

**UNIVERSITY OF PENNSYLVANIA
WHARTON SCHOOL
DEPARTMENT OF LEGAL STUDIES
SPRING TERM 2014
DR. MAYER**

LGST 219 LAW AND POLICY IN INTERNATIONAL BUSINESS

TEXT: Folsom, Gordon, Spanogle, et al., International Business Transactions. (St. Paul: West, 11th edition, 2012). The text has become expensive, but a copy is available for you to use for free at the reserve desk in the Lippincott Library.

Course Pack: The course pack (updated – not identical to ones used in earlier years) will be available from Wharton Reprographics via study.net. If current events warrant updating assignments, some new readings may be added or substituted for assignments currently listed on the syllabus.

There is also a small paperback, International Business Transactions in a Nutshell, that is optional reading.

There will be many handouts distributed in class during the course of the semester. Students are responsible for making sure that they have a complete set. If missing a class, students should arrange to have a classmate pick up the handouts. The handouts for each class will be recorded on Canvas.

The documents referred to are now easily accessible on Google.

READING ASSIGNMENTS

Class lectures and discussions will assume that students have already read the assigned materials. (Where questions arise about how far students need to read ahead, students may contact the professor.) Please note that the order of topics is settled, but the time that we devote in class to individual topics will be influenced by students' degree of interest in discussing questions that come up and potentially also by new developments. That is, what is listed as one "session" may be short or may extend well beyond the time allotted for one class meeting. If past experience is any guide, we shall fall behind the syllabus, meaning that the last assignments listed here may not be covered in class. No test questions will be asked on any material not already covered in class by the time when the tests are given!

Questions in the textbook can assist you in focusing on issues; answers do not need to be formally prepared unless a question has been specifically assigned for class discussion.

Session 1

Overview of Course.

Introduction to basic terms and concepts. Globalization and the legal framework for conducting international business. Coping with the layers of national and transnational, regional, and international laws.

TEXT: 2-24 as background reading.

Sessions 2-3

Current problems in handling international business disputes.

Discussion of the Yang Rong case as a sample problem illustrating generic legal questions raised by international business cases. Forums and institutions for international dispute resolution and strategies used in forum selection and the varieties of laws that can apply. Special features of the U.S. legal system.

TEXT: 1134-1151.

Course pack: Diversity or Cacophony (an article to be skimmed to get a sense of how frustrating it can be to try to cope with the multiplicity of legal regimes that international business currently confronts); Forum Shopping, Domestic and International (the first part of the forum shopping material is to be skimmed for background; in class we shall discuss pp. 560-74).

Sessions 4-5

Continuation of previous material. Introduction to jurisdictional problems.

International arbitration versus litigation in courts with assessments of the pros and cons Evaluation of the policy implications of privatizing the work of deciding important business disputes.

What rules do courts refer to in deciding whether they can resolve an international business dispute? Introduction to basic U.S. concepts of jurisdiction. When can foreign defendant be forced to show up in court? Attempts to standardize jurisdictional rules. Jurisdiction of international tribunals. Specific problems with getting the ICJ (the World Court) to hear cases involving international business. Selected concepts of jurisdiction from different countries.

Documents referred to: Selected provisions in the UN Convention on

the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) and the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the EEC Brussels Convention).

Course pack: International Commercial Arbitration; Towards a Greater Depolitization of Investment Disputes (Section on ICSID only); Public Protests, Private Contracts: Confidentiality in ICSID Arbitration; Hvide.

TEXT: 1165-1182.

Sessions 6-7

Continuation of previous material. What law(s) apply/should govern international business disputes?

Problems in assigning corporate nationality to international businesses. Problems in deciding what country's law applies to an international business dispute when more than one country's law might apply. Potential advantages of being classed as a foreign corporation. Recourse to contracts to decide in advance what law will cover any disputes. Choice of law and choice of forum clauses – legal and policy dimensions.

Course pack: Nationality cases; Corporate Nationality, Investment Protection Agreements; The Current Legal Framework of Sex/Gender Discrimination Law -- Sex, Allies and Bfoqs.

TEXT: 1151-1164, and consult as background the discussion of conflicts of laws principles on 1204-1212.

Documents referred to: UN Convention of Contracts for the International Sale of Goods (CISG) See articles 1, 7, 10. Convention on the Law Applicable to Contractual Obligations (EEC Rome Convention) See articles 1, 2, 3, 7. Hague Convention on Choice of Court Agreements.

Sessions 8-9

Continuation of previous material. The enforceability of foreign judgments in local courts.

When will a business be liable for judgment rendered against it in an international arbitration or in foreign court? On what bases can such enforcement be resisted?

TEXT: 1246-1276.

Sessions 10-13

Should uniform standards or local standards govern operations of international business?

To what extent can international businesses "escape" strict environmental, health, labor, safety, and other regulations in their home countries by moving operations to loosely regulated markets overseas? Should the race to the bottom be regulated – and, if so, how? What international legal standards may apply? New risks of lawsuits in OECD countries against international businesses based on harms they have caused overseas.

Special problems of recourse to U.S. forums to determine liability for harms and accidents caused overseas. ATCA cases. Forum non conveniens dismissals of cases filed in US courts. The Bhopal accident litigation.

Attempts to regulate the international transport and disposal of hazardous wastes, and US resistance to the Basel Convention.

TEXT: 1047-1074, 1182-1203.

Documents referred to: Alien Tort Claims Act and Torture Victims Protection Act.

Course pack: Binding Corporations to Human Rights Norms through Public Law Settlement – part up to section III.A being required reading, the remainder optional reading; Keeping Africa Out of the Global Backyard; In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice; India's Toxic Landfills: A Dumping Ground for the World's Electronic Waste.

Session 14

APPROXIMATE DATE FOR MIDTERM (The class may decide by majority vote that the timing for the midterm should be adjusted in the light of other exams and events; the professor is open to changing the date.) Whenever scheduled, the midterm exam will be taken during our regular class period in our regular classroom.

Sessions 15-16

Legal problems facing businesses suing foreign governments and their agencies.

The doctrine of sovereign immunity. What rules decide whether a foreign

government can claim legal immunity when sued by a private party? The U.S. Foreign Sovereign Immunities Act of 1976 and unresolved problems.

TEXT: 1089-1094.

Documents referred to: Foreign Sovereign Immunities Act

Sessions 17-18

Continuation of previous material. The act of state doctrine as currently applied in U.S. courts.

The impact of foreign relations concerns on U.S. litigation involving acts by foreign governments. How closely related are the policy concerns underlying sovereign immunity defenses and act of state defenses? Do the rules as they now stand make sense?

TEXT: 1095-1102.

Course pack: IAM V. OPEC.

Sessions 19-21

Regulating foreign direct investment (FDI).

Various approaches to regulating incoming foreign investment, laws and related policies and how they have shifted in relation to changing political currents. The European Union and NAFTA systems. U.S. attitudes and the role of CFIUS.

TEXT: 900-934, 947-976, 1106-1133.

Course pack: The Committee on Foreign Investment and National Security Act of 2007

Documents referred to: North American Free Trade Agreement, Foreign Investment Law of the United Mexican States.

Sessions 22-24

Continuation of previous material. Dealing with expropriation risks in foreign investment.

Different types of expropriation of foreign-owned property. What are the applicable standards for deciding when such takings are legal? What is the current status of international law in this area? Types of political risk

insurance programs. Long-term development contracts.

TEXT: 1075-1088,1103-1106.

Course pack: A Canadian Commentary on Constructive Expropriation Law under NAFTA Article 1110 – emphasis on first four sections, the remainder being background; Mississippi Judicial System: Failing to Meet the Minimum Standard of Justice in *Loewen Group, Inc. v. O'Keefe* ; Economic Development Agreements; and refer back to the previously assigned Bolivian expropriation case in *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*.

Sessions 25-26

Force majeure and frustration as excuses for non-performance of contracts.

Different national and international rules on excusing parties for non-performance of contracts in specific circumstances. Special legal problems of suing state-run/state-related enterprises for breach of contract.
TEXT: 125-157.

Course pack: States and State-Controlled Corporations.

Session 27

Patterns of extraterritoriality in the area of antitrust.

Issues that are raised when national economic regulation extends beyond a country's own frontiers. Extraterritorial applications of U.S. antitrust law and European competition law and responses to these. What are the policies behind such extraterritorial extension of economic regulation? Do we need a uniform international approach to regulating competition?

TEXT: 1213-1245.

Course pack: International Antitrust at the Crossroads; Global Antitrust and the Evolution of an International Standard; Extraterritorial Jurisdiction – European Responses.

Documents referred to: UK Protection of Trading Interests Order 1992; Order Requiring Persons in Canada to Give Notice

Session 28

How far does the reach of SEC enforcement extend beyond U.S.

borders?

Extraterritorial application of U.S. securities regulations in suits involving conduct by non-U.S. citizens or securities transactions in other countries.

Course pack: Morrison v. National Australia Bank Ltd.

Session 29

Penalizing international business for corrupt overseas payments.

The U.S. policy of criminalizing questionable payments to foreign officials. The U.S. Foreign Corrupt Practices Act. Other responses to the problems of corruption/corrupt payments. New international and OECD initiatives and Transparency International.

The U.S. Foreign Corrupt Practices Act. Other responses to the problems of corruption/corrupt payments.

TEXT: 722-751.

Documents referred to: Foreign Corrupt Practices Act (as amended); UN Convention Against Corruption 2003; Convention on Combating Bribery of Foreign Public Officials (OECD).

EXAMINATIONS:

There will be a midterm and a final examination. The midterm will be held during a regular class period. A tentative date will be proposed; if it happens to clash with too many other exams on class members' schedules, it can potentially be moved to another day. PLEASE NOTE: The final will be held on the day and at the time scheduled by the University based on a scheme correlating final exam slots with the time and day of the week of the first class meeting. The exam date and time can be found on various Penn websites.

Purpose of examinations

The examinations are not designed to test whether you are qualified to be lawyers!! They examine your ability to demonstrate an informed and intelligent appreciation of legal problems that are typically encountered in the conduct of international business. You must grasp the basic rules affecting the international business cases that will be discussed and appreciate the policy implications of various approaches to regulating international business. To handle the questions you will need to show that you can identify the relevant national or international legal rules and apply them and/or recognize what kinds of legal strategies are likely to be successful in achieving certain business goals and also what the legal risks and potential liability may be of a proposed course of action. Among other things, you should be able to demonstrate on an examination that you know how to plan and structure international business operations so that you do not incur avoidable legal liabilities and problems.

Cases will be read on various topics, but you will not be tested on your ability to remember the exact captions or names of all cases. You will be responsible for understanding the holding, or basic legal principle, enunciated in the assigned cases, and why the court reached the conclusion that it did. This is essential for grasping the implications of court decisions for international business.

Students will need to have a sound command of English to handle the exams. Students will be expected to grasp the significance of all the legal terms that are used in class lectures and discussions. The meanings of these terms should be clarified by the readings and in-class discussions, but, if they are not, you should definitely ask the instructor for explanations of any terms that you find confusing.

Style of examinations

The examination format changes somewhat from semester to semester. In the past, examinations have included essay questions, short answer questions, and true or false propositions. On rare occasions multiple choice questions have been used. (If multiple choice questions are being used, you will be advised well before the examination.) The types of questions could include the following:

- 1) Statements of fact situations that could occur in international business, where the student is asked to analyze what legal issues these would raise and explain what legal risks or penalties, if any, might be incurred by the parties involved.
- 2) Descriptions of hypothetical legal cases involving international business, where the student is asked to identify what legal rules would govern the case and with what likely result.
- 3) Descriptions of proposed courses of action in international business, where the student is asked to recommend what should be done, presenting arguments based on legal and policy considerations about the advisability of different courses of action and explaining why a particular action is the best one to take.
- 4) Short descriptions of actions that could be taken by a person in international business that call for brief explanations about whether the action would or would not be legal.
- 5) Descriptions of an actual or hypothetical law affecting international business, where the student is asked for a critical appraisal of whether or not the law is sound in terms of the policies involved or the impact it could be expected to have.

Handouts with bullet points and sample exam questions

Please note: Handouts will be distributed in class on with bullet points on topics that we address to help you focus on the major themes and issues that we are covering. (These are NOT substitutes for class notes; they do NOT offer comprehensive listings of every angle that we cover or all the important points in the readings.) Sample exam questions will also be included. Students may want to practice for the exams by writing answers to these sample questions and submitting them to the professor for evaluation. Submitting answers for evaluation should not be delayed until the evening before an exam! Students who wait till the last minute to submit their sample answers may not get their answers evaluated in time for the exercise to be useful. Preferably, the sample answers should be turned in no later than two days before an exam.

Preparing for examinations

The questions are designed to give you the opportunity to show that you have mastered the materials that are presented in lectures and discussed in class. It is your responsibility to cover the assigned readings, which are important as background for understanding what is discussed in class. The examinations will not test you on points that are mentioned only in the assigned readings and are never touched on in class.

Good class notes are very important for this course. Your class notes, if they are complete and

accurate, will provide a helpful study outline for both the midterm and the final. You may find that group study and comparing class notes with other class members will help you improve your notes and enhance the effectiveness of your exam preparation.

Experience has shown that in this course any failures to attend class on a regular basis and to stay abreast of the readings have negative consequences for the students' ability to master the material. Students who keep on top of what is going on by paying close attention to what we cover in each class meeting will find that the pieces fit together neatly by exam time. The material is not intrinsically difficult, but it cannot be comfortably digested by last minute cramming. Preparing adequately for the test questions without attending class will be extremely difficult.

If you have kept up with the readings, understood everything covered in class, kept a good record of class discussions and lectures, and have reviewed your notes so that at exam time all the points are fresh in your mind, you will be well prepared to answer all the questions.

Grading

You will be graded not on an absolute scale but in relation to the performance of other class members taking exams in the same semester.

Where answers to essay exam questions are involved, it is essential for students to be able to write coherently and to express themselves accurately. Students who have weak verbal skills or who have experienced problems communicating their ideas clearly in writing will have great difficulty handling the questions on the tests for this course, which could result in poor grades.

GRADING SCHEME – TWO ALTERNATIVES:

There are two ways to take this course:

One way is to take the midterm and the final. In that case, the midterm will count for 40% of the course grade and the final for 60%.

The second way is to do the optional paper requirement. In that case, the midterm will count for 30%, the final for 30% and the paper for 40%.

In cases where students are on the border between two grades, the course grade will be influenced by the quality of student preparation and participation in class discussions.

DESCRIPTION OF PAPER OPTION:

Students electing the paper option must notify the professor by February 10, and by that date they must submit an outline of at least one page of the proposed paper, along with a list of representative sources. The outline and sources must both be approved before the paper project is undertaken. The final paper must be submitted BOTH in hard copy AND electronic format to the professor no later than our last class scheduled meeting. Papers submitted after that date and time will be graded down one full grade, and papers submitted after 3PM on May 2 will not count as fulfillment of the paper option. The paper must be typewritten, double-spaced. Although quality of research and analysis will ultimately be more important than quantity of pages, students should aim for a paper of at least 16 pages of text in a normal-sized font (approximately 4,000 words). These 16 pages will be counted with tables, bibliography, and the footnotes/endnotes excluded.

The paper must be completed in accordance with Penn's academic integrity code. It must be documented with appropriate citations to the sources relied on. The footnotes/endnotes must be done according to standard styles like those of the University of Chicago or the MLA.

The paper should be problem-oriented and offer a critical perspective on a legal aspect of international business. Mere description of the information available on a topic will not be sufficient. Instead, students will be required to identify a question regarding which opinions of knowledgeable people diverge. They will be expected analyze the problem that they have chosen and to reach intelligent and informed conclusions about the legal issues involved, demonstrating good judgment as they explain how they have reasoned to their conclusions

The most successful papers are ones dealing with problems in which the student authors have a personal interest or that pertain to students' career objectives. They might be on topics like whether Indonesia should change its law on foreign investment, whether a US court has ruled

appropriately in dismissing a lawsuit involving international business to courts overseas, whether a decision in an international arbitration should be enforced, whether the level of compensation offered for the expropriation of foreign-owned property in a particular country was or was not adequate, or whether NAFTA has harmed the Mexican economy. Students will be required to take a position on the question being researched and to justify their conclusions.

The purpose of the paper is to provide students with the opportunity to do research and original analysis regarding legal questions in the area of international business. This requires appropriate sources. Therefore, students should plan to use materials like recent articles in law reviews (accessible in the library via the LEXIS system), interviews with persons in government or business, case reports, UN documents, and articles and books written by specialists wrestling with legal dimensions of international business. Serious journalism, like reports in the Economist, the Financial Times or the Wall Street Journal, may also be used. Compilation of materials in textbooks and basic mass media sources will not constitute adequate research. There are many sources on the Internet that students may find helpful, but great care must be used to avoid being ensnared by Internet sites that disseminate low-quality and inaccurate information or that adopt biased approaches to issues.

As the paper option should ideally test the student's ability to work independently on an aspect of law and international business, students taking the paper option are expected to exercise initiative and to work largely on their own. The professor is available, however, for any consultations that could prove helpful -- choosing a topic, reviewing paper outlines, identifying and locating sources, etc. Consultations can be arranged during office hours or at other mutually convenient times.

Please consult the professor promptly with regard to any preliminary questions or difficulties. Call 215 898-5717 or use e-mail <mayera@wharton.upenn.edu>.

PLEASE NOTE: ANY FAILURE TO COMPLY WITH THE LISTED PROCEDURES MAY MEAN THAT YOU WILL NOT GET CREDIT FOR YOUR PAPER.

Sources That You May Find Helpful:

<http://www.lib.berkeley.edu/TeachingLib/Guides/Internet/Style.html> -- guidelines on documenting papers.

<http://owl.english.purdue.edu> -- Purdue University's On-Line Writing Lab, with links to many useful "handouts" on a wide range of writing issues.

http://www.columbia.edu/cu/cup/cgos/idx_basic.html -- The Columbia Guide to Online Style.

<http://nutsandbolts.washcoll.edu/nb-home.html> -- Michael Harvey, The Nuts and Bolts of College Writing, with coverage of most aspects of paper writing in a clear format.

