

ARBITRATION

Fall 2012

Room 306

Tuesday/Thursday 1:00–2:20 p.m.

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SYLLABUS AND POLICIES

What Is this Course About?

We begin resolving disputes through informal arbitration when we are children: Fights with siblings are often resolved by running to a parent for a final solution. We watch arbitrations on television: In a *Seinfeld* episode, Elaine and Kramer agreed to have Newman decide their dispute regarding who was the “true” owner of an old bike. We may “arbitrate” on some level whenever we agree to have a third party determine the outcome of a dispute.

In commercial dealings, and in employment and consumer contexts, contractual arbitration has become more a norm and less an alternative for resolving disputes. Individuals agree to arbitration in many common contracts, including leases, credit card applications and sales agreements. Business clients regularly request their attorneys’ advice regarding whether they should agree to arbitrate a dispute, what provisions they should include in an arbitration agreement, whether their arbitration clauses are enforceable, and what effect an arbitration award will have in future litigation.

Legislatures and courts have created a complex body of statutory and case law that governs the enforceability and effect of such arbitration agreements and awards. Attorneys working in transactional and litigation practices face complex arbitration issues, and must understand and apply the constantly evolving arbitration rules. Moreover, we all should consider important policy issues that have developed in conjunction with the law, and seek legal reform if and where necessary. Indeed, the United States Supreme Court has grappled with abundant arbitration issues during the last ten years and there are more on the horizon for this year. At the same time, Congress has debated the Arbitration Fairness Act for years!

Be aware that there are various types of arbitration: labor, court-annexed, private, etc. This means that there is a vast landscape of arbitration law and practice, and we cannot cover it all in a three-hour course. Accordingly, this course focuses on private arbitration — meaning arbitration pursuant to parties’ contractual agreements. Although some of what we learn is relevant to other types of arbitration, the course does not cover court-annexed, labor arbitration under the Fair Labor Standards Act, or other statutorily required arbitration. There is not enough time to cover all these aspects and other courses cover these procedures and laws.

In addition, international arbitration is another important area that we cannot fully cover along with domestic arbitration in a three-hour course. Over the years, I have “revamped” this course to cover some private international arbitration law, sometimes attempting to cover too much. Based on feedback and my experimenting with different levels of coverage, I have learned that it is best to limit specific coverage to introducing the key aspects of the New York Convention (treaty law incorporated in United States federal law through Chapter Two of the Federal Arbitration Act (“FAA”)) and noting some distinctions between international and domestic arbitration law. Furthermore, you will see that many of the cases we cover are international because the law covering private domestic and international law is often the same. Nonetheless, time will not allow for in-depth discussion of the vast landscape of international laws and treaties.

Please also note that this is not a clinical course, and therefore we will not do a simulated arbitration. However, student participation and interactive discussion is very important in this course. I encourage and welcome your thoughts and ideas! Arbitration has become particularly controversial in employment and consumer cases, and the law is continually evolving.

Required Materials:

1. Drahozal, Commercial Arbitration: Cases and Problems (2nd ed. 2006).
2. Drahozal, Documentary Supplement for Commercial Arbitration: Cases and Problems (2nd ed. 2006).
3. **Free 2012 Update for Commercial Arbitration: Cases and Problems.** In addition to the above books, there is a 2012 Update for the casebook due to the continual developments in arbitration law! To access the 2012 Update, go to http://www.lexisnexis.com/lawschool/study/texts/pdf/PUB_3126CommercialArbitration.pdf . You also can access the Update on TWEN under the Course Materials Forum. *Please note that the assignment listings refer to this as “Up.” and there are places where it replaces casebook pages.*
4. Other **Free** Materials posted on TWEN (as noted below).

TWEN, Speakers and Additional Resources:

I have created an Arbitration course page on TWEN. *All students in this course must register on TWEN in order to access the page.* The TWEN course page will post materials, announcements, assignments of Problems, and other resources you need for class. Also, I have placed some materials on reserve for this course and there are many resources in the library and on the internet. For example, the website for one of the most established arbitration organizations, the American Arbitration Association (AAA) (www.adr.org), includes good arbitration resources and additional links. We also will have the Vice President of the AAA who has offices in Denver as guest speaker. He provides a good practical perspective, and has been involved with the IOC arbitrations related to the Olympics.

Class Schedule:

Class will meet on Tuesdays and Thursdays from 1:00 to 2:20 p.m. We are adding 5 extra minutes to account for a missed day on Thursday, September 27, and another missed day TBA.

Office Hours:

Office hours for this class will be held on Tuesdays from 3:30 to 5 p.m. or by appointment. Of course, please feel free to talk to me after class or stop by my office anytime. I am in my office most days. In addition, I am happy to schedule coffees and meetings with study groups.

Class Attendance, Preparation and Participation:

General Attendance and Preparation: Class attendance, preparation and participation are essential. Your contribution to this class will enhance everyone's course experience. *This means you really should be present and prepared for every class meeting.* This includes reading the material, thinking about it, and being prepared to discuss the cases, Problems in the book, and related hypotheticals I create. Nonetheless, in order to relieve some burden and stress, I do assign the book Problems in advance. This means that you should prepare answers to all the Problems, but you will be responsible **for more carefully preparing** answers to your assigned Problems and will present these answers in class. I also may add follow-up questions and related hypotheticals to the Problems. *If you are unable to attend class the day on which you are scheduled to present an assigned Problem, then you must "swap" Problems with another student to be sure the Problem is covered. In that event, kindly let me know of the "swap."*

I realize that you will have days that you cannot attend due to illness, etc., and extenuating circumstances may prevent you from being prepared at times. For this reason, you each have three "passes." A pass allows you to come to class without fear of being called on for that day. You must alert me that you are using a pass, however, *before* class begins. *Please also note that the ABA accreditation standards require us to enforce "regular and prompt class attendance," and a student's failure to comply will result in failing or being denied credit for the class.* I hate to have any rules, and sincerely hope that you all come to class and that you prepare for and participate in class discussions! I truly enjoy this material and discussing it with you.

Participation Points: Because participation is very important to your learning, I wish to acknowledge students' efforts and contributions to the class through additional points. Therefore, I will add from 1 to 5 points to each student's final grade based on the student's overall participation and contribution to the class. These are full points that can really help bring up your grade. *It is therefore very beneficial to participate!*

Exam:

There will be a three-hour limited open book essay examination. This means you may bring with you to the exam the required materials (listed above), any supplemental materials I have distributed, and outlines which *you have prepared/substantially prepared (i.e., not borrowed or copied from a friend, former student, outline file, etc.). You may not bring other books, treatises, nutshells, commercially prepared outlines, or the like.*

Course Themes:

As you prepare the materials, please consider the following themes:

- Private vs. Public Dispute Resolution
- "Arbitration" Distinguished From Other Forms of Private Dispute Resolution
- Pros and Cons of Arbitration in Consumer and Employment Contracts

- Proper Scope of Arbitration in Light of Historical Context and Current Public Policy
- Possible Reforms of the Federal Arbitration Act
- Procedural Reforms and Roles of Arbitration Institutions and their Rules
- Domestic vs. International dispute resolution, and importance of cultural and legal differences among disputing parties

Assignments:

General: The assignments generally will follow sequentially from the Table of Contents of the casebook, but we are skipping certain pages and sections. There also are parts of the casebook replaced by the Update as noted below. Please also note that the syllabus lists reading assignments for 25 classes in order to account for the missed days, a guest speaker, and the fact that we will not necessarily get through a “class” in one class meeting. Moreover, the reading assignments are subject to change and you may find solace in the shorter readings toward the end of the semester. *Above all, please do not read too far ahead of class due to possible changes, and ask me at the end of class if you are uncertain how far to read for the next class meeting.*

Problems: In addition to preparing the assigned reading, you must prepare the assigned Problems from the book. I expect you to carefully consider and prepare answers to all of the Problems. It is to your advantage to prepare all Problems because they require you to apply the legal concepts, and they help prepare you for the exam. **In addition you are all “on call” for all the Problems in chapter one. However, in order to ease some stress, I will assign Problems starting with chapter two per a listing on TWEN for which you must be especially prepared and will be “on call.”** MAKE SURE TO CHECK TWEN FOR THE POSTING and to be present and prepared for your assigned Problems. Again, kindly tell me if you have arranged to “swap” Problems with another student as noted above.

Statutes and Rules: It is essential that you study the provisions in the conventions, statutes, arbitration rules, and other materials referenced in the reading assignments and reprinted in the Documentary Supplement and Update. You should be especially vigilant in consulting the Federal Arbitration Act and AAA Commercial Arbitration Rules (both reprinted in the Supplement, and as revised in the Update).

Update: As noted above, you need to access and read the free 2012 Update as assigned. The full Update appears long and daunting but note that I am not assigning the entire Update, and it *replaces some of the casebook to account for recent developments*. Again, I have indicated the assignments from the Update in the listings below with references to “Up. ____”. These page numbers are the pdf page numbers as they appear on the pdf. The varied materials for this course keep up with the changing landscape of arbitration law and policy, and inject fresh reading into the course. Indeed, the Supreme Court is continually deciding cases on arbitration.

Class 1: pp. 1 to 27 through Prob. 1.3; Up. 1-4

Introduction to Commercial Arbitration

- § 1.01 Overview
- § 1.02 A Theory of Private Dispute Resolution
- § 1.03 What is Arbitration?

***FOCUS:**

Should we privatize dispute resolution? Why do we value “our day in court”?

Should constitutional due process apply in arbitration and other private tribunals?

What is “arbitration” governed by the FAA, and how does it differ from other types of “ADR”?

Is the term “ADR” useful or meaningful in today’s dispute resolution marketplace?

Class 2: pp. 27 through 52 (the end of Chapter 1), Up. 5-8 & prepare for the Policy Debate after you read the proposed Arbitration Fairness Act (“AFA”) reprinted at Up. 126-130 & the short Policy Debate document posted under the Course Materials Forum on TWEN .

§ 1.04 Why Arbitrate?

§ 1.05 A Brief History of Commercial Arbitration

Policy Debate

The Arbitration Fairness Act (“AFA”) has been proposed in Congress for the past few years, and has garnered renewed support this year despite its past failures (it has fizzled in committees each year). The pending language would invalidate the enforceability of pre-dispute agreements to arbitrate employment, consumer, franchise and civil rights disputes. Read the AFA as reprinted in the Update at 126-130 & the short Policy Debate document posted under the Course Materials Forum on TWEN .

FOCUS: Use all these materials in preparing for the Problem 1.5 policy debate. What arguments can be made on both sides? Does the broader AFA make sense? Should there be distinction between consumer and employment arbitration? How has arbitration changed or grown since adoption of the FAA? Are there better options to banning pre-dispute arbitration clauses? If so, what would you propose?

Class 3: pp. 53 to 59 & 66 to 71 (including notes and Probs. 2.1, 2.2 & 2.3); Up. 9-12.

Chapter 2 Enforcing Agreements to Arbitrate

§ 2.01 Overview

§ 2.02 Who Decides Arbitrability

- **My Arbitrability Framework for Analysis & Arbitrability Worksheet (both on TWEN under Course Materials)**

Class 4: pp. 80 to 88 through Prob. 2.6; Up. 13-22 (replaces pp. 71-80 in the casebook!)

§ 2.03 Default in Proceeding with Arbitration

§ 2.04 The Scope of the Arbitration Agreement

Class 5: pp. 88 to 107 (Skip Prob. 2.10).

§ 2.05 General Contract Law Defenses

[A] Assent & Formalities

Class 6: pp. 108 to 118 through Prob. 2.12 & Up. 27-34 (*Rent-A-Center* & Notes –from the S. Ct.)

[B] Lack of Consideration

[C] Unconscionability, Reasonable Expectations and Contracts of Adhesion

Class 7: pp. 118 to 129 through Prob. 2.15

- [D] Fraud
- [E] Material Breach

Class 8: pp. 129 to 144 (through the end of Chapter 2); Up. 36-37

- § 2.06 Binding Non-Signatories to Agreements to Arbitrate
- § 2.07 Procedural Issues in Enforcing Domestic Arbitration Agreements

Class 9: pp. 145 to 153 (including Prob. 3.1); pp. 167 to 169 (including notes and Prob. 3.3 but skip Probs. 3.2 & 3.4) & pp. 169 to 182 through Prob. 3.5

Chapter 3 Arbitrability of Federal Statutory Claims

- § 3.01 Overview
- § 3.02 The Rise and Decline of the Nonarbitrability Doctrine
- § 3.03 Current Issues in the Arbitrability of Federal Statutory Claims
 - [A] Civil Rights
 - **Note we are skipping [B] Bankruptcy (pp. 182-86)

Class 10: pp. 187 to 207 through Prob. 3.9 & Up. 39-42 (includes notes about the CROA!)

- § 3.03 Current Issues in the Arbitrability of Federal Statutory Claims
 - [C] Magnuson-Moss Warranty Act
- § 3.04 Arbitrability and Statutory Rights and Remedies

Class 11: pp. 209-229 through Prob. 4.4 & Approaching Preemption Framework for analysis posted on TWEN under the Course Materials Forum -- to be used throughout Chapter 4, but you will not fully understand until you get further along in the Chapter

Chapter 4 The Federal Arbitration Act and State Law

- § 4.01 Overview
- § 4.02 Preemption and the FAA

Class 12: pp. 229 to 242 through Prob. 4.7; pp. 248 to 253 through Prob. 4.9; Prob. 4.10 on pp. 256-257 & Up. 43-54 (replaces the casebook pp. 253-256!)

- § 4.03 Scope of the FAA
- § 4.04 Applications (through Prob. 4.10) (skipping 242-47)

Class 13: pp. 257 to 272 through Prob. 4.14 & Up. 55-56

- § 4.04 Applications
- § 4.05 Choice of Law Issues

Class 14: pp. 278 to 286 (through the end of Chapter 4) & Up. 57-61 (replaces 273-77!)

- § 4.06 Procedural Issues in Enforcing Domestic Arbitration Agreements

Class 15: pp. 287 to 310 through Prob. 5.4 & read the short (1) Enforcing International Agreements to Arbitrate and (2) International Perspectives summaries both posted on TWEN under the Course Materials Forum.

Chapter 5 Enforcing International Agreements to Arbitrate

- § 5.01 Overview

§ 5.02 Scope of the New York Convention

[A] “Agreement in Writing”

[B] “International”

[C] “Commercial”

[D] Reciprocity

NOTE: The materials assigned above that are posted on TWEN should help with the basics of international arbitration. Unfortunately, we do not have enough time to cover all of international arbitration, as that would be a full three-credit course in itself.

Accordingly, we are skipping pp. 310 to 317. We also are skipping pp. 317 to 339 (Defenses to Enforceability). However, note that enforcement and defenses in international cases largely parallel those for domestic FAA cases.

***If you are interested in learning more about international arbitration, please feel free to talk with me. I have taught the course in Paris, France, and Oxford, UK, and am currently involved with CU’s Study Abroad programs and a working group of the UN for ODR.**

Class 16: pp. 349 to 371 through Prob. 6.4 (Skip 6.5); Up. 68-70

Chapter 6 The Arbitration Proceeding

§ 6.01 Overview

§ 6.02 Initiating the Proceeding

§ 6.03 Representation

§ 6.04 Selecting Arbitrators

[A] The Mechanics of Selecting Arbitrators

Class 17: pp. 372 to 381; pp. 388 to 398 & Up. 71-79 (replaces casebook pp. 382-387!)

[B] Challenging Arbitrators for Partiality

§ 6.05 Provisional Remedies (Skip 399-408 through Prob. 6.8)

Class 18: pp. 413 to 431 through Prob. 6.12 & Up. 81-90 (replaces casebook pp. 409-413!)

§ 6.06 Consolidation and Class-Wide Arbitration

§ 6.07 Discovery

Class 19: pp. 432 to 440 (skip *Min of Def*) & pp. 443 to 447 through Prob. 6.14

§ 6.08 Confidentiality

§ 6.09 Pre-Hearing Procedure and Motions Practice (skip *Min of Def*)

Class 20: pp. 447 to 456 & pp. 464 to 482 through the end of Chapter 6

§ 6.10 The Hearing (Skip *Buckamier, Iran Aircraft* & Prob. 6.16)

§ 6.11 The Award

§ 6.12 Online Arbitration Proceedings

**Consideration of ODR programs in consumer disputes: Note that I may be adding materials related to my work with the United Nations ODR Project, and hope to inject discussion related to that project into class as it proceeds!*

Class 21: pp. 483 to 511 through Prob. 7.5

Chapter 7 Enforcing Arbitral Awards

§ 7.01 Overview

§ 7.02 Challenging Awards Before the Arbitral Tribunal

§ 7.03 Enforcing and Challenging Domestic Arbitration Awards

[A] Grounds for Vacating Domestic Arbitration Awards (Part I)

Class 22: pp. 512 to 534 through Prob. 7.9 & Up. 95-98

[A] Grounds for Vacating Domestic Arbitration Awards (Part II)

[B] Procedural Issues in Enforcing Domestic Arbitration Awards

Class 23: pp. 584 to 585; Problems on 592 (but Skip 7.17(b)) & Up. 101-110 (replaces the case and notes on pp. 586-92!)

§ 7.05 Modifying the Standard of Review by Contract

Class 24: Drafting a Dream Consumer Arbitration Clause: Can Consumer Arbitration Be Fair?

1. Find an Example of an Arbitration Provision in a contract you are subject to or you find online or through other means (*i.e.*, credit card, cell phone, loan, and broker contracts/terms and conditions nearly always include arbitration provisions).
2. Review the AT&T and Propertyroom.com provisions posted on TWEN under the Course Materials Forum. Which is better (long versus short), and why?
3. Compare and consider these different clauses, along with the example that you found on your own. How does your provision compare with the AT&T and Propertyroom.com provisions? Are these clauses “fair” in your view? What, if any, of the provisions in these clauses trouble you, and why?
4. With these considerations and resources in mind, you will be placed in one of the three groups stated below. You must work together outside of class with your group in crafting a “Dream Consumer Arbitration Clause” from your group’s perspective. You may use the different provisions noted above in drafting the clause. Be prepared to explain the group’s draft in class, and hand the draft in as a group.
5. Your work will not be graded per se but your participation in the exercise and the class discussion will be taken into account in assessing participation points.

DRAFTING AND REGULATING ARBITRATION IN THE REAL WORLD:

Chase: You are dealing with the new caps on debit card swipe fees and other fee limits/regulations set by the CARD Act and Dodd-Frank. You are also concerned with litigation and class actions that have been launched with respect to your compliance with these rules, and challenges of new fees you have started to charge in order to account for increased regulation. Consider why or why not you would want to include an arbitration clause in your credit and debit card contracts. In addition, draft a clause that you would seek to incorporate if you were to adopt an arbitration program. Be prepared to explain that clause and why you included each part of the provision.

Consumers: You lead a consumer interest group that includes various constituencies from across the United States. Consider why or why not you should employ your lobbyists to resist enforcement of arbitration clauses in debit and credit card contracts? Do the constituencies in your group agree on a stance? Why or why not? Would you want the CFPB to limit or bar arbitration clauses? Is there a difference between pre and post-dispute arbitration agreements? How would you draft the best arbitration clause for your constituencies? Be prepared to explain that clause and why you included each part of the provision.

CFPB: You are in the CFPB and considering whether to bar or limit arbitration in consumer financial products/services contracts. What considerations/concerns do you have about arbitration? What about costs of regulation? Explain any other political and economic factors that come into play. Draft what you would propose as a required form arbitration provision that all companies must use if they wish to require arbitration in their contracts for financial products and services. Such regulatory forms are often used (ie: the TILA provisions for mortgage contracts), and it is conceivable that the CFPB could choose to pursue that route in regulating arbitration under Dodd Frank. Remember that you must balance interests of companies and consumers, and deal with political backlash in Washington! Be prepared to explain your proposed arbitration provision, and your reasoning with respect to each part of the provision.

Class 25: Pre-Exam Review and Catch Up! Note there is a practice exam posted on TWEN and all my past exams are available for practice on CU Law's test-bank. I release all my exams and have taught Arbitration every year since 2000 (although it used to be called Commercial Arbitration in the early years).

CU POLICY STATEMENTS (Provost Requirements)

(1) If you qualify for accommodations because of a disability, please submit to me a letter from Disability Services in a timely manner so that your needs be addressed. Disability Services determines accommodations based on documented disabilities. Contact: 303-492-8671, Willard 322, and <http://www.Colorado.EDU/disabilityservices>

If you have a temporary medical condition or injury, see guidelines at <http://www.colorado.edu/disabilityservices/go.cgi?select=temporary.html>

(2) Campus policy regarding religious observances requires that faculty make every effort to deal reasonably and fairly with all students who, because of religious obligations, have conflicts with scheduled exams, assignments or required attendance. In this class, please let me know in advance of the class if you will be missing class due to a religious observance.

(3) Professional courtesy and sensitivity are important in this class, and especially with respect to individuals and topics dealing with differences of race, culture, religion, politics, sexual orientation, gender, gender variance, and nationalities. Class rosters are provided to the instructor with the student's legal name. I will gladly honor your request to address you by an alternate name or gender pronoun. Please advise me of this preference early in the semester so

that I may make appropriate changes to my records. See policies at <http://www.colorado.edu/policies/classbehavior.html> and at http://www.colorado.edu/studentaffairs/judicialaffairs/code.html#student_code

(4) The University of Colorado at Boulder policy on Discrimination and Harassment, the University of Colorado policy on Sexual Harassment and the University of Colorado policy on Amorous Relationships apply to all students, staff and faculty. Any student, staff or faculty member who believes s/he has been the subject of sexual harassment or discrimination or harassment based upon race, color, national origin, sex, age, disability, creed, religion, sexual orientation, or veteran status should contact the Office of Discrimination and Harassment (ODH) at 303-492-2127 or the Office of Judicial Affairs at 303-492-5550. Information about the ODH, the above referenced policies and the campus resources available to assist individuals regarding discrimination or harassment can be obtained at <http://www.colorado.edu/odh>

(5) All students of the University of Colorado at Boulder are responsible for knowing and adhering to the academic integrity policy of this institution, and law students are also subject to the CU Law Honor Code. Violations of this policy may include: cheating, plagiarism, aid of academic dishonesty, fabrication, lying, bribery, and threatening behavior. All incidents of academic misconduct shall be reported to the Honor Code Council. Students who are found to be in violation of the academic integrity policy will be subject to both academic sanctions from the faculty member and non-academic sanctions (including but not limited to university probation, suspension, or expulsion).