Course Syllabus

COMMERCIAL ARBITRATION OF BUSINESS DISPUTES
Fordham University School of Law
Spring 2015

Updated January 11, 2015

Prof. George H. Friedman, Esq.

This course is offered to students interested in acquiring knowledge of arbitration as it relates to business disputes. The course will also explore mediation, mini-trial, court-annexed arbitration and negotiation, systems that are vital to a contemporary lawyer’s practice. It will also focus on the emerging legislative challenges to mandatory predispute arbitration clauses in consumer and employment contracts. Students registering for this course do not need any prerequisites except those already established by the law school as to the manner and selection of elective course offerings. General background in contract law is helpful.

In lieu of a final examination, students will submit a paper on a pre-approved ADR topic. A sample list is attached to this syllabus. Classes meet MONDAY afternoons from 4:00 p.m. to 5:50 p.m., in Room 3-08, unless otherwise noted. Prof. Friedman can be contacted as follows:

E-Mail: mailto:ProfGFriedman@gmail.com
Phone/FAX: 917-841-0521; FAX 201-353-8828
Twitter: @GFriedmanADR
LinkedIn: www.linkedin.com/pub/george-friedman/63/866/33b/


Provided: There is a class web site: http://www.gfriedmanadr.com/fordham/ and Professor Friedman also has an ADR blog at Arbitration Resolution Services, Inc., and at the Securities Arbitration Commentator, and a more general blog at the World Future Society. He also has a business website: www.gfriedmanadr.com. The class web site contains the class syllabus and links to most of the cases, articles and authorities covered in the course. The site also contains links to web sites of interest, and printable forms.
 COURSE SCHEDULE AND SYLLABUS

Class 1 [1/12/15]: Introduction and Overview


Optional: There is a wealth of statistics kept by the U.S. Department of Justice Bureau of Justice Statistics at http://www.bjs.gov/

*** No Class 1/19/2015: ML KING DAY ***

Class 2 [1/26/15]: Mediation I – Overview of the Process

Assignment: GSR&C Chapter 3, “The Practice of Mediation” [pp. 121-57]; “Public Encouragement of Mediation” [pp. 186-91]. Also read:

- Cottone, Phillip Mediating a FINRA Securities Case: a Practical Guide, published by the Practicing Law Institute as chapter 7 of Securities Arbitration 2011. This is a nice, plain English mediator’s overview of the process.

We will also do a group problem-solving exercise.

Class 3 [2/2/15]: Mediation II – Practical Applications


We will also see the mediation part of the FINRA video, "What Investors Can Expect from the FINRA Dispute Resolution Process" (link is to the video and PDF study guide). Also read:


- Uniform Mediation Act, GSR&C pp. 617-45

- Guide to the Uniform Mediation Act

We will also do a group problem-solving exercise on regulating mediation.

*** Selection of Term Paper Topic Due ***

Class 4 [2/9/15]: Mediation III – Use of Information; Arbitration I - Overview of Arbitration

Assignment: GSR&C Chapter 6, “Confidentiality” [pp. 247-70]; Chapter 7, “Arbitration” [pp. 303-9]. Also, NY Civil Practice Law & Rules, CPLR Art. 75 , Federal Arbitration Act ["FAA"] § 1 – 16
(GSR&C pp. 585-90) and Revised Uniform Arbitration Act (GSR&C pp. 599-615) and accompanying guide. Also skim:

- Gross, Jill, Arbitration Case Law Update 2013, published by the Practicing Law Institute in of Securities Arbitration 2013. This is a nice roundup of key cases dealing with arbitration (all aspects).

We will also see the arbitration part of the FINRA video, "What Investors Can Expect from the FINRA Dispute Resolution Process" (link is to the video and PDF study guide).

We will also do a group problem-solving exercise.

*** No Class 2/16/2015: PRESIDENTS DAY ***

Class 5 [2/17/15 - TUESDAY]: Arbitration II - Enforcing the Promise to Arbitrate

Assignment: GSR&C Chapter 7, “Arbitrability” [pp. 343-56]. Read also CPLR §§ 7501 - 3, FAA §§ 1 - 4, Revised Uniform Arbitration Act §§ 6 and 7. See compilation of CPLR sections on enforcing arbitration agreements in class web site. Also, read and review the AAA Construction Demand for Arbitration Form, and be prepared to discuss the cases below.


We will also do a group problem-solving exercise.

*** Paper Outline and List of Resources Due ***

Class 6 [2/23/15]: Arbitration III - Federal Preemption; Mandatory Predispute Arbitration Agreements in Consumer Contracts

Assignment: GSR&C Chapter 7, “Arbitration” [pp. 312-321; 333-41]. Read the Supremacy Clause, (US Const., Art. 6, para 2); and the Commerce Clause (US Const., Art. 1, sec. 8, clause 3). Read sections 921, 922 and 1028 -- only these sections -- of the Dodd-Frank Wall Street Reform and Investor Protection Act of 2010. This link will give you the entire massive statute.


Read also these cases and New York GBL § 399-c:

Skim the following cases:

- **AT&T Mobility, LLC v. Concepcion**, 563 U.S. 321, 131 S. Ct. 1740 (2011)

We will also do a group problem solving exercise.

For a nice analysis of the important Supreme Court cases on this topic see Cole, Sarah, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 *UNIVERSITY OF CHICAGO LEGAL FORUM* 271 (2013).

Also, for those interested in this topic (or writing about it) there is an excellent article on mandatory arbitration in investor contracts, by Professor Jill Gross in the Pace Law Review. See Gross, Jill, *The End of Mandatory Securities Arbitration?* 30 *PACE L. REV.* 1174 (2010).

Class 7 [3/2/15]: Arbitration IV - The Arbitration Hearing

Assignment: Read CPLR § 7506, FAA §7. See also these study aids (click on link). Also, read:

- **Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association**, (October 1, 2013). Read only the arbitration rules on hearings, rules R24 – R36. Read also this summary of the change effective October 1, 2013.
- **FINRA Discovery Guide**

We will view the arbitration part of the FINRA video, "What Investors Can Expect from the FINRA Dispute Resolution Process" (link is to the video and PDF study guide), and part of an AAA arbitrator training video (read fact pattern).

Class 8 [3/9/15]: Arbitration V - The Arbitration Award

Assignment: GSR&C Chapter 7, “Arbitration” [pp. 396-404]. See also these study aids (click on link). Please read the AAA Commercial Arbitration Rules sections on arbitration awards. Also, read: CPLR §§ 7507 -11, and FAA §§ 9 -12. Read Friedman, G., *Federal Courts on Frivolous Motions to Vacate Arbitration Awards: “I'm as Mad as Hell and I'm Not Going to Take this Anymore!”*

Read and be prepared to discuss:

• Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182 (1953)

• In Re Wal-Mart, No. 11-17718 (9th Cir. 2013)


• Johnson Controls v. Edman, 712 F.3d 1021 (7th Cir. 2013) (focus on the discussion of frivolous motions to vacate awards in section V)

Supplemental/Optional Skim Case and Materials:


• Also, for those really interested in the topic, there is an excellent analysis of the scope of judicial review of arbitration awards written by David Robbins, Calling All Arbitrators, appearing in the February/April 2005 issue of 60:1 THE DISPUTE RESOLUTION JOURNAL 9 (2005).

We will also do a group problem-solving exercise.

*** No Class 3/16/2015: SPRING BREAK


Assignment: Read GSR&C Chapter 7, “Arbitration of Statutory Claims” [pp. 357-62; 366-83; 391-96]. Also read FAA §§ 1 – 2. Read and be prepared to discuss:

• Circuit City Stores v. Adams, 532 U.S. 105 (2001); summarized briefly in GSR&C pp. 319-20

• Compucredit v. Greenwood, 132 S.Ct. 65 (2012))

Skim the following cases:

• Rosenberg v. Merrill Lynch, 170 F.3d 1 (1st Cir. 1998)

We will also do a group problem-solving exercise.

Class 10 [3/30/15]: Arbitration VII - Ethical Issues


Skim:
Those who are writing their papers on this topic, or who are really interested in this topic, may want to check out:


We will also do a group problem-solving exercise.

*** DRAFT PAPERS DUE 3/31/2015 (if being submitted) ***

**Class 11 [Wednesday 4/8/15]: Arbitration VIII - International Arbitration**

Assignment: No GSR&C reading for this class. Read this short article about nation-nation arbitration. Also, please print this study aid comparing the AAA’s international and commercial arbitration rules.

- **FAA §§ 201-207**

- **United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards** (text) and list of signatory countries

- **International Dispute Resolution Procedures of the American Arbitration Association** (June 1, 2009)

- **Johnson Controls v. Edman**, 712 F.3d 1021 (7th Cir. 2013) (focus on the discussion of what is an international matter under FAA chapter 2)


Skim the following cases:

- **Alghanim & Sons v. Toys R’ Us**, 126 F.3d 15 (2d Cir. 1997)

- **Blue Ridge Investments, LLC v. Republic of Argentina**, 735 F.3d 72 (2d. Cir. 2013)

- Also, for those really interested in the topic, there is an excellent analysis of international arbitration rules and venues here.

**Class 12 [4/13/15]: Hybrid ADR Systems**


Read: **Avista Management v. Wausau Ins. Co.**, M.D. Fla. (2006); Ruskin, William, *The Success of the SDNY Mediation Program*. 
We will also do a **group problem-solving exercise.**

**Class 13 [4/20/15]: FINAL CLASS - Drafting the ADR Clause; Putting it All Together. What does the future hold?**


**Read:** Friedman, George, *Technology, Alternative Dispute Resolution, and the Insurance Industry: the Future Has Arrived (Really this Time)*, 1:1 JOURNAL OF AMERICAN LAW 22 (Fall 2014). Also, see my short blog post *The Elections are over: What it means for Consumer Arbitration - Five things to look for in 2015.*

Students will be grouped in teams for the purpose of developing an ADR clause for a given set of acts.

*** Official Last Day of Classes is April 24, 2015: TERM PAPERS DUE ***
List of Topics for Student Papers

1. Dispositive Motions in Arbitration
2. Class Actions and Arbitration
3. The Arbitration of Statutory Rights
4. Arbitrator Immunity
5. ADR and the Unauthorized Practice of Law
6. The Arbitration Clause as an Enforceable Contract of Adhesion
7. The Arbitration of Consumer Disputes
8. The Use of Discovery in Arbitration
10. Mandatory ADR and the Right to a Jury Trial
11. Time Bars and Arbitration
12. The Arbitrator’s Duty to Disclose
13. Punitive Damages in Arbitration
14. Enforceability of Online ADR Agreements
15. Enforceability of Agreements to Mediate
16. Must the Mediator Ensure Fairness?
17. Arbitration of Non-union Employment Disputes
18. Arbitration of Securities Disputes
19. Arbitration of Bankruptcy Disputes
20. The Use of ADR to Resolve Amateur Sports Disputes
21. The Use of ADR to Resolve Professional Sports Disputes
22. Use of Minitrial to Resolve Complex, Multi-Party Cases
23. Enforceability of Arbitration Awards Abroad [specify nation]
24. Enforceability of Foreign Arbitration Awards in the U.S.

*** OR ***

Creating Dispute Resolution Systems

Students can create a dispute resolution system for the following types of transaction/situation.

1. Bankruptcy Claims
2. Class Actions
3. Employment Discrimination Claims
4. Computer Licensing Agreement with a Foreign Party
5. Environmental Disputes
6. Sexual Harassment Claims
7. Construction Project to Build a Hotel
8. Commercial Loan Agreement
9. Law Firm Partnership Agreement
10. Internet Service Provider Agreement
INFORMATION REGARDING PAPER REQUIREMENT

Successful completion of this course requires that students fulfill a writing requirement. Students have the option of: 1) submitting a paper on a pre-approved topic - O R - 2) creating an ADR system for a given circumstance.

Requirements for each are discussed below.

**Paper Option**

Students are to prepare a 5,000 to 6,000 word, doublespaced paper (including notes) on a pre-approved topic. This amounts to 20 - 25 doublespaced pages if you were to use the type font and size utilized for this syllabus. The usual citation method should be followed. The usual number of footnotes will be about 50. A topic should be selected by February 2, 2015 using the form below. If a student desires to write about a topic not on the list, specific approval from Prof. Friedman is required. The Outline and List of Resources is to be submitted by February 17, 2015. It should be no more than 2 - 3 pages in length, consisting of the basic outline the student intends to follow, and a list of the major resources to be used (key cases, articles, authorities, etc.) The final paper is due April 24, 2015. It is not necessary to submit a draft paper for approval unless you are using this course to satisfy the upper class writing requirement, but you may do so if you desire, by March 31, 2015.

**ADR System Option**

Students are to prepare a 5,000 to 6,000 word, doublespaced paper (including notes) in which they describe the creation of an alternative dispute resolution system for a specific type of transaction. This amounts to 20 - 25 doublespaced pages if you were to use the type font and size utilized for this syllabus. The usual citation method should be followed, and the typical number of footnotes will be about 50. The paper will consist of the actual wording of the dispute resolution portion of the contract or other agreement the parties enter into, followed by a point-by-point dissection of the clause. In effect, the student creates an annotated ADR system, with a detailed explanation, including relevant cases and points of authority, on each substantive provision of the clause. For example, if the clause provides for discovery under the F.R.C.P. in an arbitration, the paper would discuss the availability of discovery in arbitration, relevant points of law, as well as the merits of including such a provision in an ADR system. This format would be repeated for each substantive part of the clause. The usual citation method should be followed.

A topic should be selected by February 2, 2015, using the form below. If a student desires to design an ADR system for a transaction topic not on the list, specific approval from Prof. Friedman is required. The Outline and List of Resources is to be submitted by February 17, 2015. It should be no more than 2 - 3 pages in length, consisting of the basic outline the student intends to follow, and a list of the major resources to be used (key cases, articles, authorities, etc.) The final paper is due April 24, 2015. It is not necessary to submit a draft paper for approval unless you are using this course to satisfy the upper class writing requirement, but you may do so if you desire, by March 31, 2015.
SELECTION OF PAPER OPTION FORM
Commercial Arbitration for Business Disputes

Student Name:________________________________________________________________________

Option Selected: ☐ PAPER       ☐ ADR SYSTEM DESIGN

**PAPER Topic Selected (circle number):**

1. Dispositive Motions in Arbitration
2. Class Actions and Arbitration
3. The Arbitration of Statutory Rights
4. Arbitrator Immunity
5. ADR and the Unauthorized Practice of Law
6. The Arbitration Clause as an Enforceable Contract of Adhesion
7. The Arbitration of Consumer Disputes
8. The Use of Discovery in Arbitration
10. Mandatory ADR and the Right to a Jury Trial
11. Time Bars and Arbitration
12. The Arbitrator's Duty to Disclose
13. Punitive Damages in Arbitration
14. Enforceability of Online ADR Agreements
15. Enforceability of Agreements to Mediate
16. Must the Mediator Ensure Fairness?
17. Arbitration of Non-union Employment Disputes
18. Arbitration of Securities Disputes
19. Arbitration of Bankruptcy Disputes
20. The Use of ADR to Resolve Amateur Sports Disputes
21. The Use of ADR to Resolve Professional Sports Disputes
22. Use of Minitrial to Resolve Complex, Multi-Party Cases
23. Enforceability of Arbitration Awards Abroad [specify nation: ____________________________]
24. Enforceability of Foreign Arbitration Awards in the U.S.

Other:________________________________________________________________________________

*** OR ***

**ADR SYSTEM DESIGN Topic Selected (circle one):**

1. Bankruptcy Claims
2. Class Actions
3. Employment Discrimination Claims
4. Computer Licensing Agreement with a Foreign Party
5. Environmental Disputes
6. Sexual Harassment Claims
7. Construction Project to Build a Hotel
8. Commercial Loan Agreement
9. Law Firm Partnership Agreement
10. Internet Service Provider Agreement

Other:________________________________________________________________________________