

Columbia Law School

Fall Semester 2022

Strategic International Commercial Transactions

Mark Vecchio

Syllabus

This course is designed to introduce the student to several of the most frequently encountered types of strategic international business arrangements -- including mergers and acquisitions, joint ventures and strategic alliances, project finance, intellectual property licensing, and international private equity and venture capital transactions. We will compare and contrast deal elements common to international transactions of varying types. In addition, we will look at how specific elements of the U.S. regulatory environment and foreign regulatory environments affect international transactions and will consider what kinds of barriers -- legal, financial, cultural, commercial, practical, and ethical -- businesses face in cross-border deals. What are the elements which make a transaction truly international? How do international transactions differ from purely domestic ones? What is the role of the lawyer in international transactions? This course is targeted to JD, LLM, and MBA students who are interested in learning more about international corporate law and business. We will be taking a decidedly hands on, practical approach, which will include close scrutiny and examination of actual deal agreements and related documents. The class is a basic, survey-style course, intended as an introduction to the world of international deal-making for the relatively uninitiated -- students with significant deal-making experience may find it insufficiently challenging. Students will be responsible for reading assignments, class participation, and preparation of an 8-10 page mid-term take-home client memo. In lieu of a final exam, JD and LLM students will be expected to prepare, individually, a 25-30 page research paper, and MBA students (who will be earning 3 credits for this course) will be expected to prepare, individually, two separate 15-20 page research papers, in each case on a topic of international business law as agreed upon with the instructor. A select number of students will have the opportunity to present the results of their research to the class. JD minor writing credit granted upon completion. LLM writing credit granted upon completion.

We will be following a modified and accelerated Monday/Wednesday evening schedule, as follows: Class will meet the following Monday evenings from 6:20 pm – 8:30 pm (with a short break): September 12th, 19th, 26th, October 3rd, 10th, 31st, November 7th, 14th; and the following Wednesday evenings from 6:20 pm – 8:30 pm (with a short break): October 12th, November 2nd, 9th and 16th. Notably, class will **not** meet on Monday October 17th or 24th, or any Monday after November 14th. The last class of the semester will be on Wednesday, November 16th. All take-home midterms will be due on Monday, October 10th; first MBA papers will be due on Monday, November 7th; and second MBA papers and all final JD and LLM papers will be due on Monday, December 5th.

Reading Materials: Various handouts, articles, sample agreements and other documents to be made available by the Instructor.

Session 1 Monday, September 12, 2022

Introduction

(Class meets from 6:20 pm – 8:30 pm, with one 10- 15 minute break)

- The Role of the International Business Lawyer
- Doing Deals Abroad
- Representing Foreigners in the U.S.
- The Building Blocks of International Commercial Relations -- the Alphabet Soup of Commonly Encountered Domestic and International Business Entities (Inc., LLC, S.A., A.G., GmbH, S.a.r.l., Societas Europaeae, etc.)
- The Importance of Perspective: How Cultural Differences Affect Business Negotiations

Required:

1. Ralph H. Folsom; Michael P. Van Alstine; Michael D. Ramsey; and Matthew P. Schaefer; *International Business Transactions, A Problem-Oriented Coursebook*, Thirteenth Edition, West Academic Publishing (2019), Chapter 2, pp. 11-26.

2. List of Company Extensions (www.corporateinformation.com).

3. Brian Martucci, “How to Choose the Best Legal Structure for Your Business – Pros & Cons” Money Crashers (September 14, 2021):

<https://www.moneycrashers.com/choose-best-legal-structure-business/>

4. “Choosing an Entity Comparison Chart (DE)” Practical Law Checklist 7-381-0701 (2022).

Optional:

(See next page)

Optional:

5. Business France, *Setting Up Business in France* (2022):

<https://world.businessfrance.fr/nordic/wp-content/uploads/sites/903/2022/02/Insights-to-grow-your-business-Setting-up-Business-in-France-2022.pdf>

6. Noerr, *Doing Business and Investing in Germany* (2022):

https://www.lexmundi.com/CountryGuides/PDF/Guide_Germany.pdf

7. Baker McKenzie FenXun, *Doing Business in China 2022*:

<https://www.bakermckenzie.com/-/media/files/insight/guides/2022/doing-business-in-china-guide-2022.pdf>

Session 2 Monday, September 19, 2022

International Mergers and Acquisitions (Part 1)

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- LOI's, MOU's, Term Sheets, etc.
- Stock Deals v. Asset Deals
- Deal Process and Timeline
- Who are the Various Players and What are Their Respective Roles?
- Structuring Transactions -- Forward and Reverse Triangular Mergers

Readings:

Required:

1. Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions*, Law Journal Press (2022), Volume 1, Chapters 1 and 2.

Optional:

2. ABA Model Stock Purchase Agreement, Second Edition, Ancillary Document B -- Letter of Intent.
3. Sample Asset Acquisition Letter of Intent.

Session 3 Monday, September 26, 2022

International Mergers and Acquisitions (Part 2)

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- Dissecting the Documents: Covenants, Representations and Warranties, Conditions Precedent, Indemnification, etc.
- Deal Protection Mechanisms

Readings:

Required:

1. “Break-up or Termination Fees,” Practical Law Company, Practice Note 6-382-5500.
2. “Reverse Break-up Fees and Specific Performance,” Practical Law Company, Practice Note 8-386-5095.

Optional:

3. Sample Stock Purchase Agreement
4. Sample Stock and Asset Purchase Agreement.

Session 4 Monday October 3, 2022

Joint Ventures, Strategic Alliances and Foreign Direct Investment

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- Choosing a Local Partner
- Pro's and Con's of Going it Alone
- The Importance of Due Diligence
- Difference Between Mature Markets and Emerging Markets
- "Contractual" versus "Entity-Type" Joint Ventures
- Shareholders' Agreement as the *Magna Carta* of Deals
- Timeline of Joint Venture Establishment
- Financial Issues (GAAP versus IFRS)
- Business Realities of Dealing in Different Geographical Markets

Readings:

Required:

1. Ralph H. Folsom; Michael P. Van Alstine; Michael D Ramsey, *Principles of International Business Transactions*, West Academic Publishing (Fifth Edition, 2022), Chapter 14 (pp. 579 - 605) and Chapter 16 (pp. 627 - 639).

Optional:

[See next page]

Optional:

2. Sample Joint Venture Agreements.
 - a) Domestic.
 - b) International.
 - c) Delaware LLC.
3. PricewaterhouseCoopers, *Similarities and Differences: A Comparison of IFRS and US GAAP* (February, 2022):
https://viewpoint.pwc.com/dt/us/en/pwc/accounting_guides/ifrs_and_us_gaap_sim/assets/pwcifrsusgaap0222.pdf

NB: THE MIDTERM TAKE-HOME ASSIGNMENT WILL BE ANNOUNCED AT THE END OF CLASS THIS EVENING AND WILL BE DUE AT THE BEGINNING OF CLASS ON MONDAY, OCTOBER 10, 2022.

Session 5 Monday, October 10, 2022

Project Finance and Privatization

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

NB: ALL MID-TERM TAKE-HOME PAPERS DUE AT THE START OF CLASS

- Areas of Application
 - Exploitation of Natural Resources
 - Power Generation
 - Transportation and Infrastructure
- Recourse v. Non-Recourse Financing
- Build-Operate-Transfer (BOT) and Build-Own-Operate-Transfer (BOOT) Models
- The Various Players
 - Developers
 - Private Banks
 - International Financial Institutions and Regional Development Banks
 - Suppliers and Other Contractors
- The Interrelationship Between Debt and Equity
- Government Incentive Programs (EXIM, COFACE, SACE, etc.)
- Political Risk Insurance (OPIC, MIGA)
- Special Considerations Regarding Privatization and Public - Private Partnerships
- Understanding the Role of the State in Overseas Jurisdictions

Readings:

Required:

Dentons, “A Guide to Project Finance” (2018):

<https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2013/april/1/a-guide-to-project-finance>

Session 6 Wednesday October 12, 2022

U.S. Capital Markets

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- The '33 Act and '34 Act
- Public Offerings v. Private Placements
- The IPO Process – Bankers and Lawyers
- Exempt Offerings (Reg. D, Reg. S, and Rule 144A)
- American Depositary Receipt Programs (ADRs)
- PIPES and Registration Rights

Readings

Required:

1. Mayer Brown, What's the Deal? Foreign Private Issuers" (2022).

<https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/06/whats-the-deal-foreign-private-issuers-2022.pdf?la=en>

Optional:

2. On Holding A.G. Prospectus, August 23, 2021.

<https://d18rn0p25nwr6d.cloudfront.net/CIK-0001858985/ac6888e5-6b7c-4724-9d4d-cd2f4b34c4f7.pdf>

Monday October 7, 2022,

NO CLASS THIS EVENING

Monday, October 14, 2022,

NO CLASS THIS EVENING

Session 7 Monday, October 31, 2022

Private Equity and Venture Capital

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- What is Private Equity?
- Who are the Major Players?
- Fun with Funds
- LBO's and MBO's
- Mezzanine Investments
- Convertible Preferred Stock
- Investors' Rights Agreements
- Co-Sale Agreements, Tag-Alongs and Drag-Alongs
- Liquidation Preferences
- Anti-dilution Protection
- Down-Round Financings
- Pay-to-Play Provisions
- Pro-Investor v. Pro-Entrepreneur Cultural Environments

Readings:

Required:

1. “Private Equity: Overview,” Practical Law Company Practice Note Overview w-015-9272 (2022)

Optional:

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Optional:

2. Sample venture capital deal documents, with annotations.
 - a) Amended and Restated Certificate of Incorporation
 - b) Series A Preferred Stock and Warrant Purchase Agreement
 - c) Amended and Restated Investors' Rights Agreement
 - d) Right of First Refusal and Co-Sale Agreement
 - e) Voting Agreement

Session 8 Wednesday, November 2, 2022

Hedge Funds

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- What is a Hedge Fund?
- Hedge Funds vs. Private Equity
- Illustrative Investment Strategies and Styles
- Legal Structures
- Disclosure and Documentation
- Regulation of Hedge Funds

Readings:

Required:

1. Pictet, An Introduction to Hedge Funds (April 2018):

<https://www.group.pictet/media/212/download>

Optional:

2. Sample Hedge Fund Private Placement Memorandum.
3. Sample Hedge Fund Limited Liability Company Agreement.

Session 9 Monday, November 7, 2022

Intellectual Property

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

NB: FIRST OF 2 RESEARCH PAPERS DUE FROM ALL MBA STUDENTS

- "Hard" IP v. "Soft" IP
- Relevant International Conventions and Treaties (Paris, Berne, Madrid, Rome, TRIPS, etc.)
- Protection of Intellectual Property at Home and Abroad

Readings:

Required:

1. Aaron Xavier Fellmeth, *The Law of International Business Transactions*, Thomson West (Second Edition, 2011), Part II, Chapters 2-3 (pp. 25-92).

Optional

2. Sample Cross-Border Trademark License.

Session 10 Wednesday, November 9, 2022

International Tax Issues

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- U.S. v. Foreign Taxes
- Transfer Pricing
- Foreign Tax Credits
- Withholding Taxes
- Tax Havens
- Bilateral Tax Treaties

Readings:

Required:

1. Jerold A. Friedland, *Understanding International Business and Financial Transactions*, Fourth Edition, Lexis Nexis (2014), Chapter 6, pp. 343 - 377.
2. U.S. - U.K. Bilateral Tax Treaty.

Session 11 Monday, November 14, 2022

The US Regulatory Environment

(Class meets from 6:20 pm –8:30 pm with one 10-15 minute break)

- Export Controls
- Boycotts and Anti-Boycott Legislation
- Trading with the Enemy Act; Helms-Burton
- Foreign Corrupt Practices Act
- Foreign Sovereign Immunities Act
- FINSA

Readings:

Required:

1. Jonathan Masters, “What are Economic Sanctions?” Council on Foreign Relations (August 2019):

<https://www.cfr.org/backgrounder/what-are-economic-sanctions>

2. CONGRESSIONAL RESEARCH SERVICE, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS), February 14, 2020:

<https://sgp.fas.org/crs/natsec/RL33388.pdf>

3. “The Foreign Corrupt Practices Act (FCPA): An Overview,” Congressional Research Service, June 29, 2020:

<https://sgp.fas.org/crs/misc/IF11588.pdf>

4. Foley Global Risk Solutions; FCPA FAQs (2022):

https://www.foley.com/en/files/uploads/FCPA_FAQs-English.pdf

Session 12 Wednesday, November 16, 2022

Resolution of International Disputes

(Class meets from 6:20 pm – 8:30 pm, with one 10-15 minute break)

- International Arbitration (ICC, AAA, LCIA, ICSID, Stockholm Chamber of Commerce)
- Arbitration v. Litigation
- Choice of Law, Choice of Forum
- 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Readings:

Required:

Latham and Watkins, Guide to International Commercial Arbitration (2017):

<https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>

Monday, December 5, 2022

2nd MBA PAPERS DUE AND ALL JD AND LLM FINAL PAPERS DUE BY 6:00 PM.