

Twenty-first Century **English for Law**

# 21世纪法律英语

(上册) 第三版

董世忠 赵建 主编 ● 赵建 刘海虹 修订



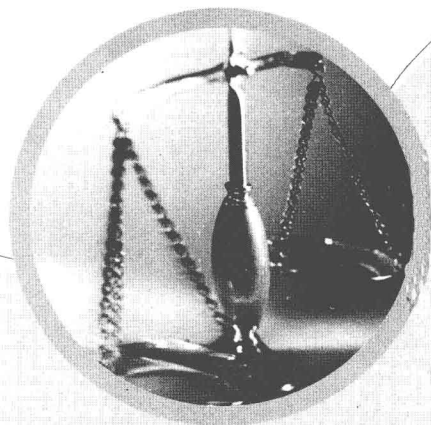
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## 内 容 提 要

《21 世纪法律英语》(上册)系法律专业英语教材之一,供具有大学英语三级以上水平的法律系学生及法律工作者使用。编写这套教材的宗旨是使其既具有法律内容上的系统性,又在语言上由浅入深,循序渐进,更有外语教材所必备的可操作性。

全书包含的五个单元,简明而完整地介绍了美国法律的五个部分:导论、宪法、民事诉讼、合同和票据。每单元都有若干篇课文,并配有大量口笔头练习,帮助学生熟练掌握课文内容。此外,每单元还配有较多的案例阅读材料,以助学生深化对课文的理解。使用本教材可达到一举两得的效果:取得对美国的司法制度及主要的民事商事法律的初步了解,并掌握基本的法律英语词汇和概念的英语表述。因此,对于有志于日后从事涉外业务的法律专业的学生和法律工作者,它将是一本不可多得理想教材。

## 第三版前言

《法律英语》前二版是在 20 世纪 90 年代为上海紧缺人才培训工程编写的一本教材,可供具有大学三级以上英语水平的法学学生和涉外法律工作者使用。它自 1997 年初问世以来,受到了广大师生及其他使用者的欢迎。近 10 年来,随着我国改革开放的步步深入,社会对法律工作者的英语要求不断提高,大学生的总体英语水平也今非昔比。考虑到使用者要求的提高,也考虑到近年来美国法律的一些变化,亦应广大读者的要求,编者对本教材进行了比较大的修改,使其进一步完善,以期更好地满足读者的需要。

本书编者多年来从事法律英语的教学,同时兼职法律事务的翻译,既了解英语教学的普遍规律,又了解法律英语的特殊要求。第二版修订中,编者结合自己长期教学的体会和工作中积累的丰富经验,对原书进行了比较全面的修改和充实。再版的《法律英语》保持了原版的整体格局,一方面它涵盖的法律内容较为完整和系统;另一方面语言地道、难度适中,既有供课堂讲练的课文和练习,也有丰富的案例可供学生自学和阅读,如果使用得当,教师和学生密切配合,定可在较短的时间内获得法律英语的长足进步。

第二版《法律英语》中,第一单元突出介绍了美国的法律和司法制度;商业票据单元全部刷新,反映了美国商法变化的新动态;侵权法单元增加了产品责任;其他单元的课文也均有一定程度的扩展和充实,同时对各单元的先后次序安排也有适当的调整。作为泛读阅读材料的案例,内容几乎全部更新,覆盖面更广,增添的案例多为本世纪的判例,更好地反映了当前美国法律的情况和发展趋向。考虑到所选的案例在文字和内容上有一定难度,除了增加文字注释外,还在每个案例后加了点评,以画龙点睛的方式简述案件的要点,有助于学生理解法官的分析思路和判案原则。

修订工作主要由赵建执笔,刘海虹参加修订了第六和第七单元。全书由赵建最后审定。



最新版《21 世纪法律英语》对《法律英语》第二版的个别章节进行了充实和完善,并根据一些使用者的要求,将原书分为上、下两册,以方便学生携带和使用。

在本书的修订中,计美娟编辑不辞辛劳,做了大量工作,特此表示感谢。

编者

2010 年 3 月



# 序

谢丽娟

由上海市人民政府教育卫生办公室、市成人教育委员会、中共上海市委组织部、市人事局联合组织编写的“90年代上海紧缺人才培训工程教学系列丛书”将陆续出版。编写、出版这套丛书是实施上海紧缺人才培训工程的基础工作之一,对推动培养和造就适应上海经济建设和社会发展急需的专业技术人才必将起到积极的作用。

90年代是振兴上海、开发浦东关键的十年。上海要成为国际经济、金融、贸易中心之一,成为长江流域经济发展的“龙头”,很大程度上取决于上海能否有效地提高上海人的整体素质,能否培养和造就出一大批坚持为上海经济建设和社会发展建设,既懂经济、懂法律、懂外语,又善于经济管理,擅长国际竞争,适应社会主义市场经济新秩序的多层次专业人才。这已越来越成为广大上海人民的共同认识。

目前上海人才的状况与经济建设、社会发展的需求矛盾日趋显著。它集中表现在:社会主义市场经济的逐步确立,外向型经济的迅速发展,新兴产业的不断崛起,产业产品结构的适时调整,城市建设和管理任务的日益繁重,使原来习惯于在计划经济体制下工作的各类专业技术人才进入了一个颇感生疏的境地,使原来以面向国内市场为主的各类专业技术人才进入一个同时面向国内外市场并参与国际竞争的新天地,金融、旅游、房地产、城市建设和管理等以及许多高新技术产业又急切地呼唤一大批新的专业技术人才。这就加剧了本市专业人才总量不足、结构不合理的矛盾。此外,本市的从业人员和市民的外语水平与计算机的应用能力普遍不高,这种情况如不迅速改变,必将影响上海的经济走向世界,必将影响上海在国际经济、金融、贸易中的地位和在长江流域乃至全国经济发展中的作用。紧缺人才培训问题已引起市委、市政府的高度重视。

“机不可失,时不再来。”我们要大力加强紧缺人才的培训工作和外语、计算机的推广普及工作。鉴于此,及时编写、出版本丛书,是当前形势之急需,其



意义是现实的和深远的。诚然,要全面组织实施 90 年代上海紧缺人才培训工程,还有待于各有关方面的共同努力。

在“90 年代紧缺人才培训工程教学系列丛书”开始出版之际,感触颇多,简述代序。

1997 年 1 月





# 编者的话

《21世纪法律英语》(上、下册)是一套法律专业英语教材,供具有大学英语三级以上的法律专业学生以及法律工作者学习专业英语使用。

本教材有以下特点:

**一、内容上的完整性:**本教材的八个单元介绍了美国法律的八个重要部分:导论、民事诉讼、宪法、合同、票据、财产、侵权、公司。每个单元的课文力求用最简练的语言,勾画出一门法律的全貌。因此,每学一个单元,就会对美国的一门法律有一个总体概念,并掌握这一门法律所常用的术语和基本概念的表述。

**二、使用上的可操作性:**本教材的课文文字由浅入深,词汇重复率高,符合外语学习循序渐进的要求。每课配有大量口头与笔头练习,旨在帮助学生理解课文、操练基本法律词汇和用语。书后附有答案,无论对教师还是自学者都十分方便。

**三、使用对象的兼容性:**由于课文内容浅显,注释充分,具有一般水平的学生通过自学完全能够理解。如果能做完练习的I、II、III部分,则达到了巩固的效果。练习的IV、V部分有一定难度,供水平较高的学生使用。每单元配有的案例阅读材料,是课文中涉及的法律原则在实际中的体现,可作为泛读材料,用以加深、拓宽对课文的理解,也可作为教师的参考资料,用以解释课文。

参加本教材编写的,除主编外,还有刘海虹同志。她担任编写了财产法和侵权法两个单元。本教材在编写过程中,得到了上海市司法局教育处戴鸿儒处长、黄立群干事和复旦大学出版社张永彬同志的大力支持,特在此表示感谢。

我们热诚欢迎使用本教材的教师和学生对其中的问题加以指正。

编者

2010年3月

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# UNIT ONE

## Introduction to American Law

### Lesson One

#### Law: Definition, Classification and Sources

##### Text

What is law? Though we use the word “law” very often in our daily life, we use it in so many ways that there is no simple answer to this question.

The definition of law depends on how we look at its purposes or functions.

A basic purpose of law in our society is to maintain order and to resolve disputes. For this purpose we make laws to define our rights and duties and prescribe what we should and should not do<sup>1</sup>. However, law is not simply a set of rules. It is also the means to impose responsibility and to enforce social justice. The rules of law must be followed, and breaking any of them will result in a punishment.

Law has also been defined as a command from a superior to an inferior. The tax law fits in well with this concept of law<sup>2</sup>.

Law is also a method of social control. The law brings about changes in our society and society brings about changes in the law. In this sense law is both an instrument of change and a result of change.

Laws can be classified in many ways too. They are sometimes referred to as either substantive or procedural<sup>3</sup>. The rules of law that are used to resolve disputes are known as substantive law. The legal procedures that determine how



a lawsuit is begun, how the trial is conducted, how appeals are taken, and how a judgment is enforced are called procedural law. Substantive law defines rights, and procedural law establishes the procedures by which rights are protected and enforced. For example, A and B have entered into an agreement, and A claims that B has breached the agreement. The rules that provide for bringing B into court and for the conduct of the trial are rather mechanical, and they constitute procedural law. Whether the agreement is enforceable and whether A is entitled to damages are matters of substance and will be determined on the basis of the substantive law of contracts<sup>4</sup>.

Law is also frequently classified into areas of public and private law. Public law deals with the relationship between the state and individuals (private citizens, companies, etc.) and affects the public generally. It can be further divided into constitutional law, administrative law and criminal law. Private law is the part of law that defines the rights and duties between private individuals. It covers the subjects of contracts, torts and property, each of which can be subdivided into several bodies of law. The law of torts is the primary source of litigation in America<sup>5</sup>. It deals with wrongful acts against a person or his property and is based on the theory that in a civilized society, people who injure others or their property must compensate them for their loss<sup>6</sup>.

Classification of law according to subject matter can often be difficult because the law is indeed a seamless web, and overlapping is inevitable if we divide it according to a clear-cut definition<sup>7</sup>. Assume that a person is injured by a product he has purchased. He may sue on the sales contract. But the law of sales, even though a part of the law of contracts, contains several aspects that could best be labeled a branch of the law of torts<sup>8</sup>. Therefore, it is apparent that even the general classification of contract and tort is not accurate in describing the subject matter of various bodies of law.

The phrase “sources of law” is used to describe methods and procedures by which law is created and developed, or the origin from which particular laws derive their authority or coercive force<sup>9</sup>. American law is derived from four basic sources: constitutions, legislation, judicial decisions (case law), and administrative rules and regulations.

Judicial decisions as part of law is a tradition in American law. This concept



of decided cases as a source of law is often referred to as the common law system, which must be contrasted with the civil law system developed in continental Europe<sup>10</sup>. The civil law countries have codified their law so that the main source of law in those countries is to be found in the statutes rather than in the cases. Under the common law system, however, statutes as well as cases are sources of law. This means that when a judge decides a case, not only does this resolve the dispute between the litigating parties, but it also further decides all similar cases that might arise in the future.

### Words and Phrases

definition /,defɪ'nɪʃən/ <i>n.</i>	定义
define /dɪ'faɪn/ <i>vt.</i>	给……下定义,界定
to be defined as	被界定为……,定义是
classification /,klæsɪfɪ'keɪʃən/ <i>n.</i>	分类
classify	把……分类
source /sɔ:s/ <i>n.</i>	来源,渊源
function /'fʌŋkʃən/ <i>n.</i>	功能
resolve /rɪ'zɒlv/ <i>v.</i>	解决
dispute /dɪs'pjʊ:t/ <i>n.</i>	纠纷,争议
prescribe /prɪs'kraɪb/ <i>vt.</i>	规定,开处方
impose /ɪm'pəʊz/ <i>vt.</i>	强加
enforce /ɪn'fɔ:s/ <i>vt.</i>	执行,实施
enforceable /ɪn'fɔ:səbl/ <i>adj.</i>	可执行的
justice /'dʒʌstɪs/ <i>n.</i>	正义,司法
superior /sju:'pɪəriə/ <i>n.</i>	上级
inferior /ɪn'fɪəriə/ <i>n., adj.</i>	下级(的);低等的
to fit in with	符合
to bring about	造成
instrument /'ɪnstɹəmənt/ <i>n.</i>	工具;票据
refer /rɪ'fɜ:/ <i>vi.</i>	指称
to be referred to as	被称为,被说成是
substance /'sʌbstəns/ <i>n.</i>	实质



substantive /'sʌbstəntɪv/	adj.	实体的
procedure /prə'si:dʒə/	n.	程序
procedural	adj.	程序的
lawsuit /'ləʊsɪt/	n.	讼案
trial /'traɪəl/	n.	庭审
conduct /kən'dʌkt, -dəkt/	vt.	处理, 进行
appeal /ə'pi:l/	vt., vi., n.	上诉
judgment /'dʒʌdʒmənt/	n.	判决
enter into		签订(协议等)
breach /bri:tʃ/	n., v.	违反, 违约
provide for		规定
mechanical /mɪ'kæni:kəl/	adj.	机械的, 死板的
constitute /'kɒnstɪtju:t/	vt.	组成, 构成
entitle /ɪn'taɪtl/	vt.	给……权利, 使……有权
be entitled to		有权得到
damages /'dæmɪdʒɪz/	n.	赔偿金
public law		公法
private law		私法
divide	vt.	分, 分开
subdivide	vt.	再分
to be divided/subdivided into		被分(再分)成
constitutional /,kɒnstɪ'tju:ʃənəl/	adj.	宪法的
administrative /əd'mɪnɪstrətɪv/	adj.	行政的
criminal /'krɪmɪnəl/	adj.	刑事的
contract /'kɒntrækt/	n.	合同
tort /tɔ:t/	n.	侵权
property /'prɒpəti/	n.	财产
primary /'praɪməri/	adj.	首要的, 主要的
litigation /,lɪtɪ'geɪʃən/	n.	诉讼
litigate /'lɪtɪgeɪt/	vi., vt.	诉讼, 就……争讼
compensate /'kɒmpənsət/	vt.	赔偿, 补偿
subject matter		内容
seamless /'si:mɪləs/	adj.	无缝的





overlap /'əʊvə'læp/	<i>vt.</i>	重叠, 竞合
inevitable /ɪn'evɪtəbl/	<i>adj.</i>	不可避免的, 必然的
sue /sju:, su:/	<i>vt., vi.</i>	起诉, 对……提起诉讼
label /'leɪbl/	<i>vt.</i>	把……称为, 把……列为, 把……归 类为
origin /'ɒrɪdʒɪn/	<i>n.</i>	起源
particular /pə'tɪkjʊlə/	<i>adj.</i>	特定的, 具体的
derive /dɪ'reɪv/	<i>vi., vt.</i>	取得, 得到, 形成
derive from		源自, 起源于
authority /ɔ:'θɒrɪtɪ/	<i>n.</i>	权威, 权威部门
coercive /kəʊ'sɜ:sɪv/	<i>adj.</i>	强制的
legislation /,ledʒɪs'leɪʃən/	<i>n.</i>	立法
judicial /dʒu:'dɪʃəl/	<i>adj.</i>	司法的
regulation /regjʊ'leɪʃən/	<i>n.</i>	法规, 法则
common law system		普通法(系)
contrast /kən'trɑ:st, kən'træst/	<i>vt., vi.</i>	使成对比, 形成对比
civil /'sɪvl/	<i>adj.</i>	民事的
civil law system		大陆法(系)
continental /,kɒntɪ'nentl/	<i>adj.</i>	大陆的
continental Europe		大陆欧洲(不包括英国和爱尔兰)
codify /'kɒdɪfaɪ, 'kəʊ-/	<i>vt.</i>	编纂(法律)
statute /'stætju:t/	<i>n.</i>	(成文的)法规, 成文法
statutory /'stætjʊtəri/	<i>adj.</i>	成文(法)的

### Notes

1. A basic purpose of law in our society is to maintain order and to resolve disputes. For this purpose we make laws to define our rights and duties and prescribe what we should and should not do.

在我们的社会里,法律的一个基本目的是维持秩序、解决争议。为此目的我们制定法律,以界定权利义务,规定我们应做什么不应做什么。

2. The tax law fits in well with this concept of law.

税法很符合法律的这一概念。



3. They are sometimes referred to as either substantive or procedural.

它们有时被称为实体的或程序的,两者非此即彼。

4. Whether the agreement is enforceable and whether A is entitled to damages are matters of substance and will be determined on the basis of the substantive law of contracts.

协议是否可执行、是否 A 有权得到赔偿金则是实质问题,要根据实体的合同法来决定。

5. The law of torts is the primary source of litigation in America.

侵权法是美国诉讼的主要依据。本句的意思是:美国的诉讼大多是侵权诉讼。

6. It deals with wrongful acts against a person or his property and is based on the theory that in a civilized society, people who injure others or their property must compensate them for their loss.

它(侵权法)处理危害人身或财产的过错行为,它的理论依据是:在文明社会里,危害他人或他人财产者必须赔偿损失。

7. Classification of law according to subject matter can often be difficult because the law is indeed a seamless web, and overlapping is inevitable if we divide it according to a clear-cut definition.

根据内容对法律进行分类往往是件难事,因为法律确实是一张无缝的网,按明确的定义将其一刀切开,就必然有竞合。

8. The law of sales, even though a part of the law of contracts, contains several aspects that could best be labeled a branch of the law of torts.

买卖合同是合同法的一部分,但即便是这样,它有好几个方面还是称之为侵权法分支为妥。结合上下文,本句的意思是:某人被所购的商品伤害,他依据买卖合同索赔,而买卖合同的某些方面(如有关产品责任的规定),实际上属于侵权法范畴,这就是法律上所说的“竞合”。

9. The phrase “sources of law” is used to describe methods and procedures by which law is created and developed, or the origin from which particular laws derive their authority or coercive force. “法的渊源”这一术语用以描述法律形成和发展的方法和程序,或特定法律获取权威和强制力的源头。

10. This concept of decided cases as a source of law is often referred to as the common law system, which must be contrasted with the civil law system developed in continental Europe. 把已决判例作为法的一个渊源,这一概



念常被称作普通法系,我们必须将它与大陆欧洲形成的大陆法系相区别。

### Word Study

1. to define *vt.* 给……下定义,界定  
The powers of a judge are defined by law.  
Modern dance is hard to define. The body is the same that has danced for ages.
2. to impose *vt.* 强加  
Courts have the power to impose damages on defendants.  
The traffic authority has imposed a speed limit on all motorized vehicles.
3. to fit in with 符合  
The new bookshelf you just bought doesn't fit in well with the old furniture.  
Being a mother of two teenage boys, she is looking for a job that fits in with her family responsibilities.
4. to bring about 造成  
The new law will bring about an increase in labor cost.  
Efforts are being made to bring about improvements in our working conditions.
5. to classify 把……分类  
If we classify countries according to GDP per capita (人均 GDP), China is still a poor country.  
Books in this room are classified according to subject.
6. to refer to ... as 把……称为,把……说成是  
Frank was referred to as "the problem child" at school. I was the only one among his classmates he would talk to.  
I think what he refers to as "litigation cost" includes attorney's fees (律师费).
7. to provide for/that 规定  
This contract does not provide for renewal (续期).  
My employment contract with the company provides that I can not use my work product to benefit any third party.
8. to entitle 给……权利, to be entitled to 有权得到



This coupon (优惠券) entitles you to a 20% discount on everything you buy in this store.

As a full-time employee I am entitled to two weeks paid leave every year.

9. to divide/subdivide 分开/再分

A leader should unite rather than divide, encourage rather than discourage.

We divided ourselves into two opposing teams for the debate, and then subdivided each team into groups of three to prepare for it.

10. to contrast with 对比, 对照

His public statements contrast sharply with his private life.

Contrasted with the high-rise buildings surrounding it, this school looks much too shabby.

## Exercises

### I. Tell whether each of the following statements is true or false:

1. There are many ways to define law, but no single definition is completely satisfactory.
2. All people agree that the purpose of law is to achieve justice.
3. Law brings about changes in society, so it is an instrument of change.
4. Tax law can be seen as a command of the state to its citizens.
5. Judicial decisions are an important source of law in France and Germany.
6. Private laws are mostly statutes.
7. Laws can be classified according to their sources.
8. Common law countries have only case law.
9. Case law is judge-made law.
10. Constitutions are public law.

### II. Answer the following questions:

1. What are the purposes or functions of law?
2. Are laws just a set of rules of conduct? Why or why not?
3. What is substantive law?
4. What is procedural law?



5. What is public law?
6. What is private law?
7. From what sources do American laws derive their authority?
8. What is a common law country?
9. What is a civil law country? Name as many civil law countries as you can.
10. Classify and describe the following laws in as many ways as you can: contract law, tort, property, criminal law, constitutions, criminal procedures, civil procedures, statutes, administrative law, case law

**III. Fill in the blanks with proper words:**

1. Law can be \_\_\_\_\_ in different ways according to its different \_\_\_\_\_.
2. Without the means to \_\_\_\_\_ laws, we can not have order.
3. Even if the court \_\_\_\_\_ a fine ( 罚款 ) on him, the judgment will not be \_\_\_\_\_ because he is too poor to pay.
4. The tax law is a good example of the concept of law as a \_\_\_\_\_ from the superior to the \_\_\_\_\_.
5. Law is \_\_\_\_\_. This means that breaking any rule of law will \_\_\_\_\_ punishment.
6. Whether someone is \_\_\_\_\_ to damages is a question of \_\_\_\_\_ law.
7. Substantive laws define rights while procedural laws \_\_\_\_\_ procedures by which rights are \_\_\_\_\_ and enforced.
8. Countries in continental Europe are \_\_\_\_\_ to as civil law countries. This means that law in these countries is \_\_\_\_\_ and the main source of law is \_\_\_\_\_ rather than decided cases.
9. Public laws \_\_\_\_\_ the public generally, while \_\_\_\_\_ laws deal with the relationship between \_\_\_\_\_.
10. Classification of law according to \_\_\_\_\_ inevitably results in \_\_\_\_\_.

**IV. Cloze:**

Law can be defined \_\_\_\_\_ (1) to its functions. If we see law as a



\_\_\_\_\_ (2) by which we maintain social \_\_\_\_\_ (3) and resolve disputes, then law is not only a set of \_\_\_\_\_ (4) of conduct but also the means to \_\_\_\_\_ (5) responsibility and to enforce social \_\_\_\_\_ (6). If we see law as a method \_\_\_\_\_ (7) social control, then law is an \_\_\_\_\_ (8) of change as well as a result of change. Law is also seen as the \_\_\_\_\_ (9) from the ruling class to the ruled. Although there are many \_\_\_\_\_ (10) of law, we must know that no single definition \_\_\_\_\_ (11) perfect and no definition fits in \_\_\_\_\_ (12) all laws.

Laws can also be classified in different \_\_\_\_\_ (13). They can be divided into substantive and \_\_\_\_\_ (14) law, public and private law, \_\_\_\_\_ (15) and case law.

Particular laws derive their \_\_\_\_\_ (16) from different sources, of which there are four in America: constitutions, \_\_\_\_\_ (17), judicial decisions and administrative rules and \_\_\_\_\_ (18).

## V. Translation:

### 1. English to Chinese

The U. S. is a common law country. In all states except Louisiana (which is based on the French civil code), the common law of England is adopted as the general law of the state, EXCEPT when a statute provides otherwise. Common law has no statutory basis; judges establish common law through written opinions that are binding on future decisions of lower courts in the same jurisdiction. Broad areas of the law, most notably relating to property, contracts and torts are traditionally part of the common law. These areas of the law are mostly within the jurisdiction of the states and thus state courts are the primary source of common law. Common law changes over time, and at this time, each state has its own common law on many topics. The area of federal common law is primarily limited to federal issues that have not been addressed by a statute. Thus, "common law" is used to fill in gaps.

### 2. Chinese to English

- 1) 法律是一套具有权威性和强制力的行为规则。
- 2) 可将实体法根据内容分成民法、刑法和行政法三大领域,而它们各



自又可再分成若干部分。

- 3) 判例法是法官制定的,而成文法则是由立法或行政机构制定的。
- 4) 判例法存在于法官的书面意见中,在这个意义上它也是成文的。它只不过没有被编纂成法条。
- 5) 国家有权力通过立法将其意志强加于公民,但这一权力是有限的 (limited)。
- 6) 与大陆欧洲的法官相对照,普通法国家的法官权力大得多。



## Lesson Two

### Law Under American Federalism

#### Text

The United States has a federal system of government. What this means is that under the U. S. Constitution there is a national, or federal, government, and there are individual states, each enjoying a substantial degree of autonomy. Each state has its own constitution, its own government, its own set of statutory laws made by its own legislature, and, because of the common law tradition, a body of case law created by its own courts.

The U. S. Constitution gives certain law-making powers to the federal government, others to the state governments, and yet others to both.

The law-making powers granted to the United States Congress are specific and limited. They include areas of interstate and foreign commerce, federal taxation, currency, the postal service, declaration of war, maritime law, bankruptcy, patent and copyright, and the establishment of armed forces. In addition, Congress is also empowered to make “all laws which should be necessary and proper for carrying into execution the foregoing powers”. Among these enumerated and implied powers, some are exclusive and others are shared with the states<sup>1</sup>. In areas where there are both federal and state laws, federal law prevails if the two are in conflict<sup>2</sup>.

The powers not specifically granted to Congress are reserved to the states or to the people. Thus, most areas of private law, such as contracts, torts, business and corporate governance, are governed by the statutes and common law of each state.

Beginning in the mid-20th century, a number of trends combined to enhance the federal role within the legal system. Even so, much of that system remains





within the state domain. While no state may deny a citizen any right guaranteed by the federal Constitution, many interpret their own constitutions as bestowing even more generous rights and privileges. State courts applying state law continue to decide most contractual disputes. The same is true of most criminal cases, and of civil tort actions. Family law, including such matters as marriage and divorce, is almost exclusively a state matter. For most Americans most of the time, the legal system means the police officers and courts of their own state, or of the various municipalities and other political subdivisions within that state.

As a consequence of this federal scheme, choice of law questions confront judges and lawyers in multi-jurisdiction disputes almost as frequently as in international litigation<sup>3</sup>. If a dispute arises out of a series of activities in different states or between parties who are residents of different states, and the substantive rights at issue are defined differently in these states, the choice of applicable law may become a crucial and hotly contested issue; thus giving an added dimension of complexity to the legal situation.

Let's first look at a case involving claims of securities fraud. Since securities transactions are governed by both federal and state laws, the applicable law in such cases includes both federal law and the laws of relevant states.

A tort claim typically does not involve federal law. The law applicable to a tort claim is generally said to be the law of the place of injury. Thus, a court sitting in state X would follow its own rules of procedure, but it would use the tort law of state Y if the injury occurred in Y.

The choice of law question with respect to contract disputes is much more complicated. Several choice of law rules are used by different courts on issues involving the law of contracts. Suppose a contract is concluded in one state (State A), performed in another (State B), and the parties are from still others (State C and State D). In this multi-jurisdiction case, which state's substantive law is applicable? The question will be answered by the court which hears the case. Suppose the plaintiff brings his contract claim before a court in his home state C. Suppose also that according to the choice of law rules of State C, contract disputes should be governed by the law at the place of contract performance. The court in State C will apply the contract law (both statutory and



case law) of state B in resolving the dispute. However, if the plaintiff brings the dispute before a court sitting in defendant's home state D, whose choice of law rules direct the court to apply the law of the state most involved with the contract<sup>4</sup>, the outcome of the lawsuit may be different.

The trend toward uniform statutes has tended to decrease these conflicts, but many of them still exist. So, in studying American law, students should be aware that different states may have different substantive laws and different choice of law rules regarding a particular legal situation, resulting in the possibility that the choice of forum may affect the substantive rights of parties concerned.

### Words & Expressions

substantial /səb'stænʃəl/	adj.	实质性的,重要的
autonomy /ɔ:'tɒnəmi/	n.	自治(权)
statutory /'stætjʊtəri/	adj.	成文的
statute /'stætju:t/	n.	成文法,法规
legislature /'ledʒɪsleɪtʃə/	n.	立法机构
common law		普通法
specific /spə'sɪfɪk/	adj.	具体的,特定的
interstate /,ɪntə'steɪt/	adj.	州际的
currency /'kʌrənsɪ/	n.	货币
maritime /'mæɪtəɪm/	adj.	海事的
bankruptcy /'bæŋkrəptʃɪ/	n.	破产
patent /'pætənt/	n.	专利
copyright /'kɒpɪraɪt/	n.	版权
execution /,ɛksɪ'kju:ʃən/	n.	执行
enumerate /ɪ'nju:məreɪt/	vt.	列举
exclusive /ɪk'sklʌ:sɪv/	adj.	排除其他一切的,独有的
prevail /prɪ'veɪl/	vi.	获胜,压倒
govern /'gʌvən/	vt., vi.	统治,管理,支配,决定,适用于
domain /dəʊ'meɪn/	n.	领域,范围
bestow /bɪ'stəʊ/	vt.	将……授予



tort /tɔ:t/ <i>n.</i>	侵权
municipality /mju:nɪsɪ'pælətɪ/ <i>n.</i>	市, 市政府
subdivision /'sʌbdɪ,vɪʒən/ <i>n.</i>	分支
choice of law	法律选择
jurisdiction /,dʒʊərɪs'dɪkjən/ <i>n.</i>	管辖权, 辖区
multi-jurisdiction dispute	涉及多辖区的纠纷
litigation /,lɪtɪ'geɪʃən/ <i>n.</i>	诉讼
substantive /səb'stæntɪv/ <i>adj.</i>	实体的
complexity /kəm'pleksətɪ/ <i>n.</i>	复杂性
relevant /'reləvənt/ <i>adj.</i>	相关的
claim /kleɪm/ <i>n., vt.</i>	要求(权); 索赔(权); 声称
securities /sɪ'kjʊərətɪz/ <i>n.</i>	证券
fraud /frɔ:d/ <i>n.</i>	欺诈, 欺骗
uniform /'ju:nɪfɔ:m/ <i>adj.</i>	一致的, 同样的
forum /'fɔ:rəm/ <i>n.</i>	法庭, 进行公开讨论的地方

### Notes

1. Among these enumerated and implied powers, some are exclusive and others are shared with the states.  
在这些列举的和默示的权力中, 有一些是只属于联邦的, 有一些则是与州共享的。
2. In areas where there are both federal and state laws, federal law prevails if the two are in conflict.  
在既有联邦也有州法律的领域, 如果两者相冲突, 则以联邦法为准。
3. As a consequence of this federal scheme, choice of law questions confront judges and lawyers in multi-jurisdiction disputes almost as frequently as in international litigation.  
联邦制造成的后果之一是, 法官和律师在跨辖区的纠纷中常常要面临法律选择问题, 几乎就像在国际诉讼中一样。
4. ... whose choice of law rules direct the court to apply the law of the state most involved with the contract.  
该州的法律选择规则规定法院适用与合同关系最密切的州的法律。



## Word Study

1. specify *vt.* 指定,指明,详述

specific *adj.* 具体的,明确的,特定的

You said you wanted me to buy a cell phone for you. I will not do that unless you specify the brand and model you want.

The task would have been easier for us if your instructions were specific.

2. enumerate: to name a list of things one by one 列举

In his closing speech the chairman enumerated the objections to the proposal that were raised by committee members.

To enumerate the works of Mark Twain will take more than a page, I think.

3. prevail *vi.* 获胜,压倒

The Parties agree in their contract that the English version will prevail over the Chinese if the two give rise to different interpretations.

The prevailing party won a damage award of one million.

4. govern *vt.*, *vi.* 支配,决定,适用于

The law of supply and demand governs the prices of goods.

The governing law for this dispute is Chinese law.

5. with respect to 关于,就……而言

The manager wants to talk to you with respect to your employment contract.

With respect to tort claims the choice of law is quite simple.

## Exercises

### I. Tell whether each of the following statements is true or false:

1. The states in the federal system have their own legal systems.
2. The legislative power of the United States Congress is limited.
3. The powers granted to Congress are exclusive.
4. Federal law-making power has been expanded over the years.
5. Federal law is now a dominant part of American law.
6. Substantive laws are uniform in all states.
7. With respect to securities transaction, the governing law is state law.



8. The law for a tort claim is the law at the place of injury. This is a choice of law rule.
9. Choice of law rules may affect courts' judgments on substantive issues.
10. The courts in different states follow the same set of choice of law rules.
11. Choice of forum does not affect the outcome of a lawsuit.
12. Conflict of law problems still exist despite of many uniform statutes.

**II. Answer the following questions:**

1. Does America have a uniform legal system?
2. How does the Constitution divide the law making power between the federal and state governments?
3. Why is it said that the states have a substantial degree of autonomy?
4. Explain the concept of American federalism and its effect on the American legal system.
5. What law making powers does the U. S. Congress have? Are they granted to the Congress exclusively?
6. What happens if a state law conflicts with a federal law?
7. Is it possible for a court in State A to apply the laws of State B? If the answer is yes, when does it happen?
8. What kinds of cases are most likely to be governed by state laws?
9. Explain how choice of law may affect the substantive rights of the parties to a dispute.
10. Explain how choice of forum may affect the outcome of a lawsuit.

**III. Fill in the blanks with proper words:**

1. The powers \_\_\_\_\_ to Congress are enumerated in the U. S. Constitution. They are \_\_\_\_\_ and limited. However, they can be stretched through the elastic clause or the "necessary and proper" clause of the Constitution, which has been a source of \_\_\_\_\_ powers of Congress.
2. The taxing power of the Congress is not \_\_\_\_\_, since states can also collect taxes.
3. The parties agree that disputes over contract interpretation shall be



- \_\_\_\_\_ by Chinese law.
4. You can quote court judgments without worrying about \_\_\_\_\_. They are in the public \_\_\_\_\_.
  5. What should be the \_\_\_\_\_ law for a dispute \_\_\_\_\_ out of contract performance? Is there a general rule?
  6. The board members voted down the first proposal. But with \_\_\_\_\_ to the other proposals, opinions differed widely.
  7. The fact that America is a common law country gives another dimension of \_\_\_\_\_ to its legal system.
  8. Choice of forum is a procedural question, but it may \_\_\_\_\_ the \_\_\_\_\_ rights of the parties.
  9. In America's over two centuries of constitutionalism, the general \_\_\_\_\_ has been an \_\_\_\_\_ of federal power.
  10. In spite of \_\_\_\_\_ statutes, \_\_\_\_\_ differences still exist in the laws of different states and \_\_\_\_\_ of law often arise in \_\_\_\_\_ cases.

#### IV. Cloze:

Federalism is a system of government in which a written \_\_\_\_\_ (1) divides power between a central government and governments of states or other \_\_\_\_\_ (2). Under American federalism the states enjoy a substantial degree of \_\_\_\_\_ (3). They have their own constitutions, their own governments, and their own bodies of \_\_\_\_\_ (4) and case laws. They have powers that would \_\_\_\_\_ (5) to the central authority in other governmental set-ups.

The United States Constitution \_\_\_\_\_ (6) the power of the federal government to the fields of defence, \_\_\_\_\_ (7) affairs, the control of the currency and the control of commerce \_\_\_\_\_ (8) the states. The basic principle of American federalism is fixed in the Tenth Amendment to the Constitution, which states that the powers not \_\_\_\_\_ (9) to the national government are \_\_\_\_\_ (10) to the states, or to the people.

Urbanization, industrialization and war are factors which worked to \_\_\_\_\_ (11) the power of the national government over the years. But the



states \_\_\_\_\_ (12) to be very important political centers of government activity. President Nixon and Reagon tried to give \_\_\_\_\_ (13) to the states power that was deemed to have been taken \_\_\_\_\_ (14) them. The current president, George W Bush, has promised to continue this Republican principle — making the \_\_\_\_\_ (15) government smaller.

## V. Translation:

### 1. English to Chinese

Certain basic facts about the American legal system must be recognized. First of all, statutes and precedents, in all legal areas, vary from state to state. In some states the plaintiff in an automobile accident case must be completely free of fault in order to recover damages; in other states a plaintiff found to be 20% at fault could recover 80% of his damages. Second, each state is free to decide for itself questions concerning its common law and interpretation of its own constitution and statutes. Third, many legal issues arise out of acts or transactions that have contact with more than one state. These facts make litigation in the courts of America a complicated process.

### 2. Chinese to English

- 1) 美国法律制度的复杂性很大程度上 (largely) 是由美国式的联邦制造成的。
- 2) 在联邦制的架构中, 每个州都有实质性的自主权, 有自己的宪法、自己的立法机构制定的法律, 以及自己的法院作出的判例法。
- 3) 法律选择规则决定在跨州交易或事件中适用的实体法。
- 4) 如果纠纷涉及数州, 而这些州在有争议的问题上又有不同的实体法, 那么法律选择就成为至关重要的问题。
- 5) 侵权适用的法律是侵权行为地法。
- 6) 统一法规的趋势已趋于减少法律冲突。



## Lesson Three

### The Dual Court System

#### Text

The American judicial system, reflecting the overall decentralized nature of its government, comprises a large number of federal and state courts.

The federal and the state judicial systems are each constructed like a pyramid. Entry-level courts at both the state and federal levels are trial courts, in which witnesses are called, other evidence is presented and the fact-finder (a jury or sometimes a judge) is called upon to decide issues of fact based on the law.

At the top of each pyramid structure is the court of last resort, which has the authority to interpret the law of the relevant jurisdiction. In most states and in the federal system there is also a mid-level court of appeals.

Along with certain federal crimes (such as terrorism or drug trafficking across state lines), federal courts hear non-criminal or civil cases only if they are premised on a question about the meaning of a federal statute or application of the Constitution; if the parties are citizens of different states, or if one is a citizen of a foreign country, and more than \$75,000 is at stake; or if the federal government itself is a party to a suit<sup>1</sup>. For example, if a company is accused of violating a federal environmental law, the suit may be brought before a federal court.

In theory, a party to a federal judicial proceeding has access to three levels of decisions; it may appeal the decision of the trial court to a U. S. Court of Appeals, and, if it is dissatisfied with the appellate court's decision, it may seek further review of that decision by the United States Supreme Court. In practice, however, the Supreme Court agrees to review only a small number of cases each





year that it considers to be of national significance.

Each of the fifty states has its own set of courts having an overall structure that parallels that of the federal court system<sup>2</sup>. These state courts hear the overwhelming majority of criminal and civil cases. State trial courts initially hear civil and criminal cases; decisions can then be reviewed by courts of appeal, and finally, a case may be reviewed by the state court of last resort, which, in most cases, is called the supreme court of the state. States also have different kinds of specialized courts dealing with such matters as juvenile and family relations, probate, tax, or trade and commerce. Many states and localities have small claims courts in which people can file claims for small sums of money directly, without attorneys, following simplified and relatively quick procedures<sup>3</sup>.

Federal judges, whether in district courts or the nine-member Supreme Court, are nominated by the President and subject to approval by a two-thirds vote of the Senate. To ensure their impartiality and to remove outside political pressures as much as possible, they are appointed for life, subject to removal only after impeachment for and conviction of a crime.

At the state and local level, judges may be appointed or elected to specific terms of office. Elected or appointed, judges at every level must be seen as impartial arbiters of the law, not as partisan politicians. They cannot be removed before the end of their term for minor complaints or unpopular decisions. Like the federal court judges, they can be removed from office only through the process of impeachment and conviction.

In civil and criminal matters, courts operate under the principle known as *stare decisis*, Latin for “let the decision stand.” In other words, courts rely on the precedents established by previous court decisions in deciding current cases of similar legal issues and facts. *Stare decisis* does not mean that courts cannot, and do not, overturn principles established in previous decisions. However, reliance on precedents gives the law a measure of stability and predictability, and allows the parties to enter into relationships and regulate their conduct with reasonable assurance of the governing rules of law. *Stare decisis*, in the words of one Supreme Court justice, is the strong tie which the future has to the past.



## Words &amp; Expressions

decentralize /,di:'sentrəlaɪz/	vt.	分散,下放(权力)
pyramid /'pɪrəməɪd/	n.	尖塔
resort /rɪ'zɔ:t/	vi.	求助,凭借,采用,诉诸;求助的 对象
	n.	(同上);常去的人群,常去之地
court of last resort		终审法院
premise /'premɪs/	n., vt.	前提;作……的前提,假定……为 前提
to be premised on		是以……为前提的
stake /steɪk/	n.	赌注
at stake		在危险中
appellate /ə'pelət/	adj.	上诉的,有权受理上诉的
parallel /'pærəlel/	adj., n., vt.	平行的;平行线,相似之处;与…… 平行;与……相当
juvenile /'dʒu:vənəɪl/	adj.	少年的
probate /'prəʊbeɪt/	n.	遗嘱检验
small claims court		小额诉讼法院
file /faɪl/	vt.	把(文件)归档,提出(申请),提起 (诉讼);立案,登记备案
nominate /'nɒmɪneɪt/	vt.	提名
impartiality /'ɪm,pɑ:ʃɪ'ælətɪ/	n.	公正,不偏不倚
impeachment /ɪm'pi:tʃmənt/	n.	弹劾
conviction /kən'vɪkʃən/	n.	定罪
arbiter /'ɑ:bɪtə/	n.	仲裁人,公断人,裁决人
partisan /,pɑ:tɪ'zæn/	n., adj.	党徒,党派的,派性的
stare decisis /'steəri:di 'saɪsɪs/		(拉丁)因循前例,遵循先例
precedent /'presɪdənt/	n.	先例
overturn /,əʊvə'tɜ:n/	vt.	翻倒
predictability /,prɪ,dɪktə'bɪlətɪ/	n.	可预见性
regulate /'regjuleɪt/	vt.	管理,规范;调节



## Notes

1. Along with certain federal crimes (such as terrorism or drug trafficking across state lines), federal courts hear non-criminal or civil cases only if they are premised on a question about the meaning of a federal statute or application of the Constitution; if the parties are citizens from different states, or if one is a citizen of a foreign country, and more than \$75,000 is at stake; or if the federal government itself is a party to a suit.

除了审理某些联邦法界定的罪行(如跨州的恐怖主义行为或贩卖毒品)外,联邦法院只处理下列非刑事或民事案件: 1) 案件是基于联邦法律释义或联邦宪法的适用问题; 2) 诉讼当事人是不同州的公民,或一方是外国公民,并且诉讼金额超过七万五千美元; 3) 联邦政府是诉讼当事方。

2. Each of the fifty states has its own set of courts having an overall structure that parallels that of the federal court system.

五十个州各有其自己的一套法院,该法院系统总体上与联邦法院系统相同。

3. Many states and localities have small claims courts in which people can file claims for small sums of money directly, without attorneys, following simplified and relatively quick procedures.

许多州和地方有小额诉讼法院,人们可以直接向其申请小额索赔,不需要律师,程序简易便捷。

## Word Study

1. resort *vi.*, *n.* 求助,凭借,采取,诉诸;求助的对象

If the dispute can not be settled through negotiation, it is feared that the two countries might resort to force.

He turned to his family for financial support only as a last resort.

2. premise *vt.*, *n.* 作为……的前提,前提

His conclusion is based on a false premise. How could it be correct?

The injured worker sought damages against his employer. His claim is premised on the Federal Employment Compensation Act.



3. parallel *adj.*, *n.*, *vt.* 平行的;平行线,相似之处;与……平行,与……相当  
There are some interesting parallels between the education systems of these two countries.  
The history of the law firm parallels the growth of Southern California.
4. subject to 受……支配(制约)的,取决于……的  
Foreigners are subject to the laws of this country when they are here.  
The agreement, which has been signed by the parties, is still subject to government approval.
5. overturn *vt.* 翻倒  
A principle established by a decision of the U. S. Supreme Court can only be overturned by itself.
6. regulate *vt.* 管理,规范  
Traffic is regulated here by the municipal police authority.  
A well-regulated market is what the government is working hard to achieve.

## Exercises

### I. Tell whether each of the following statements is true or false:

1. A plaintiff injured in a car accident can have a choice between state courts and federal courts.
2. Federal district courts can hear all criminal cases.
3. For a claim of less than \$7,500, the plaintiff can only file a suit with a small claims court.
4. There is at least one federal appellate court in each state.
5. A party unhappy with an appellate court decision is entitled to a review of the case by the U. S. Supreme Court.
6. The federal court system also has small claims courts.
7. State judges are appointed for life.
8. Judges can not be removed from office for their poor or unpopular judgments.
9. All federal judges are nominated by the President and approved by the Senate.
10. Precedents can be overturned.



**II. Answer the following questions:**

1. Does America have a unified court system?
2. Under what circumstances will a federal court hear a contract dispute?
3. What kind of cases are more likely to get review by the U. S. Supreme Court?
4. If the amount at stake is very big, can the plaintiff bring the claim to a federal court?
5. Explain the structure of the federal court system.
6. Explain the structure of the state court system, with emphasis on the differences between the state and federal systems.
7. Federal judges are appointed for life. Explain the reasons behind this.
8. Judges should not be partisan politicians. But do you think they can really stay away from politics?
9. Explain the principle of stare decisis.
10. What are the reasons for the principle of stare decisis?

**III. Fill in the blanks with proper words:**

1. The United States is a nation \_\_\_\_\_ 50 states under a \_\_\_\_\_ national government.
2. No one has \_\_\_\_\_ his success in business.
3. Laws are meant to \_\_\_\_\_ human behavior, and the court is seen as the last \_\_\_\_\_ for settling disputes.
4. Only very \_\_\_\_\_ defined legal issues can be brought before federal courts. The \_\_\_\_\_ majority of court cases take place at the state and local levels.
5. Because I didn't have \_\_\_\_\_ to a computer when I was in the hotel, I didn't get his email message until now.
6. His claims are \_\_\_\_\_ on tort liability.
7. The \_\_\_\_\_ of the independent director is \_\_\_\_\_ to the approval of the shareholders.
8. When judges are \_\_\_\_\_ upon to decide a case, they often rely on \_\_\_\_\_.
9. The small income gave him financial independence and a \_\_\_\_\_ of



self-respect.

10. When such a huge amount is at \_\_\_\_\_, no one will agree to undertake the project without reasonable \_\_\_\_\_ of success.

#### IV. Cloze:

The United States district courts are the \_\_\_\_\_ (1) courts of the federal court system. Within \_\_\_\_\_ (2) set by Congress and the Constitution, the district courts have \_\_\_\_\_ (3) to hear nearly all categories of \_\_\_\_\_ (4) cases, including both civil and \_\_\_\_\_ (5) matters. There are 94 federal judicial districts, including at \_\_\_\_\_ (6) one for each state, the District of Columbia, and Puerto Rico.

The 94 U. S. judicial districts are organized \_\_\_\_\_ (7) 12 regional circuits, each of which has a United States court of appeals. A court of appeals \_\_\_\_\_ (8) appeals from the district courts \_\_\_\_\_ (9) within its circuit, as well as appeals from decisions of federal administrative agencies. In \_\_\_\_\_ (10), the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases.

The United States Supreme Court \_\_\_\_\_ (11) of the Chief Justice of the United States and eight associate justices. The Supreme Court each year hears a \_\_\_\_\_ (12) number of the cases it is asked to \_\_\_\_\_ (13). Those cases may begin in the federal or state courts, and they usually \_\_\_\_\_ (14) important questions about the Constitution or \_\_\_\_\_ (15) law.

#### V. Translation:

##### 1. English to Chinese

- 1) It is something of a myth to speak about a single U. S. court system because it is in reality composed of multiple autonomous court systems. There is the federal court system, an integrated system divided into numerous geographic units and various levels of hierarchy; in addition, each state has its own courts operating within the state. Under this dual federal/state court structure, the U. S. Supreme Court is the final arbiter of federal law, while the highest



court of each state has the ultimate authority to interpret laws of the state.

- 2) The vast majority of courts at both the state and federal level are “courts of general jurisdiction,” meaning that they have authority to decide cases of many different types. There are no special constitutional courts in the U. S. — any court has the power to declare a law or action of a government executive to be unconstitutional, subject to review by a higher-level court.

## 2. Chinese to English

- 1) 美国的司法制度反映了其政体的权力分散的性质。
- 2) 州的司法系统与联邦的很相似。它们的架构很像一座宝塔。
- 3) 虽然在理论上联邦最高法院是联邦案件的终审法院,许多联邦案件是没有机会得到最高法院复审的。
- 4) 联邦法官都是终身制的。这有助于减少对他们的政治压力。
- 5) 法官应该是公正的判官而不是结党拉派的政客。但是在我看来很多法官的政治倾向是很明显的。
- 6) “因循前例”的原则使法律具有一定程度的稳定性和可预见性。



# UNIT TWO

## Civil Litigation

### Lesson One

#### The Adversary System

##### Text

The law of procedure can be divided into criminal and civil. Civil procedure is the body of rules by which the parties in civil litigation use the court to settle disputes.

Generally, the party bringing the lawsuit to the court is called the plaintiff, and the party against whom the action is brought is called the defendant. On appeal, the appealing party is usually referred to as appellant, and the winning party at trial is called the appellee.

In most states and in the federal courts, all persons may join in one lawsuit as plaintiffs if the causes of action arise out of the same transaction or series of transactions and involve common questions of law or fact<sup>1</sup>. In addition, the plaintiff may join as defendants all persons who are necessary to a complete determination or settlement of the issues<sup>2</sup>. If a defendant alleges that a complete determination of a controversy cannot be made without other parties, that defendant may bring in new third parties as third-party defendants<sup>3</sup>. The procedure is usually followed when someone is liable to a defendant who, in turn, is liable to the plaintiff.

A distinctive element of the Anglo-American judicial procedure is the





adversary system, which is the characteristic form of trial procedure in common law countries, in civil as well as criminal cases. Its essential feature is that a decision is made by judge, or judge with jury, who finds the facts and applies the law from submissions made by partisan advocates on behalf of the parties. In this system of trial procedure, the responsibility for beginning suit, for shaping the issues, and for producing evidence rests almost entirely upon the parties to the controversy<sup>4</sup>. The court takes almost no active part. It does not do its own investigating. It rarely even asks a question. Most often it is only responsible for guiding the proceeding according to certain procedural rules and for making decisions on questions of law that arise. This system is to be contrasted with what is generally called the inquisitorial system, which is used in countries of the civil law tradition such as France and Germany. In the inquisitorial system of trial, the judge applies the law and finds the facts by his own active investigation and inquiries at trial.

Under the adversary system, the scope of the lawyers' power and responsibility is wide. It is the lawyer who makes the initial and usually final decisions as to choice of court, size of claim, nature of claim, parties, extent and kind of pre-trial investigation, mode of trial (whether jury or non-jury), settlement offers, extent and kind of proof, style of presentation and argument, and, within limits, speed and vigor of presentation. Judges are called on to intervene only occasionally and then briefly, to ensure that all the procedural safeguards are met and essential fairness is achieved.

The reasons for the prevalence of the adversary system are manifold. First, it is believed that a truer decision will be reached as a result of a contest directed by interested parties<sup>5</sup>. Second, since the parties have a direct interest in the resolution of the dispute, they should bear the burden of the time and energy required. Third, setting up sides reduces the determination of the suit to some yes-or-no questions, which are easier for an unbiased judge<sup>6</sup>. Fourth, the human instinct to do battle is better satisfied by a contest that is very much in the hands of the parties.

Contrasted with the methods of scientific or historical research, this system of finding answers to legal controversies seems sometimes unsatisfactory. When one reflects on the fact that under the adversary system victory often turns on



factors other than the true merits of the case, there is reason to be skeptical about it. Critics of the adversary system point out that it tends to reduce litigation to a costly game, in which the lawyers become the principal players and the outcome will turn on their skills rather than on the true merits of the case<sup>7</sup>. In recent times there has been a trend toward increasing the affirmative or active functions of the court that reflects the larger trend away from the “sporting” or “game” theory of litigation. Nonetheless, it cannot be questioned that in the United States the primary responsibility and control over almost all phases of the judicial process continue to reside in the parties. Full understanding of the American legal procedure will require our constant attention to the existence of the adversary system as well as critical analysis of its shortcomings.

### Words & Expressions

action /'ækʃən/ <i>n.</i>	诉讼
to bring an action/lawsuit against sb.	向某人提起诉讼,到法院告某人
defendant /dɪ'fendənt/ <i>n.</i>	被告
appellant /ə'pelənt/ <i>n.</i>	上诉人
appellee /,ɪpə'li:/ <i>n.</i>	被上诉人
cause of action	案由
transaction /træn'zækʃən/ <i>n.</i>	交易
to join sb. as plaintiff/defendant	与某人共同起诉/把某人作为第三人被告合并起诉
to make a complete determination of a controversy	彻底解决争端
to be liable	负有责任
to rest on	依靠,依赖
adversary /'ædvəsəri/ <i>n.</i>	敌手,对手,敌对的
adversary system	抗辩制
characteristic /,kærɪktə'rɪstɪk/ <i>adj., n.</i>	特有的;特征
advocate /'ædvəkət/ <i>vt., n.</i>	拥护,提倡;拥护者,辩护者
produce /prəʊ'dju:z/ <i>vt.</i>	拿出,出示
evidence /'evidəns/ <i>n.</i>	证据



inquisitorial /ɪn,kwɪzɪ'tɔ:riəl/	adj.	纠问的
presentation /,prezən'teɪʃən/	n.	介绍,陈述
intervene /,ɪntə'vi:n/	vi.	干涉;介入
safeguard /seɪfɡɑ:d/	n., vt.	预防措施,保证条款;保护
prevalence /'prevələns/	n.	流行,盛行
manifold /'mæɪnfəʊld/	adj.	多种多样的
contest /'kɒntest/	n.	比赛
interested	adj.	有利害关系的
resolution /,rezə'lju:ʃən/	n.	解决
to bear the burden of		承担
to reduce ... to		把……降为,把……归纳为
unbiased /ʌn'baɪəst/	adj.	无偏见的
satisfy /'sætɪsfaɪ/	vt.	满足,符合
critic /'krɪtɪk/	n.	批评者
merit /'merɪt/	n.	事实真相,是非曲直
phase /feɪz/	n.	阶段
reside /rɪ'zaɪd/	vi.	属于,归于
affirmative /ə'fɜ:mətɪv/	adj.	肯定的,积极的

### Notes

1. ... all persons may join in one lawsuit as plaintiffs if the causes of action arise out of the same transaction or series of transactions and involve common questions of law or fact.  
如果案由出自同一桩交易或者同类交易并且涉及的事实或法律问题又相同,原告可以合并起诉。
2. In addition, the plaintiff may join as defendants all persons who are necessary to a complete determination or settlement of the issues.  
除此之外,原告可以把所有对彻底解决或处理争议必不可少的人作为被告合并起诉。
3. If a defendant alleges that a complete determination of a controversy cannot be made without other parties, that defendant may bring in new third parties as third-party defendants.



如果被告声称彻底解决争议还必须要有其他当事人,他可以将其他人作为第三人被告纳入该案。

4. In this system of trial procedure, the responsibility for beginning suit, for shaping the issues, and for producing evidence rests almost entirely upon the parties to the controversy.

在这种庭审程序制度中,提起诉讼、界定争议以及出示证据都几乎完全是争议当事人的责任。

5. First, it is believed that a truer decision will be reached as a result of a contest directed by interested parties.

首先,人们认为由有利害关系的当事人为主导的较量可以导致更符合实际情况的决定。

6. Third, setting up sides reduces the determination of the suit to some yes-or-no questions, which are easier for an unbiased judge.

第三,树立对立面把案件的处决简化成了几道是非选择题,使不具偏见的法官处理起来比较容易。

7. Critics of the adversary system point out that it tends to reduce litigation to a costly game, in which the lawyers become the principal players and the outcome will turn on their skills rather than on the true merits of the case.

对抗辩制持批评态度的人指出,抗辩制把诉讼变为一场费钱的比赛,律师成了主角,而结果则取决于他们的技巧而不是案子本身的是非曲直。

### Word Study

1. to join *vt.*, *vi.* 合并

It is a good idea to join Tom's employer as defendant, because Tom may not be able to pay the damages.

The victims of the accident joined in an action against the bus company.

2. to be liable to sb. for sth. 因某事对某人负有责任

In this case the employer is also liable for the accident caused by his employee.

All the persons who signed this note (期票) are liable.

3. to rest on 依靠

Our hope rests on you.



The legal counsel is only an advisor. The final decision rests on the board of directors (董事会).

4. to reduce ... to 把……降为,把……归纳为

After months of negotiation they finally reduced their agreement to a written contract.

The battle was reduced to a fist fight after all the weapons became useless.

5. to reside in/with 属于

The highest judicial authority resides in the Supreme Court.

With which institution does the power to legislate reside in your country?

### Exercises

#### I. Tell whether each of the following statements is true or false:

1. The plaintiff may join all persons as defendants who he thinks are necessary for a complete determination of the dispute.
2. A defendant can not bring in a new party.
3. Under the adversary system the judge takes an active part in the resolution of disputes.
4. The judge also introduces his own witnesses.
5. The judge is responsible for guiding the proceedings and ruling on questions of law.
6. The adversary system helps to reduce the cost of litigation.
7. The adversary system puts the control of the judicial process in the hands of the parties.
8. In recent years, there has been a trend toward strengthening the adversary system in America.
9. By setting up sides and making litigation a contest between interested parties, the adversary system tends to reduce litigation to a game.
10. Critics of the adversary system think that the role of the judge should be greater.

#### II. Answer the following questions:

1. What is civil procedure?



2. What is a plaintiff?
3. What is a defendant?
4. What is an appellant?
5. What is an appellee?
6. Can more than one person be joined in a lawsuit as plaintiffs? If so, under what circumstances?
7. Can more than one person be joined in a lawsuit as defendants? If so, under what circumstances?
8. What is the adversary system?
9. What is the role of the judge in litigation under the adversary system?
10. What are the advantages of the adversary system?
11. What are its weaknesses?

**III. Fill in the following blanks with proper words:**

1. Civil procedure is the \_\_\_\_\_ of rules guiding the procedure of civil litigation.
2. The party who brings the lawsuit to court is the \_\_\_\_\_.
3. The party who appeals from the decision of the lower court is generally referred to as the \_\_\_\_\_.
4. When the causes of action \_\_\_\_\_ out of the same transactions and \_\_\_\_\_ common questions of law or fact, all persons may \_\_\_\_\_ in one lawsuit as plaintiffs.
5. If a defendant alleges that another party is \_\_\_\_\_ to him with respect to the same dispute, he may bring in that party as a \_\_\_\_\_ defendant.
6. The adversary system is a \_\_\_\_\_ element of the Anglo-American judicial procedure. It reduces the process of litigation to a contest between \_\_\_\_\_ parties, who have control over almost all \_\_\_\_\_ of litigation.
7. In a court operated under the adversary system, the responsibility for \_\_\_\_\_ suit, for \_\_\_\_\_ the issues and for \_\_\_\_\_ evidence rests almost entirely \_\_\_\_\_ the parties, who also \_\_\_\_\_ the burden of the time and expenses required.



8. Since the determination of the dispute is \_\_\_\_\_ to some yes-or-no questions, the job of the judge is made \_\_\_\_\_.
9. \_\_\_\_\_ of the adversary system think that the skill of the lawyers should not be made decisive to the outcome of litigation.
10. Justice requires that the outcome of a case depend on the \_\_\_\_\_ of the case.

#### IV. Cloze:

The adversary system is a distinctive element of \_\_\_\_\_ (1) in American courts. Within this system, the parties \_\_\_\_\_ (2) the controversy play a leading role \_\_\_\_\_ (3) the litigation process. The judge guides the proceeding \_\_\_\_\_ (4) to rules of procedure, and makes decisions \_\_\_\_\_ (5) questions of law. But he takes no active \_\_\_\_\_ (6) in the process.

Advocates \_\_\_\_\_ (7) the adversary system thinks that it has many advantages. First, it tends to result \_\_\_\_\_ (8) truer decisions. Second, it places the main \_\_\_\_\_ (9) of litigation on the parties and saves \_\_\_\_\_ (10) of the time, energy and money for the court. Third, it makes the job of the \_\_\_\_\_ (11) easier, since the determination of the suit is \_\_\_\_\_ (12) to yes-or-no questions.

But the only test of a good system of procedure is: Does it tend \_\_\_\_\_ (13) the just and efficient determination of legal controversies? Measured \_\_\_\_\_ (14) this standard, the adversary system seems unsatisfactory. As many critics have \_\_\_\_\_ (15) out, the adversary system often means that control \_\_\_\_\_ (16) the litigation process will very much be in the \_\_\_\_\_ (17) of the parties, and victory will depend on the \_\_\_\_\_ (18) of the lawyers rather \_\_\_\_\_ (19) on the justice or true \_\_\_\_\_ (20) of the cause.

#### V. Translation:

##### 1. English to Chinese

The question of *standing to sue* (诉讼主体资格) is whether the litigant is entitled to have the court decide the dispute. The issue arises



because of the limited role of courts in our society.

For a court to hear a case, the plaintiff must allege that there is a controversy between him and the defendant, and that he has a personal interest in the outcome of the controversy. He must also allege that this personal interest is based on the threatened or actual injury to him resulting from the defendant's action.

Without the requirement of "standing", courts will be called upon to decide abstract questions of wide public significance. Such questions are best resolved by the political process.

## 2. Chinese to English

- 1) 如果你对某人提起诉讼,你就是原告。如果某人对你提起诉讼,你就是被告。
- 2) 既然案由是出自同一桩交易,我们可以把所有的受害人作为原告合并在一个案子中。
- 3) 被告声称史密斯对他负有责任,便把史密斯作为第三人被告带入该案。
- 4) 在美国法院,法官并不积极参与诉讼。法官根据程序法指导案子的进程并决定法律问题。
- 5) 案子的结果应该取决于案子本身的事实真相,但是抗辩制往往使它取决于律师的技巧。
- 6) 虽然已有趋势要增强法官的作用,抗辩制仍然是美国司法程序的一个显著的特点。

