

Law 1632.01 Sp23: Arbitration Practice and Advocacy

Prof. Tom Stipanowich

Spring Semester 2023

Welcome to Arbitration Practice!

Many people don't know much, if anything, about ARBITRATION. However, it may be an essential part of your conflict resolution toolbox in current practice. This course is designed to familiarize you with the many kinds of arbitration and equip you with insights shared by very few members of the public—or lawyers. Those students who do know something about arbitration will deepen their knowledge and skills, and perhaps refine some of their understandings and perceptions.

Course Materials

TEXT: THOMAS J. STIPANOWICH & AMY J. SCHMITZ, ARBITRATION: PRACTICE, POLICY AND LAW (Aspen Publishing 2023) (softcover). The ISBN # is ISBN 978-1-5438-5918-8. The Pepperdine Law School Bookstore should have plenty of copies!

[This new edition is hot off the presses, and just won the award for Outstanding Book on Dispute Resolution for the past year from the International Institute for Conflict Prevention & Resolution (CPR Institute).]

Various materials will also be distributed in class or posted on the COURSES platform for this course (Law 1632.01 Sp23)

Where and When?

We will meet in CLASSROOM F. Classes will be held every Friday from NOON until 4:40 pm. Our first class will be held on Friday, March 17, and our last class will be held on Friday, April 21.

What will I learn in this course?

1. Obtain insights and skills to effectively employ arbitration processes as an important set of tools in your toolkit for managing conflict and resolving disputes.

Students completing this class should be able to:

- Differentiate between kinds of arbitration processes and understand how arbitration may be tailored to serve different goals and circumstances;
- Compare and contrast arbitration with mediation and other “ADR” approaches, and with litigation in court;
- Demonstrate knowledge and understanding of arbitration usages in business relationships, and the role of arbitrators;

- Negotiate and draft an arbitration/dispute resolution agreement that reasonably serves a client's goals;
- Compare and contrast leading arbitration rules and procedures, including differences in arbitration provider institutions, and arbitrator appointment procedures.

2. Learn the basics of “the art of arbitration”-- practical skills for arbitrators and advocates.

Students completing this class should be able to:

- Describe how to prepare for and conduct an arbitration hearing from the commencement of the process through the rendition of an arbitration award including the pre-hearing conference, development of a procedural order and setting a timetable for arbitration;
- Identify and explain issues or process choices likely to arise before and during the course of an arbitration;
- Show an understanding of the kinds of remedies available in arbitration and ways of framing arbitration awards, and what happens after an award is rendered;
- Differentiate between ethical and unethical practices in arbitration and identify potential ethical dilemmas and solutions.
- Be able to identify and address issues that arise when the same person “switches hats”, and acts as a mediator as well as an arbitrator with regard to a particular dispute.

3. Develop a general understanding of the laws affecting arbitration.

Students completing this class should be able to:

- Demonstrate knowledge and understanding of key principles and legal doctrine supporting arbitration agreements and awards .
- Demonstrate knowledge and understanding of special fairness concerns associated with arbitration agreements between businesses and consumers or employees;

Class Format / Evaluation

Each week you'll prepare for our class session by doing the assigned readings, sometimes preparing written assignments. During class sessions we'll engage in exercises of different kinds. In order to make the most of this course it is essential that you take the time to prepare for class and actively participate in our live class sessions.

Ten (10%) of your grade will be class participation. You need to be prepared to answer questions and discuss the readings, and actively participate in all the exercises.

Thirty percent (30%) of your grade will be based on two written assignments you will submit on the course platform at various times during the course. They will be turned in with your name on them, and will NOT be graded anonymously. **The two written assignments are included at the end of the course syllabus.**

Sixty percent (60%) of your grade will be based on a TAKE-HOME FINAL EXAM covering different subjects covered in the course. The questions may consist of essay, short answer, or multiple-choice questions. The Final Exam will be open-book and open-materials. (Details to be provided later.) The Final Exam will NOT be graded anonymously.

Student Work Product Rule

A. Presumption Against Collaboration:

It will be presumed that students are not allowed to collaborate on the preparation of work product (examinations, research papers, assigned problems, etc.) unless the professor specifically authorizes such collaborations.

B. Violations of this Section:

Any attempt to obtain on behalf of one student credit for any activity, examination answer, or other work product not actually performed by such student, or to a degree not reflective of the actual activity or performance of such student, whether or not such attempt is successful, will be subject to administrative discipline. Such discipline may include, *inter alia*, the forfeiture of all or part of any credit obtained by such conduct and such forfeiture may be cumulative of any other penalty imposed.

C. Prohibition on Submitting Papers for Credit Multiple Times:

Students may not submit their own work product for credit in more than one course at Pepperdine School of Law or elsewhere. Credit will not be awarded for a student's own work product that has already been submitted to obtain academic credit in another course, either at Pepperdine School of Law or elsewhere.

D. Plagiarism Detection Process:

Straus Institute classes regularly utilize the plagiarism detection services. .

E. When there is reliable evidence that any of the standards in this Section have been violated, the matter will be referred to the Academic Dean who will decide refer the matter to the Honor Board.

F. All students in any Straus Academic Program are subject to the Honor Code and to the jurisdiction of the Honor Board. The Honor Code is detailed in the Student Handbook.

Any questions regarding these policies can either be directed to Shellee Warnes at the Straus Institute or your academic program advisor.

INSTITUTIONAL LEARNING OUTCOMES

The mission of Pepperdine University is to strengthen students for lives of purpose, service and leadership. The values expressed in this mission are reflected in Pepperdine's commitment to several student Institutional Learning Outcomes: knowledge, scholarship, faith, heritage and global understanding. School of Law Program Learning Outcomes and course Student Learning Outcomes should advance the Pepperdine mission and the University Institutional Learning Outcomes.

Program Learning Outcomes

- Students will demonstrate knowledge and understanding of arbitration and substantive law. (Cognitive Apprenticeship).
- Students will demonstrate professional arbitration /lawyering skills. (Professional Lawyering Skills);
- Students will demonstrate knowledge and understanding of lawyers' and arbitrators' pertinent moral, ethical, and professional responsibilities. (Moral, Ethical, and Professional Identity Apprenticeship).

Student Learning Outcomes

- Assess technique and theory and the arbitrator's role in commercial arbitrations (LS 2);
- Identify and explore different kinds of arbitration (LS 2);
- Practice counseling and advocacy skills and techniques associated with arbitration practice (LS 2);
- Practice skills and techniques associated with arbitral adjudication;
- Assess legal, professional, and ethical issues in arbitration (ME 1); and
- Assess key legal precedents, rules and standards relating to arbitration (CA 1).

OTHER APPLICABLE STANDARDS

Disability Statement

Any student with a documented disability (physical, learning, or psychological) needing academic accommodations should contact the Disability Services Office (Malibu Campus, Tyler Campus Center 225, 310.506.6500) as early in the semester as possible. All discussions will remain confidential. Please visit <http://www.pepperdine.edu/disabilityservices/> for additional information.

Arbitration Practice and Advocacy

CLASS SCHEDULE, ASSIGNMENTS

Unless otherwise indicated, all assignments refer to the TEXT, ARBITRATION: PRACTICE, POLICY AND LAW. As a rule, you should not only read the assigned pages, but also make an effort to consider and try to formulate answers to problems and questions raised in the text. You may also be expected to review and apply various standards, including provisions of leading arbitration rules, the Code of Ethics for Arbitrators in Commercial Disputes, and/or legal standards. These will normally be provided to you by links, but they are typically very easily accessible online.

Week 1 Arbitration: The Big Picture (Friday, March 17, 2023)

READING: TEXT, CHAPTER 1. pp. 1-29.

TOPICS COVERED IN WEEK ONE:

- **Arbitration in the Dispute Resolution Spectrum**
- **History of Arbitration**
- **Arbitration vs. Litigation**
- **Arbitration vs. Negotiation and Mediation**
- **The Many Faces of Arbitration**
- **“As Time Goes By” Arbitration Role-Play Exercise**

TENTATIVE AGENDA FOR WEEK 1 CLASS SESSION:

- **Introductions**
- ***Exercise: The Arbitration Game***
- ***Exercise: As Times Goes By (Arbitration role-play and de-brief)***
- ***Exercise: Problem, p.10: Arbitration vs. Litigation***
- **Discussion of readings—The Many Faces of Arbitration**
- **Review and Look-Ahead**

Week 2 Agreeing to Arbitrate; The Arbitration Process (Mar. 24, 2023)

READING: CHAPTER 2, pp.31-46; CHAPTER 4, pp. 61-88

TOPICS COVERED IN WEEK 2:

- **The Contractual Foundations of Arbitration**
- **Negotiating and Drafting Arbitration Clauses**
- **Overview of the Arbitration Process**
- **Laying the Groundwork: The Prehearing Conference**
- **Jurisdictional Issues**
- **Interim Measures and Emergency Relief**
- **Dispositive Motions**
- **Information Exchange / Discovery**
- **Arbitration hearings**
- **Privacy and Confidentiality**
- **Arbitration Awards and Remedies**
- **Arbitration and Settlement**

TENTATIVE AGENDA FOR WEEK 2 CLASS SESSION:

- **Overview on Agreements to Arbitrate -- Prof. Stipanowich**
- ***Exercise: Problem 1, p.39: Selecting Arbitration Institutions and Procedures***
- ***Exercise: Arbitration Drafting Nightmares***
- **Overview of the Arbitration Process – Prof. Stipanowich**
- ***Exercise: Negotiating a Dispute Resolution Provision (Breakout)***
- **Class discussion – Addressing Concerns about Extreme or Irrational Awards**
- **Review and Look-Ahead**

Week 3 Selecting Arbitrators; Enforcing Arbitration Agreements (Mar. 31, 2021)

READING: CHAPTER 3, pp. 47-59; Chapter 5, pp.89-130

TOPICS WE'LL COVER IN WEEK 3:

- **Arbitrator Selection**
- **Arbitrator Conflict of Interest, Disclosure, and Challenge; Related Ethical Issues**
- **“Party Arbitrators”**
- **The Law of Arbitration; Court Enforcement of Arbitration Agreements**
- **Arbitrability: Validity, Enforceability and Scope of Arbitration Agreements**
- **Other Forms of Pre-Award Court Support of Arbitration**
- **Public Policy Limitations on Arbitration**
- **Public Policy Limits: Employment and Consumer Contracts**

TENTATIVE AGENDA FOR WEEK 3 LIVE SESSION:

- **Overview of Arbitrator Selection, etc. – Prof. Stipanowich**
- ***Exercise: Arbitrator Disclosure and Challenge, Problems 1, 2A, and 2B (in Text)***
- **Overview of Arbitration Law and Enforcement of Arbitration Agreements – Prof. S**
- **Public Policy Limits on Arbitration Agreements**
- **Review and Look Ahead**

NOTE: WRITTEN ASSIGNMENT 1 IS TO BE COMPLETED AND SUBMITTED BY NOON ON THE DAY OF THE WEEK 4 CLASS SESSION (Assignment due by noon on April 7, 2023). See details under “Written Assignments” below.

Week 4 Fairness Issues in Arbitration: Consumer and Employment Contracts (Apr. 7, 2023)

READING: CHAPTERS 7 AND 8, pp. 185-216, 219-250

NOTE: WRITTEN ASSIGNMENT 1 IS TO BE COMPLETED AND SUBMITTED BY NOON ON APRIL 7. See details under “Written Assignments” below.

TOPICS WE’LL COVER IN WEEK 4:

- Fairness Issues in Arbitration under Standardized Contracts for Consumers and Employees
- Court Policing of Arbitration Agreements in Consumer and Employment Contracts
- Legislative Responses to Fairness Concerns
- Recent Supreme Court Decisions

TENTATIVE AGENDA FOR WEEK 4 LIVE SESSION

- Review on Consumer and Employment Arbitration – Professor S.
- Breakout Discussion – How Fair is My Arbitration Agreement?
- Debrief
- Review and Look Ahead (Discussion of Mock Arbitration Hearing and Exercise on Deliberating on and Writing a Final Arbitration Award)

Week 5 Role-play Arbitration Hearing / Award Deliberation (Apr. 14, 2023)

THIS WEEK IS DEVOTED TO CONDUCTING OUR MOCK ARBITRATION EXERCISE – *General Food v. Pitts*

TENTATIVE AGENDA FOR WEEK 5 CLASS SESSION:

- **Instructions: Explanation of deliberation and final award.**
- **Exercise: Deliberation on Award in General Food v. Pitts Arbitration**
- **Final Instructions for Arbitration Award (Written Assignment 3.)**
- **Look ahead at Week 6 class**

NOTE: WRITTEN ASSIGNMENT 2 -- FINAL ARBITRATION AWARD -- IS TO BE COMPLETED AND SUBMITTED BY NOON ON THE DAY OF OUR LIVE SESSION FOR WEEK 6 (Assignment due by noon on April 21, 2023). See details under “Written Assignments” below.

Week 6 Arbitration Awards and the Courts; Mixed Processes (Apr. 21, 2023)

READING: CHAPTER 6, pp. 131-184; Chapter 9, pp. 258-263, 266-280 (ignore problems 1 and 4).

NOTE: WRITTEN ASSIGNMENT 2 -- FINAL ARBITRATION AWARD -- IS TO BE COMPLETED AND SUBMITTED BY NOON ON THIS DATE. See details under "Written Assignments" below.

WHAT WE'LL COVER IN WEEK 6:

- Court treatment of arbitration awards
- Awards procured by corruption, fraud
- Evident partiality or corruption in the arbitrator(s)
- Arbitrators exceeding their powers
- Arbitrator misconduct in failing to postpone hearing, etc.
- Contractual provisions attempting to expand scrutiny by courts
- Mixed processes involving mediation and arbitration
- Careers in arbitration

TENTATIVE AGENDA FOR WEEK 6 CLASS SESSION:

- Discussion of arbitration awards in the courts
- Discussion of mixed processes involving mediation and arbitration
- Discussion of careers in arbitration and dispute resolution
- Review of subjects covered in class, look-ahead to Final Exam

Written Assignments

Written Assignment 1: Just How Fair Is My Arbitration Agreement?

TO BE SUBMITTED BY NOON ON APR. 7, 2021

(15 points possible, 15% of total points for the class)

After doing the readings in Chapters 7 and 8, please locate an arbitration / dispute resolution provision in a contract to which you are a party – that is, a contract for consumer goods or services, including any arbitration rules that may be applicable. (Note, some administering dispute resolution organizations have special policies regarding consumer arbitration!) This will most likely be for wireless services, a credit card, an app, etc. (Even if you are not a party to such an agreement, please locate such an agreement online and locate the arbitration / dispute resolution provision and referenced rules.) Your assignment is to do your best to investigate and answer the following questions with regard to the arbitration program:

- a. Did you take the time to read these contents before signifying your acceptance of the agreement? (Remember that, generally speaking, a failure to read terms and conditions will not operate as a defense against their enforcement under U.S. contract law.)
- b. *Clarity and transparency.* Where is the agreement to arbitration contained in your contract? How easy is it to locate? Under what heading or section title does it appear? Is the language clear and understandable? Does the provision reference or incorporate separate rules or procedures, and, if so, how easy is it to locate and review them? Do those rules, if any, provide any of the answers you are seeking?
- c. *Administration.* Can you tell how the program is administered, and by whom? Is it an independent organization? Can you tell who pays the fees of administration?
- d. *Arbitrators.* How are the arbitrators selected, and by whom? Are they selected from a panel, or subject to experiential or other requirements? Who pays the arbitrators' fees and expenses?
- e. *Procedures.* How are filings of claims made, and what kind of notice is required for the filing of a demand? May you be represented by an attorney, if desired? If need be, can you obtain critical documents or testimony from the company? What kind of a hearing are you entitled to, and when and where will it be held? How long will it take to obtain relief? Can you bring a claim as part of a class action or collective action by other consumers/employees? To what extent is the proceeding confidential, and how does this affect your ability to share information with third parties? Are you permitted the option of pursuing relief in small claims court?
- f. *Outcomes (awards and remedies).* Are there any limitations on your ability to obtain relief that might be available in court, including punitive damages or statutory remedies? Will the award contain any form of rationale? Is the loser required to pay for attorney fees and arbitration costs?

Are you comfortable with these procedures? What relative advantages or disadvantages do they present in comparison to going to court? In reaching your answer, what difference does it make whether any claims you might have are likely to be relatively small—say, no more than \$100 or \$200? [*Suggested length: 600 - 1,000 words.*]

Written Assignment 2: Mock Arbitration Award with Rationale

TO BE SUBMITTED BY NOON ON APR. 21, 2023

(15 points possible)

This is a team exercise. You and two other students will be assigned to a three-person arbitration panel appointed to hear and make an award regarding the disputes in *General Food v. Pitts*. Prior to class, you will have reviewed the written materials submitted by the parties and conducted a hearing on the merits of the case you must now deliberate with your fellow panelists and write a written award. In a real-life case you would be expected to prepare a written award fully and finally addressing all of the issues put forward by the parties, including elements of damages. (In our mock hearing, no evidence regarding damages was presented, so you should not address the issue of damages in your award.)

For present purposes, it is sufficient for you and your two teammates to prepare an award based on the form below. Please indicate how you would rule on each of the following claims and counterclaims (For example, "Liability proven" or "Liability not proven") and provide a brief rationale in support of each element of your decision. Do NOT attempt to address the issues relating to the amount of damages to be award. [Suggested length of award: 600 words to 1000 words]

BEFORE PREPARING YOUR AWARD, PLEASE SEE THE GUIDELINES FOR ARBITRATION AWARDS BELOW.

[NOTE: It is possible for an arbitrator to file a dissent with respect to one or more elements of the award. However, they should also include a supporting rationale and separately sign the dissent.] I will also permit a concurring opinion by an arbitrator, although that is highly unusual in real life.

Be sure that all three arbitrators' names appear on the award!

Arbitrator 1: _____

Arbitrator 2: _____

Arbitrator 3: _____

Claim by General Food v. Pitts for breach of contract

Ruling:

Rationale:

Counterclaims by Pitts v. General Food Corporation

[Continued on next page]

A. Claim for breach of contract.

Ruling:

Rationale: [Note, your rationale here is presumably going to be the same as the rationale supporting your decision on the breach of contract claim by General Food, so you do not need to repeat it.]

B. Claim for defamation of character (slander).

Ruling:

Rationale:

Arbitration Award
General Food Corporation v. Herbert Pitts

Guidelines for Awards

1. ***Use the elements of the cause of action to organize your discussion.*** With legal causes of action, it is best to set forth the elements that someone needs to prove to sustain the cause of action. Here, the causes of action were breach of contract and defamation. [Do not worry about proof of damages for either party – that matter was to be dealt with in a later portion of the arbitration, remember.] In this matter, when it comes to the breach of contract issues you have a further “template” in the form of the termination clause in the contract. There were several grounds laid out in the contract for terminating Herb Pitts, any one of which would be sufficient to terminate him if the facts supported it. Ideally, you will discuss each of these potential grounds and not just one.
2. ***Include a sufficient rationale to lay the foundation for your award, but not too much. Avoid redundancies.*** A sufficient rationale for your award should go beyond a mere stating of conclusions (such as, for example, “General Food failed to prove that Pitts breached the contract”) to provide a chain of logic to support your conclusion as well as key elements of evidence that support your logic.

Please note that the logic and evidence supporting General Food’s breach of contract claim and Herb Pitts’ counterclaim should be essentially the same. The best approach would be to include one thorough rationale in connection with the award respecting the General Food breach of contract claim and simply refer back to that in addressing the Herb Pitts breach of contract claim. Arbitrarily dividing the logic and evidentiary foundation between the two claims does not make sense.
3. ***Offer multiple bases for your award if possible.*** As an arbitrator, I always try to cover myself and enhance the finality of my award by offering multiple bases for my conclusion if possible. For example, because the contract here identified several bases upon which General Food might terminate Pitts, you may have more than one potential ground for your award in favor of General Food (if you believed the facts supported each ground).
4. ***Don’t be informal.*** This is a formal document with legal consequences. Do not use contractions or conversational style. Use a declarative style and avoid referring to your “feelings.”
5. ***Identify yourself.*** The names of all three arbitrators should appear on the award, and if an arbitrator writes a dissent the dissenting arbitrator should be identified. Always remember to put your name on the award, concurrence or dissent. It is very important to identify yourself and your role in the award.