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Dispute Resolution

(Resolution of Private International Disputes)

Session 1: Introduction

FTU Master Program

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About this class

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- Me?
- You?
- Our joint venture: “Dispute Resolution”
  - Structure of the class: Course syllabus
  - Legal texts provided by FTU (hard copy)
  - No proper reading assignments (only voluntary reading)
  - How to get the PP presentation?
  - Your participation in the class:
    - ✓ All questions are welcomed (all the time)
    - ✓ Reading + Discussion
    - ✓ Quick quiz
    - ✓ Exams

Structuring international commercial disputes

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Background

- International trade and commerce has increased steadily.
- International trade law aims at opening up foreclosed markets, more and more countries open their markets for cross-border trade.
- Firms and entrepreneurs enter into cross-border transactions & invest abroad
- How are commercial disputes resolved?

Structuring (2)

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Disputes between states

- Trade disputes on matters covered by WTO law
  - Special dispute settlement bodies and procedures
  - Laid down in WTO law
- Outside WTO
  - Dispute settlement mechanisms of other international/supranational bodies
  - Diplomatic consultations
  - ICJ
- These type of disputes are not treated in my class -> WTO law, Trade Remedies

Structuring (2): Disputes between investors & states

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- Example: French investor that has invested in country A, claims expropriation by host state (= country A).
- Investor may sue state before a court in Pakistan
  - P1: Immunity of state?
  - P2: Is court “neutral”?
  - P3: Law of Pakistan might allow expropriation
- Result: French firm might not invest in country A

Structuring (3): Disputes between investors & states

- Therefore: Many states (including Vietnam) have concluded bilateral investment treaties (“**BIT**”) for the protection of investors
- BIT stipulate the right of the investor or the host state to sue the other side before an arbitral tribunal
- Many states (approx. 150, not Vietnam) have ratified the **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (World Bank, 1965)
  - Convention establishes **ICSID** (International Centre for Settlement of Investment Disputes)
  - Authorizes arbitration, rules for arbitration procedure
  - ICSID proceedings very common dispute resolution mechanism
- Investor-state proceedings <u>not</u> covered in this class, only commercial arbitr.

Structuring (4): Disputes between private parties

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- In this class we treat **disputes between private parties in commercial matters**

  Example: German firm sells machines to buyer in Vietnam. Buyer claims that machines are defect.

- What are appropriate dispute settlement mechanism for this case?

Dispute resolution mechanisms: Negotiation

- Parties try to resolve their dispute by mutual agreement without adjudication
- Skills required are to a lesser extent of a legal nature, rather a question of negotiation tactics and experience.

Negotiation – pro and contra

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- Advantages:
  - Inexpensive and amicable agreement allows the parties to continue their business relationship, parties can try to include solutions which require cooperation and would normally not be available in court proceedings
- Disadvantages:
  - No coercive power!
  - Parties must both agree to negotiate and resolve their dispute – If no agreement no result!

Litigation

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- Determination of a dispute between the parties by a public court …
- whose authority is in principle independent of the consent of the parties ….
- for resolution in a judicial manner (i.e. court has the power to issue a binding decision).
- Opportunity for parties to present evidence or submissions in support of their claim.

Advantages

- Coercive power of the court, in particular in relation to third parties (joinder) and witnesses
- Judgment enforceable in the country where the court is seated (in Europe in whole EU)
- No other alternative if negotiations fail and there is no agreement on arbitration or mediation

Disadvantages

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- “All or nothing” decision
- Judicial expertise might not be sufficient due to legal (foreign law) or factual difficulties of the case
- Rather formal proceeding in most countries
- Courts may be biased in some countries
- Lack of confidentiality in court proceedings
- Cost and complexity of litigating in a foreign court
- Publicity & possible damaging effect on business relationship
- In transnational cases: Can a judgment be enforced abroad?

Arbitration

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- Dispute between the parties …
- that is submitted by agreement to a private third party chosen by the parties (= arbitrator or arbitrators) …
- for resolution in a judicial manner (i.e. third party has the power to render a binding decision).
- Opportunity for parties to present evidence or submissions in support of their claim.

Advantages

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- Permits maximum of party autonomy, little intrusion by state courts
- Special professional knowledge of arbitrators that can be chosen by parties
- Confidentiality: proceedings not open to public
- Procedural informality, e.g. no formal serving of documents
- Duration
  - Often arbitral tribunals work faster than courts
  - Only one instance
- Sometimes (not always): lower costs
  - Only one instance + shorter duration,
  - No translation costs because of agreement on language of proceedings
- Almost universal recognition of arbitral awards through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
- Which firms choose arbitration in practice?

Disadvantages

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- Weak coercive power of arbitration tribunal over parties and in particular non-parties
- Support by state courts may be necessary
  - to obtain evidence
  - for interim measures
  - for constitution of a tribunal
- Depending on “forum”: Uncertainties about procedural issues + application of regulatory rules
- Problems with joinder of third parties (unless contracted for)

Mediation

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- Process by which disputing parties engage the assistance of a neutral third party to act as a mediator – a facilitating intermediary – who has no authority to make any binding decisions but who uses various procedures, techniques and skills to help the parties resolve their dispute by negotiated agreement without adjudication
- Essentially negotiations supported by a neutral third party
- Mediators sometimes have knowledge of psychology (business psychology)

Mediation – pro & contra

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- Advantages:
  - Same as negotiation
  - Looking at „interests“, not merely “rights” (orange example)
  - Sightly more expensive than negotiation without mediator, but (maybe) better chance to succeed
- Disadvantages:
  - Parties must agree on mediation/final agreement + cooperate during negotiations
  - Mediation clause can be included in contract
  - No agreement, no result! (waste of time…)

Minitrial

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- Negotiating procedure which is generally (albeit not always) assisted by a neutral third party (“neutral advisor”).
- Dispute is presented in an “abbreviated” trial form to senior firm representatives of the parties to the disputes (i.e. before officials that are not directly involved in the transaction in dispute).
- Senior officials try to reach agreement by negotiation.
- Neutral advisor informs senior officials how the dispute could be resolved.

Minitrial – pro & contra

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- Advantages:
  - Same as mediation
  - More structured than traditional mediation (can also be a disadvantage)
- Disadvantages:
  - Same as mediation: Parties must agree on minitrial + cooperate during negotiations + no agreement, no result
  - Limited scope of application: recommended for major disputes in which senior business decision takers are interested in a strong personal involvement to solve the dispute.

Which mechanism is “the best” for private disputes?

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Impact of “culture”

- Chosen settlement mechanism depends partly on “cultural preferences”.
- Parties from countries that regard court litigation as offensive (a view that is strong in Asia) may prefer negotiation or arbitration.
    - “Informal dispute resolution” is therefore common in Vietnam.
    - Less common in many European states where courts are often seen as neutral instances helping the parties to settle the disputes.
    - Settlements “brokered” by the courts are however frequent in many jurisdictions, see e.g. Article 10 Vietnamese Code of Civil Procedure:

> “The courts have the responsibility to conduct conciliation and create favorable conditions for the involved parties to reach agreement with one another on the resolution of civil cases or matters under the provisions of this Code.”

- Europeans try to avoid being sued in U.S. as proc. system is “plaintiff friendly”.
- Consequence: arbitration agreements frequent in international commerce

Impact of “business strategy”

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- Vary depending on the relationship between the parties to the dispute

  Example: “One-time-transactions” vs. Comprehensive business relationship over an extended period of time to the benefit of both parties.

- If you want to continue doing business with the adversary
  - it might not be a good idea to sue him in a court.
  - It must be assured that the suit does not negatively affect other transactions/relationships
- Maybe in complex relationships negotiation / mediation / minitrial is the better alternative

Impact of the forum’s legal system

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- Litigation is no option if courts having jurisdiction over the dispute will not ensure due process (corruption, decision in favour of inland party etc.)
- Litigation will be cumbersome if proceedings will take long time
- Litigation must be reconsidered if proceedings will consume a lot of resources (court fees, lawyer’s fees etc.)

Drafting the dispute resolution clause

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- Assess the risks of future disputes out of a business relationship
- Negotiations of dispute resolution mechanisms might give hints about the integrity of the contractual partner.
- In practice
  - No lawyer involved in conclusion of contract, no dispute resolution clause
  - midnight clauses on jurisdiction/arbitration, applicable law for contracts
  - Larger relationships might include multi-step approach, including
    - a provision on negotiation
    - a provision on non-binding dispute resolution, such as mediation
    - and, if the former alternatives do not lead to a conclusion: a clause on litigation/arbitration

    P: Such clauses may delay a final decision, if negotiations/mediation does not lead to an agreement.

Example for a negotiation clause

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“The parties shall attempt in good faith to resolve any dispute arising out of or relating to this agreement promptly by negotiations between executives who have authority to settle the dispute. Any party may give the other side written notice of any dispute not resolved in the normal course of business. Within 20 days after delivery of said notice, executives shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the dispute could not resolved after 60 days after delivery of the notice, the parties are free to initiate mediation [<u>alternative</u>: arbitration/court proceedings].

If a negotiator intents to be accompanied at a meeting by a lawyer [attorney], the other negotiator shall be given at least three working days’ notice of such intention and might also be accompanied by a lawyer [attorney]. All negotiations pursuant to this clause are confidential.”

Examples for mediation/minitrial clauses

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“If the dispute has not been resolved by negotiation as provided in this contract, the parties shall endeavour to settle he dispute by mediation [minitrial]. The neutral third party will be selected from the ____ (Name of Panel of neutrals). If the parties encounter difficulty in agreeing on a neutral, they will seek the assistance of____ (name) in the selection process.”

Examples for a mediation/minitrial clauses (2)

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Neutral party can be agreed on when the contract is formed

„If the dispute has not been resolved by negotiation as provided in this contract, the parties shall endeavour to settle the dispute by mediation [minitrial]. The parties have selected ___ as the mediator [neutral advisor] in any such dispute and he has agreed to serve in that capacity and to be available on reasonable notice.

In the event ___ is or becomes unwilling or unable to serve, the parties have selected __ as the alternative mediator [neutral advisor]. In case the alternative mediator [neutral advisor] is unwilling or unable to serve, and the parties can't agree on a neutral, they will seek assistance of___ in the selection process."

Key issues in international cases

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Introduction

- What is an *international* case? = Dispute having a nexus with more than one jurisdiction.
- Possible features of a cross-border case:
  - Diversity of citizenship
  - Diversity of domicile/residence
  - Business transactions abroad
  - Torts abroad

An example (automobile case)

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Suzuki, a Japanese motorcycle manufacturer headquartered in Tokio, purchased wheels for their bikes from Tecla, a manufacturer seated in Palo Alto (California). The wheels are delivered and built into the scooters by Suzuki which are then delivered to Vietnamese consumers. It turns out that most of the wheels are defective and Suzuki has to recall the scooters.

The CEO of Suzuki calls the chief legal officer to discuss problems and pitfalls of claiming damages from Tecla.

Which issues should be raised in this meeting?

Considerations in the automobile case

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- Can we litigate? Or does our contract have a valid arbitration/mediation clause which bars litigation?
- Shall we litigate at all (bad publicity, cultural attitudes to litigation, must/can we do busines after litigation with opponent, premature lawsuits might escalate the conflict)?
- Where to litigate: which courts are available (= have adjudicatory jurisdiction)?

Considerations (2)

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- Which substantive law will be applied (will action be successful, which remedy can be obtained, how much damages can be claimed)?
- Will the judgment be enforceable in other countries?
- How to serve the other party?
- Do we have sufficient evidence to win the case; how can evidence be obtained abroad?
- Are there any procedural advantages in some courts which makes litigation before those courts more convenient (pre-trial discovery, freezing of assets, (no) jury trial)?

Considerations (3)

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How might Tecla react?

- Contest jurisdiction
- Commence counter-proceedings in another court (counter-claim, negative declaration)
- Conceal or disperse its assets
- Once it is clear which court has jurisdiction (and will hear the case), the chances of success can be determined which often leads to a settlement.

Main issues to be distinguished

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- Jurisdiction
  - What is this?
  - Lex fori
  - Bases of jurisdiction
- Applicable law
  - What does this mean?
  - Conflict-of-law rules
  - Local law, foreign law, uniform law
- Will a foreign judgment be recognized and enforced in a country where the debtor has assets?
  - Definition of recognition and enforcement
  - Protection of the debtor

Related issues

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- Service of documents
  - Definition
  - Importance of due service of process
- Taking evidence abroad
  - Definition
  - Legal assistance between sovereign states

Where to sue? The parties' perspective

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In transnational litigation, jurisdiction is crucial because plaintiff can choose the forum:

- Subjective considerations (familiarity, language)
- Convenience (location of parties and witnesses)
- Considerations of cost (legal fees)
- Quality of the available courts (expertise, neutrality, bias, corruption)
- Legal advantages (availability and extent of interim/final remedies, damages, certainty of legal rules, rules on evidence)
- Applicable law favorable to claimant

The parties' perspective (2)

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When do you have to sue abroad?

- Domestic court has no jurisdiction.
- No claim under the law applied by domestic court but under the law applied by foreign court.
- Assets in countries in which judgment from domestic court cannot be enforced.

When do you want to sue abroad?

- Favorable law
- Higher awards
- Enforceability

Sources of law (for the resolution of int‘l disputes)

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International (Treaty) Law

- Hague Conference on Private International Law (www.hcch.net) (founded in 1893)
- Elaborates conventions to unify private international law rules in the broad sense (including jurisdiction + enforcement):
  - For example, on service and taking evidence abroad
  - Most conventions relate to family and succession law
- Today more than 75 states + EU may take part in negotiations
- Asian Member States include: China, Japan, Singapore, South Korea, and (since 2013) Vietnam
- Problems and pitfalls
  - Slow ratification process
  - Due to differences, not many conventions are ratified by many states
  - To reach compromise many conventions allow reservations, which limit the unifying effect of a convention

Member States Hague Conference (map slightly outdated)

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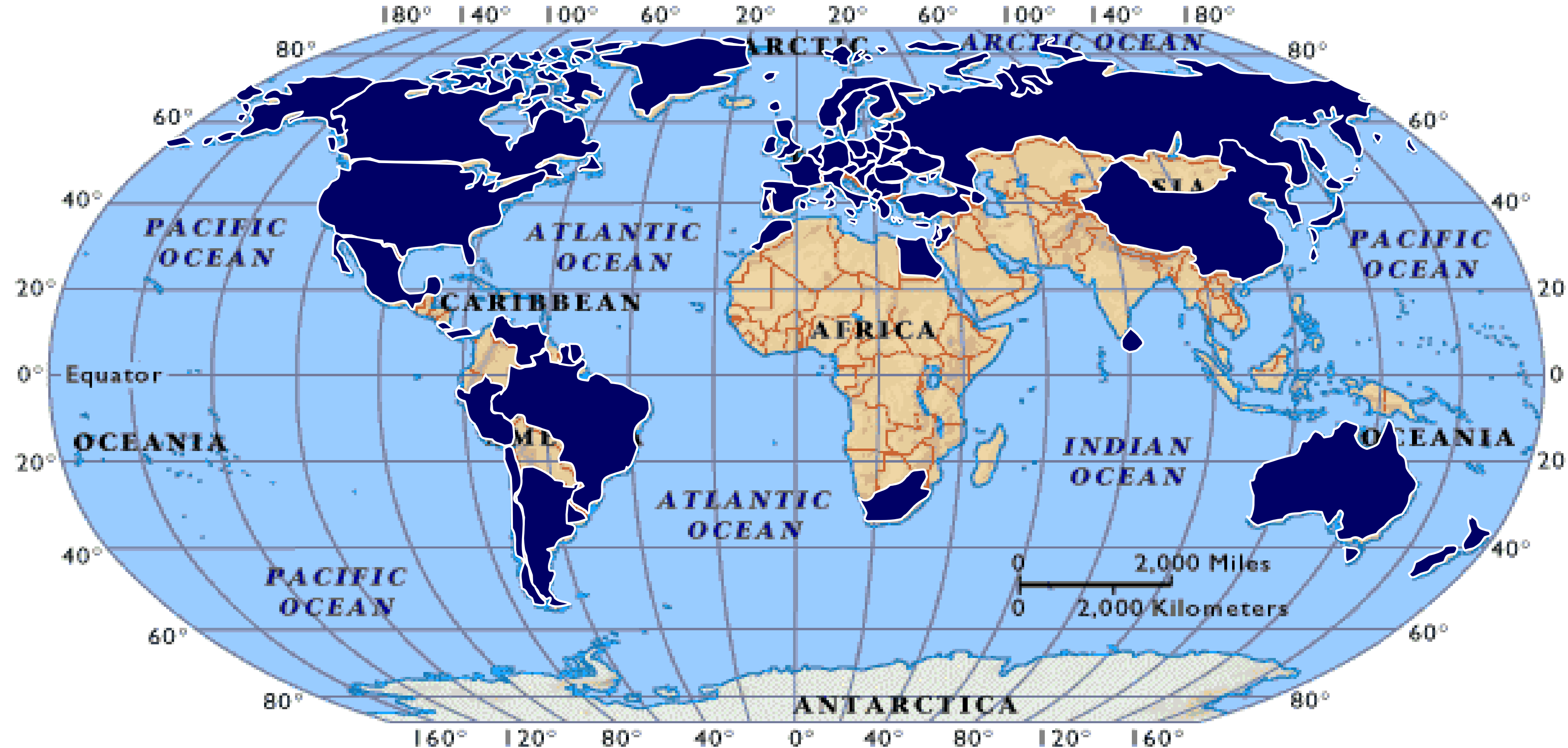

Sources (2) – In Europe „regional law“: EU law

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- Since 1999 (Treaty of Amsterdam) EC (now: EU) has competence (power) to enact statutes (legal rules) in the field of judicial cooperation in civil matters.
  - What is a Regulation?
  - Why was the “communitarization” necessary and desirable?

Sources (3) – EU law

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- Today this power is mainly enshrined in Art. 81 TFEU
- Special case (Protocols to EU Treaties)
  - GB & Ireland
  - Denmark

Sources (4) – National law

- The Nation State: traditionally most important actor
- Today: importance slightly diminished by international treaties + EU law (in Europe)

Summary

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When you have to solve an international case, you have to have three sources in mind:

- International law
- „Regional“ supranational law, in Europe European law
- National law

Important legal texts: Jurisdiction & enforcement

International level

- No Hague Convention
- Three attempts to elaborate a worldwide “judgments convention” failed, negotiations were however recently resumed.

Legal texts: Jurisdiction & enforcement (2)

Regional level (European law)

- Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (new Brussels I Reg /Recast Reg/Brussels Ibis Reg)
- Applies in Member States since 10 January 2015 and replaces „old“ Reg 44/2001)

Legal texts: Jurisdiction & enforcement (3)

National level

- Rules of the German Code of Civil Procedure (for issues not covered by international or EU law)
- US law (state and federal level)
- Law of Vietnam

Important legal texts: Service of process

International level

- Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (“Hague Service Convention”)
- Ratified by more than 60 states (Germany, GB, France, Japan, USA etc. but not Vietnam so far)
- For service abroad between two states bound by convention, unless the two states are EU states.

European level

- Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)
- For service abroad from one EU state to another EU state

National level

- Vietnam law of civil procedure etc.

Litigation in the U.S., Germany and Vietnam

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U.S.	EU / Continental Europe	Vietnam?
Discovery (pre-trial phase)	Plaintiff has to submit evidence	
Class action (FRCP) based on opt-out model	– No real equivalent – Capital Markets Model Case Act (not for all areas of law) – Planned legislation at national level – Planned EU legislation withdrawn in 2013, but new proposals lanced in 2018	
American rule of costs	Loser pays principle	
Contingency fees	Fee system based on “value” of the claim	
Substantive law: Punitive damages (albeit US Supreme Ct. has issued limits)	Actual damages (albeit preventive function gets more and more important)	

Summary

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- Transnational cases: Issues
  - Which dispute resolution mechanism must/should be made recourse to?
    - Negotiation
    - Mediation
    - Arbitration
    - Litigation
  - If adjudication: distinguish
    - Jurisdiction
    - Service & taking evidence abroad
    - Applicable law
    - Recognition and enforcement of foreign judgment
- Sources of law: international, regional (European) & national
- Litigation abroad might be very different from litigation in domestic courts

Questions, discussion, quick quiz

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- Questions?
- Case for discussion (including quiz questions)

A firm in Hanoi provides shoe manufacturing services (“Hanoi firm”). It wants to enter into an agreement with a well known “brand for running shoes” based in Munich/Germany (“German firm”). The parties agree on all commercial aspects of their relationship (amount of shoes to be produced, design, quality, price per pair of shoe etc.).

Towards the end of the negotiation process the CEO of the Hanoi firm comes to you and asks what clauses he should discuss with the German firm with regard to future disputes that might come up between the parties. What issues could be considered?

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Thank you very much for your attention!