

Syllabus

Law 6113 Arbitration Law, Policy, and Practice Spring 2015

Mondays, Tuesdays & Wednesdays 9:05-10:00 am
Location: Myron Taylor Hall 279

Prof. Alex Colvin
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Phone: 254-8206
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Office hours: Monday and Tuesdays 2:30-3:30 pm
and by appointment.

Purpose of the Course:

This course will examine the law, policy and practice of arbitration. A major part of the course will focus on understanding the legal framework within which arbitration operates, with a particular emphasis on the evolving case law interpreting the Federal Arbitration Act. We will examine: the formation of the agreement to arbitrate, defenses to arbitration, arbitral due process, and judicial review of arbitral awards. We will be looking at arbitration in a range of different settings, including commercial, consumer, employment and securities arbitration. We will also examine the separate legal framework governing labor arbitration under the Labor Management Relations Act. We will not be covering international commercial arbitration – the many interesting dimensions of that topic are covered in Prof. Barcelo's course: Law 6351 International Commercial Arbitration.

As well as investigating the legal framework governing arbitration, we will look at the practice of arbitration and the ways in which it is similar to and different from litigation in the courts. To help do this, we will have guest lectures from practicing arbitrators, do some simulation exercises, and will look at examples of arbitration hearings. In addition, we will examine the vigorous policy debates that have emerged as the use of arbitration has expanded, particularly in the areas of consumer and employment disputes.

Readings:

The casebook we will be using for this course is: Katherine V.W. Stone, Richard A. Bales, and Alexander Colvin. *Arbitration Law, Third Edition*. Foundation Press: 2015.

Additional readings and materials will be available under “Readings” on the course blackboard site.

Requirements and Grading:

Grades in this course will be based on a 24 hour take-home final exam given during the regular final exam period.

Normal levels of preparation and in-class participation for a typical law school class are expected for this course. In addition, there will be a series of short in and out of class activities and assignments designed to learn about arbitration. I may boost or reduce individual final grades based on exceptionally strong or poor in-class participation and performance on learning activities and assignments.

Academic Dishonesty Statement:

Each student is responsible for understanding and abiding by the Cornell University Code of Academic Integrity. The university *Code of Academic Integrity and Acknowledging the Work of Others* is available on the web at: <http://www.cuinfo.cornell.edu/Academic/AIC.html>.

Disabilities:

Cornell University encourages qualified persons with disabilities to participate in its programs and activities. If you anticipate needing any type of accommodation in this course or have questions about physical access, please tell the instructor as soon as possible.

Course Outline

I. The Agreement to Arbitrate (Chapter One)

1. Introduction to arbitration
2. Historical background
3. State versus federal jurisdiction
4. State versus federal law
5. Enforceability of agreements to arbitrate

Article readings: Estreicher, Samuel. 2001. "Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements." *Ohio State Journal on Dispute Resolution*, Vol. 16, no. 3, pp. 559–70; Consumer Financial Protection Bureau, "Arbitration Study Preliminary Results"; Alexander J.S. Colvin. 2007. "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*. Vol. 11(2), pp. 405-447.

Film: "Court-ordered Arbitration – Pittsburgh"

II. Defenses to Arbitration (Chapter Two)

1. Introduction
2. Arbitrability
3. Mutual assent
4. Fraud, illegality and the separability doctrine
5. Adhesion contracts, duress and unconscionability
6. State consumer protection law
7. Allocating the costs of arbitration

8. Class actions
9. Employment contracts
10. Arbitration involving nonparties

Article readings: Testimony of Stephen Ware, “Hearing on ‘Mandatory Binding Arbitration – Is It Fair and Voluntary?’”; Testimony of Cliff Palefsky, “Hearing on ‘Mandatory Binding Arbitration – Is It Fair and Voluntary?’”; Alexander J.S. Colvin. 2011. “An Empirical Study of Employment Arbitration: Case Outcomes and Processes.” *Journal of Empirical Legal Studies*, Vol. 8, No. 1, pp. 1-23.

III. Arbitral Due Process (Chapter Three)

1. Introduction
2. Notice, ex parte hearings, and default
3. Right to an evidentiary hearing
4. Right to counsel
5. Discovery
6. Evidence
7. Waiver
8. Arbitral bias and misconduct
9. Forum selection
10. Confidentiality
11. Arbitrator immunity and obligations to testify

Article readings: Richard A. Bales. 2005. “The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of

Interest.” *Ohio State Journal on Dispute Resolution*, Vol. 21, No. 1, pp. 165-198.

Film: “The Proof of the Matter”

IV. Judicial Review, Remedies, and Finality (Chapter Four)

1. Standard of review of arbitral awards under the Federal Arbitration Act
2. Remedies in arbitration
3. Finality of arbitral awards

Article readings: Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin, “Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts,” *U Mich. J.L. Reform* (2007); Colvin, Alexander J.S. and Kelly Pike. 2014. “Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?” *Ohio State Journal on Dispute Resolution*, Vol. 29, No. 1, pp. 59-83.

V. Arbitration Under the Labor Management Relations Act – An Alternative Statutory Framework (Chapter Five)

1. Introduction
2. The intersection of labor and employment arbitration
3. Judicial review under Section 301 of the Labor Management Relations Act

Film: “A Labor Arbitration Case Study: The Suspension of Nurse Kevin”

End of syllabus.