

SYLLABUS

PART I – Sessions 1-5

INTERNATIONAL BUSINESS LAW “LEGAL ISSUES OF TRANSNATIONAL CONTRACTS”

Course Description

Beginning with the second half of the 20th century, the world has faced drastic changes. These changes were mainly brought about by an so far unprecedented pace of technological progress. Various new phenomena, especially innovations in the sphere of transport and communications technologies, have altered the ways that, on the one hand, individuals enter into relations and, on the other hand, the way states mutually interact. As an additional element, interactions between states and individuals have increased in number. Considering the adage *ubi societas, ibi ius* (“where there is society, there is law”, or “without law, no society”), changes in society have equally become reflected in the way we conduct business in a globalising era. Accordingly, the complexity of legal affairs has proportionally grown with the effect of blurring many traditional lines of distinctions, such as notably the public/private, the international/municipal law and political/economic dichotomy. These changes have raised the significance of the question of the emergence of a third legal system, *i.e.* a system situated between international law and domestic law which is “transnational law”.

This course aims at establishing the basic pillars on which the various legal issues related to transnational contracts rest. In view of the sheer infinity of the issues covered and great complexity of the subject matter, the central focus is on paving the way for a good understanding of the legal issues related to contracts in a global business environment.

1. Introduction to the Current International Legal Order as the Framework for International Business: *Contracts versus Treaties*

The first session will inquire into the basic foundations of the current international legal order. By sketching out the basic architecture of the international legal order, as established following the two World Wars under the aegis of the League of Nations and the United Nations Charter respectively, it will inquire into the alleged paradigm shift having occurred in international law, which is often described by a transformation of a vertically centralised and hierarchical system of international regulation into a more horizontally decentralised and network-oriented system of global governance.

It will address different related issues, such as the still widely dominant separation of public international law and private international law, the principal sources of international law as well as the question of various threats to the unity of the international legal order. Equally, some selected basic concepts, such as “international law”, “transnational law”, “comity”, “act of state doctrine” and others will be mentioned and explained.

Reading materials:

Hilton v. Guyot (Supreme Court of the United States, 1895), 159 U.S. 113.

R.J. Neuwirth, “International Law and the Public/Private Law Distinction” (2000) 55 *Austrian J. Pub. & Int’l L. R.* 393.

2. The History of the Old and the New *Lex Mercatoria*

In the second session, the debate about the new *lex mercatoria*, the so-called new “law merchant” as the prominent proponent of the third legal order of “transnational law”, will be fleshed out. Hand in hand with the proliferation of international organisations and tribunals, a general trend towards specialisation can be observed. This, it has been suggested, has contributed to the emer-

gence of various new autonomous legal orders or at least separate sector-specific legal regimes, such as the *lex petrolea* (oil law), *lex maritime* (maritime law), *lex sportiva* (sports law), *lex electronica*, *lex digitalis* or *lex informatica* (law governing information and communications technologies (ICT)) which themselves can be classified as being subcategories of the *lex mercatoria* (law merchant).

It yields principal questions, such as whether there is such a thing called “the new law merchant”, what does it consist of, and what are its main sources?

Reading materials:

A.F.M. Maniruzzaman, “The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?” (1999) 14 Am. U. Int'l L. Rev. 657.

J.-F. Lalive, “Contracts between a State or a State Agency and a Foreign Company” (1964) 13 Int'l & Comp. L. Q. 987.

FIA Decision, Re: Article 151(c) International Sporting Code – Vodafone McLaren Mercedes (13 September 2007): at http://www.fia.com/resources/documents/17844641_WMSC_Decision_130907.pdf

3. The Dynamics of the Creation of the ‘New Law Merchant’: Instruments and Institutions

The third session focuses on the central actors and institutions, both public and private, active in the development of the *lex mercatoria* and the main instruments they have produced. This presentation is preceded by a brief inquiry into the wider trends governing the rapidly changing environment of international economic relations, or trade and commerce which can be found to be in a constant dynamic state of flux. This dynamic evolution has been often been said to be the main cause for a widening gap between the organisation of economic affairs on the one hand and of political affairs on the other.

One important aspect is this changing global environment is the role of comparative law in view of the relevant changes in the practice of law.

Reading materials:

P. Shankar Jha, *The Twilight of the Nation State: Globalisation, Chaos and War* (New Delhi: Vistaar, 2006).

H.P. Glenn, “Comparative Law and Legal Practice: on Removing the Borders” (2000) 75 Tul. L. Rev. 977.

4. The Example of the European Union

As a unique supranational polity and relatively young legal order *sui generis*, originally created by the sovereign will of the Member States of the European Union (EU), is a suitable theoretical and practical example for the complexities of public and private forces governing international trade and commerce today. This session highlights the possible synergies that may derive from an entwining of the publicly-driven process of European economic integration and a privately-driven effort towards greater harmonisation of the civil laws of the EU Member States. In more concrete words, the central question is whether the so-called “single market programme” can be finalised without a major unification of major branches of private law in the form of a European Civil Code?

Reading materials:

A. Stone Sweet, “The new Lex Mercatoria and transnational governance” (2006) 13 *Journal of European Public Policy* 627–646.

Communication from the Commission to the Council and the European Parliament on *European Contract Law*, COM(2001) 398 (11 July 2001).

5. From Public to Private: The Problem of Economic Sanctions

Another good example for the complex interaction between the blurring lines of private and public, or else economic and political forces is the case of embargoes or economic sanctions. An embargo is generally understood as an official ban or sanctions especially on trade or other commercial activity with a particular country. Embargoes are usually imposed by one or more states

as well as by international organizations, such as the United Nations (see *e.g.* the work of the UN Security Council Sanctions Committee at <http://www.un.org/sc/committees/index.shtml>). Although these measures are usually derived from public international law and pursue political ends, they will in most cases target economic areas and unfold effects in the sphere of private and commercial law.

This problem will be exemplified by way of the work of the IRAN-US Claims Tribunal, an international arbitral tribunal which was established in 1982 following the crisis in relations between the Islamic Republic of Iran and the United States of America arising out of the detention of 52 United States nationals at the United States Embassy in Tehran in November 1979.

Reading materials:

M. Brunetti, "The *Lex Mercatoria* in Practice: The Experience of the Iran-United States Claims Tribunal" (2002) 18 *Arbitration International* 355.

Award: *Harnischfeger vs Ministry of Roads and Transport and Machine Sazi*, Case No. 180, Award No. 144-180-3 (Iran - United States Claims Tribunal).