ANGLO-SAXON BUSINESS AND CONTRACT LAW

RALUCA PAPADIMA

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Redactor: Gheorghe Iovan
Tehnoredactor: Ameluța Vişan
Coperta: Monica Balaban

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Tel.: 021 – 315.32.47 / 319.67.27
www.editurauniversitara.ro
e-mail: redactia@editurauniversitara.ro

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TABLE OF CONTENTS

INTRODUCTION
CIVIL LAW VERSUS COMMON LAW

- Civil law countries: France, Germany, Belgium, Netherlands, Spain, Italy, Romania
- Common law countries: United Kingdom, Ireland, United States, Canada, Australia, New Zealand, India, Pakistan, Nigeria, Bangladesh, Malaysia, Ghana, Sri Lanka, Hong Kong, Singapore, Burma, Israel, Papua New Guinea, Jamaica, Trinidad and Tobago, Cyprus, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Marshall Islands, Micronesia, Nauru, Palau, Zimbabwe, Cameroon, Namibia, Liberia, Sierra Leone, Botswana, Guyana, Fiji.
- Mixed countries: Louisiana, Québec, Scotland, South Africa.

I. History and Development

(a) *Civil law*. The phrase comes from the Latin "*jus civile*" (as opposed to "*jus gentium*"), the law originally applicable only to the Roman citizens.

(b) *Common law*. The English common law (as opposed to "statutory law") originated in the king's courts, which created the first uniform rules. It did not originally consist of substantive rights but rather of procedural remedies ("*writs*"). The common law includes two branches: "law" (monetary remedies) and "equity" (non-monetary remedies, such as specific performance, rescission, injunction, rectification).

- The equity branch is based on the principles of fairness and natural justice.
- In the United Kingdom, the common law courts and the equity courts merged (Judicature Acts of 1873-1875). We will see that the equity litigation is handled by the Chancery Division of the High Court.
- In the United States, the federal courts and most state courts have progressively merged law and equity in the courts of general jurisdiction. The movement for merger of law and equity began in the mid-19th century (for example, the state of New York adopted the Field Code in 1848-1850). However, the substantive distinction between law

and equity has retained its importance and the difference is not a mere technicality. For example, certain statutes specifically authorize only equitable relief, which forces courts to analyze in lengthy detail whether the relief demanded in particular cases brought under those statutes would have been available in equity. Today, only a handful of states still have separate courts for law and equity. The most notable is the state of Delaware. The Delaware Court of Chancery is where most cases involving Delaware corporations are decided. Moreover, the merger of law and equity courts in some states is less than complete. Some other states (for example, Illinois and New Jersey) have separate divisions for legal and equitable matters in a single court. Finally, bankruptcy was also historically considered an equitable matter. Although bankruptcy is today a purely federal matter in the United States, bankruptcy courts are still officially considered "courts of equity" and exercise equitable powers under the Bankruptcy Code.

II. Legislation and Judicial Decisions

(a) *Legislation as the basis of the civil law*. Generally, in civil law countries, the main source or basis of the law is legislation, and large areas are codified in a systematic manner.

(b) *Judicial decisions as the basis of the common law*. The common law designates the customary and unwritten laws as embodied in old cases and commentaries. As a body of law, it consists of all the rules that can be generalized out of judicial decisions. The common law is applied based on the doctrine of "precedent" and the principle of "*stare decisis*" ("stand by what has been decided").

- In common law countries, earlier cases (precedents) have decisive (binding) authority.
- Judicial decisions are both the source and the proof of the law.
- *Ratio decidendi*: The main legal reason, the exact point which was indispensable and necessary to reach the decision that was reached by the judge.
- *Obiter dicta*: "By the way" statements, non-essential statements which are not binding.
- If a new situation resembles a prior case but is not exactly the same, the judge has three options: (i) "apply" the rule of the earlier case nevertheless, (ii) "distinguish" the earlier case and leave its application limited to the specific fact situation which it controlled or (iii)

"overrule" the earlier case (very rarely, only in extreme circumstances, if the judge believes that the earlier case was erroneously decided).

(c) *Legislation in the common law*. There is also legislation ("statutory law") in common law countries (typically called "acts" or "statutes"). Contrary to codes found in civil law countries, common law legislation is usually not formulated in terms of genera principles but consists rather of particular rules intended to control certain fact situations specified with considerable detail.

- Example (United Kingdom): Companies Act (adopted in 2006, as subsequently amended)
- Example (United States): Uniform Commercial Code (adopted in 1952, as subsequently amended)
- European civil law has profoundly impacted common law in the United Kingdom (adoption of the European Convention on Human Rights ratified by the United Kingdom in 1949, joining of the European Union by the United Kingdom in 1973).

(d) *Judicial decisions in the civil law*. In civil law countries, earlier cases have only persuasive authority, in the sense that courts are not bound to follow previous judicial decisions. The function of the courts is merely to "apply" (but also to "interpret") the written law. The utilization of prior decisions is mainly on points of interpretation of the written texts. Certain decisions do however have binding force even in civil law countries.

- Example (France, Belgium): "*jurisprudence constante*" (constant manner of deciding certain cases)
- Examples (Romania): "*recursul în interesul legii*" (appeal "in the interest of the law" before the Supreme Court of Romania, Înalta Curte de Casație şi Justiție), decisions of the Romanian Constitutional Court, decisions involving abusive clauses in standard, non-negotiated, contracts between professionals (for example, banks) and consumers

III. Doctrinal Materials, Legal Education and Research

(a) *Doctrinal materials*. In civil law countries, the treaties and commentaries of legal writers are generally expressed in the form of systematic expositions and in discussions about broad legal principles. The doctrine is an inherent part of the legal system and, even if it is not a recognized source of law, it exercises a great influence in the development of the law. In common law countries, there is not as large a quantity of doctrinal writings, and these are likely to consist of analyses of decided cases.

(b) *Legal education*. Legal education for the civil law is centered on legislation, codification and doctrine, on a very high level of abstraction. In contrast, legal education for the common law if founded on the primacy of the decided cases. The great names of the civil law are the names of professors who wrote the treatises. By contrast, the heroes of the common law are the judges who contributed most to its development.

(c) *Research*. In the civil law system, inquiry usually begins with the codes and other legislation, then it seeks out the commentators and the treatises, and only in third place do cases come in for consideration and evaluation. In the common law, research is focused essentially on prior judicial decisions, with the help of powerful databases (for example, WestLaw, LexisNexis).

IV. Judges and courts

(a) *The training and recruitment of judges*. In the common law countries, there is no particular training for the judges apart from the fact that it is necessary to be an attorney or a barrister for a certain number of years.

(b) *The method of deciding cases*. In civil law countries, the reasoning process is to go from the general principle to the special case. In common law counties, judges search first previous decisions for a similar case.

(c) *The personal or collective character of decisions*. Personal in civil law versus collegial in common law.

(d) *The manner of writing opinions and decisions*. In the common law countries, decisions are generally long, including all the facts and an examination of previous cases. In civil law countries, decisions are much shorter.

(e) *Silence of insufficiency in the matter of established law*. The common law judge can create legal rules, absent written law. In contrast, silence or insufficiency of the written law is problematic for the civil law judge.

Further reading: Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, The American Journal of Comparative Law, Vol. 15, No. 3 (1966-1967), p. 424-427

A. *Legislation as the basis of the civil law*

Generally, in civil law jurisdictions the main source or basis of the law is legislation, and large areas are codified in a systematic manner. These codes constitute a very distinctive feature of a Romanist legal system, or the so-called civil law. Although in the form of statutes duly enacted by the proper legislative procedure, these codes are quite different from ordinary statutes.

A civil code is a book which contains the laws that regulate the relationships between individuals. Generally it contains the following topics: persons and the family, things and ownership, successions and donations, matrimonial property regimes, obligations and contracts, civil responsibility, sale, lease, and special contracts, as well as liberative prescription (statute of limitations) and acquisitive prescription (adverse possession). A code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves the highest level of generalization based upon a scientific structure of classification. A code purports to be comprehensive and to encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise.

The nature of such a code naturally calls for a liberal interpretation in order that it may serve as the basis of decision for new situations. The same method of liberal interpretation likewise prevails for the ordinary statutes in a civil law jurisdiction. There is a great respect and high regard for legislation as the basic source of the law.

A significant feature about legislation in modern civil law is the importance attached to the preparatory works and the draftsmen's comments, as well as the parliamentary discussions in connection with its initial formulation. This is especially true of the codes, and particularly during the earlier periods of their interpretation. Thus, in France the history of the drafts, the observations of the courts, the debates and the changes, were indispensable to the interpretation of the *Code Napoleon*.

B. *Judicial decisions as the basis of the common law*

Looking at the law in England, the picture is a totally different one. During the formative period of English legal history, there was no strong central legislative body, but there were the powerful king's courts.

When a court decided a particular case, its decision was not only the law for those parties, but had to be followed in future cases of the same sort, thereby becoming a part of the general or common law. Thus, the common law, as a body of law, consisted of all the

rules that could be generalized out of judicial decisions. New problems brought new cases, and these enriched the rules of the common law.

Actually, the common law was conceived as being all-inclusive and complete; if a rule had not already been formulated, it was the judge's responsibility to declare it. Thus, judicial decisions were both the source and the proof of the law, pronounced in connection with actual cases.

What gave stability and continuity to this system was the doctrine of "precedent." Once a point had been decided, the same result had to be reached for the same problem; the judge was obliged to "follow" the earlier decision, the precedent. However, since courts are jealous of their prerogatives, the rule of precedent was applied only to the *"ratio decidendi"* or the exact point which was indispensable and necessary to reach a decision. Non-essential points were classified as *"obiter dicta"* and were not binding.

If a new situation resembled a prior case but was not exactly the same, then two possibilities were open to the judge. If he felt that it would be the socially desirable result to have the same solution, he could "apply" the rule of the earlier case. However, if the judge felt the other way, he could "distinguish" the previous decision and leave its application limited to the specific fact situation which it controlled. In extreme situations, a court could brand an earlier case as erroneous and "overrule" it, thereby providing a new precedent for the point involved.

The first two of these techniques, following precedent and applying the rule, assured stability and continuity of the law with the corollary of a reasonable protection of the parties involved and the security of legal relationships. The latter two techniques, distinguishing and overruling, made room for flexibility and permitted adjustment to new conditions.

In the development of the common law, in short, the focal point has been the judge.

C. *Legislation in the common law*

Of course, there is also legislation in the common-law countries. The first striking feature about this legislation is that statutes are usually not formulated in terms of general principles but consist rather of particular rules intended to control certain fact situations specified with considerable detail. Recently there have been some notable exceptions, and it might be asked whether this is the beginning of a movement toward codification.

In considering the place of legislation in the common law, it is necessary to remember the historical fact that the growth of Parlia-

ment was a popular expression to counterbalance the power of the king. For their part, the king and the efficient organization of the king's courts manifested a jealous and sometimes hostile attitude towards Parliament and its increasing power. The judges refused to place any value on legislative history or preparatory works, and they sought by all means to minimize the infringement of their "common law." This resulted in the adoption of very strict methods of statutory interpretation.

In turn, to counteract these restrictive judicial tactics, the drafting of bills for legislative consideration became an art in the expression of succinct detail in order to assure maximum fulfillment of the legislative intent in specific situations.

By way of contrast, in the system of the civil law and of codified law, legislation occupies the most highly respected place as a source of law. The attitude of the courts is not only one of liberal and extensive interpretation of texts. Even in totally new kinds of cases, civil law courts generally look for a legislative text and its underlying principles which they can use in one way or another as a basis for their new decision.

D. *Judicial decisions in the civil law*

It is sometimes said that in civil law jurisdictions the function of the court is merely to apply the written law. This is a very curtailed statement, and it would mean a very narrow judicial function. Actually, when a court applies a law, it has to interpret that law; in the process of interpretation the court may well extend the scope of the law considerably beyond that originally contemplated. By this method of interpretation and by filling in gaps where the written law is silent or insufficient, the civil law court can be considered as "making" law, interstitially.

In this manner, the utilization of prior decisions is mainly on points of interpretation of the written texts, whereas in the common law, the decisions are themselves the source of law and "make" law "from the whole cloth," as it were.

In the civil law system, courts are not bound to follow previous judicial decisions. Each new decision must be grounded on the authority of the legislative text which provides the basis of continuity and stability. This does not preclude the same result in a later case, because the same text and the same reasons lead to the same conclusion. However, there is no binding rule of precedent; each case must be decided on the primary authority of legislation, and the reasons for the decision must be stated. A court may not render a judgment in the nature of a general rule.

In some countries like France and Belgium, the practice has been

consolidated that when a certain point has been consistently decided in the same way by an appreciable number of cases, it becomes *"jurisprudence constante"* and is considered binding in future cases. This serves to stabilize the interpretation of the law.

In addition, after a second *"cassation"* (judgment of lower court annulled and case remanded for retrial) by the highest court of appeal in these two countries, the lower tribunal is obliged to accept the solution indicated.

There is also an increasing tendency among attorneys to cite cases as well as codes and other legislative texts.

Finally, for some topics there are very few legislative provisions, for example, in France, in connection with the civil responsibility for delicts and quasi-delicts. Thus, the elaboration of more detailed rules is necessarily delegated to judicial decisions in particular cases.

E. *Comparative comments*

In comparative studies of civil law and common law, it is sometimes concluded on the basis of the foregoing observations that the net result is approximately the same in both systems. In effect, while the common law starts with a case-law basis it also includes legislative encroachments, and while the civil law starts with a legislative basis, it incorporates developments of case-law. While this is a correct statement, it is fraught with the errors and pitfalls of partial truth.

As sources of positive law, legislation and judicial decisions have their place in both systems, but their relative importance is very different. It is not conducive to an understanding of the civil law and the common law to say that the difference is merely one of degree.

Despite the fact that legislation infiltrates into the common law, and regardless of the increasing importance of judicial decisions in a civil law country, the fundamental difference in the nature of the two systems continues to express itself in many other ways. The statutes in England and judicial law-making in France have not brought about any change in the classification of the respective legal systems. On the contrary, the importance of the difference between the civil law and common law is confirmed by an examination in the two systems of their doctrinal materials, legal education and modes of research, as well as in the organization and functioning of their judicial systems.

III. Doctrinal Materials, Legal Education and Research

As a result of the relative importance of legislation and judicial decisions in the civil law, on the one hand, and in the common law, on the other, there follow a number of other essential consequences,

Case Study: Contract for the Sale of a Country (Louisiana Purchase)

Law in the state of Louisiana is based on a more diverse set of sources than the laws of the other 49 U.S. states. Private law (principally contracts and torts) has a civil law character, based on French and Spanish codes and ultimately Roman law, with some common law influences. Louisiana's criminal law largely rests on U.S. common law. Louisiana's administrative law is generally similar to the administrative law of the U.S. federal government and other U.S. states. Louisiana's procedural law is generally in line with that of other U.S. states, which in turn is generally based on the U.S. Federal Rules of Civil Procedure.

The Louisiana Revised Statutes (R.S.) contain a very significant amount of legislation, arranged in titles or codes. Apart from this, the Louisiana Civil Code forms the core of private law, the Louisiana Code of Civil Procedure (C.C.P.) governs civil procedure, the Louisiana Code of Criminal Procedure (C.Cr.P.) governs criminal procedure, the Louisiana Code of Evidence governs the law of evidence, and the Louisiana Children's Code (Ch.C.) governs family law and juvenile adjudication. The Louisiana Administrative Code (LAC) contains the compilation of rules and regulations (delegated legislation) adopted by state agencies. The Louisiana Register is the official journal of regulations and legal notices issued by the executive branch.

European influence in Louisiana began in the 16th century, and *La Louisiane* (named for Louis XIV of France) became a colony of the Kingdom of France in 1682 and passed to Spain in 1763. In 1800, Napoleon, hoping to re-establish an empire in North America, regained ownership of Louisiana from Spain under the Third Treaty of San Ildefonso, but the treaty was kept secret. Louisiana remained nominally under Spanish control, until a transfer of power to France on November 30, 1803.

James Monroe and Robert R. Livingston traveled to Paris to negotiate the purchase of New Orleans in January 1803, at the request of Thomas Jefferson, the third President of the U.S. Their instructions were to negotiate or purchase control of New Orleans and its environs. They did not anticipate the much larger acquisition which would follow. Jefferson disliked the idea of purchasing Louisiana from France, as that could imply that France had a right to be in Louisiana, but he was aware of the potential threat that France could be in that region and was prepared to go to war to prevent a strong French presence there. Pierre Samuel du Pont de Nemours, a French nobleman, also helped with the negotiations between France and the U.S.

Du Pont was living in the United States at the time and had close ties to Jefferson as well as the prominent politicians in France. He engaged in back-channel diplomacy with Napoleon on Jefferson's behalf during a visit to France and originated the idea of the much larger acquisition than just New Orleans or Louisiana (known today as the Louisiana Purchase) as a way to defuse potential conflict between the U.S. and Napoleon over North America.

Jefferson had up-to-date intelligence on Napoleon's military activities and intentions in North America. Part of his evolving strategy involved giving Du Pont some information that was withheld from Livingston. He also gave intentionally conflicting instructions to the two. Spain procrastinated until late 1802 in executing the treaty to transfer Louisiana to France, which allowed American hostility to build. Napoleon needed peace with Great Britain to implement the Treaty of San Ildefonso and take possession of Louisiana. Otherwise, Louisiana would be an easy prey for the United Kingdom or the U.S. But continuing war between France and the United Kingdom seemed unavoidable. As Napoleon failed to put down the revolt in Saint-Domingue (present-day Haiti) and re-enslave the emancipated population of Haiti, he abandoned his plans to rebuild France's New World empire. Without sufficient revenues from sugar colonies in the Caribbean, Louisiana had little value to him. Spain had not yet completed the transfer of Louisiana to France, and war between France and Britain was imminent. Out of anger against Spain and given the opportunity to sell something that was useless and not truly his yet, Napoleon decided to sell.

Although the French Foreign Minister Talleyrand opposed the plan, Napoleon instructed the French Treasury Minister Barbé-Marbois to offer Livingston all of the Louisiana territory for $15 million. The Louisiana territory included land from 15 present U.S. states and 2 Canadian provinces. The territory contained land that forms the present U.S. states of Arkansas, Missouri, Iowa, Oklahoma, Kansas and Nebraska, a large portion of the present U.S. states of North Dakota and South Dakota (and small portions of land within the present Canadian provinces of Alberta and Saskatchewan), as well as portions of the present U.S. states of Minnesota, New Mexico, Texas, Montana, Wyoming, Colorado and Louisiana (including New Orleans). Its population was around 60,000 inhabitants, of whom half were African slaves. The American representatives were prepared to pay up to $10 million for New Orleans and its environs, but were dumbfounded when the vastly larger territory was offered for $15 million. Jefferson had authorized Livingston only to purchase New Orleans. However, Livingston was certain that the U.S. would accept the offer.

The Americans thought that Napoleon might withdraw the offer at any time, preventing the U.S. from acquiring New Orleans, so they agreed and signed the Louisiana Purchase Treaty on April 30, 1803. The treaty was signed by Robert Livingston, James Monroe and Barbé Marbois in Paris. After the signing of the treaty, Livingston made this famous statement: "We have lived long, but this is the noblest work of our whole lives...From this day the United States take their place among the powers of the first rank."

On July 4, 1803, the treaty reached Washington, D.C. Before the purchase was finalized, the transaction faced Federalist Party opposition. They argued that it was unconstitutional to acquire any territory. Jefferson agreed that the U.S. Constitution did not contain explicit provisions for acquiring territory, but he asserted that his constitutional power to negotiate treaties was sufficient. Ultimately, the U.S. Senate ratified the treaty with a vote of twenty-four to seven on October 20, 1803. On the following day, October 21, 1803, the Senate authorized Jefferson to take possession of the territory and establish a temporary military government. In legislation enacted on October 31, 1803, Congress made temporary provisions for local civil government to continue as it had under French and Spanish rule and authorized the President to use military forces to maintain order. France formally turned over New Orleans, the historic colonial capital, on December 20, 1803. Just three weeks earlier, on November 30, 1803, Spanish officials had formally conveyed the colonial lands and their administration to France.

Acquiring the Louisiana territory doubled the size of the U.S. It was by far the largest territorial gain in U.S. history. The purchase price paid by the U.S. consisted of fifty million francs ($11.25 million) and a cancellation of debts worth eighteen million francs ($3.75 million) for a total of sixty-eight million francs ($15 million). Adjusting for inflation, the modern financial equivalent spent for the Louisiana Purchase is approximately $240 million in 2016 U.S. dollars which averages to approximately 3-4 cents per acre.

Prior to the U.S. purchase in 1803, the Custom of Paris, supplemented with royal ordinances, was the primary law in Louisiana. After the 1763 Spanish cession, however, this law was supplanted by the Spanish law. Afer the U.S. purchase, the first Louisiana Civil Code Digest of 1808 was written in French by 3 attorneys. The Digest proved problematic when in 1817 the Louisiana Supreme Court found that the Spanish law in force prior to the Digest's enactment had not been repealed and was therefore still in effect insofar as it did not contradict the Digest. This provoked a legislative

response by the General Assembly who formed a task force charged with drafting a new, fuller code written in French and English and which formally repealed prior existing law. This code, the Civil Code of 1825, was enacted on April 12, 1824. For many years, legal practitioners made great effort to ensure that both versions agreed. Despite those efforts some clauses were found only in one version or the other. Due to modern legislative enactments which repeal and reenact Louisiana's Civil Code, the differences between the original French and the English translation are now primarily of historical interest. Despite popular belief that the Louisiana Civil Code derives from the Napoleonic Code, the similarities are because both stem from common sources, namely the 1800 Draft of the Napoleonic Code. The Napoleonic Code was not enacted in France until 1804, one year after the Louisiana Purchase. Historians discovered original notes of the 1808 Digest drafters who stated their goal was to base Louisiana law on Spanish law and who make no mention of the Napoleonic Code. The 1825 Code, however, which had the express purpose of repealing earlier Spanish law, elevated French law as the main source of Louisiana jurisprudence.

Great differences exist between Louisianan civil law and common law found in all other U.S. states. While many differences have been bridged due to the strong influence of common law, the civilian tradition is still deeply rooted in Louisiana private law and in some parts of criminal law.

One often-cited distinction is that while common law courts are bound by *stare decisis* ("to stand by a decision" *i.e.* the legal principle of determining points in litigation according to precedent) and tend to rule based on precedents, judges in Louisiana rule based on their own interpretation of the law. This distinction is not absolute, though. Civil law has its own respect for established precedent, the doctrine of *jurisprudence constante*. But the Louisiana Supreme Court notes the principal difference between the two legal doctrines: a single court decision can provide sufficient foundation for *stare decisis*, however, "a series of adjudicated cases, all in accord, form the basis for jurisprudence constante." (*Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n.*, 903 So.2d 1071, at n.17 (La. 2005) (Opinion no. 2004-C-0473)). Moreover, the Louisiana Court of Appeals explicitly noted that *jurisprudence constante* is merely a secondary source of law, which cannot be authoritative and does not rise to the level of *stare decisis* (*Royal v. Cook*, 984 So.2d 156 (La. Ct. App. 2008)). Since 1972, there is no longer an official case reporter and courts themselves decide which decisions are published. Decisions of the Louisiana Supreme Court and Louisiana Court of Appeal are available in paper and via the internet,

while trial court decisions are not published. The Code of Civil Procedure provides for the posting of unpublished opinions of the Louisiana Supreme Court and Louisiana Court of Appeal on the internet and provides that such opinions may be cited as authority. Slip opinions are available from the courts, while bound volumes of the case reports are contained in the Louisiana Cases (a Louisiana-specific version of the Southern Reporter).

Property, contractual, business entities structure, much of civil procedure, and family law are still strongly influenced by traditional Roman legal thinking. Louisiana law retains terms and concepts unique in U.S. law: usufruct, forced heirship (a person is not free to dictate who will inherit their estate and forced heirship laws require a deceased person's estate to pass to one or more blood relatives (usually children and grandchildren) and/or a surviving spouse, who are referred to as the "protected" heirs), redhibition (a civil action available under Louisiana law against the seller and/or manufacturer of a defective product, similar to the lemon laws more familiar to common law jurisdictions in other U.S. states), and lesion beyond moiety (the seller may rescind the sale of an immovable when the price, or the property it is exchanged for, is less than one half of the fair market value) are a few examples.

Due to the civil law tradition, Louisiana's constitution does not contain a right to a trial by jury in civil cases, although this right is contained in the Louisiana Revised Statutes. Additionally, appellate courts have a much broader discretion to review findings of fact by juries in civil cases. Also, damages are apportioned differently from in common law jurisdictions, specific performance is almost always available, and juries may hear cases that would be considered equitable in other jurisdictions.

In commercial law, the 49 other U.S. states have completely adopted the Uniform Commercial Code (UCC), thereby standardizing the rules of commercial transactions. Louisiana enacted most provisions of the UCC, except for Articles 2 and 2A, which are inconsistent with civil law traditions governing the sale and respectively the lease of goods.

Legal careers are also molded by the differences. Legal education, the bar exam, and standards of legal practice in Louisiana are significantly different from other states. For example, the Louisiana Bar Exam is the longest of any state, at 21.5 hours. The Multistate Bar Examination is not administered in Louisiana.

TOPIC 1
ANGLO-SAXON BUSINESS LAW

I. American Business Law

Two of the core structural characteristics of a company are legal personality and limited liability, also described as "entity shielding" and "owner shielding". Entity shielding protects the assets of the company from the creditors of the company's owners, while owner shielding protects the assets of the company's owners from the creditors of the company. A component of entity shielding, which serves to protect the going concern value of the company against destruction by either individual owners or their creditors, is that the individual owners of the company (the shareholders or the members) cannot withdraw their share of the company's assets at will, thereby forcing partial or complete liquidation of the company, nor can the personal creditors of an individual owner foreclose on the owner's share of the company's assets. It follows that, unless a legal or contractual exception applies, shareholders may not abandon the company at will. At the origins of corporate law, owners had an absolute veto over extraordinary corporate events, which required unanimous approval. However, as this burdensome protection gave way to majority voting requirements, exit rights were granted as a compensation for the loss of the veto right.

There are two main types of companies in the U.S.: corporations and limited liability companies (LLCs). Absent federal intervention, corporate law is left to the national legislators. The national laws adopted by the state of Delaware (one of the 50 U.S. states) are particularly important because Delaware is the privileged venue for company incorporations, and, consequently, for shareholder litigation. More than one million companies are incorporated in Delaware, including more than 50% of all public companies and more than 60% of the Fortune 500 companies.

With respect to corporations, approximately half of the U.S. states follow the Model Business Corporation Act (MBCA), with certain national variations. Notably, California, Delaware, New Jersey and New York do not follow the MBCA. In Delaware, the Delaware General Corporation Law (DGCL) applies to both private and public corporations. With respect to