SOUTH ASIAN UNIVERSITY
Faculty of Legal Studies
LLM
2015-2017
Winter Semester (Fourth Semester)

Course Information

Part I

Course Title: Law on Transnational Commercial Contracts and Arbitration
Course Code: LW037
Course Instructor: Dr Sai Ramani Garimella (ramani@sau.ac.in)
Course Duration: One Semester
Credit Units: 4
Medium of Instruction: English
Prerequisites: Nil
Precursors: Nil
Equivalent Courses: N/A

Part II

“Commercial law occupies in some sense the ground zero of the onslaught of globalization.”

Pluralism characterizes the explanation of the legal systems touching upon a transnational commercial contract, founded upon the principle of party autonomy as the primordial choice of law rule. There is a diversity of law, in fact a buffet to choose from that could be applied
to these contracts. This diversity is populated at various levels with national and international instruments, transnational law, soft law instruments, and such touching upon the various stages of the contract – formation, validity, performance, remedies, and enforcement. The complexity is further enhanced by the lurking choice of a purely domestic law as the governing law or applicable law for the contract. There also exists the possibility of transnational law, also known as non-State law, as the choice of law in the contract. There is a further possibility of parties negotiating a plurality of laws for various clauses in the contract, also known as the practice of depecage.

South Asian region is, as yet, an underdeveloped region for transnational law regimes. The content of this domain area still remains the derivation of the colonial laws – Contract Act, 1872 and Sale of Goods Act, 1930. With little variation, the nations of this region have largely adopted these laws into their legal system, and they have continued ever since. However, the trade and commerce pattern of these nations has developed beyond their former colonial authority, and now the largest contributing region to their external commerce earnings come from nations of the region that have harmonized legal platforms for transnational commerce. Therefore, indirectly though, these nations are forced to negotiate for a governing law/applicable law that is foreign to their legal system and yet is governing their contractual relations.

A comparative contracts law course emerges from this need to gain knowledge about the existing regime that touches upon transnational commerce. Within the existing regime, there are a variety of instruments – Conventions, soft law instruments, trade practices terminology like the INCO Terms and the UPCC Rules, and of course domestic law’s provisions wherever they touch upon the contract. A comparative contracts law course also addresses the transnational dispute resolution instruments that have now become an essential component of the harmonized legal platforms.

Comparative transnational contracts law, therefore, emerges as an important domain to study the plurality of laws that exist within the international law regime. The course on Law governing transnational commercial contracts and arbitration is arranged into two parts articulating the substantive law related provisions and the provisions related to dispute resolution mechanism of arbitration.

- a comparative analysis of the essentials of a transnational commercial contract – formation of the contract, governing law of the contract and the remedies for breach of contract
- an analysis of the legal architecture of international commercial arbitration and the arbitration legislations of South Asian nations

Thus this course is positioned to include the legal regime explaining the substantive law issues as well as procedural law issues, specifically related to arbitration.

Within the discussion related to substantive law the issues that would be discussed relate to formation of the contract, contract construction and rectification and remedies for breach of
contract. There would be a comparative analysis of these issues within the international legal regimes identified for this course – UN Convention on the Contracts for International Sale of Goods, 1980, the UNIDROIT Principles of Commercial Contracts, 2010 and the Sale of Goods Act, 1930. It is attempted to empower the student to understand the comparative value of these three regimes, so that they may appreciate the value of each of these instruments in the space affecting transnational commerce, and especially the importance of harmonization.

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.

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. Also preferred for its structured methodology, arbitration merits more space in the academic curricula because it offers a framework of rules and international institutions that have, with remarkable success to date, offered an efficient, fair, neutral and expert means for resolving complex disputes.

**Part III - Course Aims**

This course is designed to equip students with an understanding of the transnational commercial law and 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.

**Part IV – Evaluation Pattern**

The evaluation is based on simulation method – mid-term and end-term examinations (40 marks each) would be based on a case-based evaluation. The evaluation also includes a scholastic essay writing effort examined for 20 marks.

**Part V – Structured course programme**

**Week 1 - The ‘Law’ in Transnational Commercial Contracts**
• The pluralism in the existing international legal regime on transnational contracts
• Conventions - CISG
• Soft Law – UNIDROIT, HPCL
• Transnational Law and Trade Practices
• The law governing transnational commercial contracts in South Asian nations

**Week 2 – The important issues with regard to a transnational contract of sales**

• Interpretation clause of the CISG – the unique feature of autonomous interpretation of the CISG by domestic courts
• Party Autonomy under the CISG
• Formation of Contract
• Rectification of the terms of the Contract
• Remedies for breach of performance of the Contract
• Dispute Resolution

**Week 3 – Comparative analysis of the legal systems**

**Essentials of a contract of Sale**

• CISG – Articles 2-6
• Sale of Goods Act – Section 4 (similar feature in the Statutes of the South Asian nations)

**CISG on the formation of the Contract**

• Article 4 – governs only the formation of the Contract and not the validity of the contract
• Offer, Acceptance of Offer, Effective Acceptance, Revocation of Offer (Articles 14-24)
• Article 55 – conditions related to Price
• Comparative analysis with the Sale of Goods Act

**Week 4 – Remedies for Breach**

**Remedies for Breach of Contract by the seller**

• CISG - Articles 45-52
• Sale of Goods Act - Damages for non-delivery, Remedy for breach of warranty & Specific Performance

**Remedies for Breach of Contract by the buyer**

• CISG – Article 61-65
• Sale of Goods Act – Suit for Price & Damages for non-acceptance

Week 5 – CISG
• Article 74 - Damages and Disgorgement of Profits
• CISG Advisory Council
• CISG and International Commercial Arbitration – complementary role of substance and procedure

Week 6 – The architecture of International Arbitration in South Asian nations
• The history leading to the New York Convention, 1958
• The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
• The UNCITRAL Model Law, 1958 on International Commercial Arbitration
• The arbitration legislations of the South Asian nations – Bangladesh, India, Nepal, Pakistan and Sri Lanka

Defining characteristics of international commercial arbitration
• Arbitration agreement - Seat of arbitration - Party autonomy - Finality of outcomes - International enforcement of arbitration agreements and awards
• Confidentiality of the arbitration – distinction from privacy – legislative provisions and judicial opinion on confidentiality and the argument for transparency in commercial arbitration

PT Garuda Indonesia v Birgen Air (2002) 1 SLR 393
Union of India V. Videocon Industries Ltd. 2012 (1) Arb. LR 416 (Delhi)
Chromalloy v Egypt 939 F Supp907 (DDC 1996) (US District Court of the District of Columbia)

Week 7 - Arbitration agreement
Arbitration agreement - Doctrine of separability – pathological arbitration clauses
Governing Law of the Arbitration Agreement
Enercon (India) Limited & Ors. v Enercon GmbH & Anr Civil Appeal No.2806 of 2014
C v D [2007] EWHC 1541 (Comm) 28
Defined legal relationship - Consolidation, joinder and third party notices
Arbitrability

_Hub Power Company Ltd. v WAPDA_ PLD 2000 SC 841

Multi-tiered ADR clauses and enforcement of conditions precedent

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

_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

**Week 8 - Jurisdiction of Arbitration Tribunal**

_Kompetenz-Kompetenz_ (or) competence-competence? – the distinction

The Gateway questions on jurisdiction

Recourse against an arbitral tribunal’s jurisdictional decision – judicial 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

**Week 9 – Arbitral Tribunal and Applicable Substantive Law**

Disclosure obligations - General principles of disclosure – IBA rules of disclosure

Challenges to arbitrators – third party funding and disclosure of interest

Resignation and replacement of arbitrators


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

Article 27 UNCITRAL ML and its presence within the arbitration laws of the South Asian region.

National law as applicable Law – Nepal Arbitration Act, 2055 (1999); Pakistan Arbitration law

_Light Industries (Pvt.) Limited, through Chief Executive v Messrs ZSK STICKMASCHINEN GmbH through Attorney_ (2009) CLD [Karachi]

Conflict of Laws issues in International Commercial Arbitration

_Clough Engineering Ltd. v Oil & Natural Gas Corporation Ltd._ (2007) FCA 881

_ICC Case No.9479_ (1999)

**Week 10 - Procedure and Evidence**

Party autonomy - Limits to party autonomy - Rules and procedural law

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

**Week 11 & 12 – International arbitration awards**

- NY Convention – foreign awards - non-domestic awards
- Time limits - Scrutiny of the draft award – ICC rules on scrutiny - Finality
- Final awards - Partial awards - Interim or provisional awards, orders or measures - Consent awards - Default awards
- Costs & Arbitrators’ fees – 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)

**Set Aside (Vacation) Proceedings at the Seat**

- Model Law setting aside grounds and their exclusivity

*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/](http://www.dis-arb.de/en/)

**Challenges to Recognition and Enforcement of the Award**

- NYC, Article V(1) (a) – (e) and V(2) (a) & (b)

*Md. Nurul Abser v Alhaj Golam Rabbani and others* 6 SCOB [2016] AD 54

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

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


*Shri Lal Mahal v Progetto Grano Spa* 2013(3)ARBLR1(SC)

*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](http://www.dis-arb.de)

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


**Week 13 – Arbitration – Private Justice – New Vistas for International Arbitration**

International Commercial Courts at Dubai and Singapore – what’s next for Arbitration


SELECT READINGS – BOOKS

Petra Butler & Peter Schlechtriem, UN Law on International Sales (2nd ed, Springer, 2009)


Maren Heidemann, Does International Trade Need a Doctrine of Transnational Law? Some Thoughts at the Launch of a European Contract Law (Springer briefs in Law, 2012)


Pieter Sanders, Quo Vadis Arbitration? Sixty Years of Arbitration Practice (Kluwer Law International, 1999)


ARTICLES

CISG - PACE University Directory  http://iicl.law.pace.edu/cisg/cisg


George A. Bermann – ‘The “Gateway” Problem in International Commercial Arbitration’ (2012) 37(1) YJIL 1


Stefan Kirchner, Frankfurt am Main Transnational Law and the Choice-of-Law Competence of Arbitral Tribunals in International Commercial Arbitration  http://ssrn.com/abstract=988677


Richard H. Kreindler, Arbitral forum shopping, in *Parallel State And Arbitral Procedures In International Arbitration*  http://www.shearman.com/~/media/Files/NewsInsights/Publications/2005/07/Arbitral-
Audley Sheppard, ‘Res judicata and Estoppel’ www.ila-hq.org/...cfm/.../446043C4-9770-434D-AD7DD42F7E8E81C6


