ARBITRATION

Spring 2007
Room 300
Monday/Wednesday 10:30-11:45
Professor Amy J. Schmitz

Office: room 465
Phone: (303) 735-0285
E-mail: amy.schmitz@colorado.edu

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.

That said, there are various types of arbitration: labor, court-annexed, private, etc. This
course focuses on private arbitration -- meaning arbitration pursuant to parties’ contractual
agreements. This means that the course does not cover labor arbitration under the Fair Labor
Standards Act or other statutorily required arbitration. In addition, international arbitration is
another important area we cannot adequately cover in this three-hour course. We will touch on
private international arbitration in that I will at least introduce the New York Convention (treaty
law incorporated in United States federal law through Chapter Two of the Federal Arbitration
Act (“FAA”)) and some key distinctions between international and domestic arbitration law.
The law school offers other courses on international dispute resolution in conjunction with the
greater international law curriculum. Please also note that this is not a clinical course, and
therefore we will not do a simulated arbitration.

I wish to emphasize the importance of student participation and interactive discussion. I
encourage and welcome your thoughts and ideas! Arbitration has become particularly
controversial, and a multitude of thorny issues in the area remain unresolved.

 Required Materials:

Drahozal, Commercial Arbitration: Cases and Problems (2nd ed. 2006) and its
companion Documentary Supplement (2006). This is not the same book from last year, as it
has been significantly updated and revised for the second edition to account for the
changing landscape of arbitration law.

 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 announcements,
list assignments of Problems you will be required to prepare for class presentation, and provide
additional resources and analytical guides. Also, the website for the American Arbitration
Association (AAA) (www.adr.org) includes arbitration resources and additional links. We likely
will have a guest speaker from the AAA.

 Class Schedule:

Class will meet from 10:30 to 11:45 a.m. on Mondays and Wednesdays. NOTE, however, that we must add 5 minutes to the first 15 classes in order to make up for the holiday (Martin Luther King Day) on Monday, January 15, per law school rules.
Office Hours:

Office hours for this class will be held on Mondays from 1:30 to 3:30 or by appointment. Of course, please feel free to talk to me after class or stop by my office at any time. I am in my office most days. In addition, I am happy to schedule coffee or lunch meetings with study groups.

Class Attendance, Preparation and Participation:

Class attendance, preparation and participation are essential. Your contribution to this class will enhance everyone's course experience. In an effort to reinforce this, I had used the “Present and Prepared Sign-In Policy” in the past. Based on student feedback, however, I am not going to use this policy this year. It does not really work in this upper-level course, and seems to hinder interactive discussion.

This means you really must be present and prepared for every class meeting. This includes reading the material, and thinking about it. This also includes preparing the Problems in the book. Nonetheless, in order to relieve some burden and stress, I do assign the 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.

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.

Using a pass is preferable to skipping 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.

Accordingly, I do acknowledge students' participation and contributions to class discussion, and therefore reserve the right to add one to three additional points to reflect such efforts. This does matter, and often makes a difference in students’ final grades!

Exam:

There will be a three-hour (+ 15 minutes for reading the questions and outlining your answers) 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 (ie: 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.
Optional Paper:

You may choose to write a short (10-page) paper on a topic relevant to the course materials presented in class. If the grade on your paper is higher than your final examination grade, it will count for 20 percent of your final grade. If the grade on your paper is lower than your final examination grade, it will not be counted toward your final grade. The paper is due by noon on Wednesday, April 11. If you would like me to comment on your paper, please submit a draft to me by Wednesday, March 21.

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 Varied Relational Contexts
- 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

Assignments:

The assignments generally will follow sequentially from the Table of Contents. Because it may be necessary to spend more or less time on some topics, the reading assignments are subject to change. Also, note that the syllabus lists reading assignments for 27 classes, with the lightest reading assignments at the end, in order to account for “catch up,” and a likely guest speaker. Please do not read too far ahead of class. Again, note also that we must add 5 minutes to the first 15 classes in order to make up for the holiday (Martin Luther King Day) on Monday, January 15, per law school rules.

In addition to preparing the assigned reading, you will be assigned Problems from the book for class presentation. MAKE SURE TO CHECK TWEN FOR THE POSTING OF PROBLEM ASSIGNMENTS. Although you will be assigned these particular Problems, however, 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.

Also, 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. You should be especially vigilant in consulting the Federal Arbitration Act reprinted in the Supplement.
Class 1: pp. 1 to 27 through Prob. 1.3
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) & Find an Example of an Arbitration Provision in a contract you are subject to or you find online or through other means (ie: credit card, cell phone, loan, and broker contracts/terms and conditions nearly always include arbitration provisions).

§ 1.04 Why Arbitrate?

§ 1.05 A Brief History of Commercial Arbitration

*FOCUS:
How has arbitration changed or grown since adoption of the FAA? Does the example arbitration provision you found bother you? Why or why not?

Class 3: pp. 53 to 71 through Prob. 2.3 & Handout
Chapter 2 Enforcing Domestic Agreements to Arbitrate

§ 2.01 Overview

§ 2.02 Who Decides Arbitrability

Class 4: pp. 71 to 88 through Prob. 2.6
§ 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
   [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)
   § 2.06 Binding Non-Signatories to Agreements to Arbitrate
   § 2.07 Procedural Issues in Enforcing Domestic Arbitration Agreements

Class 9: pp. 145 to 169 through Prob. 3.4 (Skip Prob. 3.2)
   Chapter 3 Arbitrability of Federal Statutory Claims
   § 3.01 Overview
   § 3.02 The Rise and Decline of the Nonarbitrability Doctrine

Class 10: pp. 169 to 194 through Prob. 3.7
   § 3.03 Current Issues in the Arbitrability of Federal Statutory Claims
      [A] Civil Rights
      [B] Bankruptcy
      [C] Magnuson-Moss Warranty Act

Class 11: pp. 194 to 207 (through the end of Chapter 3)
   § 3.04 Arbitrability and Statutory Rights and Remedies

Class 12: pp. 209 to 229 through Prob. 4.4
   Chapter 4 The Federal Arbitration Act and State Law
   § 4.01 Overview
   § 4.02 Preemption and the FAA
Class 13: pp. 229 to 257 through Prob. 4.10
   § 4.03 Scope of the FAA
   § 4.04 Applications (through Prob. 4.10)

Class 14: pp. 257 to 272 through Prob. 4.14
   § 4.04 Applications
   § 4.05 Choice of Law Issues

Class 15: pp. 272 to 286 (through the end of Chapter 4)
   § 4.06 Procedural Issues in Enforcing Domestic Arbitration Agreements

Class 16: pp. 287 to 310 through Prob. 5.4
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: In Chapter 5, we are skipping pp. 310 through the end of the chapter. This includes § 5.03 Defenses to Actions to Enforce International Arbitration Agreements; and § 5.04 Procedural Issues in Enforcing International Arbitration Agreements
*I limit the international arbitration material based on time and student feedback. Be aware, however, that the defenses to enforcement of arbitration agreements in international cases are essentially the same as those in domestic cases – with some quirks.
Class 17: pp. 349 to 371 through Prob. 6.4 (Skip Prob. 6.5)
Chapter 6  The Arbitration Proceeding

NOTE: In Chapter 6, we are skipping international arbitration material as noted below, including Problems 6.5 and 6.16, and the following Problem subparts regarding international arbitration: 6.6(s), 6.7(b), 6.8(b), and only the last sentence of 6.11(a).

§ 6.01 Overview
§ 6.02 Initiating the Proceeding
§ 6.03 Representation
§ 6.04 Selecting Arbitrators
[A] The Mechanics of Selecting Arbitrators

Class 18: pp. 372 to 398 and 403 to 408 through Prob. 6.8(a)
[B] Challenging Arbitrators for Partiality

§ 6.05 Provisional Remedies (Skip 399-402)

Class 19: pp. 408 to 431 through Prob. 6.12
§ 6.06 Consolidation and Class-Wide Arbitration
§ 6.07 Discovery

Class 20: pp. 432 to 440 (skip Min of Def) and 443 to 447 through Prob. 6.14
§ 6.08 Confidentiality
§ 6.09 Pre-Hearing Procedure and Motions Practice (skip Min of Def)

Class 21: pp. 447 to 454 and 464 to 482 through the end of Chapter 6
§ 6.10 The Hearing  (Skip Friedland excerpt, Buckamier, Iran Aircraft & Prob. 6.16)
§ 6.11 The Award
§ 6.12 Online Arbitration Proceedings
Class 22: pp. 483 to 511 through Prob. 7.5
Chapter 7 Enforcing Arbitral Awards

NOTE: In Chapter 7, we are skipping § 7.04 Enforcing and Challenging International Arbitration Awards (521-69, including Probs. 7.10 through 7.15) and subpart (b) of Problem 7.17 (we will cover the rest of 7.17)

§ 7.01 Overview
§ 7.02 Challenging Awards Before the Arbitral Tribunal
§ 7.03 Enforcing and Challenging Domestic Arbitration Awards


Class 23: pp. 512 to 534 through Prob. 7.9


[B] Procedural Issues in Enforcing Domestic Arbitration Awards

Skip § 7.04 Enforcing and Challenging International Arbitration Awards 534-584, including Probs. 7.10 through 7.15)

Class 24: pp. 584 to 592 through Prob. 7.17 (Skip 7.17(b))
§ 7.05 Modifying the Standard of Review by Contract

Class 25: pp. 592 to 606 through the end of Chapter 7
§ 7.06 Preclusive Effect of Arbitration Awards

Class 26: pp. 607 to 617 and 625 (cover Prob. 8.2)

*NOTE: In Chapter 8, skip 617 to 624 and Problem 8.1, as well as 8.3(3) & 8.4(E)

Chapter 8 Drafting Arbitration Clauses

§ 8.01 Overview

§ 8.02 Empirical Studies of Arbitration Agreements (Skip 617- 624, including the Bond article and Problem 8.1)

Class 27: pp. 625 to 645 through the end of Chapter 8 (skip 8.3(3) & 8.4(E))
§ 8.03 Drafting an Arbitration Clause

Special Session Will be Scheduled for Pre-Exam Review