ARBITRATION

Fall 2009
Room 307
Tuesday/Thursday 1:00-2:15
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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.

That being 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 that I have not covered in the past due to other course offerings at CU and the limitations of a three-hour course. This year, however, I have decided to “revamp” this course to cover more private international arbitration law due to its importance – and welcome feedback on this newly devised arbitration course! To that end, we will cover important aspects of the New York Convention (treaty law incorporated in United States federal law through Chapter Two of the Federal Arbitration Act (“FAA”)) and key distinctions between international and domestic arbitration law.

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 a multitude of thorny issues in the area remain unresolved.

**Required Materials:**

_Drahozal, Commercial Arbitration: Cases and Problems (2nd ed. 2006) _and its Documentary Supplement (2008). In addition, there is a 2009 Update which is available at [http://www.lexisnexis.com/lawschool/study/texts/pdf/2009%20Update%20(3126).pdf](http://www.lexisnexis.com/lawschool/study/texts/pdf/2009%20Update%20(3126).pdf) You also may download the 2009 Update via the “Study Aids” section of the LexisNexis Law School website at [www.lexisnexis.com/lawschool](http://www.lexisnexis.com/lawschool). Be careful to make sure you have the 2nd ed. of the cases and problems book and are continually consulting the Update for replacements and additions to that casebook. This is necessary because of the changing landscape of arbitration law.

In addition, you will have to pick up a packet of additional materials for this course from outside the Faculty Assistants’ office on the 4th floor (referred to as “Add Materials” below). Furthermore, I will be giving you other handouts and materials in class or through TWEN from time-to-time. My hope is to inject the course with recent developments and debates in this area.

**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, 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 will have a Vice President of the AAA in Denver as guest speaker on Oct. 22, so please be sure to be present for that class (he provides a good practical perspective and outline of the arbitration process).

Class Schedule:

Class will meet from 1-2:15 on Tuesdays and Thursdays.

Office Hours:

Office hours for this class will be held on Mondays from 10:30 to noon 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 coffee/meetings/lunch 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.

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.

Participation Points: Because participation is very important to your learning, I also 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 (+ 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 in class on December 3, which is the last day of classes. If you would like me to comment on your paper, please submit a draft to me by November 17, which is the Tuesday before the Thanksgiving break. Also, I am happy to help you find paper topics, determine paper scope, locate resources, etc.

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
- 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 but we will not necessarily get through a “Class” in one class meeting. Furthermore, 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 the guest speaker. 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 will be assigned Problems from the book for class presentation. YOU ARE ALL RESPONSIBLE FOR THE
PROBLEMS IN CHAPTER ONE. THEREAFTER, YOU WILL BE ASSIGNED PARTICULAR PROBLEMS AND WILL BE ABLE TO SEE THE LISTING POSTED ON TWEN (MAKE SURE TO CHECK TWEN FOR THE POSTING). 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.

Statutes and Rules: 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 and Update. You should be especially vigilant in consulting the Federal Arbitration Act and AAA Commercial Arbitration Rules (both reprinted in the Supplement).

Update and Add Materials: As noted above, you need to consult the 2009 Update to see if there are additions, deletions, or replacements from the casebook (I noted Update pages below as “Up. __”). Furthermore, some materials are in the Additional Materials (noted as “Add Materials” below) in the packet from the 4th floor or provided as handouts in class or through TWEN. Again, this is necessary to keep up with the changing landscape of arbitration law and policy.

Class 1: pp. 1 to 27 through Prob. 1.3; Up. 1
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) & the Policy Debate materials including the 2 documents per the links below (accessible on the web) along with the handout I will provide in Class #1; Up. 2; Arbitration Fairness Act (“AFA”) Up. 75-81.

§ 1.04 Why Arbitrate?

§ 1.05 A Brief History of Commercial Arbitration

Policy Debate

The Arbitration Fairness Act 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
The pending language would invalidate the enforceability of predispute agreements to arbitrate employment, consumer, franchise and civil rights disputes. Read the AFA of 2009 (Up. 75-81). You also may want to consult the short article (optional/FYI), posted as “AFA Article” under Course Materials on TWEN.

Note also that hearings are being held on credit-related arbitration, and lawsuits have attacked the fairness of National Arbitration Forum (“NAF”) proceedings in particular. We will debate the pros and cons of pre-dispute arbitration clauses in this class and throughout the semester. For this class, also make sure to access and read these 2 documents via the links provided related to recent developments in the wake of concerns and hearings regarding the fairness of arbitration:

1. The NAF, in a consent decree entered in settlement of a suit brought by the Minnesota Attorney General, is exiting the business of consumer arbitration (not just credit card arbitration) altogether. See http://pubcit.typepad.com/files/nafconsentdecree.pdf.

2. The AAA has voluntarily imposed a moratorium on administration of debt collection arbitration programs (again, not limited to credit card arbitration, but not extending to all consumer arbitrations) pending resolution of various due process and fairness issues. See http://domesticpolicy.oversight.house.gov/documents/20090722112616.pdf

FOCUS: Use all these materials in preparing for the Problem 1.5 policy debate. Also consider, how has arbitration changed or grown since adoption of the FAA? Should legislative changes be made?

Class 3: pp. 53 to 59 & 66 to 71 (including notes and Probs. 2.1, 2.2 & 2.3); Add Materials 1-23; Up. 3-4.

Chapter 2 Enforcing Agreements to Arbitrate

§ 2.01 Overview
§ 2.02 Who Decides Arbitrability

- My Framework for Analysis & Worksheet (Add Materials pp. 24-25)
- Christopher R. Drahozal, New Experiences of International Arbitration in the United States, 54 Am. J. Comp. L. 233-255 (2006) (pp. 1-23 in the Add Materials): Read this short article to get a sense of the current landscape of international arbitration from the U.S. perspective. No need to memorize or completely understand the concepts introduced.

Class 4: pp. 80 to 88 through Prob. 2.6; Up. 5-15 (replaces pp. 71-80!)

§ 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. 16
   [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. 17-19
   § 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. 21-23
   § 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 & Add Materials pp. 38-39 (to be used throughout Chapter 4, but you will not 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 257 through Prob. 4.10; Up. 25
§ 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. 26-28
§ 4.04 Applications

§ 4.05 Choice of Law Issues

Class 14: pp. 272 & 277 to 286 (through the end of Chapter 4); Up. 29-33 (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 “English Arbitration Perspectives” summary I created and posted on TWEN under Course Materials as “International Perspectives Handout”; Up. 35

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: Make sure to read the “English Arbitration Perspectives” summary posted on TWEN as “International Perspectives Handout.” It includes coverage of arbitrability in international arbitration, thus allowing us to skip pp. 310 to 317.

Class 16: pp. 317 to 339 (Skip ALL Problems)
§ 5.03 Defenses to Enforceability

[B] Assent

[C] “Null and Void”

[D] “Subject Matter Capable of Settlement by Arbitration”
Class 17: pp. 339 to 344 (include notes) & pp. 349 to 371 through Prob. 6.4 (Skip 6.5); Up. 37–39
§ 5.04 Procedural Issues in Enforcing International Arbitration Agreements (skipping Tolaram & Probs. 5.10 – 5.11 pp. 344-47)

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 18: pp. 372 to 382 & 387 to 398; Up. 40-49 (replaces 382-387!)
[B] Challenging Arbitrators for Partiality

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

Class 19: pp. 408 to 431 through Prob. 6.12; Up. 50-52
§ 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 456 and 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

*Materials on Macau’s Consumer Arbitration Centre in Add Materials p. 40-48 (if time)

Class 22: 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


Class 23: pp. 512 to 534 through Prob. 7.9; Up. 55-57
[B] Procedural Issues in Enforcing Domestic Arbitration Awards

Class 24: pp. 534 to 555 (Skip Prob. 7.10)
§ 7.04 Enforcing and Challenging International Arbitration Awards
[A] Actions to Enforce International Arbitration Awards
[B] Grounds for Non-Enforcement of International Arbitration Awards

Class 25: pp. 584 to 585 & Problems on 592 (but Skip 7.17(b)); Up. 59-68 (replaces 586-92!)
§ 7.05 Modifying the Standard of Review by Contract

Class 26: 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 (ie: credit card, cell phone, loan, and broker contracts/terms and conditions nearly always include arbitration provisions).
2. Review the AT&T Provision (I will provide copies & it is posted on TWEN).
3. Compare and consider these two clauses: What do you notice about your own provision? How does it compare with the AT&T provision? Are either/both of these clauses “fair” in your view? What, if any, of the provisions in these clauses trouble you, and why?
4. In light of the above and using these two clauses as templates, put together what you would view as the “dream consumer arbitration clause” in terms of being “fair” for consumers and companies. You may use all, part, none of the language in these two clauses.
5. Be prepared to discuss and hand in your dream clause in class. Your work will not be graded per se but it will be taken into account in assessing participation points.

Class 27: 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 central database.
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).