

# Global Business Law



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## Principles and Practice of International Commerce and Investment

FOURTH EDITION

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# Summary of Contents

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<b>PART ONE</b>		
<b>INTRODUCTION TO GLOBAL BUSINESS LAW</b>		
Chapter 1	The Forms and Challenges of Global Business	3
Chapter 2	Finding Your Way in a Foreign Legal and Cultural Landscape	37
<b>PART TWO</b>		
<b>INTERNATIONAL COMMERCE — EXPORT TRANSACTIONS</b>		
Chapter 3	Commercial Codes: The Development and Application of International Contract Rules and Standards	101
Chapter 4	Drafting the International Sales Contract: Standard Commercial Terms and Other Key Contract Provisions	167
Chapter 5	Documentary Sales and Letters of Credit: Techniques to Facilitate Exports	211
Chapter 6	Other Selected Legal Aspects of International Sales Transactions	301
<b>PART THREE</b>		
<b>TRANSNATIONAL LICENSING, FRANCHISING, AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS</b>		
Chapter 7	Balancing Risk and Return: Overseas Production with Permitted Use of Intellectual Property Rights	363
Chapter 8	International Franchising Arrangements	393
<b>PART FOUR</b>		
<b>FOREIGN DIRECT INVESTMENT</b>		
Chapter 9	The Decision to Invest Abroad: Definitions, Incentives, and Methods of Foreign Direct Investment	423
Chapter 10	FDI Restrictions and Risks: Host Country Regulation, International Regulation, and the Universe of Risks Facing Investors	503
Chapter 11	Protection of FDI Interests: Facing Host Government Regulation and Insuring against Risk	569
<b>PART FIVE</b>		
<b>CROSS-CUTTING ISSUES IN GLOBAL BUSINESS LAW</b>		
Chapter 12	Dispute Resolution in International Business Transactions	635

Chapter 13 Corrupt Practices: Regulatory Efforts to Combat Bribery	667
Documentary Appendices	699
Selected Bibliography	889
Index	893

# Contents

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List of Illustrations, Tables, Diagrams, Readings, Sample Documents, and Song Lyrics	xix
Preface to the Fourth Edition	xxiii
Preface to the Third Edition	xxvii
Preface to the Second Edition	xxxi
Preface to the First Edition	xxxv
Acknowledgments	xxxix
About the Author	xli
Acronyms	xliii
Styles, Usages, Citations, and Other Conventions	xlvi

## PART ONE

### INTRODUCTION TO GLOBAL BUSINESS LAW

<b>Chapter 1 · The Forms and Challenges of Global Business</b>	<b>3</b>
I. Introduction: Aims, Issues, and Overview	4
II. The Forms of International Business Transactions: From Exports to FDI	6
A. Exporting	7
B. Licensing of Production Abroad	9
C. Foreign Direct Investment	9
III. The Special Challenges of Conducting Transborder Business	10
A. Exporting	11
B. Licensing of Production Abroad	13
C. Foreign Direct Investment	13
D. General Principles	14
IV. The Larger Legal Landscape: Where Global Business Law Fits into the International Legal System	15
A. The Character of International Economic Law	15
B. Global Business Law and the Sources of International Law	19
1. Treaties	20
2. Customary international law	22
C. Global Business Law and International Dispute Resolution	23
D. Global Business Law and International Institutions	25

1.	A “taxonomy” of international organizations	26
2.	Forms of influence	28
(a)	Influences on national economic conditions	28
(b)	Regulatory influence	29
E.	Global Business Law and Other Issues of International Law	30
1.	The future of the nation-state	30
2.	A withering of multilateralism?	31
3.	The North-South divide	32
4.	Security and terrorism	33
5.	Global climate change and other environmental issues	33
F.	Concluding Observations	34
<b>Chapter 2 · Finding Your Way in a Foreign Legal and Cultural Landscape</b>		<b>37</b>
I.	Introduction: Aims, Issues, and Overview	38
II.	The Importance of Legal Tradition(s)	41
A.	Legal Traditions, Legal Systems, Legal Families, and Global Business Law	41
B.	The Civil Law Tradition and the Family of Civil Law Systems	45
1.	Significance and distribution	45
2.	Thumbnail history	47
3.	Sources of law	52
4.	The legal profession(s)	54
C.	The Common Law Tradition and the Family of Common Law Systems	56
1.	Significance, distribution, and contrast with civil law	56
2.	Thumbnail history	57
3.	Sources of law in the common law tradition	59
4.	The legal profession	61
D.	The Islamic Law Tradition and Islamic Law in Modern Legal Systems	62
1.	The significance of Islamic law in today’s world	62
2.	Thumbnail sketch of Islamic history	64
3.	Sources of law and representative norms in Islamic law	66
E.	The Chinese Legal Tradition and Its Reflection in Modern Chinese Law	69
1.	China and international business	69
2.	Thumbnail sketch of the Chinese legal tradition	70
III.	Business and Culture in a Global Context	76
A.	Cross-Cultural Negotiations: General Principles	76
B.	Cross-Cultural Negotiations: Specific Examples	85
IV.	Getting Help: Local Counsel, Freight Forwarders, and Other Sources of Assistance	90
A.	Local Counsel	91
B.	Freight Forwarders and Other Facilitators	93



C. International “Agents” and Distributors	96
D. Official Support from Government Agencies	97

## PART TWO

## INTERNATIONAL COMMERCE — EXPORT TRANSACTIONS

<b>Chapter 3 · Commercial Codes: The Development and Application of International Contract Rules and Standards</b>	101
I. Introduction: Aims, Issues, and Overview	102
II. International Commercial Law and Custom: Historical and Practical Setting	106
A. Historical Background — The <i>Lex Mercatoria</i>	106
B. Practical Issues — Conflicts of Law	109
III. The Vienna Sales Convention (CISG): Character, Aims, and Application	117
A. Background	117
B. Character and Aims of the CISG	120
C. Applicability of the CISG	122
1. States participating in the CISG	124
2. Conflicts of law and Article 1(1)(b)	126
3. “Internationality” of the sale	129
4. Sales and issues not covered by the CISG	132
5. Opting out of (and into) the CISG	133
IV. The Vienna Sales Convention (CISG): Content and Operation	136
A. Noteworthy Features — Contract Formation	137
1. What constitutes an offer under the CISG	137
2. When an offer takes effect and its duration	138
3. Revocation of an offer	138
4. What constitutes an acceptance and when it becomes effective	139
5. Effect of a late acceptance	140
6. Effect of a varied acceptance	140
B. Noteworthy Features — Performance	142
1. Manner and place of delivery	142
2. Time of delivery	142
3. Notice under the CISG	142
4. Time and place of payment	143
5. Currency in which the price is to be paid	144
C. Noteworthy Features — Breach and Remedies	144
1. Significance of the fundamental breach concept	144
2. Buyer’s right to avoid the contract for non-delivery	145
3. Buyer’s right to avoid the contract for quality defects	145
4. Seller’s right to cure	146
5. Seller’s right to avoid the contract	146

6. Buyer's right to compel performance	147
7. Seller's right to compel performance	148
8. Non-avoidance damages	148
9. Avoidance damages	148
10. Mitigation	149
11. Remedy of reduction of price	149
12. Anticipatory breach	149
D. CISG–UCC Differences and Similarities	150
E. Pros and Cons of the CISG in Operation	154
V. Related Commercial Rules: The UNIDROIT Principles and the UN Limitation Period Convention	157
A. The UNIDROIT Principles of International Commercial Contracts	157
B. The UN Limitation Period Convention	160
1. Aims, history, and status	160
2. Substantive summary of the Limitation Period Convention	161
VI. Closing Observations	165
<b>Chapter 4 · Drafting the International Sales Contract: Standard Commercial Terms and Other Key Contract Provisions</b>	167
I. Introduction: Aims, Issues, and Overview	168
II. Incoterms: Enhancing Harmonization and Specificity	171
A. Background to Incoterms: Purpose, History, and Status	171
1. The purpose of trade terms	171
2. The ICC and the status of Incoterms (and the CISG)	172
3. Getting to the 2010 version of Incoterms	174
B. Details of the Eleven Incoterms (2010)	175
1. Groups, terms, and frameworks	175
2. Practical implications and observations	180
(a) The extremes: EXW and DDP	181
(b) Incoterms and mode of transport	181
(c) Limits of Incoterms	182
(d) Passage of cost and risk in CIF	183
(e) Incoterms and transport documents	183
(f) Right of inspection	184
(g) Choosing the best Incoterm	185
(h) The future of Incoterms	186
3. Incoterms and the UCC	186
III. Drafting of Other Contract Terms: Guides and Practical Applications	188
A. Governing Law	189
1. Factors for choosing a governing law	190
2. Limits on free choice by the parties	191

3. Specific governing law formulations — with and without CISG	191
B. Choice of Forum	193
C. Nonperformance, <i>Force Majeure</i> , and Hardship	196
1. Nonperformance	197
2. <i>Force majeure</i>	199
3. Hardship	202
D. Notice	205
E. Corrupt Practices	206
IV. Conclusion	207
<b>Chapter 5 · Documentary Sales and Letters of Credit: Techniques to Facilitate Exports</b>	211
I. Introduction: Aims, Issues, and Overview	212
II. Documentary Sales: Managing Risk in Transborder Transactions	216
A. Parties Involved in the Documentary Sale	217
B. The Steps Included in the Documentary Sale	219
C. The Documents Included in the Documentary Sale	221
D. Annotated Explanation of the Steps and the Documents Involved in the Documentary Sale	234
III. Letters of Credit: Substantive Rules for Facilitating Payments	249
A. International Letters of Credit in a Nutshell	250
B. The Principle of Strict Compliance	252
C. The Independence Principle and Its Exceptions	266
IV. Related Matters: More on Bills of Lading, Letters of Credit, and Liability of Carriers	276
A. Functions and Varieties of Bills of Lading and Other Transport Documents	277
1. Negotiable and non-negotiable bills of lading	277
2. Other types of transport documents	279
3. National and international rules on bills of lading and liability of carriers	281
B. Standby Letters of Credit and Back-to-Back Letters of Credit	292
1. Standby letters of credit	293
2. Back-to-back letters of credit	296
V. Conclusion	299
<b>Chapter 6 · Other Selected Legal Aspects of International Sales Transactions</b>	301
I. Introduction: Aims, Issues, and Overview	302
II. International “Agency” and Distributorship Arrangements: Using Third Parties to Market Products Abroad	307
A. Sales Representatives versus Distributors versus Employees	309
1. Choosing the form of relationship	309

2.	Choosing the person or entity	312
B.	Laws Affecting the Relationship with Such Intermediaries	313
1.	Protective legislation	314
2.	Other laws and regulations	317
C.	Drafting Guidance: Sales Representative Agreements	317
D.	Drafting Guidance: Distributorship Agreements	319
E.	Harmonization of Rules on International Sales Representatives and Distributors	321
III.	Electronic Commerce: Modifying Traditional Concepts to Fit the Digital Age	323
A.	Digital Signatures	324
B.	Conceptual Challenges	330
C.	Privacy Concerns and Electronic Transactions	333
D.	Other International E-Commerce Issues	336
IV.	Official Restrictions on International Sales: Practical Aspects of Customs Procedure and Export Controls	341
A.	Customs Classification and Duty Determinations	341
B.	Export Controls — A Thumbnail Sketch	346
C.	Other Nuts-and-Bolts Issues of Trade Regulation	350
1.	Foreign Trade Zones	350
2.	Anti-boycott rules	352
V.	Government Assistance for International Sales: A Glance at Official Export Inducements	353
A.	Export Inducements under US Tax Laws	354
B.	Export Inducements through Government Financing	355
C.	Export Inducements under US Antitrust and Banking Laws	357
D.	Export Encouragement through Government Agency Assistance	359
VI.	Conclusion	359

### PART THREE

#### TRANSNATIONAL LICENSING, FRANCHISING, AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

<b>Chapter 7 · Balancing Risk and Return: Overseas Production with Permitted Use of Intellectual Property Rights</b>	<b>363</b>
I. Reprise: From Exports to FDI	363
II. Intellectual Property Rights and Their Protection	368
A. Patent Protection	370
1. Overview	370
2. International initiatives encouraging protection	372
B. Protection of Knowhow	375
1. Overview	375
2. International initiatives	376
C. Trademark Protection	376

1. Overview	376
2. International initiatives encouraging protection	377
D. Copyright Protection	380
1. Overview	380
2. International initiatives encouraging protection	381
III. Licensing of Production Abroad — Key Considerations	382
A. Preliminary Matters — Relative Advantages and Disadvantages	382
B. Choices in Planning Licensing-of-Production Arrangements	384
IV. Licensing of Production Abroad — Drafting the Agreement	386
V. Conclusion	391
<b>Chapter 8 · International Franchising Arrangements</b>	<b>393</b>
I. Introduction: Aims, Issues, and Overview	393
II. The What, Why, and How of International Franchising	396
A. Definition and Importance of International Franchising	396
B. Advantages and Disadvantages of International Franchising	400
C. Choices in Establishing an International Franchise Arrangement	402
III. Regulatory Requirements and Protections	405
A. Home-Country Regulatory Requirements	406
B. Host-Country Regulatory Requirements	408
C. Relevant Multinational Regimes	412
IV. Franchising Abroad — Drafting the Agreement	413
V. Conclusion	419

## PART FOUR

## FOREIGN DIRECT INVESTMENT

<b>Chapter 9 · The Decision to Invest Abroad: Definitions, Incentives, and Methods of Foreign Direct Investment</b>	<b>423</b>
I. Introduction: Aims, Issues, and Overview	425
II. The “What” and the “Why” of FDI: Definitions and Incentives for Investing Abroad	428
A. The Meaning and Significance of FDI	428
1. Definition(s) of FDI	428
2. Significance of FDI	430
B. The Attraction of FDI	431
III. The “How” of FDI: A Chaos of Choices	433
A. Forms of Presence: Liaison Offices, Branches, and Subsidiaries	433
1. Liaison office	433
2. Branch or subsidiary	434
B. Forms of Establishment: “Greenfield”, M&A, and Joint Ventures in General	437
1. “Greenfield” or <i>de novo</i> investment	437
2. Merger and acquisition — definitions and implications	440

3.	Merger and acquisition — advantages	441
4.	Merger and acquisition — disadvantages	443
5.	Merger and acquisition — documentation	444
	(a) Consideration	445
	(b) Assumption of liabilities	445
	(c) Warranties	445
	(d) Covenants	446
	(e) Conditions	446
	(f) Closing	446
	(g) Indemnification	446
6.	Merger and acquisition — Indonesia as an illustration	447
7.	Joint venture — nature and scope	449
IV.	Joint Ventures: Legal Issues and Agreements	452
A.	Key Legal Issues in Joint Ventures	452
1.	Structure	453
2.	Tax	453
3.	Liability	454
4.	Resources: funding and capitalization	454
	(a) Initial contributions	455
	(b) Future contributions	458
	(c) Details and refinements in the capitalization plan	458
5.	Management and control	459
6.	Dispute resolution	461
7.	Transferability and termination	461
8.	Hiring local legal counsel	462
9.	Other issues in forming an international joint venture	462
	(a) Informational preparation	463
	(b) Strategic planning	463
	(c) Selecting a partner	463
B.	Drafting Equity Joint Venture Agreements	464
1.	Building up to the joint venture agreement	464
2.	Contents and structure of the joint venture agreement	465
V.	International Project Finance: Special Considerations and Opportunities	483
A.	Introduction: Aims, Nature, Risks, and Structures	483
1.	Defining “project finance”	483
2.	The nature of and demand for infrastructure projects	485
3.	Risks	486
4.	Project structure	487
B.	Project Financing through Commercial Lending — The Syndicated Loan	487
1.	Overview — the need for syndicated lending	487
2.	Responsibilities of the lead bank	488
3.	Syndicated loan documentation	491

C. Project Financing through Sales of Registration-Exempt Securities	493
1. Introduction	493
2. Private placements and Section 4(2)	494
3. Offshore sales and Regulation S	496
4. Rule 144A	498
5. Other issues relating to securities regulation	499
D. Summary on Project Financing	500
VI. Conclusion	501

<b>Chapter 10 · FDI Restrictions and Risks: Host Country Regulation, International Regulation, and the Universe of Risks Facing Investors</b>	503
I. Introduction: Aims, Issues, and Overview	504
II. Host-Country Restrictions on Entry: Balancing Conflicting National Interests	507
A. Costs and Benefits of FDI from a Host Country's Perspective	507
1. Benefits of FDI for a host country	508
2. Costs, disincentives, and disadvantages of FDI	509
B. Trends in Host-Country Regulation of FDI in Recent Decades	510
1. Colonization	510
2. Decolonization	511
3. The debt crisis (1982)	511
4. The Soviet collapse (early 1990s)	512
5. The Asian financial crisis (1997–1998)	514
6. The global financial crisis, and today's world (2008+)	514
C. Forms of Host-Country Restrictions on FDI Entry	516
1. Designation of red light, yellow light, and green light sectors	516
2. Concentrating FDI regulation in a single government agency	518
3. Joint venture requirements	519
III. Host-Country Restrictions and Risks Relating to FDI Operation and Withdrawal	524
A. Restrictions on FDI Management	524
B. Performance Requirements	525
C. Currency Restrictions and Risks	525
1. Nonconvertibility risk	526
2. Exchange rate fluctuation risk	527
D. Other Risks to FDI from Host-Country Developments	532
1. Political risk	532
(a) Conceptual definitions and species of “political risk”	533
(b) Expropriation, exchange controls, and political violence	536
(c) Distinguishing political risk from other risks	537
(d) De-constructing the distinctions	538
2. Expropriation	539
IV. Home-Country and Multilateral Regulation of FDI	541

A.	Regulations on FDI by Investors' Home Countries	542
1.	Prohibitions on corrupt practices and anti-competitive behavior	542
2.	Prohibitions on behavior violating international law	542
B.	Multilateral Regulation of FDI	559
C.	Self-Regulation by Multinational Corporations	563
1.	Company-specific codes of conduct	563
2.	Other voluntary corporate code initiatives	565
V.	Conclusion	567
<b>Chapter 11</b>	<b>· Protection of FDI Interests: Facing Host Government Regulation and Insuring against Risk</b>	<b>569</b>
I.	Introduction: Aims, Issues, and Overview	570
II.	Regulation of the Regulators: International Rules and Guidelines on Treatment of Foreign Investors	573
A.	The TRIMs Agreement	574
B.	Toward a Multilateral Agreement on Investment?	581
C.	Influence from International Financial Institutions	585
D.	Regional Initiatives on FDI Regulation: The NAFTA Chapter 11 Protections	588
E.	Bilateral Investment Treaties ("BITs")	594
F.	Summing-Up: Protection of FDI by International Legal Rules	613
III.	Legal Standards on the Special Risk of Expropriation	614
A.	Lawfulness	615
B.	Compensation	617
C.	Defenses	619
1.	The Act of State doctrine	620
2.	The concept of sovereignty and the doctrine of sovereign immunity	621
3.	The Calvo doctrine	622
IV.	Insurance and Hedging	623
A.	OPIC	624
B.	MIGA	625
C.	Private Insurance for FDI Risks	626
D.	Hedging Against Currency Risks	627
V.	Conclusion	629
<b>PART FIVE</b>		
<b>CROSS-CUTTING ISSUES IN GLOBAL BUSINESS LAW</b>		
<b>Chapter 12</b>	<b>· Dispute Resolution in International Business Transactions</b>	<b>635</b>
I.	Introduction: Aims, Issues, and Overview	636
II.	Choices: An Overview of the Array of Dispute-Settlement Techniques	640



III. Key Issues in Litigation	647
A. The Proper Court: Personal Jurisdiction	647
B. Enforcement of Foreign Judgments	652
IV. Commercial Mediation and Similar Procedures	657
V. Key Issues in Arbitration	658
A. Arbitration Rules and Institutions	659
B. Enforcement of Arbitral Awards	662
VI. Other Issues Concerning Dispute Resolution	663
VII. Summing-Up on Dispute Resolution	665
<b>Chapter 13 · Corrupt Practices: Regulatory Efforts to Combat Bribery</b>	667
I. Introduction: Aims, Issues, and Overview	668
II. Is Corruption Bad?	670
III. The US Foreign Corrupt Practices Act	678
A. Overview of the FCPA	679
1. History and intent	679
2. The prohibition of bribery	679
3. Requirements of internal corporate accounting	681
B. The 1988 Amendments to the FCPA	681
1. Affirmative defenses	682
2. Exception for “routine governmental action”	682
3. Amending the bribery standard	683
4. Amendments to the accounting standards	683
C. Administrative and Enforcement Mechanisms	684
1. Elements for successful government enforcement	684
2. The SEC’s role in FCPA compliance	685
3. The Justice Department’s role in FCPA enforcement	686
(a) Initiation of an investigation	687
(b) Unique aspects of the FCPA investigative procedure	687
(c) Remedies and penalties	688
(d) The review procedure	689
4. Practical considerations — planning to mitigate FCPA liability	689
IV. The OECD Anti-Bribery Convention	692
<b>Documentary Appendices</b>	699
Appendix #1 CISG (Vienna Sales Convention)	701
Appendix #2 UNIDROIT Principles	725
Appendix #3 UN Limitation Period Convention	730
Appendix #4 CIF, INCOTERMS 2010	736
Appendix #5 UCP	739
Appendix #6 COGSA	742
Appendix #7 Hague Rules (& Hague-Visby Rules)	746
Appendix #8 Hamburg Rules	750

Appendix #9 UNCITRAL Model Law on Electronic Commerce	752
Appendix #10 UETA	760
Appendix #11 Mexican Foreign Investment Law	770
Appendix #12 Exon-Florio Amendment and FINSA (USA)	776
Appendix #13 World Bank Guidelines on the Treatment of FDI	784
Appendix #14 NAFTA Investment Provisions	792
Appendix #15 US Model BIT	807
Appendix #16 UFCMJRA (USA)	821
Appendix #17 LCIA Rules of Arbitration	826
Appendix #18 New York Convention	845
Appendix #19 ICSID — International Convention on the Settlement of Investment Disputes	848
Appendix #20 Hague Convention on the Taking of Evidence Abroad	860
Appendix #21 FCPA	866
Appendix #22 OECD Anti-Bribery Convention	878
<b>Selected Bibliography</b>	<b>889</b>
<b>Index</b>	<b>893</b>

# List of Illustrations, Tables, Diagrams, Readings, Sample Documents, and Song Lyrics

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*Note: This list does not include the documents appearing in the Documentary Appendices.*

## ***Illustrations***

Illustration #1A	Coulson Coathanger Company wants to “go international”	4
Illustration #2A	Gower Group asks about dealing with foreign legal systems	39
Illustration #3A	AmSport buys bicycles from Mexico	103
Illustration #3B	CISG applicability, first fact pattern	130
Illustration #3C	CISG applicability, second fact pattern	131
Illustration #4A	GeoStat sells GPS equipment to a buyer in Rotterdam	169
Illustration #5A	GPS equipment to the Netherlands: GeoStat uses a documentary sale	213
Illustration #5B	Using a standby letter of credit in an Indonesia road project	293
Illustration #6A	Marketing Nebraska computers in Malaysia: transactional questions	303
Illustration #6B	An Ohio furniture company sells via its website	303
Illustration #6C	Marketing Nebraska computers in Malaysia: regulatory questions	304
Illustration #7A	Coulson Coathanger Company: licensing production in Japan	365
Illustration #7B	Coulson Coathanger Company: drafting the licensing agreement	387
Illustration #8A	Purdue Palace Hotel Company takes its winning style overseas	394
Illustration #9A	AmSport considers an FDI in Malaysia	425
Illustration #9B	AmSport works on a joint venture contract: capitalization issues	455

Illustration #9C	NatWest serves as lead bank in a syndicated loan for road works	488
Illustration #10A	AmSport worries about government regulations affecting FDI	505
Illustration #10B	Micronesia considers FDI regulations	507
Illustration #10C	Designing FDI regulations for Micronesia	516
Illustration #10D	An Indonesian joint venture faces exchange rate fluctuation risk	528
Illustration #10E	Forms of “market risk” for a Japanese FDI in Indonesia	537
Illustration #11A	AmSport asks about FDI protections	571
Illustration #12A	AmSport considers suing its bicycle supplier for breach	637
Illustration #12B	Drafting a dispute-resolution clause for AmSport sales to Korea	638
Illustration #13A	Special payment for investigative services in Istanbul	669

## *Tables*

Table #1.1	Comparison of various forms of transnational business transactions	8
Table #3.1	Participation in the Limitation Period Convention	162
Table #6.1	Sales representatives, distributors, and employees: some key comparisons	311
Table #6.2	Checklist of provisions for international sales representative agreement	318
Table #6.3	Sample page from the HTSUS	343
Table #7.1	Comparison of various forms of transnational business transactions (updated and elaborated)	364
Table #7.2	Checklist for agreement for licensing of production abroad	387
Table #8.1	Checklist for an agreement for international franchising operation	414
Table #13.1	Perceived corruption around the world — 1996 rankings (ten least corrupt and ten most corrupt)	673
Table #13.2	Perceived corruption around the world — 2016 rankings (ten least corrupt and ten most corrupt)	673

## *Diagrams*

Diagram #1.1	The “world” of international, comparative, and foreign law	16
Diagram #1.2	Selected “taxonomy” of international organizations	26
Diagram #3.1	Operation of CISG provisions on applicability	129
Diagram #4.1	Incoterms in a nutshell	180
Diagram #5.1	A documentary international sale-of-goods transaction involving a confirmed letter of credit	245

Diagram #9.1	Joint Venture A (narrow focus of operations)	452
Diagram #9.2	Joint Venture B (broad range of operations)	452
Diagram #10.1	General trends in the restrictiveness of FDI regulation by host countries	513
Diagram #10.2	Levels of restrictiveness of FDI regulation by host countries: the Public Code, the Operational Code, Aspirational Declarations, and the Edge of Discouragement	523
Diagram #12.1	Comparison of litigation, arbitration, and mediation: the required level and continuity of consent to be bound by a decision	641
Diagram #12.2	Decision tree for considering options for dispute resolution	644

## *Readings*

Reading #2.1	Making Global Deals: Navigating Culture, Ideology, Language, Attitude, and Style	77
Reading #2.2	“Contexting”, “Face-Saving”, and Other Aspects of Global Negotiations	83
Reading #2.3	Country-Specific Observations about International Negotiations	85
Reading #2.4	Selecting and Engaging Local Counsel	91
Reading #3.1	Regulation (EC) No. 593/2008 (17 June 2008) on the Law Applicable to Contractual Obligations (Rome I) (excerpts)	111
Reading #3.2	Restatement, Conflict of Laws (Second), 1971 (excerpts)	114
Reading #3.3	Inter-American Convention on the Law Applicable to International Contracts (1994) (Mexico City Convention) (excerpts)	115
Reading #3.4	CISG Provisions on Applicability (Articles 1–6)	122
Reading #3.5	Case Abstract, UNCITRAL Texts (CLOUT) — Abstract No. 104, ICC Arbitration Case No. 7197 (1991)	126
Reading #3.6	CISG versus UCC: Key similarities and differences	150
Reading #5.1	<i>J.H. Rayner and Company, Ltd. v. Hambro’s Bank Ltd.</i>	252
Reading #5.2	<i>Voest-Alpine International Corporation v. Chase Manhattan Bank</i>	257
Reading #5.3	<i>Beyene v. Irving Trust Company</i>	263
Reading #5.4	<i>Maurice O’Meara Company v. National Park Bank of New York</i>	266
Reading #5.5	<i>Sztejn v. J. Henry Schroder Banking Corp.</i>	272
Reading #5.6	Sample terms in a bill of lading	282
Reading #5.7	Standby Letters of Credit: Forms, Types, Uses, and Documentation	294
Reading #9.1	Structuring and Drafting an International Joint Venture Agreement	466
Reading #9.2	Sample International Joint Venture Agreement	472

Reading #10.1	<i>Filártiga v. Pena-Irala</i>	545
Reading #10.2	<i>Beanal v. Freeport-McMoran, Inc.</i>	555
Reading #10.3	Reebok Human Rights Production Standards	563
Reading #11.1	North American Free Trade Agreement, Statement of Administrative Action— Chapter 11	588
Reading #11.2	Bilateral Investment Treaties 1959–1991 (1992)	
Reading #11.3	Bilateral Investment Treaties, 1959–1999	604
Reading #11.4	Bilateral Investment Treaties 1995–2006	606
Reading #11.5	US Bilateral Investment Treaties (BITs)	609
Reading #13.1	Stuart Eizenstat, Bribery of Foreign Public Officials: Hearing Before the Senate Foreign Relations Committee, 105th Cong. (1998)	693

### ***Sample Documents***

Sample Document #5.1	Letter from Potential Buyer Requesting Proforma Invoice	222
Sample Document #5.2	Proforma Invoice	223
Sample Document #5.3	Purchase Order	224
Sample Document #5.4	Contract Document	225
Sample Document #5.5	Letter from Confirming Bank to Seller	226
Sample Document #5.6	Packing List	227
Sample Document #5.7	Commercial Invoice	228
Sample Document #5.8	Certificate of Origin	229
Sample Document #5.9	Dock Receipt	230
Sample Document #5.10	Certificate of Inspection	231
Sample Document #5.11	Bill of Lading	232
Sample Document #5.12	Insurance Certificate	233
Sample Document #5.13	Draft	234

### ***Song Lyrics***

Song #2.1	Don't Know Much About History (But I want to avoid a "D") [History of the Civil Law Tradition in Song]	51
Song #5.1	It's a Documentary Sale!	248
Song #11.1	I've Been Working on an FDI	630

# Preface to the Fourth Edition

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*John Head*

I urge readers not to skip this Preface. Even though it can seem tedious to look at a preface, I hope in this one (less than three pages long) to highlight some specific characteristics about this book generally and this Fourth Edition in particular. These points could be helpful before using the book.

Peculiar Practicality. This book might not be unique, but I believe it is unusual for the *insistently practical approach* that it takes to presenting a broad range of quite detailed material. Because I have a double intended audience—that is, I am writing both (1) for practitioners who *currently* need details about international business law and (2) for students *aspiring* to become familiar with its contours—I have placed overwhelming emphasis on a cluster of values:

- conciseness. This is not a “casebook” or a “cases and materials” text that raises questions without answers, or that requires readers to speculate about the author’s reason for including some items in the manuscript. Instead, I intend to provide a brisk explanatory account that identifies ambiguities but concentrates on the nuts and bolts.
- clear structure. Each chapter opens with a table of contents and other obvious signals about the key points covered in the pages that follow. (These signals include Study Questions, every one of which can be answered with materials in the chapter.) With several layers of headings and subheadings, consistently employed to add clarity, I try to lead the reader—whether practicing lawyer or beginning student—through a dense landscape of law, practice, policy, and overriding principles.
- sources and resources. Footnotes in this book offer (1) substantiation (authority) for the points I make, (2) specific citations to legal instruments (for closer study as warranted), (3) countless website addresses and references to secondary sources, and (4) a “subnarrative” to provide details and illustrations without detracting from the momentum of the “story line” in the main text. Readers can of course take them or leave them—the footnotes, that is—but will, I hope, gain from the presence of those footnotes some reassurance that my work has been *exhaustive* without creating a text that is *exhausting*.

- optimism. Although this might seem to be an odd value to emphasize in a book on the practice-oriented transactional aspects of international business law, I highlight it here because I believe the tone of this book differs from most practitioner’s manuals and law school texts. This early-21st-century era is one of tremendous challenges, even danger. I doubt international business intercourse will make a massive contribution to meeting those challenges or handling that danger — indeed, like many of my colleagues, I am ambivalent on the old mantra of “world peace through world trade”. However, lawyers working at the international level do have a remarkably wide range of motion in nurturing the rule of law, pressing for the economic betterment of societies, and exhibiting grace under pressure. We should, I believe, embrace these opportunities; we should lean forward with a sense of mission and optimism, intent on serving not only (i) our clients as they engage in transborder sales and investments but also (ii) the larger community with whom we share the planet. Few career choices allow (and require) the breadth of engagement that international business law does. If this is the career choice we have made, we should be joyful in it. Practice optimism.

Scope and Structure. As noted in the Third Edition, this book does not cover international trade law and regulation, except for a few passages focusing on such key transaction-oriented aspects as (i) calculating tariff rates and (ii) handling questions of export controls. Likewise, the book deals only sparingly with policy issues except as they bear directly on a practitioner’s understanding of context — that is, the context (cultural, historical, economic, political) in which a client’s transactions take place. Also as in the Third Edition, this book follows a logical substantive progression — from (i) exports (commercial sales of goods across borders) to (ii) licensing of production abroad (and its first cousin, international franchising) and then to (iii) foreign direct investment, a progression that many businesses follow as they “go international”.

New Developments. The greatest task I have confronted in preparing this Fourth Edition is to comprehend and reflect the complex symphony of changes that have occurred in the last half-decade or so since the Third Edition was released. The specific changes are legion, and some of them signal broad trends, such as a growing weariness with multilateral solutions. By undertaking an extensive survey of pertinent literature, I have updated, downgraded, headlined, or sidelined information as appropriate — all with an eye to touching on matters, at least the basics, that I consider *essential for an international business lawyer to know*. Naturally, I will have overlooked some and given too much or too little emphasis to others. My diligence in citing authority and sources for further study should, I hope, allow persons using this book to compensate for my shortcomings.

Thank you for reading these paragraphs. If you have time and inclination, I also recommend skimming the Preface to each of the preceding editions of the book.



Lastly, good luck in your studies and practice of international business law. I hope the information and observations in this book will help you in this endeavor. Naturally, I welcome any suggestions and questions you might have in this regard.

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# Preface to the Third Edition

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*John Head*

In the Preface to the Second Edition, I highlighted several ways in which it differed from the First Edition. For example, I emphasized how I had given special attention to clarity in presentation of what is surely complicated and unfamiliar material for most readers. This is why, for example, I introduced Study Questions at the opening of each chapter. I also explained how I had decided to trade away some depth for greater breadth of coverage, thus omitting several long excerpts from other books, articles, or judicial decisions in favor of shorter explanatory narratives of my own creation.

In those and most other respects, this Third Edition follows the lead of the Second Edition. Indeed, I have continued to omit or shorten excerpted readings—providing my own summaries instead—in an effort to facilitate the easiest possible understanding of central points of interest. I have reformulated some explanations in an effort to improve readability. And I have modified several Study Questions to highlight new developments.

Naturally, the biggest challenge I have faced in preparing this Third Edition is to reflect the wide array of changes that have occurred in the past five years since the Second Edition was published. They are too numerous to mention here; suffice it to say that my research assistants and I have spent countless hours trying to identify such changes and update the text accordingly. In this process, of course, I have also corrected some errors in the Second Edition. No doubt I have (despite my best efforts) introduced some new ones now, for which I apologize in advance.

I would urge readers to bear in mind a few of the other points made in the Preface to the Second Edition, including these:

- This book does not cover international trade law and regulation, except for a few passages focusing on such elementary and transaction-oriented aspects as (i) calculating tariff rates and (ii) handling questions of export controls.
- Instead, this book focuses predominantly on the nuts-and-bolts transaction-oriented practicalities of international business law from a private-sector perspective.
- This book follows a logical substantive progression—from (i) exports to (ii) licensing of production abroad and then to (iii) foreign direct investment (“FDI”), a progression that many businesses do in fact follow as they “go international”.

Let me also emphasize the importance I attach to *legal authority*. It is, in my view, absolutely crucial to gain some familiarity with the primary documentary sources bearing on international business law—especially the relevant authoritative statutes, treaties, and multilaterally-generated guidelines. In the Second Edition, I collected a great many such documentary sources of legal authority in a separate book called a *Handbook*; and I included numerous cross-references to the *Handbook* throughout the main text of the *Global Business Law* book.

For the purposes of this Third Edition, I have decided to take a somewhat different approach. Instead of having two books (the main text and the *Handbook*), I have incorporated the contents of the *Handbook* into the same bound volume with the main text. In doing so, I have performed a lot of necessary editing, so that what remains of the authoritative documents—appearing now in appendices to this book—reflects my judgment of the most important items. Readers are encouraged to move back and forth frequently between the main text and the documentary appendices (following the numerous cross-references in the main text), in order to gain fluency in the key documents that a practitioner of global business law should have at ready reference.

Lastly, I encourage readers to bear in mind the following few points that I consider essential in commencing a study of international business law using this book:

- *New and old*. The content and practice of international business law can be regarded as a balancing act. A balance must be struck between (1) understanding the historical foundations—how letters of credit were developed, for example, or how the Vienna Sales Convention finally emerged after many decades of effort to codify the centuries-old *lex mercatoria*—and (2) embracing the new and exciting aspects of international business transactions in the fast-changing technological and social environment of today. (The rise of electronic commerce comes to mind in this regard.) A practitioner who gives much more emphasis to the historical foundations than to the current developments obviously runs the risk of obsolescence; on the other hand, a practitioner who disregards the historical foundations and context will be destined to see the new developments as “free-floating” items and will be unable to understand and use them effectively.
- *Risk*. Another kind of balancing act relates to risk. In many respects, the information and perspectives presented in this book reflect the need for international business lawyers to help their clients deal with risk. A mantra of such lawyers might be this: “Reduce risk, reduce risk, reduce risk, then insure”. Countless techniques are available to the well-trained international business lawyer for reducing the intimidating mountain of risk inherent in international sales, licensing, franchising, and investment transactions. The smart lawyer learns to use those techniques effectively, and to advise his or her client as to the outer limits of those techniques—in other words, when to insure (either through commercial insurance or through self-insurance).
- *Ethics*. A focus on ethical behavior in cross-cultural settings is more important now than ever before. If there is any validity to the mid-twentieth-century belief

in “world peace through world trade” (and I believe there still is), then surely such world trade (in the form of commercial sales, foreign investments, etc.) must be conducted in a way that respects both culture-specific and global values. Increasingly, a core set of global values are seen as able to “trump” contradictory local values; and some of those core values center on ethics. Transparency, good faith, non-discrimination—these and other values are contributing to the gradual coalescence of an international business ethic. Modern international business lawyers need to be attuned to that ethic and to see how it is gradually getting codified in authoritative law that matters to them and their clients. Two examples of this would be the OECD Anti-Bribery Convention and the expanding influence of international human rights norms in international economic relations.

I shall close with some observations about what I call “normative maturity” in global business law. Having engaged in the practice and teaching of international business law for nearly four decades, I perceive a growing concreteness and harmonization of the disparate rules and processes of international law as it applies to cross-cultural economic relations. From a world in which transborder business transactions occurred in a largely *laissez-faire* environment occupied by a relatively small number of actors, the world of economic relations (especially private-sector economic relations, the focus of this book) has now become criss-crossed with common rules, processes, and institutions, partly because of the leveling and globalizing influence of technological change. Moreover, it is now the workplace (and maybe playground) of thousands of businesses and millions of people, all of whom operate under the influence of those rules, processes, and institutions, and whose activities affect nearly every single one of the seven billion people on Earth.

In short, there is today an unprecedented “normative maturity” governing private-sector transborder business transactions. This is invigorating, of course, but I find it also worrisome—worrisome because the growing integration of the world economy makes it ever more susceptible to shock and collapse. The adage that comes to mind is this: “The bigger they are, the harder they fall.” As enthusiastic as we might be about the growing ease and regularity of selling, licensing, or investment across borders—and about the benefits such transactions can indisputably bring—I would urge that we also be alert to the dangers that can come from global economic integration, or more precisely from the surrender of local and individual self-reliance that such integration makes possible and attractive.

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October 2011

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# Preface to the Second Edition

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*John Head*

In the Preface to the First Edition, Professor Bhala has offered the reader an introduction to this book, and to some key choices that he and Professor Frisch made in first creating it. Now I should briefly explain the approach I have taken in writing this Second Edition.

Unlike Professor Bhala and Professor Frisch, I did not undertake this project with a sense of doom or complete it with a sense of failure. After all, my job is substantially easier than theirs, and it is not only a blessing but also a privilege for me to be able to build on the strong foundation that they have laid in their First Edition. In nearly all respects, I concur in the choices that the first authors have taken. Although I have made many changes—some of these are highlighted below—I have done so in an attempt merely to make an already good thing a little better.

My own experience in teaching courses in international business transactions and a range of other courses in the larger field of “international economic law” has led me to place great emphasis on clarity of presentation. For many students, much of the content of this book will be completely new material, taking them into areas of business and law with which they have very little or no experience. In the face of this reality, I have attempted to enhance the clarity of the First Edition by identifying at the beginning of each chapter the key points that students should watch for in reading the material. I do this in part by posing a list of Study Questions that students should have in mind as they undertake the reading. At the same time, I have included—also at the beginning of each chapter—an outline of its contents so that the reader can see at a glance a “map” of the material presented therein. These and other elements (for example, the inclusion of numerous Illustrations in textual boxes) all have a common aim—to bring clarity by giving the reader a fairly discernable “story line” in his or her study of global business law.

In addition, this Second Edition trades away some depth for breadth. While I agree with Professor Bhala that there are benefits to long readings that permit students (and teachers) to get “inside” an important topic, I have struck the balance at a somewhat different point by omitting some of the long case decisions that were found in

the First Edition. In exchange, I have tried to offer more explanatory text—and especially to provide more descriptive narratives that I have written myself—for the purpose of filling in a larger portion of the landscape that I believe global business lawyers need to be prepared to traverse. Like Professors Frisch and Bhala, I thoroughly dislike the “snippet” approach that some coursebooks take (to the annoyance, I think, of students and teachers who are often left to wonder just why various “snippets” were included). But I place great value in presenting a broad enough array of topics to equip a student in an introductory global business law course to recognize many issues that will likely arise in practice. Hence, while I have included shorter (and fewer) excerpts from cases and secondary materials than appear in some portions of the First Edition, this Second Edition includes much more explanatory text. It also includes more extensive references to other sources to which students can refer for further information. These references appear largely in footnotes, which I have used liberally in order (again) to maintain as clean a “story line” in the text as possible, and also in a bibliography that highlights some of the most valuable texts in the field. I have drawn extensively from innumerable authorities, and I wish to cite them not only in the interest of disclosure and attribution but also to provide authenticity to what I have written—and in doing so to emphasize to readers the importance I place on finding, and properly citing, authority for propositions made in any kind of careful legal writing.

Having identified a few respects in which this Second Edition is distinguishable from the First Edition, I should emphasize that the underlying thesis and themes remain unchanged. Allow me to highlight a few of these.

First, this book does not cover the law of international trade regulation. That should, in my opinion, be left to a separate course for reasons that Professor Bhala has already explained. A brief survey of some aspects of trade practice that are quite private-sector-specific—such as the nuts and bolts of making tariff calculations and obtaining export licenses—does appear in Chapter 6, but otherwise international trade regulation (the GATT, the WTO, antidumping duties, and the like) need separate treatment. (An excellent place to find that treatment, of course, is in Professor Bhala’s own *International Trade Law—Theory and Practice* or in his recent treatise entitled *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade*.)

Second, this book also gives only brief attention to (or leaves aside entirely) certain other topics that, while closely related to international business, are too broad to include here—as evidenced by the fact that they often constitute the subject-matter of free-standing courses. One such topic is dispute resolution; aside from some brief references to it (in various chapters) in the context of offering guidance about drafting governing-law and dispute-resolution provisions in international business contracts, I have devoted only a small section to dispute resolution in the next-to-last chapter.

Third, this book follows the logical substantive progression that Professor Bhala noted in his Preface to the First Edition. That is, it proceeds from exports to licensing of production abroad and then to foreign direct investment (“FDI”), a progression that many businesses do in fact follow as they “go international.” The logic of this



progression is aided, I believe, by my addition of two introductory chapters summarizing the methods and special challenges of global business and of “getting oriented” in a foreign legal and cultural landscape.

Fourth, as Professor Bhala eloquently expressed it, “[t]his is not simply a book for *Americans* who are interested in ‘going international’ . . . *Global Business Law* aims at the present or aspiring world citizens who are going to practice, and world law professors who are going to teach, in an increasingly borderless business world.” In preparing this Second Edition, I have attempted to go even further than the First Edition did in speaking from a global (not American) point of view, to a global audience. Hence, where the text refers to US law, I have tried to emphasize that the reference is intended to be representative, not restrictive.

Fifth, I have also tried in this Second Edition to focus mainly on the practicalities of global business law, leaving aside most excursions into policy issues—tempting as it is to take such excursions—unless doing so is essential to an understanding of the practicalities. Likewise, I have taken a decidedly “nuts and bolts” approach to the subject of public international law, confining the treatment of that subject (largely in Chapter 1) to those bare fundamentals that a practitioner must know in order to be minimally conversant with and competent in this larger context in which private-sector business transactions take place.

Finally, I have also updated and revised the documentary supplement, now called the *Handbook for Global Business Law*. The title intentionally carries two possible meanings. First, the documentary supplement is a “handbook” for the course in global business law that this text envisions; and indeed numerous cross-references to the *Handbook* appear throughout these pages. Second, the documentary supplement is a “handbook” in its own right—that is, completely separate from the course—in the sense that it contains numerous documents that a practitioner of global business law should have at ready reference in providing advice to his or her clients.

I would greatly appreciate receiving comments, criticisms, even condemnations, of this Second Edition, in hopes of learning from my readers and from my mistakes and thereby becoming a better lawyer and teacher myself. All of us—that is, students, teachers, and practitioners of global business law—are embarked on a path that both demands and deserves our best efforts. Indeed, it is on that rather philosophical point that I wish to close these prefatory remarks, having largely resisted the temptation to dwell on it in the pages that follow. In my view, there are few areas of human endeavor more worthy of our personal efforts in today’s world than that of bridging cultural divides in order to create an Earth of better understanding and hence better cooperation. And, being a believer in the old credo of “world peace through world trade,” I regard the conduct of international commerce and investment not just as a means to financial return but also as a means to that greater end. I would like to think that my contribution to the teaching and learning of global business law can at least indirectly serve that greater end.

John W. Head  
May 2006



# Preface to the First Edition

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*Professor Raj Bhala*

Perhaps it will come as a surprise to admit that I took on this book project with an impending sense of doom, and that my excellent co-author and dear friend, Professor David Frisch, and I complete it with a sense of failure.

*Global Business Law*, and the accompanying documents supplement and teacher's manual, are designed for what is now a standard course in the curriculum of American, and indeed many overseas, law schools: "International Business Transactions" (frequently abbreviated as "IBT"), which sometimes is called "International Business Law." The rubric is of no consequence. The real problem is that after teaching the course two or three times, every professor should realize that it is an impossible one. Not even the best of professors with the most gifted of students can cover all aspects of international business law in one semester. There is no clear way to determine what topics should be covered, and what should be omitted. There is no obvious way to focus the course. There is no one best way to organize the voluminous subject matter. In short, teaching a second or third year law student, or LL.M. candidate, the transactional, legal, and policy aspects of global business in one semester is about as easy as explaining to a foreign guest what America is like in one hour.

Given the inherent impossibility of the course, why should I have enlisted Dave, and why should we together have started what is possibly a march of folly? We offer five reasons.

First, because we believe that whatever topics are covered, wherever the emphasis is placed, whichever organizational framework is used, the course can "globalize" law students and professors alike. . . . In this respect, the course makes the notoriously parochial American legal curriculum just a little less so. That is a good thing.

In turn, this introductory survey course in international business can provide the necessary foundation for advanced courses in the specialty areas of international business law, which ought—both in a positive and normative sense—to be offered with increasing frequency in American law schools in the New Millennium. . . .

Second, because while we believe that there are excellent course books available for use in the course, we believe we offer a distinct and attractive alternative. We very much believe in “letting 100 flowers bloom”...

Professor Frisch and I have enormous respect for the courageous scholars who have gone before us down the treacherous path on which we now find ourselves. But, we put ourselves on this path because we are not complacent about many of the extant course books. Many try to be all things to all readers. Many are characterized by a very large number of very short excerpts on an uncontrollably wide array of topics. Many lack vision....

Yes, the IBT course is supposed to be a survey. But, the law student and, dare we admit, law professor ought not be left as confused as she is stimulated, as frustrated as she is enthusiastic....

Professor Frisch and I, therefore, have tried to prepare *Global Business Law* with the “big game” in mind. We endeavor to cover a still-impressive array of topics, but not at the expense of depth. We strive to choose excerpts in *Global Business Law* that convey the range of legal and policy problems, and risk issues, in global business, but then edit them in a way that allows the reader to get as complete a picture as possible about these problems. Thus, we have a smaller number of challenging readings, but the average length of each reading is longer, than most other course books....

Third, and closely related to the second, because we believe that exporting and foreign direct investment (FDI) are the essential foundations of contemporary international business. Here, then, is the vision: the most essential global business transactions a law student must understand are exporting and FDI. These two transactions are the “big game” in global business (excluding finance)....

Fourth, because we believe our alternative is user-friendly... Most law school academic semesters are fourteen weeks. We have constructed *Global Business Law* so that most of the Chapters are of roughly equal length and difficulty, and thus can be covered in one week's worth of classes (i.e., assuming a three-credit course, two 75 minute classes, or three 50-minute classes, per week). This plan leaves two weeks, to be used at the discretion of the professor....

Of course, there is more to being user-friendly than organizing a casebook in a way that fits naturally with the academic calendar. We—and our friends at Carolina Academic Press—have done our best to minimize errors, which obviously annoy us all and, to a certain degree, are inevitable. But, we also have taken a few editing liberties to make the excerpts in *Global Business Law* and the accompanying *Documents Supplement* easier on the eye to read....

Fifth, because we believe our alternative is a uniquely cosmopolitan one. The word “global” in the title of this Casebook is no accident. This is not simply a book for Americans who are interested in “going international,” any more than it is a book for a law student—or again, dare we say, law professor—who does not want to take the time to read learn about exporting, FDI, and related regulatory issues in depth. *Global Business Law* aims at the present or aspiring world citizens who are going to practice,

and world law professors who are going to teach, in an increasingly borderless business world. . . . *Global Business Law* tries to provide differences across legal cultures without providing the reader with a false sense of certainty. To the contrary, perhaps the most valuable pedagogical contribution *Global Business Law* can make is to leave the student and teacher alike with a higher level of comfort with, and a greater understanding of, uncertainty. . . .

So, if, for these five reasons, we believe sincerely in the course and are proud of the alternative we offer you, then why do we confess a sense of failure? Because we know from researching and writing *Global Business Law* how vast international business law is, how there is no end to detail, and—most importantly—how there are legitimate competing visions. There are always those readings not included, those organizational frameworks not selected, and those themes not highlighted, that give us pause, indeed doubt, about our own work. In brief, we know that our choices are not necessarily “right,” and that in truth it is impossible for anyone to get it “right.” The more we learn, the more we realize that there are no right—much less easy—answers, only hard questions that cry out for exploration. Thus, we commend *Global Business Law* to you with intellectual humility. . . .

Raj Bhala Professor of Law August 1999



# Acknowledgments

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I find it more difficult to compose an “Acknowledgments” page for this book than for other books I have written because in this case nearly all the inspiration and insights and incentives for my work have come from hundreds of individual students. Over the past quarter-century, the men and women who have paid me the compliment of coming to my classes in international business law have made a great contribution to my understanding of the subjects covered in this book. Many of those students have asked interesting and provocative questions, prompting me to dig deeper in my own study and research; some of them have shared their own experiences, thereby bringing to life this or that topic being discussed in class; and nearly all of them have brought an enthusiasm to the study of international business law that has fueled my own efforts to give them at least the basic tools with which to build a successful career as international business lawyers were they to choose that direction for their professional lives.

It would be impractical to try to name all those students, or even to pinpoint the ones whose contributions were greatest, and so I will simply offer this general acknowledgment and expression of gratitude to them. I am deeply indebted to my students, and I hope they will regard this book as a tangible manifestation of what I learned from them.

My acknowledgments do not stop there, however, for several other people have made important contributions that have made this book possible, or at least easier to complete. Among them are my colleagues, including Raj Bhala, who co-authored the first edition of this book many years ago—in a form that has almost entirely disappeared, for better or for worse—as I have taken it through three more editions. To the editors and other staff at Carolina Academic Press who gave guidance and showed patience, I also issue a “thank you” for yet another successful and enjoyable venture with this Fourth Edition.

In addition, I offer an acknowledgment and a note of appreciation to the “big names” who have written coursebooks and treatises from which I have drawn in composing this book. I would mention in particular the scholars whose names are familiar to lawyers throughout the USA who have taken law school courses in international business transactions since the late 1980s: Folsom, Gordon, and Spanogle. Although he does not know this, I took John Spanogle’s course in International Business Trans-

actions in early 1990, when I was still working at the International Monetary Fund before starting my academic career. Ever since then, I have relied on the work that he and his co-authors have done. Other “big names” whose work I have found especially helpful in preparing this book will be found listed in the bibliography following the main text of this book. And where would we be without the contributors to the work of the International Chamber of Commerce and to the “practitioners’ guides” on which I have drawn (and tried to improve in some respects). In short, the value I have gained from the work of many authors, and that I have tried here to organize logically and present clearly (with attribution, of course), is what has made this book possible. Hence, whatever contribution this book makes in the understanding of global business law is truly a collective enterprise.

I would offer a special note of gratitude to one of my mentors, the late J. Eugene Marans of the Washington office of Cleary, Gottlieb, Steen & Hamilton. Gene forced (and allowed) me to survive three years of unforgiving pressure to perform at the highest professional level possible. I deeply value his influence, along with the guidance of others with whom I practiced law in my early career—including Peter Sullivan, Peter Pedersen, Peter Kyle, Alan Palmiter, Pierre-Marie Bouvet de Maisonneuve, Rich Hinds, John Taylor, Herbert Morais, Pierre Francotte, Françoise Gianviti, and others whose legal talents and maturity helped me develop my own.

A big note of appreciation also goes to several research assistants who have provided such valuable help to me in the work that culminated in the Fourth Edition of this book. They include in particular Matt Battiston, Nicholas Bjornson, Alex Gilmore, Shakita Miller, Jacque Patton, Yarhmaan Peerbaccus, and John Truong. Special nods of gratitude are due to Michele Rutledge and Yolanda Huggins for their help in formatting and correcting the text. Support from the University of Kansas General Research Fund is also gratefully acknowledged. And lastly, as usual, I thank my wife Lucia Orth, who remains my most trusted and stalwart critic and conscience.

J W H



# About the Author

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John W. Head holds the Robert W. Wagstaff Distinguished Professorship at the University of Kansas, where he concentrates on international and comparative law. He earned his English law degree from Oxford University (1977) and his US law degree from the University of Virginia (1979). Before starting an academic career, he worked in the Washington, DC, office of Cleary, Gottlieb, Steen & Hamilton (1980–1983), at the Asian Development Bank in Manila (1983–1988), and at the International Monetary Fund in Washington (1988–1990).

In both his teaching and his published works, Mr. Head concentrates in the areas of international business and finance, public international law, and comparative law, with a special focus on Chinese law, agricultural reform, and environmental protection. His principal books, in addition to *GLOBAL BUSINESS LAW*, include *INTERNATIONAL LAW AND AGROECOLOGICAL HUSBANDRY: BUILDING LEGAL FOUNDATIONS FOR A NEW AGRICULTURE* (2017); *THE ASIAN DEVELOPMENT BANK* (4th ed. 2018, with Xing Lijuan); *LEGAL TRANSPARENCY IN DYNASTIC CHINA: THE LEGALIST-CONFUCIANIST DEBATE AND GOOD GOVERNANCE IN CHINESE TRADITION* (2013, with Xing Lijuan); *GLOBAL LEGAL REGIMES TO PROTECT THE WORLD'S GRASSLANDS* (2012); *GREAT LEGAL TRADITIONS: CIVIL LAW, COMMON LAW, AND CHINESE LAW IN HISTORICAL AND OPERATIONAL PERSPECTIVE* (2011), *CHINA'S LEGAL SOUL* (2009); *LOSING THE GLOBAL DEVELOPMENT WAR—A CONTEMPORARY CRITIQUE OF THE IMF, THE WORLD BANK, AND THE WTO* (2008); *GENERAL PRINCIPLES OF BUSINESS AND ECONOMIC LAW* (2008); *THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS* (2005), and *LAW CODES IN DYNASTIC CHINA—A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING* (2005, with Wang Yanping). Mr. Head has also written numerous monographs, articles, and other works relating to international law, some of which have been published in Chinese and Indonesian.

Mr. Head has been awarded Fulbright teaching fellowships to China (1994), to Italy (2009), and to Canada (2016) and has also taught in Austria, Hong Kong, Jordan, Mexico, Mongolia, Turkey, and the United Kingdom and has undertaken special assignments in numerous locations for international financial institutions and development agencies. Mr. Head is married to Lucia Orth. He and his wife live in the grassland-and-woodland countryside southwest of Lawrence, Kansas.



# Acronyms

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The study of global business law involves gaining a command of many acronyms. The Study Questions that appear at the beginning of the chapters of this book refer to many such acronyms, as well as to numerous specialized terms. The following list provides a fairly comprehensive list of the acronyms and their meanings.

AAA	American Arbitration Association
BIT	bilateral investment treaty
CCC	Commodity Credit Corporation (of the US Department of Agriculture)
CCL	Commerce Control List (in US Export Administration Regulations)
CIF	cost, insurance, and freight (in Incoterms or other, nation-specific usage)
CIP	carriage and insurance paid to (under Incoterms)
CISG	UN Convention on Contracts for the International Sale of Goods (Vienna Sales Convention)
CLOUT	Case Law on UNCITRAL Texts (for CISG interpretation)
COCOM	Coordinating Committee on multilateral export controls
COGSA	Carriage of Goods by Sea Act (USA, 1936)
DDP	Delivery Duty Paid (under Incoterms)
EAA	(US) Export Administration Act (1979)
EAR	(US) Export Administration Regulations
E-SIGN Act	(US) Electronic Signatures in Global and National Commerce Act (2000)
ETC	(US) Export Trading Company
EU	European Union
EXIMBANK	Export-Import Bank of the United States (USA)
EXW	Ex Works (under Incoterms)
FCPA	(US) Foreign Corrupt Practices Act (1977)
FDI	foreign direct investment
FOB	free on board (in Incoterms or in other, nation-specific usage)
FSC	Foreign Sales Corporation (USA)
FTZ	free trade zone (or, in USA, foreign trade zone)

G-7	Group of Seven—USA, UK, France, Germany, Japan, Canada, Italy
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product (one measurement of national income)
HTSUS	Harmonized Tariff Schedules of the United States
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IFIs	international financial institutions (MDBs and the IMF)
IMF	International Monetary Fund
Incoterms	international commercial terms, as published by the ICC
JV	joint venture
LCIA	London Court of International Arbitration
LDC	less (economically) developed country
MAI	Multilateral Agreement on Investment (proposed)
MDBs	multilateral development banks
MIGA	Multilateral Investment Guarantee Agency
MNCs	multinational corporations
MNEs	multinational enterprises
NAFTA	North American Free Trade Agreement
NGOs	non-government organizations
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of Petroleum Exporting Countries
OPIC	(US) Overseas Private Investment Corporation
PRC	People's Republic of China
SEADOCS	(a form of electronic bill of lading)
SEC	(US) Securities and Exchange Commission
TRIMs	(Agreement on) Trade-Related Investment Measures
TRIPs	(Agreement on) Trade-Related Intellectual Property Rights
UCC	(US) Uniform Commercial Code
UCP	Uniform Customs and Practice for Documentary Credits
UETA	(US) Uniform Electronic Transactions Act (1999)
UFCMJRA	(US) Uniform Foreign-Country Money Judgments Recognition Act
UFMJRA	(US) Uniform Foreign Money Judgments Recognition Act
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	UN Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
US	United States (used as an adjective)
USA	United States of America (used as a noun)
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

# Styles, Usages, Citations, and Other Conventions

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As noted in the Preface, this book tries to take a global perspective on global business law, rather than a purely American view. One reason for this is to make the book suitable for use outside, as well as inside, the USA. Hence, although many examples are drawn from US law and practice, they are intended usually as illustrations of how one relatively sophisticated legal and economic system handles certain topics (and they are often accompanied by examples from other countries as well). This non-US-specific perspective has some implications for the styles and usages found in the following pages. I have summarized below some of the specific approaches I have taken to several matters of spelling, citation, punctuation, terminology, and formatting that reflect that perspective, or that, for other reasons, I have considered appropriate for this book, and which might be unfamiliar to some readers.

- *Citations in general.* Citations to books, articles, and other legal materials appear in a less abbreviated style than that used by many US law journals and books. I believe the heavily abbreviated style used in US legal texts can be so unfamiliar to a general audience as to create confusion or uncertainty. In addition, in the case of books, I have departed from the practice of putting the authors' names in all capital letters. Instead, authors' names for all works—books and articles and other items—appear in regular upper case and lower case letters; then titles of books appear in large and small capitals and titles of other works appear in italics or, in a few cases depending on the nature of the work, in regular font with quotation marks.
- *Internet citations.* In the case of citations to sources found through the internet, I have not included details of “last updated” and “last visited”, on grounds that such information is likely to be of little use. Most of the citations to such sources were operational as of sometime in 2017. However, it is not uncommon for a document on a website to change from one location to another within the website, so a reader wishing to retrieve such a document might wish to use the “search” function within that website in order to find the new location—bearing in mind that sometimes documents are in fact removed from the internet entirely.

- *Internal citations.* Many of the passages that I have quoted from other authors included, in their original publication, citations to authority in the form of footnotes or endnotes. Throughout this book, unless noted otherwise, I have omitted these citations without expressly indicating “(citations omitted)” or “(footnote omitted)”.
- *Wikipedia.* I also have omitted (in nearly all cases) citation to the authorities that support the factual accounts and explanations that I have occasionally drawn from Wikipedia. Although I am fully aware of the shortcomings of relying on Wikipedia for many types of research and analysis, I have felt comfortable drawing on such accounts and explanations if (i) they cite sources that, in my judgment, warrant confidence and (ii) they relate to general information that I am confident can easily be substantiated elsewhere if curiosity prompts someone to pursue the issue further.
- *Specific usages.*
  - Throughout this book, the term “state” typically carries the meaning it has in international law—that is, as a nation-state and not as a subsidiary political unit such as the individual domestic states that make up federal nation-states such as India or the USA or Mexico.
  - In most references to the People’s Republic of China, I have used the abbreviation “PRC”, rather than using the name “China”. This facilitates separate reference, when necessary, to (i) the Republic of China (“ROC”) on Taiwan or to (ii) China as a single social and political entity, especially in the years before 1949.
  - The acronym noun “USA” is often used in this book in preference to the commonly-used noun “United States”, inasmuch as there are other countries (such as Mexico) with the title “United States” in their official names. However, the term “US” has been retained for use as an adjective referring to something of or from the USA, such as “US legislation” or “US states”.
  - I have opted for the use of “US” and “USA” without periods, as this seems to be the more modern trend and also follows the usage found in acronyms for other political entities such as the United Nations (UN) and the People’s Republic of China (PRC). Naturally, I have not changed “U.S.” to “US” in any quoted material or official citations.
  - References are sometimes made to US\$, not just \$, given the fact that several countries use dollars as the name (or at least “\$” as the sign) for their currencies.
  - I have used the abbreviation “CE”, for Common Era (or Current Era), to carry the same meaning as the increasingly outdated abbreviation “AD”, for *Anno Domini*; and I have used the corresponding abbreviation “BCE”, for “before Current Era”, instead of “BC”, for Before Christ.

- *Punctuation with quotation marks.* I have followed the less-used but more logical convention of placing quotation marks inside all punctuation (unless of course the punctuation itself is included in the original material being quoted). Doing so allows the text to reflect more faithfully how the original material reads.<sup>1</sup>
- *Italicization.* I have used italicization in six main circumstances: (i) where I wish to add emphasis (or where emphasis was already inserted in material being quoted from other authors); (ii) in textual references to case names (such as the *Raynor* case or the *Filartiga* case); (iii) in textual references to titles of books (such as Justinian's *Digest*); (iv) in citing law journal articles or other works appearing within larger publications; (v) to signify words or terms from languages other than English (mainly Latin, French, and Chinese); and (vi) in certain "levels" of subsection headings, as a navigational aid to the reader. I assume the context will allow easy distinction between these various usages.

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1. In defense of my decision to use this approach, I would refer readers to H. W. Fowler, *A DICTIONARY OF MODERN ENGLISH USAGE* 591–92 (2nd ed., 1965):

Questions of order between inverted commas [quotation marks] and stops [periods] are much debated. . . . There are two schools of thought, which might be called the conventional and the logical. The conventional prefers to put stops within the inverted commas, if it can be done without ambiguity, on the ground that this has a more pleasing appearance. The logical punctuates according to sense, and puts them outside except when they actually form part of the quotation. . . . The conventional system is more favored by editors' and publishers' rules. But there are important exceptions, and it is to be hoped that these will make their influence felt. The conventional system flouts common sense, and it is not easy for the plain man to see what merit it is supposed to have to outweigh that defect; even the more pleasing appearance claimed for it is not likely to go unquestioned.

