# Conducting Transatlantic Business

## Basic Legal Distinctions in the US and Europe

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3rd Edition

ISBN 978-87-403-0294-3

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# Introduction

The laws of continental Europe and those of the USA are substantially distinct. The general difference between common law, as practiced in the US, and civil law, as practiced in continental Europe, is widely accepted, even if it is not always fully understood. American court rulings, for instance, can be extreme in the eyes of Europeans, who are not familiar with concepts such as punitive damages.

The perception of Europeans and Americans about each other's laws is sometimes wrong, yet people can be so convinced that they have heard it right, that smaller and even medium sized businesses make important decisions based on assumptions. A European company did not dare to sell a product in the US because management was afraid, not of product liability issues but of the mere belief that liability insurance premiums would be too steep and still not cover all legal expenses. Internal memos and even business plans of large European companies preparing to establish US ventures describe organization, strategies, financing, product and much more, in great detail, with many numbers, footnotes, figures and charts. But when it comes to the choice of Delaware for incorporation the motivation is sometimes narrowed down to just two words: "of course".

Not only Europeans have misconceptions and biases. The General Counsel of a very large American conglomerate once told an audience that when you do business in Germany, anything that is not expressly allowed by written law is prohibited.

What nonsense! What these examples reflect is a lack of understanding, not just of the law but of the underlying cultures. Law and culture, certainly business culture, are strongly intertwined. They continuously affect and influence each other. Theoretically, laws reflect the mores of the local culture. Once put in place, they start living their own life. When a new situation arises people consult the law for reference on how to act.

Europeans expect the American culture to be a mirror of their own. The Dutch speak of Manhattan as New Amsterdam, and learn at school that Brooklyn is actually Breukelen. Many Italians have a remote uncle "in America". German conventional wisdom has it that once in recent history a vote was held in Congress in which the German language lost by one vote to become the official language of the US. They all see "America" as an extension of their own culture and expect doing business with America to be very similar to doing business at home. Even where no such expectations exist, difficulties loom. The French are convinced that America has no culture at all, and thus the French way prevails.

Americans make the same mistake. Many see their "home country" as Europe. When Americans of Greek descent speak of going to Europe, they mean a trip to Greece. Italian Americans mean Italy, Polish Americans mean Poland, and so forth.

In reality, cultures do differ – even within the United States. Add the difference between common law and civil law, and the result is that in some areas the laws of the USA and of continental European countries are poles apart. As a result, many situations are dealt with in a manner that seems very unfamiliar for someone from the other side of the Atlantic. Parties involved cross-Atlantic business transactions are often surprised by the outcome when a contract is terminated, a creditor becomes insolvent, or minority shareholders assert certain rights.

Without pretending to be an academic tome[1] this book aims to help European and American business partners understand where and how their legal and cultural systems are at odds. The book aims to provide laymen insights to better understand the legal differences by putting the law in a cultural context. It focuses on business, not on matters of for instance family or criminal law. It is not a law book in a strict sense, but rather a book that describes select legal aspects in a cultural perspective to raise awareness of some very important distinctions when conducting business across the Atlantic. The main distinctions, the major pitfalls, the different concepts that you may come across when doing business across the pond are addressed.

Finally, as with any book that describes or compares legal topics, there is a disclaimer: this book does not in any way teach "the law", nor does it provide legal advice. Legal details are different in each and every country and state, and in every situation. For legal advice you must consult an attorney who is familiar with the laws of the relevant countries.

1 There aren't even any (further) footnotes…

# 1 Cross-Atlantic Legal Styles

The difference between the law in the US and in Europe goes beyond the generally accepted distinction between common law and civil law. Legal traditions find their roots in a country's own national past. Cultures with a history of feudal or centralized government often enjoy uniform legislation; countries with a tradition of decentralized government enjoy laws that are more divers. Consequently, the cultural approach toward legal issues is different as well.

The law on the European continent is not just "civil law". Both Roman and Napoleonic law have strongly affected the legislations of most western European countries, but not all to the same degree. Notably German law has its own school of thought. Napoleonic systems typically think in terms of obligations of the defendant. Germanic laws think in terms of rights or claims of the claimant or plaintiff. The relevant statutes, or acts, center on the rights of a tradesperson, whereas in Napoleonic systems the duties of a tradesperson are the focus of the law. Additional EU regulations often focus on the rights of the consumer. German law is also structured and clear, which is not something that can be said of e.g. the laws of Belgium, a Napoleonic country, where a long tradition of compromise between deeply divided political camps is reflected in the national legislation.

That being said, despite their different systematic approach Germanic and Napoleonic law often give rise to the same result, albeit via different detours of reasoning.

With regard to business, the laws of former Eastern Bloc countries that have been adopted after the fall of the Iron Curtain are based on the 20th century amalgam of civil law or other European countries. The cultural mindset, however, is still influenced by experiences during the previous regime. In practice this can also affect interpretation of the law.

American common law is also called judge-made law. Local juries warrant that local culture and local mores are applied to the outcome of a lawsuit. The jury checks the facts of a case and the judge applies the rules. If the rules don't fit the facts, or are altogether missing, the judge makes a new rule or amends an existing one. Today's action may be subject to tomorrow's rule. As a result, businesses try to anticipate as much legal issues as possible.

Even if it seems that in a globalizing world both legal systems are moving toward each other, the cultural frame of mind of the population does not change as fast. People behave according to the rules they grow up with. European businesspeople still write up their own contracts and generally consult an attorney only after a problem has arisen. This may even be an attorney with a very broad practice, not one that specializes in the particular matter ad litem. After all, in a civil law system written statutes provide for the bulk of the legal formalities that govern a contractual relationship. American businesses, on the other hand, still include specialized attorneys in a very early stage of negotiations. Sometimes this is to seek cover behind a legal authority in case there might be sudden legal obstructions; occasionally legal opinions are written to serve the objective of the client. But usually the purpose is to avoid any foreseeable problems in the future. Intellectual property rights, for instance, are considered assets; conflicting bookkeeping and accounting rules cause headaches for many tax specialists; each industry and often even product lines have their own rules for compliance; and so forth. These all need to be addressed in the contract – and that can only be done properly by a person who is knowledgeable about these issues. The contracts these attorneys draft still fill entire bookshelves because the law does not fill in the blanks – or if it does it may not have the desired outcome.

## 1.1 It's the Law, Isn't It?

In Europe the law is a mainly written set of rules that governs the conduct of its subjects. In some countries the written text is interpreted more strictly than in others, but the principle is that everybody can know beforehand whether certain behavior is allowed, not allowed, or allowed under certain circumstances. In the United States the law is a system of written and unwritten rules, judges' opinions, political opportunities and moralistic beliefs that are not always etched in stone, and that are tested in the courts after an event has occurred. One will learn only after the facts whether or not behavior – that particular behavior – was actually proper.

### 1.1.1 The Law Out West

In the American legal style state and federal rules complement, overlap and sometimes contradict each other. Foreigners often do not grasp the idea that American states have a large degree of autonomy, especially when it comes to enacting laws. It would be easier for them to draw a comparison with independent countries. State law is the basis; federal rules either replace state law or add an extra layer of law.

The USA encompasses 50 different states together with several territories, each with its own laws. Some laws appear to apply equally in all, or at least many, states, and carry the monikers "Uniform" and "Code". The UCC, or Uniform Commercial Code, comes to mind. Despite their name, details differ per state and these statutes are therefore far from uniform. State case law warrants further variation.

When doing business in more than one state, the laws of all states involved may apply, as well as federal law. Simplified, if a transaction involves one state only, only the laws of that state law apply. Federal law kicks in when there is "interstate commerce". That it is interstate commerce does not necessarily follow from the transaction itself: it also applies when there is a foreseeable transfer of the product to another state by someone else. But there is no golden rule here, either. It may seem that maintaining a web site easily results in interstate commerce-web sites are usually available far outside any state- but courts have ruled that that isn't necessarily the case.

US states cannot set federal law aside, although in some cases they have a little leeway. An example can be found in a recent environmental law enforcement issue, where California was allowed an exception – and through the back door 13 other states followed California, but only after these states fought a legal battle with the federal government.

Sometimes the law seems to go around in circles. Even if federal law applies, where a federal rule leaves blanks, states can impose their own rules. Federal law is not always exclusive, either: sometimes it provides for a minimum requirement and states may still impose stronger or additional rules. State law may also still apply, e.g. when dealing with consumers.

### 1.1.2 The Law Euro-Style

The continent of Europe consists of more than 50 independent countries, each maintaining its own legal framework. In addition, member states of the European Union are also subject to EU rules. European Union Directives impose harmonized requirements on national laws.

The status of EU Directives can not be compared to that of US federal law. American federal law supersedes state law and often leads a parallel life. EU Directives are implemented in national law and thus are part of national law. EU member states can implement EU Directives with minor changes, the least ones stemming from translation and interpretation differences. In some cases member states may partly or fully opt out of a Directive.

## 1.2 Legislative Process

In the United States legislative power is not only shared between state and federal governments. Within those it is shared between legislators, courts and stakeholders of all sorts. Lobbyists try to educate law makers about the consequences of legislation, thereby also becoming part of the process. As a result, legislation can be an incoherent product of power wrestling that includes issues which are not at all related to the area that it is trying to regulate.

European parliamentary majorities draft laws with less concern for momentary political follies or interest groups. Like its politics, which is almost always based on coalitions and other forms of cooperation, lawmaking in Europe is a process in which the interests of all parties that can be affected are balanced. When a statute is drafted more attention is paid to the opinion of experts in the field, sometimes even independent ones.

More importantly, European legislative processes typically include a test whether a statute is constitutional, before it can be enacted. In the USA draft legislation is not submitted to such test. This often results in odd situations – at least in the European eye – where it is not exactly clear how or to what extent the law applies, or whether it applies at all. A statute that was perfectly valid yesterday may suddenly not be valid today. The law may not have lost its validity, but it was decided, in retrospect, that it didn't apply to that particular case.

## 1.3 Consequences for Doing Business

The back-and-forth of whether or not certain conduct is legal in the US can have far-reaching consequences. To be on the safe side and reach a desired outcome, several seemingly unrelated rules are used. In recent years the CEO of the New York Stock Exchange, who at the time of his appointment legally negotiated a very generous contract for himself, was forced to pay back his remuneration. His benefits were deemed excessive at the time he was ousted, even though they were legal when he negotiated them. The law had not changed by the time he was fired, but the political climate had. Needless to say that this resulted in a lawsuit – and that he eventually won his case. The determining factor, however, was not the validity of the law or the even the contract itself. It was a technicality: the fact that the stock exchange was a not-for-profit organization meant that the state court had no standing to decide on the issue. In short: different tax structure, different court, different contract law.

In Europe this is unthinkable. If the contract was legal there might have been a public outcry of anger about excessive pay, and perhaps a political hearing or parliamentary inquiry, maybe followed by a new statute to cap remuneration in the future. But any effort to intervene with legal contractual stipulations would falter on its face. The conduct can not suddenly have become illegal. Whether or not an organization is a for-profit organization is a matter of tax law and would never affect any behavioral norm, contract, or standing of a court, outside the duties to the tax authorities.

This also shows that when you do business in the United States you should always have your underlying paperwork in order. This is of course the case anywhere in the world, but often for a simpler reason: if paperwork is lacking an administrative or sometimes criminal penalty will ensue. In Europe the general public usually views such fines as a penalty. Conventional wisdom has it that penalties are only given in case of wrong-doing, and a link to criminal law is easily made. They can therefore easily turn into a public relations nightmare. In the US an administrative fine is not so much an issue: as with any cost of doing business there is often a cost-benefit analysis, and if it can be booked under assessments there may even be a tax deduction.

The more important reason here is that the miscellany of laws can make it difficult for anyone not specialized in the field to see what was right and what was wrong at what time. In the US more than in Europe, once a business or transaction is under scrutiny and documentation is lacking, unrelated issues can also come to light. Among equals. In litigation the discovery process requires submission of any document that pertains to the case. Investigations by authorities can also be thorough. This stems in part from initial screenings being more flexible. The US is in principle a trust-based society. The "mean-and-leanness" reputation that American corporation enjoy abroad only applies to about 10 or 20% of its domestic businesses. As a result permits can relatively easily be obtained, merely based on the reputation of the applicant being current with formalities. The other side of the coin is that in any investigation the entire process will be reviewed, starting at or even shortly before the moment of inception of the issue that is being examined.

Being able to produce the proper paperwork thus not merely avoids a fine or exposes a weakness during litigation. Where "the law" is not clearly written in stone one has to do it oneself. The least it does is serving as a defense. For that very reason attorneys are often asked to draft legal opinions. These are non-binding reviews that provide clarity on a legal issue. The use of legal opinions is limited because they are written towards a conclusion that suits the client, but they do take all pros and cons in mind that can be used when making a decision. If after a while a dispute arises or an investigation ensues, it may be too costly and tie consuming for the adverse party to rebut the findings. Authorities in northern Europe may sometimes decide to pursue a matter for the sake of principle, but in the US the equitable – read: financial – result usually prevails. For a cash-strapped government spending limited resources on contradicting or incomplete legal tidbits is not cost effective, certainly not if the other party has his clear answer ready.

## 1.4 Legal Terminology

The similarity of American and European legal terms is sometimes deceptive. When Europeans speak about "the law" they mean a written set of rules. European legal practitioners may call them "acts". Americans call them "statutes" or "codes". But even officially, the "*Loi du 19 décembre 2002*" translates into the "*law of 19th December 2002*". To Americans, the law is the collection of unwritten and written rules, and the codified rules that Europeans call "law" are merely one piece of it.

Some terms do not translate well across the ocean. "Litigation" is a word that Europeans are not necessarily familiar with. "Going to court" or "being involved in a law suit" are more familiar words.

Awareness of the actual meaning of a term is nonetheless important. In American legal documents each word is carefully chosen and has a specific meaning. For instance, verbs that are often used include "certify" or "attest". In European minds these are just synonyms for "declare", "state", or something to that extent. One's English isn't necessarily that impeccable to be bothered with minute details, and a signature is scribbled under it without further thought. Similarly, not much attention is paid to the differences between "shall" and "must".

And indeed in the European legal world, being creative with words does not necessarily have far-reaching consequences. A contract is not necessarily drafted by an attorney but can be written by the sales department or other non-legal department. After all the relevant law, a codified statute, provides the exact rule. Culturally, European writing style rules don't allow using the same word twice in the same paragraph. Sometimes words are avoided purely because they sound too complicated, foreign, ugly, don't fit in the corporate style or have a cultural meaning that is different from what the contract is intending to convey. Oddly enough – considering that a contract is actually a legal document – a word that sounds "too legalese" is often replaced by a term that is better understood by a layperson. This enables individuals in e.g. the sales or manufacturing or accounting departments to actually work with the document.

If such a thing would happen in America the attorneys have a field day, and if it ever comes to litigation it ensures them weeks of additional work, which translates to extra billable hours.

In the US there is no central statute that provides a definite meaning or rule. That is a major reason why attorneys all use the same terms and don't randomly exchange words with synonyms. They have to be able to understand each other's intent. If the language in a document is not aesthetically appealing, so be it. It doesn't matter that it is written in a manner that no layman can make head or tail of it; in the end it is a document that serves as applicable law. It is the law. To a certain extent it can even set aside some of the clauses of existing statutes. There is no room, no luxury, for ambiguities or interpretation. A contract is not designed for non-attorneys to work with. If the terms are not clear one can always ask an attorney for clarification.

| Example | What an American hears | What a European hears |
|---|---|---|
| Law | Written laws and regulations, case law, unwritten law | a. Written rule of law.<br>b. Act |
| Statute | Written rule of law | a. Not familiar with the term<br>b. "statut" / bylaw<br>c. statue |
| ADR | Arbitration, mediation | Not necessarily familiar with the term |
| Litigation | Lawsuit, arbitration, mediation | If familiar with the term, lawsuit |
| No cure no pay | Not familiar with the term | Contingency agreement, but without expenses |
| Contingency agreement | Contingency agreement | Not familiar with the term |
| Shall | In a legal document: absolutely must | In a legal document: will do |
| Must | In a legal document: must | In a legal document: absolutely must |
| To certify | In a legal document: to attest that it is the truth | In a legal document: to state, to sign |
| To declare | In a legal document: to make formally known | In a legal document: to state, to sign |
| Affidavit | Sworn statement of fact | Formal or informal statement |
| Officer | High ranking official of a company | Police agent or high-ranking soldier |
| (General) Manager | Employee with low-or mid-ranking managing position | High ranking official of a company |
| Notary | Notary public, i.e. someone who can legalize signatures | Legal practitioner and official who drafts legal documents and fulfills official tasks |
| Deposition | Court testimonies that take place under oath outside the court room | If familiar: meeting with attorneys, including those from opposing party |
| Interrogatories | Written questions to the parties in a lawsuit, to which they must respond | If familiar: letter with questions |

# 2 Business Organization

Business abroad can be conducted in many ways. A basic choice is whether to work with third parties or set up one's own organization. A physical presence in a country can be established by setting up an independent entity or a branch office. The latter is a local extension of the main office. When working with third parties the typical choice is between distributors and agents.

The choice is often made on the basis of all the domestic requirements a business has to fulfill. These include, of course, the legal rules, which are specific to each country. One of the aspects that matter on the background, even to large multi-national corporations, are the different rules that apply to businesses based on their size.

The definition of "small business" is reflected in the size of a country's market. Broadly speaking, in Europe small businesses are considered to be businesses with less than 50 employees. In the US that comes close to a mom-and-pop store. There, a small business is generally an independent business with fewer than 500 employees in manufacturing or less than 100 employees in trade. These culturally different definitions also influence legal requirements that are imposed on businesses. One can think of tax and employment regulations, capital or reporting requirements, legal structure, etcetera.

## 2.1 Incorporation

In Europe legal entities are established by or through a notary. A notary is an independent, neutral specialized legal professional who fulfils official tasks. He drafts the legally authentic acts involved in the establishing, sales or dissolution of corporate entities. A notary also performs other official functions, notably involving real estate transactions and domestic law issues. In the US these functions are performed by attorneys specialized in e.g. real estate law, family law, or wills and trusts.

An American "notary public" is not to be compared with his European namesake. The main authority of a notary public is to legalize signatures, certify copies of documents and administer oaths, all for a very low fee. He is as such not involved in the establishing of a legal entity in the US (although his services may be required when legalizing a signature).

In the US companies can be formed by an attorney, or by anyone else. An entire cottage industry has erupted, purporting to assist self-incorporators with their efforts.

### 2.1.1 Self-Incorporation versus Using an Attorney

In the US, a person who wishes to start a corporation is called a "promotor". American states allow promotors to incorporate a business themselves. It is also possible to hire a third person to arrange the formalities. This does not necessarily have to be a lawyer. Forms, templates and complete incorporation packages can be obtained from specialized companies. These packages are more or less complete and provide more or less sufficient information to get started.

Incorporating a business yourself does not necessarily save money. Depending on the state, attorneys can do a very basic incorporation starting at $200 or $300. That is not much more than an online incorporation company charges. Additional state fees and charges starting at about $1,000 apply. These fees are due regardless of who is doing the incorporation. Thus, for a simple incorporation the costs are about the same.

Where more complex structures are required, the hiring of an attorney is, almost without saying, advised. For instance when an LLC is being established a local attorney, preferably one versed in tax law, may actually be able to bring savings.

In Europe, by contrast, incorporating is a much costlier affair. For instance establishing a B.V. in the Netherlands costs about €5,000, part of which is subject to an additional 19% VAT. This amount either eats into or must be added to the €18,000 capital requirement that also exists. In this equation, incorporation in the United States is already a bargain.

The few dollars potentially saved if self-incorporating in the US, versus using the services of an attorney, is further negated by the time that needs to be invested to do the incorporation properly. A major reason for using an attorney is that basic knowledge of state corporation laws is required to avoid problems in the future. The crux of the exercise is, namely, that the paperwork must be filled out correctly and several documents filed with the relevant authorities.

To correctly draft the minutes of the initial and subsequent Board of Directors' and Shareholders' meetings the drafter must know which corporate body may make what type of corporate decisions. Blanks in the template Articles of Incorporation and By-laws must be filled in. They must be consistent with other papers that reflect what decisions were made where and when, and by whom. These documents will follow the company in the years to come and can be reviewed during tax, social security or shareholder audits. Stock certificates and ledgers have to be completed and other corporate records such as returned certificates of incorporation and filing receipts must be filed. Minutes, consent forms and other corporate documents must be maintained in a timely manner. Whether or not you are familiar with the requirements, they must be rigorously followed.

As in many countries, if the paperwork is found not to be in order, a fine may ensue. It can also lead to further scrutiny. Here, that fine will come as a surprise after an audit three to seven years later, likely with penalties and almost certainly with interest. The federal IRS appears to be slightly ore forgiving than state tax authorities, but a few years down the line that may change. Moreover, if the company or parts thereof are ever sold, any incomplete paperwork must be corrected, for instance by an attorney at, say, $500 per hour, meanwhile delaying the transaction.

Additional reasons to not squabble on attorney fees are of an economic nature. First, when requesting outside financing such as bank loans or credit cards, American financial institutions do demand copies of some of these documents, both to see how serious the company is organized and managed and to determine whom they can eventually hold liable. If the papers are incomplete or incorrect, borrowing money can be difficult.

Second, to become a preferred vendor with large buyers, submitting some of these corporate documents is part of the standard request by most American purchasing departments. If the prospective client finds that the paperwork is wanting he may decline to conduct business with the company. Here, saving a few dollars at the time of incorporation may well turn out to be one of the most expensive mistakes a business can make.

### 2.1.2 Business Registration

European companies are usually registered in a Trade Register, which is maintained by a local court or Chamber of Commerce. Here, contact information, names of individuals representing the company, a company's subscribed capital and other information relating to the company can be found. Typically, a company must file its annual reports and other essential information with the trade register. General Terms and Conditions are also deposited with the register.

In the U.S. such centralized registries do not exist. Information about the company must be filed and can be found with several agencies, such as state and city tax authorities or the county clerk. The Secretary of State of the state in which the company is established is designated for service of process. This means that if someone wants to sue the company and is not able to find the company's contact information, she can send her complaint to the Secretary of State, who will forward it to the company. Receipt by the Secretary of State equals receipt by the company. It is therefore crucial that a company keeps its information current with the Secretary of State. Several states have regular filing requirements to that extent.

Foreign companies doing business in a state are required to register when they do business in that state. Many large American cities require separate registration as well. In the US, a business is "domestic" in the state where it was incorporated and "foreign" in any other state. Thus, a Delaware corporation doing business in New York is a foreign business in New York and must register (and become a tax subject) in New York.

## 2.2 Legal Entities

An array of legal entities is available to anyone who wishes to establish a business. Business can be organized as a sole proprietorship, a partnership, a corporation, or a number of variations thereof. Each has its own advantages and is subject to its own set of rules. Each has its own structure. For instance, limited liability companies and limited partnerships restrict the personal liability of their shareholders or partners.

The law specifies which formalities must be followed to establish and maintain a corporation or other legal entity. Even though the European and American types of corporate entities appear to be similar there are some substantial differences.

European shares are typically issued at or around their par value. Each type of corporation is subject to a minimum equity capital investment. In many cases that capital must be paid in full at the time of the incorporation. Often the shareholders can opt to invest a certain percentage at the issuance of the stock and remain liable for the remainder. Usually, that remainder is immediately due upon request of the company.

Where each European country maintains its own distinct laws most US states base their corporation laws on the Model Business Corporations Act. Their rules are not the same but nonetheless comparable. However, Delaware, New York, California and a few other states with a large foreign corporate presence maintain their own systems.

In the US legal entities are not subject to a minimum capital requirement. Theoretically, a corporation can be established with a capital of one dollar. Consequently, the par value of American shares is lower: shares with a par value of one cent, or even with a zero par value, are commonplace. Yet in practice lenders follow strict standards to determine whether a borrower is creditworthy. One of the tools is the use of capitalization ratios. Insufficiently funded companies have limited or no access to loans, credit cards and even vendor credit lines. Moreover, under certain circumstances controlling shareholders can be penalized for liabilities arising from undercapitalization.

### 2.2.1 Corporations

American Corporations are abbreviated with either "Corp." or "Inc.", the latter meaning "incorporated". There is a basic distinction between the regular "C" corporation and the "S" corporation. Shareholders of the latter enjoy tax benefits similar to that of a partnership, but only when certain conditions are met. Corporate and personal taxes are jointly filed. Therefore, one of the conditions is that all shareholders must be American tax payers.

Regardless of which type of corporation is selected, shareholders of an American corporation are always registered with the company.

In most European countries a legal form of "anonymous" corporations is common. These are companies that issue what Americans would call bearer shares. These go by acronyms such as *AB*, *AG*, *NV*, *SA*, etc. In northern Europe they are typically issued by large publicly traded companies; in southern Europe they are also used for non-listed companies.

In Europe shareholders of a corporation are not registered with the company. Shareholders must register to attend shareholders' meetings but for the rest there is no way for a European corporation to know who its shareholders are. Indeed shareholders are not obliged to vote with their entire interest and thus are not required to disclose their actual holdings. An exception is made for shareholders who directly or indirectly hold more than a certain percentage of shares in publicly traded companies.

The American model may become more common in Europe. In Austria any *Aktiengesellschaft* whose shares are not publicly traded are no longer able to issue bearer shares. Closely held *AG*s must issue registered shares and keep an up-to-date share ledger, as well as keep a record of the bank account details of each shareholder.

The fact that the relevant EU corporation laws are not harmonized is reflected in the different capital requirements in each country. For example, the minimum capital for bearer share based companies is €50.000 in Germany. In Italy this is far more than double that amount, namely €120.000.

### 2.2.2 Limited Liability Company

The most commonly used form of incorporation in Europe is a limited liability company. *BV*, *GmbH*, *SRL* and such have been around for several decades. These entities are organized and taxed as corporations. Owners are usually treated as shareholders, even in Germany and Austria where they are officially called partners.

Capital requirements here differ greatly as well, for instance €10,000 in Italy, €25,000 in Germany and €35,000 in Austria. To compete with foreign "Limiteds" that establish branch offices on the German market and which are hard to call on when it comes to enforcement, Germany offers a new "*Unternehmergesellschaft"* with limited liability for which a capital of €1 is required.

In the US the limited liability company, or LLC, is relatively new. The main difference with its European namesakes is that an LLC is in name a corporation but for tax purposes is treated as a partnership. As a result, more than one person must be an owner for an LLC to be effective. LLCs are popular with foreign investors because they offer tax benefits that were previously only available to American income tax payers, namely shareholders of "S-Corporations" that met certain requirements. Although LLCs provide tax benefits the actual advantage is sometimes hard to compare. States such as California tax LLCs at rates and brackets that are different from those of regular corporations and from personal tax. They may also charge an additional franchise tax. Determining the benefits of an LLC over a regular corporation requires the insights of an accountant or tax attorney.

When establishing an LLC states usually impose additional publication requirements. The incorporation must be advertised in a local weekly magazine or daily newspaper. In many cases the county clerk decides in which periodical the publication is to be made. Non-compliance can be construed as not meeting the formalities, which technically means that the LLC is void. In some areas local newspapers thrive on this type of captive business and charge publication rates of a few thousand dollars. It can be worthwhile to establish the LLC in another county that is covered by different publishers or where the clerk is willing to assign a different periodical for publication.

### 2.2.3 European Corporation

The European Union wishes to facilitate corporations that conduct business in all or a substantial number of its member states. The European Corporation, or *Societas Europaea* (SE), is a public company that can be registered in the trade register of the EU member state in which it has its head office. The registration must be published in the Official Journal of the European Union. The main advantage of an SE is that it makes it is easy to comply with the legal and other requirements of each individual member state where it does business. SE's can be transferred to another member state, although elaborate formalities are involved.

An SE must have a minimum capital of €120.000. It must either hold an annual shareholders' meeting and maintain an administrative board, or have both a management board and a supervisory board. In the latter, two-tier, system the supervisory board appoints members of the management board. Serving in both boards is not permitted.

### 2.2.4 Partnerships, Foundations and Trusts

Aside from various types of corporations, business can also be organized as a sole proprietorship, partnership, foundations or even trust. On both sides of the Atlantic several types of partnerships exist that each in their own way do or do not limit the liability of the partners. No matter how they are organized – e.g. as a professional corporation, limited partnership, limited liability partnership or even as limited liability limited partnership – their distinctions usually find their basis in domestic tax laws, supplemented with elements of domestic corporation or business law. Knowledge of the applicable tax rules is advised before entering into a partnership arrangement.

European countries allow for a legal entity in the form of a "foundation". National laws governing foundations differ greatly, but the common ground seems to be that they can either be charitable or serve a private interest. Similarly, "associations" can also exist as legal entities. Foundations, and usually associations as well, can be compared to American not-for-profit corporations.

Trusts are Anglo-Saxon phenomena that are not commonly understood in Europe. Europeans often compare foundations with American trusts. However, a trust is not a legal entity but rather a contract involving (but not necessarily between) three or more parties: a grantor, a trustee, and beneficiaries. If one is lacking, the trust – the contract – does not exist. Trustees act as individuals, and transferring trust funds from one trustee to another involves complicated paperwork to avoid either the new or the old trustee being subjected to personal taxation for the value and the proceeds of the trust funds. The use of trusts is generally limited to estate planning, although REITS, or real estate investment trusts, are derived from the trust concept.

## 2.3 Shareholders

Shareholders' rights are governed by national or state law. Differences between America and Europe include the existence of classes of shares, voting rights and voting agreements, the right of information, and certain economic rights. The distinctions are too technical to address in this book.

> In Europe, common wisdom has it that in the US shareholders prevail over creditors in case of bankruptcy. If this were true, thousands of bankruptcies would take place on a daily basis, most certainly right after a company completed a major investment. As will be seen in Section 8.1, in a "Chapter 7" liquidation procedure assets are sold to pay off the creditors. A "Chapter 11" reorganization procedure, comparable to "*surséance*" or default in Europe – where payments to creditors are postponed or partly settled – the survival of the company, and therewith only indirectly the interest of the shareholders, prevails just as in Europe.

Shareholder meetings are held on a regular, at least annual basis. Shareholders may appoint others to represent them. In Europe powers of attorney are typically used. Proxies are limited powers of attorney authorizing someone to represent a shareholder for the specific and often sole purpose of casting a vote in a particular shareholders' meeting. Proxies can give voting instructions. They are commonly used in the US. In France proxies are also known but with one notable distinction: shareholders can only send "*mandats en blanc*", or blank proxies, giving the Board of Directors full discretion. Not surprisingly, French proxy votes usually support the Board's proposals.

In the US, if a company does not pursue certain legal action a shareholder may bring an action on behalf of the corporation. Prerequisites are that the shareholder is a shareholder at the time of bringing the action as well as at the time of the transaction about which he complains, and that he sought redress from the Board of Directors or other competent body. The latter is not necessary if seeking such redress would lead to no result. The shareholder files the suit at his own expense but any court award is for the benefit of the company.

## 2.4 Directors and Officers

Corporations usually have a Board of Directors that oversees the business' officers. Both in Europe and in the US, rules pertaining to Boards of Directors are governed by national or state law. Competencies of the Board are therefore different in each country or state. The major distinction for the purpose of this book is that in the US, directors of a company can also be officers or employees of that company. Even a majority shareholder can be a Director as well as an officer of the company. In effect, it is quite common that the Chief Executive Officer is also a member of the Board of Directors.

This is not the case in most of Europe. In Germany shareholders and labor unions occupy one or a few seats in the Board, but there the Board has been divided in two separate bodies: the *Aufsichtsrat* and the *Vorstand*. Employee and shareholder representatives are seated in the first, independent third party members in the latter. Elsewhere in Europe officers and directors are separated to an even larger degree. Management Boards or Management Teams do exist, but they only have an executive function and are not to be confused with Boards of Directors.

In the US a Board can act independently from the shareholders. State law prescribes the duties of the Directors, but the Articles of Incorporation or the By-Laws of a company may either add a few duties or transfer some to the shareholders. In Europe on the other hand, the Board needs permission of the shareholders for a large number of decisions. Whereas American Board members enjoy a rather solid position, their European counterparts can often be fired by a simple majority shareholder vote.

Americans who combine these functions are aware of the pitfalls and often consult attorneys before making important decisions, or decisions that can have far-reaching effects on the continuity of the company. When wearing multiple hats it is crucial to realize which function is being exercised at what moment. Directors have a fiduciary duty, one of loyalty and care, towards the corporation and towards the shareholders. They may rely on the data provided by officers or third parties – e.g. accountants, who are usually hired by officers – as long as they are in good faith in doing so.

But if Directors rely on their own information, or opinions provided by third parties they themselves hired and perhaps instructed, albeit in a different capacity, there may be a conflict. Wearing the hat of an officer they have a different legal duty or obligation. It may often seem a mere formality, but theoretically an officer who makes a quick business or "executive decision" (for which she has to report to the Board of Directors) has a different responsibility than when she makes a decision as a Director (which she has to justify to the shareholders), even if she is the same person. Formally, decisions taken by the wrong corporate body can also be void or nullified. In extreme cases, if ever a lawsuit ensues from the decision, the person may have opened herself to a personal liability.

## 2.5 Piercing the Corporate Veil

Under the American doctrine of "piercing the corporate veil" a majority shareholder of a closely held company can be held liable for the corporate acts of the company, if he uses his control of the company for his private purpose. To pierce the corporate veil, usually in order to claim payment for the debts of a subsidiary, that subsidiary must be dominated by the shareholder or parent company, without a will of its own. Standards to determine domination include financial flows within the organization and whether related individuals are Directors or Officers of several related companies. To prove this requires insight in the workings of the organization. That means that showing proof is generally very hard, especially when LLPs or LLCs, which limit a shareholders' or partners' liability, are involved.

Courts can also pierce the corporate veil in case incorporation requirements are not met, such as the publication requirement of an LLC. Other reasons are when corporate funds are commingled, or mixed, with private funds, and when a company is undercapitalized or lacks the funding to operate as a viable enterprise.

Similar to piercing the corporate veil, the largest shareholders of privately held companies in the US can be held liable for unpaid wages, insurance and welfare benefits of an employee who was wrongly fired. Foreign parent companies can also be held liable for acts of their American subsidiary in its capacity as an employer. Issues that come to mind are employment discrimination and non-payment of taxes. Here, too, the court looks at who makes the business decisions.

In Europe the principle of piercing the corporate veil does not exist as such. However, several countries have enacted provisions that protect debtors. For instance in Germany and the Netherlands, the CEO of a limited liability company can be held personally liable in case of insolvency if he does not strictly follow the proper procedures. In Germany parent companies can be held liable for debts of a subsidiary, and if a parent company requires a subsidiary to transfer its profits to the general group of companies it is a part of – which is often done for tax purposes – that parent company is also liable for any losses of that subsidiary.

## 2.6 Agents

A company that doesn't wish to establish its own organization abroad can serve a foreign market through local distributors or agents. Simplified, a distributor acts as a sales person for a product, whereas an agent is a representative of the company that sells the product.

The pro's and cons of dealing with local third parties differ per country, per organization and per product group.

### 2.6.1 The Vast American Market

European businesses seeking to conduct business in the USA often want to "cut out the middleman". However, America is the ultimate middlemen country. The vastness of the US market is often underestimated. Indeed some individual American buyers are bigger than the entire market of large European countries. A company that works with importers or distributors in each European country cannot possibly do it alone in the US. Even American companies don't – or if they do they operate with regional offices or hubs, in effect establishing their in-house middleman close to where the market is.

The American territory is vast. To give an inkling, travelling from Denmark to northern Italy involves crossing four countries with about five different languages spoken, plus more than double of that in different cultures. The same distance barely covers the trip from New York to Chicago. The middlemen have already been cut: the American area is probably covered by two or three agents rather than five or more for a comparable market size in Europe.

### 2.6.2 The Various European Markets

The other way around, US businesses new to transatlantic business often seem to prefer a start in Great Britain – the United Kingdom, if you will – and from there on conquer the continental markets. Bluntly stated in a similar manner: even British companies don't do this. The British legal and business culture differs too much from the continental cultures to achieve this (even this book does not address British issues).

European countries may be small but their markets are between the smaller and the big American states in size. Each country imposes different requirements, but more and more are governed by Directives of the European Union. While not 100% uniform, these Directives provide steady and sometimes even clear rules that can be followed throughout the member states of the European Union. Even non-members sometimes borrow from the Directives, to facilitate trade and business.

But European countries remain culturally distinct, languages differ, decision models are very diverse and sometimes very unfamiliar to American businesspeople. Even from a marketing and sales perspective working with local partners may be beneficial.

### 2.6.3 Agency Relationship

Other than in the European Union, where this is prohibited, American agency contracts often include territorial boundaries and exclusivity clauses. Although territorial boundaries are in principle allowed there are restrictions to these limits. Some states allow agents to actively solicit sales in another territory. This, then, is not allowed in Europe.

There are many differences between state agency laws in the US, yet agencies are important to successfully cover the American market. Agency contracts should be drafted by a specialized attorney. The same could be said of Europe, although there the use of ICC model contracts is common.

Describing the competencies of the agent is important can serve as proof or even determines whether or not the agent can legally bind his principal. In the US contracts cannot easily bind a third party. The relationship between the agent and his principal and the way it is conveyed to the outside world is therefore important to determine whether an agent has the authority to contractually bind the principal. This area of the law is known for its many pitfalls.

In Europe an agent can usually legally bind his principal. Agency contracts can limit the extent of binding actions but these contracts govern conduct between the parties to the contract; they can not be held against a third party in good faith.

A principal in Europe can agree to different contractual conditions with different agents. Differences per country seem almost natural. But even within a country the arrangements do not have to be equal, or even similar.

In the US, on the other hand, comparable agents should be offered more or less the same, even if they are based in opposite corners of the country. American agency contracts are subject to anti-competition law. This is not a matter of consumer protection but rather to protect the agent. An agent who is put in a disadvantageous position compared to other agents is entitled to damages. Actually, treble damages: three times the actual damage that he suffered. This means that e.g. non-compete clauses are allowed, unless they are more restrictive to that particular agent than they would be for other agents. In other words, favoring one agent above another is against the law, regardless of how it affects consumers.

# 3 Contracts

A business relationship between European and American parties will likely be embodied in a contract. That contract forms the basis of the cooperation, trade, sale and what not. "What not" is perhaps the proper term, as the interpretation of what constitutes a contract, which acts are covered or excluded, and what to do if a contract is breached differs on both sides of the Atlantic.

Initiatives such as the Principles of European Contract Law and the Common Frame of Reference are efforts to more or less harmonize contract law in European countries. The rules are nonetheless fragmented and do not govern contracts across the board.

The situation in the USA is similar. Even provisions of the "Uniform" Contract Code, or UCC, are interpreted differently in each state. Moreover, the UCC only applies to the sale of goods. Services contracts are not subject to the UCC. And in international transactions, if the parties are not careful, the UN Convention on Contracts for the International Sale of Goods (CISG, or the Vienna Sales Convention) most likely governs. Since American businesses are more familiar with American law they often explicitly stipulate to exclude the Vienna Sales Convention. Merely stating that the law of a particular American state applies is not enough, as that law may very well stipulate that the UCSG is valid.

In such a chaotic landscape, where each law imposes its own requirements and invokes its own case law, contracts must be lengthy. To create at least a minimum amount of certainty and avoid disputes over the very basics, a short contract is risky. In Europe, on the other hand, statutes regulate most clauses that are standard in an American contract. European contracts therefore don't need to be too detailed. Indeed, many European businessmen will say that a short contract is a good contract. Where they are longer, e.g. in Poland, it has more to do with the particulars of language and grammar than with anticipating future legal issues.

Other major differences between the US and Europe include offer and acceptance, a typical American concept called "consideration", delivery, and damages in case of what Americans call breach of contract and Europeans often consider a default of a contractual obligation. These will be discussed below.

## 3.1 Contract formation

Most businesses have procedures in place which they follow when making an offer, as well as when accepting offers. Everything between offer and acceptance are negotiations. Once the offer has been accepted, there is a contract.

Whatever the procedure may be, it is based on locally applicable law. For unique or large transactions parties, such as a takeover of a company, it seems almost obvious that parties look into the details of any law that may apply. But for day-to-day transactions sales departments operate without really realizing that the procedure is based on sometimes minute legal requirements.

In short, the procedure in another country can be quite different. This has among others as result that parties do not always realize at what exact moment an offer was accepted or if a counteroffer has been made.

In Europe, consent seems to be the binding element: a contract enters into force between the parties at the very moment that consent has been achieved. What exactly this consent entails can be interpreted either more or less stringently. For instance, in the Netherlands the courts will look at what the parties reasonably intended to agree upon, whereas in Poland the courts interpret the wordings of a contract more literally. But these countries have one thing in common: whatever the interpretation may be, it is applied the same in the entire country.

In the US, too, there must be a "meeting of the minds". However, either meeting or minds aren't always that simple. Under the UCC a contract exists where it appears that the parties intended to form a contract. But the UCC applies only to the sale of goods (most goods, that is), and often not in international transactions. If the UCC does not apply, three basic elements must be fulfilled before there is consent: there must be an offer, acceptance, and consideration. If common law applies, essential terms such as the quantity of goods must also be included.

### 3.1.1 Offer and Acceptance

Offer and acceptance, and therefore the moment of entering into a contract, are subject to interpretation. The actual making of the offer is formulated differently in each country, as is the acceptance.

In most European countries an offer is a proposal to enter into a contract. Offers that are made to the general public are treated as offers if they show an intent to be legally bound. Offers that are made to merchants, meaning among businesses, can be subject to different rules. But in either case, if the offer was sufficiently definite and showed intent to be bound if it were accepted, its acceptance creates a contract.

In the US, the ultimate shipment by the seller is the moment of acceptance. Coincidentally, this is also the moment that the risk of loss shifts from the seller to the buyer. Accepting an offer with a request that is even a slight change to the conditions as they were initially offered is considered to be a counteroffer. The result is that whereas in Europe publication of catalogues, brochures and web sites can be construed as offers, in the US these are merely invitations to negotiate. Negotiations then are a salvo of counteroffers by each party. When a client places an order, this constitutes an offer to accept the invitation, even if he provides payment information.

This, of course, explains why purchasing departments in other countries maintain different procedures and why sometimes Europeans insist on prompt action whereas the American party insists that this is not possible at this point: due to differences of minor details – in the eyes of a merchant at least – a contract has simply not been established yet. Or sometimes it has, but the other party doesn't realize it, from the perspective of their own benchmark law.

### 3.1.2 Consideration

Consideration is an American legal concept that Europeans, even lawyers, are not familiar with. When hearing the term their immediate connotation is either a well-contemplated reflection, or an obligation to consider the interest of both parties. However, in American legal parlance the term "consideration" means that both parties have to give something in exchange in order for a contract to be binding. Officially, both parties must give up something tangible, and that giving up must be "to their detriment", meaning that that something is valuable to themselves. Consideration must be tangible – it can not be a discount, no matter how valuable in real life, because you can't hold a discount in your hand. It must be sufficient but it doesn't have to be adequate: it may be worthless to a third person, as long as it has value to the person who surrenders it. In that perspective, consideration can be anything, even a penny or a paperclip, and it doesn't have to be related to the contract itself. But it may not be omitted. It may well be the most useless thing ever in existence, but it certainly does determine the course of a contract.

Consideration plays a role during negotiations and continues to do so after a contract has been signed. An offer may be revoked any time before it is accepted, unless consideration has been given. Hold that paperclip! Modification of a contract and even confirmation of a pre-existing duty requires additional consideration.

There are exceptions. If it is a contract for selling goods between merchants, and if the UCC applies, consideration is not always needed. Sometimes still, but not always.

Nonetheless, the American legal culture is so engrained with the notion, and law students are so happy when they realize that they have finally mastered the concept, that whenever the validity or enforcement of a contract is at issue lawyers automatically look at whether consideration has been given. It can also be explained by the fact that consideration in itself provides evidence of a party's intent to be bound, even under the UCC.

A side effect of the consideration requirement is that one cannot contract for the benefit of a third party, since that third party does not have the opportunity to give up something in exchange. Thus, unless perhaps the UCC applies, a parent company can not contract on behalf of a subsidiary. The subsidiary itself should be a party to the agreement. There are exceptions and ways to circumvent this, but typically a third beneficiary party must be made aware of his advantage, which may trigger other legal issues.

### 3.1.3 Oral Commercial Contracts

Sam Goldwyn of MGM is credited with saying that "an oral contract is not worth the paper it is written on". He may have been wrong. The second that parties act in accordance with an oral agreement it is just as good as being written in stone, or broadcast on the silver screen for that matter. But there is a big chance that disputes about the details of such a contract arise.

Oral contracts are made on a daily basis. In Europe oral contracts can usually be enforced. Evidence of the existence of a contract can be given in any form, including through a witness's statement or by conduct of the parties.

In the US there is a concept called the "Statute of Frauds". In modern English this has nothing to do with "fraud" in a criminal sense, and not much with a "statute", or written law, either. Under the Statute of Frauds certain contracts must be in writing, and signed, in order to be enforceable. For the purpose of doing business these include any contract that can not be performed within one year, contracts for interest in land, and most types of guarantees. The Statute of Frauds does not apply to service contracts shorter than one year. For sales of goods to consumers it also applies to contracts for a value of $500 or more. This requirement also holds true for commercial sales of goods, but exceptions apply to for sales among merchants. The most notable exceptions are sales of specially manufactured goods, after a substantial beginning has been made, and sales for which any sort of performance has been made in more than one part.

A contract that is not within the Statute of Frauds is in principle valid but on shaky grounds: it can not be enforced. From a European perspective each party has an easy way out. That may not always be the case: the contract can still be enforced if one of the parties detrimentally relied upon the contract.

The latter sort of provides a double anchor for the exceptions among merchants (specially manufactured goods, substantial beginning, substantial performance), for these actions all seem to show reliance and are all detrimental to the party who has acted.

### 3.1.4 Contracts for Goods or Services

In the US a crucial distinction is made between contracts for the sale of goods and contracts for the sale of services. Contracts for the sale of goods are usually subject to the UCC, whereas contracts for the sale of services are not. If the product is a mix of both, it depends on whether it pertains to a good that also has a services element, or to a service that also has an element of a good being sold. If the contract is not clear on this matter, the court may decide.

Because the law treats contracts for the sale of goods differently than contracts for the sale of services, clauses in these contracts do not use the same language or terms, even if they govern the same issue. And because different laws apply, the outcome of any dispute can also be different.

Contracts to sell electronic services such as computer software may allow a seller to organize data in a buyer's computer, limit the use of the service, require updates, and perform other intrusive acts. If it were a contract for the sale of goods some of these actions would be construed as a breach of contract, or otherwise the tortuous act of trespass to chattel (chattel in such case being the buyer's computer).

Often a buyer believes he has purchased a good, whereas all he got was a license. Whether buying access to specialized computer software or just an electronic version of a song, as long as the buyer is able to work with the program from the computer on which the software or data is installed he often does not realize that his reasonable expectation of ownership is trumped by a unilateral services agreement.

### 3.1.5 Signing a Contract

Signing a contract in the USA can be a shocking experience for European businesspeople. Whenever several parties are involved, it is common procedure that only the signature page gets passed or sent around. The signature page(s) will be attached to the contract after all signatures have been collected. This is more effective than sending around a 100-page document to various parties.

In Europe the signature page is an integral and inseparable part of the document just like any other page. Moreover, in several countries contracts must be initialed, or "paraphed", by the parties on each page.

In the US people initial documents with their actual initials. Two letters suffice. In Europe a "paraph" is a shorter version of a signature. Sometimes simply paraphing is not sufficient. E.g. in Belgium parties to certain contracts must add a sentence confirming that they have read and approved or understood the content of the page, in handwriting above their paraph. European contracts being substantially shorter than their American stepbrothers, this procedure is usually as time-consuming as it would be if it were applied in the US.

## 3.2 Delivery

Determining the exact moment of the delivery of goods or services has legal implications, including transfer of ownership and the risk of loss. The major difference between Europe and the US here is the use of Terms of Delivery and of Acceptance, sometimes called Terms and Conditions or Standard Terms.

In Europe Terms of Delivery are standard terms of a company that apply equally to each buyer. In many countries they are deposited with public Trade Registers maintained by the Chamber of Commerce or the local court. Countries often also require that the terms are made known to the buyer at a given stage prior to the order or conclusion of a contract. A hodgepodge of rules exists. In some countries referring to the terms or reproducing certain clauses in the offer suffices. Elsewhere providing a summary on the back of the offer, invoice or other communication is required. A buyer may even be required to return the papers signed for approval. National rules governing the actual content of the terms differ to the same great extent.

In the US such standard terms do not exist, and therefore neither the depositing with public registers. Using standard terms is nonetheless important, and not just for an efficient sales or purchasing organization. For instance, other than in Europe, in the US a seller may not charge interest, collection costs or legal fees over late payments if this is not specifically allowed by either the contract or delivery terms.

As a result, each sales offer refers to the specific terms that the seller wishes to implement. Although streamlined, these conditions can be different per product group, type of customer or even amended per contract. The terms are usually sent along with the rate quote or offer, and are attached to the contract so that it forms part of it. As these terms are a legal document, just like the contract itself, they are lengthy, and the buyer usually must return either a signed copy or a statement that he has received and read the document.

Buyers usually also maintain Terms of Acceptance. When the Terms of Delivery are not properly conveyed, or where they do not control a certain subject, these Terms of Acceptance apply. When the applicable Terms of both parties conflict, complex rules decide which one governs the transaction. This process is known as the "battle of the forms". No attorney can assure winning this battle, at least not in a commercially viable way. The only way to be sure which terms govern is to avoid conflicting terms. This means negotiating all terms that are deemed important before the sale is closed and to include them in a signed writing.

## 3.3 Commitment to Contracts

The commitment to fulfill contractual obligations on either side of the Atlantic is worlds apart. A complaint many American businesses have with European contract partners is that, in the American eye, once an agreement has been inked there is no room for flexibility or interpretation. Yet Europeans are often surprised that American parties can seemingly put a contract aside without blinking an eye.

In the European mindset, following the letter or at least the spirit of a contract is sacred. The purpose is to achieve the goals that are set forth in the document. Changes require renegotiation. If a contract is easily abandoned, what good does it do going through the efforts of negotiating and drafting a contract in the first place. In short, as with the law, the written instrument guides the relationship. Breaching one contract often adversely affects all other relationships that the parties have with each other. Breaching a contract is considered a default, the breacher an unreliable business partner.

This notion is engrained in the European cultures to the extent that it will remain forever. Case in point are the Principles of European Contract Law, which consider non-performance of a contract a failure to perform, whatever the cause. Thus, even after true harmonization of EU contract law has eventually been achieved, specific performance will remain the primary remedy.

In American business even more than in Europe, a contract is not the purpose; the intended outcome is. Just like American law, American contracts can be interpreted, changed, and sometimes even be set aside. If other means can lead to the same outcome, parties should be able to pursue that channel. If the outcome is no longer desired, parties should be able to part. This does not affect their business relationship and can be done amicably.

### 3.3.1 Breach of Contract

A problem that European businesses are often not prepared for when dealing with US contracts is that a contract can more easily be breached than in Europe, and that the standard remedy is damages. Specific performance is the exception to the rule in America. If a dispute arises about a breach, the breach itself is not so much a point of legal discussion. Appropriate remedies are. In otherwise "freedom to contract" America, damages may only be contractually limited in clear and unambiguous terms.

Worse, from a European perspective, remedies are not viewed from a perspective of enforcing the contract, but from an equitable point of view. Equitable means money, or more pointedly: the financial interests that are at stake. Although damages are considered the type of relief that is best and most easily obtained, negotiations to establish "equitable", or monetary, damages aren't always smooth. Classes to learn how to calculate which remedies take almost a full semester in law school, and negotiating them has become a complicated and therefore lucrative part of American contracts practice.

There are safeguards in place to ensure that contractual terms will not be laid aside at random, but these are enforced through the courts rather than through statutes, and they include misty terms such as "good faith". It doesn't help that American courts do not rule uniformly across state lines, or that even federal courts in one district are not necessarily bound by rulings of a higher federal court in another district.

In European contracts law on the other hand specific performance is the standard. Non-performance is not considered a breach, but a default on a duty. Europeans will do anything to defend the terms of a contract, sometimes even out of principle. They may not want to be considered unreliable, or wish to warn other businesses about the low business morals of the breacher-opponent.

If it comes to remedies these are not damages in the American sense of the word, but rather a reimbursement of the harm that has been caused and that would have been avoided if the breaching party had not defaulted on his duties. The party that is wrong has to compensate the party that is right.

This compensation can be determined by contract, or by the court. "Going to court" in European conventional wisdom means that the outcome is a penalty – even if there is no criminal law involved. A business that often finds itself in court as a defendant is quickly regarded as serially and therefore structurally unreliable; a business that often files or even threats with a law suit is perceived as aggressive, cutthroat and disrespectful of its business partners or customer base.

To Americans the European practice of sticking to a contract appears inflexible. That is a misperception. Mutual consent is often all that is needed to cancel a contract. That means that parties can certainly agree to amend the contract, or even set it aside, and settle each other's harm. It just requires a bit of explanation or justification. A company that is cutthroat European style may refuse, referring to the contract. But usually a few telephone conferences or politely phrased emails and some extra meetings are sufficient to achieve the change and remain on speaking terms. The only reason it may take a little longer is that, at least in northern European and more modern southern European business structures, more people are involved in the decision process.

### 3.3.2 Buyer's Remedies

In the US the remedies that are available to a buyer and to a seller are slightly different. If the seller breaches a contract it is in principle the buyer who has to take action and resolve the problem that he incurs, even if it stemming from the seller's breach. He must first look for an alternative solution, called "cover". Only after he has found cover can he seek damages from the seller. The logic here is that the breacher already caused enough harm, and he should not impose a solution of his choice to the duped party. Moreover, the actual amount of damages is not known before a final solution has been found.

If the buyer does not succeed in finding cover he is entitled to damages, which is in principle recovery of the contract price in as far as it has been paid already. He must deduct any expenses he has saved by the breach. If the breach takes place on acceptance, e.g. if the wrong product has been delivered, the damages are the difference of the value of the goods that were received and the value that was warranted. What the buyer further does with the faulty products is his problem, not a problem for the law or the seller. Unless the contract or his Terms of Acceptance include a clause to the opposite, he bears the burden and expenses.

The buyer can also claim incidental or consequential damages. The seller should preferably sign release form for any future payments.

In Europe a claim for damages is often a remedy of last resort. The list of remedies that are available to the buyer usually starts with performance. The buyer may require the seller to cure the default, which means demanding that he either delivers or comes up with a different but acceptable solution. It is the defaulting seller, not the victim buyer, who has to come up with a solution for the problem that he caused. If all of that is not possible the buyer may remedy the breach himself, at the expense of the seller.

As a consequence of the notion that the breaching party is at default, the duped party enjoys additional remedies, namely those of a creditor.

### 3.3.3 Seller's Remedies

In the US, if a buyer breaches a contract, the seller has a choice of remedies. She can stop the production of additional goods. She can also stop ready products that are in transit from being delivered, or demand assurances that the buyer accepts goods that aren't delivered yet. Alternatively, she can resell them to third parties. In any event the seller can retain the down-payment. Here, too, the duped party can claim incidental damages, but must deduct expenses she has saved as a consequence of the breach. Unless the contract or her Terms of Delivery include a clause to the opposite, she may not charge for collection costs, interest for late payment, attorney fees and the alike.

In Europe, where actual performance is the standard, a seller's remedies broadly speaking do not differ that much from the remedies that are available to a buyer: require the other party to either cure the default or provide a different but acceptable solution. She can also request an assurance for the performance or repudiate the contract for future deliveries.

Here, too, following the notion that a breaching party is at default, the duped party enjoys the remedies of a creditor. In addition, the EU Late Payment Directive may apply.

### 3.3.4 Consequential and Incidental Damages

The previous sections mentioned incidental and consequential damages stemming from breach of contract in the US. Incidental damages are additional costs that are related to the actual damages. For a seller these include e.g. reasonable expenses incurred in stopping delivery. For a buyer they are e.g. reasonable expenses incurred for caring for the seller's goods, such as warehousing.

Consequential damages are indirect damages or losses that result from the other party's breach. They include loss of profit if it was reasonably foreseeable that these would be made. They also include anything that one party can show were his expectations, if that party indicated these expectations earlier and if those expectations did not materialize because of the breach by the other party.

### 3.3.5 Liquidated Damages or Penalty Clauses

"Liquidated damages" is the American term for fixed amounts that are established at the time of concluding the contract and are due when a contract is breached. They can also be a fixed formula to determine the exact amount.

American courts do not easily approve of liquidated damages. In practice they are limited to situations where actual damages are very hard to establish.

In Europe, where specific performance is the norm, contractual penalty clauses are usually allowed. Historically, Napoleonic law considered these clauses as a stimulus to enforce contracts. Efforts by the Council of Europe (not to be confused with the EU) in the early 1970s to harmonize penalties and liquidated damages have and at the same time have not succeeded. Now, about 40 years later, most European countries distinguish between liquidated damages and penalties. The extent of what is allowed, however, greatly differs per country.

Penalty clauses are still used to encourage performance of a contract. In case of full non-performance proof of any real damage is not required. With the exception of Spain, in most countries allow for penalties to be reduced if the court deems them excessive, and if some other conditions have been met – e.g. part of the contract has been performed. The uniformity fails where it concerns rather important nuances. The terminology in different countries ranges from the excessiveness having to be "manifestly excessive", to "disproportionate", to "unreasonable", to plain "excessive". In Belgium the amount may not "obviously" exceed the actual damage. Different additional rules are in place when a contract has been partially performed. In Sweden the court will also take into account whether a party is in a disadvantageous bargaining position.

The Council of Europe at the time also introduced liquidated damages, to allow for estimated damages in case of non-performance. In this view liquidated damages recognize that actual harm has been done. Similar to penalty clauses, most countries allow for a reduction of liquidated damages if the court considers them to a greater or lesser extent excessive. In France liquidated damages can also be adjusted if the court deems them "ridiculously low".

# 4 Torts and Liability

"Torts" in the US is what in Europe is taught under the various interpretations of "wrongful acts". The latter finds its roots in Roman law, which was applied in much of Europe from the 9th through the 18th century, in Germany even well into the 19th century. The concept is therefore deeply embedded in local cultures. English law, and therefore US law, is far less influenced by Roman law.

Torts and wrongful acts laws aim to protect a person against bodily injury and damages. These damages can be inflicted to property, financial resources, or reputation. They are usually compensated in a way that the person is restored to the situation in which she was before the tortuous act was committed.

## 4.1 Torts or Wrongful Acts

Liability for tortuous acts is a major cause of concern for businesses in the US and Europe alike. Liability for other actions exist, such as for administrative or criminal wrongdoing, but torts or wrongful acts can occur in daily interactions with or even among third parties. It is also the discipline of law where most surprises are found when it comes to the outcome of a legal case. The US remains unique in both the unpredictability and severity of money damages. Often, juries are involved in the outcome. Legal fees and the aggregation of similar cases in large class action lawsuits make torts law a fearsome concept that is the least understood by foreign businesses.

> Yet, compared to Europe, the basic principles of American torts are relatively simple. The foundation of torts in is almost the same in every state: negligence. And in almost every state, the elements of negligence are duty, breach, causation and harm. Some nuances and state distinctions exist, due to the fact that there is no open norm other than that negligence is required. Duties can be different, and sometimes more or less harm is required. Causation can broadly be compared to the European *conditio sine qua non*.
>
> In Europe the situation immensely differs per country. For instance, like the US, German law does not have an open norm. But it is codified. The most important statute dealing with "*unerlaubte Handlung*" protects possessions (including claims, disadvantages stemming from unfair competition and such) only if personal "property" such as life, body, health, freedom, or any other right is violated. In the Netherlands, under its definition of "*onrechtmatige daad*", these possessions are always protected. As a consequence German law includes a specific unfair competition statute dealing with these possessions *sec*, whereas in the Netherlands there is no need for a special act. France has resolved the issue via case law, which has ruled that the "*responsabilité délictuelle*" applies to immaterial loss as well as to property loss. Other solutions include the creative use of law, for instance by combining torts with environmental laws or (pre-) contractual damages.

**The Hot Coffee Myth**

Americans and Europeans alike all "know" the case of the American woman who sued McDonalds because she spilled coffee whilst she was driving, and severely burnt herself. Apparently, she won millions. Based on what they have heard about the case, Europeans believe that instead of receiving damages her driving license should have been taken away for the mere fact that she was drinking a beverage whilst driving. Europeans don't appreciate the notion of cup holders in cars in the first place. But driving is exactly what the woman did not do. Indeed the woman, Stella, bought coffee at a McDonalds. But the rest of the story is totally different from lore and anecdotal evidence. It was her nephew, Chris, who was driving the car. And because Stella wanted to add sugar and milk to her coffee, Chris had actually stopped the car. That is when Stella spilled the coffee: when she was a passenger in a stationary car.

What became important was the temperature of the coffee. It was so hot that Stella suffered serious burns, not only to her legs but also to her genitals. As a result of the burns her skin had to be replaced. Because Stella's insurance didn't to pay for all of her medical expenses she asked McDonalds to pay the difference, plus lost wages. Her total claim was $20,000. McDonalds offered $800. Only then did Stella go to court. The jury awarded $200,000 for the injury but also held her partly at fault, for 20%. So, she got $160,000 for medical treatment, skin grafting and lost wages.

The multi-million dollar story that goes around concerns punitive damages. During the court proceedings one surprise followed another. It turned out that McDonalds deliberately served its coffee much hotter than anyone else would expect, and much higher than industry standards. At those high temperatures McDonalds could press more flavor out of ground coffee, and thus produce more coffee with fewer coffee beans. McDonalds had already received hundreds of complaints about skin burns, and its own legal department had warned against the practice. So, the jury awarded punitive damages for McDonald's irresponsible behavior. The initial sum was $2.7 million, equal to 2 days worth of McDonalds' coffee sales. McDonalds appealed and the amount was reduced to $480.000. To avoid longer court proceedings the parties settled. The exact amount of the settlement remains confidential, but is said to be below $600.000, including the $160.000 for medical treatment and lost income. These are amounts before tax.

All being said this is not a case in which an incompetent driver got millions for being stupid. In effect it became a product liability case against a company that was held to be knowingly and willingly selling a defective product.

## 4.2 Liability

Unlike in Europe, where social insurance plans take care of a victim's current and future medical expenses, in the USA those expenses can not or not easily be recovered from a social safety net. Health insurance being terribly expensive, famously ill-covering doctor networks and even treatment, many people choose not to be fully insured. As a result the courts can provide a victim with a chance to recover damages, lost earnings, and other expenses. Often a jury is involved, presumably to give the procedure an element of local mores but in practice leading to an unpredictable shower of different rulings.

### 4.2.1 Strict Liability

Aside from liability for negligence Americans are familiar with the concept of strict liability. This means that a tortuous act is presumed, or that some of the elements of negligence do not have to be shown. The fact that the plaintiff himself has been careless is not a defense.

Strict liability applies to several types of activities. For the purpose of doing business these include activities related to explosions, chemical, toxic and radioactive materials, and ultra-hazardous activities with a risk of severe harm. Additional conditions apply.

A second category concerns animals, and includes trespass of cattle. To European ears this sounds funny: one imagines the occasional escaped calf rummaging through a tulip field. In the American West, however, roaming herds of a few hundred cows are not uncommon even in this day and age. The damage they can cause can be substantial.

European businesses are mainly confronted with strict liability when dealing with employees or agents, ultra-hazardous activities, and specific acts that are described in domestic statutes. For instance in Germany, wrongful acts include liability for breach of statutory or regulatory provisions that are designed to protect other persons, e.g. for product safety or medical devices. These can be classified as strict liability in that there is a breach of a statutory duty. But because they are based on specific statutes the outcome is not always the same. The Drug Act differs slightly from the Product Liability Act, and therefore the liability outcome is different as well. More importantly, German legislation does not accept – as a matter of principle – any compensation for non-material damages without proof of negligence. Since strict liability does not require a showing of negligence these damages are not necessarily available.

### 4.2.2 Product Liability

It is alleged that US manufacturers spend $1 on each $70 in sales on litigation, whereas in Europe this would be $1 for each $7,000. Culprit: product liability.

Product liability exists on either side of the ocean. However, the workings on both continents differ greatly. In most American states a manufacturer is strictly liable for damages that result from a defect in the product that existed at the time that the manufacturer placed the product in the stream of commerce. A mere defect is not enough: there must be damage, and that damage must be to a person.

In short, someone must be hurt. Moreover, only a product that causes harm can be defective, but it can be defective even if it functions properly. A product that does not function properly but does not cause any harm is not defective: it can still be returned, under warranty, or exchanged.

There are of course additional details, such as that the product must have been used in a manner that was intended. Intended use includes foreseeable use. For instance a chair is intended to sit on but it is foreseeable that someone will use it as a stepping tool to reach into the highest shelf of a kitchen cabinet.

In Europe a defective product is defined differently. It is a product of which the safety is not of the kind that a person is generally entitled to expect, taking into account the product itself, its presentation, the expected use and the moment that it was put into circulation.

Two other major differences with the US are, first, that damage means death, personal injury, as well as loss or damage to any property; and second, that even if no harm is suffered there are minimum claim values below which no claim can be made.

Both in Europe and in the US three types of defects for strict product liability exist: manufacturing defects, design defects and failure to warn. Avoiding liability for a failure to warn has led to numerous labeling requirements in the US. Some are imposed by state laws, others by federal rules or specific regulations, but most by either state or federal courts. So many different rules and cases apply that by now nobody knows exactly where and why a warning is required, and excessive labeling has begun. To Europeans, who are trained to take responsibility for their own acts, not hide behind some disclaimer, these labels hardly make sense. Indeed some are well-intended but nonetheless confusing, and some are outright stupid (“remove cap before drinking”).

A manufacturer has several defenses against strict liability. Another major distinction between Europe and the US manifests here: the equitable focus. In the US a design will not be held defective if there is no alternative way to make the product – equitably. Even if an alternative exists, the marketed version only suffers from a design defect if that alternative is not only safer, but also practical and cost-effective. Practicality here does not mean user-friendliness, nor does cost-effectiveness refer to consumer pricing. Instead, they have the manufacturer in mind: whether it is practical and cost-effective to produce, store, transport, market, etcetera, the product to make those changes.

In Europe such a cost-benefit analysis will not be accepted by any court. Developmental risk, which has been included in the implementation of the relevant EU Directives of most member states, is a "state of the art" defense under which avoiding or not being able to detect a defect is outweighed by the overall interest of society, namely product innovation to benefit consumers in the long run.

But before concluding that a manufacturer is better off producing and selling his batch of defective goods in the US than in Europe, another concept should be borne in mind, namely that of a class action lawsuit (see Section 6.4). And of course punitive damages.

## 4.3 Punitive Damages

A court award for damages in torts or wrongful acts serves to restore the sufferer in his original state. Anything above the "original state" is usually considered unjust enrichment. In the US one notable exception exists, in the guise of punitive damages. These are monetary awards that are substantially higher than the value of the injury or damage.

In European lore, American courts grant punitive damages left, right and center almost every day of the year. But only the occasional excesses make headlines. These cases are usually appealed or settled in a later stage – but once a few zeros have been stripped off the amount, the award is less sensational and therefore apparently less newsworthy.

Anyone doing business with a clear conscience should perhaps be aware of, but not necessarily fear punitive damages. They are only available in cases where the defendant acted with malice or gross negligence. They are not a compensation for the claimant's injury or suffering. Instead they are meant to punish the offending party for its reckless or unconscionable behavior.

Punitive damages are in effect an element of criminal law in a civil lawsuit, but because they are not really within the realm of a crime, and the state is not a party to the case, the money is awarded to the person who suffered the injury.

Whereas the full award does not go to the state coffers, but it is subject to taxation, and by its mere size it will put the receiver in the highest tax brackets.

Punitive damages are not allowed as a remedy in contracts.

Punitive damages go against the public policy of European legal systems. European courts will never grant them, and they will not enforce foreign punitive damages awards, even if lawfully awarded by an American court.

# 5 Human Resources

Regardless which business a company is involved in, the hiring, managing and sometimes firing of employees is a substantial part of daily operations. The importance is also reflected in any country's legislation – to the extent that US states and EU member states alike refuse to relinquish authority to Federal legislation or EU harmonization.

When it comes to employment law no country is alike. Even in Europe, where generally speaking employee rights prevail, some countries are more vigorous in enforcing these rights than others. In the US a traditional distinction exists between states that are, or perhaps were, heavily industrialized, and those who are not. The first tend to be more union-friendly than the latter. New York and California are considered more progressive regardless of union pressure.

Distinctions galore. Yet there are a few subjects that are typical to the cultures of America, generally, and Europe, generally. These will be addressed in this chapter.

## 5.1 Written and Oral Contracts

European employment contracts are always in writing. In contrast to their American brethren European employees who do not have a written employment contract enjoy the strongest form of protection against being laid off. If there is no written agreement, there is no end date, and without an end date the employee is presumed to have been hired for an indefinite time.

In America, under common law at least, an employment contract must be in writing in order to be enforceable. But here we enter a niche of the law where states found clarity so important that they all have codified the relevant rules. There is not much room left for common law to apply. The rule in most states is that if there is no written agreement that stipulates otherwise, an employee is hired on an at will basis. "At will" means that either party can terminate the agreement at any time, without notice, for any reason. At his own will, so to speak.

As a result, in practice, labor union members or collective bargaining agreements aside, most employees do not have a written employment contract. If they have one, it is usually a disclaimer of some rights or entitlements – non-disclosure agreements, the rights to inventions made in the course of employment, etc – in the guise of a contract. Higher ranking staff and officers usually have agreements that stipulate benefits such as stock options, golden parachutes and the like. The employment element may not even be expressly mentioned in such contract, but it can be inferred from it.

Often, employee handbooks are interpreted as being a written employment contract. Employees have to sign off on the receipt. Handbooks and manuals in themselves, of course, are written for totally different purposes than to establish an employment relationship. The procedures they describe apply to anybody who works for the company, regardless of their employment status. So, in many cases different handbooks are issued to different categories of employees. Even the occasional independent contractor obtains a different version, or signs off on a different signature page, than someone who is hired as an employee, just to avoid that he can assert employment rights.

## 5.2 Employers' duties

When hiring employees, employers must fulfill certain duties. In the US, they must comply with federal as well as state labor law. Some rules overlap, some federal rules provide minimum conditions for which states may impose more stringent regulations, and sometimes federal law leaves gaps which are filled in by state law or vice versa.

In Europe employers must comply with national labor laws. EU member states have incorporated harmonized European rules in their national legislation. Rules pertaining to occupational health are very "European" but here, too, certain requirements remain country-specific. For instance, in Belgium language laws are part of working conditions law.

The main differences are discussed in this section.

### 5.2.1 Working hours

In the USA the federal work week standard is 40 hours, but in practice this is often considered part-time. What this standard mainly does is bring overtime into play. Overtime wages in the USA are calculated as "time and a half", or 1.5 times normal wages ("plus 50%" in European terminology). In some unionized work places it may be more, but those are exceptions.

For the rest, the implementation of the 40 hour standard varies widely. In California every minute after the 8th worked hour in a given day is subject to overtime pay. In New York overtime begins after the 40th worked hour in a given week. Consequently, New York employees may work four 10-hour days in a week and not be paid overtime, whereas in California this results in eight hours regular pay plus two hours of overtime for each of the four days. But Californians are required to take a 30 minute unpaid break (in additional to two 15-minute paid breaks), and in practice an actual working day is often 7½ hours.

In Europe the situation is even more muddled. Famously, the French work week is 35 hours, with limitations on overtime. To show that this is not a typical European phenomenon, the Swiss workweek is 45 hours in the services, industrial and retail industries and 50 hours elsewhere.

The differences are even more stark when you look at how the various hours are implemented. Notably overtime pay and resting time are subject to a maze of rules. In Austria the official workweek is 40 hours although most employees work 38 to 39 hours. Weekday overtime pay is plus 50% ("time and a half" in American parlance), on Sundays and holidays plus 100% (translated to American readers: "double pay"). Employees must take an 11-hour period between two work days. Germans work between 36 and 39 hours a week, capped at 48 hours including overtime. Overtime pay is to be paid plus 25%, night work plus 10%. Belgium complicates matters even more with a five-day, 38-hour workweek, meaning that not all working days are equally long. This affects shifts. Further, employees may not work more than 11 hours per day, 50 hours per week and they must take an 11-hour period between two work days. Overtime pay is plus 50% on Sundays and plus 100% on holidays.

### 5.2.2 Minimum wages

American minimum wages are based on hourly earnings. The federal minimum wage is currently $7.25 per hour. Where federal law does not apply, state minimum wages do. Just half of the states adhere to the federal standard. Among the ones that don't the range is between $5.15 in Georgia and Wyoming, and $9.04 in Washington. In some cities the rate is higher. For instance, the Californian rate is $8 but in San Francisco categories are between $10.24 and $16. A few Southern states do not have minimum wage requirements.

Downward adjustments also apply. Exceptions are often made for professions that receive tips and for small businesses with less than half a million dollars in annual revenue, if they do not conduct business across state lines.

In Europe minimum wage is not based on an hourly basis but on monthly earnings. The differences are substantially bigger than in the US. For instance, within the Euro zone the amounts range from €55 in Montenegro and €170 in neighboring Kosovo, to €1802 in Luxemburg. Only taking the European Union into account, with some variations based on actual age of the worker ballpark northwestern Europe's minimum wages are around €1400–1450, southern Europe's in the €650–750 range, eastern Europe's between €300 and €400, and in the Baltic states hovering in the €200s. There are of course exceptions to this fist rule, but all in all the minimum wage in Luxemburg is almost 14 times higher than Bulgaria's €138, or more than 11 times higher than Romania's €162.

Minimum wages are not always the standard, but they do set the tone for other salary negotiations. For instance, France's official minimum wage, of €1398, is in practice always exceeded by collective bargaining agreements.

Not all European countries impose a minimum wage, most notably Switzerland and the Scandinavian countries. In Germany most employees are covered by collective bargaining agreements, which set wages by industry. The minimum is in the €1400 range, or over €8 per hour. Lately the wages have reached €8.50 in some states, and current union negotiations in Northern Germany aim at €8.90 per hour. The German "mini-job" program offers work at around €5 per hour.

### 5.2.3 Workers' Compensation

In the United States Workers' Compensation is a statutory insurance scheme to provide compensation for an employee's injuries he sustained on the job.

Note that Europeans are taught British English at school, not American English. When using the word "scheme", Americans understand a scam or other dubious plot. The proper term to use in America is insurance plan.

Being a legitimate plan, *"workers' comp"* holds employers strictly liable even when the employer has been merely negligent. The employee does not need to prove fault.

Workers' compensation is an exclusive remedy – meaning that it prevents employees from suing their employer or co-workers for job-related injuries. It does neither provide for pain and suffering, nor for torts claims or punitive damages. It does not cover 100% of lost wages. Yet the insurance may not be excluded, nor replaced by a better plan. The sole exception appears to be, at least in some jurisdictions, that an officer who is also a controlling shareholder of a business can seek approval to exclude himself from the policy.

In Europe two distinct approaches to workers' compensation, as well as a third blend, exist. In the German system, self-governed industrial insurance associations provide prevention, remedial and compensation services. Like the workers' compensation boards in the US, these associations are funded through employer contributions.

In other countries the state administers the insurance plan as part of its social security scheme. The state collects contributions from employers through its tax or social security collection authorities. Hence the – incorrect – belief that workers' compensation is funded by taxpayers. However, this misconception somewhat holds true in the Netherlands and Greece, where workers who are injured or become ill in the course of their employment are covered by social health and disability insurance schemes. No separate administration is held. Similarly, to date, many other European countries maintain a mixture of state and private insurance schemes.

### 5.2.4 Discrimination and Equal Opportunity

"Equal opportunity" rules prohibit employment discrimination on the basis of race, color, religion, gender, nationality or birth, and other distinctions. On its face, this would seem the same in Europe and America alike. Indeed it is, but there are a few major differences. This can best be explained with the example of age discrimination. In the US it is illegal to discriminate against older employees at the hiring stage. In Europe it is illegal to discriminate against older employees at the firing stage.

As a result, European résumés, or curriculum vitae, may include the age and gender of an applicant. In some countries CV's even include a photograph. American employers are absolutely prohibited from inquiring about a job applicant's gender or age at any stage during the application procedure, let alone that they would be allowed to ask for a picture – which could easily give away the applicant's race and with some names his or her gender.

An exception to the equal opportunity rule is "affirmative action", which is promoted in America. In Europe, where the days that this practice was favored are basically a thing of the past, this practice is known as "positive discrimination".

### 5.2.5 Workplace Harassment

American and European cultures have different understandings of what entails harassment. Different cultural perspectives also lead to different interpretation of the law. Generally speaking, the US the norm is stricter.

On both continents it is the responsibility of the employer to safeguard the workplace against harassment and discrimination, but the consequences of misconduct are felt differently. In Europe it is the person who is found guilty of misbehavior who gets punished in the end. In America, it can also be her employer. No matter the size of the organization, it is required to keep its managers and any other person with supervisory status under control. If it doesn't, or if one errant employee slips through the cracks, the employer can be held liable.

This is a reason why even companies that are known to be responsible and employee-friendly can come across as extremely cold and matter-of-factly in a harassment lawsuit, even when a harassed employee is personally affected. In its capacity as employer the company has the burden of proof that the behavior of the offending employee – basically a third party for whom but not to whom it bears liability – towards the harassed employee – also a third party, but for and to whom the company bears a responsibility – did not happen; and if it happened, the it had no involvement.

## 5.3 Organized Labor

Organized labor is usually held to be a synonym for labor unions. In the US that may be the case but in many European countries other forms of employee involvement with their employer also apply. Several countries hold companies above a certain size to a degree of employee representation. This can take place through seats in an official body of the company, or employee assemblies.

### 5.3.1 Labor Unions

Labor unions play an important role on both continents, albeit in incomparable ways. In continental Europe union membership is a free choice. Employees can chose between two or more competing unions. When negotiating collective bargaining agreements these unions close ranks and jointly negotiate with the employer, or in many industries with organizations representing employers. Even if only a few workers are unionized in a company union negotiations matter, as the law often stipulates that the collective agreement applies to the entire industry, equally binding to non-unionized workers performing the same type of work as unionized workers.

American unions on the other hand enjoy a multifold monopoly. First, there is only one union represented, whether it is in the company, at a work site, or representing a group of professions. Second, once a location is unionized, each and every worker who performs work that is considered unionized must become a member of that particular union. Although pure "closed shop" arrangements are illegal it is practiced through the back door nonetheless: an employer is allowed to hire a non-union employee under the condition that that employee joins the union within a short time.

Third, American unions determine and enforce job descriptions. Unionized workers must work within rules that strictly outline their function. Not observing the job description may result in fines. Finally, a union member who performs non-unionized work can be discharged from the union, which makes him practically unemployable.

### 5.3.2 Workers' Representation

In several European countries employees enjoy a right of co-determination. These rights range from the establishment of "workers councils" to representation in the board of directors. In Germany the supervisory board is appointed by shareholders and unions elects an executive board. Similarly, Swedish employees have the right to appoint two or three board members and substitute directors.

Safety issues and other aspects of daily operations of the business typically are the territory of employee bodies. In larger companies they must be also consulted before taking decisions of a financial nature or that can affect the course or the future of the company.

Employee representatives are independent and represent their co-workers, although in practice they are often union members, and union interests sometimes do play a role.

## 5.4 Benefits

Benefits are the little extra's employees receive in addition to their salaries, in Europe also known as secondary employment rights. In many European countries they include e.g. a "13th month", usually paid in December or January, and a vacation allowance, usually paid before the summer vacation. How and why some benefits are granted depends on a country's tax rules. It may be beneficial for an employer and employee alike to partly pay or be paid in meal vouchers rather than "real money". An employee may be enticed to receive a car with operational lease, which includes paid gasoline and insurance, rather than the same value in cash.

It is not just tax law at the basis of a benefit. In Italy paid vacation is a constitutional right.

American employees enjoy a different array of benefits. The perquisites, or "perks", that American employers provide are mainly reduced health insurance premiums and deposits into retirement plans. More importantly, where in Europe big and small businesses alike provide benefits of a similar value, in the US small businesses are allowed to provide smaller benefits than large businesses.

### 5.4.1 Health Insurance

Health insurance in the US is currently in a transitional stage. Historically, employers may provide their employees with health insurance. There is currently no federal law requiring them to do so, although some states do.

Where an employer provides health insurance as a benefit, he can do so in two ways. He can either pay part or all of his employees' insurance premiums, or negotiate with an insurance carrier to provide discounts for his employees. The larger the employer, the higher the discount.

A caveat for employees is that the insurer may re-negotiate the terms of the contract with the employer. If this happens the employee, in her capacity as the insured, finds herself with a higher premium or even new insurance terms without being able to influence the decision. Another major issue is that the employer may be able to negotiate a better deal with a different insurance carrier. In that case the employee, as the insured, changes insurance company altogether. In practice that often means that she must also change her doctor and other medical service providers.

### 5.4.2 Unemployment and Social Benefits

In Europe unemployment is provided by national agencies, funded by tax or by social security premiums, and are not considered a benefit. These entitlements are capped and based on a percentage of minimum wages. Receiving an income from other work results in the benefit being reduced for the same amount as the additional income, or even withheld.

In the United States unemployment involves a series of state and federal laws. The reason that it is addressed in this chapter is that in the USA the unemployment fund receives its money from the collective of employers, supplemented by federal contributions. State agencies administer the fund. Employers are encouraged not to fire too many workers: an employer who lays off employees will be assessed a higher contribution to the fund in the future.

Other than in Europe, if an employee in America receives social benefits and also enjoys other sources of income, with the exception of unemployment benefits he can keep both. The philosophy behind is that he has accrued a right. In practice this means that a person can collect retirement from his earlier job and also work elsewhere, for which he enjoys the normal employee rights, including sick leave. Retirement pay is based on an employee's final year's income, and in many cases workers try to rack up as much overtime as possible in that final year.

## 5.5 Termination or Redundancy

European employers can be hesitant to hire employees, whereas American employers may hire workers on an as-needed basis and lay them off whenever their services are no longer needed.

As discussed above, in the US an employment contract is "at will". In practice employers often maintain a period of 2 to 4 weeks' notice. There is also a presumption of an implied promise not to fire an employee without cause. In unionized work places termination is subject to the rules set by the union or collective bargaining agreement. From their own perspective, employees are not known to easily terminate their own source of income. But instantly walking out of a job and instant firing does occur, especially when there is "cause", a legitimate reason.

American employment law is a state matter but mass layoffs and termination as a result of business closings are subject to federal rules.

In Europe termination, or redundancy, usually requires approval from a local court, even if the termination is for cause". Before laying off an employee the employer must give him notice. The notice period is calculated based on the number of year that the employee worked. For employment contracts without an end date, such as oral agreements, the notice period is the longest.

Notices always play a role. Even if an employee is in his trial period and can technically be terminated at will, not observing the proper notice period will extend that trial period into permanent employment.

The northern European perpetual state of reorganization of businesses and government institutions can in part be explained by the fact that exceptions are made for layoffs stemming from restructuring the organization. Court and other formal procedures still take a few months, and some form of compensation for the employees is usually required to gain approval, but that approval is not as hard to obtain as under normal circumstances.

When a contract is wrongfully terminated a European employer must re-hire the worker. In the US re-hiring is a last resort of specific performance caliber that is virtually never reached in employment disputes. American courts deem the relationship between the employer and the employee too poisoned to resume a healthy relationship. The norm is… damages.

# 6 Litigation

Litigation in Europe is about applying and interpreting a known law to a particular situation. In the US it encompasses more: finding out which law applies, whether to apply it to a particular situation and if so, how.

American court proceedings are not quite what you see on television. There you may see the juicy parts, such as opening or closing statements, or a witness gone haywire. In reality procedures can last months to several years, and most of the action consists of exchanging paperwork between the parties' attorneys. Commercial disputes are often settled before the case really goes to the court – read: before all relevant information becomes public. In the meantime all those documents are being read by a battery of lawyers, either to assess their chances to win the case before a jury or to determine the best moment to settle. Their findings are written down in lengthy papers called briefs. Motions are crafted on the basis of those briefs, and those motions raise other questions which then have to be answered.

In Europe significantly less information is exchanged among parties and European motions are therefore substantially shorter.

## 6.1 Jurisdiction

The term "jurisdiction" here refers to both the geographic territory over which a court presides and to the power of a court to exercise authority over a matter. In the US the latter is called "subject matter jurisdiction". There is a particular issue that for non-Americans blurs the distinction: American courts happily extend their jurisdiction over non-residents through "long arm statutes". As long as a party has sufficient minimum contacts with the state, these long arm statutes can pull anyone into the gravity of the court, even if neither party has ever set foot in the country at all.

The law considers this subjection to the American judicial system an honor. Contradicting the warm welcome to which cases with a large foreign element are treated, the very same courts are so overburdened that they offer litigants relief from their law reading duties and submit the dispute to mediation instead. To the surprise of European parties quite a few American courts actually prefer that parties enter into arbitration procedures. In New York for instance the courts favor contractual clauses providing for arbitration between parties as a matter of policy. Parties have been asked to consider mediation or arbitration even where no such contractual provision existed, just before entering the court room for a first hearing.

In some states arbitration laws exist that govern specific civil actions. California prefers arbitration for labor disputes and environmental regulatory issues. This includes disputes involving water rights, which are crucial to the state and a political hot potato. All with the goal to relieve the court system.

In most European countries jurisdiction is property-based. The place where the issue at litigation is situated determines which court can try the matter. A notable exception exists: French law provides for exclusive jurisdiction over French citizens and businesses by a French court, unless they expressly consent to foreign jurisdiction. In practice, the relevant Article 14 of the Civil Code is not often used, save for cases where a defendant has assets in France. French businesses typically have assets in their homeland, and they may very well be protected by this clause.

### 6.1.1 Forum Shopping

Forum shopping is the art through which parties in a law suit to choose the most favorable location when more than one jurisdiction is available. Americans courts enforce contract clauses that require the consumer to litigate in the seller's home court, but sometimes the circumstances allow for an exception.

Somewhat similarly, an American plaintiff can occasionally file a complaint in federal court and a "back-up" complaint in a state court. The state case will be kept dormant until the outcome of the federal case is known, after which it will be either pursued or withdrawn, depending on what the plaintiff deems desirable. This practice may also persuade a defendant to settle earlier.

### 6.1.2 Internet and Jurisdiction

Use of the internet has changed the face of jurisdiction in many cases. In business the internet is not limited to the use of web sites, either aimed at consumers or other businesses. Various forms of communication, ordering and delivery systems, industry platforms, online payment, electronic services, even the use of a supplier's or a buyer's software when working on particular projects can generate different standards of scrutiny.

The easiest is the plain old website. Maintaining a highly interactive, transaction-oriented website can trigger American long-arm jurisdiction in any state where the web site can be accessed by potential customers to apply. Maintaining a passive web site does not.

Across the Atlantic it is not the web site that determines the jurisdiction, but the level of activity of the consumer. European consumer protection laws distinguish between an active and a passive consumer. The rules are complex. Recent rulings of the European Court of Justice do not completely follow that distinction, and in doing so the ECJ has managed to clarify the rules.

The laws of EU member states provide that passive consumers may seek redress in the country where they reside. Active consumers should seek redress in the country where the seller is based. The idea behind this is that an active consumer is somehow considered to be more knowledgeable, and therefore in less need of protection. To Eurocrats, the more you click the smarter you are, and once you know how to use Google you've earned your degrees. The European consumer who look for a rare or unique product, or just a better deal, and finds it just across the border is assumed to have gained in-depth knowledge of the laws and trade customs of both countries as well.

That doesn't always pan out well. Determining who is an active and who is a passive consumer is in itself not simple. When requiring similar buyers in one country to enforce their rights in two different countries, a uniform outcome is impossible. If two Dutch consumers bought the same product from the same Italian company and one may enforce delivery under Dutch law and the other under Italian law, things quickly become complicated.

The European Court of Justice has recognized this and established a test, which is in itself a very American way of dealing with complex matters. Tests aren't necessarily as easy as a fixed rule, but if the rule is bad or illogic they at least provide a clear guideline that leads to a similar outcome in similar cases.

Under the ECJ tests the seller is subject to the consumer protection laws of the country of the buyer if his web site is directed at consumers in EU countries other than his own. It is not the act of selling to a country, but rather the directing of web traffic from a country to the web site that is the determining factor.

If a site mentions an EU member state, this indicates that the company wants to direct web traffic from that country to its web site. Once it is established that it does, the company opens itself up to the consumer protection laws of that EU country, as it seems that it wants to direct web traffic from the country.

"Mentioning" a country can be achieved in many ways, not only by using its language or currency but also through the use of SEO (search engine optimation) tools, or even the use of a generic .com or .eu domain name.

## 6.2 Discovery

In a European lawsuit there is no such thing as a pre-trial stage. After the plaintiff has been heard and defendant has made his defense, the judge sets a trial date.

In the US, on the other hand, the stage in which parties go to court is preceded by a phase called discovery. During discovery each party provides the other party with all relevant information pertaining to the case. Full disclosure rules require that everything that will be used in the court must be produced to the other party beforehand. Last-minute surprises in the court room are not allowed.

Lawyering skills during the discovery stage include review, research, legal analysis, writing, business acumen, and holding the hand of the client. By the time the case goes to court each party knows which facts and evidence the other party is going to present. Only then can oral skills as they are often suggested on television come into play. But in reality trying to tilt the direction of a case is not always a matter of influencing a jury by means of drama. Adequately using and portraying the information that was obtained in the discovery phase is the hallmark of a true litigator.

The discovery process revolves around the exchange of documents, including those documents that are damaging to the case. These days most documents are stored in electronic format. A "document" is actually anything that can be stored in any form, whether on paper or as electronic data. It includes the usual suspects such as letters, memoranda, files, invoices transcripts of conference calls, email, SMS and instant messaging or text and of course handwritten notes and other old-fashioned means of communication.

Increasingly, it also includes voice mail, taped memos and other audio or video files that can be electronically stored. More complex matter such as meta data (hidden information of an electronic document) reveal who had knowledge of what version of a document at what time, and therefore was aware of its content. Simpler functions such as remote printing commands reveal the same. The days of "you have never received this" faxes are bygone: deleting these data is not only illegal once the company is on notice of litigation. It is also futile, since servers store information beyond an individual's hard drive or other storage device. If the stakes are high information can always be recovered.

Interrogatories and depositions form part of discovery and are part of a court procedure. Interrogatories are written questions to which the other party must respond. Depositions have no European counterpart, yet they are so commonplace in America that American lawyers do not fully comprehend how European parties hardly fully realize their seriousness.

A deposition is an oral testimony under oath that takes place outside the court room. Attorneys for all parties involved are present, as well as a court reporter.

Depositions take place outside the court room, but not outside of the court (if a party doesn't cooperate the other side may contact the presiding judge for instructions. This is not necessarily a successful way to attract the attention of a judge). They are usually held at the offices of the attorneys for one of the parties, but they can be held anywhere, even abroad. All it requires is that all parties, and the presiding judge, agree, and that they be held in English.

Depositions are indeed a serious matter. The fact that they are extensions of a courtroom has led some countries to prohibit foreign depositions on their territory. In Switzerland special official permission is required and in Germany it is outright prohibited. There, depositions may only be taken at the US embassy or consulate.

Depositions are usually taken in a later stage of the discovery procedure. Attorneys on both sides have done their homework well and are well-prepared. Now they want to obtain explanations and additional information. They know what they are looking for. There is no room for inquiry or curiosity: an undesired answer could undermine the goal the lawyer had in mind when she asked the question. As a result, attorneys rarely ask an adverse party a question to which they don't already know an answer – preferably "the" answer. Most attorneys will ensure that a person who is to be deposed is well-prepared for the task.

## 6.3 Court Proceedings

In Europe a law suit is a procedure in which a judge actively seeks the truth in a matter. The judge is in charge of the process and she is the one who asks the questions. Based upon the answers she comes to a conclusion, which is her ruling. Rulings on similar matters are relatively uniform throughout a country.

In the US litigation is a process in which the attorneys of both parties are in competition with each other. They are the ones asking the questions. During the entire process the judge plays the role of a referee. He sees to it that the rules of the game are properly observed and keeps an eye on the calendar. His career may even depend on how fast he moves cases through the system. The unpredictable factor here is the jury. Based upon the answers to questions asked by the attorneys, the jury comes to a conclusion, called a verdict. Based upon that conclusion the judge decides the outcome, called a judgment or a court order.

The judge may give instructions to a jury, but these are of procedural nature. Any fact finding is the privilege of the jury.

Some European countries are familiar with jury systems, but only for criminal cases. In the US parties to a civil case are also entitled to a jury trial. The idea is that a jury reflects the mores of the local society.

Juries are selected by the attorneys of both parties. Entire cottage industries have sprouted that advice in the selection and study jury behavior, and a number of iPhone and iPad apps have been developed to assist attorneys in selecting, observing or tracking juries on the cheap.

Given the size and diversity of the country the outcome it is hard to provide uniform justice across the country, within a state or even within a big city. For instance, New York City consists of five different boroughs. In personal injury cases one of these, the Bronx, juries are considered to be among the most plaintiff-friendly in the nation. Neighboring Queens not only tends to be more defendant-friendly but also less generous in awarding damages.

## 6.4 Class Actions

In the US class action litigation is a lawsuit in which a person brings a claim to court on behalf of himself as well as of other people that were in the same situation. The rationale behind the existence is that there is no, or at least no adequate, supervising authority to oversee corporations and their behavior toward consumers, and therefore somebody else should keep them in check. With these noble motives in mind an entire industry has sprouted and several law firms specialize in, and sometimes solicit, class action litigation.

The relevant rules and case law are complex, but the gist is that if there are enough people who have sustained the same kind of injury or suffered damages from the same type of defect, the court can grant a request to certify a class, and grant class status. Different cases about the same issue can be consolidated in one case, and law firms compete vigorously to become the lead counsel.

Cases are routinely settled. Since most documents that come out in court proceedings are in considered public information, defendants often settle rather than remain involved. Settlements are not a matter of "right" or "justice", but are the result of cost-benefit analyses by both parties, sometimes after winning, or losing, a case in first instance. More importantly, a good settlement agreement contains stringent confidentiality clauses.

Class action suits are expensive and time consuming. Plaintiff's lawyers usually advance all or most of the costs related to the suit on behalf of the plaintiffs. Where this is not allowed certain expenses must be paid as the case progresses.

As attorneys are paid at the end of the class action suit they do not know what or even if they will be paid until several years later. In return for taking this financial risk they typically get in between 10 or 15%, and in rare cases up to 33%, of the award or settlement. The percentage largely depends on the phase in which the case came to an end. This may sound like a steep fee but divided over the number of years, and figuring taxes, the cost of financing staff, salaries and bills, it is not that excessive. Only the exceptional high-profile cases make headlines. In reality, cases are also lost, and even when they are won or settled a law firm can still operate at a loss.

In Europe more and more countries allow or consider permitting similar "mass claims" lawsuits. Either by statute or by case law, Austria, Italy, the Netherlands and Spain allow for such suits in that consumer or select other interest groups can file suit on behalf of a category of people. In the Dutch system monetary claims are not allowed but every other remedy is. The court can even declare a settlement between parties binding for all members of the class, including those who have not sustained actual damages, potentially setting aside the principle of unjust enrichment that otherwise applies in torts law. German mass actions are only allowed where they concern a limited type of financial transactions. Technically, mass actions are in France but the requirement that each claimant is individually named in the complaint makes it impractical. Switzerland on the other hand has expressly rejected the possibility of class action suits.

## 6.5 Arbitration

ADR, or Alternative Dispute Resolution arrangements, are alternatives to court proceedings. These include arbitration, mediation and amicable settlements. As discussed above, many American courts favor arbitration and mediation. In international business an additional advantage exists. All courts of countries that are a party to the New York Convention of 1958 will almost automatically recognize a properly rendered ADR award. This includes the United States and most European countries.

Because no similar treaty exists that governs court awards, recognition of rulings by foreign courts is subject to exequatur proceedings in the country where the ruling would be enforced. This involves review of the foreign award by a national court. Some foreign court awards will not be enforced. For instance, American jury awards are subject to additional scrutiny in many European countries, and recognition of jury awards that are not motivated is sometimes refused. And punitive damages will never be enforceable in virtually all of Europe, even if they were properly granted by an American court, as they are considered against public policy.

## 6.6 Attorneys

Going to court is expensive, no matter in what country, but it can often be avoided. The law can be a maze of applicable rules and regulations, all with their own exceptions. To maneuver the inconsistencies a knowledgeable lawyer is essential. This is not international law, this is foreign law, and in foreign law you are per definition a stranger. A local lawyer is not.

Whether it is for the purpose of litigation or for advice, choosing an attorney is not easy. The attorney must understand your business. There must be a personal fit in order to effectively convey your message. Notably in the US certain business decisions are based on a legal opinion, basically research by an attorney that concludes whether or not certain action is allowed. It is important to choose a law firm that understands the client's special needs as well as their international business law background.

There is a truth in the saying that asks how much justice one can afford – only the keyword is not "justice" but "law". In many cases the law leaves a grey area, and a legal opinion can go either way: the conduct is allowed or not allowed, or allowed with a few conditions, exceptions, questions or concerns. If the legal opinion provides the go-ahead, the attorney must be able to follow through on his opinion. This means that e.g. an adverse party later claims that her patent is infringed, the attorney must be able to litigate based on his earlier opinion.

### 6.6.1 Type of Attorneys

In the US the market is so vast that attorneys can afford to specialize in specific disciplines of the law, or even in niches within a discipline. For instance, many attorneys specialize in real estate; others go further and specialize in sales of large commercial buildings or in leasing in shopping malls.

European countries are often too small to warrant a specialization in a particular field of law. Where specializations exist an attorney usually has more than one. Continental law firms also tend to be small compared to their US counterparts; law firms with a few hundred attorneys are rare in Europe.

### 6.6.2 Attorney Fees

In many European countries attorney fees are calculated based on a schedule sanctioned by the national bar association or equivalent authority. In the US the attorneys set their own fees. East Coast and West Coast lawyers tend to be more expensive than lawyers elsewhere in the country, but often fees and payment schedules are negotiable.

Attorneys usually bill on an hourly basis. Each activity is specified on the invoice by date, action and duration of the activity. If the total amount on an invoice seems excessive there is often room to strike some entries. Flat fees can often be agreed upon when it concerns standard activities such as a simple incorporation, copyright filings or basic employment visas and work permits.

It is also possible to work on the basis of a retainer arrangement. Here the client pays a monthly fee that typically covers a minimum of 5 hours of an attorney's time. The retainer can be refundable or non-refundable. In the latter case the client will not be reimbursed for hours that are not "used". Businesses working with a law firm on a retainer basis should instruct their employees on how and when to deal with the attorneys. Failing proper instructions corporate departments automatically send work to the law firm thinking that it has already been paid for. However, attorneys are notorious for keeping track of their hours. If the work that is being sent their way consistently exceeds the scope of the agreement not only can they bill the additional work load, they may also renegotiate a heftier fee at the end of the term.

Regardless of fee arrangement, in many states an attorney is not allowed to advance court fees and must charge them beforehand to the client. Law firms also charge other expenses, such as couriers, postage and long-distance phone calls, and most certainly travel costs separately.

### 6.6.3 Contingency, or "No Cure, No Pay"

European parties often insist on finding American lawyers that will take their case on a "no cure no pay" basis. The assumption is that every attorney in the USA works that way. In reality "no cure no pay" is an expression that most American attorneys are not familiar with. The fee structure that comes closest to what a European means with the term is a contingency arrangement. If an attorney works for a contingency fee he will be paid a percentage of the proceeds of the case. In exchange for the risk he takes for not getting paid, the lawyer usually typically receives up to 33% of a court award; less in case of a pre-trial settlement. If he loses the case he may indeed ending up with receiving very little.

In contingency arrangements law firms also send monthly invoices for out of pocket and other expenses. And here, too, lawyers may not advance, let alone pay, court fees. There is no "no pay" in this scenario.

In order to make the contingency worth an attorney's risk, the amount at stake or room for settlement must be sufficient. Purely from a financial perspective an attorney is not likely to accept a complex matter that involves many hours of work if she does not expect to receive some sort of minimum result. There are numerous attorneys that take pro-bono cases or otherwise fight for their particular belief in justice, but businesses usually do not qualify for these special treats.

Contingency fee arrangements are forbidden for several types of cases. Relevant to business, these often include employment cases, where they are considered unconscionable or unethical.

# 7 Intellectual Property

European companies often underestimate the importance of intellectual property rights when approaching the American market. Patents and trademarks are guaranteed by the constitution. Perhaps more than anywhere in the world, in the US intellectual property rights are considered to be a valuable asset of a company. Proprietary systems may command additional streams of revenue. Patents can protect market niches and sometimes keep competitors out. In an economy so influenced by marketing, and where selling a lifestyle is at times more rewarding than the actual quality of a product, maintaining trademarks are key.

## 7.1 Patents

Officially, a patent is a description of an invention to which the inventor is granted exclusive use for a limited number of years in exchange for sharing it with the public. There are in principle three basic requirements for an invention to be patentable: it must be novel, it must not be obvious, and it must be useful. In the US the novelty requirement does not necessarily apply to pharmaceutical products.

The current American patent system can best be described as a "first to invent" system. However, in 2013 it will become a "first inventor to file" system, meaning that whoever made an invention, the person who runs to the patent office fastest can claim the rights to it. The person must be an inventor. Most other countries maintain "first to file" systems, where the first person to file does not necessarily have to be an inventor.

In Europe legal entities can be named as inventor. Under the American rules inventors are individuals. Only natural persons are deemed capable to actually invent. Patents are therefore only issued to natural persons, not to legal entities such as corporations.

### 7.1.1 European Patent

Although a single European patent does not yet exist the European Patent Office provides for the need of a uniform patent in all member states. The EPO does accept applications for multiple-country patents. An EPO patent allows the inventor to claim patents in any member state. However, is important to realize that these national filings must observe national law. The EPO patent can sometimes prove too weak to fulfill the relevant national requirements. In most European countries newness of the invention is rigorously investigated. That is not the case with patents granted by the European Patent Office.

This also implies that EPO patents can more easily be subject to litigation or protest, whereas "old school" patents are harder to contest. For that reason, national patents based on EPO patents enjoy a different status than patents that comply with national standards. For instance in Belgium, if the applicant has requested a patent search with the EPO, the Belgian patent can be granted for 20 years. If no EPO patent search was requested the Belgian patent will be granted for a maximum of six years.

Other requirements include that the patent application or EPO patent grant must be translated in the official language of the country where the application is made.

### 7.1.2 Design and Business Model Patents

Design patents are patents granted for ornamental or functional designs. In the US they are treated like regular patents. In the European Union the situation is different. A distinction can be made between two types of community designs, and special patents based on national patent law.

A community design is a form of protection that is not a patent. A registered community design is valid for 25 years after the date of application. Unregistered designs are protected for three years after first use in public.

A few EU member states maintain their own distinct design patent law. The particulars can at first be confusing, as registration takes place with different authorities than for regular patents, and the requirements are not uniform. For instance, in Germany design patents are registered with the local court where the creator is domiciled. Design protection is granted for a period varying from one to three years but can be extended to a total of maximum fifteen years. This "*Geschmacksmuster*" protection is quite different from "*Gebrauchsmuster*" protection. The latter is particular to technical improvements to tools or articles of daily use, and is valid for eight years.

A peculiarity to the US and a limited number other common law countries is the patentability of business models. These are currently patentable under an interpretation of existing patent law. Proposed legislation would officially introduce it, subject to a separate procedure and new standards. Interim guidelines include the requirement that a method for doing business must produce a concrete, useful and tangible result in order to be patentable.

## 7.2 Trademarks and Service Marks

Registering a trademark is essential in the United States, as it serves as evidence of ownership and of use of a brand or trade name. Owners of federally registered trademarks are entitled to use the ® symbol. The ™ symbol indicates either an unregistered trademark or a trademark that is registered with a state. It is also used to show an owner's intent to pursue the mark. A service mark is the same is the same as a trademark but is used for services.

In Europe an EU Trademark Office has been established, but each country imposes its own requirements governing trademarks. Owners of nationally registered trademarks are entitled to use the ® symbol.

The requirements to uphold a trademark in various countries are substantially different. Actual use of the mark is commonly required. In Germany an occasional use of a trademark does not constitute genuine use, whereas in the US an occasional annual sale can be sufficient to uphold a trademark.

Internet domain names are affected by trademark rules. In Europe domain names may also be subject to competition laws. As a result the registration of a domain name is subject to several requirements, including providing an excerpt of the trade register or other proof of existence of the business or mark. In the US, on the other hand, anyone can register a .com domain name, although trademark restrictions apply.

## 7.3 Copyright

Copyright laws in EU member states are harmonized via EU Directives and implement the WIPO Copyright Treaty. The Digital Millennium Copyright Act does the same in the United States. That means that the basis of copyright protection is the same: an author automatically enjoys a copyright on her original work of authorship.

Registration nonetheless provides several advantages. In the US the owner of a non-registered copyright can only sue an infringer for actual damages, which are very hard to prove. The owner of a registered copyright on the other hand can sue for statutory damages, which is a standard amount determined by law.

### 7.3.1 Work for Hire

An issue that is relevant to businesses is that if an employee in the US creates a work within the scope of her employment, the employer automatically owns the copyright as if he had created the work himself.

When working with non-employees such as independent contractors, a work-for-hire situation arises. This means that the copyright in principle stays with the work's creator, even if she is contracted to craft the work and even if the principal pays her for the work. Ownership of the copyright can be transferred to the principal, but only if the independent contractor expressly agreed with the transfer in writing and before she begins her work.

In Europe a copyright stays with the individual who created the work. She always enjoys protection, even if the work was created for hire. A few notable exceptions exist: EU Directives dictate that copyright for software programs is owned by employers, and in the Netherlands exceptions can be made for work created whilst the creator is in an employment relationship.

### 7.3.2 Moral Rights

A copyright guarantees a creator the economic rights to her creation. Moral rights are rights beyond those economic rights and are also considered personal to the creator of a work. Typically they entitle the creator to be identified as the author of the work and allow her to object to derogatory treatment of the work.

Moral rights are independent from ownership of the actual work and do not transfer together with a transfer of the copyright. They can not be sold or alienated. For instance, Germany's *Urheberrecht* includes the moral right of a creator to veto any change to a work.

The US only recognizes moral rights for creators of visual works such as paintings and sculptures. In many European countries creators of a work enjoy moral rights for any work.

## 7.4 Trade Secrets

A trade secret is information that contains independent economic value that is not publicly known, and for which reasonable measures have been taken to protect it. The most cited example is the Coca Cola recipe, something hardly anybody in the world will ever lay his eye on and have the opportunity to violate. Examples that are useful in the real world are customer lists, price charts, draft business or marketing plans, sales prognoses, manufacturing methods and many more. These are tools with which a company conducts business. By the very nature of running a business this information is in the hands of many employees.

In the US trade secrets are protected under state law, not federal law. Two additional major differences with other intellectual property rights exist. First, there are no filing formalities for trade secrets. That wouldn't quite serve the purpose. Second, they never expire.

Trade secret protection is not a familiar concept in Europe. Indirect protection of a company's information requires the creative use of the legislation of each individual country. In France and in Germany, unfair competition laws can be invoked, which brings a violation in the realm of criminal law. In France, moreover, contract law, and in Germany statutes applying to honest business practices, can also govern the issue.

# 8 Select Other Business Matters

The law always has a few loose ends that cannot easily be categorized. From the perspective of a book that focuses on cultural aspects that affect conducting trans-Atlantic business, a selection of additional distinctions on the convergence of culture and law is discussed in this final chapter.

## 8.1 Bankruptcy

In the European mindset bankruptcy is a recipe for misery for years to come. Society labels a bankrupted person or business as a failure. Legal discharge of debts can not always be obtained. Future earnings may even be subject to collection until the debt has been paid in full. And even if a debt can be discharged a moral obligation to pay it off often exists nonetheless.

Being "broke" is not just a showing of failure. It is the ultimate failure, one that follows a person for the rest of his life. A once bankrupted person may not be able to secure a loan. Under the presumption that someone who is not capable of handling his own money may not be entrusted with other people's money or public funds he can not be hired as a civil servant, and financial institutions will shun him as potential employee.

When a businesses files for bankruptcy the situation is not much different. They have done something wrong. At best the company's products weren't good enough. Or perhaps the company was dodging its obligations, or it was a showcase for mismanagement. Whatever the public opinion may conclude, anyone who was involved in the management of the company will face the stigma for a long time.

The American culture surrounding bankruptcy is quite the opposite. You clear out your debts and get a fresh start. In practice credit history and ratings play a role, and for the first couple of years there may be a few hurdles here and there, but after a few years the negative impact should no longer show.

A term that currently in vogue and that is sometimes confused with bankruptcy procedures is "foreclosure". However, foreclosure is not a bankruptcy procedure. It is a remedy for creditors and lien holders trying to recover the balance of a loan from a debtor who has stopped making payments. The creditor can do so by repossessing assets or selling any collateral that he has.

### 8.1.1 Bankruptcy in European Countries

Bankruptcy, and anything that reeks of it, is "the end" in Europe. A default, where payments are legally postponed or settled in order to give the company a period of rest during which it can bring its business in order, is presumed to result in bankruptcy within a relatively short term. The bankruptcy procedure, of course, aims at the dissolution of the business.

No officer or director wants it to happen on his watch. In this culture, default and bankruptcy are measures of the very last resort. They are usually invoked at a time when it is too late for an effective restructuring and survival.

Only large companies can survive a default, and only with a little help from the public relations department. They may be able to use bankruptcy laws as a restructuring measure, which makes it easier to lay off personnel, which without a restructuring plan can become extremely costly.

The French process for bankruptcy is typical for most bankruptcy laws on the continent. It consists of three phases: safeguarding, reorganization and liquidation. These are not so much three different remedies or proceedings, as is the case in the US. Indeed they are *the* three stages of the bankruptcy process. If in one stage not all debts are paid or settled, the procedure moves on to the next. Each stage aims not so much at getting the business out of an insolvent situation, but instead serve to give the creditors the most and fastest return – before the debtor is no more. In all phases the business is overseen by a court-appointed curator who must approve of, and may even be liable for, every business decision and payment. If there are insufficient funds to fully pay the curator for his services he becomes a preferred creditor.

National policies may sometimes round the edges off these rigid bankruptcy procedures. In Belgium a judicial settlement system is introduced that seeks to preserve a specific company, even an entire industry, or sometimes regional employment. Somewhat as a side effect these rules also prevent bankruptcy. The procedure has been completely disconnected from bankruptcy laws. This had been done with the cultural negative connotation of a bankruptcy or default in mind, to avoid that a company refuses to seek protection. A court collects information about the troubled company. If the court deems that sale of the company is beneficial to the creditors and to national interests it can order ownership to be wholly or partially transferred to a new, more financially sound, owner.

### 8.1.2 Bankruptcy in the USA

American bankruptcy law has three different trajectories, named after their chapters in the bankruptcy laws. These are three different trajectories, not three different steps of one process. None expressly aim at bankruptcy and dissolution. The purpose of each Chapter is to relieve the debtor of his debt so that he can get a new, fresh, start.

Simplified, a so-called Chapter 13 proceeding is a wage earner's bankruptcy. The main difference with a European personal bankruptcy is that under the American rule an individual is eventually discharged from his debts. After his credit has been "repaired", which may take seven to ten years, future employers will have a hard task detecting that the individual was ever involved in a bankruptcy.

A Chapter 11 proceeding is a business reorganization. Here, submitting a reorganization plan that aims at saving the company from bankruptcy is required. If the court approves the reorganization plan some debts may be stricken and other payments may be delayed. In practice, with regard to the continuity of the business, suppliers will no longer supply goods on credit but require prepayment or cash-on-delivery (COD) until the company has reestablished its good status.

If no restructuring plan can be established, or if the court does not approve it, liquidation proceedings follow. There is a foreign misconception here that in the US shareholders always prevail over creditors. But if all the rules are followed in a liquidation proceeding, a company disbands its original shares and issues new ones. They can pay their creditors either with the proceeds from the sale of these shares, or with these new shares. If the latter happens the creditors become the new shareholders. Either way, the value of the old shares becomes nil and the buyers or recipients of the new shares become the shareholders. Only if there is any value left in the company the remainder will be distributed among the old shareholders. So, technically the "shareholders" may prevail, but these are no longer the same people or entities – and to the extent they are, their interest is substantially diluted.

Chapter 7 proceedings are liquidation proceedings in which assets are sold to generate cash. That cash is distributed to the creditors. After all proceeds have been distributed among the creditors there is not so much a discharge of debt but a collection relief from creditors. Resurrection of the company can, at least in theory, results in revival of the debt.

Unlike in many European countries, tax authorities in the US may be inclined to cooperate with a settlement.

Bankruptcy proceedings are subject to federal law but have strong state distinctions. Because in practice they are far more complex than described above they require the services of a bankruptcy attorney. Timely involvement of an attorney is necessary, as it is almost impossible to file for bankruptcy if there is no money left to pay the attorney, pay court fees, and offer the creditors at least an incentive to agree with debt relief.

From a European perspective it is ironic that you must have money to file for bankruptcy. However, the American rules are designed to create a new start, and therefore there must be room for that new start.

## 8.2 Franchising

Franchising is an American invention, or at least the concept has been perfected there, and many foreigners believe that setting up a franchise in the US is a fast and simple process. Nothing is further removed from the truth.

In the US franchise offerings are subject to very specific federal and state laws pertaining to the sale of investments. These rules already apply in the earliest stage of offering a franchise opportunity to potential franchisees. Under federal rules a franchise prospectus is considered a solicitation to buy a financial product. From that perspective it needs to comply with virtually just as many rules as for instance a stock or bond offering does.

In addition, a large number of states maintain their own franchise registration and filing requirements. Franchise plans and advertisements for franchise opportunities must be approved by the state franchise examiner. If a state examiner requires that changes are to be made to the franchise plan, renewed filing requirements with the Federal Trade Commission (FTC), as well as with many – but not always all – other states, are triggered.

Even if a few states do not have stringent filing requirements, each state's general business laws apply. These can impose requirements that are similar to the conditions set forth in the specific franchise laws of other states.

Once the franchise is in place, formalities continue to exist. A few states require a mere short annual filing. Others require a whole slough of paperwork.

In short, involving a specialized franchise attorney before setting one word on paper is not a luxury.

In Europe the situation is less complex, even though each country has its own rules and regulations. Not many are particularly aimed at franchising. In Italy, no specific franchise law exists, however franchises are subject to laws pertaining to supply contracts. Similarly, in Belgium laws that seem to apply to franchising are in effect laws on commercial cooperation in any form. Most importantly, national laws are not related to those of other countries. Changes made to a franchise plan for one country do not trigger (re)filing requirements in another country.

## 8.3 Consumer Protection

Europe and the US each have legislation in place to protect consumers, but there is an ocean of difference between the underlying philosophies. The European norm is competition among multiple suppliers. The idea it is that competition benefits the consumer.

In addition, several EU Directives govern particular consumer concerns such as unfair contract terms, warranties or guarantees, electronic transactions, distance and door-to-door selling, and indication of product prices. These Directives are all implemented in national laws of each member state, albeit each with slight differences. For instance in Germany, unlike in many other European countries, the definition of "consumer" also includes an employee who acts in the course of a business. In the Czech Republic and the Netherlands unfair clauses in consumer contracts are binding, unless the consumer claims unfairness.

In the US, on the other hand, the basis of consumer protection is not competition, but the consumer himself. Thus, (quasi) monopolies may exist, as long as the players behave in a fair manner towards the consumer. This difference is exemplified in the case of Microsoft, which sells various unrelated software products that are bundled and made dependent on each other. The practice is allowed in the US (where the company was forced to pay a non-criminal penalty for the wrongdoing of abusing its position – coupled, or bundled if it were, with the promise to better its behavior in the future). In Europe the practice was held to violate antitrust laws, as a result of which it had to unbundle certain functions and products.

In short, on the American market a strong market party, almost a monopolist, is allowed to impose its will on the user, whereas in Europe that same party must leave room and opportunity for the buyer to install and use competing products.

## 8.4 Privacy

The safeguarding of an individual's privacy in Europe is of a totally different nature than in the US. European regulations are based on the belief that personal data privacy is a fundamental human right.

EU member states have enacted national privacy laws in compliance with the EU Data Protection Directive. Minor national distinctions apply. Privacy rules strictly govern the processing of personal information, including their collection, transmission and use. Every individual enjoys control over his own information and must be notified of all use and disclosure of the data pertaining to him. Personal data may only be used for the purpose for which it was originally collected and may not be transferred to countries that do not provide an adequate level of protection. In that sense the EU deems American privacy protection effort insufficient, and is particularly skeptical of the US insurance industry.

The US, namely, leaves privacy matters to the market, thus turning it into a commodity. Some states have enacted data protection legislation but these merely apply to certain industries or to specific situations. None offer broad or all-encompassing coverage. All contain exceptions or leave blanks by following an opt-out system. Some statutes even have expiration dates, after which protected data is no longer protected.

Where those statutes do not apply companies may impose their own privacy policies. This is often done with a privacy component as part of a unilateral user agreement. Certification programs that purport to show good conscience are issued by several institutions, but participation is voluntary. Regardless of certification, a company may change its privacy policy at any time.

Somewhat related to privacy is spam, or unauthorized bulk email advertisements. In the European opt-in approach a sender must have a recipients' consent before he may send him bulk emails. In the US the opposite is the case: under the "CAN-SPAM Act" advertisers indeed can spam. The statute requires email recipients to opt out from receiving unwanted messages by sending a notice to the emailer. A theoretical remedy against spam is via internet service providers and the tortuous concept of trespass to chattel.

The "do not call register" provides a central registry to opt in against unsolicited phone calls. The rules leave many exceptions. A more effective and encompassing system governs unsolicited telefax messages. In short, it is not the act of contacting the consumer but rather the choice of media that determines whether spamming is permissible.

## 8.5 Criminal Law and Business

The ins and outs of criminal law are beyond the scope of this book. However, rules of criminal law are among the most distinct in every culture, and when doing business across the pond one should be aware of a few major issues.

In the US a corporation can be held criminally liable if it violates rules of criminal law. A corporate officer or director will not often be held liable for fraud of the company, unless he personally participates in it or has actual knowledge of it. This requires a little nuance: not being held liable is different from not being charged or accused.

Moreover, in the US one can be subjected to additional procedures. Protection against double jeopardy – being prosecuted for the same crime twice – only applies within the same jurisdiction. It does not avoid procedures in other areas of law, nor does it prevent stacking up charges, or "counts", for one and the same offence. Independent regulatory bodies such as the FTC may impose their own rules, procedures and penalties, which do not necessarily prevent either civil cases or prosecution by a state.

In continental Europe on the other hand, legal entities other than natural persons can usually not be held criminally liable for their criminal acts. Individual officers or directors of the company are prosecuted instead.

This does not mean that businesses are of the hook. They are held liable for their own acts, but in stead of through criminal law this is done by imposing administrative fines. These fines usually settle the matter and close the case. Even though they are instruments of administrative law, due to the use of the term "fines" conventional wisdom regards them as penalties for delinquent behavior, and they can tarnish the reputation of a company.

## 8.6 Insider Trading

Simplified, insider trading means that a person is buying shares of a publicly listed company based on essential information that is not known to the general public. In the US such information is considered a corporate asset. Anyone who is privy to that information has a fiduciary duty to the company and may not use it for his own benefit. The company's interests prevail.

American insider trading laws are threefold: common law, SEC rules and the Securities Exchange Act all apply. Each is limited in scope. All are based on a violation of a fiduciary duty, which can only be imposed on an employee, officer or director, and sometimes an independent contractor. Obtaining information whilst accidentally eavesdropping on a conversation in a restaurant does not fall under any of these rules, and acting on that information is not insider trading in itself. That doesn't necessarily mean it is legal, but different rules apply. That can be either state law or federal law, including inferring the duty of the insider to the person who acts on it. That indirectly brings the SEC rules and the Securities Exchange Act back into play.

In Europe it is less relevant whether or not the information is an asset. Unfair competition, namely the advantage the informed person has above other investors, seems to be the driving force. Each and every person, whether she has a fiduciary duty or not, is subject to insider trading laws. Information obtained whilst accidentally eavesdropping on a conversation in a restaurant is inside information, namely information that other investors can not possibly have. Acting on it gives rise to criminal prosecution.

# 9 Conclusion

Despite the expectation of many similarities between Europe and the United States, the keyword in this book is: "different". A few major differences between the two are described in just over 100 pages. Within both continents, additional distinctions can be made. Nonetheless, describing similarities may have resulted in a series of books a few hundred times thicker each. And that is exactly why recognizing that cultural differences exist, realizing that there is a different legal outcome, is important. These are the kind of unexpected surprises that may have far-reaching consequences.

More differences can of course be found, but they do not necessarily distinguish "America" from "Europe". Some areas of law are different in every country or state. In the Netherlands statutes of limitations (legal parlance for deadlines, e.g. to file a lawsuit) can be stayed (kept alive) by sending reminders, provided that certain formalities are observed. Settlement negotiations are not such a formality and thus do not in themselves stay the period. In Germany it is exactly the other way around. Each country further maintains its own tax laws, its own financial regulations, its own import restrictions, health laws and many more rules and regulations. These differences hardly come as a surprise, as no responsible business steps into a foreign venture without researching at least the basics.

As you may have gathered from this book it is not "the law" that is different across the Atlantic. It is the culture. Or rather, the cultures. The laws of a country set the tone on how to behave within its culture, and then the interaction between law and culture does its work. Whether the law is structured or eclectic, individuals and organizations alike have the same law as a framework to operate within. Whether the rules are clear or not, they govern anyone. Judges or arbitrators must use them as their tool. They are a lawyer's tools to remedy a client's loss after a mishap has occurred. They are also a lawyer's tools to protect and prevent unwitting missteps of their clients. But only of their clients – actively seeking advice is required.

And of course, regardless of the culture you are conducting business in, if a genuine legal issue occurs, being represented by a knowledgeable attorney is crucial. Saving a penny here or there is not always good policy. Whilst "no cure, no pay" may not exist as such, "no pay, no cure" certainly does.