

**INTERNATIONAL ARBITRATION**  
**(3 credits)**

**Professor Manuel A. Gómez**  
**Florida International University College of Law**  
**Fall Semester 2014**

Classes: Tuesdays and Thursdays 5:00-6:15 pm, in RDB 2046  
Office: RDB-2043; Office hours: Thursdays 3:30-4:30pm, or by appointment  
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*Florida International University is a community dedicated to generating and imparting knowledge through excellent teaching and research, the rigorous and respectful exchange of ideas, and community service. All students should respect the right of others to have an equitable opportunity to learn and honestly to demonstrate the quality of their learning. Therefore, all students are expected to adhere to a standard of academic conduct, which demonstrates respect for themselves, their fellow students, and the educational mission of the University. All students are deemed by the University to understand that if they are found responsible for academic misconduct, they will be subject to the Academic Misconduct procedures and sanctions, as outlined in the Student Handbook.*

**COURSE DESCRIPTION AND OBJECTIVES**

As societies have become more affluent and trade between states, private corporations and individuals continues to expand across national borders, parties to commercial transactions and foreign investors are increasingly interested in adopting adequate dispute processing mechanisms that are effective beyond the realm of state courts. Because of its perceived advantages vis-à-vis domestic courts, international arbitration has emerged as one of the preferred dispute resolution mechanisms by parties engaged in transnational trade, foreign direct investment, and large scale commercial transactions. International arbitration has also gained incredible notoriety in academic and professional circles, a trend that is signaled by the numerous conferences, academic programs, professional seminars and countless publications on the topic. International arbitration has also had a profound impact on the legal profession, and on the work of national courts, administrative agencies, and other organs of the state.

This is a three-credit course geared to upper-level JD students who want to expand their knowledge about the increasing popularity of international arbitration as an alternative to the national courts. The course will focus on international arbitration from the US perspective including the relevant statutes, court opinions, and doctrines followed in the US. When relevant, the course will also incorporate some foreign statutes, doctrines and international agreements into the discussion, especially as they pertain to Latin America because of its obvious importance to U.S. lawyers in general, and to those from Florida in particular. Rather than focusing solely on the interpretation of legal rules and court decisions, class discussions will also pay attention to

the strategies and practices by the parties, their counsel, arbitrators, judges, and other participants in the arbitral process. Throughout the semester, several prominent international arbitration practitioners and scholars will share their expertise in special guest lectures, and several in-class exercises will be carried out to give students a first-hand experience of how it is to participate in arbitral proceedings.

The course will also encourage a discussion about the ethical dilemmas and other challenges typically faced by participants to international arbitration proceedings, with the purpose of raising awareness among the students about the importance of conducting themselves with professionalism and high ethical standards in the practice of transnational law.

### **COURSE MATERIALS AND COMMUNICATIONS PLATFORM**

No textbook will be assigned for this course. All reading materials will be made available by the professor as part of a course pack especially assembled for the course, and made available in electronic format. Given the changing landscape of international arbitration and the importance of several ongoing arbitration cases, there may be occasional assignments (e.g. recent court opinions, arbitral awards, and recently enacted legislation) not included in the initial course pack, which the professor deems useful to teach a particular point. These additional materials will be handed out during class or will be offered online through Westlaw, LexisNexis, or via our class TWEN page. In any case, each student will be responsible for accessing, downloading, and printing any supplementary readings in anticipation of our class discussion.

In addition to a dedicated TWEN page where the professor will post reading materials, useful links to court opinions, treaties, statutes, and other relevant documents, the professor has set up a dedicated Twitter account (<http://twitter.com/fiuarbitration>) to post brief links to news reports on current events that are relevant to international arbitration. Although not mandatory, you are encouraged to sign up and follow this Twitter account.

### **GRADING POLICY**

The final grade will be based on the following two components:

- (a) Individual preparation and participation in three (3) in-class exercises and simulations, each worth ten percent (10%) of the grade for a total of thirty percent (30%).
- (b) A final assignment (take home examination) administered at the end of the semester that will count toward the remaining seventy percent (70%) of the total grade.

Any adjustment earned for class participation or extraordinary activities will be assessed separately pursuant to section 1004 of the College of Law's Academic Policies and Regulations.

In order to successfully complete the course, students are required to: 1) do the readings assigned for each class; 2) participate in the class exercises and simulations as instructed; 3) conform to the attendance rule set forth in the College of Law's academic policies; 4) participate in class discussions *with regular and meaningful contributions* that demonstrate command of the subject matter and attention to the assigned readings or current events related to the topic, and not just by providing a yes or no answer; and, 5) complete the take home examination.

## SYLLABUS

(\* Denotes a mandatory reading; + denotes a recommended reading)

### **UNIT 1 (AUGUST 19-21) LOOKING AT THE FOREST: THE LANDSCAPE OF INTERNATIONAL ARBITRATION**

\* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 *Am. J. Comp. L.* 233 (2006)

+ List of important international arbitration conventions and rules

### **UNIT 2 (AUGUST 26-28) IT IS A CREATURE OF CONTRACT, AFTER ALL: THE ARBITRATION AGREEMENT AND ITS OVERSIGHT BY DOMESTIC COURTS**

#### August 26, 2013-First in-class exercise: Drafting an arbitration agreement

\* IBA Guidelines for drafting International Arbitration Clauses (*skim*)

#### August 28, 2013-Judicial review of the arbitration agreement

\* *Rent-A-Center, West, Inc. v. Jackson*, US S. Ct. 2010

\* *Buckeye Check Cashing v. John Cardegna et al.* 546 US 440, 126 S. Ct. 1204

\* *First Options of Chicago, Inc. v. Manuel Kaplan et al, and MK Investments, Inc.* 514 US 938, 115 S. Ct. 1920

### **UNIT 3 (SEPTEMBER 2, 4 AND 9) SUBJECTS IN INTERNATIONAL ARBITRATION: THE PARTIES AND THEIR REPRESENTATIVES**

\* *Johnson v. Pires et al.* 968 So.2d 700 (Fla.App.4 Dist. 2007)

\* *Thomson-CSF, S.A. v. American Arbitration Ass'n* 64 F.3<sup>rd</sup> 773 (2<sup>nd</sup> Cir. 1995)

\* David W. Rivkin, *Keeping Lawyers out of International Arbitrations*, 9 *Int'l Fin. L. Rev.* 11 (1990)

+ IBA Guidelines on Party Representation in International Arbitration, adopted by a Resolution of the IBA Council on 25 May 2013.

September 9, 2014-In class exercise on party representation in international arbitration

- \* The Rompetrol Group v. Romania, ICSID Case No. ARB/06/3
- \* Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, ICSID Case No. ARB/05/24

**UNIT 4 (SEPTEMBER 9-16) SUBJECTS IN INTERNATIONAL ARBITRATION: THE ARBITRATORS**

September 9, 2013-Second in-class exercise: Deciding the challenge of an arbitrator

- \* IBA guidelines on conflicts of interest in international arbitration (*skim*)
- \* UNCITRAL Arbitration Rules, articles 7 to 16.

*Counsel for claimant:*

- \* Claimant's challenge to Professor Stern in the matter between Murphy Exploration & Production Company-International v. Republic of Ecuador, Permanent Court of Arbitration case No. AA434
- \* Claimant's rebuttal on challenge to Professor Stern in the matter between Murphy Exploration & Production Company-International v. Republic of Ecuador, Permanent Court of Arbitration case No. AA434

*Counsel for respondent:*

- \* Respondent's challenge to Professor Stern in the matter between Murphy Exploration & Production Company-International v. Republic of Ecuador, Permanent Court of Arbitration case No. AA434

September 11, 2013-Judicial involvement in the challenge of arbitrators

- \* Yulia Andreeva, How challenging is the challenge, or can U.S. courts remove arbitrators before an arbitration has come to an end? 19(1) Am. Rev. of Int'l Arb. 2009

**UNIT 5 (SEPTEMBER 30-OCTOBER 2) SUBJECTS IN INTERNATIONAL ARBITRATION: ARBITRAL INSTITUTIONS**

- \* International Medical Group, Inc. v. AAA, 312 F.3d 833 (7<sup>th</sup> Cir. 2002)
- \* New England Cleaning Services, Inc. v. AAA, 199 F.3d 542 (1<sup>st</sup> Cir. 1999)
- \* S. Ezra Austern v. CBOE, Inc. 898 F.2d 882 (2<sup>nd</sup> Cir. 1990)
- \* FL ST § 682.051 (Arbitration Code) Immunity of arbitrator; competency to testify; attorney fees and costs
- \* FL ST § 684.0045 (International Commercial Arbitration) Immunity for arbitrators

**UNIT 6 (OCTOBER 7-9) MULTIPARTY AND CLASS INTERNATIONAL ARBITRATION**

- \* Stolt-Nielsen et al v. Animalfeeds international Corp. US S. Ct. 2009
- \* Abaclat et al v. Argentina, Excerpts from Decision on Jurisdiction and dissenting opinion by Mr. Georges Abi-Saab.

+ American Arbitration Association, Supplementary Rules for Class Arbitrations, Effective October 8, 2003

#### **UNIT 7 (OCTOBER 14-21) SETTING UP ARBITRAL PROCEEDINGS**

- \* *Tierra Right of Way Services, Ltd. V. Abengoa Solar, Inc. et al*, U.S. Dist. Court. D. Arizona, June 9, 2011 (2011 WL 2292007) Not reported in F. Supp. 2d.
- \* *Kahara Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, et al 364 F.3d 274 (5<sup>th</sup> Cir, 2004)
- + UNCITRAL, Notes on Organizing Arbitral Proceedings, March 2012
- + ICC 2012 Arbitration Rules, articles 16 to 26

#### **UNIT 8 (OCTOBER 23) PRECAUTIONARY MEASURES AND INTERIM AWARDS**

October 23, 2014-Third in-class exercise: Enforcing Chevron's Interim Award

*General readings for the entire class*

- \* Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and a Related Exchange of Letters, signed at Washington on August 27, 1993
- \* United Nations Commission on International Trade Law, Arbitration Rules, As revised in 2010

*Counsel for Chevron/Texaco*

- \* Claimant's notice of arbitration, filed on September 23, 2009, PCA Case No. 2009-23
- \* Claimant's request of Interim Measures dated January 4, 2012, PCA Case No. 2009-23

*Counsel for the Republic of Ecuador*

- \* Respondent's Memorial on Jurisdictional Objections filed on July 26, 2010, PCA Case No. 2009-23)
- \* Respondent's Letter to the Tribunal regarding Claimant's request of Interim Measures dated January 4, 2012, PCA Case No. 2009-23

*Arbitral panel*

- \* Order on Interim Measures dated May 14, 2010, PCA Case No. 2009-23
- \* First Interim Award on Interim Measures dated January 25, 2012, PCA Case No. 2009-23

#### **UNIT 9 (OCTOBER 28-30) PRECAUTIONARY MEASURES AND THE SANCTIONING POWER OF ARBITRATORS**

October 28, 2014-Precautionary measures

- \* *Toyo Tire Holding of North America, Inc. v. Continental Tire North America, Inc.* 609 F.3d 975 (9<sup>th</sup> Cir. 2010)
- \* *Bahrain Telecommunications v. Discoverytel, Inc.* 46 F. Supp. 2d 176 (D. Conn. 2007)

October 30, 2014-The sanctioning power of arbitrators

- \* Reliastar Life Insurance Company of New York v. EMC National Life Company, 564 F.3d 81 (2<sup>nd</sup> Cir 2009)
- \* Certain Underwriters at Lloyd's London v. Argonaut Insurance Company, 264 F.Supp. 2d. 926 (N.D. Cal. 2003)
- \* McDaniel v. Bear Stearns & Co, 196 F.Supp.2d. 343 (S.D.N.Y. 2002)

**UNIT 10 (NOVEMBER 4-6) THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION**

**November 4-The versatility of USC 28 § 1782**

- \* Intel Corporation v. Advanced Micro Devices, Inc. 124 S.Ct. 2466 (2004)
- \* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA) 685 F.3d 987 (11<sup>th</sup> Cir. 2012)
- \* In re application of Victor Mikhaylovich Pinchuk
- \* U.S.C.A. § 1782
- + In re Application of Operadora DB Mexico, SA de CV, U.S. Dist. Court , M.D. Florida (2009 WL 2423138) Not reported in F.Supp.2d.
- + Republic of Ecuador v. Connor 708 F.3d 651 (5<sup>th</sup> Cir. 2013)
- + IBA Guidelines on the Taking of Evidence in International Commercial Arbitration, June 1999

**November 6-Guest Speaker: “The ins and outs of § 1782: A practical view”**

**UNIT 11 (NOVEMBER 11-13) THE FINAL AWARD, ITS RECOGNITION AND ENFORCEMENT**

**November 11-Guest Speaker: “Crafting the final award”**

**November 13-The recognition and enforcement of the final award**

- \* Corporación Mexicana de Mantenimiento Integral (Commisa) v. Pemex-Exploración y Producción, No. 1:10-cv-00206 SDNY, August 27, 2013
- \* Mont Blanc Trading Ltd. v. Kahn (S.D.N.Y. 2014)

**UNIT 12 (NOVEMBER 18-20) THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION**

**November 18-Guest speaker**

- \* Maya Steinitz, The Litigation Finance Contract, 54 William & Mary Law Review 455 (2012)

**November 20-Current issues in Third party funding**

- \* S&T Oil Equipment & Machinery v. Juridica Investments Limited, 456 Fed. Appx. 481 (US Ct App. 5<sup>th</sup> Cir. 2012)
- \* Lisa Bench Nieuwveld & Victoria Shannon, Third-party funding in International Arbitration, Chapters 1 and 3, Kluwer International (2012) (online publication to be accessed through the Law Library' databases)
- \* Case notes on third-party funding, 3 Global Arbitration Review 2008

**UNIT 13 (NOVEMBER 25) REVIEW SESSION**

**NOVEMBER 25-WRAPPING UP**

**The interplay between international arbitration and litigation**

**Guest Speaker**