Overview

This seminar provides an introduction to the theory and practice of international commercial arbitration. The seminar is intended to introduce students to both the theoretical questions surrounding international commercial arbitration and the more hands-on issues of the practice of arbitration.

The class is intended to be international in focus, but there is also the goal that students have a reasonable broad grasp of how international commercial arbitration operates in the United States. Accordingly, while material will be drawn from many jurisdictions, the course will focus more on the U.S. than any other jurisdiction, and practice under the Federal Arbitration Act.

The topics of the 13 classes are the following:

1. Introduction: What Is International Arbitration?
2. The Arbitration Agreement I: Formation, Validity and Scope
3. The Arbitration Agreement II: Separability or Autonomy and Applicable Law
4. Fundamentals of arbitration: Kompetenz-Kompetenz and arbitrability
5. Arbitration in practice
6. Taking of evidence in International Arbitration
7. Procedural steps until award
8. Challenges, Interventions and Consolidation
9. Recap class
10. Set-aside and appeal of Arbitral Awards
11. Recognition and Enforcement of Foreign Awards I
12. Recognition and Enforcement of Foreign Awards II
13. Exam preparation class
SYLLABUS

1. WHAT IS INTERNATIONAL ARBITRATION?
   • Brief historical introduction to US and international arbitration
   • Distinguishing characteristics of arbitration as compared to other dispute resolution forms
   • The costs and benefits of arbitration
   • Main differences between international and domestic arbitration
   • Overview of the legal framework: FAA in a nutshell; state/federal issues; NY/Panama Conventions; UNCITRAL Model Law
   • Introduction to core principles that will be developed throughout the semester (Kompetenz/Kompetenz; separability; limited review; party autonomy; “arbitrability”)

Reading:
   • UNCTAD, Introduction to International Arbitration
   • Gary Born, International Commercial Arbitration, Second Edition, §§1.01-1.03

Reference will also be made to the following (although students need not have read in detail):
   • New York Convention
   • Federal Arbitration Act
   • UNCITRAL Model Law
   • UNCITRAL Model Rules

2. THE ARBITRATION AGREEMENT I: FORMATION, VALIDITY AND SCOPE
   • Formation of the agreement to arbitrate
   • Formal and substantive validity of the agreement to arbitrate
   • Scope of the agreement to arbitrate
   • Who decides whether an arbitration agreement is binding?
   • Compelling arbitration under the New York Convention, the FAA, and the UNCITRAL Model Law

Reading:
   • New York Convention, art. II
   • UNCITRAL Model Law, arts. 7, 8
   • U.S. FAA, 9 U.S.C §§ 2, 3, 4, 202, 206 and 303
   • English Arbitration Act, §5, 6(1)
   • IBA Guidelines for Drafting International Arbitration Clauses (2010)
   • ICC, ICDR, LCIA, UNCITRAL recommended arbitration clauses


LCIA: [http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx)


- *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991) (Facts and Part I, Subparts A-C)
- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Parts I and II of Justice Blackmun’s majority opinion; Part I of Justice Steven’s dissent)
- *Fiona Trust & Holding Corporation & Others v Yuri Privalov & Others* [2007] EWCA Civ 20 (HL)

3. **THE ARBITRATION AGREEMENT II: SEPARABILITY OR AUTONOMY AND APPLICABLE LAW**

- The doctrine of severability (or separability)
- Law applicable to the arbitration agreement

*Reading:*

- UNCITRAL Model Law, arts. 8, 16(1)
- New York Convention, arts. II, V
- Swiss Statute on Private International Law (1987), art. 178
- ICC Rules, art. 6(9)
- *All-Union Foreign Trade Ass’n v. JOC Oil Co. Ltd.* (Award of 9 July 1994) (Foreign Trade Arbitration Comm’n, USSR Chamber of Commerce and Industry, Case No. 109/1980)
- *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967) (entire majority opinion except paragraph containing footnote 13; only Part IV of dissent)
- *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd.*, [2007] UKHL 40 (Lord Hoffman, J. at 1-10, 16-21; Lord Hope, J. at 32-35)
- HSF model arbitration clauses
4. FUNDAMENTALS OF ARBITRATION: KOMPETENZ-KOMPETENZ AND ARBITRABILITY

- The nature and scope of arbitral jurisdiction
- Kompetenz/Kompetenz
- US legal interpretations of arbitral jurisdiction
- Arbitrability: objective and subjective

Reading:
- New York Convention, arts. II, V(1)(a) & (c)
- UNCITRAL Model Law, art. 16
- ICC Rules, art. 6
- Redfern and Hunter on International Arbitration (Fifth Edition), §2.111-2.144
- Award in All-Union (previously assigned)
- Contec Corp. v. Remote Solution, Co., 398 F.3d 205 (2d Cir. 2005)
- Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), (Part III of Justice Blackmun’s majority opinion; last two paragraphs of Part III and Parts IV and V of Justice Steven’s dissent) (previously assigned)
- Roby v. Corp. of Lloyd’s, 996 F.2d 1353 (2d Cir. 1993) (Background; Parts I.B., II, and III)
- Summary of Lufuno Mphaphuli & Associates (Pty) Ltd. v. Nigel Athol Andrews and Bopanang Construction CC (South Africa 2009)

5. ARBITRATION IN PRACTICE

- Constitution of the tribunal: usual methods of appointment
- Powers and duties of arbitrators
- Arbitrator immunity
• Role of arbitral institutions
• Role of counsel

Reading:
• IBA Guidelines on Conflict of Interest in International Arbitration
• IBA Guidelines on Party Representation
• ICC Rules
• LCIA Rules 2014
• AAA-ABA Code of Ethics
• Redfern and Hunter on International Arbitration (Fifth Edition), §5.06-5.84
• Gerhard Wegen, "Chapter 26: Transaction Counsel as Arbitration Counsel and as Witness?" in Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider), (Kluwer Law International 2015) pp. 205 – 218

External speeches from:
• A representative from an arbitral institution
• An arbitrator
• A user of the dispute resolution process

6. TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION
• Overview of sources of procedural rules
• Different approaches: common law vs. civil law
• Discovery in international arbitrations
• Use of Section 28 U.S.C. § 1782
• Privilege; Confidentiality; Disclosure/Discovery
• Heavy styles (cross examination)

Reading:
• IBA Rules on the Taking of Evidence in International Arbitration, Rules 9.2 and 9.3
• LCIA Rules, Art. 30
• ICC Rules, Art. 22(3)
• Queen Mary International Arbitration Survey 2015 (skim read only)
• ASA President's Message, 1/2011, The problem with predictability, and 2/2012, Managing uncertainty (available on Kluwer Arbitration)
7. PROCEDURAL STEPS UNTIL AWARD

- Common procedural framework
- Unique procedural and evidentiary issues
- Bifurcation / Trifurcation
- Review mock Request for Arbitration and mock Procedural Order
- Advocacy options in international arbitration

Reading:

- UNCITRAL Model Law, arts. 18-27
- FAA, §7
- English Arbitration Act, ss33-45
- ICC Rules, arts. 16-28
- LCIA Rules, arts. 14-22
- UNCITRAL Rules, arts.17-31
- CIETAC Rules, arts.11-21
- IBA Rules on the Taking of Evidence in International Arbitration
- UNCITRAL Notes on Organizing Arbitral Proceedings
- Example of Redfern Schedule

8. CHALLENGES, INTERVENTIONS AND CONSOLIDATION

Challenges of arbitrators

- Challenge and replacement of an arbitrator
- Termination of an arbitrator's mandate
- Truncated tribunals

Reading:

- S.A. Auto Guadeloupe Investissements (AGI) c/ Columbus Acquisitions Inc, Cour d'appel de Paris, Pôle 1 – Chambre 1, n° 13/13459
• Redfern and Hunter on International Arbitration (Fifth Edition), Chapter 4. The Establishment and Organisation of an Arbitral Tribunal (from 4.91 to 4.155)
• *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007)
• *Sierra Fishing Company and others v Hasan Said Farran and others* [2015] EWHC 140 (Comm) (http://www.bailii.org/ew/cases/EWHC/Comm/2015/140.html)
• Vivian Ramsey, Chapter 17: Two out of Three: The Effect of Truncated Tribunals in Domitille Baizeau and Bernd Ehle (eds), Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider), (Kluwer Law International 2015) pp. 139 – 144

*Interim measures and interaction with national courts:*
• Key points in the arbitral process where parties interact with national courts
• Choice of national courts/role of courts
• Court's appointment/disqualification of arbitrators
• Provisional measures in aid of arbitration
• Anti-suit injunctions and parallel proceedings
• Expedited and emergency arbitration procedures
• Interim measures

*Reading:*
• *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335, F.3d 357 (5th Cir. 2003)
• Global Arbitration Review, "UNITED STATES: The rise of the emergency arbitrator", 23 February 2015

*Multi-Party and Multi-Contract Arbitration*
• Joinder and intervention of third parties
• Consolidation of different arbitrations
• Equal treatment in the appointment of arbitrators
• Comparison of different arbitration rules and laws
• Pros and cons of multi-party arbitration

*Reading:*
• Redfern and Hunter on International Arbitration (Fifth Edition), §2.186-2.218
• "Dealing with Multi-Party and Multi-Contract Arbitration Issues", 11 June 2012 (HSFnotes / Arbitration)
• HSF model joinder/consolidation provisions

9. RECAP
• Opportunity to revisit topics that the Class has encountered problems with
• Review of Applicable Law
• Introduction to “Recognition and Enforcement of Arbitral Awards”

10. SET-ASIDE AND APPEAL OF AWARDS
• Differences between an annulment/set aside (pursuant to the local law of arbitration) in the court of the seat and denial of enforcement in other jurisdictions (pursuant to the New York Convention)
• Brief comparison between the grounds of vacation (FAA), set aside (UNCITRAL Model Law) and denial of enforcement (New York Convention)
• Requirements for challenge
• Grounds for setting aside
• Consequences of challenge claims
• Waiver of the right to challenge an award

Reading:
• FAA
• UNCITRAL Model Law, chs. VII-VIII
• New York Convention, arts. III-V
• Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, French Court of Appeals, 17 February 2011
• 2015 School of International Arbitration – 30th Freshfields Lecture by Lord Mance (November 4, 2015)
• Telenor v. Storm LLC, 524 F. Supp. 2d 332 (S.D.N.Y. 2007) (introductory paragraph and Part II.A.2.a.; review also Part II.A.2.b.)
• Iran Aircraft Industries v. Avco Corp., 980 F.2d 141 (1992)
• Termo Río S.A. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007) (except Part E)

11. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS I
• Recognition and enforcement of foreign awards under the New York Convention
• Pre-requisites for enforcement

• Grounds for refusing enforcement:
  o Incapacity to enter into arbitration agreement/invalidity of such agreement
  o No notice/inability to present case (due process)
  o Award deals with disputes beyond their scope
  o Corruption or undue means
  o Evident partiality or corruption
  o Misbehaviour, no extension of hearings in due circumstances, not hearing important evidence
  o Excess of powers
  o Arbitrability
  o "Public policy" exception in the US and elsewhere

Readings:
• New York Convention, art. V
• Gary Born, International Arbitration: Cases and Materials (2011) Chapter 16, Section A at 1125-1130 (including Parson) and Notes at 1131-1136 (posted); Section B.1 at 1136-1147 (including MinMetals)
• Summary of Yukos Capital S.A.R.L. v. OAO Rosneft (Netherlands Supreme Court) (25 June 2010)
• Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L’Industrie du Papier, 508 F.2d 969 (2d Cir. 1974)
• Baxter Int’l Inc. v. Abbot Labs., 315 F.3d 829 (7th Cir. 2003) (Judge Easterbrook’s majority opinion and the four paragraphs of Judge Cudahy’s dissent starting with "The growing fondness for arbitration...")

12. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS II

• Grounds for refusing enforcement (continued)
• Annulled awards and enforcement of awards even when they are annulled
• Possibility of expand/reduce grounds of annulment by contract

Reading:
• Jan Paulsson, Enforcing Arbitral Awards Notwithstanding Local Standard Annulment (LSA)
• Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (“COMMISA”) v. PEMEX–Exploración y Producción (“PEP”), --- F.3d ----, 2nd Cir. (N.Y.), August 02, 2016


13. EXAM PREPARATION CLASS