

## **SYLLABUS**

International Business Transactions, 352.01

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## **International Business Transactions**

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### **SYLLABUS SPRING 2008**

**Text For This Course: Vagts, Dodge and Koh, TRANSNATIONAL BUSINESS PROBLEMS (Third Edition 2003). Other assigned readings are listed in the Annex and are available on the course homepage.**

**Lecture 1. Introduction. Assignment: Text pages 1-20; 65-93; *The Schooner Charming Betsy*.**

- A. The international business transactions we will consider include:
- (i) The sale of goods to another country, either by sales direct to the foreign customer, the appointment of a foreign distributor, or the use of trading companies.
  - (ii) The licensing of “intellectual property” (trademarks, patents, copyrights and/or trade secrets) to a person or entity in another country, for use in production abroad.
  - (iii) The acquisition of a business in another country by forming a new company or purchase of an existing entity.
  - (iv) The sale of services in another country (for example, the architectural, financial and legal services involved in an infrastructure project).
- B. These transactions often involve legal disciplines or rules that are not encountered in domestic business law practice:
- (i) Customary international law which has an important role in the analysis of legal rights and obligations on the transnational business scene.
  - (ii) International Agreements which provide important business access and investor protections, including Treaties of Friendship, Commerce and Navigation (“FCN”), Free Trade Agreements (“FTA”), and Bilateral Investment Treaties (“BIT”).

- (iii) Multinational agreements such as the Convention on the International Sale of Goods (“CISG”), which differs in important respects from the Uniform Commercial Code (“UCC”) and which may be applicable to international transactions originating in a CISG signatory country unless a choice of law is specified.
- (iv) The Vienna Convention on the Law of Treaties (“Vienna Convention”), which has been adopted by more than 120 countries, provides guidelines for treaty interpretation.
- (v) Unofficial definitions of commercial and banking terms such as the INCOTERMS sponsored by the International Chamber of Commerce are often incorporated into commercial contracts.

C. Private international law, and its relationship to national law.

- (i) International law is binding on U.S. courts in the absence of conflicting executive or legislative action. *The Schooner Charming Betsy*, 6 U.S. 64 (1804)
- (ii) Resolution of the potential conflict between the extraterritorial application of U.S. laws and the domestic laws of other countries.

**Lecture 2. International Litigation. Assignment: Text pages 20-64; 94-103; *The Republic of Argentina v. Weltover*, 504 U.S. 607 (1982), *The U.N. Convention on the Recognition and Enforcement of Arbitral Awards*.**

A. The jurisdiction of U.S. courts in international disputes:

- (i) Contracting parties’ selection of the forum for dispute resolution is upheld in *M/S Bremen v. Zapata Off-Shore Company*.
- (ii) Discovery abroad where the action is commenced in a U.S. court.
- (iii) Jurisdiction of U.S. Courts over foreign governments; the Foreign Sovereign Immunities Act; *Weltover* is the key precedent.
- (iv) Enforcement of judgments.

B. Arbitration is an alternative to litigation that is favored by many lawyers.

- (i) The evolution of judicial acceptance of compulsory arbitration clauses in transnational business contracts.
- (ii) The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been adopted by most countries.

**Lecture 3. The Effect of International Agreements on International Business Transactions:**  
*Assignment: Text pages 104-151, 170-183; GATT-1994, Articles I, III, XI and XX; Section 102 of the Uruguay Round Agreements Act.*

- A. The General Agreement on Tariffs and Trade (“GATT-1994”) lays down rules that govern trade regulation by members of the World Trade Organization (“WTO”) and has been responsible for an enormous increase in international business transactions.
- B. Article I, the most-favored-nation (“MFN”) principle, and Article III, the national treatment clause, are the cornerstones of GATT-1994.
- C. GATT-1994, Article XI guarantees the right (“trading rights”) to export to WTO members, subject to numerous exceptions.
- D. Customs unions and regional trade agreements such as the European Union (“EU”) and North American Free Trade Agreement (“NAFTA”) permit regional trade preferences that give advantage to member countries despite GATT-1994 and the MFN principle.
- E. Only governments can assert trading rights and other claims under the GATT and WTO Agreements; however, GATT violations may be a denial of fair and equitable treatment under bilateral investment treaties.

**Lecture 4. The Nationality of Corporations:** *Assignment: Text pages 184-224; Section 19 U.S./Uruguay BIT; Barcelona Traction; Excerpt from Toklas.*

- A. The customary rules concerning the nationality of corporations; the *Barcelona Traction* decision.
- B. Treaty provisions concerning corporate nationality.
- C. The treatment of foreign corporations under national law in the United States and abroad.
- D. The multinational enterprise: hero or villain?
- E. The limits of limited liability of corporations on the international scene; piercing the corporate “veil.”

**Lecture 5. Problem 1: Transnational Sales.** *Assignment: Text pages 283-335; UCC §§ 5-107, 5-180 and 5-116; U.N. Convention on the Use of Electronic Communications in International Contracts; CISG Articles 1-6, 14-24, and 79.*

- A. The transnational sales contract is governed by national law (for example, the Uniform Commercial Code for transactions originating in the United States) unless the CISG is applicable.
  - (i) Why the IBT lawyer must be aware of the CISG.
  - (ii) The CISG applies where the transaction is between signatory countries unless there is an “opt-out” clause in specific transactions.

- B. Commercial terms (e.g., FOB, CIF, etc.) utilized in international transactions as defined in the UCC and INCOTERMS.
- C. The U.N. Convention on Electronic Communications in the formation of contracts.
- D. The letter of credit and shipping issues:
  - (i) How the letter of credit transaction works and its importance to the international business transaction.
  - (ii) The “exact compliance” rule: UCC §§ 5-107, 5-108 and 5-116 and international principles.
  - (iii) The Uniform Customs and Practice for Documentary Credits (“UCP”) is a non-official statement of rules that banks uniformly incorporate in letters of credit.
  - (iv) Payment procedures and obligations of the parties under the UCP.
  - (v) The letter of credit in the electronic age.
- E. While banks are usually required to pay against documents compliant on their face, Sztejn v. Henry Shroeder Banking Corporation, 177 Misc. 719, 31 N.Y.S.2d 631 (1941), permits an injunction against payment where the buyer alleges intentional fraud and the person presenting the draft was a party to the fraud.
  - (i) The “fraud exception” as stated by UCC 5-109: the fraud must be found either in the documents or must have been committed by the beneficiary, issuer or applicant.
  - (ii) The “fraud exception” is not self-executing; judicial intervention is required.

**Lecture 6. Problem 1, Continued. Assignment: *the Hague Rules; COGSA; Federal Bills of Lading Act; UCC 5-109; the OECD Convention on Combating Bribery; Some Experiences in International Business.***

- A. Marine cargo claims:
  - (i) The Hague Rules (the “International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”) limit the liability of the common carrier.
  - (ii) The United States adopted the Hague Rules in the Carriage of Goods by Sea Act (“COGSA”) and unlike most of the world, applies the Rules to inward and outbound shipments.
  - (iii) Non-responsibility clauses: ways for the common carrier to limit liability to the owner of the cargo.
  - (iv) Insurance of goods during transit.

- B. Regulation of export sales due to national security or foreign policy considerations.
- C. Bribery of foreign officials.
  - (i) U.S. persons and companies are subject to the Foreign Corrupt Practices Act (“FCPA”), 15 USC § 78dd-1, 78dd-2, which makes it a crime to knowingly, directly or indirectly, pay a bribe to a foreign official to obtain or retain business.
  - (ii) The elements of an offense under the FCPA and why U.S. counsel must properly advise their clients on compliance.
  - (iii) What should counsel do when it learns that a client has made a questionable payment?
- D. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
  - (i) Why the OECD Convention is important to U.S. business.
  - (ii) Implementation of the OECD Convention: peer review has worked.
- E. The UN Convention on Bribery focuses on the host country officials.

**Lecture 7. Problem 2: Agency and Distributorship Agreements. Assignment: Text pages 336-374.**

- A. Understanding the law of the country where the transactions are planned to occur.
- B. The elements of an agency or distribution agreement.
- C. Will the business arrangement selected subject the client to jurisdiction and taxation in the target country?
- D. Termination problems abound as many countries grant extensive rights to terminated agents/distributors and these laws must be considered before the contract is signed.

**Lecture 8. Problem 3: Licensing Agreements. Assignment: Text pages 374-412; Doha Round Amendment of the TRIPs Agreement; Summary of Grey Market Cases.**

- A. Intellectual property is the legal recognition of inventions or creative work that is limited to the territory of the state.
  - (i) Registration of the creative work is essential to achieve intellectual property status.
  - (ii) The WTO rules: the Agreement on Trade Related Aspects of Intellectual Property (“TRIPS”).
  - (iii) Know-how and trade secrets are also intellectual property but have less protection from misuse.

- B. The Franchise agreement as a way for a business owning intellectual property to “go international”:
  - (i) First, make sure the intellectual property is protected in the target country.
  - (ii) Pitfalls in drafting the franchise agreement.
  - (iii) Regulation of the franchisor by the host government.
  - (iv) Dealing with local objections: Francisco Toledo takes on McDonald’s in Oaxaca, inspired (perhaps) by Jose Bove in France.
  - (v) Antitrust issues can be a real problem.
- C. Piracy of intellectual property:
  - (i) Piracy menaces the carefully constructed global intellectual property regime.
  - (ii) Measures available to U.S. intellectual property owners to combat piracy.
- D. Compulsory Licensing pursuant to TRIPs.
  - (i) Abuse of competitive position
  - (ii) Public health issues
- E. Gray Markets:
  - (i) The U.S. Customs Service has traditionally favored parallel imports as benefiting consumers, which is evident from the common control exception to Section 526 (allows trademark owner to request exclusion).
  - (ii) The Supreme Court in K-Mart Corp. v. Carter, 486 US 281 (1988), confirmed the common control exception of Section 526.
  - (iii) Lower courts are less sympathetic to the consumer benefits from the gray market, leading to judicial efforts to find ways around the common control exception.

**Lecture 9. Problem 4: The establishment and operation of a foreign investment.**  
*Assignment: Text pages 413-461; the U.S./Poland Treaty of Friendship Commerce and Navigation.*

- A. The lawyer’s role in risk analysis:
  - (i) The political climate may make laws less helpful than they seem.
  - (ii) Labor/management relations are frequently highly regulated.
- B. Investment options include establishing a greenfield company, making an agreement for merger or acquisition, or setting up an unincorporated branch:

- (i) An example from Germany.
  - (ii) Antitrust issues in acquisitions.
  - (iii) The European Company Statute: the EU's Frequently Asked Questions.
- C. International agreements that may be important:
- (i) Treaties of Friendship, Commerce and Navigation are common between developed countries and provide for the right of "establishment" and other commercially important benefits.
  - (ii) Bilateral Investment Treaties are generally between developing and developing countries and provide important investor protections.
  - (iii) The Agreement on Trade Related Investment Measures ("TRIMS") limits the right of WTO members to restrict foreign direct investment.
  - (iv) Regional trade agreements also contain investor protections.

**Lecture 10. Problem 4, Continued: Investor Protection. Assignment: Text pages 563-579, 607-612; *Metalclad v. United Mexican States*; *Ghana/United Kingdom Bilateral Investment Treaty*; *The Claim by Dutch Nationals against the Republic of Zimbabwe*.**

- A. Diplomatic protection and the jurisdiction of the International Court of Justice.
- B. NAFTA Chapter 11 authorizes investors to submit claims against member governments to compulsory arbitration before the International Centre for Settlement of Investment Disputes ("ICSID").
- C. The Metalclad decision and its aftermath; Bill Moyers and environmentalists versus investors.
- D. The land dispute in Zimbabwe and arbitration pursuant to the Netherlands/Zimbabwe BIT.
- E. Comparison of investor/state arbitration to WTO dispute resolution where a GATT 1994 Article XI right is violated.

**Lecture 11. Problem 5: Mergers and Acquisitions. Assignment: Text pages 462-511; *CIFIUS*.**

- A. A stock purchase agreement.
- B. Securities law implications.
- C. Antitrust issues are always a concern.
- D. CIFIUS Review
- E. Privatizations.

**Lecture 12. Problem 6. An International Joint Venture. Assignment: Text pages 512-540.**

- A. Chinese regulation of joint ventures.
- B. Dispute resolution.
- C. Antitrust issues.

**Lecture 13. Development Agreements. Assignment: Text pages 541-582.**

- A. Sovereignty over natural resources and the right to contractually provide for exploitation by non-nationals.
- B. Drafting problems in development agreements.
- C. Unique issues such as the right to cancellation; the new paradigm in South America.

## Annex to Syllabus

### List of Additional Readings

1. The Schooner Charming Betsy, 6 U.S. 64 (1804).
2. The Convention on the International Sale of Goods (“CISG”).
3. The Vienna Convention on the Law of Treaties.
4. Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).
5. The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
6. Section 102, Uruguay Round Agreements Act.
7. GATT-1994 Articles I, III, XI, and XX.
8. Section 19, U.S./Uruguay BIT; excerpt from Toklas.
9. Case Concerning the Barcelona Traction, Light and Power Company, Ltd., 1CJ (1970).
10. U.N. Convention on the Use of Electronic Communications in International Contracts.
11. The Uniform Customs and Practice for Documentary Credits (“UCP”).
12. Sztejn v. Hentry Schroeder Banking Corporation, 177 Misc. 719, 31 N.Y.S. 631 (1941).
13. UCC Sections 5-107, 5-108, and 5-116.
14. The Pomerene Act.
15. The Carriage of Goods by Sea Act.
16. The OECD Convention on Combatting Bribery.
17. Some Experiences in International Business.
18. Doha Round Amendment of the TRIPs Agreement.
19. Summary of Gray Market Cases.
20. Treaty of Friendship, Commerce and Navigation Between the United States and Poland.
21. Bilateral Investment Treaty Between Ghana and the United Kingdom.
22. Excerpts from Metalclad v. United Mexican States.
23. Excerpts from Vivandi v. Argentina.
24. Wiley Rein CIFIUS Analysis.