Course Goals and Objectives

This course covers a wide variety of practical and theoretical issues relating to international commercial arbitration and underscores how this particular form of dispute resolution differs from both litigation and domestic arbitration. The course is intended to help students understand: (1) the special nature of international commercial arbitration; (2) drafting issues relating to international arbitration agreements; (3) the intersection between litigation and arbitration; (4) procedural elements concerning the formation of the arbitral tribunal and the conduct of the proceedings; and (5) enforcement issues in an international context. Furthermore, students learn about the different sources of authority used in international commercial arbitration and improve both their analytical and communication skills.

This course combines experiential (skills-based) elements with doctrinal elements.

Requirements and Grading

The course is graded on a pass-fail basis. Students are assessed on their performance on the various practical simulations conducted throughout the course as well as on their oral contributions in in-class discussions.

Given the nature of this particular class, attendance is critical. Attendance is taken visually at the beginning of each class.

Disabilities

Students seeking accommodation for a physical, learning, mental health, or other disability should contact the Office of Disability Services at least one month before the start of the semester in which accommodation is sought. Laura Cutway, the Director of Disability Services, may be reached at 202-662-4042, by e-mail at lmc228@law.georgetown.edu, or in McDonough 210. The process for registering with Disability Services includes submitting appropriate documentation and meeting with the Director to determine reasonable accommodations. Students with a disability may wish to register with the Office even if they are not sure they will need an accommodation. More information about the process for requesting accommodation, the role of the faculty in
determining appropriate accommodation, and the process for appealing decisions regarding requested accommodations is available at http://www.law.georgetown.edu/campus-life/disabilityservices/index.cfm.

**Academic Dishonesty**

Academic integrity is fundamental to the activities and principles of the Law Center. All members of the law school community must be confident that each person’s work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. Breaches of the Georgetown Student Disciplinary Code are considered extremely serious matters and may be subject to sanction pursuant to the code. For more information about the Georgetown Student Disciplinary Code, see the website at http://www.law.georgetown.edu/campus-services/registrar/bulletin/upload/Bulletin-Conduct-Policies.pdf. When in doubt about plagiarism, paraphrasing, quoting, collaboration, or any other form of cheating, consult me. I reserve the right to lower a grade because of violations of academic integrity.

**Required Readings**


Additional readings are posted in the syllabus below. You can find all of the articles on Westlaw and/or LexisNexis.

**Class Schedule and Assignments**

Classes are from 1:00-4:00.

The readings are from the FJC text unless otherwise indicated. Additional readings may be assigned, and there will be an ongoing hypothetical upon which the simulations are based. References to “fact pattern scenarios” refer to the mock case readings.

Discussion in class will inevitably cover some but not all of the material in the readings. If you have questions about the readings, please ask them, preferably in class. Feel free to email me with questions, though I may defer answering them until class time.

The following class schedule is subject to change.

1/11 Overview of International Commercial Arbitration and Research in International Commercial Arbitration
  FJC Guide – pp. 1-49
  Read fact pattern scenario 1

1/12 Drafting Arbitration Agreements and Selection of Arbitrators


Read fact pattern scenario 2

1/13 Challenging Arbitrators and Jurisdictional Objections
International Bar Association (IBA), Guidelines on Conflicts of Interest in International Commercial Arbitration (available on IBA website, ibanet.org)


United Nations Commission on International Trade Law (UNCITRAL) (2010 version), arts. 8-15 (available on UNCITRAL website, uncsitral.org)


Read fact pattern scenario 3

1/14 Arbitral Procedures
FJC Guide, pp. 49-63


Ricardo G. Cedillo, “Practical Tips on Cross-Examination of Expert Witnesses,” 33 The Advocate (Texas) 44 (Winter 2005)

ICC Arbitration Rules, arts. 18-26

UNCITRAL Arbitration Rules, arts. 17-32

Read fact pattern scenario 4 and 5
1/15 Vacatur and Enforcement of Arbitral Awards
FJC Guide, pp. 63-87

Read fact pattern scenario 6
Mock Case
Introduction and Overview

This exercise is designed to introduce students to various practical and tactical concepts that arise regularly in international commercial arbitration. The exercises are organized around a single fact pattern so that students can focus on skills acquisition as opposed to relearning relevant facts.

In working through these exercises, students should consider how these issues might play out in their home jurisdiction. It is also useful to consider any possible differences that might arise as a result of disparities in the size of the companies, the type and size of the dispute, etc.
Introduction to the Mock Case:
Cross-Border Agreements and Dispute Resolution Planning

1. **Island Beauty** is an interior design manufacturer based in Caribe, a Caribbean island nation that was at one time a member of the British Commonwealth. Island Beauty is a relatively young company that creates decorative items made out of local shells, driftwood and vegetation and sells them in gift shops in Caribe and other Caribbean nations. Island Beauty has 85 employees and a small factory outside Portsmouth, the capital of Caribe. **Joseph Alston**, the CEO of Island Beauty, is interested in expanding the company’s operations and eventually selling Island Beauty’s products to the lucrative European market.

2. **Exotic Home Imports** is a wholesaler specializing in interior design items. Exotic Home Imports is headquartered in the country of Civilia, which follows the civil law tradition. Civilia is not a member of the European Union. Exotic Home Imports sells to retail outlets throughout the European Union and commissions bespoke (customized) items for sale within the trade (i.e., to professional interior decorators working on individual projects).

3. **Susan Whittaker**, the CEO of Exotic Home Imports, recently discovered Island Beauty products while on vacation in the Caribbean. She thinks that she can sell the Caribbean home décor in a number of different European countries, although she believes that the trend may be somewhat seasonal (in that more people will prefer such items in the summer) and may take a while to catch on. However, she believes that there is long-term potential for these products, which include both mid-range retail items and high-end bespoke goods.

4. Island Beauty is very interested in entering into a distribution contract with Exotic Home Imports, although it is concerned about fixing its prices at too low of a point if its sales really do take off. However, Island Beauty is convinced that if this relationship goes well, there may be potential for expansion of the company into other European markets.

5. Although Whittaker is keen to enter into the contract, she has concerns about whether Island Beauty has the capacity to produce sufficient goods to keep up with the demand that she sees likely to occur. She is also very concerned about the reliability of production, since she could incur substantial damages if the goods, particularly the bespoke goods, were not delivered in a timely manner.

6. Whittaker is also concerned about the reliability of the local courts in Caribe and about the possibility of common-law judicial procedures, including discovery of documents, if this dispute goes to trial in Caribe. She also worries about whether a judgment arising out of a Civilian court would be enforced in Caribe.

7. Alston has not thought much about the dispute resolution mechanism that might be used if problems arise, since most business conflicts in Caribe are settled amicably out of
court. However, he is concerned about the costs associated with dispute resolution, since he does not have a great deal of extra cash available and would expect to have even less if something went wrong with this contract.

8. For these reasons, the parties have tentatively agreed that they should include an arbitration clause in their contract, as well as a choice of law provision.
Session 1: International Arbitration Agreements and Practical Exercise in Drafting an Arbitration Clause

This session is intended to introduce students to strategic and other considerations in negotiating and drafting an international commercial arbitration agreement. Students will be broken into teams and asked to negotiate and draft an arbitration agreement with their counterparts. In so doing, students will need to consider the background information already provided as well as the information provided below and any additional information given to the individual parties.
Joint Facts for Session 1

1. Island Beauty and Exotic Home Imports have successfully negotiated the substantive terms of their agreement, which is reflected in the attached Agreement Between the Parties. According to the agreement, Island Beauty will provide Exotic Home Imports with both retail and bespoke goods over a period of three years. The retail items are fixed in number for one year and the bespoke goods are subject to subsequent agreement between the parties.

2. The one aspect of the agreement that has not yet been finalized is the choice-of-law provision and the method by which any disputes between the parties are to be resolved. Counsel for both Island Beauty and Exotic Home Imports believe that arbitration is the best way to resolve such disputes, but the parties have not agreed to specific terms.

3. Students will be separated into teams to negotiate, draft and finalize an arbitration agreement and choice-of-law provision to include in the Sales Agreement.
AGREEMENT BETWEEN THE PARTIES

Article 1 – The Parties

1.1 Island Beauty (“Seller”) is in the business of manufacturing decorative items for the home for wholesalers and purchasers in the trade. Seller’s principal place of business is 501 High Street, Portsmouth, Caribe.

1.2 Exotic Home Imports (“Purchaser,” and jointly with Seller, “the Parties”) is in the business of locating, commissioning and selling decorative items for the home on a wholesale or per-project commission basis. The principle place of business of Exotic Home Imports is 1001 JFK Boulevard, Capitole, Civilia.

1.3 Seller and Purchaser hereby agree on this 5th day of January in the year 2014 to the terms contained herein.

Article 2 – Description of the Goods

2.1 Seller agrees to manufacture and deliver to Purchaser the following items in the following quantities:

(1) shell-encrusted picture frames at the rate of 2000 units each per month for the first year in which this Agreement Between the Parties is in effect, with the monthly quantity for future years to be decided between the Parties;

(2) shell-encrusted curio boxes at the rate of 2000 units each per month for the first year in which this Agreement Between the Parties is in effect, with the monthly quantity for future years to be decided between the Parties;

(3) rattan baskets at the rate of 2000 units each per month for the first year in which this Agreement Between the Parties is in effect, with the monthly quantity for future years to be decided between the Parties; and

(4) shell-enhanced pillow covers at the rate of 2000 units each per month for the first year in which this Agreement Between the Parties is in effect, with the monthly quantity for future years to be decided between the Parties.

2.2 Delivery is to be made by the 15th day of each month, beginning with February 15, 2014.

2.3 Seller also agrees to manufacturer and deliver to Purchaser various customized objects with the price, quantity and specifications to be agreed between the Parties. Any agreement concerning customized objects shall be memorialized in writing and interpreted in accordance with this Agreement Between the Parties.
Article 3 – Purchaser’s Rights and Obligations

3.1 Purchaser agrees to purchase the following items from the Seller at the following rate for the first year that the Agreement Between the Parties is in effect:

   (1) shell-encrusted picture frames for a unit price of 16 Caribe dollars per unit;

   (2) shell-encrusted curio boxes for a unit price of 12 Caribe dollars per unit;

   (3) rattan baskets for a unit price of 9 Caribe dollars per unit; and

   (4) shell-enhanced pillow covers for a unit price of 32 Caribe dollars per unit.

3.2 If the Parties agree to a more than 20% increase in the amount of units to be sold in the second or third years of this Agreement, the per-unit price for that item shall be subject to an increase to be negotiated by the parties in good faith.

3.3 Prices are FOB, delivery at Portsmouth Harbor.

3.4 Prices for customized items are to be negotiated separately in good faith, as noted in paragraph 2.3 above.

3.5 Purchaser agrees to pay 10% of the contract amount immediately upon receipt of each monthly installment of goods from Seller. The remaining 90% of the contract amount is due within thirty (30) days of receipt of the goods.

3.6 Goods are deemed received by Buyer upon delivery to Buyer’s designated agent at Portsmouth Harbor, Caribe.

3.7 Purchaser has the right to examine the goods upon receipt and may reject any defective or nonconforming goods, in whole or in part. Purchaser has ten (10) days in which to notify Purchaser of any defect or nonconformity or of any rejection based on the condition, quality, quantity or marketability of the goods. Any such notice must be in writing and must detail the particularities of the defect or nonconformity.

3.8 Failure to provide adequate notice within the time period outlined in paragraph 3.7 above shall constitute irrevocable acceptance of the goods.

3.9 Purchaser must return all rejected goods to Seller within ten (10) days of giving notice. Seller must refund Purchaser’s advance payment for properly rejected goods within five (5) days of receipt of the rejected goods.

Article 4 – Seller’s Obligations, Representations, and Warranties

4.1 Until received by Purchaser, Seller bears all risk of loss to the above-described goods.
4.2 Seller warrants that the goods are free from any and all security interests, liens and encumbrances.

**Article 5 – Term and Termination**

5.1 This Agreement shall expire in all its terms after thirty-six (36) months from the date on which this Agreement is concluded, unless it is renewed in writing signed by both Parties before the expiration date.

5.2 Should either the Seller or Purchaser substantially fail to perform its obligations under this Agreement, the other party may send written notice via courier to the other party. If the failure in performance is not remedied within twenty (20) days of receipt of such notice, the non-defaulting party may terminate this Agreement.

5.3 Termination made in accordance with the provisions of paragraph 5.2 shall be without prejudice to any damages to which the non-defaulting party may be entitled.

**Article 6 – Governing Law & Dispute Resolution**

6.1 [choice of law provision to be negotiated and drafted]

6.2 [dispute resolution clause to be negotiated and drafted]

**Article 7 – Miscellaneous**

7.1 Seller agrees not to enter into any other distribution agreements with any other entity serving the same territories as the Purchaser for the duration of this Agreement. This provision shall not hinder Seller’s ability to engage in discussions with other potential contracting parties for the three months prior to the termination of this Agreement.

7.2 This Agreement constitutes the entirety of the agreements between the Parties. Any subsequent or corollary agreements must be in writing and shall be interpreted in conformity with this Agreement.

Signed by:

____________________________________
Representative of Island Beauty
Representative of Island Beauty

Date

Representative of Exotic Home Imports

Representative of Exotic Home Imports

Date
Session 2: Arbitrator Selection

This section focuses on procedures and practical techniques for selecting arbitrators. Also covered are strategic issues relating to the constitution of a tribunal. For purposes of this session, all participants will be representing Island Beauty when divided into small groups.
Factual Background for Session 2

1. Exotic Home Imports and Island Beauty executed the Agreement Between the Parties with the following clauses regarding choice of law and arbitration:

   6.1 Governing Law
   The substantive law governing the present contract and all disputes arising out of or in connection with the present contract shall be English law.

   6.2 Dispute Resolution
   All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The arbitration shall be seated in Miami, Florida, and the language of the arbitration shall be English.

2. The Agreement Between the Parties provides for Island Beauty to send Exotic Home Imports a shipment of 2000 units each of picture frames, curio boxes, rattan baskets and pillows covers each month.

3. The first nine months of the contract progressed well, with Island Beauty making all necessary deliveries for the retail items from February 2014 through October 2014 and Exotic Home Imports making all necessary payments.

4. In March 2014, Exotic Home Imports asked Island Beauty to create a series of large, ornate, shell-encrusted mirrors for a luxury seaside resort (Luxos Resort) that was being built on the Mediterranean. The deal was consummated through a series of emails. Exotic Home Imports asserts that delivery was to take place on or before October 15, 2014, and that time was of the essence.

5. Although the time frame was tight, Island Beauty hired extra workers to manufacture the mirrors. However, production was delayed because of a hurricane, and the mirrors were not delivered to Exotic Home Imports until November 5, 2014.

6. On November 6, 2014, Exotic Home Imports rejected the mirrors on the grounds that they were defective or nonconforming.

7. On November 17, 2014, Exotic Home Imports also rejected the November 15 shipment of retail goods on the grounds that they were defective or nonconforming. The first notice of non-acceptance was very general in nature, and, when pressed, Exotic Home Imports indicated that the rejection was based on the fact that a number of the seashells were cracked and a “general sense that the shells and other local materials were of a substandard quality.”

8. Island Beauty believes that Exotic Home Imports is rejecting the retail goods for reasons other than the quality of the product. Furthermore, Island Beauty believes that it lived up
to its contractual obligations regarding the production of the twenty custom mirrors. Island Beauty informs Exotic Home Imports that it intends to file a Request for Arbitration with the ICC.

9. Pursuant to the ICC Rules, each party is entitled to nominate one arbitrator, and the two party-appointed arbitrators generally select the chair of the arbitral tribunal. Under the ICC Rules, Island Beauty must nominate an arbitrator in its Request for Arbitration.

10. Based on initial research, an associate at your law firm has produced a list of two possible arbitrators who seem to have appropriate experience and background. You will need to conduct research and find two other alternatives to consider.

11. Once you have identified all four prospective arbitrators, rank the prospective arbitrators in the order you think would be most beneficial to your client and be prepared to discuss why you have ranked the arbitrators that way.

12. In addition to selecting a prospective arbitrator to nominate, you are aware that Island Beauty’s party-nominated arbitrator will likely have input into the selection of the chairperson. You are also aware that, pursuant to ICC practice, if the parties cannot agree on an arbitral chairperson, a chairperson will ordinarily be selected from the arbitral seat, which is in this case shall be Miami. When selecting a party-appointed arbitrator, you should take into account who your appointed arbitrator might attempt to nominate as chairperson of the tribunal.
PROSPECTIVE ARBITRATOR ONE

Sarah Martingale, Q.C.
Chancery Lane Chambers
London, United Kingdom

Gildings Chambers
Hamilton, Bermuda

Languages: English
Nationality: U.K.
Bar Admission: England and Wales, 1982
Education: St. John’s College, Oxford (BA, MA); City Law School, London (bar professional training)
Academic Position: Adjunct Lecturer, Queen’s College Bermuda (1999-2000)
Arbitral Experience: Chairperson, sole arbitrator and party-appointed arbitrator in numerous international and domestic arbitrations proceeding under the ICC, LCIA, ICDR and SIAC Rules, as well as ad hoc proceedings under the UNCITRAL Arbitration Rules
Practical Experience: Thirty years of practice as counsel in a wide variety of commercial matters proceeding in court and in arbitration under various rules (ICSID, ICC, SCC, LCIA, SIAC, ICDR and UNCITRAL)
“Separability and Commercial Contracts,” Bermuda Bar Association Blog, March 2009
“Ten Tips for Young Arbitrators,” Caribbean Arbitration Association Newsletter, October 2005
PROSPECTIVE ARBITRATOR TWO

Juan Antonio Hernandez
Hernandez & Jones, LLC
Miami, Florida

Languages: English, Spanish

Nationality: U.S.A.


Education: Harvard College (BA); Harvard Law School (JD)

Academic Position: Professor, University of Miami Law School

Arbitral Experience: Sole arbitrator and party-appointed arbitrator in various international arbitrations proceeding under the ICC and ICDR Rules

Practical Experience: Two years as an associate in a major New York Law firm specializing in securities and commercial litigation; Clerk to then-Judge Sonia Sotomayor on the Southern District of New York

Publications:


“Creation of the Caribbean Court of Justice,” 14 European Review of International Law 112 (2010)

“Arbitration With Latin American States,” ABA Journal (May 2009)


Session 3: Challenge of Arbitrators

The purpose of this session is to illuminate the grounds for challenging an arbitrator as well as the tactical considerations associated with such challenges. For this session, all students represent Island Beauty in small group discussions.
Factual Background for Session 3

1. Exotic Home Imports has selected Horace Nottage, Q.C., as its arbitrator. When he was named, he provided the parties with the following disclosure:

My son, Brett Nottage, works in the IT department of Clayton Briggs, the law firm representing Exotic Home Imports. However, my son is not working on this case in any way. Furthermore, my son is based in the London office of Clayton Briggs, while the arbitration is being run by partners based in the firm’s Civilia and New York offices.

I do not believe that this relationship will affect my independence, impartiality or neutrality in this matter.

2. You have also conducted independent research and discovered that Horace Nottage is a member of the Oxford and Cambridge Club, which has an affiliate relationship with a number of university clubs around the world. Susan Whittaker is a member of the University Club in Civilia. The University Club is one of the affiliates of the Oxford and Cambridge Club.

3. You have also discovered that Horace Nottage’s wife, Elizabeth Nottage, is an architect and partner in the firm of Nottage Blankley. Although you have not found any connections between Elizabeth Nottage and Exotic Home Imports, you have learned that Nottage Blankley has consulted on architectural projects for the resort developer (Luxos) that was supposed to buy the twenty bespoke mirrors.

4. Consider whether any of these facts provide sufficient grounds for a challenge to the nomination of Horace Nottage. Consider also whether you believe a challenge would be appropriate, even if grounds existed, and how such a challenge would be mounted. In so doing, you may want to consider Article 14 of the ICC Arbitration Rules and the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration.
Session 4: Jurisdiction and Enforcement of Arbitral Agreements

The purposes of this session is to consider jurisdictional challenges in context and to illustrate the concepts of separability and competence-competence. Students also must evaluate the strategy behind making and preserving jurisdictional objections, which includes understanding the potential risks related to the making of such objections. For this session, all students represent Island Beauty.
Factual Background for Session 4

1. The tribunal has been appointed and Island Beauty has filed its Request for Arbitration. Excerpts from the Request are reproduced separately. In its Request, Island Beauty asserts a claim for breach of contract and seeks damages for wrongful termination of the agreement. Island Beauty argues also that Exotic Home Imports fraudulently misrepresented its intention to enter into a long-term contract, which injured Island Beauty’s ability to investigate or enter into other business relationships with European entities.

2. In its Response, Exotic Home Imports contends that Island Beauty had the right to look into other business opportunities for the three months prior to the termination of the Agreement Between the Parties and that Island Beauty has the ability to enter into those agreements now that the contract has terminated. However, Exotic Home Imports suggests that Island Beauty’s failure to do so demonstrates either that no remediable injury has occurred and/or that Island Beauty has failed to mitigate its damages.

3. Exotic Home Imports also indicates in its Response that the tribunal does not have jurisdiction over all or part of this dispute because the parties’ substantive agreement is either void or voidable. In support of this assertion, Exotic Home Imports claims that the importation of regulated materials such as seashells and other indigenous materials into Civilia is illegal and that therefore the Agreement Between the Parties, including the arbitration provision, is void. Alternatively, Exotic Home Imports argues that the fact that time was of the essence regarding the delivery of the mirrors made the contract void upon non-delivery as of the contractually specified date. Exotic Home Imports also claims that Hurricane Isabella rendered the agreement regarding the sale of mirrors either void or voidable under the doctrine of force majeure. Alternatively, Exotic Home Imports claims that the arbitration agreement does not cover the sale of mirrors, since those were a separate contract. Finally, Exotic Home Imports argues that Island Beauty has asserted a claim for fraudulent inducement, which also renders the contract voidable.

4. Exotic Home Imports alternatively argues that, if its jurisdictional objection is denied, it should be awarded a sum to be determined at a hearing based on the damages associated with the failure of the contract between Exotic Home Imports and Luxos for the purchase of the bespoke mirrors as well as a declaration that the Agreement Between the Parties is void and unenforceable.

5. Exotic Home Imports has also threatened to initiate a litigation in the courts of Civilia seeking both damages and declaratory relief.

6. Island Beauty has sought advice from you regarding the validity of these jurisdictional challenges and what the effect of a lawsuit in Civilia might be. In considering these issues, it may be relevant to note that Exotic Home Imports also has assets located in France and the United Kingdom.
ISLAND BEAUTY,

Claimant

versus

EXOTIC HOME IMPORTS,

Respondent

REQUEST FOR ARBITRATION

January 6, 2015
Request for Arbitration

1. This Request for Arbitration is submitted on behalf of the Claimant in accordance with Article 4 of the Rules of Arbitration of the International Chamber of Commerce, effective January 1, 2012.

I. The Parties

2. The Claimant is Island Beauty, a company registered in Caribe. Its primary place of business is 501 High Street, Portsmouth, Caribe. Claimant is in the business of manufacturing decorative items for sale to wholesalers and buyers in the trade.

3. The Claimant is represented in this arbitration by Andrews & McMullin, whose address is 1127 Coastal Drive, Portsmouth, Caribe. All communications to the Claimant in this arbitration should be made to the above-mentioned firm.

4. The Respondent is Exotic Home Imports, a company registered in Civilia, whose primary place of business is 1001 JFK Boulevard, Capitole, Civilia. Respondent is in the business of purchasing items for interior decoration for resale to retailers and customers in the trade.

II. The Arbitration Agreement

5. This dispute arises under a sales contract between Claimant and Respondent (“Agreement Between the Parties”). A copy of the Agreement Between the Parties is attached to this Request for Arbitration.

6. The Agreement Between the Parties contains an arbitration provision in paragraph 6.2, which reads:

   6.2 Dispute Resolution
   All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The arbitration shall be seated in Miami, Florida, and the language of the arbitration shall be English.

7. The Agreement Between the Parties also includes a provision permitting additional side agreements between the Claimant and Respondent. That language is found in paragraph 2.3 of the Agreement Between the Parties and reads:

   2.3 Seller also agrees to manufacture and deliver to Purchaser various customized objects, price, quantity and specifications to be agreed between the Parties. Any agreement concerning customized objects shall be memorialized in writing and interpreted in accordance with this Agreement Between the Parties.
III. Governing Law, Place, and Language of the Arbitration

8. The Agreement Between the Parties contains a choice of law provision at paragraph 6.1, which reads:

6.1 Governing Law
The substantive law governing the present contract and all disputes arising out of or in connection with the present contract shall be English law.

9. Paragraph 6.2 of the Agreement Between the Parties provides that the seat of the arbitration shall be Miami, Florida.

10. Paragraph 6.2 of the Agreement Between the Parties provides that the language of the arbitration shall be English.

IV. Constitution of the Tribunal

11. Paragraph 6.2 of the Agreement Between the Parties states that, as provided by the ICC Rules, each side shall nominate an arbitrator and the two arbitrators so nominated shall, by mutual agreement, nominate a third arbitrator.


V. Nature and Circumstances of the Dispute

A. The Contract Between Island Beauty and Exotic Home Imports

13. In January 2014, Island Beauty and Exotic Home Imports entered into an agreement in which Island Beauty agreed to sell Exotic Home Imports a defined number of decorative items as well as various unspecified decorative items on a commissioned basis. . . .

[Further text omitted]

Relief Requested

As a result of the foregoing, Island Beauty respectfully requests an award granting the following relief:
a) A declaration that Exotic Home Imports has breached its obligations under the Agreement Between the Parties by terminating the agreement and failing to pay for the twenty bespoke mirrors and the final three shipments of retail items;

b) Monetary damages from Exotic Home Imports arising out of Exotic Home Import’s breach of the Agreement Between the Parties, including lost profits for the duration of the three-year contract and lost future business opportunities;

c) The costs of the arbitration and all of Island Beauty’s reasonable legal fees, expenses, and other costs incurred in connection with the arbitration, including all internal costs; and

d) Such additional or other relief as may be just.

Island Beauty reserves the right to amend or supplement this Request for Arbitration or to make additional claims or revisions to its claims.

Respectfully Submitted,

________________________
Counsel for Island Beauty

Dated: January 6, 2015
Session 5: Evidence in International Commercial Arbitration –
Witness Statements and Cross Examination

This session introduces students to evidentiary procedures used in international commercial arbitration and the types of strategies needed to develop their cases. Students will work on developing a strategy for cross-examining a witness whose affirmative testimony has been provided by witness statement. All students will be representing Island Beauty for this exercise. These arguments will be based on the following developments in the case.
Factual Background for Session 5

1. The arbitral tribunal has issued a ruling rejecting all jurisdictional objections. The tribunal bifurcated the liability and damages questions and issued a procedural order setting forth a timetable for the proceeding.

2. During the liability phase, it became apparent that the following documents are key to the dispute.

3. Consistent with arbitral practice, the parties have submitted written witness statements that will stand as affirmative testimony. Among the submissions is the following statement from Susan Whittaker.

4. You believe that there are several holes in Whittaker’s testimony that you will need to fill at the hearing. Prepare a cross-examination strategy identifying what needs to be discussed and be ready to conduct part of that cross-examination in class.
To:     Joseph Alston (jalston@islandbeauty.com)  
From:  Susan Whittaker (sue@exotichome.com)  
Date:  March 7, 2014  
Re:     Mirrors  

Hey Joe, just following up on our phone convo re: the mirrors. We need twenty mirrors, 145 cm tall by 84 cm wide, encrusted with shells as per the design specs we sent last week. I’m glad you agreed to take on this project – the people developing this resort are really high-end and I think there could be more work in the future if this goes well.

The one thing I don’t think we finalized was the delivery date. As I remember, I asked for August 15, 2014. If you can confirm, that’d be cool.
To: Susan Whittaker (sue@exotichome.com)  
From: Joseph Alston (jalston@islandbeauty.com)  
Date: March 8, 2014  
Re: Re: Mirrors

Dear Susan

Many thanks for your email of March 7, 2014. We would be happy to produce twenty bespoke mirrors for you at 145 cm (h) x 84 cm (w). We will decorate the mirror as noted in the design specifications sent on March 1, 2014, subject to the availability of raw materials. You indicated that your client’s key concern was that all twenty mirrors would be identical, so we may need to change certain minor design elements so as to ensure consistency across all twenty mirrors. Normally our bespoke products are each unique, so an order of this nature is somewhat unusual for us. Nevertheless, we are sure that we can produce something with which you and your client will be happy.

As for the delivery date, I believe I told you on the phone that we will be unable to make an August deadline. We will soon be going into the Caribbean hurricane season, which can create a variety of scheduling problems. We also will need to hire on some extra workers in order to produce this many bespoke items. Given these factors, the earliest date that I can offer is October 15, 2014, but that would still be contingent on having no unforeseen delays arise.

I thank you for your business and look forward to your confirmation of the above.

Kind regards,

Joseph Alston
To: Joseph Alston (jalston@islandbeauty.com)

From: Susan Whittaker (sue@exotichome.com)

Date: March 9, 2014

Re: Re: Re: Mirrors

J –

Just about to board a plane, but October 15, 2014, will be tight from our end but acceptable.

More later –

S

Sent from my iPhone – please excuse any typos.
Dear Susan

Thanks for your confirmation message of March 9, 2014. We will begin production on the twenty mirrors immediately and will use our best efforts to make delivery on or before October 15, 2014.

If you have any other questions, please let me know.

Kind regards,

Joseph Alston
To:        All Clients

From:   Joseph Alston (jalston@islandbeauty.com)

Date:    October 1, 2014

Re:       Hurricane Isabella

Dear Clients

Apologies for the informality of this message, but we have been advised by the National Weather Service that Hurricane Isabella has recently switched paths and is now due to hit Caribe. As you can imagine, we at Island Beauty are taking all necessary steps to deal with this crisis. However, please note that communications may be difficult in the coming days if the hurricane is as bad as experts predict.

We will be in touch as and when we can.

Kind regards,

Joseph Alson
To: Joseph Alston (jalston@islandbeauty.com)
From: Susan Whittaker (sue@exotichome.com)
Date: October 5, 2014
Re: All well?

Joe –

I’ve been watching the news and am very sorry to hear about the effects of the hurricane. I hope that you and yours have come through all right. It sounds as if the worst of the storm hit the other side of the island, so hopefully you’re okay. Do let me know how things are. Not to sound crass, but my client is very concerned about how this is going to affect the delivery of the mirrors – he has a grand opening date that is set and needs to have everything in place to make a good impression (apparently he has the Prime Minister as the guest of honor!). Time really is running short.

Thanks and be well –

S
To: Susan Whittaker (sue@exotichome.com)

From: Joseph Alston (jalston@islandbeauty.com)

Date: October 6, 2014

Re: Re: All well?

Island Beauty is unable to respond to any messages at this time due to issues associated with Hurricane Isabella. We apologize for any inconvenience and will reply to your message as soon as possible.

This is an automated response.
Shipment Order

November 5, 2014

To:   Exotic Home Imports

From: Island Beauty

This is to confirm shipment of twenty (20) shell-encrusted mirrors, as per the contract dated March 10, 2014.
To: Joseph Alston (jalston@islandbeauty.com)  
From: Susan Whittaker (sue@exotichome.com)  
Date: November 6, 2014  
Re: November 5 delivery  

Dear Mr. Alston  

This is to inform you that the November 5 delivery of twenty mirrors has been rejected on the grounds that the goods were defective or non-conforming.
To: Joseph Alston (jalston@islandbeauty.com)

From: Susan Whittaker (sue@exotichome.com)

Date: November 17, 2014

Re: Delivery of November 15

Dear Mr. Alston

This is to inform you that the delivery of retail merchandise dated November 15 has been rejected on the grounds the goods were defective or non-conforming. This conclusion is based on our agent’s general sense that the shells and other local materials were of a substandard quality.
To: Joseph Alston (jalston@islandbeauty.com)

From: Susan Whittaker (sue@exotichome.com)

Date: November 19, 2014

Re: Re: Delivery of November 15

Dear Mr. Alston

In response to your voicemail of yesterday, this is to advise you that the delivery of November 15 was rejected because of (1) excessive breakage and (2) substandard materials.

As for the mirrors delivered on November 5, those were rejected because (1) nonconformity (the shells were different and were differently arranged than in the design model) and (2) the shipment was late. As I told you in my various emails and telephonic discussions, time was of the essence in this delivery. While we certainly understand the difficulties you faced in the aftermath of Hurricane Isabella, hurricane-related contingencies were taken into account when you agreed to this delivery schedule, as per your email of March 8, 2014.
Witness Statement of Susan Whittaker

1. My name is Susan Whittaker and I am the Chief Executive Officer of Exotic Home Imports.

2. Exotic Home Imports is a wholesaler and importer specializing in interior design items. Exotic Home Imports is headquartered in Capitole, Civilia. Exotic Home Imports is in the business of identifying, buying and reselling unique items of interior décor to retail outlets throughout the European Union and commissioning unique items for sale within the trade.

3. I entered into a contract with Island Beauty on behalf of Exotic Home Imports on January 5, 2014. That contract was for the purchase of certain interior decorative items that were to be sold wholesale. The contract specified particular items and quantities for one year.

4. The contract also contemplated the possible purchase of various customized items. Pursuant to this clause of the contract, Exotic Home Imports commissioned twenty mirrors on behalf of Luxos Resorts. The terms of that agreement were settled on March 9, 2014.

5. Exotic Home Imports needed the mirrors in August but agreed to a delivery date of October 15, 2014 to accommodate Island Beauty. Time was of the essence in this contract because Exotic Home Imports’ client, Luxos Resorts, needed the mirrors prior to its grand opening on October 31, 2014.

6. On or about October 1, 2014, Exotic Home Imports was advised by Island Beauty that communications could be delayed as a result of Hurricane Isabella. Although Exotic Home Imports was advised by Island Beauty that communications could be delayed as a result of the storm, there was no indication that the hurricane could or would affect the timing or quality of the delivery of goods.

7. Island Beauty did not attempt to make delivery on the bespoke items until November 5, 2014. At that point, the mirrors were no longer needed because Luxos had cancelled its contract with Exotic Home Imports and purchased replacement mirrors on or about October 25, 2014.

8. Furthermore, the mirrors that were delivered were of an inferior quality to the mirrors that were agreed upon. The size of the shells surrounding the mirrored pane were smaller and less vibrantly colored. As such, the mirrors were unsuitable for resale at the contracted price.
9. The retail goods that were delivered on November 15, 2014, were also of inferior quality. The workmanship on the materials was substandard and many of the shells used in the making of the goods were cracked. Furthermore, the designs were not consistent even within the shipment. For example, some of the picture frames appeared to have a smaller number of shells than other frames in the shipment or in previous shipments.

10. During contract discussions with Island Beauty, I expressed an interest in a long-term contract but did not want to commit to any particular price or quantity beyond one year since I did not know how well the Island Beauty products would sell. Therefore, the contract dated January 5, 2014, did not include any guarantee of an order beyond the first year.

11. The sales of the Island Beauty products in the first ten months of the contract were not encouraging from the perspective of Exotic Home Imports. As a result, I would not have renewed our order for the retail merchandise after the first year’s obligation ended, even if the November shipment had not been substandard. Indeed, at no time did I ever discuss future orders with Island Beauty.

12. Custom interior design is a very specialized market and highly dependent on a reputation for quality and dependability. After the experience with the twenty mirrors for Luxos Resorts, I would not recommend Island Beauty’s products to another customer. Therefore, there is no possibility that Exotic Home Imports would commission future work from Island Beauty.

/s/ Susan Whittaker

Susan Whittaker

December 21, 2014

Signed and sworn before me this 21\textsuperscript{st} day of December, 2014.

Clara DeSoto, Notary Public
This session introduces students to evidentiary procedures used in international commercial arbitration and the types of strategies needed to develop their cases. Students will be broken into small groups representing either Island Beauty or Exotic Home Imports to develop a case strategy for gathering and presenting evidence in support of their claims relating to damages. These arguments will be based on the following developments in the case.
Factual Background for Session 6

1. After an evidentiary hearing on liability, the tribunal issued a partial award finding that Exotic Home Imports breached the Agreement Between the Parties and rejecting all of the counterclaims put forward by Exotic Home Imports.

2. The tribunal has scheduled separate written submissions and a hearing on the damages issues.

3. Island Beauty believes that it has been substantially injured by the termination of the contract by Exotic Home Imports, while Exotic Home Imports believes that any injuries are minimal. Each party is assessing its theory of damages and the type of evidence it can produce in support of its position on damages.

4. The tribunal has asked each party to make a submission concerning evidentiary issues prior to the substantive submissions on damages are made. This evidentiary submission includes an outline of any documents, if any, that the party requests from the other side. The tribunal has indicated that it will be using the 2010 IBA Rules on the Taking of Evidence as its starting point, although the tribunal will hear arguments from the parties as to whether that is the proper course to adopt.

5. The tribunal has also requested a list of fact witnesses and expert witnesses that can be expected to be called, a summary of the topics each witness will address and an indication of how many hearing days each party will need to present their case on damages.

6. Work with your group to prepare a strategy and the documents that have been requested by the tribunal (outline, list of witnesses, summary of topics and indication of hearing dates). Remember that you will be provided with affirmative testimony via written witness statements for each witness and, in the case of expert witnesses, an expert report.