

LARRY A. DiMATTEO & LUCIEN J. DHOOGHE

International Business Law

A TRANSACTIONAL APPROACH

SECOND EDITION



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INTERNATIONAL BUSINESS LAW: A TRANSACTIONAL APPROACH

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Table of Cases and Laws

- Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999), **212**
- Allied Chemical International v. Companhia De Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), **348**
- All Pacific Trading v. M/V Hanjin Yosu*, 7 F.3d 1427 (9th Cir. 1993), **341**
- Alpine View Company, Ltd. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000), **107–108**
- American Home Assurance Co. v. M/V Tabuk*, 170 F. Supp.2d 431 (S.D.N.Y. 2001), **343–344**
- Anheuser-Busch Brewing v. United States*, 207 U.S. 556 (1908), **194**
- Averbach v. Vnesheconobank*, 280 F. Supp.2d 945, 951-52 (N.D. Cal. 2003), **372**
- Avery Dennison Corp. v. Sumpton*, 189 F.3d 868 (9th Cir. 1999), **528**
- Banque Libanaise Pour le Commerce v. Khreich*, 915 F.2d 1000 (5th Cir. 1990), **120**
- Barnard v. Adams*, 51 U.S. 270 (1850), **364**
- Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993), **258**
- Bende & Sons, Inc. v. Crown Recreation, Inc.*, 548 F. Supp. 1018 (E.D. Louisiana 1982), **135**
- Bensusan Restaurant Corp v. King*, 126 F.3d 25 (2d Cir. 1997), **520–521**
- Bernina Distributors v. Bernina Sewing Machine Company*, 646 F.2d 434 (1981), **21–22**
- Best Cellars Inc., v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431 (S.D.N.Y. 2000), **435–437**
- Bower v. Gateway*, 676 N.Y.S.2d 569 (App. Div. 1999), **134**
- BP Oil International, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003), **316–317**
- Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1971), **132**
- Brennan v. Carvel Corp.*, 929 F.2d 801 (S.D.Fla. 1992), **93**
- Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331 (4th Cir. 1998), **90–91**
- Bruce v. Weekly World News, Inc.*, 150 F. Supp.2d (D. Mass. 2001), **502–504**
- Brulotte v. Thys Company*, 379 U.S. 29 (1964), **494**
- Capital Currency Exchange v. National Westminster Bank and Barclays Bank*, 155 F.3d 603 (2d Cir. 1998), **112**
- Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 (4th Cir. 2003), **521–523**
- Carell v. The Shubert Organization, Inc.*, 2000 U.S. Dist. LEXIS 8807 (S.D.N.Y. 2000), **463–464**
- C-Art, Ltd. v. Hong Kong Islands Line America*, 940 F.2d 530 (9th Cir. 1991), **349**
- Caterpillar Overseas v. Marine Transport, Inc.*, 900 F.2d 714 (4th Cir. 1990), **331**
- Chateau des Charmes Wines Ltd. v. Sabate USA, Inc.*, 328 F.3d 528 (9th Cir. 2003), **266–267**
- Chemco Leasing SpA. v. Rediffusion Plc.*, LEXIS Enggen library, Cases file (Q.B. July 19, 1985), *aff'd*, LEXIS Enggen library, Cases file (Eng. C.A. Dec. 12, 1986), **248**
- Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988), **491–492**
- Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc.*, 569 F. Supp. 47 (E.D. Pa. 1983), **452–453**
- Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), **519–520**
- Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), **443**

- Constructores Tecnicos v. Sea-Land Service, Inc.*, 945 F.2d 841 (5th Cir. 1991), **352–353**
- Creaciones Con Idea, S.A. v. MashreqBank, PSC*, 51 F. Supp.2d 423, 427 (S.D.N.Y. 1999), **376**
- Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), **186–187**
- Daedalus Enterprises, Inc., v. Baldrige*, 563 F. Supp. 1345 (D.C. 1983), **210**
- Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988), **212**
- Dayan v. McDonald's Corporation*, 466 N.E.2d 958 (Ill. App.1984), **100–102**
- Delchi Carrier, S.P.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995), **276–277**
- Delverde USA, Inc., v. United States*, 202 F.3d 1360 (F. Cir. 2000), **159–160**
- Doe v. Unocal Corporation*, 963 F. Supp. 880 (C.D. Cal. 1997), **65–66**
- Dupont de Nemours Int'l v. Mormacvega*, 493 F.2d 97 (2d Cir. 1974), **344**
- Dymocks Franchise Systems (NSW) Pty Ltd v. Todd*, Judicial Committee of the Privy Council [2002] 1 NZLR 289, **95–97**
- E-Data Corp. v. Micropatent Corp.*, 989 F. Supp. 173 (D.Conn 1997), **520, 551**
- EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), **92**
- E&H Partners v. Broadway National Bank*, 39 F. Supp.2d 275, 283 (S.D.N.Y. 1998), **376**
- El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), **366**
- Enrique Bernat, S.A. v. Guadalajara, Inc.*, 210 F.3d 439 (5th Cir. 2000), **448**
- Estee Lauder, Inc. v. L'Oreal, S.A.*, 129 F.3d 588 (Fed. Cir. 1997), **477**
- Europcar Italia, S.P.A. v. Maiellano Tours, Inc.*, Docket No. 97-7224 (2d Cir. 1997), **134**
- Fairbrook Leasing, Inc., v. Mesaba Aviation, Inc.*, 295 F. Supp. 2d 1063 (D. Minn. 2003), **242–243**
- Falcoal, Inc. v. Kurumu*, 660 F. Supp. 1536 (S.D. Tex. 1987), **15–17**
- Farrel Corporation v. International Trade Commission*, 949 F.2d 1147 (Fed Cir. 1991), **128–129**
- Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981), **20**
- Fieldturf, Inc. v. Southwest Recreational Industries, Inc.*, 357 F.3d 1266 (Fed. Cir. 2004), **499–501**
- Filanto, S.P.A. v. Chilewich International Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), **268–269**
- Finnish Fur Sales Co., Ltd. v. Juliette Shulof Furs, Inc.*, George Shulof and Juliette Shulof, 770 F. Supp. **139**; (S.D.N.Y. 1991), **75–76**
- Folger Coffee Company v. Olivebank*, 201 F.3d 632 (5th Cir. 2000), **364–365**
- Frediani & Del Greco S.P.A. v. Gina Imports, Ltd.*, 870 F. Supp. 217 (N.D. Ill. 1994), **133**
- Frigalment Importing v. B.N.S. International Sales Corp.*, F. Supp. 116 (S.D.N.Y. 1960), **270**
- General Electric Co. v. Inter-Ocean Shipping*, 862 F. Supp. 166, 169 (S.D. Tex. 1994), **330**
- Gorman v. Ameritrade Holding Corporation*, 293 F.3d 506 (D.C. Cir. 2002), **518–519**
- Green River Bottling Co. v. Green River Corp.*, 997 F.2d 359 (7th Cir. 1993), **512–513**
- Groupe Chegaray/V. de Chalus v. P&O Containers*, 251 F.3d 1359 (11th Cir. 2001), **335–337**
- Habib Bank Ltd. v. Convermat Corp.*, 554 N.Y.S.2d 757 (1990), **388**
- Hamilton Bank, N.A. v. Kookmin Bank*, 44 F. Supp.2d 653 (S.D.N.Y. 1999), **380–381**
- Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576 (2d Cir. 1993), **135, 286**
- Heritage Bank v. Redcom Laboratories, Inc.*, 250 F.3d 319 (5th Cir. 2001), **381–382**
- Heritage Mutual Insurance Co. v. Advanced Polymer Technology, Inc.*, 97 F. Supp. 2d 913 (S.D. Ind. 2000), **426–427**
- Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 909 F.2d 1464 (Fed. Cir. 1990), **498**
- Hilton v. Guyot*, 159 U.S. 113 (1895), **113, 114**
- Home Paramount Pest Control Companies, Inc v. FMC Corp./Agricultural Products Group*, 971 P.2d 936 (Wash. 1999), **450**
- Nelson Bunker Hunt v. BP Exploration Company. (Libya) Ltd.*, 492 F. Supp. 885 (N.D. Tex. 1980), **114–115**
- Hy Cite Corporation v. Badbusinessbureau.com*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004), **524–526**

To my heart and my soul: my wife Colleen for her love and support
and my son, Ian, for his inspiration.
L. A. D.

To my wife Julia for her love, support, and patience.
L. J. D.

- IKON Office Solutions, Inc. v. American Office Products, Inc.*, 178 F. Supp.2d 1154 (D. Or. 2001), *aff'd*, 61 Fed. Appx. 378 (9th Cir. 2003), **450**
- In re Application of Mohamed Al Fayed*, 92 F. Supp. 2d 137 (D.D.C. 2000), **139**
- In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), **58**
- In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (1987), **42**
- Institute of London Underwriters v. Sea-Land Service, Inc.*, 24. 881 F.2d 761, 768 (9th Cir. 1989), **334**
- International Commodities Export Corporation v. North Pacific Lumber Company*, 764 F. Supp. 608 (D. Or. 1991), **319–320**
- Interpane Coatings, Inc. v. Australia and New Zealand Banking Group*, 732 F. Supp. 909 (N.D. Ill. 1990), **384**
- Iran Aircraft Industries v. Avco Corporation*, 980 F.2d 141 (2d Cir. 1992), **126–127**
- Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2nd Cir., 1998), **477**
- Itek Corp. v. First National Bank of Boston*, 730 F.2d 19 (1st Cir. 1984), **389–390**
- Jacob v. State*, 22 Tenn. 493, 514-15 (1842)
- Kern v. Dynallectron Corporation.*, 577 F. Supp. 1196 (N.D. Texas 1983), **19–20**
- Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806 (9th Cir. 1982), **346**
- Kumar Corp. v. Nopal Lines Ltd.*, 462 So.2d 1178 (Fl. Ct. Appeals 1985), **307**
- Kuwait Airways Corporation v. Iraq Airways Corporation*, 2 Lloyd's Rep. 317 (H.L. 1995), **109**
- Lamb v. Philip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), **53**
- Made in the USA Foundation v. United States of America*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999), **168–169**
- Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), **489–490**
- Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587 (5th Cir. 2000), **354–355**
- Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), **551**
- Marobie-FL, Inc. v. Natl. Assn. of Fire Equipment Distributors*, F. Supp. (1997 WI 709747, N.D. Ill.), **551**
- Marchetto v. Dekalb Genetics Corp.*, 711 F. Supp. 936 (N.D. Illinois 1989), **36**
- Marcraft Clothes, Inc. v. M/V Kurobe Maru*, 575 F. Supp. 239 (S.D.N.Y. 1983), **341**
- Mattel, Inc. v. Internet Dimensions, Inc.*, 2000 U.S. Dist. LEXIS 9747 (S.D.N.Y. 2000), **530–531**
- Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003), **444–446**
- McAlpine v. AAMCO Automatic Transmission, Inc.*, 461 F. Supp. 1232 (E.D. Mich. 1978), **100**
- M & Z Trading Corporation v. Cargolift Ltd.*, No. 98-56887, 2000 U.S. App. LEXIS 11573 (9th Cir. May 1, 2000), **301–302**
- MCC-Marble Ceraminc Center v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F. 3d (1384 11th Cir. 1998), **258–259**
- McCoy v. Mitsuboshi Cutlery, Inc.*, 67 F.3d 917 (Fed. Cir. 1995), **513**
- McDonald's Corporation v. Shop at Home, Inc.*, 82 F. Supp.2d 801 (M.D. Tenn. 2000), **441–443**
- Micro Data Systems, Inc. v. Dharma Systems*, 148 F.3d 649 (7th Cir. 1998), **254–255**
- Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763 (D.C. Cir. 1992), **121–123**
- Millar v. Taylor*, 4 Burr. 2303 (1769), **477**
- Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp.2d 915, 919 (N.D. Ill. 1998), **259**
- Monsanto Corporation v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004), **489–490**
- Mori Seiki USA, Inc. v. M/V Alligator Triumph, in rem, Mitsui O.S.K. Lines, Ltd., and Marine Terminals Corp.*, 990 F.2d 444 (9th Cir. 1993), **339–340**
- Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), **439–440**
- NEC Electronics v. Cal Circuit Abco*, 810 F.2d 1506 (9th Cir. 1987), **452**
- Nieman v. Dryclean U.S.A. Franchise Company, Inc.*, 178 F.3d 1126 (11th Cir. 1999), **92–93**

- Nike, Inc. v. Variety Wholesalers, Inc.*, 274 F. Supp.2d 1352, 1372 (S.D. Ga. 2003), **438**
- Nimrod Marketing v. Texas Energy Corp.*, 769 F.2d 1076 (5th Cir. 1985), **238**
- Novecon Ltd. v. Bulgarian-American Enterprise Fund*, F.3d (1999 WL 683006, D.C. Cir.), **239**
- Nowogroski Insurance, Inc. v. Rucker*, 971 P.2d 936 (Wash. 1999), **449**
- Orbisphere Corporation v. United States*, 765 F. Supp. 1087 (Ct. Int'l Trade 1991), **191–192**
- Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), **528**
- Parex Bank v. Russian Savings Bank*, 116 F. Supp.2d 415 (2000), **110–111**
- Phillips Puerto Rico, Inc. v. Tradax Petroleum*, 782 F.2d 314 (1985), **136, 308**
- Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Company*, 215 F.3d 1217 (11th Cir. 2000), **337–338**
- Prima U.S. Inc. v. M/V Addiriyah*, 223 F.3d 126 (2d Cir. 2000), **328–329**
- Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.*, 118 S.Ct. 1125 (1998), **452**
- Raven Metal Products v. McGann*, 699 N.Y.S.2d 503 (1999), **74**
- R.G. Group, Inc. v. Bojangles' of America, Inc.*, 751 F.2d 69 (2d Cir. 1984), **240–241**
- Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (Sup. Ct. 1989), **139**
- Rollerblade, Inc. v. United States*, 282 F.3d 1349 (Fed. Cir. 2002), **182–183**
- Samsonite Corporation v. United States*, 889 F.2d 1074 (Fed. Cir. 1989), **189**
- St. Paul Guardian Insurance Company v. Neuromed Medical Systems & Support, GmbH*, No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. Mar. 26, 2002), **314–315**
- St. Paul INS. v. Sea-Land Service*, 745 F. Supp. 186, 188 (S.D.N.Y. 1990), **343**
- Scotch Whiskey Assoc. v. Barton Distilling*, 489 F.2d 809 (7th Cir. 1972), **450**
- SEC v. Tesoro Petroleum Corp.*, 2 FCPA Rep. (1980), **55**
- Secrest Machine Corp. v. S.S. Tiber*, 450 F.2d 285 (5th Cir. 1971), **330**
- Shaver Transportation Co. v. The Travelers Indemnity Co.*, 481 F. Supp. 892 (D.C. Oregon 1979), **360–361**
- Shearing v. Iolab Corporation*, 712 F. Supp. 1446 (D. Nevada 1989), **494**
- Smith v. Pillsbury Company*, 914 F. Supp. 97 (E.D. Pa., 1996), **552**
- Sony Magnetic Products Inc. v. Merivienti*, 863 F.2d 1537 (11th Cir. 1989), **350–351**
- SPM Corporation v. M/V Ming Moon*, 965 F. Supp. 1297 (3d Cir. 1992), **345–346**
- Sporty's Farm, L.L.C. v. Sportman's Market, Inc.*, 202 F.3d 489 (2nd Cir., 2000), **552**
- Steele v. Bulova Watches*, 344 U.S. 280 (1952), **450**
- Stromberg-Carlson Corp. v. Bank Melli Iran*, 467 F. Supp. 530 (S.D.N.Y. 1979), **398**
- Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147 (N.D. Cal. 2001), **280–281**
- Sztejn v. J. Henry Schroder Banking Corp.*, 31 N.Y.S.2d 631 (Sup. Ct. 1941), **390**
- TACS Corp. v. Trans World Communications*, 155 F. 3d 659 (3rd Cir. 1998), **249**
- Tennessee Imports, Inc. v. Pier Paulo*, 745 F. Supp. 1314 (M.D. Tenn. 1990), **132–133**
- Texaco v. Pennzoil*, 729 S.W.2d 768 (Tex. Ct. App. 1987), **243–244**
- T.J. Stevenson & Co. v. Bags of Flour*, 629 F.2d 338 (5th Cir. 1980), **279–280**
- Toys "R" Us v. Feinberg*, 1998 Dist. LEXIS 17217 (S.D.N.Y. 1998), **529–530**
- Travelers Indemnity Co., v. Waterman Steamship Corp. ("The Vessel Sam Houston")*, 26 F.3d 895 (9th Cir. 1994), **346–347**
- TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), **249**
- Ulloa v. Universal Music and Video Distribution*, 303 F. Supp.2d 409 (S.D.N.Y. 2004), **490–491**
- United States v. Ali Moghadam*, 175 F.3d 1269 (11th Cir. 1999), **453, 458**
- United States v. Balsys*, 118 S.Ct. 2218 (1998), **139**
- United States v. Donald Shetterly*, 971 F.2d 67 (7th Cir. 1992), **206–207**
- United States v. Haggar Apparel Company*, 526 U.S. 380 (1999), **184–185**
- United States v. Hsu*, F.3d (1998 WL 538221, 3rd Cir.), **449**
- United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991), **54–55**
- United States v. Donald Shetterly*, 971 F.2d 67 (7th Cir. 1992), **206–207**
- United States v. Yang*, 281 F.3d 534 (6th Cir. 2002), **449**

Valente-Kritzer Video v. Pinckney, 881 F.2d 772 (9th Cir. 1989), **484–485**
Vegas v. Compania Anonima Venezolana, 720 F.2d 629 (11th Cir. 1983), **335**
Vimar Seguros Y Reaseguros v. M/V Sky Reefer, 515 U.S. 526 (1995), **332**
Voest-Alpine International v. Chase Manhattan Bank, 707 F.2d 680 (2d Cir. 1983), **375–376**
Voest-Alpine Trading USA Corp. v. Bank of China, 167 F. Supp.2d 940 (S.D. Tex. 2000), **377–379**
Warner Bros. & Co. v. Israel, 101 F.2d 59 (2d Cir. 1939), **308**
Warner-Jenkinson Co. v. Hilton Davis Chemical, 117 S.Ct. 1040 (1997), **448**
Wood v. Lady Duff-Gordon, 222 N.Y. 88 (1917), **249**
Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp.2d 1181 (N.D. Cal. 2001), **116–118**
Yarway Corp. v. Eur-Control, Inc., 775 F.2d 268 (Fed. Cir. 1985), **498**
Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D.Pa. 1997), **521**

United States Statutory Law

Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), **64**
 Alien Venue Statute, **112–113**
 Anti-Bootlegging Statute (1994), **453**
 Anti-cybersquatting Consumer Protection Act, **529**
 Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300–1315, **326, 328–329**
 Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c(a-e) (2000), **160–161**
 Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (Can-Spam Act), **533**
 Copyright Act of 1976, 17 U.S.C. § 102, **440–441, 484**
 Customs Modernization and Informed Compliance Act of 1993, **197, 403**
 Economic Espionage Act of 1996, **449–450**
 Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510, **533**
 Electronic Signatures in Global and National Commerce Act, (E-Sign Act), **543**
 Export Administration Act of 1979, 50 U.S.C. App. §§ 2401–2420, **201–202**
 Export Trading Company Act of 1982, **8**
 Extraterritorial Income Exclusion Act (ETI), **143–144**
 Fair Credit Reporting Act, **532**
 Federal Trademark Dilution Act, 15 U.S.C. § 1125(c), **437, 528–529**
 Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1982), **425**
 Federal Rules of Civil Procedure, **24**
 Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1 (2000), **49, 50–51**
 Foreign Corrupt Practices Act Amendments of 1988, **52**
 Franchise Rule (Federal Trade Commission), **91**
 Harter Act of 1893, **328, 339**
 Harter Act, 46 U.S.C. App. §§ 190–196 (1988), **328, 339**
 Harmonized Tariff Schedule (HTS), 19 U.S.C.A. § 1202, **178–179, 190**
 Lanham Act, 15 U.S.C. 1125(a) (1988), **434, 528**
 North American Agreement on Environmental Cooperation, **171**
 North American Agreement on Labor Cooperation, **171**
 North American Free Trade Agreement (NAFTA), **168–172**
 Patent Act, 35 U.S.C. §§ 100, 271 (a) (1994), **448**
 Privacy Act of 1994, **533**
 Section 301 Antidumping Provisions, 19 U.S.C. §§ 2411–19 (1994), **161–162**
 Section 337 of the Tariff Act, **164**
 SEC, Release 33-7233 (1995) (direct public offerings), **548**
 Smoot-Hawley Tariff Act of 1930, **164**

Sound Recording Act of 1971, **453**
 Telecommunications Act of 1996, **533**
 Telephone Consumer Protection Act, **533**
 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 35
 U.S.C. § 271(a), **141**
 Trade Act of 1974, Section 201, **144**
 Trade Act of 1988, **474**
 Trade and Development Act of 2000, Section 407, **163**
 Trade and Tariff Act of 1984, **193**
 Uniform Commercial Code, Section 2-302, **134**
 Uniform Commercial Code, Section 2-615, **260**
 Uniform Commercial Code, Section 2-718, **224**
 Uniform Computer Information Transactions Act (UCITA), **505**
 Uniform Electronic Transactions Act (UETA), **506**
 Uniform Foreign Money-Judgments Recognition Act, **115**
 Uniform Trade Secrets Act, **449**
 United States–Canada Free Trade Agreement, **168**
 United States–Israel Free Trade Agreement of 1985, **172**
 United States Tariff Act of 1930, 19 U.S.C. § 1304(a) (1982), **164**
 United States Sentencing Guidelines, **58–59**
 Uruguay Round Agreements Act of 1994, **142**

English Case Law

Chemco Leasing SPA. v. Rediffusion Plc., Transcript Assoc. (Q.B.1985), **248**
Enichem Anic S.P.A. v. Ampelos Shipping Co. (The Delfini), 1 Lloyd's Rep. 252,
 268 (C.A. 1990), **301**
Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., 1943 App. Cas.
 32 (H.L.), **285–286**
Hadley v. Baxendale, 156 Eng. Rep. 145 (1854), **229, 268**
J. H. Rayner & Co. v. Hambros Bank Ltd., 112 K.B. 27 (1943), **386**
Lamb Head Shipping v. Jennings, 1 Lloyd's L. R. 624 (C.A. 1994), **351**
Manifest Shipping v. Uni-Polaris Insurance Co., 1 Lloyd's L. R. 651 (Q.B. 1995), **334**
Noten v. Harding, 2 Lloyd's Law Report 283 (C.A. 1990), **366**
Reardon Smith Line Ltd., [1976] 1 W.L.R. 989, **271**
Rose & Frank Co. v. Crompton, 1924 All E.R. 245, 255 (Ct. App. 1923), **248**

English Statutory Law

English Unfair Contract Terms Act of 1977, **222**
 Frustrated Contracts Act (1943), **285**

European Union Law

SA Pasquasy v. Cosmair, Inc., [1989] ECC 508, **247**
 Commission Decision of 17/11/1999 (1999 OJ C 357) (Case No Iv/M.1652), **78–79**
 Commission Regulation (EC) No 2868/95 (implementation of community trademark
 directive), **473**
 Commission Regulation (EEC) No 4087/88 Of 30 November 1988 (Franchise
 Regulations), **99, 102–103**
 Council Regulation 2913/92 (European Union Customs Code), **192, 194**
 Directive on Unfair Terms in Consumer Contracts, 93/13/EEC: L 95/29 (1993), **227–228**
 Directive 97/55/EC on Comparative Advertising (1997), **61**
 Directive 97/7/EC on Protection of Consumers in Distance Contracts (1997), **405–406**

- Directive 94/45/EC of 22 September 1994 (European Works Council Directive), **414**
 Directive 96/9/EC on the Legal Protection of Databases, **535**
 Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data, **534–536**
 Directive 84/450/EEC (1984) (Misleading Advertising Directive), **61**
 Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, **227**
 Directive 86/653/EEC of December 18, 1986 Regarding Commercial Agents, **421**
 Directive 99/44 (Warranties in Consumer Transactions), **287**
 Directive 1999/93/EC (electronic signatures), **543**
 Directive 2002/58/EC on Privacy and Electronic Communications, **533**
 EU Regulation 2790/1999 (vertical agreements), **103**
 EU Regulation No. 4087/88, Application of the Treaty to Categories of Franchise Agreements (Nov. 30, 1988), **99–100, 103**
 Lugano Convention, **116**
 Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, **116**
 Technology Transfer Block Exemption Regulation (TTBER), EU Regulation 772/2004, **507**

Other European Laws

- Council of Europe, Resolution (78) 3 on Penal Clauses in the Civil Law (1978), **223–224**
 EURATOM Treaty of 1958, **173**
 Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, **57–58**
 Treaty of Nice of 2000, **174**
 Treaty of Paris of 1952, **173**
 Treaty on European Union (Treaty of Maastricht), **173–174**
 York-Antwerp Rules of 1994, **364**

Brazilian Law

- Brazilian Industrial Property Law of May 15, 1997, **465–466**

Canadian Law

- Braintech, Inc. v. Kostniuk*, British Columbia Court of Appeals (1999), **527–528**

Chinese Law

- Administrative Measures for Export-Prohibited Technology or Export-Restricted Technology, **511**
 Administrative Measures on Import of Prohibited or Restricted Technology, **511**
 Administrative Measures on Registration of Technology Import and Export Contracts, **510**
 Chinese Company Law, **73**
 Chinese-Foreign Equity Joint Venture Law, **71**
 Contract Law of the People's Republic of China, Articles 114 and 115, **138, 226**
 Labor Code of the People's Republic of China, **410**
 Law on Joint Ventures Using Chinese and Foreign Investment (1990), **71**
 Law on Chinese-Foreign Contractual Joint Ventures (1988), **71, 81**
 People's Republic of China Patent Law, **468**
 People's Republic of China Trademark Law, **468**
 Regulations on Administration of Technology Imports and Exports, **510**
 Unified Contract Law of the People's Republic of China, **228**

Dutch Law

- Plas v. Valburg*, 18-6 Nederlandse Jurisprudentie 723 (1983), **244–245**

French Law

Article 1134 of the French Civil Code, **283**
 Article 1152 of the French Civil Code, **138**
 Article 1590 of the French Civil Code, **124**
 Articles 1587, 1674, 1681, and 1706 of the French Civil Code, **225**
 French Labor Code, **411**

German Law

Federal Act Establishing the General Conditions for Information and Communications Services, **545**
 German Civil Code, Section 313, **283**
 Municipal Court of Holstein, 5 C 73/89, The CLOUT Case No. 7, **274**
 Termination Protection Act, **411**

Hungarian Law

Hungarian Conflict of Law Rules, **119**
Pratt & Whitney Corp. v. Malev Hungarian Airlines, 13 Bp. P.O.B. 16 (Metropolitan Court of Budapest 1991), **262**

ICC Arbitration Cases

ICC Arbitration Case No. 7531 of 1994, **274**
 ICC Arbitration Case No. 5713 of 1989, **253**
 ICC Arbitration Case No. 6281 of 1989, **285**

Indonesian Law

Arbitration Law Number Thirty, **89**

International Treaties and Conventions

Agreement on Import Licensing Procedures, **150**
 Agreement on Preshipment Inspection, **150**
 Agreement on Rules of Origin, **195**
 Agreement on Subsidies and Countervailing Measures, **143, 159**
 Agreement on Technical Barriers to Trade, **201**
 Agreement on the Application of Sanitary and Phytosanitary Measures, **150**
 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), **454, 458–462**
 Berlin Act of 1908, **457**
 Berne Convention for the Protection of Literary and Artistic Works, **447, 456**
 Brussels Act of 1948, **458**
 Brussels Protocol Amending the Hague Rules (Hague-Visby Rules), **324, 326**
 Budapest Treaty on the International Recognition of the Deposit of Microorganisms for Purposes of Patent Procedure, September 26, 1980, **455**
 Convention Establishing the World Intellectual Property Organization, July 14, 1967, most recently amended on September 28, 1979, **454**
 Convention for the International Sale of Goods, Article Seventy-Nine, **137**
 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, signed October 29, 1971, **454**
 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) (1929), **326–327**
 Convention on Contracts for the International Sale of Goods (CISG), **253, 260,**

Appendix A

Convention on the Limitation Period in the International Sale of Goods, **286–288**

- Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), **324, 325**
- Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), **327**
- Convention on the Contract for the International Carriage of Goods by Road (CMR) (1956), **325**
- Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), **106**
- Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), **113**
- Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930, **382**
- Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, May 21, 1974, **455**
- Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier (1961), **324**
- Customs Valuation Code, **150**
- Declaration on Trade in Information Technology Products, **183**
- Eurasian Patent Convention, **476**
- General Agreement on Tariffs and Trade (GATT), **64**
- General Agreement on Trade in Services (GATS), **26**
- Hague Agreement Concerning the International Deposit of Industrial Designs, November 6, 1925, amended January 1, 1998, **454**
- Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, **116**
- Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Hague Protocol) (1955), **324**
- Inter-American Convention on the Extraterritorial Validity of Foreign Judgments, **116**
- International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), **324–325, Appendix D**
- Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, October 31, 1958, amended September 28, 1979, **454**
- Locarno Agreement Establishing an International Classification for Industrial Designs, October 8, 1968, amended September 28, 1979, **454**
- Mercosur, **175**
- Madrid Agreement Concerning the International Registration of Marks, April 14, 1891, recently amended January 1, 1998, **454**
- Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, signed April 14, 1891, **454**
- Nairobi Treaty on the Protection of the Olympic Symbol, September 26, 1981, **455**
- Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, June 15, 1957, amended September 28, 1979, **455**
- Paris Act of 1971, **458**
- Paris Convention for the Protection of Industrial Property, **454, 455**
- Patent Cooperation Treaty, **454**
- Protocols 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Montreal Protocols) (1975), **324**
- Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Guatemala Protocol) (1971), **324**
- Rome Act of 1928, **457**

Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, October 26, 1961, **454**
 Sirte Declaration (African Union), **175**
 Stockholm Act of 1967, **457**
 Strasbourg Agreement Concerning International Patent Classification, March 24, 1971, amended September 28, 1979, **454**
 Trademark Law Treaty, October 27, 1994, **455**
 Treaty on Intellectual Property in Respect of Integrated Circuits, **455**
 UNCTAD/ICC Rules for Multimodal Transport Documents (1991), **325**
 Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM) (1980), **324**
 Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM) (1999), **325**
 United Nations Convention on International Multimodal Transport of Goods (1980), **325**
 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), **219**
 United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), **324–325, 328**
 Universal Copyright Convention, **325**
 Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, signed June 12, 1973, amended October 1, 1985, **455**
 Vienna Convention on the Law of Treaties, **220**
 WIPO Copyright Treaty, signed December 20, 1996, **455**
 WIPO Performances and Phonograms Treaty, signed December 20, 1996, **455**
 WTO Dispute Settlement Understanding (DSU), **153–158, 167**

Italian Law

Italian Civil Code, Article 1326, **261**
 Italian Civil Code, Article 2596, **493**
Italian Discrimination Against Imported Agricultural Machinery, GATT Report L/833-7S/60 (1958), **147–149**

Japanese Law

Commercial Code, Article 121, **272**
 Japanese Civil Code, Article 420(1), **138**
Min v. Mitsui Bussan K.K., Tokyo High Court (March 17, 1987), **245–246**

Korean Law

Basic Environmental Policy Act (BEPA) (1990), **48–49**
 Contractual Joint Venture Law of the People's Republic of Korea, **104**

Mexican Law

Foreign Investment Act of 1993, **14**

New Zealand Law

Comite Interprofessional du Vin de Champagne v. Wineworths, Ltd., 2 NZLR 432 (1991), **466**

Russian Law

Labor Code of the Russian Federation, **412**
 Law on Enterprises (1996), **77**
 Russian Civil Code (1994), **226–227**
 Patent Law of the Russian Federation, **468**
 Resolution 4670/96 (1997) of the High Arbitration Court of the Russian Federation, **257**
 Russian Trademark Law, **464, 466**

Preface

The international marketplace offers great opportunity for a domestic enterprise seeking to expand. It is also a place where the risks of loss are somewhat unique in character. Accordingly, the American businessperson must become an astute manager of international business risk in order to minimize the chances of financial loss. This book will illuminate the risks of doing business internationally, while providing the student of international business law with tools to help minimize those risks.

The legal issues relevant to international business transactions can be seen as a due diligence checklist. The sophisticated international entrepreneur directly addresses the legal issues discussed in this book before transacting international business. The tremendous expansion of international business is a testament to the fact that the legal issues in international business transactions are discernible. Furthermore, the real world often provides solutions to the risks associated with such issues.

The trend toward increased international trade is likely to continue. It began at the end of World War II with the establishment of the World Bank, International Monetary Fund, United Nations, and the evolution of the General Agreement on Tariffs and Trade (GATT). The trend continued to accelerate with the adoption of the North American Free Trade Agreement (NAFTA), the deepening of the European Union (EU), and the establishment of the World Trade Organization (WTO). It will continue to accelerate with the expansion of the European Union into Eastern Europe, the entry of the People's Republic of China into membership in the WTO, the explosion of e-commerce, and the continuing quest for new international markets.

In order to obtain profits in the international marketplace, small to large size companies will have to develop an "international business strategy" in order to stay competitive. This book provides an introduction to the legal issues that need to be addressed in formulating such a strategy.

Transactional Approach

The subtitle of this book, *A Transactional Approach*, was selected to distinguish it from the more generic texts on International Business Law. As such, it focuses on transactional international business law. The text presents international business transactions with an emphasis on rules *and* practice. The topics of coverage have been selected to place predominant emphasis on matters that most directly impact private business transactions: export-import, licensing and technology transfer, and sales of services. It is the authors' belief that it is these practical legal aspects of international business that are most relevant to today's business student. Therefore, extensive coverage of more "macro" issues like expropriation or nationalization, workings of the United Nations, and international monetary policy are abandoned due to the increasingly minor role they play in today's international business arena. This is not to say that these areas of cover-

age are not important, but that in a relatively stable free trade environment they are unlikely to be of direct importance to the international entrepreneur. Given the time limitations in a standard college course, it is to the basics of transactional business law that this textbook's coverage is directed.

Managerial Perspective

Throughout the book, capsules and materials will be provided to illustrate the law of international business transactions *as practiced*. A variety of methods will be utilized to provide the student with a real world perspective. These methods include case studies, checklists, forms, tables, and summaries.

Capsules, Exhibits, and Icons

The chapters contain numerous capsules and exhibits that emphasize the transactional and managerial emphasis of the text. The Doing Business Internationally and Focus on Transactions capsules provide checklists and practical information relevant to the international entrepreneur. Comparative Law capsules highlight differences in national legal systems. Exhibits expose the student to the forms used in carrying out international business transactions, along with charts and statistics. International icons alert the reader to coverage in the text of foreign laws.

Special Features

A number of *hot topics* are included to make the textbook more comprehensive and cutting edge. These topics include in-depth coverage of international commercial arbitration; recent interpretations of the United Nations Convention for the International Sale of Goods (CISG); the legal issues of e-commerce and other types of electronic transactions; the expanding recognition of international franchising; the problems of international bribery, including the adoption of the OECD Anti-Corruption Code; the development of international standards such as the International Standards Organization's ISO 9000 and ISO 14000; the unique issues pertaining to joint venturing; the continuing problem of piracy of intellectual property; and changes in international business practices and procedures wrought by the terrorist attacks of September 11, 2001.

Electronic Transactions

The growing importance of electronic means of communicating and contracting in the international business arena is reflected in the allotment of an entire chapter to the topic, along with coverage of electronic developments pertaining to the other substantive topics discussed throughout the book.

Ethics Coverage

Ethical questions in international business can arise in various contexts. These contexts include the ethics of negotiations, disclosure of information, dealing with foreign governments, and the divergence between home country and host country laws. The student will be encouraged to form a mind-set in which ethical behavior

will become an inherent part of his or her approach to international business. An entire chapter is devoted to the topic, along with a number of ethics capsules placed throughout the book.

Sources and References

The text reflects an earnest attempt to expose the student to a sampling of foreign law. National laws from approximately two dozen countries are referenced and used for purposes of illustration. There are numerous references throughout the text to a number of primary sources. All references to the Uniform Commercial Code, or UCC, are references to the law of the United States. The book also makes ample use of a variety of European Economic Community (EEC), European Community (EC), and European Union (EU) directives and regulations. This body of law, apologetically, is referred to as EU Regulations. The reader may refer to the footnotes for the proper citations. In order to emphasize the nature of national laws' impact upon international business transactions, the laws of the European Union, the People's Republic of China, and the Russian Federation have been singled out for extra attention. These three bodies of law were also selected because of the importance of these markets in world trade. These bodies of law also provide an excellent comparison between laws pertaining to international business in developed and emerging market economies. Emphasis on the law of the European Union also serves to highlight the difficulties inherent in harmonizing differing national legal systems. The use of national law serves to illuminate the typical issues found in international business transactions.

Case Law

A concerted effort has been made to update the case law in order to provide a more contemporary flavor to the text. Sixty-eight of the cases are from 1990 to the present; of those, 44 cases were decided no earlier than 1997. Of course, some older cases remain because of their power as precedents or as clear illustrations of a given legal principle. Along with a presentation of American law, cases have been selected from Canada, the European Union, Japan, the Netherlands, New Zealand, the Russian Federation and the United Kingdom, along with International Chamber of Commerce Arbitration cases and cases employing the GATT dispute resolution processes.

Style and Structure

A premium has been placed upon readability by the use of clear narrative, carefully edited case summaries and articles, and concise use of tangential materials. Also, in the spirit of the practical-managerial focus of the book, more in-depth insight is offered in certain areas so that the student is exposed not only to the *why* a given rule of law has evolved, but also *how* it is applied in practice. The chapter coverage allows for the use of the chapters as individual modules or as blocks of chapters. The first seven chapters can be viewed as foundational in that they provide the legal environment of international business, including: International Business Risks, International Business Ethics, Strategies for Doing Business Internationally, International Dispute Resolution, National and International Trade Regulation, and International Contract Law. Chapters 8–11