COMMERCIAL ARBITRATION

Spring 2005
Monday/Wednesday 9:00-10:15
Professor Amy J. Schmitz

Office: room 405
Phone: (303) 735-0285
E-mail: amy.schmitz@colorado.edu

SYLLABUS AND POLICIES

Why study Commercial Arbitration?

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, 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.

The study of commercial arbitration cannot be adequately addressed in a general alternative dispute resolution ("ADR") course. Legislatures and courts have created a complex body of statutory and case law that governs the enforceability and effect of commercial 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.

I also have found that both domestic and international commercial arbitration cannot be adequately covered in a three-hour course. Based on student feedback from the last three years, I have decided to omit nearly all of the international arbitration material. Still 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. There is an international dispute resolution course offered by Professor Yee. Also, due to time constraints (and because this is not a clinical course), 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! Although this is a traditional three-hour law school course, it mimics a seminar in that it seeks to spark discussion and debate. Arbitration has become particularly controversial, and a multitude of thorny issues in the area remain unresolved.

**Required Materials:**

Drahozal, Commercial Arbitration: Cases and Problems (2002), its companion Documentary Supplement (2002), and the 2004 Update pamphlet. The required materials (including the Update) are available from the bookstore.

**TWEN, Speakers and Additional Resources:**

I have created a Commercial 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](http://www.adr.org)) includes commercial arbitration resources and additional links. We likely will have a guest speaker from the AAA.

**Class Schedule:**

Class will meet from 9:00 to 10:15 a.m. on Mondays and Wednesdays. There is no class in Monday, January 17, due to Martin Luther King, Jr. Day. Accordingly, the University requires that we make-up the class. In lieu of scheduling an additional class, we will add 5 minutes to the first 15 classes.

**Office Hours:**

Office hours for this class will be held on Mondays from 10:15 a.m. to noon. 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 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 a class this small, and it hinders 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. This class uses the 20% rule, which means that I will automatically lower your grade for missing more than 5 classes (5.4 is 20% of the 27 classes, so 6 missed classes exceeds 20% of the total classes).

I hate to have any rules, and sincerely hope that you all prepare for and participate in class! I truly enjoy this material, and discussing it with you. I also acknowledge students' outstanding contributions to class discussion, and therefore reserve the right to add one to three additional points to reflect such extra efforts.

Please feel free to ask me questions about this policy, and provide your feedback.

**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, test 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 6. If you would like me to comment on your paper, please submit a draft to me by Monday, March 14.

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

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.

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 and 2004 Update. You should continually consult the Federal Arbitration Act reprinted in the Supplement, including the new §10 (reprinted on pp. 111-12 of the 2004 Update). In addition, please make sure to check the 2004 Update and read it along with the casebook and documentary supplement as applicable. Update references to the casebook are provided in the assignments below, but there are also updates to the documentary supplement not referenced in the assignments. Nonetheless, please see pp. 111 to the end of the Update for these additional materials, as appropriate with the assignments.
Class 1: pp. 1 to 27 through Prob. 1.3 and pp. 339-40; Update pp. 1-2
Introduction to Commercial Arbitration
   § 1.01  Overview

   § 1.02  A Theory of Private Dispute Resolution

   § 1.03  What is Arbitration?

   § 6.01 Overview (of arbitration proceedings)

*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 50 (the end of Chapter 1); Update p. 3
   § 1.04  Why Arbitrate?

   § 1.05  A Brief History of Commercial Arbitration

Class 3: pp. 51 to 69 through Prob. 2.3; Update pp. 5-8 replaces 62-67
Chapter 2  Enforcing Domestic Agreements to Arbitrate
   § 2.01  Overview

   § 2.02  Who Decides Arbitrability

Class 4: pp. 69 to 86 through Prob. 2.6
   § 2.03  Default in Proceeding with Arbitration

   § 2.04  The Scope of the Arbitration Agreement

Class 5: pp. 86 to 103 (Skip Prob. 2.10 on p. 103); Update pp. 10-17
   § 2.05  General Contract Law Defenses

      [A] Assent & Formalities

Class 6: pp. 103 to 114 through Prob. 2.12; Update pp. 18-24
   [B] Lack of Consideration

      [C] Unconscionability, Reasonable Expectations and Contracts of Adhesion
Class 7: pp. 115 to 125 through Prob. 2.15
[D] Fraud

[E] Material Breach

Class 8: pp. 124 to 140 (through the end of Chapter 2); Update pp. 25-27 (please excuse the typo referencing “349” on p. 25 of the Update, it should reference p. 139 of the casebook)
§ 2.06 Binding Non-Signatories to Agreements to Arbitrate

§ 2.07 Procedural Issues in Enforcing Domestic Arbitration Agreements

Class 9: pp. 141 to 166 through Prob. 3.4 (Skip Prob. 3.2 on p. 158); Update p. 29
Chapter 3 Arbitrability of Federal Statutory Claims

§ 3.01 Overview

§ 3.02 The Rise and Decline of the Nonarbitrability Doctrine

Class 10: pp. 166 to 191 through Prob. 3.7; Update pp. 30-36 replaces Duffield (pp. 172-78)
§ 3.03 Current Issues in the Arbitrability of Federal Statutory Claims

[A] Civil Rights

[B] Bankruptcy

[C] Magnuson-Moss Warranty Act

Class 11: pp. 191 to 204 (through the end of Chapter 3); Update pp. 37-46
§ 3.04 Arbitrability and Statutory Rights and Remedies

Class 12: pp. 205 to 225 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. 225 to 249 through Prob. 4.10 (Skipping Prob. 4.9 on p. 248); Update pp. 47-51 replaces Sisters of Visitation (pp. 226-231)
§ 4.03 Scope of the FAA

§ 4.04 Applications (through Prob. 4.10)

Class 14: pp. 249 to 264 through Prob. 4.12; Update pp. 52-63
§ 4.04 Applications
§ 4.05 Choice of Law Issues

Class 15: pp. 264 to 277 (through the end of Chapter 4)
§ 4.06 Procedural Issues in Enforcing Domestic Arbitration Agreements

Class 16: pp. 279 to 301 through Prob. 5.4; Update pp. 65-66
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. 301 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 have continued to limit the international arbitration material based on time and student feedback over the past three years. Also, it would be particularly impossible to cover the material this year due to the 2003 Update material I have added in light of changing law in this area. 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. I encourage you to inquire further into this very important area.

Class 17: pp. 339 to 361 through Prob. 6.4 (Skip Prob. 6.5); Update pp. 67-68
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 (re-read)

§ 6.02 Initiating the Proceeding

§ 6.03 Representation

§ 6.04 Selecting Arbitrators
Class 18: pp. 362 to 385 and 389 to 394 through Prob. 6.8(a); Update pp. 69-72
[B] Challenging Arbitrators for Partiality

§ 6.05 Provisional Remedies (Skip 385 – 388)

Class 19: pp. 394 to 417 through Prob. 6.12; Update pp. 73-80 replaces Blue Cross (pp. 394-401) and Update pp. 81-85 replaces Comstat (pp. 407-09)

§ 6.06 Consolidation and Class-Wide Arbitration

§ 6.07 Discovery

Class 20: pp. 417 to 426 and 430 to 434 through Prob. 6.14

§ 6.08 Confidentiality

§ 6.09 Pre-Hearing Procedure and Motions Practice (Skip 427 – 429)

Class 21: pp. 434 to 441 and 451 to 469 through the end of Chapter 6; Update p. 86

§ 6.10 The Hearing (Skip 441 – 451)

§ 6.11 The Award

§ 6.12 Online Arbitration Proceedings

Class 22: pp. 471 to 499 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 (only this subpart (b) dealing with international arbitration)

§ 7.01 Overview

§ 7.02 Challenging Awards Before the Arbitral Tribunal

§ 7.03 Enforcing and Challenging Domestic Arbitration Awards


Class 23: pp. 499 to 521 through Prob. 7.9; Update p. 87


[B] Procedural Issues in Enforcing Domestic Arbitration Awards
Skip § 7.04 Enforcing and Challenging International Arbitration Awards 521-69, including Probs. 7.10 through 7.15, and Problem 7.17(b)

Class 24: pp. 569 to 577 through Prob. 7.17 (Skip 7.17(b)); Update pp. 104-110 replaces Lapine (pp. 570-76)
   § 7.05 Modifying the Standard of Review by Contract

Class 25: pp. 577 to 591 through the end of Chapter 7
   § 7.06 Preclusive Effect of Arbitration Awards

Class 26: pp. 593 to 605 and 612 to 613 through Probs. 8.1 and 8.2
*NOTE: In Chapter 8, skip 605 – 612, and the following Problem subparts: 8.3(3) and 8.4(E).

Chapter 8 Drafting Arbitration Clauses
   § 8.01 Overview

   § 8.02 Empirical Studies of Arbitration Agreements (Skip 605 – 612: the Stephen Bond article on international arbitration)

Class 27: pp. 613 to 634 through the end of Chapter 8
   § 8.03 Drafting an Arbitration Clause

Special Session Will be Scheduled for Pre-Exam Review