

Syllabus

TEACHING FACULTY

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COVERAGE

This course provides an introduction to the law, theory and practice of international commercial and investment arbitration, alongside more limited coverage of mediation and conciliation. Arbitration has become the default method of resolving major international commercial and investment disputes. Litigation, other than to force parties to honor the contractual or treaty provision for arbitration, is more the exception in any substantial international commercial transaction or investment dispute.

The course will cover eight main topics: (1) mediation and conciliation, either separately or in advance of arbitration; (2) the borderline to international litigation and the practical preference written into international contracts typically for arbitration, mediation or conciliation in its place; (3) the comparative law side that an international arbitration would seem to the US litigator less a live trial than an appellate or Civil Law court proceeding (no jury, focus on the file and documentation-oriented, very limited discovery, typically confidential proceedings, and run more by the arbitrators than the lawyers on the Civil Law judicial model); (4) coverage of the Convention on the International Sale of Goods (CISG) as the likeliest substantive law governing trade in goods in ordinary international commercial arbitrations; (5) the agreement to arbitrate or treaty rights (particularly, the 1958 New York & ICSID Conventions, alongside sample FTA and investment treaty rights); (6) the selection and role of the arbitrators; (7) the arbitration process; (8) the arbitral award and its enforcement; and (9) international investment arbitrations (typically under bilateral investment treaties reaching back to the 1990s, or more recently under free trade agreements or FTAs, like NAFTA or now USMCA). The role of national courts in the process will also be examined, alongside collateral substantive law areas like sovereign immunity and waivers (particularly involving state-owned enterprises) and basic investment law treaty and customary law principles.

Students can expect to review commentaries, statutes, treaties and case law plus arbitral awards, and there will be some practical exercises in terms of drafting sample agreements and clauses, alongside working through an anonymized arbitration file.

MEETING TIMES & PLACES

The class meets on Mondays and Wednesdays from 02:40-04:05 pm in room 204 of the Law School. I should normally be in my 320 office in the Law School Faculty Suite most afternoons Tuesday and Thursday, meanwhile maintaining formal office hours Monday and Wednesday 10:45-13:00. You are free to drop by whenever you can catch me in my office. Check with me at the end of class or email me anytime to set a physical or zoom meeting time that fits your individual schedule Monday-Friday.

COURSE MATERIALS, CONCEPT AND TAKE-AWAYS

The main text is Gary Born, *International Arbitration: Cases and Materials* (3rd ed, Aspen Casebooks Wolter Kluwer 2022), together with its related documentary supplement Gary Born, *International Arbitration Supplement; Third Edition* (Wolters Kluwer 2022). Additional instructional materials will be accessible via links on the biweekly course assignments pages e-mailed to you. The point of biweekly (every two weeks, not twice a week) assignments is to let you look ahead a bit in your assignments, whenever you have time available. This is a small class, so we shall essay a couple of drafting and file review exercises too, mostly under Chris Campbell as practitioner.

Our first day will be spent looking at international arbitrations generally from 50,000 feet, largely as an overview of the whole course. We shall then spend a day or two on some comparative law background to disabuse you of the idea that international arbitration works just like either international or domestic US litigation, and then move to mediation and conciliation. Thereafter we shall launch into more detailed coverage of international arbitration, covering in turn (1) the legal framework and basic issues for international arbitration agreements, (2) presumptive validity and severability presumption for international arbitration agreements, (3) choice of law for international arbitration agreements, (4) arbitral tribunal's power to interpret the arbitration's scope (competence-competence) and formation of the international arbitration agreement, (5) validity and non-arbitrability for international arbitration agreements, (6) interpretation of international arbitration agreements, (7) non-signatory issues of international arbitration agreements, (8) CISG coverage (two days), (9) overview and arbitral seat in international arbitration procedures, (10) selection and challenge of arbitrators in international arbitration procedures, (11) procedural rules and judicial non-intervention in international arbitration proceedings, (12) procedures and disclosure in international arbitration proceedings, (13) provisional measures in international arbitration proceedings, (14) consolidation, joinder and intervention in international arbitration proceedings, (15) choice of substantive law in international arbitration proceedings, (16) confidentiality and transparency in international arbitration proceedings, (17) investment arbitrations as such (two days), (18) representation and professional responsibility in international arbitration proceedings, (19) annulment of international arbitral awards, and (20) recognition of international arbitral awards (two days). Basically, the topics you see 1-20 will be covered in an individual class unless stated otherwise, and we shall fit into the stream of things where appropriate an extra day for coverage of practical topics.

The documentary supplement contains the main procedural documents relating to international arbitration, namely the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), the 2006 UNCITRAL Model Law on International Commercial Arbitration (plus the relevant US, UK, French and Swiss legislation, as samples from major jurisdictions as arbitration sites), and various arbitration center rules. The casebook documentary supplement does not contain as substantive law the [1980 Convention on the International Sale of Goods](#) (CISG), but you can access that easily online. Further, you might look into as another free online resource the Pace Law School's [Institute of International Commercial Law's CISG database](#).

We shall also have the Law Library place on course reserve some arbitration reference works, to include some conflict of laws references for clarity's sake, since conflicts of law may also come into play in arbitrations. Competent counsel would normally specify applicable law in

written contracts, but it happens that documentation for the transaction that is the subject of the arbitration may be less than clear and complete. Perhaps the client made oral contracts (formally permissible under the CISG), or used minimal domestic form documents without involving the lawyers, etc. Sometimes the documentation consists of a billing invoice, perhaps for an online B2B website where the client did not take the time to read the terms and conditions link, so where exactly did that digital transaction take place if said terms do not specify applicable law, etc.?

Meanwhile, you will notice from the above that you will be working with a lot of treaties constituting both procedural and substantive law concerning arbitrations. Be aware that much as you might need to interpret the domestic FRCP or UCC, you will often be called upon to interpret said treaties, for which purpose you should also make use of the [1969 Vienna Convention on the Law of Treaties](#) (particularly via its articles 31 and 32). The US is not a signatory to the Vienna Convention, however, it takes the position that it simply restates customary law. Be aware that international law strongly favors textual interpretation, so the formal rules employed in interpreting treaties often differ from the domestic statutory interpretation rules you may encounter in purely domestic situations (so preparatory work in the international treaty process is typically not consulted in the same way as domestic legislative history in statutory interpretation). If you need a quick reference for public international law generally, I suggest Rebecca Wallace & Olga Martin-Ortega, *International Law 9th ed*, London: Sweet & Maxwell, 2020, or simply the public international law nutshell on reserve in the Law Library.

ASSESSMENT

Your grade will be based on a final examination, exercises, class presentations and class participation. The primary contributor to your grade will be the final examination (80%), plus to a lesser extent performance on the practical exercises (20%). Your group work will also include for certain exercises presentations of individual CISG problems for class (including powerpoint presentation and fielding questions).

Your group projects will incorporate an element of self-grading business-school style, to make sure that all group members invest the required effort in their work. The point of self-grading in that sense is not to evaluate who had the best ideas within the group, but rather to ensure that all group members do their fair share of the work. Incidentally, practicing lawyers largely work in groups when doing complex work. Practically speaking, both class participation and the self-grading normally could move you up or down no more than half a grade (e.g., from B to B+ in the case of class participation, or perhaps B+ to B on the self-grading side, if you left your groupmates in the lurch).

LEARNING OUTCOMES

This course is designed in particular to assist students in acquiring the following knowledge and skills:

Ability to navigate and understand standard international alternative dispute resolution, particularly involving a mixture of procedural and substantive law approaches that in practice owe more to Civil Law than Common Law approaches to advocacy, including but not limited to finality, very limited appeal rights and enforcement concerns.

Understand the limits and practice of the broader framework of private party international alternative dispute resolution approaches, including diplomatic protection, conciliation, mediation and arbitration.

Understand and work approaches under both treaty and customary law to issues such as exhaustion of local remedies and investment rights.

Ability to research procedural issues in terms of the comparative advantages and disadvantages in proceeding under different arbitration rules (ICC, AAA, etc.), which is determined in designating an arbitral forum and sources most commonly used by practitioners.

Practical aspects of drafting arbitration agreements or clauses in broader agreements.