

MACQUARIE UNIVERSITY
DIVISION OF LAW
STUDY GUIDE

Year and Semester:	Semester 2, 2008
Unit Code & Unit Name:	BUSL848 International Commercial Arbitration
Credit points:	4 credit points
Unit convener:	Benedict Connors W3A416 – 9850 4883 <u>ben.connors@law.mq.edu.au</u>

Please read this study guide carefully at the start of semester. It contains important information about the unit. If anything in it is unclear, please consult the convener.

1. ABOUT THIS UNIT

The unit examines topics in international commercial arbitration including the nature of mediation and arbitration, the advantages and disadvantages of international commercial arbitration, the role of the arbitration agreement and the significance of the arbitration award, arbitral procedures, the role of the arbitrator, enforcement of awards; and the legal and institutional framework including the role of national law and courts, the UNCITRAL Model Law on International Commercial Arbitration, the UN Convention on the Recognition and Enforcement of International Arbitral Awards, the London Court of International Commercial Arbitration, and the International Chamber of Commerce.

Commercial arbitration is one of the growth areas of legal practice and a widely used dispute resolution method in domestic and international business.

2. TEACHING STAFF

Benedict Connors (contact details above).

3. CLASSES AND STUDY TIMES

Classes will be held weekly during the semester.

The class time will be spent reviewing and discussing the materials identified for reading, within light of unit objectives.

Some fictional case-based problems will be considered, on the basis that the law is better understood in its application to factual situations. The review of the case decisions will reinforce this approach.

The unit will be taught in two alternative modes – intensive (weekend) mode, and weekly. Students may choose either mode. The weekend classes will run from 10.00 am to 5.00 pm, on the stipulated days. The weekly classes will take the form of three hour seminars.

Weekly class: Tuesday 6.00 pm – 9.00 pm, W6B 315 (this class may relocate to W5A 205 in week 2, subject to availability).

Intensive class: Sunday, 2 August; 10.00 am – 5.00 pm and Saturday, 30 August 10.00am – 5.00 pm in C5A 226

The timetable for classes can be found on the University website at:

<http://www.timetables.mq.edu.au> and also at www.law.mq.edu.au

4. REQUIRED AND RECOMMENDED TEXTS AND/OR MATERIALS

Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008.

BUSL848 – Reading Materials 2008 Readings

REFERENCES

(There may be more recent editions of some of the following)

Bagheri, *International Contracts and National Economic Regulations: Dispute Resolution through International Commercial Arbitration*, 2000, Kluwer International

Binder, P, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, 2000, London, Sweet & Maxwell

Born, Gary, *International Commercial Arbitration – Commentary and Materials*, 2001, Kluwer Law International

Broches, A, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, 1990, Deventer, Kluwer

Carbonneau, TE, *Cases and Materials on the Law and Practice of Arbitration*, Juris Publishing, 3rd edn, 2003

Carr, Indira, and Kidner, Richard, *Statutes and Conventions on International Trade Law*, 1st edn, 1993, Cavendish

Coe, J, *International Commercial Arbitration: American Principles and Practice in a Global Context*, 1997, Irving-on-Hudson, NY, Transnational Publishers Inc

- Garnett, R, Gabriel, H, Waincymer, J, Epstein, J, *A Practical Guide to International Commercial Arbitration*, 2000, Dobbs Ferry, NY, Oceana Publications
- Garrett, A *Practical Guide to International Commercial Arbitration*, 2000, Oceana Publications Dobbs Ferry
- Hill, *International Commercial Disputes*, 1998, LLP Reference Publishing
- Redfern, A, and Hunter, M, *Law and Practice of International Commercial Arbitration*, Student Edition, 4 edn, 2004, London, Sweet & Maxwell
- Sarcevic, P, *Essays on International Commercial Arbitration*, 1989, London, Graham and Trotman
- Scaffer, R, Earle, B, and Augusti, F, *International Business Law and its Environment*, 4 edn, 199, Cincinnati, West Educational Publishing Co, chap 4
- Todd, Paul, *Cases and Materials on International Trade Law*, 1 edn, 2003, London, Sweet & Maxwell
- Wilde, and Islam, R, *International Transactions (Trade, Investment and Finance)*, 1993, LBC
- Van Den Berg, A, *The New York Arbitration Convention of 1958*, 1981, The Hague, Kluwer
- Australasian Dispute Resolution Law Journal* (Thomson LBC)
- The Arbitrator and Mediator* (Institute of Arbitrators and Mediators – available online)
- The Dispute Resolution Journal: Journal of the American Arbitration Association (http://findarticles.com/p/articles/mi_qa3923) (Alternatively Google Dispute Resolution Journal)
- Yearbook Commercial Arbitration (Kluwer) (not available at the university library)
- <http://www.lib.uchicago.edu/~llou/forintlaw.html>
(International Commercial Arbitration: Resources in Print and Electronic format, University of Chicago Law School, D'Angelo Law Library)
- www.worldbank.org (ICSID materials)
- www.iccwbo.org/court (ICC Court of International Arbitration materials)
- www.Lcia.com (London Centre for International Arbitration)
- www.pca.cpa.org (Permanent Court of Arbitration at The Hague)
- www.uncitral.org (UNCITRAL instruments)
- www.jus.uio.no/lm/index.html (Lex Mercatoria – international law and e-commerce site)
- www.jurisint.org (Juris International - international conventions, etc)
- www.asil.org/resource/pill.htm (ASIL guide to Electronic Resources for International Law)
- www.laweye.de/ (Eye on International Business Law)
- www.cisg.law.pace.edu (Pace University site on Vienna Convention – “CISG”)

A search for relevant journals can also be made on journalfinder at the University Library web page.

The online law databases available through the university homepage are very useful. These include:

Case Base facilitates searches for Australian legal materials, and provides links to these. (If a case is not available through one of the commercial reports – for example, the library does not subscribe to the Australian Law Reports in electronic format – try the parallel BC..... link.)

Hein Online is for searching journal articles.

LexisNexis AU is for searching local primary (cases, legislation) and secondary (articles) materials.

LexisNexis affords a facility for searching for primary and secondary materials from a number of jurisdictions. Although it focuses on US materials it is also a good source for materials from other jurisdictions.

Westlaw international also provides a trans jurisdictional search facility for primary and secondary materials.

Some tips for using these databases – click the Natural Language option; key in fewer rather than more words, so as to provide a wider net for searches (for example, take one distinctive word in the title of a case, if the full title does not get a hit); use AND or & in order to narrow a search (for example, waiver & arbitration will ensure that documents retrieved contain both words).

5. UNIT WEB PAGE

Study guides and information on this unit can be found at:

<http://www.law.mq.edu.au/html/postgraduate/studyguides.htm>

6. LEARNING OBJECTIVES

The unit aims to develop an appreciation of the nature and role of arbitration in international commercial dispute resolution, an understanding of the legal framework, and the instruments and the institutions that may be resorted to in arbitrating disputes. It aims to develop an understanding of the operation of general and statutory law and of the respective roles of private dispute resolution processes and entities on the one hand, and the public courts on the other. It also aims to develop an understanding of the role of international commercial law instruments and their relationship with the domestic law of the state. The unit also proposes to lay a foundation for the acquisition of practical skills, by focusing on a case study.

7. GENERIC SKILLS

The skills sought to be developed by the unit include critical analysis skills, and problem-solving skills, focused on the law and its institutions.

8. TEACHING AND LEARNING STRATEGY

The classes will take the form of a seminar. Students are encouraged to read ahead of class.

9. ASSESSMENT

Assessment will be based on an essay of 5,000 (to a maximum of 7,000) words.

You may choose your topic, subject to approval by the unit convener.

Otherwise, some suggested topics are:

(1) Review and analyse the Full Federal Court's decision in *Comandate Marine Corp v Pan Australia Shipping*, commenting on the issues raised there of relevance to international commercial arbitration, including waiver of the right to arbitrate, and the validity of the arbitration agreement. (Although the decision does not involve a challenge to an arbitral award or to its recognition or enforcement, it does deal with some of the permitted grounds for challenge, because if an arbitral agreement is invalid then logically any award rendered at the conclusion of proceedings based upon it would be open to challenge.)

(2) Write a memorandum for each of the claimant and respondent, in the hypothetical case (*Equatoria Office Space v Mediterraneo Electrodynamics*) that was the subject of the 14th Vis International Commercial Arbitration moot in Vienna in 2007. (Copyright to this and related materials is owned by the Institute of International Commercial Law – Pace University, NY, USA.) The problem and documents are at www.cisg.law.pace.edu/vis.html – follow the links.

You will need:

The problem

Arbitration Rules of the Court of International Commercial Arbitration, Romania

CISG (Convention on the International Sale of Goods – the Vienna Convention)

Convention on Agency in the International Sale of Goods

IBA Rules on the Taking of Evidence in International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) are in the BUSL848 Reading Materials.

The most highly ranked memoranda for claimant and respondent can be downloaded from this website.

Although you will have access to specimen answers, please write your own independent memoranda. The suggested word limit is between 5,000-7,000 words overall, so allot half your total to each of the two memoranda.

(3) A, a resident corporation of USA, and B, a resident corporation of New South Wales, are party to a contract for the sale of goods. This contract contains an arbitral clause pursuant to disputes involving the contracts are to be arbitrated in Sydney, and Australian law is to apply. Discuss the circumstances from the notification of the dispute through to the rendering of an award and its possible challenge, in which a party or parties could seek to invoke the jurisdiction of the courts. In what circumstances could a party successfully so move. (It is noted that the US is a signatory to the New York Convention on the Enforcement of Foreign Arbitral Awards, and it may be taken that the arbitral regime in the US is similar in its fundamentals to that in Australia.)

Submission of essays:

Internal students – place a hard copy of the essay in the PG box outside room W3A 341, or mail to the unit convener (details below).

External students – submit by post if this is more convenient, either by way of the COE folder provided, or mail directly to the unit convener (Benedict Connors, Division of Law, Macquarie University, NSW 2109).

In addition, assignments must be emailed to postgrad@law.mq.edu.au

DUE DATE: Friday 5.00 pm, 21 November 2008.

10. RELATIONSHIP BETWEEN ASSESSMENT AND LEARNING OBJECTIVES

Assessment is by way of an independent research project, which will foster the acquisition of knowledge specific to the subject matter of the unit, and the development of the more general skills of law-focused data searching, analysis, synthesis and written expression.

11. PLAGIARISM

THE DANGERS OF PLAGIARISM AND HOW TO AVOID IT

You will be guilty of Plagiarism

If you take and use the work of another person without clearly stating or acknowledging your source, you are falsely claiming that material as your own work and committing an act of *PLAGIARISM*. This is a very serious violation of good

practice and an offence for which you will be penalised. If you do any of the following in an assignment, or in any piece of work which is to be assessed, ***without clearly acknowledging your source(s) for each quotation or piece of borrowed material you are guilty of PLAGIARISM.***

- (a) Copy out part(s) of any document, including computer and web-based material;
- (b) Use or extract someone else's concepts or experimental results or conclusions, even if you put them in your own words;
- (c) Copy out or take ideas or summarise from the work of another student, even if you put the borrowed material in your own words;
- (d) Submit substantially the same final version of any material as a fellow student. On occasions, you may be encouraged to prepare your work with someone else, but the final form of the assignment you hand in must be your own independent endeavour.

There is nothing wrong in using the work of others as a basis for your own work, nor is it evidence of inadequacy on your part, provided you **do not attempt to pass off someone else's work as your own.**

All students should acquaint themselves with the University's policy on Plagiarism before commencing any assignments <http://www.student.mq.edu.au/plagiarism/>

12. UNIVERSITY POLICY ON GRADING

The University requires all Divisions to adhere to a policy relating to the distribution of grades across high distinction, distinction, credit and pass grades. This means that on occasion a student's raw mark for a unit (ie, the total of their marks for each assessment item) may not be the same as that which they receive on their transcript. This is because the total raw mark may be scaled up or down so that the grades of all students in each unit sit within the distribution bands set down by the University. The policy does not require that any number of students are to be failed in any unit.

13. LIBRARY SUPPORT FOR POSTGRADUATE STUDENTS IN LAW

Macquarie University Library offers a wide range of services and resources to postgraduate students. Go to the Library website <http://www.lib.mq.edu.au>.

Library services include information on borrowing periods, services to distance students, links to IT Help (the Library's IT support service), and links to training information and training course notes.

Postgraduate students are eligible for a number of additional services. These include the Academic Outreach Librarians (AOLs). The Academic Outreach Librarians are

the first point of contact for Postgraduate students. There is an Academic Outreach Librarian appointed to each Division of the University.

Services offered by your AOL include:

- Providing further information on the library services
- Providing individual and group library resource sessions for postgraduate students
- Advising on new database trials being held in the Library
- Advising on appropriate contacts for specific services, such as requesting items not held at the Library from the Document Supply Service
- Preparation of resource guides in print and on the web
- Reference advice (face-to-face, phone and email)

Further information about these services is available from the **Postgraduates** link, listed under **Additional Services** on the Library homepage.

PRECIS OF TOPICS

[Weeks 1 – 2]

1. INTRODUCTION

Nature and role of arbitration, mediation and litigation; similarities and contrasts, advantages and disadvantages.

Domestic arbitration contrasted to international arbitration.

International arbitration as an amalgam of international law and domestic law.

Rationale for international commercial arbitration; advantages and disadvantages.

2. LEGAL FRAMEWORK

Relevant conventions such as the UNCITRAL Model Law on International Commercial Arbitration, the UN Convention on the Recognition and Enforcement of International Arbitral Awards, national law and courts, and arbitration facilities such as the London Court of International Commercial Arbitration and the International Chamber of Commerce.

[Weeks 3 – 4]

3. CHOICE OF LAW

Applicable laws governing the arbitration.

The law applying to the arbitration agreement

The law applying to the substantive issues in dispute (ie the underlying contract).

The law governing the arbitration proceedings.

The law governing the enforcement of the award.

Possible determinants are: (1) *Law of the Forum* (applies by default); or (2) *Conflict of Laws* principles apply, ie (a) the parties have chosen the applicable law; or (b) the law most closely connected to the contract applies – it is also relevant to ask in this situation whether the law most closely connected to the arbitration is that of the forum where the arbitration takes place.

6. CHOICE OF FORUM CLAUSES

Where the forum agreed by the parties is challenged – doctrine of forum non conveniens

Bremen v Zapata

Vimar Seguros v M/V Sky Reefer

Sinochem International Co v Malaysia International Shipping

[Week 5]

4. ARBITRATION CLAUSES AND SUBMISSION AGREEMENTS

The arbitration agreement will take the form of an arbitral clause in the substantive contract, or (less commonly) an independent agreement.

Validity of the arbitral agreement.

Waiver of the right to arbitrate.

Parties and capacity.

Scope of the arbitration agreement.

The doctrine of separability (where it is alleged that the underlying contract is null and void, does the arbitral clause in this agreement operate to vest jurisdiction in the arbitrator to decide validity, or is it likewise impugned?).

Comandate Marine Corp v Pan Australia Shipping

Gillies and Dahdal, “Waiver of a Right to Arbitrate by Resort to Litigation, in the Context of International Commercial Arbitration”

[Week 6]

5. MODEL CODES FOR ARBITRATION

Ad hoc and institutional arbitration.

UNCITRAL Model Law on International Arbitration.

London Court of International Commercial Arbitration (LCIA)

International Chamber of Commerce (ICC)

International Centre for the Settlement of Investment Disputes (ICSID)

[Week 7]

7. POWERS, DUTIES AND JURISDICTION OF AN ARBITRAL TRIBUNAL

Powers and duties of arbitrator.

Jurisdiction of tribunal.

[Week 8]

8. CONDUCT OF PROCEEDINGS

Choice of place or arbitration, preliminary steps, expedited remedies, written submissions, evidence, and hearings.

9. THE ARBITRAL AWARD

The award.

Distinguishing awards and orders

Remedies, including damages, restitution, specific performance and injunctions.

Categories of awards.

[Weeks 9 – 10]

10. CHALLENGE TO ARBITRAL AWARDS RECOGNITION AND ENFORCEMENT OF AWARDS

Grounds for challenging awards.

Issues of recognition and enforcement of awards.

Relevant provisions in the NY Convention and parallel provisions in the Model Law will be examined.

Gillies, “Enforcement of International Commercial Awards”

Lander Co v MMP Investments

Parsons v Whittemore

In re Chromealloy Aeroservices

Comandate v Pan

European Gas Turbines SA v Westman International

Dalimpex Ltd v Janicki
