

University of Nevada Las Vegas Boyd School of Law

Arbitration

Fall 2003

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REQUIRED COURSE MATERIALS:

Jean Sternlight, Arbitration Class Materials (Fall 2003) ("JS") (this is available for purchase from the Career Services Receptionist)

OTHER BOOKS YOU MAY FIND QUITE USEFUL:

Christopher Drahozal, *Commercial Arbitration: Cases and Problems* (2002) (this is a very recent casebook discussing the law of commercial arbitration in the United States)

Kathryn Stone, *Arbitration* (this is a new case book on commercial arbitration in the United States)

Gary B. Born, *International Commercial Arbitration* (2001) (this is a terrific and comprehensive book describing many of the technical aspects of international arbitration)

Ian MacNeil, *American Arbitration Law* (1992) (this short treatise provides an excellent and readable description of the history of commercial arbitration in the United States)

Ian MacNeil, Richard Speidel & Thomas Stipanowich, *Federal Arbitration Law* (1994) (this is a comprehensive four volume looseleaf series summarizing the law of commercial arbitration in the United States)

Elkouri & Elkouri, *How Arbitration Works* (1997) (this is a treatise focused on labor arbitration in the United States)

Bryant Garth & Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996) (this excellent book, written by two sociologists, describes the field of international arbitration, explaining for example what kinds of credentials are typically needed to break into that field)

Elizabeth Fajans & Mary R. Falk, *SCHOLARLY WRITING FOR LAW STUDENTS* (2d ed. 2000)

(you may find this book useful for writing your short papers, though it is more oriented to longer papers such as that required in the Major Research Seminar)

OBJECTIVES:

This class has multiple objectives. First, it will attempt to expose you to the great breadth of the field of arbitration, focusing not only on arbitrations are handled in Nevada and the United States, but also on how this dispute resolution mechanism is used in other parts of the world.

Second, the course will require you to do independent research and writing. You will be called upon to structure part of your own curriculum, to teach yourself, and to use the knowledge you gain to help teach your fellow students.

GRADING:

Your grade will be based on your completion of multiple written projects, as well as your participation in class. Specifically, the grade will be computed as follows:

two short papers and presentation(s): 25% each
journal: 30%
class participation: 20%

SHORT PAPERS

Each of you will be required to prepare two short papers pertaining to arbitration throughout the semester. One of these papers can be co-authored with one other student in the class, or you can do both papers on your own. If you want to write a short paper on an arbitration topic that is not listed on the syllabus, just state what your proposed topic is, and I will do my best to fit you in. I will use a sign up sheet to attempt to accommodate your requests as to choice of topics and weeks. The papers should be based not only on the required readings for the week, but also on other materials which you uncover independently. Your paper may focus on a policy issue, an ethical question, a practical concern, or a social science insight. Your paper should take a position on some issue, and not merely summarize what other authors have said. That is, you need to have a thesis and make an argument. You need to tell me what you will be writing about, and get my approval for your topic, in advance of when you hand in the paper. This can be an informal conversation or e-mail. This first paper is due October 20, by 4:00 pm. The second paper is due Friday December 5th by 4:00 pm.

Here are some logistical issues. Each paper should be approximately 6-10 double-spaced pages. It should have footnotes showing what your sources were for your various points. Please use the "Blue Book" to make sure your citation form is correct, but proper citation format should not be your primary focus. Because these papers are short, and do not require a rewrite, they will not qualify for the Writing Requirement. However, if you are interested in doing a single long paper that qualifies for the Writing Requirement, in lieu of the two short papers, I will permit up to four

of you to take this option on a first-come first-served basis. You can e-mail your request to me.

All students in the class will also be required to make a presentation in class based on one of your two papers. If you co-author the paper you choose to present, the presentation should also be made jointly. I will give you guidance on the length of the presentation after I see how many students are enrolled. You will make your presentation on the date on which your topic is discussed on the syllabus, or on an alternative date I may assign. I encourage you to be creative. For example, you may choose to lead the class in an exercise or role play, rather than to lecture, so long as the exercise or role play also allows you an opportunity to convey information to the class. But, whatever the format, you need to convey your basic ideas to your audience, and involve them in a discussion. **Do not simply read your paper.** The point of the presentation is to provide the information in a new way, and to engage the class in a discussion. You may want to explain why you find the subject interesting; you may want to explain the material somewhat differently than you explained it in your paper; you may want to provide some examples or exercises; you may want to use visual aids; or you may want to ask questions of the class. These are just examples. If you have specific questions about the presentation, please come talk to me, or call me on the phone, or write me an e-mail.

JOURNALS

I want each of you to keep a “journal,” throughout this course, that you will hand in to me at the end of the exam period. The purpose of the journal is to discuss your reflections on the course, and what you learned from it. As you do the readings for each class, and as you learn from the class discussion or exercises, make entries in your journal regarding what you think about what you are reading/hearing. You need not make an entry for every single class, but I expect at least one entry per week. Be analytical. That is, don’t just say “this was great,” or “this was boring,” or “I like labor arbitration better than commercial arbitration.” Rather, talk about how you are being challenged to think in different ways, what you are learning that does or does not make sense and why, how what you learned fits in with other things you know about, etc. It is fine to be critical of things that you read or hear, but do it in some depth, i.e. “the argument that Sternlight makes in her article does not make sense to me because,” or “it is interesting to me that Ware and Sternlight take such different approaches to mandatory arbitration. Ware asserts that mandatory arbitration is beneficial for consumers and employees, as well as for the companies that mandate the process, whereas Sternlight contends that such arbitration is used to allow companies to take advantage of “little guy” consumers and employees. In my view” The journal should be typed. It should be at least 15 pages long, double spaced. The journal should include a summary, at the end, discussing what the most important things are that you felt you learned in the class. You may also want to discuss what things you did not learn that you hope to learn more about elsewhere.

CLASS PARTICIPATION

Your class participation grade will be based primarily on how well you contribute to the class discussions, and on how enthusiastically you participate in role-playing exercises. My goal is that each of us will learn a great deal from one another. For this to work, each of you must speak up in

class, on a frequent basis. I expect you to make points based on the readings and based on your prior experiences. I also expect you to ask questions of me and your fellow students. Often a good question is just as valuable as a good statement. In the context of a presentation, silence is an insult, not a compliment. Of course, you must be physically present to participate, so I will also factor unexcused lateness or absences into your participation grade.

LIBRARY RESOURCES AND WEB SITES:

Our library is good, but may not contain everything you need. Remember that excellent resources may be available only from Lied or other libraries. You can get materials through interlibrary loan as long as you plan ahead sufficiently. I also have my own copies of various books, so you may want to speak to me if you are looking for sources you can't find.

All of the reference librarians are very capable and can assist you with your assignments. They can help you get books and articles through interlibrary loan, and can help you explore our own resources and the internet. However, you need to ask for help sufficiently in advance of when you need the information in order for the librarians to be able to assist you.

You may find the following web sites useful as you do your research:

American Arbitration Association: <http://www.adr.org>

American Bar Association Section of Dispute Resolution:
<http://www.abanet.org/dispute/home.html>

Association of Conflict Resolution: <http://acresolution.org>

Chartered Institute of Arbitrators (British): <http://www.arbitrators.org/>

CPR Institute for Dispute Resolution: <http://www.cpradr.org/>

International Commercial Arbitration Resources in print:
<http://www.lib.uchicago.edu/~llou/intlarb.html>

International Chamber of Commerce Arbitration (based in Paris):
<http://www.iccwbo.org/court/english/arbitration/introduction.asp>

JAMS (private arbitration & mediation provider): <http://www.jamsadr.com>

National Academy of Arbitrators (mostly elite labor arbitrators): <http://www.naarb.org/>

National Arbitration Forum (private provider): <http://www.arbforum.com/>

Permanent Court of Arbitration (handles international public disputes): <http://www.pca-cpa.org/>

United Nations Commission on International Trade Law: <http://www.uncitral.org/en-index.htm>

PLAGIARISM: You all know not to plagiarize, but some of you may conceivably be confused as to what plagiarism means in this context. Of course you all know that you cannot quote another author without attribution. In addition, it is also improper to paraphrase or borrow ideas from another, without attribution. You will find other articles' sources/footnotes to be a rich source of information. However, to the extent that you rely on another article's footnotes you must read all such sources yourself, to make sure they really say what the other author said they said. Often you will find you need to update such footnotes, as well, e.g. by citing to a more current statute or version of the book. If you have any questions on where cites are and aren't needed, please ask me, or err on the side of citation.

ATTENDANCE: Attendance is mandatory. If you miss more than 20% of the classes I will either dismiss you for excessive absences or fail you. I will also factor non-attendance and non-punctuality into your participation grade, as noted above. If you do need to miss a class and have a valid excuse please write me a note in advance of class. Excused absences will still count against the 20%, but I will not hold them against you when I calculate your participation grade. I treat non-preparedness as an absence. I will circulate an attendance sheet every day. If you do not initial the sheet you will be marked absent. If I call on you and you are unprepared you will also be marked absent.

SPECIFIC CLASS ASSIGNMENTS:

Class 1: Introduction to class, and to how arbitration compares to other types of dispute resolution.

Readings: JS 1-12

Possible discussion topics

1. What is this course going to be about?
2. What are the course requirements?
3. What is each of our backgrounds with respect to arbitration or why does it interest us?
4. What are the various types of ADR, and where does arbitration fit in?

Class 2: What is arbitration, and where does it fit in a system of justice?

Readings: JS 13-26

Possible discussion topics

1. What makes for a "just" system of procedure?
2. Which matters more, procedural or substantive justice?
3. What do psychologists' studies show about peoples' attitudes towards procedural justice?
4. Is arbitration just?

5. What are the implications of the procedural justice literature for arbitration?
6. How can arbitration be defined? Can it??
7. What is the role of lawyers in arbitration?
8. Is arbitration a formal process or an informal process?
9. What are the potential advantages of arbitration?
10. What are the potential disadvantages of arbitration?
11. Is arbitration properly considered a form of ADR?

Class 3: Introduction to arbitration in many contexts

Readings: JS 27-48.

Possible discussion topics

1. In what kinds of disputes/transactions has arbitration been used?
2. Labor arbitration
3. General commercial arbitration
4. Construction arbitration
5. Uses of arbitration to resolve disputes between two countries
6. Arbitration and insurance
7. Arbitration and medical claims
8. Arbitration and family disputes
9. Arbitration and sports
9. Historical origins of arbitration
10. How does arbitration differ from one context to the next?
11. What are the common elements of arbitration, from one context to the next?
12. Other possible uses of arbitration.

Class 4: Introduction to court-connected non-binding arbitration

Readings: JS 49-52

Possible discussion topics

1. What is court-connected non-binding arbitration?
2. Why is court-connected arbitration non-binding?
3. What are the arguments as to why court-connected non-binding arbitration would/would not be expected to be effective?
4. How should the “effectiveness” of court-connected non-binding arbitration be measured?
5. What have studies shown with respect to the effectiveness of court-connected non-binding arbitration?
6. If you were on a court committee charged with determining whether to establish a court-connected arbitration program and if so, how to design that program, what questions would you ask?

Class 5: Court-connected non-binding arbitration in Nevada

Readings: JS 53-62

Possible discussion topics

1. What kinds of cases do/don't qualify for the Eighth District non-binding arbitration program?
2. What portion of cases litigated in the Eighth District qualify for the arbitration program?
3. Who are the arbitrators in the Eighth District program, what are their qualifications, and how are they paid?
4. How are particular arbitrators assigned to a case?
5. What kinds of pleadings are filed in arbitration matters?
6. Do the Eighth District arbitrators hear motions?
7. What kind of discovery is conducted in the Eighth District arbitration cases?
8. How quickly are arbitration matters to be heard?
9. What evidentiary standards apply?
10. What do arbitrators' awards look like in the Eighth District program?
11. If a party is dissatisfied with the arbitrator's award, what recourse does that party have?
12. Do the rules contain any disincentives against seeking a trial de novo? What?

Class 6: Constitutionality of court-connected non-binding arbitration

Readings: JS 64-74

Possible discussion topics

1. What constitutional arguments have been made against mandatory court-connected non-binding arbitration?
2. What has been the success, to date, of constitutional attacks made against mandatory court-connected non-binding arbitration?
3. Is there any reason to believe that some mandatory court-connected arbitration programs are more vulnerable than others? How does the design of a court-connected arbitration program affect its constitutionality?
4. Do you believe that the Eighth Circuit mandatory arbitration program is vulnerable to constitutional attack? Why or why not? On what grounds?

Class 7: Courts' historical attitude towards private binding arbitration

Readings: JS 75-79

Possible discussion topics

1. What was/is the "ouster doctrine"?
2. Scholars disagree as to whether British and U.S. courts historically were "hostile" to arbitration.

What is your sense? Why do you think this disagreement exists?

3. Many countries have gone through or are still experiencing a reluctance to enforce all or certain arbitration agreements. What policies on the part of judges or society as a whole might explain such reluctance?

Class 8 Introduction to the Federal Arbitration Act and the Uniform Arbitration Acts

Readings: JS 80-107

Possible discussion topics

1. What economic and political forces led to the adoption of the Federal Arbitration Act in the United States, and to the “modern” state arbitration acts?
2. Can you identify any economic or political forces that might or should have opposed adoption of the FAA in the US?
3. What were/are the key features of the FAA?
4. What are the key features of the Nevada Arbitration Act of 2000?

Class 9: The Rise of Labor Arbitration

Readings: JS 108-117. Optional additional readings: Alexander v. Gardner-Denver Co, 415 U.S. 36 (1974) (union member who grieved and arbitrated discrimination claim is not thereby precluded from bringing Title VII claim); Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) (holding that labor/management contract cannot waive employee’s right to bring suit in court, at least unless waiver is “clear and unmistakable”)

Possible discussion topics

1. What is the nature of arbitration in the collective bargaining context?
2. What kinds of disputes are arbitrated in the collective bargaining context?
3. What is the difference between “grievance” and “interest” arbitration?
4. Why do people say that arbitration is a form of governance in the collective bargaining context?
5. What do you think of the labor arbitration decision contained in the materials?
6. Prepare to discuss the Nevada labor arbitration statute contained in the class materials.

Class 10: The Rise of Commercial Arbitration

Readings: JS 118-127. As additional optional reading take a look at the intervening Supreme Court case of Mitsubishi Motors Corp v. Soler Chrysler Plymouth, 473 U.S. 506 (1974) (holding that franchisee, a Puerto Rican automobile dealership, was bound by its contract to arbitrate an antitrust dispute in Japan) . Also, you may want to look at Jean R. Sternlight, “Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration,” 74 Wash. U.L.Q. 637 (1996) (tracing and critiquing the evolution of arbitration law in the Supreme Court).

Possible discussion topics

1. How would you characterize the Supreme Court's approach toward commercial arbitration Wilko?
2. Prepare to argue both sides of the Wilko case.
3. In what ways does the Supreme Court's approach to commercial arbitration change, after Wilko?
4. How would you characterize the Supreme Court's approach toward arbitration in Gilmer?
5. What does the Supreme Court mean when it states that arbitration is "favored"? Is it saying that arbitration is to be looked upon with favor or is it saying that courts are to favor arbitration over litigation? If it is saying that arbitration is favored over litigation, how is this position justified?

Class 11: The Rise of "Mandatory" Arbitration

Readings: JS 128-144.

Possible discussion topics:

1. What is the phenomenon called "mandatory arbitration" by its critics?
2. How would the defenders of imposed arbitration argue that it is not "mandatory" at all?
3. Prepare to debate whether or not mandatory arbitration should be permitted in front of a Congressional committee.
4. What do you think of the new federal legislation that protects automobile dealers from mandatory arbitration imposed by automobile manufacturers?
5. Do you think federal legislation should be adopted to govern mandatory arbitration in the United States? If so, what sort of legislation would you favor?
6. Why do you suppose that mandatory arbitration with respect to consumers and employees does not exist in many countries other than the United States?

Class 12: Arbitration Institutions and the Logistics of Arbitration

Readings: JS 144-149. In addition to these assigned readings, take a look at one arbitration statute (either the FAA or the Nevada Act, contained in the readings for Class 8) and at least one set of arbitration rules (e.g. the AAA Commercial Arbitration Rules, but that is just an example). Use the statute and rules to think about the questions below.

Possible discussion topics

1. What is an arbitral provider? What roles do they perform? What are the advantages and disadvantages of having an arbitration administered by an arbitral provider?
2. What is the difference between a "for-profit" and "not-for-profit" arbitration provider?
3. How are arbitrators selected? Must they be attorneys?
4. What kinds of matters can be covered by arbitration rules?
5. What are some of the key differences between arbitral rules that you looked at?
6. How do arbitrators decide disputes? Must they apply the law as would a court?

7. What kinds of remedies can arbitrators mete out? Punitive damages? Injunctive relief?
8. Are arbitral awards written? Must they include reasons, as would a judicial opinion?
9. From a policy perspective, do you think it is a good thing that arbitrators can, depending on the agreement, issue many of the same remedies as courts? Do you have any concerns about the growth of arbitral powers from either a cost or public policy perspective?
10. What if any powers do you think should be kept from private arbitrators? If the agreement allows it, should arbitrators, for example, be permitted to order incarceration perhaps in a private facility?

Class 13: A Hypo — How are Arbitration Clauses Enforced and How Are they Challenged?

Prior to this class I will provide a hypothetical designed to raise some of the issues that we will deal with later in the course. I do not expect you to do any research for this problem, other than to review the FAA and the Nevada Arbitration Act to the extent you think they are relevant. I will divide the class in half, to represent each client. We will then spend class time, as if we were in a law firm strategy meeting, deciding what issues will need to be researched.

Class 14: When does the FAA Apply?

Readings: JS 150-166.

Possible discussion topics:

1. What is the big deal as to whether the FAA applies or not?
2. What is the argument that the FAA should only apply in federal court? Does it make any sense to you as a matter of history? As a matter of policy?
3. What would be the practical consequence if the FAA only applied in federal court?
4. What is the significance of the Volt decision?
5. Given the Supreme Court's decisions regarding the applicability of the FAA, what is the relevance of state arbitration laws, such as the Nevada Arbitration Act?

Class 15: When does the FAA Preempt State Law?

Readings: JS 167-172.

Possible discussion topics:

1. Why is the scope of FAA preemption a big deal?
2. What kinds of state legislation is clearly preempted by the FAA?
3. What kinds of state legislation that affects or regulates arbitration is saved from FAA preemption?
4. Under what circumstances, if any, should the FAA preempt a state's conclusion that a

particular arbitration clause is unconscionable?

5. Does the Ninth Circuit's decision in Bradley make sense to you?
6. Do you think California's ethical rules for arbitrators should have been held preempted?

Class 16: Who interprets the scope and validity of an arbitration clause?

Readings: JS 173-178.

Possible discussion topics

1. As a practical matter, why does it matter who interprets the scope and validity of an arbitration clause?
2. Who decides whether an arbitration clause is valid, the court or the arbitrator?
3. Who decides whether a particular dispute is subject to arbitration, the court or the arbitrator?
4. Prepare to discuss each case assigned for the class.

Class 17: How Binding is Binding Arbitration?

Readings: Review the standards for confirmation and review contained in the Nevada Arbitration Act and in the FAA, readings for Class 8. JS 179-182.

Possible discussion topics

1. From a procedural standpoint, how can a binding arbitration award be enforced/vacated?
2. In what court would one seek to enforce/attack an arbitration award?
3. On what grounds can an arbitral award be attacked? Are the FAA and Nevada standards the same?
4. What is "manifest disregard" for the law?
5. Under what circumstances would you advise your client to draft an arbitration agreement to permit an arbitral award to be vacated more easily than stated in the relevant statute?
6. Can interim arbitral awards be challenged in court?

Class 18: How Can Arbitration Clauses be Voided?

Readings: Review Class 10 (Gilmer), Class 14 (when does FAA apply), Class 15 (when does FAA preempt), Class 16 (who interprets an arbitration clause). JS 183-193.

Possible discussion topics:

1. Can it be argued that binding arbitration is unconstitutional? Does it violate the Due Process clause? the Seventh Amendment right to jury trial? the Article III right to present one's claim to a judge? the First Amendment right to petition for redress of grievances?
2. Can it be argued that mandatory arbitration is inconsistent with the federal statute under which a claim has been brought?

3. Can contract arguments such as unconscionability, lack of agreement or fraud be used to attack an arbitration clause?
4. Can state statutes or state constitutions be used to attack arbitration clauses?

Class 19: A Brief Introduction to International Commercial Arbitration

Readings: JS 194-256. [Note that you can skim the Born reading; it is designed to give you the flavor of the world of international arbitration]. Optional: Thomas E. Carbonneau, "The Ballad Of Transborder Arbitration," 56 U. Miami L. Rev. 773 (July 2002)

Possible discussion topics

1. Why is arbitration an attractive dispute resolution mechanism with respect to commercial disputes?
2. What are the disadvantages of litigation as a mechanism for resolving international commercial disputes?
3. According to Dezalay & Garth, what kind of background is useful if one hopes to become an international commercial arbitrator?
4. If a person is interested in becoming an international commercial arbitrator, what steps might they take to further that goal?
5. What are some of the main arbitration providers, in the international context? If one were drafting an arbitration clause, how should one go about deciding which if any of these providers might be appropriate?
6. How does the ICC work? How does it facilitate international arbitration? Do other international providers work in a similar fashion?
7. How does arbitration work, in the international commercial context? Describe the process.
8. Why has the U.N., acting through UNCITRAL, chosen to support the institution of arbitration? How has it done so?
9. What is the UNCITRAL Model Arbitration Act, and what led to its adoption, and when?
10. What legal issues do you foresee would arrive with respect to international commercial arbitration, and how are they different from/similar to those that arise domestically? Take a close look at the NY Convention in answering this question.

Class 20: A Brief Introduction to International Non-Commercial Arbitration

Reading: JS 257-264.

Possible discussion topics

1. What are some of the potential advantages of international arbitration, as a dispute resolution technique, outside of the commercial context? Why might arbitration be superior to other alternatives such as mediation, facilitation or conciliation?
2. What kinds of non-commercial international disputes do you think could effectively be resolved through arbitration?
3. What is the International Permanent Court of Arbitration? Why was it established, and when, and what kinds of disputes does it now handle?
4. What was the Iran Claims tribunal? Why and when was it established, and how well has it worked?
5. Was arbitration an effective method for resolving the “Rainbow Warrior” dispute? Why or why not?
6. What kinds of international disputes do you think can/can’t effectively be resolved through arbitration?

Class 21: Arbitration Ethics

Readings: JS 265-301.

Possible discussion topics

1. What are the key ethical issues that face arbitrators? avoiding bias, preserving confidentiality, avoiding inappropriate ex parte conversations? what else??
2. Professor Rogers argues that international arbitrators face conflicting ethical rules from various jurisdictions. Do you agree? If so, do you think this is a substantial problem?
3. What is a party-appointed non-neutral arbitrator, and why has the practice been problematic, in the international context?
4. What ethical rules should govern attorneys who represent persons in arbitration?
5. What ethical rules should govern arbitration providers such as the AAA or the ICC?

Class 22: Drafting a dispute resolution provision

Readings: JS 302-305.

As discussed in the materials, I will assign you each to a side and a small group in advance of this week. I will also give you some special instructions from your client. You and your

teammate(s) will be responsible for negotiating a dispute resolution provision.

Class 23: Skills Needed to be an Arbitrator or an Advocate in Arbitration

Readings: JS 306-320.

Possible discussion topics

1. What skills do you believe a person needs to be a good arbitrator?
2. Do you believe that different skills are required to be a good arbitrator than to be a good judge?
3. What skills do you believe a person needs to be a good advocate in a arbitration?
4. Do you believe that different skills are required to be a good advocate in arbitration than in litigation?

Class 24: Additional Student Papers

Class 25: Additional Student Papers