Cross-Border Litigation  
Fall 2021  
Professor Shani King and Professor Victor Borges Polizelli  
(University of Sao Paulo)

Syllabus

Class location: On-Line (synchronous)  
Class days and time: Thurs and Fri mornings at 8:30-9:45 (EST)  
Credits: 2

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Faculty Assistant: Victoria A. Redd  
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Course Description

Required Materials for class are available on the TWEN site (see below)

This course is an introduction to cross-border litigation. The increasing physical and technological globalization of business has inevitably resulted in a dramatic increase globally in the number of litigated disputes where the parties are based in different jurisdictions, or there is some other international aspect, such as the location of evidence or assets. What substantive legal issues tend to arise? (e.g., jurisdiction, choice of law, enforcement of foreign judgments). What are the practical challenges associated with litigation across borders? How can both substantive legal and practical challenges be avoided, minimized, or managed? The first class will address these issues generally, and in the following classes we will discuss the following issues: Common Law vs. Civil Law Jurisdictions, International Judgment Enforcement, Government Enforcement Defense, Asset Recovery and Protection (other than Judgment Enforcement), Insolvency and Restructuring, Arbitration, and the Law of Privilege.

What You Should Expect to Get Out of This Course (Learning Objectives and Outcomes)

My goal in this course is for you to develop a solid grounding in cross-border litigation. Many graduate from law school with abstract notions of what being an international lawyer or specializing in international law means. While there are many ways to be a lawyer who specializes in international law or, rather, specializes in the international practice of law, very few lawyers graduate from law school understanding what that actually means in practice. One thing that it could mean is the practice of cross-border litigation.
As explained above, the increasing physical and technological globalization of business has resulted in a dramatic increase globally in the number of litigated disputes where the parties are based in different jurisdictions, or there is some other international aspect, such as the location of evidence or assets. The goal here is for you to develop a solid grounding in the substantive issues that tend to arise in the cross-border context, the practical challenges associated with litigation across borders, and a solid understanding of how these legal and practical challenges can be managed.

This will be assessed in three ways.

First, through written responses to professor questions posed every week; questions that are specific/representative of the topic to be discussed that week.

Second, through a final paper on cross-border litigation, the topic which will need to be approved by the professor.

Third, through class participation and discussion.

**TWEN**

I have set up a TWEN site for this course. I have posted this course description and will post other documents relating to the course. You should register on the TWEN site prior to the first class if possible. I use the TWEN email system to communicate about schedule, assignment, and other issues. **You are responsible for checking the TWEN site for this course on a regular basis.**

**Zoom Link**

You will receive

**Attendance**

Pursuant to law school policy and ABA requirements, students are required to attend class. It is your responsibility to sign the attendance sheet during class. You may not sign in for anyone except yourself. If you are less than ten minutes late, you may sign the roster at the end of class (see note below regarding excessive tardiness). **If you are more than 10 minutes late, you will be considered absent.** Failure to sign the attendance sheet will be treated as an unexcused absence. I will allow four (4) unexcused absences per semester on a no-questions-asked basis. If it should be necessary for you to miss more than four (4) classes, you must email me to explain the reason for each additional absence. If you know in advance that you will have to miss a class, please make appropriate arrangements with me in advance. You will have no more than seven days after the time of the unanticipated occurrence to bring the reasons for your absence to my attention, provided however, that I will not accept any excuses offered after our last session of
the semester. Any unexcused absence that exceeds the allowance will lower your grade by one level. For example, one additional unexcused absence will lower a B to a B- or a C+ to a C.

I will deal with excessive absences and/or tardiness on a case-by-case basis; excessive absences (whether or not excused) or tardiness may result in your administrative removal from the course.

Accommodations

Students requesting accommodation for disabilities must first register with the Dean of Students Office (http://www.dso.ufl.edu/drc/). The Dean of Students Office will provide documentation to the student who must then provide this documentation to the Dean Rachel Inman when requesting accommodation. You must submit this documentation prior to submitting assignments or taking the quizzes or exams. Accommodations are not retroactive, therefore, students should contact the office as soon as possible in the term for which they are seeking accommodations.

Course Requirements

There are three requirements:

1. Written responses of 500 words or less posted to the course website forum “discussion board” and submitted no later than 5pm the day before class to me via email. Please do not exceed 500 words. The response should not take more than half an hour to do; it is a way for you to digest and reflect on the readings. The responses are required and I will read them, but there is no grade (i.e., your completion of the assignment is sufficient). They should be analytical and not descriptive of the material. Students should read each other’s submissions as they will be incorporated into class discussion. Unless I specifically ask you to address a particular issue, please consider some or all of the following in your response papers:
   a. Respond to the questions on the syllabus or provided by the instructor for that week.
   b. How does the legal or theoretical framework translate into practice?
   c. What issues would you particularly like to discuss in class?

2. A 20-page (double space) final paper due on December 3rd at 4:00 PM to be submitted in hard copy format or by email to my assistant Victoria A. Redd. Paper topics must be approved by me and are due on Thursday, November 8th. You can send the topics to me via email.

3. There will also be online class discussion on TWEN, to encourage additional interaction and exchange outside of class.

Grading
25% of the final grade will be based on class participation. 20% of the grade will be based on the written responses. 55% of the grade will be based on the final paper.

Students should expect to spend at least two hours outside of class reading and preparing for every hour of class.

At the end of the semester, the points for all students will be calculated and the letter grades for the course will be assigned subject to the requirements of the mandatory curve. The Levin College of Law’s mean and mandatory distributions are posted on the College’s website and this class adheres to that posted grading policy. The following chart describes the specific letter grade/grade point equivalent in place:

<table>
<thead>
<tr>
<th>Letter Grade</th>
<th>Point Equivalent</th>
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<tbody>
<tr>
<td>A (Excellent)</td>
<td>4.0</td>
</tr>
<tr>
<td>A-</td>
<td>3.67</td>
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<tr>
<td>B+</td>
<td>3.33</td>
</tr>
<tr>
<td>B</td>
<td>3.0</td>
</tr>
<tr>
<td>B-</td>
<td>2.67</td>
</tr>
<tr>
<td>C+</td>
<td>2.33</td>
</tr>
<tr>
<td>C (Satisfactory)</td>
<td>2.0</td>
</tr>
<tr>
<td>C-</td>
<td>1.67</td>
</tr>
<tr>
<td>D+</td>
<td>1.33</td>
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<tr>
<td>D (Poor)</td>
<td>1.0</td>
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<tr>
<td>D-</td>
<td>0.67</td>
</tr>
<tr>
<td>E (Failure)</td>
<td>0.0</td>
</tr>
</tbody>
</table>
**Week 1. August 26 & 27**

**Introduction: What is cross-border litigation?**

Instructor: Professor Shani King

*What is cross-border litigation? The increasing physical and technological globalization of business has inevitably resulted in a dramatic increase globally in the number of litigated disputes where the parties are based in different jurisdictions, or there is some other international aspect, such as the location of evidence or assets. What substantive legal issues tend to arise? (e.g., jurisdiction, choice of law, enforcement of foreign judgments). What are the practical challenges associated with litigation across borders? How can both substantive legal and practical challenges be avoided, minimized, or managed?*

**Readings:**

Chevron Case (see TWEN)


**Class Two: Guest Speaker on Cross-Border Litigation**

**Week 2. September 2 & 3**

**Common Law vs. Civil Law Jurisdictions**

Instructor: Professor Shani King.

**Readings:**


Optional:


Class Two: Guest Speaker on Civil vs. Common Law Jurisdictions

**Week 3. September 9 & 10**

**International Judgment Enforcement**

Instructor: Professor Shani King

Class One: Foundations.

**Readings:**


Enforcement of Foreign Judgments 2021 (Oliver Browne & Tom Watret. Contributing eds., 2021), 3 (Global Overview), 20-25 (Brazil), 119-124 (United States).

Optional:


Class Two: Guest Speaker on IJE
Week 4. September 16 & 17

Government Enforcement Defense

Instructor: Professor Shani King

Class One: Foundations.

Readings:


Class Two: Guest Speaker on GED
Week 5. September 23 & 24

Asset Recovery & Protection (other than Judgment Enforcement)

Instructor: Professor King.

Class One: Foundations.

Readings:


Class Two: Guest Speaker on Asset Recovery & Protection
Week 6. September 30 & October 1

Insolvency & Restructuring

Instructor: Professor King.

Class One: Foundations.

Readings:


Class Two: Guest Speaker on Insolvency & Restructuring

Week 7. October 7 & 8: International Arbitration

Professor Shani King

Readings:


Article on Mutual Agreement Procedure (MAP) and Arbitration, both trending topics in tax treaty practice nowadays: H. Mooij, Chapter 14: MAP Arbitration in Tax Treaty Disputes in Flexible Multi-Tier Dispute Resolution in International Tax Disputes (P. Pistone & J.J.P. de Goede eds., IBFD 2021), Books IBFD.

Optional:


Class Two: Guest Speaker on International Arbitration

**Week 8. October 14 & 15: International Investigations**

Professor Shani King

**Readings:**


Articles on joint tax audits (PDF on TWEN has both articles together):


Class Two: Guest Speaker on International Investigations

Instructor: Professor Shani King

Readings:


Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 489 (SDNY 2013) (applying “contacts” test to determine which country has “predominant” or “most direct and compelling interest” in whether and to what extent communications should remain confidential).

In re: Interest rate Swaps Antitrust Litigation, No. 16-MD-2704, 2018 WL 5919515 (SDNT, November 13, 2018) (allowing clawback of inadvertently disclosed confidential document when document had not been ordered disclosed by foreign court with authority to issue such an order)

Newest OECD work on the topic of tax intermediaries/professionals who enable abusive tax planning. This material addresses the law of privilege and the need for countries to develop legislation with mandatory disclosure rules and other relevant features: OECD (2021), Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes, OECD, Paris.

Class Two: Guest Speaker on The Law of Privilege

Week 10. October 28 & 29: Transfer Pricing

Instructor: Professor Polizelli

Readings:

Background Paper: An Introduction to Transfer Pricing, at https://silo.tips/download/chapter-1-an-introduction-to-transfer-pricing

Because the U.N. paper above and the U.S. & OECD rules are slightly different, please also consult Article 9 and commentaries of the Model Convention 2017:

And consult Section 482 and its regulations under the internal revenue code, available at https://www.law.cornell.edu/uscode/text/26/482.


**Week 11. November 4 & 5**

**Taxpayers Rights**

Instructor: Professor Polizelli

**Readings:**

*Aloe Vera of America et al. v. United States*, Case number 2:99-cv-01794 JAT, in the U.S. Court of Appeals for the Ninth Circuit

http://www.dbriefsap.com/bytes/AloeVeraCase.pdf


Consult the 2017 OECD Tax Model Convention article 26 and the Commentaries on the Debelva & Mosquera article: http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm (free access from school or VPN).
Week 12. November 12

Mediation

Instructor: Professor Polizelli

Readings: