

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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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:

Letter Grade	Point Equivalent
A (Excellent)	4.0
A-	3.67
B+	3.33
B	3.0
B-	2.67
C+	2.33
C (Satisfactory)	2.0
C-	1.67
D+	1.33
D (Poor)	1.0
D-	0.67
E (Failure)	0.0

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)

Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. Pa. J. Int'l Econ. L. 1297 (2004).

Linda Silberman, *Transnational Litigation: Is There a "Field"?*, 39 Vand. J. Transnat'l L. 1427 (2006) (arguing that transnational litigation is a field that merits autonomous treatment).

Class Two: Guest Speaker on Cross-Border Litigation

Week 2. September 2 & 3

Common Law vs. Civil Law Jurisdictions

Instructor: Professor Shani King.

Readings:

The Robbins Collection, *The Common Law and Civil Law Traditions* (available at <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf>).

Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 Victoria University of Wellington L. Rev. 817 (2001) (available at <https://core.ac.uk/download/pdf/322530635.pdf>).

Crawford v. Washington, 541 U.S. 36 (2004) (comparing civil law and common law traditions in the context of the sixth amendment).

Optional:

Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. Legal Stud. 503 (2001).

Excerpts from Gordon Tullock, *The Case Against the Common Law* (1997).

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:

Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is it Broken and How Do We Fix It?*, 31 Berkeley J. Int'l L. 150 (2013).

Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2 July 2019) (available at <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf>).

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

Optional:

Excerpts from Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 Colum. L. Rev. 1444 (2011).

Article on the barriers for enforcement of decisions involving public law (including tax): Dodge, William S., *Breaking the Public Law Taboo* (2002). 43 Harvard International Law Journal 161, Available at SSRN: <https://ssrn.com/abstract=316660>.

Class Two: Guest Speaker on IJE

Week 4. September 16 & 17

Government Enforcement Defense

Instructor: Professor Shani King

Class One: Foundations.

Readings:

Criminal Division of the USDOJ and the Enforcement Division of the SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2nd Ed. (2020), pp. 87-100 (Text of the FCPA), pp. 1-8 (Introduction), pp. 9-37 (The FCPA: Anti-Bribery Provisions), pp. 38-46 (The FCPA: Accounting Provisions), pp. 48-49 (Other Related U.S. Laws), pp. 50-68 (Guiding Principles of Enforcement) (<https://www.justice.gov/criminal-fraud/file/1292051/download>).

Article on the multilateral assistance for recovery of tax claims: P. Baker et al., International Assistance in the Collection of Taxes, 65 Bull. Intl. Tax'n 4/5 (2011), Journal Articles & Opinion Pieces IBFD.

Article by IRS Director on the US experience on international cooperation for tax collection: D. O'Donnell, International Administrative Cooperation: Assistance for Collection Douglas O'Donnell, in Administrative Collection Process as Effective Mechanism for Increasing Revenues, CIAT, 2011, pp. 301-316, at https://www.ciat.org/Biblioteca/ConferenciasTecnicas/2011/Ingles/2011_e-book-complete.pdf.

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:

Jean-Pierre Brun, Larissa, Gray et al., *Asset Recovery Handbook: A Guide for Practitioners*, The World Bank, Stolen Asset Recovery Initiative 2011, at https://star.worldbank.org/sites/star/files/asset_recovery_handbook_0.pdf.

The Asset Tracing and Recovery Review 3rd Edition, Editor Robert Hunter, at <https://kobrekim.com/assets/Uploads/Hong-Kong.pdf>.

Manea, *International, European and National Developments in Asset Recovery*, 2015 Conf. Int'l DR. 897 (2015).

Emile van der Does de Willebois & Jean-Pierre Brun, *Using Civil Remedies in Corruption and Asset Recovery Cases*, 45 Case W. Res. J. Int'l 615 (2013).

Mihaly Fazekas & Eva Nanopoulos, *The Effectiveness of EU Law: Insights from the EU Legal Framework on Asset Confiscation*, 24 Eur. J. Crime Crim. L. & Crim Just. 39 (2016).

William T. Loris, *Private Civil Actions: A Tool for a Citizen-Led Battle against Corruption*, 5 World Bank Legal Rev. 437 (2014).

Vlasic, M. V. & Noell, J. N, *Fighting corruption to improve global security: An analysis of international asset recovery systems*. Yale J. Int'l Aff. 5(2), 106-120 (2010).

Boucht, J., *Asset confiscation in Europe – past, present, and future challenges*. Journal of Financial Crime, 26(2), 526-548 (2019).

Davis, P. J. (2016). *"To return the funds at all": Global anticorruption, forfeiture, and legal frameworks for asset return*, Univ. Memphis L. Rev., 47(1), 291-357 (2016).

Class Two: Guest Speaker on Asset Recovery & Protection

Week 6. September 30 & October 1

Insolvency & Restructuring

Instructor: Professor King.

Class One: Foundations.

Readings:

Excerpts from U.N. Comm'n on Int'l Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013) (available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>).

Excerpts from Adrian Walters, *Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law*, 93 Am. Bankr. L.J. 47 (2019).

Irit Mevorach, *A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups*, 40 Mich. J. Int'l L. 505 (2019).

Class Two: Guest Speaker on Insolvency & Restructuring

Week 7. October 7 & 8: International Arbitration

Professor Shani King

Readings:

Juliette Passer, *A Primer on International Arbitration for Board Members & Local Counsel*, Int'l In-house Counsel J., Vol. 13, No. 50, Winter 2020, 1.

Excerpts from Latham & Watkins LLP, Guide to International Arbitration (available at <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>).

1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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.

Article on baseball arbitration by Luís Flávio: L.F. Neto, *Baseball Arbitration: The Trendiest Alternative Dispute Resolution Mechanism in International Taxation*, Intl. Tax Stud. 8/Special Issue (2019), Journal Articles & Opinion Pieces IBFD.

Optional:

London Court of International Arbitration (LCIA) Rules **or** ICC International Court of Arbitration Rules (2017).

Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 Chi. J. Int'l L. 303 (2004).

Class Two: Guest Speaker on International Arbitration

Week 8. October 14 & 15: International Investigations

Professor Shani King

Readings:

Excerpts from Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. Cal. L. Rev. 697 (2020).

Criminal Division of the USDOJ and the Enforcement Division of the SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2nd Ed. (2020), pp. 87-100 (Text of the FCPA), pp. 1-8 (Introduction), pp. 50-68 (Guiding Principles of Enforcement) (<https://www.justice.gov/criminal-fraud/file/1292051/download>).

Petrus Marais & Phillip D. Ostwalt, *The Dangers of Cross-Border Investigations*, The Corporate Board, 10-15 (March/April 2014) (available at <https://info.kpmg.us/content/dam/info/en/nwa/pdf/2017/dangers-cross-border-investigations.pdf>).

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

N. Čičin-Šain, T. Ehrke-Rabel & J. Englisch, *Joint Audits: Applicable Law and Taxpayer Rights*, 10 World Tax J. 4 (2018), Journal Articles & Opinion Pieces IBFD.

I.J.J. Burgers & D. Criclivaia, *Joint Tax Audits: Which Countries May Benefit Most?*, 8 World Tax J. (2016), Journal Articles & Opinion Pieces IBFD.

Class Two: Guest Speaker on International Investigations

Week 9. October 21 & 22: The Law of Privilege

Instructor: Professor Shani King

Readings:

Norton Rose Fulbright, Navigating Privilege in Global Investigations – English and U.S. Law Perspectives, Corporate and Commercial Disputes Review, pp. 8-12 (April 2016) (available at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/corporate-and-commercial-disputes-review---issue-3.pdf?la=en-ca&revision=bf82af7c-3a03-4c23-b310-15a39cc51841>).

Susan D. Franck, *International Arbitration and Attorney-Client Privilege – A Conflict of Laws Approach*, 51 Ariz. St. L. J. 935 (2019).

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:

<http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> (free access from school or VPN).

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

The Coca-Cola Company & Subsidiaries v. Commissioner of Internal Revenue, available at <https://casetext.com/case/coca-cola-co-v-commr-1>.

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://cdn.ca9.uscourts.gov/datastore/opinions/2012/11/15/10-17136.pdf>

Aloe Vera of America et al. v. United States, Case number No. CV-99-01794-PHX-JAT, in the U.S. District Court for the District of Arizona.
<http://www.dbriefsap.com/bytes/AloeVeraCase.pdf>

Filip Debelva & Irma Mosquera, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, 45(5) INTERTAX (2017).

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:

Yariv Brauner, *Chapter 8: Tax Mediation in the United States, in* FLEXIBLE MULTI-TIER DISPUTE RESOLUTION IN INTERNATIONAL TAX DISPUTES (Pasquale Pistone & Jan J.P. de Goede eds., 2021).