

LL4338V/LL5338V/LLJ5338V/LL6338V
Advanced Practicum in International Arbitration

Course Description

As reflected in the title, this is an advanced practice-oriented course designed to build on students' basic knowledge of international commercial and investment treaty arbitration. Using factual scenarios, students will take part in strategy, drafting and advocacy exercises. The emphasis will be on primary materials: statutes, institution rules, treaties, case law, commentary and "soft law" instruments. To maximize the benefit of the exercises, the focus will be on SIAC practice on the commercial side, and on ICSID practice on the investment treaty side. There will be comparative coverage of other commercial and treaty arbitration options, including the ICC and UNCITRAL.

The course will introduce students to the strategic decisions, practice skills, analytical tools and ethics considerations that underlie key phases of an international arbitration. The phases common to commercial and investment treaty arbitration (with necessary variation) include: arbitration clause drafting; commencing arbitration with the Notice of Arbitration/Request for Arbitration; emergency arbitration; constitution of the tribunal, in particular arbitrator selection; the preliminary or case management meeting and related procedural orders and timetables; interim/provisional measures applications; written submissions and with witness statements; drafting decisions/awards (as arbitrator); and finally, proceedings to enforce, set-aside, or annul the award.

***Please note that the readings, release of assignments and deadlines, and special sessions are subject to change. Students will be informed in advance of any such changes. All readings have been uploaded to Canvas.**

Objectives

In the course, students are expected to:

- develop advanced knowledge of international arbitration law and theory;
- appreciate the role of strategy at different phases of international arbitration;
- hone written analysis and advocacy skills;
- conduct a document production exercise;
- experience oral advocacy;
- view the practice from the tribunal's perspective, by drafting awards;
- build contract and treaty interpretation skills;
- build teamwork skills; and
- recognise professional responsibility / ethical issues throughout.

Class 1: The Path to Arbitration (11 January)

This class will review the basic concepts of international commercial and treaty arbitration and provide a basic introduction to the Anchuria-Jempang-NGC dispute Scenario (the “Scenario”, which will evolve and be used throughout the semester). Class discussion and in-class exercises will include consideration of strategic issues such as whether arbitration should be commenced and why, choosing commercial or treaty arbitration and evaluating treaty arbitration options, choosing commercial arbitral institutions and rules, and drafting commercial and treaty arbitration clauses.

Readings

1. Scenario
2. M Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, 3rd ed. 2017) (“Moses”), Chapters 1-4, 11
3. N Lingard, M Mangan and J Choong, *Guide to the SIAC Arbitration Rules* (OUP, 2nd ed. 2018) (“Lingard, Mangan & Choong”), Chapters 1-4

Relevant Institutional Rules*

1. SIAC Arbitration Rules (2016)
2. ICC Arbitration Rules (2021)
3. ICSID Rules (2006)
4. UNCITRAL Rules (2013)

* Please note that these rules will be referenced frequently during the course of the semester and should be reviewed in relevant part for each class.

Class 2: Commencing a Commercial Arbitration (12 January)

After examining the Scenario in depth, this class will focus on two critical early stages in a commercial arbitration: (i) drafting the Notice of Arbitration (NOA), and (ii) constituting the tribunal. There will be a lecture on the strategy and nuts-and-bolts of drafting the NOA, and the highly strategic stage of selecting, appointing and (potentially) challenging arbitrators for conflict or other concerns. Ethical considerations permeate these stages of arbitration. Class exercises will include the evaluation of arbitrator candidates for a SIAC arbitration under the Scenario, using actual bios and curriculum vitae available on the internet.

Readings

1. Scenario
2. Moses, Chapter 6
3. IBA Guidelines on Conflicts of Interest in Arbitration (2010)
4. Lingard, Mangan & Choong, Chapters 5 & 8

Release of Written Assignment 1: Drafting a SIAC Notice of Arbitration – due 9am, 26 January 2021

Class 3: Interim Measures and Emergency Arbitration (19 January)

After reviewing Written Assignment 1, this class will discuss interim or provisional relief in international commercial arbitration, including by way of an Emergency Arbitration which takes place under institutional rules before the tribunal is constituted. The class will discuss the types of interim relief available, how and under what circumstances such relief should be granted, and the overlapping jurisdiction of arbitral tribunals and the courts. Class exercises will include strategic considerations of how and whether an application should be made for interim relief in the context of the Scenario, discussion and advocacy based upon the redacted submissions from an Emergency Arbitration case, and deliberations as to the proper result in that case.

Readings

1. Scenario
2. G Born, *International Commercial Arbitration* (Kluwer, 3rd ed. 2020) (“Born”), Chapter 17
3. Lingard, Mangan & Choong, Chapter 13
4. Redacted Submissions from Emergency Arbitration Case (provided at end of Class 2)

Release of Written Assignment 2: Drafting an Emergency Arbitration Application – due 9am, 26 2023

Class 4: The Anatomy of an Arbitration (26 January)

After reviewing Written Assignment 2 and discussing the actual result in the real Emergency Arbitration, the class will explore in depth the anatomy of a commercial arbitration. There will be a lecture on the stages of a commercial arbitration claim, with a particular focus on how these stages and procedures are determined at the outset of the arbitration. We will then cover the Preliminary Meeting in an SIAC arbitration, which convenes the tribunal and parties for the first time and leads to the important Procedural Order No. 1. The discussion will include strategic considerations of the format of the submissions (memorial versus pleading style) and the importance of factual and expert witnesses in the proceedings. Class exercises will include watching and critiquing relevant scenes from the SIAC training videos, small-group drafting of a Procedural Order No. 1, and utilising various tools of the SIAC / institutional rules to resolve procedural disputes which arise from the Scenario problem.

Readings

1. Scenario
2. Moses, Chapter 7
3. Lingard, Mangan & Choong, Chapter 9
4. UNCITRAL Notes on Organizing Arbitral Proceedings

Class 5: Commencing a Treaty Arbitration (2 February)

This class will address the early stages of a treaty arbitration, including the drafting of a Request for Arbitration and constituting the tribunal. Following a lecture on the ICSID procedure and practice, and a review of the relevant ethical considerations, the class exercises will involve strategic considerations as to the types of treaties under which an investment arbitration may be commenced.

Readings

1. S Greenberg, C Kee and R Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Kluwer, 2nd ed. 2021 (forthcoming)), Chapter 10 (not to be circulated in any form without permission of the authors)
2. L Reed, J Paulsson and N Blackaby, *A Guide to ICSID Arbitration* (Kluwer, 2nd ed. 2011) ("Reed, Paulsson, & Blackaby"), Chapter 3
3. ICSID Convention, Articles 36-49
4. ICSID Arbitration Rules, Rules 1-12
5. P Sands, "Conflict of Interest for Arbitrators and/or Counsel" in M Kinnear et al (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer, 2016) ("Kinnear"), Chapter 47

Class 6: Treaty Arbitration – Early Stages (9 February)

This class will start with a lecture on the core substantive protections in the Scenario: investment treaty protections (expropriation, fair and equitable treatment, full protection and security), the basic principles of state responsibility and treaty interpretation. We will then cover the First Session in an ICSID arbitration, including the filing of Preliminary Objections. Class exercises will include conducting a mock ICSID First Session under the Scenario and small-group drafting of a Procedural Timetable No. 1.

Readings

1. Y Fortier and S Drymer, "Indirect Expropriation" in Kinnear, Chapter 25
2. L Reed and S Consedine, "Fair and Equitable Treatment: Legitimate Expectations and Transparency" in Kinnear, Chapter 20
3. S Alexandrov, "The Evolution of the Full Protection and Security Standard" in Kinnear, Chapter 23
4. ILC Articles on State Responsibility for Internationally Wrongful Acts, Articles 4-11
5. Vienna Convention on the Law of Treaties, Articles 31-33
6. ICSID Convention, Articles 41-47
7. ICSID Arbitration Rules, Rules 13-28, 39 & 41

Release of Written Assignment 3: Drafting an ICSID Request for Arbitration – due 9am, 16 February 2023

Class 7: Expedited Arbitration and Early Dismissal (16 February)

After reviewing Written Assignment 3, this class will focus on specialised procedures available in commercial arbitration for expedited arbitration, bifurcation of jurisdiction / merits / quantum issues, and early dismissal of arbitration claims for manifest lack of merit. Class exercises will include small-group discussions on the application of expedited procedures, the procedural and strategic advantages and/or disadvantages of bifurcation, and the standards to be applied in determining an application for early dismissal. The students will discuss and debate a real case of early dismissal based on redacted submissions.

Readings

1. Lingard, Mangan & Choong, Chapters 6 & 11
2. TBD
3. Redacted Submissions on Early Dismissal Application

Release of Written Assignment 4: Drafting a Decision on an Early Dismissal Application – due 9am, 23 February 2023

Class 8: Oral Advocacy and Decision-making (2 March)

In this class, the students will practice oral advocacy and decision-making skills in a moot hearing of the Application for Early Dismissal. The class will be divided into two teams (Claimant and Respondent) and a tribunal. Using the redacted submissions discussed in Class 7 (which formed the basis for Written Assignment 4), the Parties will argue for and against the Application before the tribunal, and the tribunal will then deliberate and decide the Application. At the end of class, we will discuss and provide feedback on both the advocacy and Written Assignment 4, and discuss the actual result in the case.

Readings

1. Redacted submissions on Early Dismissal Application
2. D Bishop and E Kehoe, *The Art of Advocacy in International Arbitration* (Juris, 2010) (“Bishop & Kehoe”), Introduction and Chapters 3, 8, 9, 13 & 14
3. IBA Guidelines on Party Representation in International Arbitration

Class 9: Fact Witness Evidence (9 March)

In this class, we examine the ways to collect fact witness evidence, with reference to the IBA Rules on the Taking of Evidence. Class exercises will include mock fact witness interviews and outlining a witness statement. The witness statements will be used for the cross-examination exercise in Class 10.

Readings

1. N Ulmer, "The Witness Statement as Disclosure", Kluwer Arbitration Blog, 26 December 2014
2. P Bienvenu and M Valasek, "Witness Statements and Expert Reports" in Bishop & Kehoe, Chapter 10
3. IBA Rules on the Taking of Evidence in International Arbitration (2010)

Release of Written Assignment 5: Drafting Preliminary Objections under ICSID Rules – due 9am, 23 March 2021

Class 10: Cross-examination and Expert Witness Evidence (16 March)

After reviewing Written Assignment 5, this class will turn its focus to cross-examination of factual and expert witnesses, again using the SIAC and ICSID Rules under the Scenario as well as witness statements prepared in Class 9. It will also compare fact evidence with expert evidence. The class exercise will be mock cross-examinations.

Readings

1. M Hwang, "Ten Questions Not to Ask in Cross-examination in International Arbitration", in Bishop & Kehoe, Chapter 17
2. E Keoh, "Cross-examination and Re-cross in International Arbitration", in Bishop & Kehoe, Chapter 16
3. L Newman, "Cross-examination in International Arbitration – Opportunities and Challenges", in L Newman and R Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration* (Juris, 3rd ed. 2014), Chapter 28
4. L Newman and T Nelson (eds.), *Take the Witness: Cross-Examination in International Arbitration* (Juris, 2nd ed. 2019), Chapters 1, 2, 5, 9, 10, 13, 23 (skim)

Release of Written Assignment 6: Drafting a Response to Preliminary Objections under ICSID Rules – due 9am, 30 March 2021

Class 11: Document Production (23 March)

After reviewing Written Assignment 6, this class will start with a lecture on the much-misunderstood purpose and basics of document production or “discovery” in international arbitration, with focus on the IBA Rules on the Taking of Evidence. The class will undertake a document discovery exercise based upon the Scenario using the Redfern Schedule, including drafting requests for the production of documents, objections to such requests (if any) and decisions on the objections. In addition the class will consider alternatives to the Redfern Schedule, including the Armesto Schedule.

Readings

1. IBA Rules on the Taking of Evidence in International Arbitration (2010)
2. Born, Chapter 16.
3. Template Redfern Schedule
4. Template Armesto Schedule
5. Sample Redfern Schedule

Class 12: Oral Arguments on ICSID Preliminary Objections (30 March)

There will be no lecture during this class. Oral arguments will be heard. Students may choose to have their oral argument assessed and have this grade replace their lowest written assignment grade. The specific instructions will be given during the course.

Class 13: Post-Award Proceedings (1 April)

In the final class, we will review why “final and binding” arbitration awards are not necessarily final and binding – where setting-aside and enforcement proceedings are commenced in respect of commercial awards and annulment proceedings are instituted in respect of ICSID awards.

Readings

1. New York Convention
2. Singapore International Arbitration Act, Sections 24 & 29-31
3. Reed, Paulsson, & Blackaby, Chapters 5 & 6
4. ICSID Convention, Articles 48-55
5. ICSID Arbitration Rules, Rules 49-55

Advanced Practicum in International Arbitration Schedule (AY22/23 – Sem 2)

NUS Week	Date	Class	Remarks
1	Wed, 11 Jan 2023 (1-4pm)	The Path to Arbitration	
1	12 Jan 2023	Commencing a Commercial Arbitration	Written Assignment 1: Draft SIAC Notice of Arbitration – due 9am, 26 January 2023
2	19 Jan 2023	Interim Measures and Emergency Arbitration	Written Assignment 2: Drafting an Application for Emergency Arbitration (SIAC) – due 9am, 2 February 2023
3	26 Jan 2023	The Anatomy of an Arbitration	
4	2 Feb 2023	Commencing a Treaty Arbitration	
5	9 Feb 2023	Treaty Arbitration – Early Stages	Written Assignment 3: Drafting an ICSID Request for Arbitration – due 9am, 23 February 2023
6	16 Feb 2023	Expedited Arbitration and Early Dismissal	Written Assignment 4: Drafting Decision on an Early Dismissal Application – due 9am, 9 March 2023
Recess	23 Feb 2023	No class	
7	2 Mar 2023	Oral Advocacy and Decision-Making	
8	9 Mar 2023	Fact Witness Evidence	Written Assignment 5: Drafting Preliminary Objections (ICSID Rules) – due 9am, 23 March 2023
9	16 Mar 2023	Cross-examination and Expert Witness Evidence	Written Assignment 6: Drafting a Response to Preliminary Objections – due 9am, 30 March 2023
10	23 Mar 2023	Document Production	
11	30 Mar 2023	Oral Arguments on ICSID Preliminary Objections	
12	Sat, 1 Apr 2023 (9am – 12pm)	Post-Award Proceedings	