

Arbitration

Syllabus – Spring 2015

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COURSE DESCRIPTION: This course offers an in-depth look at the legal and practical issues involved in domestic arbitration, as well as an examination of the skills necessary to be a successful advocate in the arbitral forum. The course examines the use of arbitration in a number of different areas, including commercial, consumer, labor, employment, securities, construction, and international disputes.

SCHEDULE: Monday, Tuesday, Wednesday, 9:00 a.m. – 9:50 a.m. Room 131.

REQUIRED TEXT: The following text (CB) is required for this course:

1. Stephen K. Huber and Maureen A. Weston, *ARBITRATION: CASES AND MATERIALS* (3^d ed. 2010).

There also will be occasional handouts, which will be posted on Blackboard under “Assignments.”

READING ASSIGNMENTS: Reading assignments will be posted on a rolling basis in the “Assignments” folder on Blackboard. Unless I instruct otherwise, please always read the next assignment on the reading list for the next class, even if we have fallen behind during class discussions and lectures.

Please make sure to read the first assignment (CB 1-14 and Appendices A and C) for the first day of class (January 12, 2015). Be sure to read carefully the Federal Arbitration Act. We will be dealing with this statute for the entire semester, so it is good that you get a good sense of what the statute is all about.

SEATING: Like many of you, I am a visual learner. I best learn your names by memorizing the seating chart. On the second day of class, I will pass around a seating chart. Please sit in your assigned spot for the rest of the semester.

WHAT YOU SHOULD LEARN (a.k.a. COURSE OBJECTIVES):

1. This course, of course, focuses on arbitration law. Interestingly, “arbitration law” generally refers to the intersection of the law and the courts, as opposed to the law used within the arbitration itself. In discussing arbitration law, we will focus a great deal on issues of contract law and civil procedure – we will be building on a number of concepts that you’ve begun to master in your first year.
2. This course will also teach you about arbitration practice – both within the arbitral setting as well as dealing with courtroom issues related to arbitration. We will spend a fair amount of time discussing the procedures followed in arbitration case law – so do not overlook the procedural history! Often, the cases we read will turn on the procedural history. This class will teach you which motions you need to file in order to get into arbitration or out of arbitration. This class will also teach you how to present a case in arbitration, and what you can do with an arbitration award. We will conquer these issues both through a traditional case law analysis, as well as from practical skills exercises.
3. This course will also get you to think about arbitration policy. We will consider the types of claims that go to arbitration and whether arbitration is appropriated in all circumstances. We will consider the historical reasons for arbitration and whether arbitration’s expansion to deal with most disputes has promoted justice and fairness.

GRADING: Your grade will be based on the following two components:

1. Class Participation – 10% of grade
2. Final Paper – 70% of grade
3. Arbitration Hearings – 20% of grade

FINAL PAPER:

The research paper must be between 20 and 25 pages long, in the style of a law review article (as opposed to a legal memo or a court brief). The paper will be graded out of a total of **70 points**. A grading rubric will be posted on Blackboard.

The research paper may be on any area of arbitration law, whether or not that topic is covered in class (for example, arbitration in sports law).

The process for the research paper will be in 3 stages.

1. On February 4, 2015, you are **required** to turn in an outline of your topic. At the outline stage, I will give you brief comments on your outline. Those who would like additional comments should feel free to meet with me for discussion.

2. On March 18, 2015, you are **required** to turn in a rough draft. I will provide comments to you on your draft, and you will be required to meet with me to discuss the status of your research.
3. On April 24, 2015, your research paper is due to **me via e-mail**. I will happily accept papers early if you so choose.

Your paper grade is based only on your final paper, and not on your outline and rough draft. However, if you miss any of these deadlines, you may lose points as a result of your tardiness.

All students are **highly encouraged** to enter your paper in the following competition:

- James B. Boskey Law Student Essay Contest on Dispute Resolution, a national student competition run by the ABA Section of Dispute Resolution and that offers a cash prize to the best ADR paper of the year. See http://www.americanbar.org/groups/dispute_resolution/awards_competitions/james_b_boskey_law_student_essay_contest_on_dispute_resolution.html <http://www.abanet.org/dispute/essaycomp.html> for more information.

ARBITRATION HEARING:

Part of our class will involve preparing for and engaging in an arbitration hearing. Each student will be assigned a role of witness, attorney, or arbitrator for a full-length simulation. These simulations will occur on **Saturday, March 7, 2015**, from 10:00 a.m. to 3:00 p.m. (Husker Football Bye Week) We will be able to cancel two weeks of classes due to the Saturday class. Instructions and grading rubrics for the arbitration hearing will be available later in the semester. The performance associated with the arbitration hearing will be worth a total of **20 points**.

CLASS ATTENDANCE AND PARTICIPATION: This class teaches both theory and skills in a hands-on environment. The classroom is intended to be a safe environment to test ideas, theories, and skills before you encounter these situations in practice working for real clients. Please try new techniques in class and then discuss your motivations and the success of your techniques. Given the small numbers in our class, each of your classmates depends on your attendance in order to have lively discussions and worthwhile activities.

Class attendance is mandatory, and I keep track of attendance and class participation. Please let me know (via e-mail) of any planned absences, and e-mail me as soon as practicable for any last-minute absences (sickness, etc.). Class participation is worth **10 points** of your final grade.

OFFICE HOURS: I do not keep posted office hours, but if I am in the office, my door is open and you are free to stop by and chat. My office is Room 261 North, my office telephone number is 472-5245, and my office e-mail is kblankley2@unl.edu. If you would like to meet me and cannot make the posted office hours, please make an appointment with me by e-mail. I am

happy to meet with you without an appointment, but making an appointment with me is the best way to ensure that I will be available.

AUDIO OR VIDEO RECORDING: Classes may not be recorded, except in cases of special need with my prior permission.

CELL PHONES AND PAGERS: The use of cell phones and pagers in class is prohibited. Any cell phones or pagers brought to class must be **turned off** (*not just set to vibrate*) before class begins.

LAPTOP COMPUTERS AND PDAs: Computers may be used in class only for purposes directly related to the class. Game playing, surfing the Internet, sending messages or e-mail, or doing any work not related to this class is prohibited. **Anyone violating this policy is subject to being dropped from the class.**

NOTE: This syllabus incorporates by reference the University of Nebraska College of Law Academic Regulations (which can be found at: <http://law.unl.edu/academics/regulations.shtml>), including the Honor Code (which can be found at: <http://law2.unl.edu/HonorCode.aspx>).

ACCOMMODATION FOR STUDENTS WITH DISABILITIES: Students with disabilities are encouraged to contact me for a confidential discussion of their individual needs for academic accommodation. It is the policy of the University of Nebraska-Lincoln to provide flexible and individualized accommodation to students with documented disabilities that may affect their ability to fully participate in course activities or to meet course requirements. To receive accommodation services, students must be registered with the Services for Students with Disabilities (SSD) office, 132 Canfield Administration, 472-3787 voice or TTY.

Research Paper

The final paper must be between 20 and 25 pages long. Please use 1 inch margins all around. The font should be 12-point Time New Roman (or similar) font.

The research paper should be written in the style of a law review article (more details below). The paper should include, among other things, headings and roadmaps for the ease of the reader.

Any topic related to arbitration is fair game for the research paper, and you are free to write on a topic that we will not have time to cover in class.

The process for the research paper will be in 3 stages.

4. On February 4, 2015, you are required to turn in an outline of your topic. At the outline stage, I will give you brief comments on your outline. Those who would like additional comments should feel free to meet with me for discussion.

5. On March 18, 2015, you are required to turn in a rough draft. I will provide comments to you on your draft, and you will be required to meet with me to discuss the status of your research.
6. On April 24, 2015, your research paper is due to me **via e-mail**.

Other Notes:

1. Your paper must make some sort of recommendation (a thesis). A few examples of recommendations could include: to be change the law, to advocate the use of arbitration in certain circumstances, to advocate the prohibition of arbitration in certain circumstances, to advocate a public policy, to suggest legislation, to suggest arbitration contract language, to recommend a specific court ruling.
2. Your paper should have an audience. Are you writing to courts? Parties in dispute? Congress? An agency? An industry?
3. Try not to focus on too broad of an issue. “Labor Arbitration” or “International Arbitration” is simply too broad of a topic to write a good paper with a recommendation.
4. I will review additional drafts upon request if I have time available.

Grading Criteria:

Your paper will be graded based on the following criteria:

Criteria	Explanation	Possible Points
Clarity of Theme or Thesis Presented	<ul style="list-style-type: none">• Thesis is clear and understandable• Thesis is presented at the beginning of the paper• Thesis is repeated, as appropriate, throughout the paper• Thesis is prominent in the conclusion	/5
Significance of the Topic to the Field of Arbitration	<ul style="list-style-type: none">• Paper presents something new to the literature and not a summary of current literature	/5
Quality of Research	<ul style="list-style-type: none">• Broad research, i.e., not a reliance on a few sources throughout• Relies on primary authority when possible (cases, statutes, regulations, etc.)• Relies on secondary authority, particularly law review articles (as opposed to bar journals, blogs, etc.)• Prominence of authors cited	/20
Quality of Writing	<ul style="list-style-type: none">• Clear writing (avoiding the use of “it,” “that,” and “there” for more precise nouns)• Good grammar• Formal writing (no contractions!)	/20
Footnote Development	<ul style="list-style-type: none">• Uses footnotes to explain further ideas that are present in the body of the paper• Uses footnotes to include relevant citations paraphrased in the text• Uses footnotes to provide commentary• Cites multiple sources (as necessary) in the footnotes	/5
Overall Organization	<ul style="list-style-type: none">• Flow of paper makes sense• Discusses issues in a logical order• Includes a roadmap at the beginning of the paper• Includes “mini-roadmaps” as necessary to introduce subsections• Refers back to thesis as necessary at the end of the sections	/10
Bluebook Citations	<ul style="list-style-type: none">• See below for a <i>very basic</i> primer on Bluebook citations. Please see the library or purchase your own copy of the Bluebook for additional reference.	/5
TOTAL POSSIBLE POINTS		/70

Hot Issues in Arbitration – suggestions only!

- Class Actions in Arbitration (How should they be run? Should they be allowed at all? Should the courts be involved in these cases?)
- Judicial Review (Can it be contractually eliminated? Can it be contractually expanded (see *Hall Street*)? Can courts create their own standards (like manifest disregard?)
- Ability for a union to require arbitration of member's statutory claims (*14 Penn Plaza v. Pyett*)
- Consumer/Employee pre-dispute arbitration clauses
- Arbitration in Sports (adding arbitration to a CBA? Adding arbitration to certain NCAA contracts/rules/requirement? Baseball arbitration? Using arbitration for disputes arising out of the Olympics? Using arbitration for disputes in international competitions (i.e., World Cup & Cycling?)
- Arbitration in Health Care (using (or not using) arbitration in contracts between hospitals? Physician groups? Patients?)
- Arbitration in Education (using (or not using) arbitration in contracts for higher education? Union negotiation? Special education plans?)
- Arbitration in Environmental Law (using (or not using) arbitration within certain agencies? Evaluating current dispute resolution procedures required by statutes or regulations)
- Hybrid procedures (med-arb, arb-med, multi-step procedures)
- International Arbitration (“case study” of a high-profile case, arbitrability (also called “competence” issues), interlocutory “appeal” in international cases, judicial review of international awards)
- Arbitration in Financial Services (between employees and employers, between consumers and businesses, FINRA rules, economic crisis?)
- Online arbitration (and/or online arbitration within a hybrid process – see SquareTrade).
- Arbitration in residential real estate contracts (is it good or bad for the industry? For the homeowners?)

Quick Bluebook Form:

Cases: Plaintiff v. Defendant, 123 F.3d 345, 467 (8th Cir. 2008)

Statutes: 9 U.S.C. §10 (2010)

Law Review Articles: Kristen Blankley, Bad Behavior in Arbitration, 19 OHIO ST. J. DISP. RESOL. 236, 250 (2010).

Pay attention to font, italics, etc.

Reading List

Casebook Chapter 1 (Select Portions) – Nature and Scope of Arbitration:

- Introduction & History: Pages 1-14 & Appendices A & C

Casebook Chapter 2 – Disputes Subject to Arbitration:

- Arbitrability: Pages 51-73
- Statutory Claims: Pages 74-96 & *Adams* (on Blackboard) (to be discussed after *Gilmer*)
- Contract Formation & Unconscionability: Pages 96-131

Casebook Chapter 3 – Interaction Between Federal and State Arbitration Law

- Preemption: Pages 133-166
- Federal Court Jurisdiction: Pages 166-180
- Choice of Law & Forum: Pages 180-198

Casebook Chapter 4 (Select Portions) – Getting to Arbitration

- Waiver of Rt. to Arbitrate: Pages 210-219

Casebook Chapter 5 (Select Portions) – The Arbitration Process

- Drafting Arbitration Clauses: Pages 251-268
- The Hearing Process: Pages 269-292

Casebook Chapter 6 (Select Portions) – The Arbitrator – Selection and Conduct

- Arbitrator Ethics: Pages 301-324
- “Evident Partiality”: Pages 334-346
- Bias and Liability Issues: Pages 346-369

Casebook Chapter 8 – Judicial Review

- Mechanics: Pages 411-420
- Standard of Review: Pages 421-451
- Non-Statutory Standards: Pages 451-469

Casebook Chapter 9 – Multiple Forums, Parties & Proceedings

- Forums & 3d Parties: Pages 473-489
- Class Actions: Pages 490-515 *ATT v. Concepcion* (Available on Blackboard)
- Preclusion Issues: Pages 515-536