

Columbia Law School

Fall Semester 2023

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, as opposed to 2 credits for law students) will be expected to prepare, individually, two separate 15–20 page 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 evenings from 6:20 pm – 8:30 pm (with a short break): September 11th, 13th, 18th, 20th, 25th and 27th; October 16th, 18th, 23rd, 25th, 30th; and November 1st. Notably, class will not meet the week of October 2nd or the week of October 9th. The last class of the semester will be on Wednesday, November 1st. All take-home midterms will be assigned on Wednesday, September 20th and will be due the following Monday, September 25th. First MBA papers will be due on Monday, November 6th, and second MBA papers and all final JD and LLM papers will be due on Monday, December 4th.

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

Session 1 Monday, September 11th, 2023

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 Wednesday, September 13th, 2023

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 18th, 2023

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 Wednesday, September 20th, 2023

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, SEPTEMBER 25th, 2023.

Session 5 Monday, September 25th, 2023

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, September 27th, 2023

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>

Week of October 2nd, 2023,

NO CLASS THIS WEEK

Week of October 9th, 2023,

NO CLASS THIS WEEK

Session 7 Monday, October 16th, 2023

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:

[See next page]

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, October 18th, 2023

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, October 23rd, 2023

Intellectual Property

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

- "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, October 25th, 2023

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, October 30th, 2023

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/background/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 1st, 2023

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, November 6th, 2023

FIRST OF 2 PAPERS DUE FROM ALL MBA STUDENTS BY 6:00 PM.

Monday, December 4th, 2023

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