

## LLM Arbitration

[EDITORIAL NOTE – This is a compilation of syllabi that I have used over a number of years. It combines assignment of different textbooks.]

### Contact Information:

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### Course Description:

This course would cover law, policy, and practices relating to the arbitration in the U.S. under modern arbitration statutes in a variety of contexts.

### Course Materials:

Foberg, Golann, Stipanowich & Kloppenberg, Arbitration: Selected Pages From Resolving Disputes. 2<sup>nd</sup> Edition, 2010 (Wolters Kluwer, Publisher).

Stephen Huber & Maureen Weston, Arbitration, Cases and Materials, 3<sup>rd</sup> Ed. 2011 (Lexis-Nexis, Publisher).

### TWEN Course Webpage

Please register in the TWEN course webpage (LLM Arbitration – Gely). The syllabus and the weekly list of readings will be available in the course page.

### Grading

Your grade will be calculated as follows:

Attendance and Class Participation	10%
Presentation	40%
Final Exam	50%

### Attendance

Regular attendance is required. I expect you to notify me in advance, or in case of emergency as soon as possible under the circumstances, of the reason for your absence. If a student has been irregular in his/her attendance, I may, with the approval of the Dean and the Director of the LLM program and upon notification of the student, require the student's withdrawal from the course.

### Weekly Readings

I will distribute the list of readings about two weeks in advance. The readings will come from the textbook assigned above, from academic articles and judicial opinions. I have chosen articles and opinions that you can find available on-line. For judicial opinions you can use Lexis-Nexis or Westlaw. Many judicial opinions are also freely available on line. For law review articles you can use Lexis-Nexis, Westlaw or Heinonline. For other

academic articles you can use JSTOR. All of these services should be available to you via our library website.

### **Class Participation**

Students are expected to be prepared to participate in class on a regular basis. The class participation component will be based in part on the student's contribution to class discussion and on their performance on a series of short exercises intended to highlight specific components of the arbitration process.

### **Presentations**

\* Students (individually or in pairs) will select one of the topics listed below and prepare a presentation on that topic.

\* The presentations should: (1) provide an overview of the context (e.g., what is the subject matter; who are participants; history, etc.); (2) describe the types of disputes that are normally subject to arbitration in that context; (3) discuss any research that illustrates how the arbitration process plays out in that context; (4) discuss of any legal issues unique to that context; (5) identify current developments/problems and likely resolution; (6) where appropriate identify international/comparative aspects of the issues at hand.

In short, you are in charge of class (or a portion of the class) that day and your objective is to educate your audience as to the topic you are discussing.

\* In advance of the presentation, each presenter(s) should prepare a bibliography for their topics. In addition, the presenter(s) should identify some readings for the rest of the class to do in advance of the presentation (about 30 pages). The readings should be made available to rest of the class at least two weeks in advance of the presentation. To the extent possible, identify an on-line source for the materials (e.g., WESTLAW, JSTOR). If any materials have to be copied, please give those to me with enough time to make copies before they have to be distributed in class.

\* The material covered in the presentations will be considered part of the class materials and thus subject to coverage in the final exam.

\* Topics for selection:

- Attorney/Client Disputes Arbitration
- Construction Arbitration
- Consumer Arbitration
- Employment Arbitration
- International Arbitration
- Labor Arbitration
- Medical/Insurance Disputes Arbitration
- Sports Arbitration

Presentations will take place during the last several class sessions.

**Final Exam:**

The final exam will be a take-home exam. Students will be able to pick up their exams at any time during the final-exams, two-week period. Students will have 24 hours to return their exams. The exam has to be returned between the hours of 8:30 a.m. to 4:20 p.m., Monday through Friday. Notice that an exam that is picked up on a Friday will have to be returned on the same day before 4:30. So students planning to return their exams on a Friday are advised to pick up their exams the day before.

**Information Regarding Disabilities:**

This information is available in alternative formats upon request. If you have special needs as addressed by the American with Disabilities Act (ADA) and need assistance, please notify the Office of Disability Services, 882-4696 or the Associate Dean for Academic Affairs immediately. Reasonable efforts will be made to accommodate your special needs.

**Intellectual Pluralism**

The School of Law community welcomes intellectual diversity and respects students' rights. Students who have questions concerning the quality of instruction in this class may address concerns to either the Dean or the Director of the Office of Students rights and Responsibilities. All students will have the opportunity to submit an anonymous evaluation of the instructor at the end of the semester.

**Academic Integrity**

Academic integrity is fundamental to the activities and principles of the School of Law. All members of the Law School community must be confident that each person's work has been responsibly and honorably acquired, developed and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The Law School Community regards breaches of the Law School's Honor Code as extremely serious matters. In the event that you violate our Academic Integrity Rules on any portion of the work required for this class, you may expect a failing grade, as well as possible disciplinary sanctions ranging from probation to expulsion.

**Recordings of Course Activities**

University of Missouri System Executive Order No. 38 lays out principles regarding the sanctity of classroom discussions at the university. The policy is described fully in Section 200.015 of the Collected Rules and Regulations. In this class, students may make audio or video recordings of course activity unless specifically prohibited by the faculty member. However, the redistribution of audio or video recordings of statements or comments from the course to individuals who are not students in the course is prohibited without the express permission of the faculty member and of any students who are recorded. Students found to have violated this policy are subject to discipline in accordance with provisions of Section 200.020 of the Collected Rules and Regulations of the University of Missouri pertaining to student conduct matters.

## **Tentative Schedule of Topics**

January 27; February 3  
Background & History

February 10  
Getting to Arbitration

February 17, 24  
Arbitrator Selection and Decision-making Process

March 3, 10  
Arbitration Advocacy  
Remedial Powers of Arbitrators

March 17, 31; April 7  
The US Legal Environment for Arbitration  
Questions of Arbitrability  
Judicial Review  
Federal/State Arbitration Law  
Recent Developments  
Ethical Issues in Arbitration  
Multi-Party Arbitration

April 14, 21, 28  
Presentations

## Background & History

- (1) Read pages 537-559; 618-620; 717-723 in Folberg et al.
- (2) Read the following 4 cases: *Wolsey Ltd v. Foodmaker*, 144 F. 3d 1205 (1998); *Dluhos v. Strasberg*, 321 F. 3d 365 (2003); *Salt-Lake Tribune Publishing*, 454 F. 3d 1128 (2006); *Fit Tech Inc*, 374 F. 3d 1 (2004). In reading the cases please focus primarily on identifying the type of “arbitration” process that was involved in each case. Was that process “arbitration” in the traditional sense? Why? Why not? (Do not worry about the other legal issues discussed in the cases, just focus on the question regarding the type of “arbitration” process).
- (3) Steven A. Certilman, *A Brief History of Arbitration in the United States*, New York *Dispute Resolution Lawyer*, Spring 2010, Vol. 3, No. 1, pages 10-13 (available at <http://ssrn.com/abstract=1690512>)
- (4) The following case and law review articles deal with the issue of the privatization of justice. Identify and be prepared to discuss the policy concerns described in these readings.
  - a. *Marino v. Writers Guild*, 992 F. 2d 1480 (1993)
  - b. Jean R. Sternlinght, *Is Binding Arbitration a Form of ADR?: An Argument that the Term “ADR” Has Begun to Outlive its Usefulness*, 2000 *Journal of Dispute Resolution* 97
  - c. Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 *Ohio State Journal on Dispute Resolution* 241 (1996)
  - d. Peter L. Murray, *Privatization of Justice*, 15 *Willamette Journal of International Law & Dispute Resolution* 133 (2007)

Reading List  
Getting to Arbitration

- (1) Folberg et al, 562-577
- (2) Thomas J. Stipanowich, Arbitration: The “New Litigation”, 2010 Univ. Ill. L. Rev.
- (3) Christopher R. Drahozal & Stephen J. Ware, Why Do Businesses Use (of Not Use) Arbitration Clauses?, 25 Ohio St. J. on Dis. Resol. 433 (2010)
- (4) Erin O’Hara O’Connor, Customizing Employment Arbitration, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2031104](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031104)
- (5) Access the websites of the following dispute resolution providers: American Arbitration Association, Institute for Conflict Prevention & Resolution, Federal Mediation & Conciliation Service, Judicial Arbitration and Mediation Services. Be prepared to discuss the similarities and differences between each of these providers. What rules and protocols do they follow? What are their major differences? Does each appear to have expertise in certain areas?
- (6) Cases  
Losing the Right to Arbitrate: In the following two cases, please focus on the issue of what happened that resulted in one of the parties losing the right to arbitrate.  
Nicholas v. KBR, 565 F.3d 904 (5<sup>th</sup> Cir. 2009)  
Cabinetree of Wisconsin v. Kraftmaid Cabinetry, 50 F.3d 388 (7<sup>th</sup> Cir. 1995)  
  
In the next two cases, the arbitrators’ actions are challenged for doing something that trial judges do routinely. What did the arbitrators do and why were their actions challenged?  
Hay Group v. E.B.S. acquisition Corp., 360 F.3d 404 (3d Cir. 2004)  
Sheldon v. Vermonty, 269 F.3d 1202 (10<sup>th</sup> Cir. 2001)

Reading List  
Arbitrators' Selection & Decision-making Process

- (1) Folberg, et al, 577-581
- (2) James A. Gross, Value Judgments in the Decisions of Labor Arbitrators, 21 *Industrial & Labor Relations Review* 55-72 (1967)
- (3) Orley Ashenfelter, Arbitrator Behavior, 77 *Papers and Proceedings of the Ninety-Ninth Annual Meeting of the American Economic Association* 342-346 (1987)
- (4) Rafael Gely & Timothy Chandler, The Lumpiness of Grievance Arbitration, 32 *Journal of Collective Negotiations* 287 (2008)
- (5) Lisa Bingham & Debra J. Mesch, Decision Making in Employment and Labor Arbitration, 39 *Industrial Relations* 671-694 (2000)
- (6) William J. Bigones & Phillip B. DuBose, Effects of Gender on Arbitrators' Decisions, 28 *Academy of Management Journal* 485-491 (1985)
- (7) Brian Bemmels, The Effect of Grievants' Gender on Arbitrators' Decisions, 41 *Industrial & Labor Relations Review* 251-262 (1988)
- (8) Alexander Colvin, An Empirical Study of Employment Arbitration Outcomes & Processes, 8 *Journal of Empirical Legal Studies* 1 (2011)
- (9) Cases  
What was the alleged problem with the arbitrators' conduct in each of these cases?  
Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968)  
Merit insurance Co. v. Leatherby insurance co., 714 F.2d 673 (7<sup>th</sup> Cir. 1983)

## Reading List

### The Legal Environment for Arbitration

#### Arbitrability

- Folberg, et al, 611-636; 653-656
- Rent-A-Center, 130 S.Ct. 2772 (2010)
- Rodriguez v. Shearson/American Express, 490 US 477 (1989)
- Gilmer, in Folberg et al, 695-700

#### Judicial Review of Arbitration Awards

- Folberg et al, 659-690
- Karppinen v. Karl Kiefer, 187 F.2d 32 (1951)
- Tempo Shain Corp., 120 F.3d 16 (1997)
- Hicks v. The Cadle Co., 355 Fed. Appx. 186 (2009)
- Eastern Coal Corp., 531 U.S. 57 (2000)

#### The Issue of Preemption

- Folberg et al, 636-648

#### Multi-party Arbitration

- Dean Witter v. Byrd, 470 US 213 (1985)
- Green Tree Financial Corp., Folberg, 649-53
- Discover Bank, 113 P.3d 1100 (2005)
- Stot Nielsen, 130 S.Ct. 1758 (2010)
- ATT v. Concepcion, 131 S.Ct. 1740 (2011)
- Stavros Brekoulakis, The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room, 113 Penn. St. L. Rev. 1165 (\*\*\*)
- Sigvard Jarvin, Multi-Party Arbitration: Identifying the Issues, 8 N.Y. L. Sch. J. Int'l & Comp. L. 317 (1986-1987)

## Reading List

### Arbitration Advocacy, Ethical Issues in Arbitration and Arbitration Remedies

- (1) Folberg et al, 581-609
- (2) Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 U. Miami L. Rev. 949 (2001-2002)
- (3) Handouts on Arbitration Advocacy (to be distributed in class)
- (4) Cases

Grayson-Robinson Store v. Iris Construction Corp., 168 N.E2d 377 (1960)

Comedy Club v. Improv West, 553 F.3d 1277 (2009)

Garrity v. Lyle Stuart, 353 N.E.2d 793 (1976)

Reading List

Perspectives on the Past and Future of Arbitration Law in the U.S.

Creeping Legalism

Reading by Nolan

Reading by Cooper

Recent Developments

Folberg et al, 723-731

Martin H. Malin, The Arbitration Fairness Act: It Need Not and Should Not be an All or Nothing Proposition, 87 Ind. L. J. 289 (2012)