

# INTERNATIONAL COMMERCIAL LAW

CBA Section of Commercial Law & Bankruptcy

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## I. Arbitration

### A. Why?

1. The USA is not a party to any bilateral or multilateral judgments convention.
2. Agreements to arbitrate are specifically enforceable.
3. Arbitration awards are easily confirmed. There is no review on the merits.
4. The parties can design the system.
  - a. Qualification and number of the arbitrators
  - b. Language of the proceedings.
  - c. Form of the proceedings (i.e. documents only, etc.)

### B. There must be an agreement to arbitrate.

1. Before the dispute arises, it is an arbitration agreement.
2. After the dispute arises, it is a submission agreement.

### C. Many states have special international arbitration laws, including Connecticut. Such laws *usually* track the 1985 UNCITRAL Model Law on International Commercial Arbitration.

## II. 1958 [New York Convention on the Recognition and enforcement of Foreign Arbitral Awards](#).

### A. Implemented by US Code title 9, Chapter 2.

### B. Agreements to arbitrate are specifically enforceable (the remedy is not just damages).

### C. Arbitration awards can only be reviewed on a limited number of grounds:

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<sup>1</sup> Member of Brown & Welsh, P.C.; Member, Secretary of State's Advisory Committee on Private International Law. Links to these documents can be found on our web site at [http://brownwelsh.com/International\\_Resources.htm](http://brownwelsh.com/International_Resources.htm)

1. The parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  2. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present the party's case; or
  3. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, *provided that*, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  4. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  5. The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or
  6. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  7. The recognition or enforcement of the award would be contrary to the public policy of that country.
- D. The award cannot be reviewed for errors in fact.
- E. The award cannot be reviewed for errors in law.

III. 1975 Inter-American Commercial Arbitration Convention.

- A. Very similar to the 1958 New York Convention.
- B. Is the only treaty to contain a reference to a private body, the Inter-American Commercial Arbitration Commission. If no arbitration rules are specified, their rules apply by default.
- C. Implemented by US Code Title 9, Chapter 3.
- D. Agreements to arbitrate are specifically enforceable (the remedy is not just damages).
- E. Arbitration awards can be reviewed on a limited number of grounds:
  - 1. The parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or
  - 2. The party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
  - 3. The decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
  - 4. The constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
  - 5. The decision is not yet binding on the parties or has been annulled or suspended by

- a competent authority of the State in which, or according to the law of which, the decision has been made; or
6. The subject of the dispute cannot be settled by arbitration under the law of that State; or
  7. The recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.
- F. The award cannot be reviewed for errors in fact.
- G. The award cannot be reviewed for errors in law.
- IV. 1965 [International Center for the Settlement of Investment Disputes](#).
1. [Regular rules](#).
  2. [Supplementary rules](#).
- V. Permanent Court of Arbitration.
- A. One party will be a state entity.
  - B. Will select an appointing authority under the UNCITRAL arbitration rules.
- VI. Arbitral Institutions.
- A. Appointing v. Administering roles.
  - B. American Arbitration Association d/b/a International Centre for Dispute Resolution. [November 1, 2001 rules](#).
  - C. International Chamber of Commerce. [January 1, 1998 rules](#).
  - D. London Court of International Arbitration. [January 1, 1998 rules](#).
  - E. Inter-American Commercial Arbitration Commission. [July 1, 1988 rules](#).
  - F. Chartered Institute of Arbitrators. [2000 edition of the rules](#).
  - G. Permanent Court of Arbitration. [Rules where only one party is a state](#).

- H. 1976 [UNCITRAL Arbitration rules](#). These are commonly used in *ad hoc* arbitrations, but every arbitral institution will appoint and administer pursuant to them. If there is no appointing authority, the Secretary-General of the Permanent Court of Arbitration will select an appointing authority.
  
- VII. [1980 Vienna Convention of the International Sale of Goods](#) - similar to UCC-2.
  - A. Ratified by the United States, so it is part of United States law.
  
  - B. The parties may contractually exclude this law.
    - 1. The ordinary choice of law provision does not exclude this Convention.
  
  - C. The Convention retains the requirement the offer and acceptance mirror each other.
  
- VIII. 1974 [Convention on the limitation period for the international sale of goods](#).
  - A. The 1980 [protocol](#).
    - 1. Some countries have adopted it (like the USA).
    - 2. Some countries haven't adopted it.
  
- IX. 1988 [UNCITRAL Bills and Notes Convention](#) - similar to UCC-3.
  - A. The United States has not yet become a party.
    - 1. There is talk of the Convention coming into force early for the NAFTA countries.
  
  - B. The parties must "opt into" the Convention by having the appropriate caption and reference to the Convention in the body of the instrument.
  
  - C. Checks are excluded from the Convention's scope.
  
  - D. The revised commentary to Uniform Commercial Code Article 3 refers to this Convention.

- X. 1995 [UNCITRAL Convention on Standby Letters of Credit.](#)
  
- XI. 1994 [UNIDROIT Principles of International Commercial Contracts.](#)
  - A. Similar to the American Law Institute's Restatement of Contracts.
  
- XII. 1988 [UNIDROIT Convention on International Commercial Leasing.](#)
  - A. The United States is not yet a party to this Convention.
  
  - B. Damages must be reduced to their net present value.
  
  - C. A lessor does not need privity to obtain the benefit of a manufacturer's warranty.
  
- XIII. 1988 [UNIDROIT Convention on International Factoring.](#)
  - A. The United States is not yet a party to this Convention.
  
  - B. Future receivables can be assigned.
  
  - C. Receivables may be assigned in bulk.
  
- XIV. [INCOTERMS 2000.](#)
  - A. Published by the International Chamber of Commerce in Paris.
  
  - B. They do not have the force of law, they are written into contracts and are the usage of trade.
  
  - C. Each term typically allocates:
    - 1. How are the goods to be shipped?
    - 2. Who pays for the cost of shipping?
    - 3. Is insurance provided and who pays for it?
    - 4. Who has the risk of loss?
    - 5. Who must obtain export clearance?

- D. There are significant differences between INCOTERMS 2000 and INCOTERMS 1990. For example,
1. Seller must now obtain export clearance on FAS.
  2. Buyer must obtain import clearance on DEQ.