

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/

Assigned Text: Goldberg, Sander, Rogers & Cole: *Dispute Resolution: Negotiation, Mediation and Other Processes*, 6th ed. (Aspen Law & Business 2012), available at the law school book store.

Note: for all assignments from the text, you should **skip** the questions unless otherwise assigned.

Recommended: Web sites of the American Arbitration Association, <http://www.adr.org>. Arbitration Resolution Services, Inc., www.arbresolutions.com, and the Financial Industry Regulatory Authority (FINRA), <http://www.finra.org> (click on "[Arbitration & Mediation](#)"), which contains a wealth of downloadable information about ADR, and also Pepperdine's excellent [collection of ADR resources](#). There are also good free ADR mobile apps: AAA, JAMS, and the Federal Arbitration Act.

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

Assignment: Read Goldberg, Sander, Rogers & Cole [hereinafter "GSR&C"] Chapter 1, "Disputing Procedures" [pp. 1 - 10]. Review the "[ADR Continuum](#)" (handout). Read P. Refo, [The Vanishing Trial](#), 30:2 LITIGATION 2 (Winter 2004). Also, see my short blog post [The Elections are over: What it means for Consumer Arbitration - Five things to look for in 2015](#).

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 Practising 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

Assignment: GSR&C Chapter 3, "Regulating Mediation" [pp. 196-223]. Video, "Hearing Procedures in a Construction Mediation" to be viewed in class. Please review the [guide to the video](#).

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:

- [Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association, \(October 1, 2013\)](#). **Read only the Mediation Procedures, rules M1– M17.**
- 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 Practising Law Institute in *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.

- [Prima Paint v. Flood & Conklin](#), 388 U.S. 395, 87 S.Ct. 1801 (1967)
- [Howsam v. DeanWitter](#), 123 U.S. 588 (2002)

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: Friedman, George, [What's a Regulator to Do? Mandatory Consumer Arbitration, Dodd-Frank, and the Consumer Financial Protection Bureau](#), 2014:2 ABA DISPUTE RESOLUTION MAGAZINE 4 (SUMMER 2014).

Friedman, George, [The Arbitration Fairness Act of 2013: a Well-intended but Potentially Dangerous Overreaction to a Legitimate Concern](#), 2013:1 SECURITIES ARBITRATION COMMENTATOR 1 (June 2013).

Read also these cases and New York [GBL § 399-c](#).

- [Allied-Bruce Terminex v. Dobson](#), 513 U.S. 265, 4079, 115 S.Ct. 834 (1995)
- [Doctor's Associates v. Casarotto](#), 517 U.S. 681, 116 S.Ct. 1653 (1996)

- [AT&T Mobility, LLC v. Concepcion](#), 563 U.S. 321, 131 S. Ct. 1740 (2011)
- [Marmet Health Care v. Brown](#), 565 U.S. ____, 132 S.Ct. 1201 (2012)
- [Nitro-Lift Technologies v. Howard](#), 568 U.S. ____, 133 S.Ct. 500 (2012)

Skim the following cases:

- [American Express Co. v. Italian Colors](#), 570 U.S. ____, 133 S.Ct. 2304 (2013)
- [Credit Suisse First Boston Corp. v. Grunwald](#), 400 F.3d 1119 (9th Cir. 2005)
- [Citizens Bank v. Alafabco](#), 539 U.S. 52 (2003)

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:

- [Commonwealth Coatings Corp. v. Continental Casualty Corp.](#), 393 U.S. 145, 89 S. Ct. 337 (1968), *reh. den.* 393 U.S. 1112, 89 S. Ct. 848 (1969)
- [Wilko v. Swan](#), 346 U.S. 427, 74 S.Ct. 182 (1953)
- [In Re Wal-Mart](#), No. 11-17718 (9th Cir. 2013)
- [U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.](#), 17 N.Y.3d 912 (2011)
- [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:

- [Garitty v. Lyle-Stuart](#), 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976)
- *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, GRS&C pp. 327-32
- 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**

Class 9 [3/23/15]: Arbitration VI – Statutory Employment Arbitration

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

Assignment: Read GSR&C Chapter 7, “Arbitration Ethics” [pp. 410-13]. Also read: [Revised AAA/ABA Code of Ethics for Arbitrators in Business Disputes \(2004\)](#).

Skim:

AAA/ABA/ACR Model Standards of Conduct for Mediators (Revised Sept. 2005) in GSR&C pp. 657-63

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

- ABA/College of Commercial Arbitrators, [Annotated Code of Ethics for Arbitrators in Commercial Disputes \(2014\)](#)

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)
- [C&L Enterprises, Inc. v. Potawatomi Indian Tribes of Oklahoma](#), 532 U.S. 411, 121 S.Ct. 1589 (2001)

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

Assignment: GSR&C Chapter 8, "Designing Dispute Resolution Processes and Systems" [pp. 417-24; 430-32; and 435-36] and "Courts" [pp. 451-2]. Also "Court-Related Processes" [pp. 514-25]. Review the "[ADR Continuum](#)"

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?

Assignment: GSR&C Chapter 8, “Designing Dispute Resolution Process and Systems” [pp. 417-8; 439-51; 483-92]; Chapter 10, “The Future of ADR” [pp. 551 – 6] and GSR&C pp. 583-4. See also AAA, [Drafting Dispute Resolution Clauses: a Practical Guide](#) and Daley, Annamarie, [Recent Court Decisions Highlight the Importance of Customizing Arbitration Agreements](#), published in the NATIONAL LAW JOURNAL (12/5/2013).

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 *****

FORDHAM UNIVERSITY SCHOOL OF LAW
Commercial Arbitration for Business Disputes

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
9. Judicial Review of Arbitration Awards
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
6. Environmental Disputes
7. Sexual Harassment Claims
8. Construction Project to Build a Hotel
9. Commercial Loan Agreement
10. Law Firm Partnership Agreement
11. 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
9. Judicial Review of Arbitration Awards
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 Mini-trial 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
6. Environmental Disputes
7. Sexual Harassment Claims
8. Construction Project to Build a Hotel
9. Commercial Loan Agreement
10. Law Firm Partnership Agreement
11. Internet Service Provider Agreement

Other: _____