lack merit.

Motion No. 2

Corporations, in order to minimize the possibility of derivative actions without merit being brought merely for “nuisance value” settlements or counsel fee awards, may require a shareholder plaintiff to post security for costs, unless the plaintiff or plaintiffs hold at least five percent of any class of outstanding shares, or the value of their shares exceeds $50,000. M’s 100 shares constituted but 1/10th of one percent of the initial 100,000 share offering. Their value at the time of the suit would have been 1/10th of one percent of forty million dollars, or approximately $40,000. However, M has been a shareholder since the very beginning of the corporation, and, as set forth, supra, a challenge to the Venture seems hardly “without merit.” [Yes, basic math may be necessary!]

Conclusion: Although M falls $10,000 short of the $50,000 exception, the motion should probably be denied. Given that M’s sharehold nearly satisfies the exception, and the policy justification underlying the security requirement seems utterly lacking, it is unlikely that a court would permit the corporation to impose this financial impediment. [Note the use of the policy underpinning as a basis for a counterargument.]

Motion No. 3

Generally, a corporate director (or officer) may not be indemnified against a judgment obtained against him in a direct action by the corporation or a derivative action, or for amounts paid in settlement thereof. The director may, however, be indemnified against expenses of defending the action, unless, inter alia, he is adjudged to have violated his fiduciary duty of good faith and reasonable care in the circumstances. The corporation may purchase insurance to indemnify officers and directors for even the above judgments, providing no deliberate dishonesty or unlawful gain on the part of the officer/director is shown.

[Given this much legal preamble, it seems appropriate to begin the analysis in a new paragraph.]

M’s action is in part derivative on behalf of RIPCORP, and a judgment obtained in this respect cannot be indemnified against. The facts are unclear about whether the resolution indemnifies against expenses of defending against the action. Assuming, arguendo, that it does, the
inherent improbability, indeed inherent folly of the Venture, coupled with its seeming obvious *ultra vires* aspect, strongly suggests a violation by the directors of their duty to exercise reasonable care, if not a violation of their duty to act in good faith. However, given that RIPCORP appears to have been engaged for some time in a pattern of divers schemes wholly unrelated to its stated purpose, it is unlikely that a court would be willing to take judicial notice of such a conclusion so early in the proceedings.

Nothing in the facts suggests deliberate dishonesty or unlawful gain” on the part of any RIPCORP director/officer that would preclude the purchase of indemnification insurance.

**Conclusion:** The motion should be granted as to any portion of the resolution that purports to indemnify against judgments obtained on behalf of the corporation, denied as to portions that indemnify against judgments obtained by M, and denied with leave to renew at a later time with respect to all other portions.

**Wills Hypothetical**

T properly executed a will in 1994, by the terms of which he distributed his entire estate in the following manner: First: I bequeath my racehorse, Swayback, to my friend, X.

Second: I bequeath $100,000 to my brother, Y.

Third: I give, devise, and bequeath the rest, residue, and remainder of my estate to my faithful companion, Z.

In 1998, having fallen out with Z, T properly executed a new will with the following terms:

First: I bequeath $100,000 to my brother, Y.

Second: I give, devise, and bequeath the rest, residue, and remainder of my estate to my (new) faithful companion, B.

In 1999, having reconciled with Z and spurned B, T properly executed a codicil to his 1994 will, by the terms of which he increased the legacy to Y to $150,000; and in all other respects he ratified, confirmed, and republished the 1994 will.
T died in 2001. In a probate proceeding the evidence established the following:

1) Although sober when he made the codicil in 1999, T was “drunk out of his mind” when he executed the 1994 will.

2) T sold Swayback to a syndicate in 1997 for $200,000.

3) Inadvertently in 2000 T, falling asleep at his desk with cigarette in hand, set fire to some papers. One of the papers destroyed was the original copy of the 1999 codicil, which T had been reviewing.

4) Y died in 2000.

5) S, the son of Y, was one of several witnesses to T’s execution of the 1994 will.

— / —

Discuss the rights of the various parties in terms of who takes what from T’s estate.

RELEVANT LEGAL PRINCIPLES FOR WILLS HYPOTHETICAL

Ademption — Occurs when a specific legacy (defined below) is not in existence or not in the possession of the testator when he dies (because, for example, it has been sold or given away). When an ademption occurs, the legatee takes nothing.

Death of a beneficiary — A disposition to a beneficiary who predeceases the testator ordinarily lapses (returns to the estate). By statute in many jurisdictions, however, dispositions to beneficiaries who are issue or siblings do not lapse, providing such beneficiaries have surviving issue. Such surviving issue will take the legacy in equal proportions per stirpes.

Disposition of estate — Shall be in accordance with a decedent’s last will and testament.
Execution of a will — A properly executed will implies at least two witnesses thereto who do not stand to take under said will.

Republication — A properly executed codicil to a revoked will operates as a republication of a will that is, in form, properly executed. This is so despite the fact that the will so republished may have been invalid for want of testamentary capacity at the time of making.

Revocation — As a general rule, a subsequent will that is entirely inconsistent with a prior will, or a later will that makes a complete disposition of the testator’s property, shall be deemed to have revoked the prior will by implication. A will may further be revoked by means of its physical destruction. Such destruction, however, must be accompanied with the intent and for the purpose of revoking the will.

Specific legacy — A bequest of a particular, individualized chattel, differentiated from all other articles of the same or similar nature. It must be taken by the legatee as and where he finds it.

Testamentary capacity — Absent evidence to the contrary, testamentary capacity will be presumed where the testator, in executing a will or other document, accurately recites the nature and extent of his property, and recognizes the natural objects of his bounty.

Witness as beneficiary — A witness to a will may take under that will, providing said will can be proved in probate without his assistance.

MODEL RESPONSE TO WILLS HYPOTHETICAL

PLANNING PHASE

Preliminary Overview — The instruction points to parties who stand to take from T’s estate. Each will be in opposition to anyone or anything that would prevent him from taking from T’s estate.

Step One — X, Y, Z, B, and A vs. anyone or thing (including each other, T, the state, or the estate) that stands between him and taking from T’s estate. B v. Z seems a key conflict.
Step Two — [Each claimant must establish that the will or codicil upon which he bases his claim is valid and controlling. Each will likewise seek to defeat a competitor claim. Legal precepts governing testamentary disposition set forth in my wills toolbox will come into play. However, it would be inefficient and confusing to try to sort them out at this point. Better to focus on one conflict at a time in the writing phase. Possibly there will be overlap of premises/discussion.]

Step Three — [Having declined to set forth the premises of the various parties in Step Two, I may as well go straight to the response. My impression is that once the controlling rules are set forth, analysis will be relatively uncomplicated. Ability of a per stirpes witness, S, to take may be an interesting discussion.

Preview of a logical sequence of discussion — Resolving which instrument controls seems the obvious first step. Therefore, beginning with B v. Z would seem to make sense.

WRITING PHASE

B and Z’s rights [This label conforms to the instruction. B v. Z might confuse. But I’m thinking B v. Z!]

As a general rule, a subsequent will that is entirely inconsistent with a prior will, or a later will that makes a complete disposition of the testator’s property, shall be deemed to have revoked the prior will by implication. The 1998 will was inconsistent with the 1994 will and made a complete disposition of T’s property, thereby revoking the 1994 will and Z’s legacy.

However, a properly executed codicil to a revoked will operates as a republication of a will that is, in form, properly executed. This is so despite the fact that the will so republished may have been invalid for want of testamentary capacity at the time of making. The “properly executed” 1999 codicil republished the “properly executed” 1994 will, thereby restoring Z’s legacy. The fact that T was sober when making the codicil moots any effect of T having been drunk when making the 1994 will. There being no evidence to the contrary, the fact that T in executing the codicil accurately recited the nature and extent of his property and recognized the natural objects of his bounty will establish his testamentary capacity in making the codicil.
Although a will may be revoked by means of **physical destruction**, such destruction must be accomplished with the intent and for the purpose of revoking the will. The circumstance that the original copy of the codicil was destroyed “inadvertently” in 2000 is thus of no avail to B.

**Conclusion**: The 1998 will is revoked, and B takes nothing. Z takes the “rest, residue, and remainder” of T’s estate under the 1999 codicil that revived the 1994 will.

**X’s rights**

An ademption occurs when a specific legacy (i.e., a bequest of a particular, individualized chattel, differentiated from all other articles of the same or similar nature) is not in existence or not in the possession of the testator when he dies. When an ademption occurs, the legatee takes nothing. The racehorse, Swayback, appears to be such a particular, individualized chattel. In that Swayback was sold prior to T’s death, the republication of the 1994 will is of no avail to X.

**Conclusion**: X takes nothing from T’s estate, as his legacy has adeemed.

**Y and S’s rights**

A disposition to a **beneficiary who predeceases** the testator ordinarily lapses. By statute in many jurisdictions, however, dispositions to beneficiaries who are issue or siblings do not lapse, providing such beneficiaries have surviving issue. Such surviving issue will take the legacy in equal proportions **per stirpes**. Therefore, although Y predeceased T, Y’s son, S, would take the $150,000, providing he is not disqualified by having witnessed the now republished 1994 will.

**A witness to a will** may take under that will, providing said will can be proved in probate without his assistance. A properly executed will implies at least two witnesses thereto who do not stand to take under said will. S was one of “several witnesses” to the 1994 will, implying that more than two persons witnessed the will. Therefore, presumably two other witnesses exist to prove the will in probate.

**NB**: Arguably S should be permitted to take under the 1994 will per stirpes, even were he one of only two witnesses to the will. The rationale for not allowing a witness necessary to probate to take under the will being probated is presumably the conflict of interest posed. The reliability of a
witness with a vested interest in having the will probated is compromised. Y, however, not S stood to take under the 1994 will. Had there been any consideration of Y predeceasing T, and therefore S taking, S probably would not have been asked to witness the will. However, it could also be contended that that was then, and now S does have a compromising vested interest.

[This latter paragraph is not necessary. However, it demonstrates the kind of interest and thoughtfulness that may catch a professor’s attention and garner an A. Possibly it should be highlighted in some way, perhaps with a red star. I might even decide to put it on the blank page left at the beginning. (See p.75.)]

**Conclusion:** Y, having predeceased T, will take nothing. However, Y’s intended legacy will go to the son, S, *per stirpes*. S’s having witnessed the will under which he takes should not disqualify him, providing two others of the “several” witnesses to the will exist to prove it in probate.

**Actual Civil Procedure I Exam, Fall 2006, U. Memphis School of Law (with Model A+ Response and Professor Comments)**

[The example that follows is an actual exam and model response sent to us by one Richard Townley, Sr., U. Memphis class of 2009E (evening division). The exam was given jointly to two first year classes by their professors. Richard ordered the audio CD version of LEEWS. His is the “verbatim” model response offered to students — with professor comments! — as what was wanted. His response received the highest grade, one of only two A+ grades. His accompanying remarks are reprinted in the “Results” section. Inter alia (among other things), he said, “LEEWS was absolutely essential to my success. …. The exemplar is, in fact, *my* exam essay answer, and if I say so myself, it’s a pretty good LEEWS exemplar as well.”

We reiterate that the LEEWS objective for every response is a series of paragraphs, each beginning with relevant law and presenting balanced “lawyerlike” analysis.

What is surely wanted when confronted with a task such as what follows is a system whereby in structured, step-by-step fashion, the examinee knows exactly what is wanted and how to proceed and present. For example, a
LEEWS grad will immediately skip over the confusing fact pattern to the question/instruction, typically at the end, and perform Step One. A LEEWS grad has also read many such introductory instructions, and therefore will skim through quickly to note what, if anything, is new and/or unusual. Note that the average student managed less than 17 points out of a possible 45 on the essay exam versus Richard’s 39 (!!).

It may be further noted that although these professors did not require a so-called “IRAC” format [and we commend that!], Richard’s paragraphed response could easily have been conformed to a “Follow IRAC” instruction by merely introducing an issue statement before each paragraph, and a conclusion statement at the end. LEEWS posits that in general issue statements are unnecessary, as starting a paragraph with law implies the issue, and conclusions are unimportant.]

Civil Procedure I —

INSTRUCTIONS – Read these instructions carefully. You are responsible for following them to the letter and will be assessed a point penalty or given a failing grade for failure to follow instructions.

Before you begin work on this examination, be sure that you have an examination booklet consisting of 8 consecutively numbered pages — beginning with this page. Part I consists of problems calling for written analysis. Part II consists of 35 multiple choice questions. If your examination is incomplete, you should advise your mentor.

Part I
Your answers for Part I should be written on the paper provided. Be sure to identify clearly which subpart you are answering (e.g., I. A.). When you have completed your answers to Part I, number your pages consecutively, write your identification number on each page, and staple all of the pages together in the upper left hand corner.

1. Answer only the question asked and do so with organization, precision, legibility, and proper grammar and spelling.

2. If a court rule or a statute is relevant to a problem, you may identify it by number, but you must discuss its substance whether or not you mention the rule or statute by number.

3. Write on only one side of a page and leave a left margin.
Part II
Write your identification number in the space provided on the answer sheet for Part II and mark the appropriate corresponding circles on your answer sheet to indicate your examination number. Do not staple the answer sheet for Part II to anything.

Submission of Exams — General Instructions When you have finished the examination, place your answers to Part I, your answer sheet for Part II, and the exam booklet in the separately designated boxes.

All examination booklets must be turned in. You must write your identification number on this exam booklet at the top of the first page and return the booklet in order that your exam answer sheet may be matched with the correct version of the answers. Do not write your name on anything.

For this examination, unless we have specifically studied to the contrary, you should assume the following:

1. all states have adopted rules of civil procedure identical to the Federal Rules of Civil Procedure;

2. all states have enacted statutes that authorize the exercise of jurisdiction on each of the traditional bases recognized by the Supreme Court up to the date of its decision in International Shoe;

3. all states have also enacted the following statutes:

X.C.A. § 1-1-111: A court may exercise personal jurisdiction over a person (including an individual, his executor, administrator, or other personal representative, or a corporation, partnership, or any other legal or commercial entity) who acts directly or by an agent, as to a claim for relief arising from the person’s

(a) transacting any business within this State;

(b) causing tortious injury by an act or omission in this State;

(c) causing tortious injury in this State by an act or omission outside this State if the person regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
(d) owning, using or possessing any property situated in this State;

(e) contracting to insure any person, property, or risk located within this State at the time of contracting.

X.C.A. § 2-2-222: In any suit brought in the courts of this State, service of process may be achieved by sending a summons and a copy of the complaint by registered mail, return receipt requested, to the defendant’s home address, or principal place of business, wherever located.

Part I
The problems in Part I are worth a total of 45 points. They are not of equal weight.

I.

A. You are now an associate attorney in a law firm. Respond fully to the following memorandum from one of your employers. “I Quit” is not a recommended answer.

Memo
From: Partner
To: Associate
Re: First Commercial & Industrial Bank v. Isolde
Date: Dec. 11, 2006

[Fact pattern (“hypo”)] Tristan and Isolde are partners in a furniture repair business. Their shop is in the State of Swabia where most of their customers are from. Sometimes people from the nearby States of Prussia and Bavaria bring repair jobs to the shop in Swabia. Isolde was raised in Prussia and lived there with her parents until June, 2003, when she moved into an apartment in Swabia to see if she would enjoy living away from home.

In July, 2003, a vice-president of First Commercial & Industrial Bank of Prussia [“First Commercial”] attended a lecture on furniture repair that Isolde gave in Prussia. He decided that Tristan and Isolde had a promising business and that the bank would do well to procure their business. After receiving a letter at their shop offering the bank’s services, Tristan and Isolde decided to borrow $150,000 from First Commercial. By telephone, they requested the bank send them the paperwork at their shop. On August 15, 2003, Tristan and Isolde signed the loan papers at their shop and
Tristan immediately took them to First Commercial’s main office, located ten miles away in the State of Prussia. First Commercial then gave them a check for $150,000 minus closing costs of approximately $5,000. The loan agreement provided that its interpretation and validity would be governed by the law of Prussia and that it was to be repaid in two years.

Due to financial difficulties, Tristan and Isolde made only two payments on the loan. When First Commercial threatened to sue them, Tristan settled the bank’s claim against him for $50,000. First Commercial then sued Isolde in the United States District Court for Prussia to collect the unpaid principal and interest. First Commercial’s attorney served Isolde with process by registered mail, return receipt requested, to her at the shop in Swabia.

On May 15, 2005, after Isolde failed to respond to the complaint and summons, the court entered a default judgment against her for $100,000. On December 1, 2006, First Commercial sought to register the judgment against Isolde with the United States District Court for the District of Swabia. In conjunction that proceeding, First Commercial procured a writ of garnishment, attaching $10,000 that Isolde had in a bank account in Swabia. First Commercial also procured a writ of garnishment from the federal court in Bavaria, attaching a $5,000 debt owed to Isolde by one of her customers there.

[Question/instruction] We represent Isolde. Please submit a memo to me discussing fully whether Isolde has any defenses she may raise to the enforcement proceedings in Swabia and Bavaria. Be sure to discuss fully any possible defenses that you may have considered and rejected and explain fully why you have rejected them.

B. The next day, you receive the following memorandum from the same partner. Again, respond fully.

Memo
From: Partner
To: Associate
Re: First Commercial & Industrial Bank v. Isolde
Date: Dec. 12, 2006

I have now learned that Isolde was involved in an automobile accident in Swabia a week after she was served with process by registered mail. She was rendered unconscious for two days. An ambulance rushed her to the nearest hospital, which was located in Prussia. Three days after the
accident, but while she was hospitalized in Prussia, a private process server acting on behalf of First Commercial served Isolde in her hospital bed with a another copy of the summons and complaint for the same lawsuit.

Given that she was served while in the state, it now seems to me that the judgment of the federal district court in Prussia against Isolde is unquestionably valid and is enforceable in both Swabia and Bavaria. Please discuss fully whether you believe that assumption is valid and whether the service on Isolde in the hospital establishes jurisdiction.

Sample Essay Response

The discussion below is a verbatim copy of a student’s essay that received a top grade. Commentary by Professors Banks and Entman appears in brackets.
[LEEWS note: We reprint this commentary in blue.]

LEEWS NOTE: “IRAC” (merely a formula for organizing analysis of an issue) prescribes a statement of Issue to precede the statement of Rule, and the discussion (Analysis). (And Conclusion at the end.) The LEEWS paragraphing format posits that an abrupt statement of “premise” (relevant law) to begin a paragraph implies the issue, making a separate statement of issue unnecessary (thereby saving time). Richard's model response in LEEWS format does this. Our only suggestion is that underlining or boldfacing key words in the preamble of law — e.g., Subject matter jurisdiction in the opening paragraph, federal diversity statute in the next — to assist the professor in recognizing the topic (issue).

Part I.A.

Subject-matter jurisdiction. The federal courts are courts of limited jurisdiction; they can only hear certain types of claims as outlined in Article III of the US Constitution and as authorized by Congressional Statute. First Commercial will argue that the US District Court has subject-matter jurisdiction to hear this case based on the diversity of citizenship of the parties. First Commercial is a citizen of Prussia. Isolde has been living in Swabia for one month.[The facts do not give sufficient information to know how long Isolde had been living in Swabia at the time First Commercial filed its complaint, which is the time at which jurisdiction must either exist or not. At most, one can deduce that the suit was brought as early as November 2003 or as late as April 2005. Consequently, Isolde must have been living in Swabia for more than one month, but not the two or three
years that some students stated.] She can argue that she is still domiciled in Prussia, where she lived her whole life up to June of 2003, because she only moved to Swabia temporarily, to see “if she would enjoy” life on her own. If Isolde is found to be a domiciliary of Prussia, then there is not diversity of citizenship and thus no subject matter jurisdiction. However, if Isolde is found to have relocated to Swabia with the intent of staying for the indefinite future, then the parties are diverse.

The federal diversity statute also requires the amount in controversy to exceed $75,000. The $100,000 judgment against Isolde satisfies this requirement. N.B. [Please do not use abbreviations, including this one.] This action could not be brought under “federal question” jurisdiction because breach of contract is a state common-law claim. Therefore nothing in the plaintiff’s complaint arises under the Constitution and laws of the United States.

Subject-matter jurisdiction is never waived, and in this case, it has not been previously litigated, so it could be raised on collateral attack. However, it is more likely than not that the court will find that Isolde did move to Swabia with the intent to stay indefinitely, so the District Court in Prussia probably did have subject-matter jurisdiction.

Personal jurisdiction. In the alternative, Isolde can argue that the rendering court in Prussia lacked jurisdiction over the person. Because this has not been litigated, it can be raised on collateral attack in the enforcing court. [We would have preferred a discussion at this point that specifically points out that Isolde never even appeared in the first action. Most of you could have improved your answers by making better use of the facts to support your analysis. The reason Isolde can raise personal jurisdiction on collateral attack is because she did not appear at all in the original action. Since she did not appear, there is no reason to discuss Rule 12.] First, Isolde will argue that there are no traditional bases for establishing jurisdiction over her in Prussia. N.B. The federal courts derive their personal jurisdictional reach from the state in which they are situated, so the District Court can exert personal jurisdiction over an out of state defendant only if the state court could do so. Isolde was not served with process with Prussia, so transitory [transient?] jurisdiction does not attach. Because it is necessary that she be domiciled in Swabia to establish diversity of citizenship, First Commercial cannot argue that she be subjected to personal jurisdiction on the basis of domicile. Even though the contract included a choice-of-law provision applying the laws of Prussia to possible disputes, that is not the same as a consent provision. [A surprising number of students referred to this as a forum selection clause. At least one student referred to it as a forum selection clause in part of the answer.
Statutory basis. First Commercial will argue that the long-arm statute conferred specific jurisdiction over Isolde on the basis of the first of the enumerated acts: “a) transacting any business within the State.” The claim for relief, the $100,000 breach of contract, arises from the defendant’s act of entering into the loan contract, which First Commercial will argue was executed on Tristan’s delivery of the loan documents to the Bank’s main office in Prussia. Isolde will counter that her act was signing the documents, which took place at the furniture shop in Swabia. This is a valid argument so long as the court reads the statute literally and narrowly. However, if a court interpreted the statute broadly (See Gray v. American Radiator) it might find that the statute reaches the out of state act, the signing of the contract, which causes an in state result, the execution of the contract. [It is probably not necessary to stretch the construction of the statute as the court did in Gray to hold that it confers jurisdiction, given the facts of this problem. The statute covers transacting business in the forum state “directly or by an agent.” Like McShara in Burger King, Tristan was acting on behalf of the partnership (thus as an agent) in delivering the papers to the bank. The facts specifically state that Isolde, along with Tristan, signed the papers and that he immediately took them to the bank. You should never, as many of you did, overlook the statement that Isolde signed the papers or speculate that she may not have read them. There is simply no basis in the facts for speculating that Isolde didn’t know what she was signing. Indulging in speculation that she might not have reads reveals desperation.]

Constitutional Standard. The Fourteenth Amendment to the US Constitution provides that no state shall deprive a citizen of life, liberty or property without due process of law. The U.S. Supreme Court defined the due process standard as it relates to imposing personal jurisdiction on an out of state defendant in International Shoe: jurisdiction is constitutional only if the cause of action arises from the defendant’s minimum contacts with the forum, such that the assertion of jurisdiction would not offend traditional notions of fair play and substantial justice. Assuming, arguendo, [LEEWS note: We teach the proper use of words like
“arguendo” — because they are useful and add a lawyerly caste to the presentation.] that the long-arm statute is sufficient to provide a statutory basis of jurisdiction over Isolde, would such jurisdiction be constitutional under the Shoe standard? [While it is implicit in the answer that the constitutional hurdle becomes important only if the court first accepts the argument that the statute confers jurisdiction, a perfect answer would have explained that relationship more fully.] Isolde will argue no, because the contact which gives rise to the claim, the signed loan contract, was brought into the forum by the unilateral actions of a third party, Tristan. Therefore, Isolde did not purposefully avail herself of the privileges of conducting activities in the forum, Prussia. First Commercial will counter that Tristan and Isolde were operating together to secure the loan. They reached into the forum when they called First Commercial. Isolde knew that Tristan was taking the documents to Prussia, [run-on sentence, a sin committed by many students in these essays] therefore it was imminently foreseeable that the contract would be executed there, and she could reasonably anticipate being haled into court in Prussia over any disputes to the contract. (See Denckla, Worldwide VW).

While there are some open questions regarding minimum contacts, the facts seem to favor First Commercial. In the alternative, [In addition?] can Isolde raise any of the fairness factors, defining “fair play and substantial justice,” articulated in the US Supreme Court’s Burger King decision? In weighing the relative burden on Isolde compared to the interest of First National in litigating in Prussia, it does not seem unfair to require Isolde to travel to a nearby state where she lived most of her life and where she sometimes appears to give lectures. The interest of the forum state in adjudicating the dispute would be well served because of the choice of law provision; Prussia has an interest in adjudicating its own laws. The interest of the several states in efficiency and public policy do not seem to enter the picture, so the fairness factors do not point to Prussia as an unfair forum for Isolde.

Conclusion. Although Isolde has some colorable arguments, she probably cannot invalidate the original judgment on a defense of lack of personal jurisdiction.

[Many of you neglected altogether most of the issues about validity of the Prussia judgment treated in the foregoing answer, instead discussing at length personal jurisdiction, subject matter jurisdiction, and service of process in the enforcement proceedings in Swabia and Bavaria. Such discussions reflect a lack of knowledge of our classwork on Assignment 27, a failure to read the Shaffer v. Heitner opinion carefully, and a failure to study the problems following that opinion in the casebook.]
Part IB

The Supreme Court upheld the traditional transitory [transitory?] jurisdiction in the Burnham case. A state is all powerful within its borders, and service of process within a state is usually certain to establish personal jurisdiction over the person served, regardless of whether or not that person has any other contacts with the forum. However, in the case of a defendant who was served after having been brought into the forum against her will or without her knowledge, there seems to be something fundamentally unfair about asserting personal jurisdiction over that defendant. There are certain times when people are immune from service of process, e.g. while in the forum under subpoena as a witness. A plaintiff cannot fraudulently induce a defendant into the form for the purpose of a “gotcha” service of process. By analogy, it would seem that policy should demand that a person brought into the form unconscious, as a result of a medical emergency, should not be subject to personal jurisdiction as a result of being served with process under those circumstances.

Part 3 Contracts

Contracts Essay One
Art and Betty own adjoining farms in County, an area, where all agriculture requires irrigation. Art bought a well-drilling rig and drilled a 400-foot well from which he drew drinking water. Betty needed no additional irrigation water, but in January 1985, she asked Art on what terms he would drill a well near her house to supply better tasting drinking water than the County water she has been using for years. Art said that because he had never before drilled a well for hire, he would charge Betty only $10 per foot, about $1 more than his expected cost. Art said that he would drill to a maximum depth of 600 feet, which is the deepest his rig could reach. Betty said, “OK, if you guarantee June 1 completion.” Art agreed and asked for $3500 in advance, with any additional further payment or refund to be made on completion. Betty said, ”OK,” and paid Art $3500.
Art started to drill on May 1. He had reached a depth of 200 feet on May 10 when his drill struck rock and broke, plugging the hole. The accident was unavoidable. It had cost Art $12 per foot to drill this 200 feet. Art said he would not charge Betty for drilling the useless hole, but he would have to start a new well close by, and could not promise its completion before July 1.
Betty, annoyed by Art’s failure, refused to let Art start another well and on June 1, she contracted with Carlos to drill a well. Carlos agreed to drill to a maximum depth of 350 feet for $4500, which Betty also paid in advance, but Carlos could not start drilling until October 1. He completed drilling and struck water at 300 feet on October 30.

In July, Betty sued Art seeking to recover her $3500, plus the $4500 paid to Carlos.

On August 1, County’s dam failed, thus reducing the amount of water available for irrigation. Betty lost her apple crop worth $15,000. The loss could have been avoided by pumping from Betty’s well if it had been operational by August 1. Betty amended her complaint to add the $15,000 loss.

In her suit against Art, what are Betty’s rights and what damages, if any, will she recover? Discuss.

Host posted a flyer on the bulletin board of a local music school, stating that he was hosting an event next month, for which he planned to hire a DJ. The flyer invited interested students to contact him with their hourly rates and three past clients whom Host could contact for references. The flyer also gave a local mailing address for this purpose.

Leaving class one night, Student happened to notice the billboard. She immediately wrote to Host indicating that she was available on the date in question, and that her hourly rate was $150. She also listed the names and contact information of three prior clients. Three days later, Host wrote back to Student, stating that her references had all given excellent reviews, and asking whether Student would be willing to work for $100 per hour if he advertised her services in the program provided for the event. Student received the letter the day after Host sent it, and wrote back the next day that she would be willing to drop her rate to $125 per hour plus the advertisement, but no lower.

Four days later, having received no response, Student called Host on the telephone to say that, because the event was only about two weeks away, she had assumed that Host had decided to use another DJ. For that reason, Student had booked another client for the same day and time as Host’s event. Host said, “No, I sent you a letter yesterday accepting your terms—you haven’t received it yet? We have a contract, and I will expect you to perform at my event!” (Assume that Host really sent the letter when he said he did, and that he can prove it in court.) Later that day, Host’s letter arrived in Student’s afternoon mail.

Host has filed a breach of contract claim against Student, and asked the court to order Student to perform at his event. Assume that, if the court does not so order, Host can and will hire a replacement DJ, but only at a higher cost. Also
assume that (1) all mailings were done properly, and (2) the common law of contracts, and not Article 2 of the Uniform Commercial Code, applies.

Student argues that she and Host are not in a binding contract, because Host waited too long to respond to her, and she withdrew her offer before Host accepted it.

Questions

1. Is Student’s argument correct? Explain, analyzing only the offer-and-acceptance issue, and not whether Student has breached or repudiated any contract.

2. Assuming that Student is in breach, having repudiated a valid and binding contract with Host, is the court likely to issue an order compelling Student to perform at Host’s event? If not, what will the court do instead? Explain.

1. How do liquidated damages clauses benefit the parties?

- ☐ They give the parties a certain amount of protection and assurance.
- ☐ They function almost like an insurance policy covering the transaction.
- ☐ The parties can conduct business without fear of any large losses.
- ☐ The parties can breach contracts without fear of having to pay restitution.

3. Carrie is buying a new refrigerator. While at the store, the salesman shows her a popular refrigerator and reassures her that they include a written warranty guaranteeing the functionality of the refrigerator for up to one year. Carrie purchases the refrigerator, and after six months it breaks. She returns to the store looking to get it replaced, but they refuse to honor the warranty. What is this an example of?

- ☐ Misrepresentation
- ☐ Fraud
- ☐ Negligence
4. John could have easily made copies of his family photos. In fact, Jill suggested that John make copies and keep the originals for himself. She told John that she could construct the collage from copies. If Jill loses the copies and is unable to create the collage by March 1, she'll likely still owe John $3,000 in damages since that's what he paid for the collage. Because of __, Jill won't likely owe special damages since the photos weren't priceless and they are replaceable.

- Breach of contract
- liquidated damages
- special damages
- duress
- emotional distress
- duty to mitigate

5. Roseanne tells Ryan that she'll sue him for every penny he's worth, alleging food poisoning and unsanitary conditions, unless he agrees to sell his restaurant to her. Ryan knows his restaurant is safe and clean, but he's afraid of losing business due to Roseanne's lawsuit. Ryan agrees to the contract. Which of the following is true?

- This is a case of duress. The contract is voidable by Ryan.
- The court will assume that this is a case of undue influence. Ryan will have to prove that he consented to the contract.
- The court will assume that this is a case of undue influence. Roseanne will have to prove that Ryan freely and willfully entered the contract.
- The court will assume that this is a legal contract unless both Roseanne and Ryan present evidence otherwise.

5. For a breach of contract claim, the court will normally award:

- duty to mitigate
- rule of the expectancy
- none of the answers listed are correct
Part 4 - Criminal Law

Discuss the controversial issues that the criminal justice system is facing.

Explain the purpose and roles in the criminal justice system.

What is the meaning of criminal responsibility?

By outlawing behavior, the government expects to achieve a number of social goals. Discuss the various purposes served by the Criminal law.

List and describe the 5 methods used for punishment in the U.S. Include the purpose of each method.

What are the 7 elements for affixing criminal responsibility?
What if criminal law did not evolve, how would it affect society? What are the consequences of having stagnant criminal law?

What types of offenders would be termed "deterrable offenders?" Specifically, what makes these types of offenders more deterrable?

How does criminalization of homeless affect the economy?

Compare and contrast The Power Model and Due Process Model of criminal justice. Find similarities and differences.

How do you approach an advocacy exercise in a scenario of criminal law?

What kind of crimes are psychologically motivated?

In a litigation process, the party who files a complaint is called the _____.


What are the five key assumptions of the positivist school of thought and its limitations?

Name two (2) key differences between Civil and Common Law?

Is substantive law the same as criminal law?

How are criminal law and procedural law similar?

Is burden of proof procedural law or substantive law?

What is the difference between mens rea and actus reus?

Are contracts part of procedural law?
Answer and discuss

A and B are employees at a firm managed by multiple partners, one of whom is C. A and B strongly dislike both C himself and how C and the other partners operate the firm. Specifically, A and B believe that the partners underpay their employees and frequently neglect the employees’ needs. One day, during an informal lunch, A and B joke about stealing from C to make up for what they believe to be their unfairly low salaries.

Nothing ever materializes—until a holiday party that C hosts for the firm’s employees at his private home. C is an art connoisseur; he keeps a number of highly valued original paintings in his home. At one point during the holiday party, while chatting with different groups, B catches A’s eye and signals with his head toward the most expensive painting on C’s wall. A nods back and smiles, but no words are exchanged between the two.

During the party, A falls asleep in a guest bedroom in C’s house. When he wakes up, there are no guests around, but B is standing over A’s head and holding the painting B had pointed to earlier. A gets up. He looks first at B, then at the painting, and says: “Well done! We’ve gotta get out of here. I’m parked behind the house.” The two leave, and then A drives B to B’s house. B takes the painting inside.

In a common law jurisdiction, A is arrested and charged with one count of conspiracy to commit larceny. Larceny is defined as “the taking and carrying away of the property of another with the intent to permanently deprive the owner of the property.” In this jurisdiction, a person acts intentionally if “it is the person’s conscious desire to cause the social harm of the offense.”

Assume the prosecution can prove the above facts at A’s trial.

Questions

1. Is A liable for conspiracy to commit larceny? Explain, applying only the common law, but do not analyze B’s liability, do not apply the Model Penal Code, and do not analyze A’s liability for any other crime.

Don has owned Don’s Market in the central city for twelve years. He has been robbed and burglarized ten times in the past ten months. The police have never arrested anyone. At a neighborhood crime prevention meeting, apolice
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officer told Don of the state's new "shoot the burglar" law. That law reads: Any citizen may defend his or her place of residence against intrusion by a burglar, or other felon, by the use of deadly force. Don moved a cot and a hot plate into the back of the Market and began sleeping there, with a shotgun at the ready. After several weeks of waiting, one night Don heard noises. When he went to the door, he saw several young men running away. It then dawned on him that, even with the shotgun, he might be in a precarious position. He would likely only get one shot and any burglars would get the next ones. With this in mind, he loaded the shotgun and fastened it to the counter, facing the front door. He attached a string to the trigger so that the gun would fire when the door was opened. Next, thinking that when burglars enter it would be better if they damaged as little as possible, he unlocked the front door. He then went out the back window and down the block to sleep at his girlfriend's, where he had been staying for most of the past year. That same night a police officer, making his rounds, tried the door of the Market, found it open, poked his head in, and was severely wounded by the blast. Don is charged with assault and battery.

QUESTION: Discuss Don's potential defenses.

Your mentor can require more or less test questions to display competency and or proficiency as the mentor requires.