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MY LECTURES OF INTERNATIONAL BUSINESS LAW

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TABLE OF CONTENTS

7 *Foreword*

9 *Introduction*
1. The Course Pillars, 9 – 2. Sovereignty, Effectiveness, Jurisdiction, 33.

51 Chapter I
International law. Concept, sources and governing institutions/organizations; elements of public and private law in international business
1.1. MNOs and international Business, 51 – 1.2. The European Union Organization and Functioning, 75 – 1.3. Public law concerns in international business, 96 – 1.4. Self–assessment test on chapter One, 115.

119 Chapter II
International business law
2.1. Basics on the theory of contract, 119 – 2.2. Securing contract performance, 139 – 2.3. Cross–border transactions and international law, 156 – 2.4. International Contracts — Certain Types of Contracts, 184 – 2.5. Intellectual Property Rights — IPRs, 197 – 2.6. Exercises on Chapter Two Topics, 212.

217 Chapter III
Financing a business initiative and other investment topics
3.1. Basics of Corporate and Capital Markets Law; JVs, Consortia and PPPs, 217 – 3.2. The Deal of Financing the Deal, 238 – 3.3. Investing Abroad: Opportunities and Criticalities, 259 – 3.4. Interim Test on Chapter Three Topics, 274.

277 Chapter IV
International dispute resolution
4.1. Theory and Practice of International Dispute Resolution, 277 – 4.2. Specific Types of Litigation, 287 – 4.3. Reading Statutes, Contracts, Cases, 314 – 4.4. Final Exam Admission Test, 322.

323 Appendix
1. The Eumenides, abstract, 323 – 2. Guidance to contract drafting and reviewing, synopsis, 328 – 3. Standards of Conduct in Contract Performance, 331 – 4. Contract Structure, 336 – 5. The INCOTERMS, 342.

FOREWORD

This handbook contains the transcripts of my lectures of International Business Law as held during the triennial course of Economics — International Management — at UNINT, Università degli Studi Internazionali in Rome. A forty–hours front lessons course aimed at offering students a comprehensive view of the subject matter in a problematic manner, to ease developing a critical thinking.

A diligent student may find herewith the theoretical elements and the practical tips to handle even complex cross–border transactions. The aim of the course is to favor a hands–on attitude and the ability to contribute to all manners of internationalization processes.

The specific cut of the course has been designed to match the overall curricular programme of the Faculty, thus centering on commercial and trading aspects and leaving in the background all issues relevant to corporate and financial matters, employment, environmental or insolvency matters.

The goal hereof is to offer the keys to interpret the international (private) law systems. A matching with real–world business feeling is always offered to students, so that the general architecture of International Business Law, in each and all the dimensions and directions of its development, may be developed autonomously, should the case be.

The intent, in other words, is to provide students with the technical instruments as required to perform an operative role, with a consistent

theoretical base and all the elements to connect the dots by themselves, including commercially — and corporate — /financially wise. That objective implies establishing a mindset for understanding geographical and cultural differences relevant in the business context, as may be hidden in contractual instruments. And that can only (or at least better) be done by comparing international business law with the overall cultural environment.

History, tradition, philosophy, and something more, are therefore appearing here and there to widen the scope of the legalistic view. Deep roots make the tree to grow up taller.

Methodologically, the lectures will move from a general introduction (general methodology; the role of law in developed cultures; law and contract; the conflict of laws and the international private law systems; the concepts of sovereignty, jurisdiction, effectiveness), to four main chapters, each one dealing with a specific topic of the program, namely:

- I. International law sources and governing institutions/organizations; elements of public and private law in international business.
- II. The sale of goods, the provision of services and the execution of works at international level: sale, shipment, delivery; the Incoterms.
- III. Financing the deal: export and project finance; producer's and vendor's liability. Intellectual Property Rights; partnering and corporate transactions; investor's protection.
- IV. Dispute resolution theory and practice, the choice of law, the choice of venue, the choice of applicable discipline under the international organizations and treaties.

A sound basis of both private and (domestic) business law is required to proceed easily with the handling of the underlying concepts: it would be unrealistic to talk about international transactions without a reasonable knowledge of what a contract is, how a business corporation may be formed, and so on. Yet, some recaps of those ideas will be included in the development of the course, also for purposes of highlighting the differences between the several legal systems.

INTRODUCTION

1. The Course Pillars

The preliminary task of a course, and specifically of a course of law, is to define its engagement rules. Law may not be handled or studied with the "copy and paste" approach. Mnemonic exercises that are not supported by a "chew and digest" effort do not fit the study, the comprehension and the application of law. A personal intellectual effort is always required of students, aiming at appreciating the real–life impact of legal provisions. Let aside the fact that a mere mnemonic study leads just nowhere most likely with respect to any discipline; and makes absolutely no sense at university level, where students are supposed to be studying and learning for their own profit, and not to the very limited objective to accomplish a task and get a positive mark if and when submitted to test. The point is that law has a quite peculiar feature, to be understood upfront: it is *abstract, ductile, intangible*. And, nonetheless, it requires to be included within *a coherent and consistent system*. That may be the very first takeaway of this class: that we are referring to law — a written–in–the–stone rule of living — as something that survives the passage of time, and fits always renewing, dynamic events. The catalyst of such process may be found in the living interpretation of the law as made by the jurisprudence, with the support of all legal practitioners, Scholars, Lawyers and Judges included.

Approaching a course in law requires will. Not something we happen to do because it's in the Faculty plan. As mentioned above, law is not something to read and repeat by memory. Whether we put law at the basis of a civilized community of humans, or vice–versa as a consequence of its civilization, law deals with mankind, familiar, commercial and institutional relationships, is connected with the real life of everyone. It is therefore something to be perceived, digested and understood. We could dare to say that law must be "felt". A subjective bit of fantasy in the construction of the law may be appropriate, to the extent the conceptual limits of the legal system are duly observed.

The relevance of law in daily life should be perceived upfront and put at the basis of the eagerness to learn how it works. Indeed, law is by no means confined to the knowledge of acts and statutes, Court decisions and international treaties. Law is something that always needs to be individually reasoned and matched with real–life situations. *How would that rule of law fit with this course of action? How would such course of action be considered by law?* Law is comparable to a pattern of dots: meaningless, until when they are connected in their proper order, and figure out the picture hidden by the dots. And this is exactly what students in this class are expected to do: a personal effort of connecting the dots that will be sketched out throughout the lessons by submitting real life examples.

Have critical spirit, be (reasonably) creative. Be real persons.

If we can agree that *law is the rule that a community of humans has agreed to adopt to govern their relationships (and may enforce by the imposition of penalties)*, we should draw the conclusion that each community has its own rules, possibly different from each other, even in a significant manner. This is where the concept of *international (business) law* comes in the limelight. Since the dawn of mankind history, human communities have experienced the importance of trading with each other, exchanging goods — doing business. Such trading implies two major concepts:

- the *recognition* of a "value" to those goods that form the subject of the trading, so that kind of a standard may be identified to say that a pint of milk is worth a satchel of grain, and that a stone–carved knife equals a refined wooden arch;

– the *mediation* between the internal rules of each community participating to the exchange, so that a sort of "common" rules governing the trading may be adopted. Whether such mediated rules are somewhere in between the respective internal laws of each participant or correspond to those of either party depends very much on the strength and the attitude of the communities, that may have an aggressive or a cooperative spirit. We will see that throughout the course of history international relationships moved from *imposed law* — there is a way of reading wars as means to favor international business by means of enforcing the winning party's law — to *negotiated law*, in recent times, given the moral, human and economic cost of fighting wars.

Nonetheless, the adoption of compromise rules, alien to the internal ones of either community, poses the question of who oversees the enforcement thereof in the event of a breach, that amounts to identifying an objective criterion *to dictate who holds the power to interpret the facts to say, in an official manner, what is the law of the case (*ius dicere*),* whether and to what extent the factual developments of each contractual performance match (or deviate from) the stipulation of the law, so that a violator may be identified. And to find out whether such superior entity is also entitled to sanction the violator, who could be a party not belonging to its community.

From those very preliminary questions we have already the scope of our class figured out:

– finding out the law applicable to a transaction involving parties coming from different communities;
– identifying an entity overseeing the proper performance of the relevant stipulations and telling/deciding which is the breaching party, if any;
– verifying whether such entity has the power to sanction the breach (*i.e.*, to enforce the contract) in respect of a person who might be an alien to its own community.

Answering those questions is the core of international law, and it is where we will come back every now and again.

This means that the law has to be though about. Needs to be let flow in students' minds, questioned, discussed, and eventually reduced to its essentials for a final recombination. Remember that within each legal system, the law must be construed in a consistent manner, based upon same general principles, obeying to public policy rules, complying with a constitution.

In other words, law requires to be designed and studied with an intensive use of the intellect, that is required to assume a proactive role.

At the same time, such an exercise may not be undertaken without complying with a discipline, a set of interpretative and constructive rules which will form the external borders of the intellectual review. The starter may be understanding that law has its own language, made out of terms of art as well as legacy language from the most ancient legal systems of the respective traditions (for Western world, that means Greece and Rome of the Classic era). A stratified legacy from practitioners acting all around the world since a couple of thousand years, characterized by a language, a culture and a legal system different from case to case. International Business Law includes that also, a cultural and linguistic approach even more complex than ordinary.

Competent terminology, clear understanding of the baseline categories, acquaintance with the outline of the respective legal system, adherence to — or reasoned deviation from — the reference philosophy and political objective are all the ingredients that a student of law is supposed to be able to dose and utilize in its approach to the class. International Business Law is by no means different or less demanding in such respect. The capacity to criticize the concepts, to put them under discussion, is essential to see their connection to the real world: because *law does not exist in laboratories and manuals, but only among humans and their relationships*.

This class will continuously rotate around the essential concepts of *sovereignty, effectiveness and jurisdiction*: to be clearly laid down, and well related to the framework of a legal system into which they must operate. Without doing so, it is difficult to believe that discussing about self–referential contracts, passage of risk, closest connection with the obligation to be performed may make any sense.

It should be said, though, that once those problems are solved, or at least clarified in their terms, there's little to be added as regards the core of the subject matter.

Approaching International (Business) Law means coping with three different preliminary problems:

- whether — as concerns private transactions[1], at least — any "international" law really exists, first of all;
- from what standpoint are we going to look at it — the reference for an observer is always that of putting itself on the center of the observed system, so that everything is measured in relation to it (a modern release of Protagoras's ancient saying *pantôn chrêmatôn metron anthrôpon eìnai*, the man is the measure for all things);
- what connection a static concept such as "law" may have with a dynamic world such as that of international business.

At the same time, being able to move the subjective, internal point from where the issue is being regarded, from a selfish to an objective, external one, entails a high level of disenchantment as the mountain may now be seen its entirety, and therefore will appear crystal clear to those who will have digested the preliminary steps.

The approach that will be adopted in this class for considering International Business Law is that of a progressive unveiling of the different (and sometimes divergent) plans and dimensions in which reality articulates. Nothing here can be taken for granted, including the stone–carved laws of humans. When they first started codifying the rules of living, they had in mind to set forth a yardstick, a metric for understanding the dynamics of their relationships, and reducing them to an orderly pattern.

But the passage from a stoichiometric analysis of reality[2], as it was typical (and the only considered) in classic Greece, where Protagoras

(1) The concept of private and public with respect to law will be dealt with later on.

(2) Stoichiometry means measuring. That was the purpose of science at its origins, and for a long period thereafter. The concept at its base was "*measuring means understanding*". To comprehend refers to *"including within limits"*, that is to say, the process of interpreting and understanding how nature works is made of delimitations, measurement of reality. In Latin, we have *mensura* (measurement) that is clearly connected with *mens* (mind, intellect).

developed his ideas, to a polyhedric relation of time and space, contemplating extremes such as zero and infinite, as it was done in the baroque period, requires kind of a Copernican revolution, and is not to be accomplished momentarily, nor spontaneously.

Finally, abandoning the deterministic way of thinking that characterizes the Western mentality for considering law through the lenses of practice and jurisprudence — the only connectors between statics and dynamics — requires an effort as well that may not be disregarded: only those who believe they can do it should confront with the trial[3], and should be well considered for the attempt regardless of their results.

And so yes, here there is an upfront confession about the way of exploring the word of law adopted hereby: with an eye on the classic categories of mythology and tragedy and the other one on the morphology of history, in a philosophical combination of sort that is easier to practice (feel) than to explain.

It is almost impossible to understand in a proper and comprehensive manner today's reality unless basing upon the knowledge of the real roots of Western thinking. Superstition, religion, mythology — they have formed the intellectual categories we use in defining and explaining our experiences, the phenomena. We have construed our philosophy — and our knowledge — on such connections.

What is probably less perceived is that law, being the history and the discipline of human relationship, presents no difference from such model. Law stems directly from superstition, mythology, and religion[4]. That were transformed and consolidated into liturgy, and became formular law, the pretorian law pronounced by Roman tribunals. A series of formalities and formalisms to have the form of the law adapting to

(3) It is not by chance that the Anglo–Saxon language refers to the judicial process as a "trial", the point in time and space where the case of the parties (in a civil litigation) or of the prosecutor (in a criminal case) are heard by a competent judge and tested against the opposing arguments of the defendant. So, a case is "tried" before Courts, and only the outcome of that process, the *judgement*, will assume relevance for the case thereafter. See Chapter Four for a broader explanation of the subject.

(4) Religion is a word deriving directly from the Latin *religio*, which is most likely deriving from the verb *relegere*, meaning abide by, comply with — thus embedding the prescriptive concept of the law and the coercion power of the supreme authority; a minority theory connects with the verb *religo*, instead, which refers to the concept of unifying, bundling together: realistically, a derivative concept, more on the socio–anthropological side of the same medal, so to say.

the case and granting the participants to the transaction the protection of the law as an ideal expansion of the blessing of the gods themselves.

When reviewing a contract, legal experts acting in a business environment are rarely confronted — or at least not priority concerned — with the matching of contract terms and conditions with the stipulations of law: a contract which is contrary to a mandatory rule of law is rare, and most likely does not come from the hands of an expert. But the world is full of contracts that do not serve the purpose for which they were entered into, do not protect the business sensitive issues which lay behind them, do not mitigate the risk embedded in the relevant transactions.

To appreciate those elements, a business legal counsel needs to be familiar with the specific transaction no less than with the law. Getting acquainted with the specifics of a business organization, actively participating to the business team which has in charge the transaction at stake, asking questions to the other members thereof as to the elements that are critical to the success of the deal — or the underlying risks and how to better protect from them — understanding how the money will flow, is essential for a successful contract negotiation. Of course, all of that to be reconciled with the legal framework applicable to the contract — including the chance of moving the contract from one legal framework to another.

By itself it is evident that knowledge of the business environment is at least as important to such end as the thorough experience of law and practice. We refer to our class as (International) *Business* Law, just to connect the first pair of dots. Don't disconnect this course from the remainder of your programme!

Contract negotiations, preferably at international level, may be more than fun (experts in the field refer them as "*the biggest game of all*"), for their content of psychological drama no less than the human relationship that sometimes lasts over the years. But require preparation. Just as they are a situational game, one may not improvise, unless and to the extent as it underwent a reasonable dry run with internal business resources.

And, in turns, such dry run may only bring results if made by curious people eager to let no stones unturned in order to be prepared, conscious, aware of the business implications of legal stipulations.

Posing the baseline for attaining such an objective will be the goal of these lectures.

Given the meaning of "law" as the ensemble of rules a community choose to govern relationships inside it, our second step is represented by the contract: to be defined as *the aggregate of stipulations entered by two or more parties when dealing among them with respect to a specific objective*.

Such stipulations are left almost entirely to the parties, within the framework of the applicable legal system, that may dictate some limits, some minimum content, some ineludible consequence.

Yet, none of those limits, contents and consequences exists or applies in nature — they all are choices made by the relevant community, based upon the usages and consuetudes, the experience, the legacy of their traditions. And each community bears a different tradition, so that such limits, contents and consequences vary from here and there.

Inside the same community, trading is easily governed by such community rules, whereas cross–border transactions require *choosing the appropriate set of rules*. Whereas expert parties are free to make their own choice also in that respect, less sophisticated operators may be unaware of the hidden implications of such basic principle, and just omit any choice: International Business Law is there just to fill any vacancy in the parties' contractual choice.

We are talking about International Business Law here; our course is referred to as "International Business Law". So, let's have all the three elements clear, first of all. We have those three elements: international, business and law. And an implicit pre–requisite assumption, that law may be international. Something that requires a specific investigation. Let's take it in due order.

The issue amounts basically to understand what the matter subject of this class exactly is. Maybe we may try and answer by thinking at a different combination of those words which define our subject matter.

We have to identify what is international, referred to business and law at the same time, *what goes under the flag of "international" in deal making*. Let's question whether the element that really presents itself as

"international" in a business transaction is the law. If it is not, the subsequent step will be to check whether international refers to the transaction, and in what sense.

Based on what they have learned at the Private Law and Commercial Law classes, the students should be able to say whether a law may really be international. Yet, assuming they aren't, let's get to that piecemeal.

We will need to consider the geographic limits of application of a law no less than the subjective connection that the parties of a contract need to have with the law that governs their relationship. By answering those questions, we will know what is required for a law to be deemed to be international.

Preliminarily, though, just establish here a connection, a conceptual coincidence for the purposes of this lectures: *whenever a business combination of sort is concluded, a contract is entered*. So, contract and business are synonyms, in a certain way, and the class could be referred to as International Contract Law as well. Positively, we are therefore limiting the "law" discussed herein to Private Law, even if we will have the chance of considering a number of Public Law issues affecting the consummation of business transactions.

We have gone through the exercise of connecting the law with the community who adopted it, based upon its tradition. Law (therefore) has a geographic scope of effectiveness, coinciding with the territory under the control of such community. The whole concept of "international law" is therefore cryptic, if not critical and controversial. Are we putting the very meaning of this class at risk?

A reasonable attempt to define "international contracts" (that is basically a synonym for "international business") sounds like «whatever business combination an element of which refers to a State other than the national State of a given participant thereto may be deemed to be international».

We know, or may figure, that in a business combination the parties: may be of different nationality; may have different places of business; the place where the contract is signed, or must be performed, is different from the national State of the signatories; and the payment place may be abroad — payment is one of the obligations contained in the contract that needs to be performed.

None of the above classifications deals with the law. We could probably refine the definition to say that *"international" is a contract governed by a law different from the national law of at least one the parties*. And still we won't have found the key to the issue.

The parties, the place of performance, may be of different nationality. Assume for a while that this is sufficient to classify the transaction as "international"; and wonder what impact thereof reflects on law, whether the different origin of the parties influences *the nature* of the applicable law.

Clearly, none of those is the case. The law applicable to that transaction, whichever it is, has not changed its nature, nothing in a private deal has the power to make a law to become "international" instead of domestic. Each of the parties sits at the contracting table with its own domestic law, deals with the other one trying to bridge any difference between the two legal systems, matches the agreed stipulations with the acts and statutes and believes to be consistent with the provisions of the applicable law.

What they both miss, in most cases, is the identification of such applicable law. Which may be a chosen law, by agreement of the parties; or the one sorted out by means of application of such systems and mechanisms as States have worked out (so–called international Private Law Systems) to set forth some objective criterion of connection between deal and law. Or, eventually, the law which is identified pursuant to the applicable international treaties and conventions, as possibly integrated by standards dictated therein.

The parties, in defining the terms of their contract, are given and recognized by the legal systems a certain margin of maneuver, the so–called *freedom of contract*: that may be broader or narrower according if we are in a Common Law or in a Continental Law country, but which nonetheless still exists.

Such freedom spans in any case far enough to allow the parties to choose, among other things, the law applicable to their contract. Including that of *either of them, or a third one*(5).

The issue, therefore, will be to define which law is applicable, based on what. But clearly there is no magic by virtue of which a domestic law

(5) They may even omit any choice, and the legal system will work out the solution nonetheless — the purpose of International Private Law systems.

transforms itself into an international law just because one of the entities who are usually subject to it is temporarily (or permanently) dealing with a national of another country.

What is most likely to happen is that the applicable law — by decision or by default — will be sorted out as either of the national laws of the contracting entities[6]. What we will have is a contract between parties coming from different States that is subject to the law of (only) one of them. You see that we have an international contract, but also that the law remains a national one. As if we could say then «...governed by a law different from the national one of at least one of the parties». No international law, that's what.

Shall we rename the class "Law of International Business" then?

We are introducing two concepts here: the fact that we label of "international" a law in which the mentioned feature of internationality has nothing to do with the law, but (apparently) depends on the parties, or the performance, or the parties' will: the law governing the transaction, as such, is everything but "international". *It is just a different domestic law*. And due to the fact that the parties enjoy a certain span of freedom in determining the terms and conditions of their agreement, such span will encompass the *choice of law* as well. In other words, choice of law is part of the freedom of contract the parties may exploit in developing their relationship.

The contract we are referring to, eventually, is either governed by the national law of one of the dealing parties or, in the event of exercise of the right to choose in a specific manner, by that of a third–party country, regardless of whether this makes any (logical) sense.

We can ascend to the social matrix of this point, and call it a day for this lesson; for the rest, in fact, we'll have that either the parties to a contract are sufficiently experienced and sophisticated in cross–border dealmaking so as to know and be able to disguise when and to what extent for them it is more convenient to make an express choice or to rely upon applicable rules, or that they are acting under such a pressure as to be prevented from making even customary controls, and make no choice of their contractual discipline leaving everything to the law

(6) With the integration of harmonized rules as contained in applicable treaties and conventions, if any.

— statistically the problems that trigger a tribunal–discussed solution represent almost 20% of international traffic, and no more.

To say it differently, talking about international (private) law is intrinsically wrong: both because international law does not exist, or, if existing, dictates no substantive rules of law, only harmonization standards, procedural criteria to sort out any difference the parties may have in defining their respective rights and obligations; and as a consequence of the fact that each national law, regardless of whether harmonized, only concerns people, and business, falling within its jurisdiction in such a manner that talking, and pretending to teach, international (business) law is really a wishful thinking, and no more.

What matters for the purpose of this discussion here is that "International" as used in the context of International Business Law, given the above, clearly does not refer to the applicable law.

Likewise, let's review the word "business". Reference to "business" (more properly, business combination) can be meant to a wide variety of commercial transactions. A sale of goods is a business, as the provision of a service is. At the same time, corporate combinations, mergers, acquisitions, reorganizations, all of those may be regarded as a business. And financing a business is a business by itself. While our focus will be on *international commerce*, this course will explore the main features of public procurement, corporate reorganizations, and business financing as well, with a view to encompass the whole landscape of business segments, instruments and tools that may show up in international transactions.

Expanding the business perimeter of an organization, geographically speaking, is none of a theoretical exercise: rather, it is a very pragmatical one, requiring action and reaction capacity, often in a very short time. *Business is a "situation game"*, where own's behavior is constantly influenced by the counterparty's action. To do so, and being successful, a knowledge basis must be set and consolidated, so that thinking remains limited to the "what" should be done, whereas the "why", and foremost the "how" belong to the instinctive reaction. Our goal is to acquire sufficient confidence in the legal basis we will discuss so as to be able to handle practical issues as they may arise in real life.

It looks like "business" has so many meanings and readings that if we use it as the keyword in our definition, we will never know exactly what we