

**UNIVERSITY OF HOUSTON LAW CENTER
INTERNATIONAL COMMERCIAL ARBITRATION
FALL 2016**

INSTRUCTOR:

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Mondays, August 22—November 28, 2016, 4:00—6:00 p.m.

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22 August

**Preliminary Considerations Bearing On the
Selection of the International Arbitral Process**

The distinctive characteristics of “international” disputes. Comparison of dispute resolution alternatives. Nonbinding processes based upon negotiation contrasted with binding, adjudicative processes: the relative advantages and disadvantages of each. Advantages and disadvantages of transnational litigation as a means of binding, adjudicative dispute resolution. General considerations pertaining to the choice of commercial arbitration as a dispute resolution technique: its advantages and disadvantages. Overview and characteristics of international commercial arbitration, including the severability of the arbitration agreement, the concept of party autonomy, the sources of law that can apply to an international commercial arbitration and an overview of the international commercial arbitral processes.

ASSIGNMENTS:

1. Coe, Chapter 1, Section 1.8
2. Coe, Chapter 2.

3. Coe, Chapter 3, Sections 3.1-3.8
4. Ben H. Sheppard, Jr., “Commercial Arbitration: An Overview of the Preliminary Stages of the Arbitral Process,” (hereafter, “An Overview”) Tab 12 of supplemental materials notebook, Section I.
5. The Xanadu Mock Scenario.

29 August TOPIC: The Five Stages of the International Arbitral Process.

Stage I. The Making and Enforcement of the Arbitration Agreement

A. The Making of the Arbitration Agreement. Considerations in the drafting of the arbitration agreement. Composition of the arbitral tribunal: selection of arbitrators, qualification and number. The law to be applied by the arbitrators. Conduct of the international arbitration. Arbitral rules and institutions. Ad hoc and institutional arbitration. Application of particular standards bearing on the agreement to arbitrate. The distinction between an arbitration agreement and a submission agreement. Basic elements of an arbitration agreement. Importance of choosing the place of arbitration. The law applicable to the arbitration agreement. Procedural and other matters bearing on the arbitration clause.

Sources:

1. Coe, Chapter 6.
2. “An Overview”, Tab 12 of supplemental materials notebook, Section III.

05 September No Class. HOLIDAY.

12 September The Making of the Arbitration Agreement, continued.

19 September New Topic:

B. The Enforcement of the Arbitration Agreement. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as the centerpiece of the international commercial arbitration regime. Obligation of national courts to refer parties to arbitration. Enforcement of agreement to arbitrate under the U.S. Federal Arbitration Act. The motion to stay litigation in the United States courts under the United States Federal Arbitration Act. The

arbitration clause as a “specialized kind of forum-selection clause” and its enforceability in United States courts. Elements required to compel arbitration or stay a lawsuit in a U.S. court. Removal jurisdiction of U.S. courts. Application of the severability principle in determining whether to compel arbitration.

ASSIGNMENTS:

1. Coe, Chapter 5, Sections 5.1-5.5
2. The New York Convention, Coe Appendix 42.
3. U.S. Federal Arbitration Act, Coe Appendix 11.
4. *Buckeye Check Cashing, Inc. v. John Cardegna*, 126 S.Ct. 1204 (2006), Tab 11 of supplemental materials notebook.
5. “The Moth, the Light and the United States Severability Doctrine”, Tab 13 of Supplemental Materials notebook.
6. “An Overview”, Tab 12 of supplemental materials notebook, Sections II and IV.

26 September The Enforcement of the Arbitration Agreement, continued.

03 October Application of the Arbitration Agreement to Non-Signatories.

ASSIGNMENTS:

1. *Isover St. Gobain v. Dow Chem. France*, 1983 J. Droit Int’l 899, Vol. 9, 132 – ICC Yearbook (1983), *aff’d* by Paris Ct. App. (Oct. 21, 1983)
2. *J.J. Ryan & Sons v. Rhône Poulenc Textile SA*, 863 F.2d 315 (4th Cir. 1988)
3. *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), cert. denied, 513 U.S. 869 (1994)
4. *Thomson-CSF, SA v. American Arb. Ass’n.*, 64 F.3d 773 (2d Cir. 1995)
5. Motion for Stay Pending Arbitration, *Marathon Oil Co. et al v. Ruhrgas AG*

6. *Lin, et al v. China Oil and Gas Pipeline Bureau, et al*
7. “An Overview”, Tab 12 of supplemental materials notebook, pages 22-24.

Items 1-5 are in the supplemental materials notebook at Tabs 1-5. Item 6, the Lin case, will be provided separately by Professor Sheppard

10 October TOPIC: Stage II of the International Arbitral Process:

The Selection and Appointment of the Arbitral Tribunal.

Party autonomy: the freedom of the parties to specify the number, qualifications and method of selecting the arbitrators. Number and qualifications of arbitrators. Direct appointment of arbitrators by the parties. The “list method” of selecting arbitrators. Selection of the chair of the tribunal. International arbitral institutions and appointing authorities. Administrative appointments of arbitrators. Ethical standards applicable to arbitrators. Neutral arbitrators (impartial and independent) versus “partisan” party-appointed arbitrators. Historical distinction between U.S. ethical standards and international ethical standards. Factors for consideration in the selection of international arbitrators. The interview with the prospective arbitrator. Communications with the arbitrators during the proceeding. Disclosures of interests and relationships by the arbitrators or prospective arbitrators. Removal and challenge of arbitrators.

ASSIGNMENTS:

1. Coe, Chapter 4, Section 4.13
2. “An Overview”, Tab 12 of supplemental materials notebook, Section V.
3. London Court of International Arbitration (LCIA), Arbitration Rules effective 1 January 1998 (to be furnished by Professor Sheppard). Articles 5-13.
4. Code of Ethics for Arbitrators in Commercial Disputes – 2004 Revision, promulgated by the American Bar Association and American Arbitration Association, Tab 8 of supplemental materials notebook.
5. IBA Guidelines on Conflicts of Interest in International Arbitration (22 May 2004), tab 9 of supplemental materials notebook.

6. Ben H. Sheppard, Jr., “A New Era of Arbitrator Ethics for the United States: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes,” ARBITRATION INTERNATIONAL, Vol. 21, No.1 (2005), tab 10 of supplemental materials notebook.

17 October **TOPIC:** The Selection and Appointment of the Arbitral Tribunal, continued

24 October **NEW TOPIC:** Stage III. Preliminary Proceedings, Including Procedural Orders and Interim Relief.

Commencement of the arbitration under applicable law and under institution rules. Preliminary meetings and hearings. Conduct of preliminary hearing and matters for determination at preliminary hearings. Procedural orders. Interim or partial awards. Provisional remedies, including interim relief. Assess relative advantages of interim relief from the arbitral tribunal versus relief from a court. The availability of “discovery.” Comparison of civil law and common law legal traditions and practices. The implications of “American style” discovery. Production of documents. The availability, if any, of depositions in international arbitration. Exchange by parties of written submissions (“pleadings”). The role and function of witness statements. The International Bar Association (IBA) Rules on the Taking of Evidence in Commercial Arbitration

ASSIGNMENTS:

1. Coe, Chapter 4, Section 4.12
2. Coe, Chapter 9, Sections 9.1 – 9.9.
3. UNCITRAL Notes on Organizing Arbitral Proceedings, Coe Appendix 8.
4. LCIA Arbitration Rules, Articles 14-25.
5. IBA Rules on the Taking of Evidence in International Commercial Arbitration, International Bar Association, 29 May 2010 revision, Tab 7 of supplemental materials notebook.
6. “Confronting the Confrontation of the World’s Two Great Arbitration Systems,” by Ewell E. Murphy, Jr., Vol. 3, No. 2, THE INTERNATIONAL

ARBITRATION NEWS (Summer 2003), Tab 6 of supplemental materials notebook.

31 October **TOPIC:** Preliminary Proceedings, continued.

07 November **TOPIC:** Stage IV. The Evidentiary Hearing on the Merits.

Oral testimony versus written witness statements and other documents. Renew discussion of the importance of cross-cultural differences in international arbitration. Civil law versus common law traditions and unique features of the American system. The role of the arbitral tribunal in the evidentiary hearing: adversarial or inquisitorial. The no-show witness. The use of expert witness, presented by the parties or appointed by the tribunal. The availability and function of cross-examination. Post-hearing submissions, including briefs and oral argument.

ASSIGNMENTS:

1. IBA Rules on the Taking of Evidence in International Commercial Arbitration, International Bar Association, 29 May 2010 revision, Tab 7 of supplemental materials notebook.
2. UNCITRAL Notes on Organizing Arbitral Proceedings, Coe Appendix 8.
3. LCIA Arbitration Rules, Articles 15-25.

14 November NEW TOPIC: Stage V. The Making and Enforcement of the Arbitral Award.

A. The Making of the Arbitral Award.

General considerations bearing on the award. Deliberations of the arbitral tribunal. Remedies included in final awards. Categories of awards. Validity of awards, including the form of the award, contents of the award and time limits. Other considerations bearing on the award, including *res judicata* effect, separate and dissenting opinions, interest, costs. Confidentiality (or not) of awards.

B. Recognition and Enforcement of the Award.

Application of the New York Convention. Procedure for filing a motion for recognition and enforcement of a foreign arbitral award. Grounds for non-recognition of foreign arbitral awards. Attacks on the arbitral award before the courts of the situs of the arbitration. The distinction between vacatur where the award was made and refusal to enforce a foreign award. Factors to consider in choosing the jurisdiction in which to file enforcement actions. Renewed comparison of the advantages of an international arbitral award versus a judgment of a national court.

ASSIGNMENTS:

1. Coe, Chapter 12.
2. LCIA Arbitration Rules 26-29.
3. The New York Convention, Articles III through VI, Coe Appendix 42.
4. U.S. Federal Arbitration Act, Sections 9 through 16, Coe Appendix 11.
5. *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, Tab 14 of Supplemental Materials notebook.

21 November The Making and Enforcement of the Award, continued.

28 November The Making and Enforcement of the Award, continued.

12 December **6:00—8:00 P.M. -- FINAL EXAM—OPEN BOOK**

You may bring your book, class notes and any other printed or written material.