

ARBITRATION LAW AND PRACTICE — SPRING 2014

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Course Materials

The text for this course is Huber and Weston, *ARBITRATION: CASES AND MATERIALS* (third edition, 2011).

Course Description/Content

This seminar will examine in depth the law and practice of domestic commercial arbitration. Topics for study likely will include the essential characteristics of arbitration, the interaction between federal and state arbitration law, the division of authority between arbitrators and courts, the judging of consent to arbitrate, a detailed examination of the arbitration process and arbitration practice with a focus on the skills necessary to be a successful advocate in the arbitral forum, class arbitration, and judicial review of arbitration awards. Our study of some of these issues will take place in a mock “oral argument” or debate setting where students will act as advocates or judges.

In any given year, discussion may focus on arbitration cases currently pending on the U.S. Supreme Court’s docket. For one or more such cases, we may have a team of students present oral arguments for the petitioner and a second team of students present oral arguments for the respondent. In such an exercise, the remainder of the class will act as Supreme Court justices. We may then listen to the oral arguments made before the Supreme Court in the actual case. If the Court’s docket for the current term lacks a compelling arbitration case, we may focus our attention on a case pending before the California Supreme Court or court of appeals, or we may focus on current scholarship in arbitration.

We will concentrate not only on arbitration law but also on how arbitration is practiced. Beginning in roughly the third week of the course, some of the reading will focus on arbitration practice. Also, at that time, we will begin a series of six or so practical exercises. In general, we will work in teams on these exercises because I find that students benefit from having a partner to bounce ideas off of during an exercise. (Typically, some of the reading for the Wednesday class will relate to a practical exercise. Toward the end of that class, teams will get together to begin work on the exercise. The exercise will be due at the beginning of the next Monday’s class and will be turned in both to me and to opposing counsel. Both opposing counsel and I will then review the submission before the following Wednesday’s class. In that second Wednesday class, we will discuss the exercise as a group and begin work on the next exercise. This pattern will repeat roughly a half dozen times throughout the semester.) The exercises will be situated in an employment fact pattern and will progress from the

beginning of the employment relationship through a mock arbitration. We will utilize in these exercises the Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association. Those rules can be found at www.adr.org. Such exercises may include drafting an arbitration agreement, drafting a demand for arbitration and an answer/response to the demand, selecting an arbitrator, preparing for and participating in an arbitration management conference, drafting and responding to motions on a discovery dispute, and finally participating in a complete mock arbitration in which students will prepare witnesses, depose an opposing witness, make opening statements, examine and cross-examine witnesses, and make closing statements. Also, from time to time, we will view and discuss videotaped vignettes of an arbitration that relate to issues that arise in that week's reading or that week's class discussion.

Finally, students will be required to write a final course paper that may be used to satisfy the Supervised Analytical Writing Requirement. During the last three weeks of class, each student will present his or her paper to the class. Each student will have roughly 25 minutes to present her or his paper, including ten minutes for questions from and discussion among classmates. (The time allotted to each student presentation will depend in part on class enrollment. The 25-minute figure assumes an enrollment of 15 students.) You should feel free to make a non-traditional class presentation - for example, you might show a videotape or create an exercise for the class to watch or participate in that illustrates your paper topic.

Student Papers – Requirements and Schedule

As noted above, each student will be required to submit a paper on any topic of her or his choice relating to arbitration law or practice. You should submit to me at the start of class on **February 5**, a one-paragraph description of your paper topic. You should submit to me at the start of class on **February 26**, an outline of your paper. Your final paper is due at the start of class on **April 2**. You may change your topic after you turn in a description on 2/5, and the paper you turn in on 4/2 need not follow closely the outline you turn in on 2/26. Please keep me informed, however, of any significant changes to your paper topic or outline. The paper should be 20-25 pages in length (it may not be more than 25 pages). The paper may not be substantially similar to a paper you have prepared or are preparing for any other course. The paper will not receive a passing grade if it does not focus predominantly on arbitration. For example, a paper that describes patent law for twenty pages and then discusses arbitration in relation to patent law for five pages will not receive a passing grade.

Class Attendance and Participation

I believe that you will derive the maximum benefit from the course if you come prepared every class for class discussion, having read and reflected upon the assigned reading for that class meeting. Moreover, this class emphasizes skills development using in-class exercises and group discussions. Given the small number of students in the class, each of your classmates depends on your attendance and participation in order to have lively discussions and worthwhile activities. I intend to call on several students, randomly selected, each class. If you are unprepared, it is better to come to class than to miss class. If you plan to miss a class or if you do not wish for me to call on you on any given day, please leave a note with me prior to that day's class. I will not call on anyone

who has provided me with a note. I do not expect students to be absent or unprepared more than four times during the semester. Should I call upon any student who is either absent or unprepared for class and who has not provided me with notice prior to that class as set forth above, I will take that fact into consideration in computing the student's class participation grade. Any student who misses more than four hours of class without a valid reason may be dropped from the course, at my discretion. Valid reasons include sickness, special family-related occasions and emergencies, religious holidays, military service, jury duty, and other unavoidable responsibilities.

Grading

There is no exam in this course. Your written paper (described above) will be worth 2/3 of your final grade. The remaining 1/3 of your grade in this course will be based on your class participation. Class participation includes attending class, participating in good faith in class exercises, and being prepared to participate in class discussions of the reading materials when called upon. Also, your presentation of your paper will be a significant component of your class participation grade. I do not use a "curve" to grade this course.

Audio or Video Recording

Classes may not be recorded, except in cases of special need with my prior permission.

Cellphones and Laptops

The use of cell phones in class is prohibited. Any cell phone brought to class must be turned off before class begins. If you have a need to have your cell phone on during class, please speak to me before class begins. Also, the use of laptops in class is prohibited. Any laptop brought to class must be turned off and put away before class begins. Anyone violating this policy is subject to being dropped from the class.

Schedule of Assignments

Below is a tentative outline of the readings for the course. Each Wednesday in class, I will put on the board the specific reading assignment for the following week. Where I suggest that you "*skim*" material, that is an indication that the material is largely descriptive (rather than calling for analysis) and safely can be read at a fast pace.

Chapter 1 – The Nature and Scope of Arbitration

Pp. 1-14, 33-45, 48-49 (Introduction and Overview, What Is Arbitration?, Arbitration's Historical Roots, Arbitration Legislation, Fairness of Arbitral Proceedings, A Roadmap for Studying Arbitration).

Chapter 3 – Interaction Between Federal and State Arbitration Law

Pp. 133-166, **AT&T v. Concepcion, 131 S. Ct. 1740 (2011)** [Please pull off of Westlaw or the internet.] (Introduction, the Role of State Arbitration Law, Commerce Clause Preemption of State Law by the FAA).

Pp. 180-191 (Choice of Law Provisions).

Pp. 191-198 (Choice of Forum Provisions – this material is useful because it is an excellent review/illustration of the rule of *Casarotto*/ when a state can regulate arbitration (by treating arbitration contracts with as much hostility as any other contract; you should read it with that purpose in mind)).

Pp. 166-180 (Federal Court Jurisdiction and the FAA).

(PRACTICE) Chapter 5: The Arbitration Process

SKIM Pp. 251-268 (Introduction, Drafting of Provisions Related to Arbitration Proceedings).

Practicum Exercise – Drafting an arbitration contract.

Chapter 2 – Disputes Subject to Arbitration

Pp. 51-73 (Introduction, Arbitrability and the Division of Authority Between Courts and Arbitrator, the Separability Doctrine: *Prima Paint* and its Progeny).

(PRACTICE) Chapter 5 cont'd

SKIM Pp. 269-284 (the Arbitration Proceeding), *READ* 292-299 (Modification and Correction of Arbitration Awards by the Arbitrator: *Functus Officio*).

Practicum Exercise – Drafting a Demand for Arbitration and an Answer/Response to the Demand.

Chapter 2 cont'd

Pp. 74 (top only), 89-96 (Arbitration of Statutory Claims: Employment Discrimination Claims).

Pp. 96-102 (Contract Formation: Arbitration Provisions).

Pp. 102-103 (top only), 115-125 (Unconscionability and Related Contract Defenses).

Pp. 125-131 (Summary: Arbitrability, Gateway Issues, and Defenses to Arbitration).

(PRACTICE) Chapter 6: The Arbitrator – Selection and Conduct

Pp. 301-305 (Introduction, the Selection and Role of the Arbitrator).

Practicum Exercise – Selecting an arbitrator.

And/or -Relating to the proposed Arbitration Fairness Act: **Debate:** PRO/CON: “Resolved, the benefits of pre-dispute arbitration clauses in consumer and employment agreements outweigh any public policy concerns.”

Chapter 4 – Getting to Arbitration

Pp. 199-237 (Introduction, Pitfalls in Getting to Arbitration and How to Overcome Them, Waiver, Mediation as a Condition Precedent to Arbitration, Pre-Arbitration (Interim) Relief: By the Courts, Recommendations for Addressing Interim Relief Issues, Interim Relief and Pre-Hearing Orders by Arbitrators).

(PRACTICE) Chapter 4 cont'd

Pp. 237-250 (Pre-Hearing Conferences, Discovery, and Other Preliminary Matters, Summary Disposition).

Practicum Exercise – Preparing for Arbitration Management Conference (aka Pre-Hearing Conference or Scheduling Conference).

Chapter 6—The Arbitrator—Selection and Conduct

Pp. 305-369 (Professional Responsibility: Ethical Standards for Arbitrators, State Legislative Efforts in Regulating Arbitrators and Provider Organizations, “Evident Partiality” and Related Grounds for Disqualifying An Arbitrator, Nonneutral Neutrals: Structural Bias?, Liability of Arbitrators and Arbitral Organizations).

(PRACTICE) Practicum Exercise – Drafting motions relating to discovery dispute.

And/or **-Debate:** PRO/CON: “(1) All arbitrators appointed in cases involving interstate commerce should be bound by the Code of Ethics for Arbitrators in Commercial Disputes (2004); (2) States should adopt legislation governing provider organizations and arbitrators such as has been done in California; (3) Private arbitrators and provider organizations should receive [absolute] [qualified] [no] immunity.”

Chapter 9 — Multiple Forums, Parties, and Proceedings

Pp. 473-502, 508-516, 524-533, **Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (2013) [Please pull off of Westlaw or the internet.]**, **American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013) [Please pull off of Westlaw or the internet.]** (Introduction, Divided Disputes and Multiple Forums: Arbitration and Litigation, Third Party Issues: Non-Parties’ Enforcement of And Non-Parties Subject to Arbitration Agreements, Getting Multiple Proceedings and Parties into a Single Forum Part 1: Consolidation, Part II: Class Arbitration, Preclusion: Res Judicata and Collateral Estoppel).

Chapter 8 — Judicial Review of Arbitration Awards

Pp. 411-471 (Introduction, Procedural Considerations in Obtaining Judicial Review of an Arbitration Award, Standard of Review, Statutory Grounds for Review and Vacating Arbitration Awards, Contract-Based Standards for Judicial Review, Non-Statutory Review Standards, Sanctions for Frivolous Appeals).

(PRACTICE) Practicum Exercise – Exercise relating to arbitration case pending before the U.S. or California Supreme Court and/or current arbitration scholarship.

(PRACTICE) Practicum Exercise – Mock Arbitration.

-Student paper presentations.