

TITLE

INTERNATIONAL ///

BUSINESS LAW

ENVIRONMENTS AND
TRANSACTIONS

AUTHORS

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International Business Law

Environments and Transactions

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INTERNATIONAL BUSINESS LAW: ENVIRONMENTS AND TRANSACTIONS

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I dedicate my work to those who bore its greater weight in my absence: my family—my wife Carol and children Victoria, John, George, and Amelia. This book is an offering to any reader who has felt the flicker of wonder and a tinge of anticipation about discovering what lies over the next hill or in distant lands. JHW

This book, in a sense, is a family effort, but it would not have materialized had it not been for the encouragement and enthusiasm of my wife Fran. My special thanks go to her, and to her, this dedication. JAW

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In addition to serving clients in North America and western Europe, his business activities include advising on legislative transition in the republics of the former Soviet Union and enterprise restructuring and business management in the People's Republic of China. He is a member of the editorial advisory board of the *European Financial Law Review*. He is co-author of the seventh edition of *Contemporary Canadian Business Law* (McGraw-Hill Ryerson).

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He holds a Bachelor of Arts degree from Queen's University; Bachelor of Laws and Master of Laws degrees from Osgoode Hall Law School, York University; and a Master of Business Administration degree from the University of Toronto. He completed the Program of Instruction for Lawyers at Harvard Law School in 1982. In addition to *Contemporary Canadian Business Law* (McGraw-Hill), he has authored numerous academic monographs and cases, and is the author of *Contemporary Canadian Labour Relations* (McGraw-Hill), *Canadian Labour Relations* (Prentice Hall), and *Out of the Clouds*, the official military history of the first Canadian Parachute Battalion in World War II.

Foreword

Whether you are a business student or law student (and, undoubtedly, you recognize you are a bit of both), you are entering a demanding field that will challenge you in many ways—personally and professionally. This text will make those challenges plain to you. It also will equip you to deal with their foundations and to grow with them, as they become more complex.

Your interest in studying international business law and your later career will, with diligence, be highly rewarding. You will probably find, as we have, that the personal and emotional rewards will surprise you, motivate you, and even exceed the very significant financial rewards that are offered in this field.

If you are a law student now, your future may go well beyond merely domestic legal matters. If studying this course is any indication, you are interested in international affairs, and that preexisting interest will urge you to keep abreast of international developments, often ahead of both other lawyers and your clients. Sometimes these interests will lead you to new clients, and at other times your interests will attract clients to you. By ensuring that the senior members of your firm are aware of your interests, you may find yourself handed files or tasks that have international dimensions. In time, this field can become your specialty, or an adjunct to your domestic expertise.

If you are a business student now, your future will take on an international dimension even more easily. If your business does not seek out international business opportunities, then foreigners may seek you out, either as a competitor or as an ally. By studying this subject, you are making yourself more capable of dealing with the challenge. More so, you will be in a better position to get the most out of your relationship with an international lawyer. You will better understand the business options and transactions open to you. You will understand the reasons and risks that lie behind the strategies offered up by your lawyer. By being on the same wavelength, you and your lawyer can craft effective solutions together, to give your business the best possible chance of success in the international arena.

No matter who you are, by keeping yourself informed on international developments, and by being able to analyze their potential impact, you may, in the future, have the potential to make strategic offerings to the business at hand, in addition to making tactical offerings of legal or management services. In short, you may become a strategic advisor rather than just a line manager or service provider.

There are many employment options that provide exposure to international business transactions. Be it a law firm, business enterprise, or a multinational firm, many offer work abroad and many domestic firms engage in international transactions. Employment opportunities also exist in government or international organizations, or national or multinational corporations with established business interests abroad.

International training may give you the opportunity to travel the world, from days to years, to meet and work with people from as many backgrounds as you wish, and to engage in continuous personal and professional growth and learning. It is work in a dynamic world of changing environments and changing needs and responses, where powers of observation, knowledge, analysis, planning, and execution will be demanded, and the rewards will be limited only by your efforts.

The above is our point of departure in offering this text to you, the student. With them, we welcome you to the principles and practice of international business law.

Preface

Purpose of This Text and Learning Outcomes

The purpose of this text and its learning outcomes are

- To provide a clear, readable explanation of foundation topics in international business law for students in law and management studies.
- To create an understanding of how and why international business law affects business risks, opportunities, and the profitability of business ventures.
- To equip students with the knowledge and tools required to use international business law in creating effective corporate international business strategies and in executing international business transactions.
- To address the need for law students and future lawyers to understand more about their client's international business objectives.
- To address the need for business students and future businesspersons to understand their legal options and their lawyer's abilities and limitations to accommodate their international business objectives.
- To broaden student understanding of the divergent value systems and legal systems that will be encountered in the practice of international business and international business law.

Who Should Use This Text?

This text is written with two groups of students in mind: those enrolled at business schools and those at law schools. This dual focus strengthens this text, for it recognizes the reality that businesspersons need to know more about the law, and lawyers need to know more about business, in order to work more effectively together and to succeed in international business transactions.

This point deserves deliberate emphasis. Our experience as international lawyers, international businesspersons, and college and university instructors in both has made it plain that these disciplines have been held separately for too long. We are encouraged to see that this attitude has changed significantly in recent years, and this text is intended to reinforce that change.

Being a lawyer is being a businessperson. President Abraham Lincoln, also a lawyer, said, "Time and advice are a lawyer's stock in trade." He saw no distinction between a lawyer and a businessperson. To the extent that this text aids a law student, it increases in the future his or her ability to advise. To the extent that it aids a business student, it helps minimize his or her need to pay for that time and advice. Indeed, Lincoln would say advice, like time, is money.

Scope of This Text

This text is probably one of the first you have opened on the subject of international business law, and we thank you for the opportunity to share with you our knowledge and experience and the collected knowledge and experience of others.

As you might imagine, international business law is at work when any foreign element is introduced into an otherwise domestic business transaction. Also as you might imagine, like all other areas of the law, this subject can and does spawn entire libraries of books on the subject.

Our text provides an introduction to the most important and most frequently encountered aspects of international business law. These are the various environments of international business law (home country laws, host country laws, and international law and regulation), the primary relationships between players (business enterprises, service providers, and international bodies), and the principal transactions employed in international business (import–export, licensing, and investment).

As an introductory text, it is charged with a heavy responsibility. It cannot deal with all topics, nor can it deal in any detail on the topics it does cover. As a result, we have made many choices, including or excluding material. We have worked to include topics that will be of greatest value to ensure that you complete your course with a good map of the broad range of issues that await you in either advanced courses or later commerce or practice.

A number of good texts are available that cover broadly similar issues and facts. In writing this one, its readability has been uppermost in our minds. As a result, it is written in the plainest possible language, bearing in mind its professional subject. We hope you find it a pleasure to read.

As you might already know, law is a field of study where every rule or hard fact has its exceptions. Rather than deal with each exception in a dreary search that leaves no stone unturned, this text focuses on issues and situations that commonly occur. This does not, however, mean resorting to useless generalities. It means that the discussion of law and business found here does apply in the vast majority of situations, and we leave it to you to raise questions about the exceptions. When a “what if” question arises in your mind, you are probably on the right track toward an exception. Likewise, where a principle of law clearly fits with U.S. legal traditions, you shouldn’t be surprised that it might not square with expectations in France, China, or Saudi Arabia.

We have aimed at including considerable detail in those areas where knowledge of fundamental building blocks is at stake. Less detail is offered on issues that change rapidly, so that you absorb key aspects and fill in what you need when you need it, without having to later “unlearn” the old. Equally, some areas appear only rarely in practice, and these are best served with a knowledge of the basics now, and further study as and when required.

Perspective

The text is written from a largely Anglo-American perspective, both in terms of the common law tradition and those aspects of business generally familiar to Anglo-American students. This is only a starting point, however, as emphasized in the “Themes” section below.

As this is an introductory text, we are aware that our own perceptions and biases will carry weight in setting or altering your own initial perceptions and biases in the subject. This creates the responsibility on us to confine our writing to views that are broadly held across the international business law community, or to note otherwise where divergent opinions exist. We have tried to fulfill this responsibility to the best of our ability, and to make clear that our opinions are our own when we are in the global minority.

Themes

Within the overall goal of a text blending legal and business considerations, there are a number of other critical themes. These go well beyond simply a statement of law and its relationship to international business. These are discussed in the following paragraphs.

Broadening the Individual Perspective

One of the central challenges of international business law is to understand and accept the different perspectives held by persons elsewhere in the world. This text accommodates that

need to observe, analyze, understand, and incorporate differing perspectives by drawing on legal and business principles from around the world. Successful practitioners (in business or law) must look beyond their own borders, to the drivers that influence the behavior of foreign businesses and lawmakers. This exercise in personal growth requires examination, understanding, and acceptance of the history, geography, culture, economics, politics, and, finally, law of foreign lands. If this essential skill is not learned early on, your later business or practice will suffer. Lessons learned solely through experience often carry a very high price tag.

Dynamic and Proactive—Getting beyond the Empty Words

Businesspersons, lawyers, and politicians often speak of dynamic processes and proactive behavior, and then fail miserably at understanding the first and accomplishing the second. This is unacceptable, and this text aims to give you the tools to succeed where others may fail.

International business and law are dynamic processes, meaning that they change over time, often rapidly. Therefore, you cannot expect simple memorization of either law or business facts to turn you into a good professional in either arena. Storing facts costs only cents per megabyte these days, and such limited ability will get you no further than the back-office operation of a corporation or law firm. You must understand these dynamics or you will be left behind, frozen in time. Likewise, your textbook cannot be limited to facts, but must reveal these dynamics.

Something dynamic has a past, a present, and a future; it has come from somewhere, is somewhere, and is going somewhere else. To understand a dynamic such as the law obligates you to know more than just its present state. You must learn where it has come from, its history, and the possible direction that it is headed. A dot on a page is meaningless, while a vector is a dynamic: it has another dot, a line between theory that it has followed, and an arrow for its direction. From the point of view of our textbook, this means providing you with background, context, and history. It must not jump right into the current state of the law—that is territory for a practitioner's loose-leaf updated reference book.

As a student, you must learn where the law has come from to understand its state now, and to understand the direction in which it is going. Second, be aware that the line probably won't go straight ahead forever. All the forces bearing on the law must be understood, to get a more focused picture of what the future may look like. This represents a commitment to multidisciplinary study and the broadened individual perspective, coming to grips with the links that tie the law to business, economics, politics, history, and culture. Any law, anywhere, reflects a blend of local social demands, economic realities, political compromises, and historical experiences. These must be understood to grapple with the future.

It is this knowledge that opens the door to becoming proactive, to position yourself to take advantage of change. Being proactive requires you to anticipate changes in the coming future and adjust your strategies now, to be ready for those changes. This text sets out the dynamic and allows you to make proactive choices. You supply the initiative and courage to make them.

The Business Enterprise and Private Law Viewpoint

International business law has many stakeholders pushing their own interests. Governments desire economic growth; unions worry about jobs, and action groups are concerned about social conditions at home and abroad. Consumers demand goods from around the world at a fair price, while businesses focus on profits. That said, each of these stakeholders has a full slate of secondary interests, some shared and some not. A treatise on the law might canvass a wide range of these stakeholders, but our text is restricted to the factors that bear directly on business enterprise management. With the same intention, we address

international public law (the law between nations) only to the extent that it affects private business transactions and the options and decisions of business enterprises.

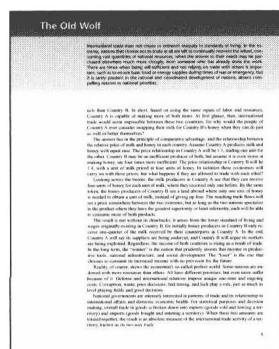
Risk Management, Opportunity Identification, and International Business Strategy

No two societies on earth are identical. This simple fact breeds enormous opportunities in global commerce but at the same time creates a wide array of risk factors that require sound management responses. Many of these risks can be avoided or minimized by using and practicing the principles of international business law. These same principles also can be applied to capture or maximize the business opportunities afforded abroad. Going beyond just what the law is and where it is going, our text strives to make clear how and why international business law can be applied to transactions to create the best possible business outcomes.

Successful transactions are vital to international business success, but they must be aimed at a particular overall goal. A corporate international business strategy is required to determine that goal and to map out a pathway for achievement. International business law has an important role to play in setting that strategy, just as much as it provides the tools for tactical success. Our text sets out where legal considerations enter into the strategic decision making of the business enterprise.

Special Features

At many points throughout the text, special feature boxes appear. These are intended to challenge your thinking on the spot, to provide you with tips and tricks learned normally through experience, or to provide examples of international business law unfolding in domestic or international media.



The Old Wolf box will contain valuable tips, tricks, and strategies that you can add to your briefcase of tools—short illustrations of the text material as applied in practice, or the consequences of not doing so. They often illustrate the seeds of a problem being planted or the efforts made to avoid or resolve a thorny problem. All are drawn from the collective experience of the authors or other practitioners—sometimes at quite a price! This box also will contain statements intended to challenge conventional wisdom, or advance arguments that are often marginalized or ignored in mainstream discussion. Some can be effectively countered; others present irreconcilable differences or value judgments. They may be wise or foolish, practical or impossible, popular or unpopular, but each represents a sentiment that will be encountered by a practitioner or student.



The Front Page Law box will contain extracts from current news items that illustrate international business law principles at work, or situations that will soon require the intervention of international legal analysis or action.

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Brief Contents

About the Authors iv

Foreword xi

Preface xii

PART ONE

**The Environment of International Business
and Law 1**

- 1 The International Business Environment 2
- 2 The Foundations of the International Legal Environment 31
- 3 Principles of International Law 64
- 4 Public Organizations and International Agreements 113
- 5 Regional Integration 158

PART TWO

**International Business Law
Transactions 207**

- International Business Law
Transactions—An Introduction 208

6 Importing 219

7 Direct Sale of Goods Exports 249

8 Transportation and Logistics 343

9 Trade Payment and Finance 386

PART THREE

**Altius and Fortius: Transactions with
Higher and Stronger Foreign Market
Commitments 429**

10 International Distribution 430

11 Intellectual Property
and Licensing 473

12 Foreign Investment 515

13 International Alternative Dispute
Resolution 564

14 Taxation of International Business
Transactions 602

INDEX 637

Contents

About the Authors iv

Foreword xi

Preface xii

PART ONE THE ENVIRONMENT OF INTERNATIONAL BUSINESS AND LAW 1

Chapter 1 The International Business Environment 2

What Is International Business? 2

Trade in Goods 4

The Economic and Political Perspectives 4

The Business Enterprise Perspective 9

Trade in Services 13

The Economic and Political Perspectives 13

The Business Enterprise Perspective 14

Intellectual Property 15

The Economic and Political Perspectives 15

The Business Enterprise Perspective 16

Investment Trade 17

The Economic and Political Perspectives 17

The Business Enterprise Perspective 18

General Considerations in International
Business 19

The Relationship between International Business
Strategy and Law 21

Defining International Business Strategy 21

International Business Law—A Working Definition 22

*Impact of International Business Law on Decisions
and Strategy 22*

Chapter Summary 26

Chapter Questions 27

Front Page Law: International Issues from Boardroom to Courtroom

Occidental: From Excess to Success 28

So You Think the World Is Your Oyster? 29

Chapter 2

The Foundations of the International Legal Environment 31

The Historical Perspective and Its Impact
on the Future 31

The Sociogeographic Perspective: Taking
a World View 38

The Cultural Perspective 41

The Political and Economic Perspective: Governance
and Prosperity 43

Bringing Perspectives Together 46

Major Legal Systems of the World 47

The Traditions of the English Common Law 47

The Civil Code Tradition 49

Theological Legal Systems 55

Other Legal Systems 61

Chapter Summary 62

Chapter Questions 62

Front Page Law: International Issues from Boardroom to Courtroom

Europe's Shareholders: To the Barricades: Investor

Activism Comes of Age on the Continent 63

Chapter 3

Principles of International Law 64

The Scope of International Law 64

Sources of International Law 66

Sovereignty 73

Sovereign Immunity and the Act-of-State

Doctrine 74

Sovereign Immunity 74

Act-of-State Doctrine 76

Jurisdiction Where No Immunity 80

Criminal Jurisdiction 81

Civil Jurisdiction 85

Choices of Law and Forum 97

Choice of Law 97

Choice of Forum and Forum Non Conveniens 99

Recognition and Enforcement of Foreign

Judgments 109

Chapter Summary 111

Chapter Questions 111

Front Page Law: International Issues from Boardroom to Courtroom

*Banking's Great Wall: Newbridge Capital's Plan
to Run a Chinese Bank Falls Apart* 112

Chapter 4

Public Organizations and International Agreements 113

A Developing Institutional Framework 113

The United Nations 114

The GATT and WTO 116

Historical Foundations 116

Principles and Evolution 117

Dispute Settlement 121

Quantitative Restrictions 124

Most-Favored-Nation Status 131

National Treatment 138

Antidumping 146

Subsidies and Countervailing Measures 149

GATS—General Agreement on Trade in Services 152

*TRIPs—Agreement on Trade Related Aspects
of Intellectual Property* 153

Final Remarks on General Exceptions 154

Chapter Summary 155

Chapter Questions 155

Front Page Law: International Issues from Boardroom to Courtroom

How to Straighten Out the WTO 156

A Trade Shipwreck in Cancun 157

Chapter 5

Regional Integration 158

Forms of Regional Integration 159

Free Trade Area 159

Customs Union 163

Common Market 164

Economic Union/Economic and Monetary Union 165

Regional Integration in the Americas—FTA to
Common Markets 166

North American Free Trade Agreement 166

Perspective 166

*International Business Performance under NAFTA—
The Results* 167

Structure and Substance 170

Operation of the Agreement 170

Mercosur 178

Free Trade Area of the Americas 179

Regional Integration in Europe—From Common
Market to Union 179

The European Economic Community and European
Union 180

Origin and History 180

Institutions of the European Union 184

Chief Legal Implications for International Traders 187

Regional Integration Initiatives outside North

America and Europe 201

Chapter Summary 202

Chapter Questions 202

Front Page Law: International Issues from Boardroom to Courtroom

Biotech Food: Europe's Phony Open Door 203

Free Trade "Offers a Climate of Certainty" 204

PART TWO

INTERNATIONAL BUSINESS LAW TRANSACTIONS 207

International Business Law Transactions— An Introduction 208

Linking Part 1, Part 2, and Part 3 208

The Parties in International Transactions 210

A Short Primer on the Domestic Law
of Contract 212

Essential Elements in Contract 212

Avoiding Enforceability in Valid Contracts 215

*Transfer of Contractual Rights
and Responsibilities* 216

Discharge 216

Breach of Contract and Remedies 217

Chapter 6

Importing 219

Entry Clearance and Documentation 219

Entry Application and Inspection 222

Classification and the Harmonized System 225

Country of Origin and Certification 230

Appraisal 239

Liquidation 241

Protest 241

Canadian Regulatory Requirements
for Imports 243

Chapter Summary 246

Chapter Questions 247

Front Page Law: International Issues from Boardroom to Courtroom

Shippers Get Caught in Customs' Net: New Security

Rules Are Costing Plenty—and Could Slow Trade 248

Chapter 7

Direct Sale of Goods Exports 249

The Significance of the Export Transaction 249

Direct versus Indirect Exports 250

Relevant Markets 250

Strategic Market Entry Options for Exporters 252

Export Option 1: The International Trading

House 254

Export Option 2: Direct Sales 255

Nature and Suitability of the Transaction 255

Reaching a Deal: Establishing the Terms of an Export

Contract of Sale 257

Electronic Contracts and International Law 259

UN Convention on Contracts for the International Sale of Goods (CISG) 261

Recording the Deal: The ICC Model International Sale Contract 281

Export Options 3 and 4: Overseas Representative versus Sales Agent 292

Business and Legal Considerations of Agents and Representatives 292

Dangers of Intermediaries between the Seller and Buyer 294

Making the Decision 295

Export Licensing and Documentation 295

Chapter Summary 297

Chapter Questions 297

Appendix 1: Table of Concordance 298

Front Page Law: International Issues from Boardroom to Courtroom

Smooth Sailing to a Global Market 342

Chapter 8

Transportation and Logistics 343

Introduction 343

Logistics and Lex Mercatoria 344

Terms of Trade and INCOTERMS 345

INCOTERMS Provisions 350

INCOTERMS and Issues of Risk and Title 354

Carriage of Goods by Sea 362

Bills of Lading 363

International Conventions Applicable to Shipping 369

Marine Insurance 376

Third-Party Beneficiaries 378

Multimodal Container Transport 379

Carriage of Goods by Land 380

Carriage of Goods by Air 382

Chapter Summary 383

Chapter Questions 384

Front Page Law: International Issues from Boardroom to Courtroom

The Jolly Roger Flies High . . . 385

Chapter 9

Trade Payment and Finance 386

Introduction 386

Informal Payment Mechanisms 388

Payment in Advance 389

Open Account 389

Formal Payment Mechanisms 389

Drafts and Bills of Exchange 389

Collections 394

Letters of Credit/Documentary Credits 396

Foreign Exchange Risks 417

Exchange Rate Risk Management Tools 418

Foreign Currency Account 418

Foreign Currency Loan Agreement 419

Forward Contracts 419

Foreign Currency Option Contracts 420

Foreign Currency Futures Contracts 421

Changing Attributes of the Cash Flow 422

Factoring: Changing the Immediate Payer 422

Leasing: Changing the Nature of the Flow 422

Repatriation Rights for Finances and Profits 422

Governmental Financial Support for International Business 423

Chapter Summary 425

Chapter Questions 426

Front Page Law: International Issues from Boardroom to Courtroom

Mexico: Say Adios to the Super Peso 427

PART THREE

Altius and Fortius: Transactions with Higher and Stronger Foreign Market Commitments 429

Chapter 10

International Distribution 430

Introduction 430

Agency versus Distributorship 432

Export Option 4: Agents in Distribution 433

General Legal and Business Risks and Considerations 434

Commissionaires 435

Responsibility of the Principal 436

Export Options 5 and 6: Foreign Distributors	443
<i>Obligations of the Distributor</i>	444
<i>Obligations of the Seller-Exporter-Supplier</i>	445
<i>Application of Local Law to Distribution</i>	446
Major Issues in Business and Law Applicable to Distribution Contracts	456
<i>Antitrust Legislation</i>	457
<i>Exclusivity in Distributorship Contracts</i>	460
<i>Product Liability in Distribution</i>	465
<i>Termination and Post-Termination Events</i>	468
Variants of Distribution Agreements	468
<i>Strategic Alliances</i>	468
<i>Value-Added Reseller</i>	469
<i>Systems Integrator</i>	469
Chapter Summary	469
Chapter Questions	470
Front Page Law: International Issues from Boardroom to Courtroom	
<i>An Export Scam Ends in a Guilty Plea</i>	472

Chapter 11

Intellectual Property and Licensing 473

Introduction	473
Patents, Copyright, and Trademarks under National Law	473
Patents, Copyright, and Trademarks under International Conventions	481
<i>Copyright</i>	481
<i>Patents</i>	482
<i>Trademarks</i>	482
Business Motivations in Licensing Agreements	488
Business Risks Requiring Responses in Contract	490
Royalties and Fees	504
Anatomy of a Licensing Agreement	507
Chapter Summary	509
Chapter Questions	510
Front Page Law: International Issues from Boardroom to Courtroom	
<i>Cisco: In Hot Pursuit of a Chinese Rival</i>	511
<i>Huawei vs. Cisco Just Got Nastier</i>	513

Chapter 12

Foreign Investment 515

Introduction	515
Business Objectives in Foreign Investment	516
Forms of Foreign Direct Investment	516
<i>Passive Investments</i>	516
<i>Representative Offices</i>	517

<i>Branch Operations</i>	517
<i>Foreign Subsidiaries and Joint Ventures</i>	518
Foreign Government Policy Objectives	518
<i>Development and Growth</i>	518
<i>Investment Screening</i>	519
<i>Competition Policy</i>	520
<i>Employee Protection</i>	521
<i>Forms of Business Associations</i>	522
Political Risk	524
<i>The Economic and International Law Dimensions of Political Risk</i>	524
<i>Expropriation and Nationalization</i>	527
<i>Profit and Capital Repatriation</i>	541
Wholly Owned Subsidiaries	543
<i>Asset versus Share Purchases</i>	544
<i>Build, Operate, and Transfer (BOT) Projects</i>	544
Joint Ventures	545
<i>Prenegotiation Considerations</i>	546
<i>Joint Ventures in Highly Regulated or Controlled Legal Environments</i>	547
<i>Management and Control Issues</i>	554
<i>Ancillary Agreements</i>	555
<i>Dispute Settlement and Winding Up</i>	556
Negotiated Investment Protection	557
Chapter Summary	558
Chapter Questions	559
Front Page Law: International Issues from Boardroom to Courtroom	
<i>India's Worsening Power Vacuum</i>	560
<i>An Indian Carmaker with a Japanese Engine</i>	562
<i>Morgan Stanley: What Great Wall?</i>	563

Chapter 13

International Alternative Dispute Resolution 564

Introduction	564
Negotiation	565
Mediation and Conciliation	565
International Commercial Arbitration	571
<i>The Arbitration Process</i>	573
<i>Enforcement of Awards in International Commercial Arbitration</i>	585
<i>Commercial Arbitration between States and Individuals</i>	586
Chapter Summary	598
Chapter Questions	598
Front Page Law: International Issues from Boardroom to Courtroom	
<i>The Highest Court You've Never Heard Of</i>	600

Chapter 14

Taxation of International Business Transactions 602

What Is Tax? 602

Direct versus Indirect Taxation 603

Basis for Taxation 604

Citizenship of Individuals 606

Domicile and Residence of Individuals 606

Corporate Residence and Domicile 607

Domestic Source Income of Nonresidents 612

Double Taxation 613

Economic Double Taxation 613

Relief of Economic Double Taxation 613

International Juridical Double Taxation 614

Tax Treaties 614

Relief of International Juridical Double Taxation 621

Treaty and Double Taxation Implications
in Transaction Structuring 622

Tax Planning, Avoidance, and Evasion 625

Anti-Avoidance Rules 625

Thin Capitalization 626

Abusive Transfer Pricing 626

Treaty Shopping 627

Tax Havens 628

Chapter Summary 631

Chapter Questions 631

Front Page Law: International Issues from Boardroom to Courtroom

Taxing Multinationals: The Donnybrook Ahead 633

Index 637