

# INTERNATIONAL COMMERCIAL ARBITRATION

(10-17-16)

**Monday & Wednesday, 9:00-10:15 a.m.**

**Room G20**

**Fall 2016**

**Professor Brand**

**office: Room 319**

**rbrand@pitt.edu**

## SYLLABUS

### REQUIRED MATERIALS:

- 1) **Gary B. Born, International Arbitration: Law and Practice (2<sup>nd</sup> ed., 2016, Kluwer Law International) (ISBN 978-90-411-6637-1)**
- 2) **The Arbitration Rules for the 2017 Vis Moot will be the Rules of Chamber of Commerce Brazil-Canada (CAM-CCBC). You will be responsible for reading and understanding those portions of this set of Arbitration Rules which relate to each assignment in the Born text.**
- 3) **Flechtner, Harry M., Two Lectures Introducing the CISG, for the United Nations Audiovisual Library of International Law, available at:  
<http://legal.un.org/avl/ls/FlechtnerIELvideo1.html> and  
<http://legal.un.org/avl/ls/FlechtnerIELvideo2.html>**
- 4) **Other materials important to the course will be posted on Professor Brand's course website at professorbrand.wordpress.com.**

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### Goals for the course:

- 1) Develop an understanding of the law of international commercial arbitration and of the UN Convention on Contracts for the International Sale of Goods (CISG)
- 2) Develop skills in legal analysis and problem solving
- 3) Improve research and writing skills, in particular with international materials necessary to the presentation of arguments in international arbitration
- 4) Improve oral presentation skills

### Grading will be based on the following:

- 1) **Vis Team Candidates:** For students who have not been on a Vis Moot team in the past, and who are not licensed (or eligible to be licensed) in their home country, the course grade will be determined as follows: class participation (15%); student research paper on an issue in the Vis Moot problem (30%); team memorandum (25%); student presentation of moot argument (30%).
- 2) **LL.M. Arbitration Moot Team Candidates:** For LL.M. students, the course grade will be determined as follows: class participation (15%); student research paper memo on an issue in the LL.M. Moot problem (30%); LL.M. team memorandum (25%); student presentation of LL.M. Moot argument (30%). Students participating in this variation will prepare documents for the LL.M. Arbitration Moot, rather than the Vis Moot, even though the syllabus refers only to the Vis Moot throughout.

- 3) **Others:** For students who may not be eligible for either the Vis or the LL.M. Moot, or who have requested to use the course to prepare for law development or teaching in their home country, the course grade will be determined as follows: class participation (15%); student research paper on an issue in the Vis Moot problem (30%); preparation of either a course syllabus for an International Commercial Arbitration course or an additional paper and presentation on an important international arbitration issue (30%); class presentation of syllabus or paper (25%).

**For all students: each student will draft an arbitration clause based on the Drafting Problem posted on the course website. While the draft will not be graded, it will be discussed in class on Sept. 7, and failure to complete the assignment will result in a full letter grade reduction of a student's final grade for the course.**

### **General Course Description:**

This course will begin with coverage of basic aspects of the law of international commercial arbitration. In order to provide a practical context for consideration of arbitration law and policy, we will work with the problem for the Vis International Commercial Arbitration Moot that will become available the first week in October. After a review of the problem, we will catalogue the major issues and each student will be assigned a topic from that list for his or her course paper. We will work through all of the arbitration procedure issues as a class, using the contributions of each student to build the arguments and analysis for each side in the Vis problem. We will also cover the substantive law issues raised under the United Nations Convention on Contracts for the International Sale of Goods (CISG) in order to add substantive law context to the arbitration materials and to prepare so that student teams can draft the Claimant's Memorandum for the Vis problem. Students will work together to prepare the Claimant's Memo for the Vis problem. Each student will also present a portion of the Vis argument in a mock arbitration at the end of the semester. **The Pitt Law Vis Moot team for the 2017 Moot will be selected at the end of the semester from the J.D. students in the course, and the Pitt Law LL.M. International Commercial Arbitration Moot team will be selected from the LL.M. students in the course.**

### **Aug. 29              Introduction to International Arbitration**

**Readings:      Born, 1-44 (Chapter 1); New York Convention (Annex I to Born)**

Be ready to answer the following questions:

- How is consent to arbitration demonstrated?
- Which is better: a short arbitration clause or a detailed arbitration clause?  
Why?
- What is a "pathological arbitration clause?"
- When should you choose institutional arbitration and when should you choose ad hoc arbitration?
- How is an arbitration proceeding different from a court proceeding?
- Does arbitration block access to justice by preventing a court from hearing the case?
- How is enforcing an arbitral award different from enforcing a judicial decision? Is it different for foreign and domestic arbitration?

**Aug. 31**

**International Arbitration Agreements**

**Formation and Validity of International Arbitration Agreements**

**Readings: Born, 45-90 (Chapters 2 and 3); New York Convention**

Be ready to answer the following questions:

- What provisions of the New York Convention apply to the agreement to arbitrate? How do those provisions address the issues of existence, formal validity, and substantive validity of an arbitration agreement?
- What law governs questions of whether an arbitration agreement is valid (or “null and void”)?
- What law governs the question of whether a party has consented to an arbitration agreement (*i.e.*, whether an arbitration agreement exists)?
- Who decides:
  - the question of whether an arbitration agreement exists?
  - the question of whether an arbitration agreement meets formal validity requirements?
  - the question of whether an arbitration agreement is “null and void?”
- When can a party challenge an arbitration agreement in a court? In an arbitral tribunal?

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**Sept. 5**

**(Labor Day - no class)**

**Drafting Assignment:** Each student will draft an arbitration clause based on the Drafting Problem found on the course website. While the draft will not be graded, it will be discussed in class on Sept. 7, and failure to complete the assignment will result in a full letter grade reduction of a student’s final grade for the course. Student drafts must be delivered to Professor Brand by email ([rbrand@pitt.edu](mailto:rbrand@pitt.edu)) no later than 5:00 p.m. on Sept. 6

**Sept. 7**

**Interpretation of Arbitration Agreements**

**International Arbitration Agreements: Non-Signatory Issues**

**IBA Guidelines for Drafting an International Arbitration Agreement**

**Readings: Born, 91-106 (Chapters 4 and 5); IBA Guidelines for Drafting an International Arbitration Agreement**

**Discussion of student arbitration clause drafts**

Be ready to answer the following questions:

- Does an arbitration agreement have to be exclusive? Why or why not? Is it either possible or advisable to draft an arbitration clause that would give parties the option of going to court instead of arbitration?
- Are there mandatory rules in arbitration from which parties may not derogate? Should there be?
- When can third parties be joined in an arbitration proceeding? What is the effect of such joinder or non-joinder? How does the question of joinder affect the choice between an arbitration agreement and a choice of court clause in an international contract?

**Sept. 12**

**Annulment of International Arbitration Awards**

**Readings:** Born, 311-374 (Chapter 16); New York Convention

Be ready to answer the following questions:

- What body may annul an arbitration award, and what are the grounds upon which an award may be annulled?
- What are the effects of a judicial annulment of an arbitration award? Can such an award still be recognized and enforced in another state? Can such an award be ignored in a recognition action in another state?
- Does annulment impose a special kind of supervision by the courts in the seat of arbitration on the arbitration process?

**Sept. 14**

**Recognition and Enforcement of International Arbitral Awards**

**Readings:** Born, 375-416 (Chapter 17); New York Convention

Be ready to answer the following questions:

- When will an award be recognized by a court under the New York Convention? When may an award be denied recognition? Who may raise a basis for non-recognition under the New York Convention? What awards are subject to the rules of the New York Convention?
- What does it mean if a Contracting State has made an Art II declaration that it will only recognize awards that are "commercial under the national law of the state making such a declaration?"
- When might a party want to consider the Article V bases for non-recognition? Can they be applied at the jurisdictional phase of arbitration proceedings?
- What effect do the Article IV formal requirements have in the award recognition phase?

**Sept. 19**

**International Arbitral Proceedings: Legal Framework**

**Selection and Removal of Arbitrators in International Arbitration**

**Readings:** Born, 107-154 (Chapters 6 and 7)

Be ready to answer the following questions:

- What is the importance of the place ("seat") of arbitration?
- What should a party know about a country's laws before that country is chosen as the seat for arbitration?
- How can the parties to an arbitration agreement provide that arbitrators be chosen? To what extent is this regulated by the arbitration rules and the place of arbitration chosen by the parties?
- Who can and cannot be chosen to be an arbitrator? What conditions might limit whether an individual may be appointed as an arbitrator? What type of past or current relationship is evidence of a lack of impartiality or independence?
- Are impartiality and independence the same thing? If not, what is the difference?
- What recourse is available to challenge an appointment after it has been made?

<b>Sept. 21</b>	<b>Procedural Issues in International Arbitration</b> <b>Readings:</b> Born, 155-184 (Chapter 8) <b>Legal Representatives and Professional Responsibility in International Arbitration</b> <b>Readings:</b> Born, 267-278 (Chapter 14) Be ready to answer the following questions: <ul style="list-style-type: none"> <li>-To what extent can (and should) a court be able to influence the course of arbitration proceedings?</li> <li>-What are the basic procedural steps in an arbitration proceeding? How are they similar to or different from the basic procedural steps in litigation?</li> <li>-What are the most significant procedural differences between litigation and arbitration, and how can our should those differences affect the choice between an arbitration clause and a choice of court clause in a contract?</li> <li>-What are the basic ethical obligations of counsel in arbitration proceedings? Do they differ from counsel's ethical obligations in litigation?</li> <li>-What are the basic ethical obligations of an arbitrator? What law determines those obligations?</li> </ul>
<b>Sept. 23</b> <b>Friday</b>	<b>International Arbitration Roundtable (Attendance Required)</b> <b>12:30 - 5:00 p.m. Room 111</b>
<hr/> <b>Sept. 26</b>	<b>Disclosure and Evidence-Taking in International Arbitration</b> <b>Confidentiality and Transparency in International Arbitration</b> <b>Readings:</b> Born, 185-202 (Chapters 9 and 10) Be ready to answer the following questions: <ul style="list-style-type: none"> <li>-If arbitration is to be efficient and time-sensitive, should the same types of rules of evidence apply as apply in litigation in U.S. courts? Why or why not?</li> <li>-Should a party be able to use national courts to supplement the taking of evidence in arbitration proceedings?</li> <li>-When should arbitration proceedings be confidential? When should they be open and transparent? How can arbitration rules, or the law of the seat, be drafted to properly represent this distinction?</li> </ul>
<b>Sept. 28</b>	<b>Provisional Measures in International Arbitration</b> <b>Multiparty and Multicontract Issues in International Arbitration</b> <b>Readings:</b> Born, 239-266 (Chapters 11 and 12) Be ready to answer the following questions: <ul style="list-style-type: none"> <li>-What aspects of the arbitration clause affect a party's ability to obtain provisional measures? How should you draft an arbitration clause to insure that proper provisional measures are available?</li> <li>-Can an arbitral tribunal award provisional measures? If so, can the same tribunal enforce those measures? What is the proper role of the tribunal and the courts in the granting and enforcement of provisional measures?</li> <li>-Should a court be able to grant provisional measures in aid of arbitration</li> </ul>

- that affect a party's assets outside the territorial jurisdiction of that court?  
-If arbitration is based on consent, when can a third party be compelled to participate in arbitration proceedings? How does the answer to this question affect the decision to include either an arbitration clause or a choice of court clause in an international commercial contract?  
-When should arbitration under two separate arbitration agreements be consolidated before a single tribunal?

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**Oct. 3**

**Choice of Substantive Law in International Arbitration**

**Readings:** Born, 233-260 (Chapter 13)

**International Arbitral Awards: Legal Framework**

**Readings:** Born, 279-310 (Chapter 15)

Be ready to answer the following questions:

- If the parties have not chosen a substantive law to govern the arbitration proceedings, how will the arbitrators determine the appropriate applicable law?
- Should arbitrators be able to ignore the applicable substantive law that would be applied by a court? If so, when?

**Oct. 5**

**Analyzing a Vis Moot Problem; Review of the 2017 Vis Moot Rules**

**(Assign students to teams for work that will begin on Oct. 7 – discuss format for Vis Moot Memoranda)**

**Readings:** 2017 Vis Moot Rules; 2016 Pitt Vis Moot Memoranda (on website)

**-Each student will be assigned to a team of 2-3 students to work on the Problem**

**-Each student team must meet and review the Problem and begin preparation of assignments which are to be delivered by email no later than 5:00 p.m. on Sunday, Oct. 9 to [rbrand@pitt.edu](mailto:rbrand@pitt.edu) and [flecht@pitt.edu](mailto:flecht@pitt.edu). That submission must include:**

- 1) An outline of headings for Claimant's argument (*i.e.* draft table of contents - reflecting the issues in the case)
- 2) A timeline of the case

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**Oct. 7**

**2017 Vis Moot Problem Distributed Online at <https://vismoot.pace.edu>**

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**Oct. 10**

**The 2017 Vis Moot Problem and Rules: CISG Issues (with Professor Flechtner)**

In preparation for this class, you must view the videos of the Two UN Lectures Introducing the CISG:

<http://legal.un.org/avl/ls/FlechtnerIELvideo1.html> and

<http://legal.un.org/avl/ls/FlechtnerIELvideo2.html>

Documents: CISG; 2012 CISG Digest; 2017 Vis Moot Problem

**Each work team must submit:**

- 1) Outline of headings for substantive issues for Claimant's argument
  - 2) A timeline of the case
- to be delivered by email to Brand and Flechtner **by 5:00 p.m. on Sunday, Oct. 9 to [rbrand@pitt.edu](mailto:rbrand@pitt.edu); [flecht@pitt.edu](mailto:flecht@pitt.edu)**

<b>Oct. 12</b>	<p><b>The 2017 Vis Moot Problem and Rules: CISG Issues</b> (with Professor Flechtner)</p> <p>Documents: CISG; 2012 CISG Digest; 2017 Vis Moot Problem (<a href="https://vismoot.pace.edu/">https://vismoot.pace.edu/</a>)</p> <p><b>Each work team must submit:</b></p> <ul style="list-style-type: none"> <li>1) Revised Outline of headings for substantive issues for Claimant's argument</li> <li>2) Revised detailed presentation of Claimant's substantive argument</li> <li>3) List of requests for clarification</li> </ul> <p>-to be delivered by email to Brand and Flechtner <b>by 5:00 p.m. on Tuesday, Oct. 11 to <a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>; <a href="mailto:flecht@pitt.edu">flecht@pitt.edu</a></b></p>
<hr/> <b>Oct. 17</b>	<p><b>Discussion of each team's:</b></p> <ul style="list-style-type: none"> <li>1) Revised Outline of headings for Claimant's argument</li> <li>2) Revised Timeline of the case</li> <li>3) Revised List of requests for clarification</li> </ul> <p>-to be delivered by <b>5:00 p.m. Oct. 16 to <a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>; <a href="mailto:flecht@pitt.edu">flecht@pitt.edu</a></b></p> <p><b>-Discussion of major list of topics in the Moot problem</b></p>
<b>Oct. 19</b>	<p><b>Assignment of Student Research papers</b></p> <p><b>Each student team must submit:</b></p> <ul style="list-style-type: none"> <li>1) Revised Outline of headings for Claimant's argument</li> <li>2) Revised Timeline of the case</li> <li>3) Completed first paragraph for each major heading</li> <li>4) Revised List of requests for clarification</li> </ul> <p>-to be delivered by email <b>by 5:00 p.m. Oct. 18 to <a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>; <a href="mailto:flecht@pitt.edu">flecht@pitt.edu</a></b></p> <p><b>-Discussion of major list of topics in the Moot problem</b></p> <p><b>-Distribution of student research paper presentation schedule</b></p> <p><b>-Preparing the Memorandum:</b></p> <p style="padding-left: 20px;">Student work teams will be combined into 2 memorandum groups</p> <p style="padding-left: 20px;">Each group will prepare a full draft Claimant's Memorandum. The first draft will be submitted to Professor Brand (<a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>) by 5:00 p.m. on Sunday, Oct. 23.</p>
<hr/> <b>Oct. 24</b>	<p><b>In class work day for group drafts of the Claimant's Memorandum</b> (attendance required)</p> <p><b>Each group must submit a draft memorandum for Claimant</b> to be delivered by email <b>by 5:00 p.m. Oct. 25 to <a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a></b></p>
<b>Oct. 26</b>	<p>Discussion of group memoranda and requests for clarification</p> <p><b>Completion of list of requests for clarification - in accordance with Procedural Order Number 1</b></p>
<hr/> <b>Oct. 27</b>	<p><b>Deadline for submission of requests for clarification to Vienna</b></p>

<b>Oct. 31</b>	<b>Presentation of student research papers</b> <b>Full Draft of Claimant's Memorandum to have been submitted by 5:00 p.m. on Oct. 30 to Professor Brand (<a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>)</b>
<b>Nov. 2</b>	<b>Presentation of student research papers</b>
<b>Nov. 7</b>	<b>Presentation of student research papers</b> <b>Full Second Draft of Claimant's Memorandum to have been submitted by 5:00 p.m. on Nov. 6 to Professor Brand (<a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>)</b>
<b>Nov. 9</b>	<b>Presentation of student research papers</b>
<b>Nov 14</b>	<b>In-Class Work Day for preparation of Final Draft of Claimant's Memorandum</b> <b>-Final group draft of Memorandum to be submitted by 5:00 p.m. on Nov. 18 to <a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>, and <a href="mailto:flecht@pitt.edu">flecht@pitt.edu</a></b>
<b>Nov. 16</b>	<b>Oral Argument Training - Discussion of parts of oral argument and issues of style, etc.; Readings: Katerina's Vis Tips</b>
<b>Nov. 18</b>	<b>Final group draft of Memorandum to be submitted by 5:00 p.m. on Nov. 18 to Professor Brand at <a href="mailto:rbrand@pitt.edu">rbrand@pitt.edu</a>, and Professor Flechtner at <a href="mailto:flecht@pitt.edu">flecht@pitt.edu</a></b>
<b>Nov. 21</b>	<b>Oral Argument Preparation - Each Student will prepare and present:</b> <ul style="list-style-type: none"> <li>1) An argument opening, including:           <ul style="list-style-type: none"> <li>a) an introduction,</li> <li>b) a "hook" to get the tribunal's attention, and</li> <li>c) a roadmap of the argument, and</li> </ul> </li> <li>2) A closing</li> </ul>
<b>Nov. 24</b>	<b>No class - Thanksgiving holiday</b>
<b>Nov. 28</b>	<b>Oral Argument Preparation (continued)</b>
<b>Nov. 30</b>	<b>Oral Argument Preparation (continued)</b>
<b>Dec. 2</b>	<b>(Friday, 10:30 a.m. - 12:30 p.m./1:30 - 3:30 p.m.)</b> <b>Each student will present a 12 minute argument to Professors Brand and Flechtner. Each student shall present the Claimant's argument on one (1) of the three issues listed in the Procedural Order</b>
<b>Dec. 3</b>	<b>Announcement (by email) of the members of the 2017 Pitt Vis Moot Team and Pitt LL.M. Moot Team</b>
<b>Dec. 5</b>	<b>9:30 a.m. - Meeting of Pitt 2017 Vis Moot team; Pitt LL.M. Moot Team</b>
<b>Dec. 7</b>	<b>Presentation of Non-competitor research papers - last day of class</b>
<b>Dec. 8</b>	<b>Claimant's Memorandum due to Vienna</b>

**Disability.** If you have a disability for which you are or may be requesting accommodation, you should contact both the office of the Associate Dean of Students in the Law School (Dean Kevin Deasy; [deasy@pitt.edu](mailto:deasy@pitt.edu)) and the University Office of Disability Resources and Services (<http://www.drs.pitt.edu>), 216 William Pitt Union, (412) 648-7890/(412) 383-7355 (TTY), as early as possible in the semester. DRS will verify your disability and determine reasonable accommodations for this course. The Associate Dean of Students will oversee the implementation of accommodations. Due to the anonymous grading policy, students should not discuss exam accommodations with professors. The Associate Dean of Students and the Registrar will insure that any testing accommodations are provided through the DRS.

**-Attendance Policy.** The American Bar Association and the School of Law require regular and punctual class attendance (see <http://www.law.pitt.edu/students/policies/attendance>). At the beginning of class, I will circulate an attendance sheet. It is your responsibility to ensure that you have signed the attendance sheet before leaving class. **Under the attendance policy, if you do not sign the attendance sheet before leaving class, you will be marked absent even if you were actually present in class.** In terms of punctuality, if, for whatever reason, you arrive at class more than 5 minutes late or leave class more than 5 minutes early, you cannot sign the attendance sheet (or, if you have signed the attendance sheet, will nonetheless be marked absent). Regular attendance is defined as attendance and preparation at not less than 80% of the classes for the semester. **To be clear, if you are unprepared for class, you will be marked absent even if you are physically present in class.** Failure to satisfy these attendance requirements will result in your being certified out of the course with a grade of "U" (Unsatisfactory).

**-Religious Observances.** In accordance with University policy, absences due to religious observance will be excused. In order to be excused, a student who plans to miss class for this reason should contact the Associate Dean of Students or the Associate Dean for Academic Affairs with the dates on which and the specific classes for which the student will be absent due to religious observance.

**-Anti-Harassment Policy.** No University employee, student or individual on University property may intentionally harass or abuse a person (physically or verbally) with the purpose or effect of unreasonably interfering with such person's work or academic performance, or of creating an intimidating, hostile, or offensive work environment. Consistent with the University Nondiscrimination Policy Statement, this Anti-Harassment Policy includes cases where the conduct is based on race, color, religion, national origin, ancestry, sex, age, marital status, familial status, sexual orientation, disability or veteran status. Violations of this policy should be reported immediately to any faculty or administrator.