



SOUTH ASIAN UNIVERSITY

Faculty of Legal Studies

LLM/M.Phil/Ph.D

Winter Semester (Fourth Semester)

Course Information

Part I

Course Title:	Law on International Commercial Arbitration
Course Code:	LW00
Course instructor:	Dr Sai Ramani Garimella (ramani@sau.ac.in)
Course Duration:	One Semester
Credit Units:	4 (MSE-40, ESE-40, TPW-20)
Medium of Instruction:	English
Prerequisites:	Nil
Precursors:	Nil
Equivalent Courses:	N/A

Part II

The discussion related to procedural law encompasses the international law on arbitration and the harmonization of the same within the arbitration laws of South Asian nations. The Convention on Enforcement of Foreign Arbitral Awards, 1958, the soft law that significantly impacted legislation efforts in more than seventy countries, the UNCITRAL Model Law on Commercial Arbitration, apart from the special/unique features of the arbitration laws of SAARC countries, would be discussed in this section. Arbitration is an important means of resolving transnational disputes, warranting attention because of its contemporary and increasing practical significance. International arbitration merits scholarly interest and research-based curriculum owing to the fact that of all the dispute settlement methods, it is the only one that attempts at a binding solution in a consensual mechanism, for disputes involving complexities often beyond the scope of ordinary litigation machinery.

This course is designed to equip students with an understanding of the transnational dispute resolution to enable them to advise and represent parties in international arbitral proceedings with confidence. Students preparing to take up arbitration appointments eventually will also benefit from this course. Students of this course, would be better positioned as compared with their peers in their respective jurisdictions as they attempt to gain knowledge of a domain that their State is still discussing. Therefore they would be empowered to participate in capacity building in this domain at various levels – academic and practitioner alike. They would also gain knowledge about the life-cycle of the arbitral process – from drafting an arbitration agreement to enforcement of the arbitral award.

The course begins with a survey of arbitration and related mechanisms of dispute resolution in the international legal system that arises out of commercial, financial, and governmental transactions. Analysis of the arbitration agreement, the process of arbitration, and the enforcement of arbitral awards as well as the common principles governing the disposition of claims, review of the various arbitral tribunals and their rules form a part of this course.

III – Structured course programme

Week 1 - International Arbitration – essential features, contemporary developments

- Uniform law and harmonisation efforts in international commercial law and dispute resolution
- Defining characteristics of international commercial arbitration - Arbitration agreement - Arbitrators - Seat of arbitration - Party autonomy and procedure - Finality of outcomes - International enforcement of arbitration agreements and awards - Arbitral institutions
- Kinds of international arbitration – ad-hoc arbitration and institutional arbitration –
- Confidentiality of the arbitration – distinction from privacy – legislative provisions and judicial opinion on confidentiality and the argument for transparency in commercial arbitration
- Mandating timelines for arbitration - Limiting party autonomy?
- Arbitral claim-funding – access to justice?
- Emergency Arbitrator

Week 2 – International Instruments and National legislations concerning international commercial arbitration

- Geneva Protocol, 1923 and the Geneva Convention, 1927
- The New York Convention
- UNCITRAL model law on International Commercial Arbitration, 1985
- UNCITRAL arbitration rules and notes on organizing arbitral proceedings
- Arbitration and Conciliation Act, 1996, Amendment Ordinance 2015
- Bangladesh Arbitration Act, 2001
- Arbitration Agreements and Foreign Arbitral Awards Act, 2011 (Pakistan)
- Sri Lanka – Arbitration Act, 1995

Week 3 – Law governing the Arbitration and the role of the Seat

Seat of the Arbitration and its difference from the venue of the hearings – *Lex Arbitri*, Procedural Law and the Arbitration Rules – International opinion on the linkages between Arbitration Proceedings and the Seat of Arbitration – Delocalization – theory and practice – Factors influencing the choice of seat of Arbitration – Court’s powers to compel selection of the *Situs*

PT Garuda Indonesia v Birgen Air (2002) 1 SLR 393

Union of India v Videocon Industries Ltd. 2012 (1) Arb. LR 416 (Delhi)

Hilmarton v OTV Cass. Le civ., March 23, 1994, *Revue de L’Arbitrage*. 327 (French *Cour de Cassation*)

Chromalloy v Egypt 939 F Supp907 (DDC 1996) (US District Court of the District of Columbia)

Week 4 – Applicable Substantive Law

Conflict of Laws issues in International Commercial Arbitration – Determination of the Applicable Law to the Arbitration – Freedom of the Parties to choose the law – Absence of such choice – role of the chosen Arbitration Law and the Institutional Rules where parties have not exercised their choice – Law applicable to non-contractual claims – issues of characterization of claims – role of *Depeçage* - Role of *Lex Mercatoria* chosen either by the parties or the arbitral tribunal - deciding cases without law: *Ex aequo et bono* and *amiable composite*.

Clough Engineering Ltd. v Oil & Natural Gas Corporation Ltd. (2007) FCA 881
ICC Case No.9479 (1999)

Week 5 - Arbitration agreement

- Arbitration agreement - Definition and formal requirements - Doctrine of separability - Validity of main contract and arbitration agreement - Law governing main contract and arbitration agreement - Validity of arbitration agreement determined independently of all national laws - Identifying the parties to an arbitration agreement - Non-signatories
- Defined legal relationship - Consolidation, joinder and third-party notices
- Arbitrability - Subjective and Objective arbitrability

- Drafting arbitration agreements - Identity of parties - Obligation to arbitrate - Subject matter and scope of arbitration - Certainty of the seat if designated - choice of *Ad hoc* or institutional arbitration.
- Multi-tiered ADR clauses and enforcement of conditions precedent

Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd. [2014] EWHC 2104 (Comm)

- Pathological arbitration agreements

Premium Nafta Products Ltd. v Fiji Shipping Company Ltd. (2007) 2 ALL ER (Comm) 1053
Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd AIR 2005 SC 3766

Weeks 6-7 - Arbitration Tribunal

- Jurisdiction - Arbitrability - Preliminary issues relating to arbitral jurisdiction - Partial and absolute jurisdictional objections – when can a disputing party raise jurisdictional objections raised by a party -Arbitral tribunal’s *ex officio* examination of jurisdiction - Waiver of the right to invoke an arbitration agreement - non-arbitrability doctrine– evolution of the doctrine - Narrowing of the doctrine in recent times - Contemporary non-arbitrability issues
- *Kompetenz-Kompetenz* - the rule and extent of domestic court intervention
- Effects of jurisdictional decisions
- Effect of a court or arbitral institution’s prima facie examination of jurisdiction - Recourse against an arbitral tribunal’s jurisdictional decision - Scope of court review of arbitral tribunal’s jurisdictional decisions - Subsidiary orders with negative jurisdictional decisions

Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd AIR 2005 SC 3766

- Constitution of the arbitral tribunal - Procedure for constituting the arbitral tribunal – Request for appointment of emergency arbitrators and relief granted by emergency arbitrators - Multiparty arbitrations
- Choosing an arbitrator - Qualifications of an international arbitrator - Chairpersons and sole arbitrators - Party-nominated co-arbitrators - Obligations of arbitrators - Disclosure obligations - General principles of disclosure – IBA rules of disclosure
- Challenges to arbitrators’ appointments - Challenges for partiality or lack of independence - Impartiality and independence distinguished - Procedure - Assessment of impartiality and independence by arbitral institutions - Assessment of impartiality and independence by domestic courts
- Resignation and replacement of arbitrators

Siemens AG and BKMI Industrienlagen GmbH v Dutco Consortium Construction Co., French Cour de Cassation, First Civil Chamber, 7 January 1992.

Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd (2007) 5 SCC 304

Weeks 8-9 - Procedure and Evidence

- Party autonomy - The principle and the Limits - Rules, procedural law and guidelines

- Arbitration rules - Choice of arbitration rules/expedited arbitration rules - Failure to object to non-compliance with chosen procedural rules

AQZ v ARA (2015) SGHC 49

- Role of the courts where the choice has not been clearly expressed in the arbitration agreement

Antrix Corporation Limited v. Devas Multimedia Ltd. 2013(4) ABR176

- Arbitral proceedings - Initiating the arbitration – Party Representation - Preliminary meeting - Terms of reference - Written submissions – IBA Guidelines on Party Representation - Amendment of claims
- Standard of Proof – documentary evidence – expert evidence – role of the tribunal
- Hearings
- Interim measures - Tribunal-ordered interim measures - National laws - Arbitral rules - *Ex parte* preliminary orders
- Court assistance – the territoriality principle and interim measures from the courts at the seat
- Privacy and confidentiality – is there a place for transparency – what is confidential about arbitration – features of the New Zealand and Hong Kong Arbitration Acts – English, Swedish, Australian, American and Singapore’s judicial opinion

Week 10 – The Award

- The New York Convention on Enforcement of Foreign Arbitral Awards – foreign awards - non-domestic awards (Article I)
- arbitral awards - Formalities - Drafting an arbitral award - Scrutiny of the draft award – ICC rules of scrutiny - Finality - Notification or deposit of award
- Definition of an arbitral award - Types of awards - Final awards - Partial awards - Interim or provisional awards, orders or measures - Consent awards - Default awards
- Costs and Fees - Costs of the arbitration & parties’ costs - Payment of costs - composite fees – challenges to arbitrators – failure, can costs be imposed.
- Correction and interpretation of awards

Gingerbread Investments Ltd v Wing Hong Contracting Ltd. (14-3-2008, Hong Kong High Court)

Week 11 – Challenges to the Arbitral Award

Finality of awards - Challenges - State control over awards at seat of arbitration –Annulment proceedings at the seat of arbitration – UNCITRAL Model Law - Failure to make a timely objection - Time limits - Setting aside jurisdictional decisions

Luzon Hydro Corp. v Transfield Philippines Inc. (2004) 4 SLR 705 (High Court)
Case 1062: MAL 12(2), 13 CLOUT Cases (or) <http://www.dis-arb.de/en/>

Week 12 – Recognition and Enforcement of the Award

Recognition and enforcement of an arbitral award - International legal framework - national legislations

- New York Convention, Article V (1) - Party incapacity - agreement invalidity - Violation of due process - Excess of jurisdiction - Irregularity in procedure or composition of arbitral tribunal - Award not yet binding or was annulled.

PR Asuransi Jasa Indonesia (persero) v Dexia Bank SA (2006) 1 SLR 507

Bhatia International v Bulk Trading S.A. AIR 2002 SC 1432

Venture Global Engineering v Satyam Computer Services Ltd. and anr. AIR 2008 SC 1061

TDM Infrastructure Pvt. Ltd. v UE Development India Pvt. Ltd. 2008(2) ARBLR 439(SC)

Bharat Aluminium v Kaiser Aluminium (2012) 9 SCC 552.

- New York Convention, Article V (2) - Arbitrability, enforceability - Public policy exception

Shri Lal Mahal v Progetto Grano Spa 2013(3) ARBLR 1(SC)

ONGC v Western Geco International Ltd. (2014) 9 SCC 263

Associate Builders v Delhi Development Authority, 25 November 2014 [2014 (4) ARBLR 307(SC)]

Westacre Investments Inc. v Jugoimport SPDR Holding Co. Ltd. (1999) 3 AllER 864

Aloe vera of America Inc. v Asianic Food Pvt. Ltd. (2006) 3 SLR 174

Case 1060: MAL 31(2), NYC V(1)(d), (1)(e), (2)(b); CLOUT cases (or) www.dis-arb.de

- Appeal against an enforcement order - *appel-nullité* (nullity appeal)

Decision of the *Cour de Cassation* in appeal on *exequatur* order *Cass. Civ. I^{re}*, 7 Oct. 2015, F-P+B, n° 14-17.490.)

- Fraud and its arbitrability

Swiss Timing Limited v Organising Committee, 2010 Olympic Games, Delhi (2014) 6 SCC 677

A. Ayyasamy v A. Paramasivam, (2016) 10 SCC 386

World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd., (2014) 11 SCC 639

- *Forum non conveniens* - State responsibility for illegal court interference with award
State immunity – recent developments on restricted meaning to State immunity

(1) *Pearl Petroleum Company Limited* (2) *Dana Gas PJSC* (3) *Crescent Petroleum Company International Limited v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm)

Ethiopian Airlines v Ganesh Narain Saboo AIR2011SC3495

SELECT READINGS – BOOKS

Alan Redfern, Martin Hunter & Constantine Partasides, *Redfern and Hunter on International Arbitration* (OUP, 2015, 6th Edition)

Pieter Sanders, *The work of the UNCITRAL on Arbitration and Conciliation* (Kluwer Law International, 2004)

Jan Paulsson, Pieter Sanders & Albert Van den berg (Eds.), *International Handbook on Commercial Arbitration* (Kluwer Law International, 2012)

Albert Van den berg, *Arbitration - The Next Fifty Years* (Kluwer Law International, 2011)

Albert Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1994)

Simon Greenberg *et al*, *International Commercial Arbitration – An Asia-Pacific Perspective* (Cambridge University Press, 2011)

Phillipe Fouchard, *International Commercial Arbitration* (Kluwer, 1999)

Gary Born, *International Commercial Arbitration – Commentary and Materials* (Kluwer, 2014)

Margaret L. Moses. *The Principles and Practice of International Commercial Arbitration* (CUP, 2008)

Loukas A Mistelis, Laurence Shore, Hans Smit, *The World Arbitration Reporter: International Encyclopaedia Of Arbitration Law And Practice* (Juris publishing, 2010)

Katia Fach Gómez and Ana Mercedes Lopez Rodriguez (eds.), *60 Years of the New York Convention: Key Issues and Future Challenges* (Wolters Kluwer, 2019)

Sai Ramani Garimella, *Enforcement of Foreign Arbitral Awards and the Public Policy Exception - Revisiting the New York Convention* (Springer, 2021) (with Bruno Zeller & Gautam Mohanty)

ARTICLES

Albert Jan van den Berg, ‘An Overview of the The New York Convention of 1958’ (2008) http://www.arbitration-icca.org/about/governingboard/MEMBERS/Albert_Jan_van_den_Berg.html

William Park & Alexander Yanos, ‘Treaty Obligations and National Laws – Emerging Conflicts in International Arbitration’ (2006) 58 *Hastings Law Review* 251 https://repository.uchastings.edu/hastings_law_journal/vol58/iss2/2/

William W. Park, ‘Arbitrator integrity - The Transient and the Permanent’ (2009) 46 *San Diego Law Review* 629 https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=2535&context=faculty_scholarship

George A. Bermann, ‘The “Gateway” Problem in International Commercial Arbitration’ (2012) 37 *The Yale Journal of International Law* 1 https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4304&context=faculty_scholarship

Michael Pryles, ‘Limits to Party Autonomy in Arbitral Procedure’ http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf

Peter Gillies, ‘*Forum Non Conveniens* in the context of International Commercial Arbitration’ (2008) *Macquarie Law WP 2008-6 March 2008* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103344

Sai Ramani Garimella, *The Faux Pas of the Automatic Stay Under the Indian Arbitration Act, 1996 - The HCC Dictum, Two Cherry Doctrine, and Beyond* (2021) 21(1) *Pepperdine*

Dispute Resolution Law Journal 195

<https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1475&context=drlj>

Luke Nottage, 'The Procedural *Lex Mercatoria*: The Past, Present and Future of International Commercial Arbitration', <http://ssrn.com/abstract=838028>

Richard H. Kreindler, "Arbitral forum shopping", in *Parallel State and Arbitral Procedures in International Arbitration* (2005)

<http://www.shearman.com/~media/Files/NewsInsights/Publications/2005/07/Arbitral-Forum-Shopping/Files/Publikation/FileAttachment/Arbitral-Forum-Shopping--263.pdf>

Audley Sheppard, "Res judicata and Estoppel" www.ila-hq.org/...cfm/.../446043C4-9770-434D-AD7DD42F7E8E81C6

Sai Ramani Garimella, 'Emergency Arbitrator Awards: Addressing Enforceability Concerns through National Law and the New York Convention' in Katia Fach Gómez and Ana Mercedes Lopez Rodriguez (eds.), *60 Years of the New York Convention: Key Issues and Future Challenges* (Wolters Kluwer, 2019) 67- 83

Sai Ramani Garimella, 'Issues of Jurisdiction, Choice of Law and Enforcement of Foreign Arbitral Awards: An Indian Perspective' in Sai Ramani Garimella & Stellina Jolly (eds.) *Private international law: South Asian State Practice* (Springer, 2017)

Sai Ramani Garimella, 'Arbitration Reforms in India – The Case for Third Party Funding of Arbitral Claims' (2018) 15(2) *Transnational Dispute Management* 1

Sai Ramani Garimella, 'Seat-centric Arbitration: Decoding the Indian Law on the Choice of a Foreign Seat' (2017) 6 *Young Arbitration Review* 29

Sai Ramani Garimella, 'Revisiting Arbitration's Confidentiality Feature' (2016) 20 *CLJP* 97 (Hors Serie)

AFM Maniruzzaman and Ijaz Ali Chishti, "International Arbitration and Public Policy Issues in the Indian Subcontinent: A Look through the English Common Law and International Lenses (2019) 16(2) *Manchester Journal of International Economic Law* 183

Sai Ramani Garimella, 'Interrogating Third Party Funding in Investment Arbitration – The Need for Regulation in the UK and India' (2019) 16(2) *Manchester Journal of International Economic Law* 213

Electronic Resources

<http://www.newyorkconvention.org/>

www.kluwarbitration.com

<https://www.uncitral.org/clout/>

<https://arbitrationacademy.org/>

Kluwer Arbitration blog