

# ARBITRATION and DR SYSTEM DESIGN

Fall 2008

## Class Syllabus

Appalachian School of Law  
Professor Paula M. Young  
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### REQUIRED COURSE MATERIALS:

William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (PON, Harvard Law 1993).

Thomas E. Carbonneau, *Arbitration in a Nutshell* (Thomson/West 2007).

Bryan A. Garner, *The Redbook* (WestGroup 2002).

Excerpts from Jean Sternlight, *Arbitration Class Materials* (Fall 2003) included in the Supplemental Materials packet.<sup>1</sup>

Other readings in the Supplemental Materials.

Statutes, Rules, Procedures and Code of Ethics Packet (hereinafter the Packet), including:

- the Federal Arbitration Act (FAA),
- the Revised Uniform Arbitration Act (RUAA),
- list of states adopting the UAA,
- list of states adopting the RUAA,

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<sup>1</sup> I want to thank Professor Jean Sternlight, University of Las Vegas Boyd School of Law, for allowing me to use these materials for this class. She is one of the leading scholars on arbitration. The materials should not be reproduced or re-printed without her permission.

- JAMS Guide to Dispute Resolution Clauses for Commercial Contracts,
- JAMS Comprehensive Arbitration Rules and Procedures (rev. March 26, 2007),
- JAMS Optional Arbitration Appeal Procedure,
- AAA Commercial Arbitration Rules and Mediation Procedures,
- AAA Securities Arbitration Supplementary Procedures,
- AAA Employment Due Process Protocol,
- AAA Code of Ethics for Arbitrators in Commercial Cases.
- NAF Code of Procedure

On Reserve for tips on writing a seminar paper:

Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes & Law Review Competition Papers* (West 2d ed. 2000).

Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers* (Foundation Press 2003).

Other materials on Reserve:

*Arbitration Insight 20/20* DVD.

John W. Cooley, *Arbitration Advocacy* (NITA 2d ed. 2003)

John W. Cooley, *The Arbitrator's Handbook* (NITA 1998)

Stephen K. Huber & Maureen A. Weston, *Arbitration: Cases and Materials* (LexisNexis 2d ed. 2006)

Paul H. Haagen, *Arbitration Now: Opportunities for Fairness, Process Renewal and Invigoration* (ABA 1999)

Alan Rau, et al., *Arbitration* (Foundation Press 3d ed. 2006)

Katherine V.W. Stone, *Arbitration Law* (Foundation Press 2003)

Resources on the web:

Ten Underused Microsoft Word Keyboard Shortcuts,  
<http://blog.legalwriting.net/2008/09/30/useful-keyboard-shortcuts.aspx>

Ethical Legal Writing,  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1324821](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324821)

Active vs. passive voice,  
[http://owl.english.purdue.edu/handouts/grammar/g\\_actpass.html](http://owl.english.purdue.edu/handouts/grammar/g_actpass.html)

Verb list, <http://www.webresume.com/resumes/verbs.shtml>

E-Prime syntax, <http://en.wikipedia.org/wiki/E-Prime>

### **LEARNING OBJECTIVES:**

Carbonneau, in the text for this class, states: “Arbitration has become the primary remedy for the resolution of civil disputes in American society and international commerce. Only the foolhardy lawyer would ignore its new significance to the legal process and the vindication of legal rights . . . . Under United States law, nearly all civil disputes are arbitrable.” Thomas E. Carbonneau, *Arbitration in a Nutshell* 1 (Thomson/West 2007).

We will not spend a lot of time in this course on the development of the doctrinal law of arbitration. In the limited time we have for this course, students benefit most from learning to use the process of arbitration, either as a separate process or as an element of an overall system design. As Carbonneau explains:

Doctrine has adapted to achieve the objectives of policy; everything is sacrificed to bring about an accessible form of private adjudicatory justice. The judicial support system [for arbitration] not only is consistent, but also unequivocal.

*Id.* at 7-8. In other words, the controversy no longer focuses on whether, as a matter of law or public policy, arbitration provides an appropriate alternative to the courts. The U.S. Supreme Court has unequivocally said it is and that the Court will enforce arbitration agreements as the alternative to trial. The focus now is on how lawyers can skillfully manage the arbitration process on behalf of clients.

### **Course Coverage:**

- This course will support your effort to write a high-quality research paper that emphasizes analysis over purely descriptive work. At the same time, I will expect you to show mastery of grammar, effective writing style, punctuation, proofreading, and conceptual organization.

- The course will also give you insight to dispute resolution system design using as the example the system designed in the 1980s for a high-strike coal mine located in Pikesville, Kentucky.
- The course will expose you to the field of arbitration.
  - We will consider commercial arbitration by examining its use in the cotton and diamond industries.
  - We will consider its use in the labor context when we read *Getting Disputes Resolved*.
  - We will discuss how the use of arbitration in the context of consumer, employment, and health care contexts has raised considerable concern among lawyers, parties to arbitration agreements, rights activists, and some politicians.
    - We will analyze whether the concerns seem well-founded.
    - We will review the efforts to correct any abuses of the process arising in these contexts.
- We will use the *Arbitration Insight 20/20* DVD (copies on reserve) to give you more familiarity with the process. The DVD will also provide an opportunity for you to apply the governing statutes, rules, and ethics guidelines to elements of the simulated arbitration proceeding.
- You will also learn:
  - How parties use arbitration in the United States.<sup>2</sup>
  - The elements of a well-written arbitration agreement.
  - A brief history of the use of arbitration in the U.S. and judicial hostility to its early use.
  - The provisions of the Federal Arbitration Act (FAA).
  - The provisions of the Revised Uniform Arbitration Act (RUAA).
  - Contractual defenses to arbitration of claims, including:
    - Contractual inarbitrability (choice of forum and scope of clause).
    - Waiver of the right to arbitrate.
    - Unconscionability.
  - The top developments in arbitration in the 1990s.
    - The creation of a uniform national law.
      - The broad view of interstate commerce under the Commerce Clause.
      - The dominance of federal law under the Supremacy Clause.
      - The application of the FAA even in diversity cases that are based on state substantive law.
    - The arbitrability of federal statutory claims, not just claims arising under contract.
      - Possible defenses to “subject-matter” arbitrability.
        - Public policy exception
        - Reverse pre-emption
        - Specific statutory limits on the use of arbitration

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<sup>2</sup> We do not have time to discuss how people in other parts of the world use this dispute resolution process.

- Recent legislative efforts in the area of consumer, employment, nursing home, insurance, and farming contracts.
  - Arbitration agreements that attempt to limit available remedies that conflict with applicable statutory remedies. E.g.,
    - Limits on class actions.
    - Limits on recovery of attorneys' fees.
    - Limits on punitive damages.
  - Choice of law and choice of forum provisions.
    - The need for a clear expression of intent to use procedural rules other than those specified in the FAA.
    - What procedural rules can apply other than the FAA:
      - AAA, NAF, and JAMS third-party provider rules.
      - Other provider's rules.
      - RUAA.
      - Private rules of parties.
  - Limits on the role of the courts in the arbitration context.
    - Parties cannot contractually expand the scope of judicial review or the statutory grounds for vacatur.
    - Parties can limit the role of courts in deciding whether a dispute is arbitrable.
- Form, correction, modification, and entry of arbitration awards.
- Judicial review of awards and defenses to the enforcement of awards, including:
  - FAA/RUAA defenses, including:
    - Excess of arbitral authority
    - Arbitrator misconduct.
    - Evident partiality of arbitrator.
  - The non-statutory defense of manifest disregard of the law.
- When to use third-party administrators.
  - Who provides these services?
  - How to use their websites.
- Counsel's role in choosing an arbitrator.
  - Essential qualities of an arbitrator.
  - Number of arbitrators.
  - Ethics governing arbitrator selection.
- A bit about arbitrator ethics.

**What You will be Able to do with this Knowledge:**

- Write arbitration clauses.
- Analyze arbitration clauses.
- Find and apply applicable state and federal law governing arbitration.
- Enforce arbitration clauses or resist motions to compel arbitration.
- Represent a client in an arbitration proceeding.

- Enforce an arbitration award.
- Attempt to vacate an arbitration award.
- Answer questions about substantive arbitration law on the bar examination.
- Design dispute resolution systems for employers, government entities, hospitals, corporations, churches, schools, and other organizations.
- Market your expertise in arbitration law to individual clients, all --or nearly all -- of whom have entered arbitration clauses under consumer, employment, or other contracts.

## GRADING:

I will base your grade on your completion of the seminar paper and its interim steps, your scores on the planned quizzes, your class participation, and your peer reviews of the outline and second draft of a colleague's paper. I will deduct points from your grade if you miss a deadline. Specifically, I will compute your grade as follows:

	<u>Points</u>
Seminar Paper Writing Process:	
- Brief description of topic and thesis (due 9/15)	50
- Bibliography (due 9/29)	100
- Outline (due 10/13)	75
- Peer Review of Outline (due 10/20)	75
- First "Vomit" Draft (due 10/27)	100
- Second "Dry Heaves" Draft (due 11/10)	200
- Peer Review of Second Draft (due 11/17)	75
- Final "Boskey Prize-Winning" Draft (12/1)	500
Class participation:	300
Class quizzes (thirteen quizzes at 20 points each)	260
Bonus point questions on quizzes (10 points per quiz)	130
<b>Total Points Possible:</b>	<b>1,865</b>

In the past, students enticed me to extend one or more of these deadlines. When I did, at least one student complained, in his or her student evaluation of the course, about my leniency. Accordingly, I am not inclined to grant any extensions this year. Just write the required element and move on to the next event in your life.

## SEMINAR PAPERS

Each of you will prepare a seminar paper pertaining to arbitration or dispute resolution system design. Each paper should be no less than 20 double-spaced pages, excluding footnotes, or about 5,000 words. The footnotes should cite your sources for your various information and points. Please use the “Blue Book” or ALWD manual to make sure you use correct citation form. Some of the quiz questions will cover citation format. If you plan to write for the Boskey or WAM awards (see below), the text of your paper should not exceed 20-22 pages (not counting footnotes).

You should base your paper not only on the required readings for the course, but also on other materials that you uncover independently. Your paper may focus on a specific case, a policy issue, an ethical question, a practical concern, or a social science insight.

Elizabeth Fajans & Mary R. Falk -- authors of *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes & Law Review Competition Papers* -- suggest that you can approach a paper topic based on Aristotle’s categories of argument: definition, comparison, causation, and substantiation.

For example, consider again the rights of unmarried domestic partners, analyzed this time by ‘topic.’

Definition: What constitutes a domestic-partner relationship? How is family redefined?

Comparison: Compare domestic-partner rights in New York to those in other jurisdictions, to those flowing from other relationships, etc. Compare executive orders with other possible solutions.

Causation: What is the likely effect of the mayor’s order? What prompted it?

Substantiation: “Executive orders are a good (bad) approach because . . . .”<sup>3</sup>

A related third technique is to explore the subject by asking a series of questions.

- How can the subject be defined?
- Is this a new subject?
- Can the subject be divided into parts or aspects?
- Can the parts be grouped in any way?
- Are there analogous subjects?
- What are the advantages of this subject or aspect?
- What are the defects of this subject or aspect?

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<sup>3</sup> ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES & LAW REVIEW COMPETITION PAPERS* 21 (West 2d ed. 2000).



- What are the implications?
- Are there competing schools of thought about the subject?
- What other disciplines deal with the subject and to what end?
- Is there a controversy concerning terminology?
- Are there disputes concerning theory?
- Is a definitive solution possible?
- What future events might affect the subject?
- Who is affected?
- Is the subject affected by political or public pressure or vested interest?
- Who is interested in the subject?"
- What problem in the law does the subject indicate?
- How can you resolve that problem?

I will give higher grades to papers that go beyond description and instead take an analytical or argumentative approach. While a descriptive paper will satisfy the basic seminar requirement, I will better reward students whose efforts take their learning to the next level of understanding. I have set out below the taxonomy of educational objectives. I hope that most of you will strive to reach the highest level of understanding. Students reaching this higher level of learning will take a position on some issue, will develop a thesis, and will make a well-supported argument in support of the thesis. They will not simply summarize what other authors have said. This expectation will force you to put your intellectual skill, sound judgment, and creativity on the line – something good lawyers do daily.

**Taxonomy of Educational Objectives**  
**Knowledge, comprehension, sorting and analysis.**

- Students reach a high level of understanding when they can
  - Apply the information,
  - Detail the analysis, and
  - Conclude.
- A lesser level of understanding occurs when students
  - Apply the information,
  - Come to conclusions, but
  - Give no detail in the analysis.
- An even lesser level of understanding occurs when students':
  - Work is descriptive, even if detailed.
- The lowest level of learning occurs when students':
  - Work is descriptive, but without detail.

**TIPS ON WRITING:** Every professor has biases and suggestions about writing. Here are mine:

- Never use a long word when a short one will do. You should choose “use” over “utilize.” Often this means you will choose an Anglo-Saxon word over its Latin counterpart.
- Please do not use semi-colons. Use shorter, snappier sentences instead, unless you are using them to separate elements of a list.
  - See *The Redbook: A Manual of Legal Style* for more information about this preference.
- Try to use active-voice verbs rather than passive-voice sentence construction.
  - See [http://owl.english.purdue.edu/handouts/grammar/g\\_actpass.html](http://owl.english.purdue.edu/handouts/grammar/g_actpass.html).
- Avoid the overuse of “to be” verbs.
  - See <http://en.wikipedia.org/wiki/E-Prime>.
- Avoid the use of “such” when you should use instead: this, that, these, those, its, or the.
- Write in first-person rather than in third-person perspective. In other words, do not say “it is suggested” but instead say “I suggest.” Please note that the first phrase uses passive voice and the second phrase uses active voice.
- Don’t use unnecessary qualifiers because they weaken your writing. Do not say that the problem was “somewhat unique.”
- Leave time for re-writing and careful proofreading. Check your spelling and do not rely on spell check programs to do the final spell check. I once had a brief in which I described someone acting as an “automaton” (a robot). Spell check turned it in to “auto man” (a car mechanic).

### **Boskey Writing Award**

The seminar paper deadlines appear above and in the class calendar. Please note that I have required two drafts of the paper, plus the final draft so that more of you will have publishable quality papers by the end of the semester. (You will also have a better prepared writing sample for potential employers.)

I would like to submit this year at least three papers for the \$1,000 Boskey Award. I expect the deadline to be June 15, 2008. The ABA Section on Dispute Resolution sponsors this highly prestigious award that is named for a founding father of the modern ADR movement.

Papers that deal with a topic not covered by other authors will probably be more likely to win the prize than one that simply summarizes the thinking of other writers. I have posted on TWEN the four papers I submitted for the award in 2007 and 2008. They all represent original thinking and research about the chosen topic.

For more information about the award, see <http://www.dsl.psu.edu/academics/boskey.cfm>.

The best entries may be published, in whole or in part, in one of the Penn State Dickinson School of Law Journals or website, and/or on the ABA Section of Dispute Resolution Competition website: <http://www.abanet.org/dispute/essaycomp.html>.

### **Wisconsin Association of Mediators' Charles "Chic" Nichol Award**

For the first time in 2008, I also submitted several papers for publication in the annual publication of WAM, *The Mediation Journal*. WAM awards a \$500 prize to one of the articles published in each issue of the journal. Judges look for "originality and unique contribution to the field."

### **PEER REVIEWS:**

I plan to give greater emphasis to the paper writing process this year. Accordingly, we will use peer review frequently to discuss the paper writing process and your work-product. **You should plan to give me a copy of your work-product at least an hour before the class at which it is due.** For example, you should give me your brief description of topic and thesis by noon on September 15, 2008. In one way or another, we will examine all or parts of one or more student's work product in class so that every student in the class can use the colleague's work-product to guide his or her drafting process.

In addition, you will provide two sets of written peer review comments to two colleagues. You will choose the colleagues for whom you will provide those comments after all of you submit your brief description of topic and thesis by noon on September 15, 2008. Your written peer review comments will be due on the dates indicated above.

### **QUIZZES and OTHER CLASS PARTICIPATION:**

We will typically start each class with a short quiz consisting of three to five of the Possible Discussion Questions that appear in the class assignments for that day. The questions will cover the assigned readings in one of the required texts, including the Red Book and the Blue Book.

I am using the quizzes this year to ensure that you stay current with the assigned readings and that you have a sufficient background to contribute meaningfully to the class discussion. As you know, I have little interest in being the "sage on the stage." I'd prefer that we spend our class time discussing the issues arising in the context of arbitration and dispute resolution system design. We will start most class discussions with the quiz questions and your answers to them. Most of the questions will not have right or wrong answers. However, to consistently accrue quiz points you will need to demonstrate in your answers that you have read the assigned materials. Some of the quizzes (or quiz questions) may be open book.

I want each of us to learn from one another. For this to work, each of you must speak up in class, on a frequent basis. I expect you to make discussion 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. Of course, you must be physically present to participate, so I will also factor unexcused lateness or absences into your participation grade.

If the current design of the class does not foster high quality class discussion, I reserve the right to make changes that may better serve that purpose. I hope to include you in those class design decisions.

### **ACADEMIC SUCCESS PROGRAM:**

With the addition of Prof. Sangchompuphen to our faculty, we have a high-quality resource to help you improve your writing in a way that will assure success on the bar exam essay questions. To ensure that you get all the coaching I think you need, I reserve the right to refer you to the Academic Success Program or to the Online Writing Lab (OWL).

**PLAGIARISM:** You all know not to plagiarize, but some of you may be confused as to what plagiarism means in the seminar paper context. Of course you 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 the sources and footnotes in other articles to be a rich source of information. However, to the extent that you rely on another article's footnotes you must read all the cited sources yourself to make sure they really say what the other author said they said. Often you will find you need to update the footnotes by citing to a more current statute, newer article on the topic, or more recent edition of the book. If you have any questions on where cites are and are not needed, please ask me, or err on the side of citation.

**ATTENDANCE:** Attendance is mandatory. If you miss more than two classes, without a pre-approved excuse, I will either dismiss you for excessive absences or fail you. I will also factor tardiness and absences into your class participation grade. If you do need to miss a class and you have a valid excuse, please write me a note or send me an e-mail in advance of class. Excused absences will still count against the two-class absence, 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.

Attendance Policy: Just so you know, the faculty passed the following changes to the attendance policy in 2006-07. The new attendance policy increases the allowed absence from 10 percent to 15 percent of scheduled classes. An individual instructor may impose a more stringent attendance requirement if presented in writing in the syllabus for the course. The individual teacher has no discretion to allow any "make-up" work, including briefing of cases or special assignments, to offset an excessive absence. The new provision states:

No student may miss more than fifteen percent (15%) of the class meetings in any course or seminar. For example, for a course that meets three times per week, a student may miss no more than five classes; for a course that meets twice a week, a student may miss no more than four classes; **for a course that meets once a week, a student may miss no more than two classes.** As student who is tardy or who exits a class early may be marked as absent. Under no circumstances shall a Professor be permitted to allow a student to “make up” an absence from a regularly scheduled class. Any student exceeding the maximum number of absences in a course may only seek relief through the Waivers and Appeals process set forth in Section XIII of the Academic Standards.

(Emphasis added.) In addition, a student will violate the Code of Academic Conduct when:

(7) requesting that another person sign a student’s name on the attendance sheet during a class that he or she did not attend, arrived late for or left early for, or signing another student’s name on an attendance sheet.

### **LIBRARY RESOURCES AND WEB SITES:**

Our library is very good, but may not contain everything you need. I have assembled a list of ADR-related books, sorted by category, for your reference. The 3-ring binder containing this list sits on the book case outside my office door. Please feel free to copy the pages covering program design and arbitration.

Remember that excellent resources may be available only from other libraries through library loans. You can get materials through interlibrary loan as long as you plan ahead sufficiently.

All of the reference librarians are very capable and can assist you with your assignments. However, you need to ask for help sufficiently in advance of when you need the information in order for the librarians to assist you.

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

ADRworld.com: <http://www.adrworld.com> (offers free trial subscriptions). I also have a paid subscription if you need to research a specific story or topic. We may also have a campus-wide subscription by now.

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

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

ArbitrationLawOnline: <http://www.arbitrationlaw.com> (offers a free trial subscription)

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>

# ARBITRATION and DR SYSTEM DESIGN

Fall 2008

## Class Calendar & Assignments

### Module 1: Introduction to Arbitration and DR System Design

Class 1, Aug. 18 Introduction to Class; Review of Various ADR Processes; View Arbitration Simulation

Class 2, Aug. 25 Where Does Arbitration Fit in a System of Justice?;  
RB: Capitalization; Commas

No school, Sept. 1, Labor Day holiday.

Class 3, Sept. 8 Introduction to Arbitrations System Design in a Commercial Setting – A Look at Arbitration in the Diamond and Cotton Industries;  
RB: Italics, Boldface, and Underlining; Semicolons

### Module 2: Quick Overview of Doctrinal Law of Arbitration

Class 4, Sept. 15 Introduction to the Federal Arbitration Act (FAA) and the Parties' Freedom to Contract (Contractual Arbitrability);  
RB: Document Design; Colons  
**Deadline: Provide a short description of the topic and thesis of your paper.**

Class 5, Sept. 22 RUAA; Federalism; Preemption of State Law; Reverse Preemption

Class 6, Sept. 29 Arbitration in Consumer Contracts; Unconscionability of Arbitration Clauses  
RB: Numbers; Quotation Marks  
**Deadline: Provide annotated bibliography for your paper.**

No class, October 6, Prof. Young will attend fall conference of the Virginia Mediation Network

Class 7, Oct. 13 Arbitration in Consumer Contracts (cont.)  
RB: Typographical Symbols; Parentheses  
Guest Speaker: John Murrey  
**Deadline: Provide outline of paper to me and your peer reviewers. Sign up for conference with me.**

Class 8, Oct. 20      Arbitration in Employment Contracts; Arbitration of Statutory Claims (Subject-Matter Arbitrability)  
RB: Spelling; Brackets  
**Deadline: Provide peer review of outline.**

### **Module 3: Designing Dispute Resolution Systems**

Make-up Class, Class 9, Oct. 24  
Third-Party Arbitration Providers; Designing Dispute Resolution Systems: Diagnosis & Design  
RB: Citations; Ellipses Dots

Class 10, Oct. 27      Designing Dispute Resolution Systems: Comparison to the U.S. Postal Service REDRESS System; Consideration of Court-Connected Mediation Program in Virginia;  
Guest Speaker: Joe Beatty  
RB: Footnotes; Em Dashes, En Dashes, Hyphens  
**Deadline: Provide “vomit” draft to me.**

Class 11, Nov. 3      Designing Dispute Resolution Systems: Making the System Work  
RB: Grammar – Nouns and Pronouns; Periods

Class 12, Nov. 10      Designing Dispute Resolution Systems: Diagnosing Problems in the Coal Industry & Designing the System in the Coal Industry;  
RB: Grammar – Verbs, Question Marks and Exclamation Points  
**Deadline: Provide “dry heaves” draft of your paper by email to me and your peer reviewers. Sign up for conference with me.**

Class 13, Nov. 17      The Grievance Mediation Program and the Promise of Dispute Resolution Systems Design; Durability of the Coal Industry DR System Design  
RB: Grammar – Adjectives and Adverbs; Apostrophes  
**Deadline: Provide your peer review of the “dry heaves” draft.**

Class 14, Dec. 1      Is Arbitration Becoming Too Formalistic?  
RB: Grammar – Prepositions, Conjunctions, Interjections, Stuffy Words and Legal Ease  
Guest speaker: Bob Breimann & Ben Street  
**Deadline: Final Boskey or WAM award-winning papers due.**



# ARBITRATION and DR SYSTEM DESIGN

Fall 2008

## Class Assignments

### Module 1: Introduction to Arbitration and DR System Design

#### Class 1 (1<sup>st</sup> hour): Introduction to Class.

*Objectives of Class:* To advise students of the requirements of the class and the class structure. To describe approaches to writing the required seminar paper. To provide some ideas for a paper topic. To discuss the Boskey Writing prize and the WAM prize.

*Readings:* Syllabus; Supplemental Materials, pp. 1-1 to 1-45. You will find the Syllabus and Supplemental Materials for this class in your student boxes. If you do not find them there, please check with Jessica Mitchell, my secretary.

*Possible discussion Topics:*

- What is this course about?
- What are the course requirements?
- What experience do you have with arbitration or DR system design?
- Why does arbitration or DR system design interest you, assuming it does?
- What do you expect to learn in this course?
- What paper topics are you considering?
- How do you develop a paper topic?
- What is the expected format of the paper?
- How will the papers be graded?
- What is the Boskey prize? Why try to win it?
- What are the Boskey prize evaluation criteria?
- What is the WAM prize? Why try to win it?

#### Class 1 (2d hour): Review of Various ADR Processes and Arbitration Simulation

*Objectives of Class:* To remind students of the various ADR processes. To discuss the general attributes of arbitration in comparison to other types of ADR processes. To review a DVD simulation of the arbitration process.

*Readings:* Supplemental Materials, pp. 1-46 to 1-55.

*Possible Discussion/Quiz Topics:*

- What are the various types of ADR and where does arbitration fit in?

- What key attributes set arbitration apart from litigation?
- What key attributes set arbitration apart from mediation?
- In your externship or summer legal positions did you see cases in which litigation became intertwined with ADR processes like negotiation, mediation or arbitration?
- What struck you about the DVD simulation of the arbitration process?
  - Parties in roles?
  - Process issues?
  - Format?
  - Location choices?
  - Anything else?

## **Class 2 (1<sup>st</sup> & 2d hours): Where Does Arbitration Fit in a System of Justice?**

*Objectives of Class:* To consider aspects of procedural justice, definitions of arbitration, and where arbitration fits in a system of justice. We will also review some of the Vanishing Trial statistics as they relate to the use of trial and arbitration. Finally, we will review an excerpt from a 2003 ABA Taskforce Report on arbitration.

### *Readings:*

- Carbonneau, pp. VII-XIV, 1-13 (up to separability) & 18-28.
- Supplemental Materials, pp. 2-1 to 2-30.
- *The Redbook*, pp. 45-58 (capitalization), 3-10 (commas).

### *Possible Discussion/Quiz Topics:*

- In what circumstances might we be concerned that ADR processes resolve disputes without generating precedent or announcing the “normative values” applied to resolve the dispute?
- Do you agree that “justice is conflict” and serves the public interest? How?
- What are your thoughts on the procedural justice research? Do the four elements make sense? Why?
- Sternlight says people probably want two more things from a DR process. The process should provide (1) a substantively fair or just result, and (2) help parties achieve other personal, emotional or psychological goals, including restoration of relationships. Do you agree?
- Can an emphasis on societal, group, or individual harmony as a goal of a DR system work in a mobile, capitalistic society?
- Assume that you will be arbitrating a Better Business Bureau complaint brought by an unrepresented consumer against a represented merchant. The arbitration will take place in your conference room. How would you set up the room? In light of the procedural justice research, how would you place yourself at the conference table in relation to the following parties: the consumer, the merchant, the merchant’s lawyer?
- Assume you are arbitrating a claim brought by a plaintiff against her husband for non-payment of child support. (The divorce settlement called for such disputes to be arbitrated.) Both the plaintiff and defendant are represented by counsel. The plaintiff has asked to be permitted to give an opening statement, separate from that of her attorney. The defendant’s counsel has objected that this would be redundant and prejudicial. How would you rule in light of the procedural justice research?
- How can arbitration be defined? Can it?
- What do the statistics say about its use to resolve disputes?
- Carbonneau says at 1:

Arbitration has become the primary remedy for the resolution of civil disputes in American society and

international commerce. Only the foolhardy lawyer would ignore its new significance to the legal process and the vindication of legal rights . . . . Under United States law, nearly all civil disputes are arbitrable.

Later, he says:

Doctrine has adapted to achieve the objectives of policy; everything is sacrificed to bring about an accessible form of private adjudicatory justice. The judicial support system [for arbitration] not only is consistent, but also unequivocal. As a consequence, arbitration has expanded its range to new dispute areas and its scope of application beyond contract itself. With the extension of the [arbitration] contract to nonsignatory parties and the deference paid to adhesionary agreements, arbitral clauses implied at law may soon become a new feature of U.S. court doctrine on arbitration.

*Id.* at 7-8.

[B]randishing the text of the Federal Arbitration Act . . . the work of the [Unites States Supreme] Court in this area has been doggedly determined, revolutionary, and -- ultimately -- quite undemocratic in tenor and implementation . . . . [T]he Court is persuaded that arbitration is the best, and perhaps last, hope for achieving workable civil justice in contemporary American society.

*Id.* at VII.

- What are your initial thoughts and feelings about the current state of arbitration law and its pervasive scope? Given these developments, should law schools require a course in arbitration? Should bar examiners test the subject?
- What are the potential advantages of arbitration?
- What are the potential disadvantages of arbitration?
- What is the role of lawyers in arbitration? A variety of books and articles are designed to help attorneys improve their skills as arbitration advocates. *See, e.g.*, John W. Cooley and Steven Lubet, *Arbitration Advocacy* (1997) (on reserve).
- Two books that focus on arbitration advocacy in the collective bargaining context are Marvin F. Hill, Jr., Anthony V. Sinicropi, and Amy L. Evenson, *Winning Arbitration Advocacy* (1997) and Jay E. Grenig & R. Wayne Estes, *Labor Arbitration Advocacy: Effective Tactics & Techniques* (1989).
- For some practical tips on how to represent clients in international commercial arbitrations *see Efficient Organization of International Arbitrations*, 8 World Arb. & Med. Rep. 61 (1997) & 8 World Arb. & Med. Rep. 82 (1997).

- In the context of capitalization of words in text, what is the modern trend?  
Towards more or less capitalization of words in written text?
- When are the three times – and only three times-- the word “court” begins with an initial cap?
- What should you do if quoted material contains a word that is capitalized in a way inconsistent with this trend?
- Should you use an initial cap on a complete sentence quote if the quote follows the word that? Example: When he was arrested, the defendant blurted out that “some other dude did it!” Should the word “some” begin with an initial cap?
- Should you capitalize the first word in a direct question, even if it does not begin the sentence? Example: I need to call my lawyer – What’s the number again?
- Should you capitalize references to the seasons? Example: fall semester.
- If you highlight the name of the law review in an article citation in a footnote using the following procedure: highlight text, open “format” button, then “font” button, then “effects” “small caps”, then OK – which style of citation are you using? ALWD or Bluebook? Example: 83 MINN. L. REV. 1337.
- Which style of comma use do lawyers most likely use? Close (heavy on commas) or open (light on commas)? Why?
- Which is correct?
  - It is red, white, and blue.
  - It is red, white and blue.
- Which is correct?
  - The mediation was successful thanks to the mediator’s insight, persistence, and forceful personality and the case settled.
  - The mediation was successful thanks to the mediator’s insight, persistence, and forceful personality, and the case settled.
- What do you call an error in when you leave out the conjunction (and, but, or, nor, for, yet, so) that joins two independent clauses? Ex: The mediation worked, the case settled.
- Which are correct?
  - First, we will outline the chapter.
  - Second we will read the assigned material.
  - In October, we will have several guest speakers.
  - In December students will take exams.
  - Even though we will have Thanksgiving week off, students will still need to write their seminar papers.
  - Since the semester comes quickly to an end students should plan to spend some time each day researching, outlining, and writing their seminar papers.
- Which is correct?
  - The seminar class, which starts at 1:00 p.m., meets in Room 226.
  - Professor Young a graduate of Washington University School of Law has over 1500 hours of training in ADR.
- Which is correct?
  - The arbitrator asked, “Did you pick me because of my experience with consumer cases?”

- The judge said: “You need a lawyer.”
  
- Which is correct?
  - August 2008.
  - November, 2008.

### **Class 3 (1<sup>st</sup> & 2d hours): Introduction to Arbitration System Design in a Commercial Setting**

*Objectives of Class:* To show students two DR systems designed specifically for two distinct commercial settings. The systems represent the “guild hall” context in which arbitration first developed. To show students one of the three ways in which arbitration agreements arise.

#### *Readings:*

- Carbonneau, pp. 29-54;
- Supplemental Materials, pp. 3-1 to 3-7;
- *The Redbook (2d ed.)*, pp. 59-64 (italics, boldface, and underlining), 10-13 (semicolons).

One-half the class will read: Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUDIES 115 (1992).

The remaining students will read: Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724 (2001);

Students should be prepared to map in class on “big Post-it-Note” sheets the results of their analysis of the diamond or cotton industry DR system using the outline -- **Analyzing Arbitration Clauses** -- that appears at Supplemental Materials, pp. 3-5 to 3-7. I will post the outline on TWEN so you can download it and work with it on your computer.

In the first hour of class, we will discuss the diamond industry dispute resolution system.

In the second hour of class, we will discuss the cotton industry dispute resolution system. We may need to continue the discussion during Class 4.

#### *Possible Quiz Questions:*

- a. Give three examples of procedural matters parties may resolve by the terms of their arbitration agreements?
- b. What are the two contractual arbitrability decisions courts typically make?
- c. Under *Hall Street v. Mattel*, can parties expand the scope of a court’s review of an arbitration award beyond the grounds provided in FAA section 10?
- d. Which type style is appropriate for emphasis in text as a general matter? Italics type or boldface?
- e. Which type style is appropriate for headings as a general matter? Italics type or boldface?
- f. Which of the following words or phrases should appear in italics:

- De novo

- In forma pauperis
- Prima facie
- Pro bono
- Pro se
- Ipse dixit
- All of the above.
- None of the above.
- Only the first three above.
- Only pro bono, pro se, and ipse dixit above.
- What is the general rule of type face that you applied in answering the last question?
- Which of the following should appear in italics?
  - Case names in text.
  - Case names in text and footnotes if you are using ALWD citation form.
  - Case names in footnotes only if the name is grammatically part of the sentence and you are using Blue Book citation form.
  - Titles of books in text (no matter which citation style you use).
  - Titles of articles in text and footnotes (no matter which citation style you use).
  - Citational signals, like “see” or “see, e.g.”
  - Internal cross-references like “id.” or “supra” or “infra.”
  - Phrases indicating the subsequent or prior history of a case, like “aff’d”.
  - The names of internet sites.
  - The names of ships, spaceships, and other vessels.
  - The punctuation mark after the italicized matter unless it is a part of the italicized matter itself.
  - All of the above.
  - None of the above.
  - All but the names of internet sites.
  - All but the names ships, spaceships, and other vessels.
- When are the only situations in which Professor Young will want to see a semicolon in your seminar paper? Hint: *See* RB §§ 1.17, 1.18.



## Module 2: Quick Overview of Doctrinal Law of Arbitration

### Class 4 (1<sup>st</sup> & 2d hours): Introduction to the Federal Arbitration Act (FAA) and the Parties' Freedom to Contract (Contractual Arbitrability)

**Deadlines: Provide a short description of the topic and thesis of your paper to me by noon by email.**

*Objectives of Class:* To learn about the FAA. To consider modification or vacatur of arbitral awards.

Review Scenarios 19-20 on Arbitration Insight 20/20 DVD (copies on reserve).<sup>4</sup>

#### *Readings:*

- Carbonneau, pp. 55-90.
- Supplemental Materials, pp. 2-1 to 2-30:
  - Courts' Historical Hostility Towards Private *Binding* Arbitration
  - Intro to FAA and UAA/RUAA
  - How Can Arbitration Clauses be Challenged?
  - Decision-Making in Arbitration
  - Judicial Review in Arbitration
  - How Binding is Binding Arbitration?
  - Some Key Supreme Court Cases
  - Lawrence R. Mills, et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23.
  - Justin Kelly, *Supreme Court Refuses to Allow Expanded Review under FAA [Hall Street]*, ADRWORLD, March 26, 2008, available at <http://www.adrworld.com/sp.asp?id=41884>.
  - Justin Kelly, *California Justices OK Expanded Review of Arbitration Award {under State's Version of UAA}*, ADRWORLD, Sept. 2, 2008, available at <http://www.adrworld.com/sp.asp?id=42302>.
- Arbitration Statutes, Rules, Procedures and Code of Ethics Packet (Packet), pp. 1-7 (FAA); 10-15 (intro to RUAA); 119-120 (JAMS Optional Arbitration Appeal Procedure).
- *The Redbook*, pp. 77-88 (document design); 15-19 (colons).

#### *Possible Discussion/Quiz Topics:*

*See instructions for Module 2 Quizzes at Supplemental Materials at 2-1.*

*The Redbook quiz will be an in-class closed book quiz.*

1. What are the key features of the FAA?

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<sup>4</sup> If you want a copy of this DVD, the ASL Bookstore will sell them at cost of about \$60.00.

2. What are the major topics covered in the FAA? Does it appear to be a procedural or substantive law statute?
3. Can a party enforce an oral agreement to arbitrate under the FAA? If the FAA requires a writing, must both parties sign it (Carbonneau at 62-63).
4. How does this interpretation of the FAA's writing requirement affect consumers and non-employees who get adhesionary form contracts (or statement stuffers that include arbitration clauses)?
5. Based on the testimony in support of the FAA at the time of its passage in 1925, do you believe Congress intended the FAA apply to contracts of adhesion involving consumers or non-union employees? Why or why not? (Carbonneau at 56.)
  - a. The *Waffle House* decision begins to shape the law governing the application of arbitration to persons who are not parties to the agreement (non-signatory parties, which should not be confused with a party to the agreement who has not signed a form contract). (Carbonneau at 65-68.)
6. What are the typical common law defenses to a contract that would apply with equal force to arbitration clauses? (Carbonneau at 62-63.)
7. California courts have adopted a "five-point test" that employment arbitration clauses must satisfy to survive one of these contractual defenses. Each party must have (1) the opportunity to vindicate fully his or her statutory rights by having a neutral arbitrator decide the case; (2) minimal discovery; (3) a written award, (4) comprehensive remedies, and (5) reasonable costs of the arbitral forum. (Carbonneau at 64.)
  - a. Does the NAF Code of Procedure satisfy these requirements? Skim Packet at pp. 165-210.
8. Carbonneau notes the shift in the U.S. Supreme Court's view of the FAA from a purely procedural statute to one with characteristics of substantive law. However, Carbonneau says the FAA does not mention anything about "subject-matter" arbitrability. (Carbonneau at 70-71.) For instance, the FAA does not say statutory bankruptcy claims can or cannot be arbitrated. The FAA seems to anticipate that other statutes, like the Bankruptcy Code, would indicate when claims arising under those statutes could or could not be arbitrated. We will talk about this issue more in Class 8. Under this interpretation of the affect of the FAA, the S. Ct. has shifted to Congress the responsibility to state expressly in existing or new legislation when the FAA will apply to enforce contractual agreements to arbitrate.
9. Carbonneau asserts that FAA § 1 creates an "irrebuttable" presumption in favor of arbitration. (Carbonneau at 57.) Does the language of section 1 necessarily create that presumption? Why or why not?
10. Which section of the FAA governs a motion to compel arbitration? Which section of the FAA governs motions to stay litigation proceedings pending arbitration? What section(s) of the FAA govern enforcement of an arbitral award?
11. What section of the FAA applies to appeals of awards? Does the appeal section support or undermine the use of arbitration? What kind of orders can a party appeal?

Does the appeal provision help parties get into or stay in arbitration? Or, does it help parties get out of arbitration?

12. Under the FAA, if the arbitrator entered a default judgment without taking the evidence of a party who did not attend the scheduled hearing, on what basis might that party seek vacatur of the default judgment or award against him or her? *See* FAA § 10(3). Based on your review of the empirical research governing vacatur of awards (Supplemental Materials at 2-22 to 2-26), what would the party likely have to show to prevail? How likely is that party to prevail?

- a. For a comparison of the rules governing default judgments, *see* RUA §§ 15(a), 15(c), 15 comments 1 & 4, 23(a)(2)(c), 23(3), 23(a)(3); AAA Rule 29; JMAS Rule 22(j); NAF Rule 36.

13. When you examine the hard-bound copy of the Eleventh Decennial Digest, part 1 (1996-2001) for cases under the head-note “Arbitration,” how many pages of case summaries appear in this digest? (To answer this question you will have to take a trip to the library.) Be sure to note West’s organization of the topic. It may help you in researching your paper.

14. When you examine the most recent hard-bound copy of the digest for the state in which you plan to practice for cases under the head-note “Arbitration,” how many pages of case summaries appear in this digest? How many involve federal court decisions? How many involve state court decisions? (To answer this question you will have to take a trip to the library.)

**15. DVD Scenario 19 – Correction of an Award**

- a. What [third-party provider] rules (if any) . . . [limit] the grounds [on] which an award can be corrected, including any [required] time frames?

- i. AAA Rule 46:<sup>5</sup>

- ii. JAMS Rule 24(j):

- iii. NAF Rules 37A, 42 & 43:

- b. If this is a non-administered case, does the applicable statute define parameters under which an award can be corrected?

- i. FAA<sup>6</sup> § 11, 16 (Carbonneau at 80-81; 86-90):

- ii. RUA § 24:

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<sup>5</sup> I have given some references to the sections of the statutes or provider rules to make your analysis of the questions a little less burdensome. The citations may not directly answer the question, but they relate to the issues raised in the question.

<sup>6</sup> Because the terms of the FAA are often cryptic, do not read too much into them. They often do not provide a clear answer. Case law interpreting the FAA, however, may provide an answer. For purposes of this course, look only to the terms of the FAA. If they do not answer the question clearly, you can make that comment in class or in your quiz answers.

16. We do not have time to talk about an appeal based on the arbitrator’s “manifest disregard of the law.” We also do not have time to talk about the “public policy” exception to enforcing an arbitration award. The courts have recognized a few situations in which they apply. *See* outlines for this class. These grounds for appeal may not apply after the decision in *Hall Street*, at least in cases subject to the FAA. *See* Supplemental Materials at 2-27 to 2-28. In theory, could a state court, like California, still give these grounds affect under its version of the Uniform Arbitration Act (UMA)? *See* Supplemental Materials at 2-29 to 2-30.
17. **DVD Scenario 20 – Must the Arbitrator Follow the Law?**
- a. Can the parties, by agreement, require an arbitrator to apply the applicable substantive (vs. procedural) statutory or common law?
    - i. FAA §§ 2, 10:
    - ii. RUA § 4, 6, 23:
    - iii. AAA Rules 1(a); 7(a), 7(b), 31, 43, 46:
    - iv. JAMS Rules 2, 4, 6(e), 11(c), 22(d), 22(f), 24(c):
    - v. NAF Rules 1B, 1C, 1D, 5M, 5Q, 12E, 20D, 20E, 20F, 35C, 37H, 37I, 41A(2), 43:
  - b. If the arbitrator fails to apply the law correctly, can a party move to have the award set aside [or vacated] by the court? Does the answer change depending on whether the agreement to arbitrate did or did not require the arbitrator to follow the law?
    - FAA §§ 10, 16 (Carbonneau at 77-80, 86-90):
    - RUA § 23:
    - AAA Rules 46, 48:
    - JAMS Rule 25:
    - NAF Rule 37A, 43E:
18. Carbonneau discusses the split in the circuits over the issue of whether parties can contractually expand the scope of judicial review on appeal to cover errors of law or fact. (Carbonneau at 46-54.) How does the recent S.Ct. decision in *Hall Street* affect the answer to Question 17.b? *See* Supplemental Materials at 2-22 to 2-26.
19. On what grounds can an arbitral award be attacked or vacated? (*See* Supplemental Materials at 2-16 to 2-18; 2-22 to 2-26). Do those grounds support or undermine the final and binding authority of the arbitrator? Which ground is most successful? Which ground might be easiest to prove on appeal, especially if the parties do not make a transcript of the proceedings?
20. 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 for a breach of contract? Could arbitrators refer people to a modern day “debtors’ prison” for failing to pay credit card debt?

*Bonus Quiz Questions (closed book, in-class quiz):*

- What are the formatting requirements for the paper you must write in this class, including margins, spacing, typeface, type size, and page limits? *See syllabus.*
- Why use extra “white space” around headings, block quotations, bulleted items, at margins, and deeper indentations?
- What is the typical paragraph indentation in law practice? 2 spaces? 3 spaces? 5 spaces?
- In a block indented quotation, how many spaces should you indent on both sides of the quote, typically? 5 spaces? 10 spaces?
- What is easier to read? Flush-left justification? Full justification (i.e. text even with both margins)?
- What are older lawyers likely to expect to see as the spacing between the sentence punctuation and the beginning of the next sentence? 2 spaces? 1 space?
- Should you single-space or double-space drafts of documents? Why?
- What does “widows and orphans” mean? Why do you want to avoid them in the final draft of a document?
- As a typical approach, should headings be centered or left-flush?
- A colon is an arrow or pointing finger, saying which of the following:
  - Here’s a quotation.
  - Here’s something that reinforces what was just said.
  - Here’s something that results from what was just said.
  - Here’s a list, especially a numbered list.
  - All of the above.
  - Only the first statement.
- Should you capitalize the first word following a colon if the text following it is a complete sentence?

## **Class 5 (1<sup>st</sup> & 2d hours): Uniform Arbitration Act (UAA); Revised Uniform Arbitration Act (RUAA); Federalism; Preemption of State Law; Reverse Preemption**

*Objectives of Class:* To learn about the UAA and the RUAA and the situations in which they will operate in light of precedent holding that the FAA preempts state arbitration laws. To briefly consider the Supreme Court precedent on preemption.

Review Scenario 1 on Arbitration Insight 20/20 DVD (copies on reserve).

### *Readings:*

- Carbonneau, pp. 91-111, 116-20, 131-37.
- Packet, skim RUAA beginning at pp. 9-101.
- Packet, UAA and RUAA adoption information at pp. 101A-02.
- Supplemental Materials pp. 2-23 to 2-37.
  - Excerpts from various state versions of the UAA (Missouri, Kentucky, Tennessee, and South Carolina).
  - Discussion of arbitration-related questions on Virginia bar exam.
  - Case brief on when FAA preempts state law: *Southland*.
  - Case brief on when FAA applies to transactions with some interstate relationship: *Terminex*.
  - Optional: Video on preemption issue in a 2008 Washington state case, <http://www.tvw.org/media/mediaplayer.cfm?EvId=2008030025A>.
- In answering the questions below, be sure to read the comments to each section of the RUAA.

*Possible Discussion/Quiz Topics (On TWEN. See instructions for Module 2 Quizzes at Supplemental Materials at 2-1):*

### RUAA:

1. Has the state in which you plan to practice law adopted the RUAA yet?
2. How does the organization of the RUAA track that of the FAA? How is it different? (Compare the table of contents and section headings.)
3. Look at the *Arbitration Insight 20/20 DVD Scenario 1 – Choosing the Arbitrator*. Answer the following questions using the provisions of the FAA and the RUAA with the purpose of determining which statute may provide the better “choice-of-arbitral-law.”
  - a. What are the considerations in deciding to participate in the selection of an arbitrator when a party is anticipating challenging whether the dispute is subject to arbitration, but instead must be litigated?<sup>7</sup>

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<sup>7</sup> Parties fear participating in an arbitration in any way when they do not believe the arbitrator has jurisdiction as a matter of “validity” or “scope.” They are afraid the other side will argue that their participation in arbitration acts as a waiver (or estoppel) of the right to litigate. Conversely, parties who litigate for some period of time and then try to switch to arbitration will likely be met with the argument

- i. FAA §§ 3, 4, 5 (Carbonneau at 74):
    - ii. RUAA §§ 5, 6:
  - b. To what extent may a party request/demand that the panel of arbitrators possess industry specific expertise?
    - i. FAA § 5:
    - ii. RUAA §§ 11, 12:
  - c. What is a party's right to request/demand a panel of three arbitrators?
    - i. FAA § 5:
      - RUAA §§ 11, 12:
- 4. Based on your analysis of these questions under each statute, which act provides greater guidance to parties and to courts – the FAA or the RUAA?
- 5. If you had to guess, which act has received more interpretation by the courts? Consider your review in Class 4 of the case digests in the Eleventh Decennial Digest, part I and the applicable state digest.
- 6. Should parties be able to agree contractually that state arbitral law (UAA or RUAA) will control the parties' relationship if a dispute arises between them? *See* answers to the Class 3 quiz.
- 7. Given the holding in *Volt* (Carbonneau at 105-09), how would you best insure that your choice of arbitral law – the FAA or the state's UAA/RUAA – would apply? Should you include a choice-of-substantive-law clause in the “container” contract and a choice-of-arbitral-law in the arbitration clause?
- 8. What kinds of persons or entities are exempted from arbitration under the various state laws included in the Supplemental Materials at pp. 2-23 to 2-27?
- 9. What do these exemptions tell you about the public policy in those states as it relates to “substantive arbitrability” of claims?

#### FAA Preemption of State Arbitral Law:

- 10. What is the big deal about whether the FAA applies or not to all agreements containing arbitration clauses?
- 11. What is the argument that the FAA should apply, as federal procedural law, only in federal court? Does it make any sense to you as a matter of history that it applies to actions filed in state courts? As a matter of policy does it make sense that the FAA applies to actions filed in state courts?
- 12. What would be the practical consequence if the FAA only applied to cases filed in federal court?

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that they have waived the right to arbitrate by participating in some meaningful way in litigation. I noticed that several of the *ADRWorld* reports describe a number of cases dealing with the “waiver” issue. As noted at Supp. Materials pp. 2-10, it remains a viable defense to arbitration.

- a. Assume that a state court with proper jurisdiction and venue operates in a state with arbitration statutes and court interpretations that exempt consumers and employees from pre-dispute arbitration clauses.
  - b. Where would a consumer seeking enforcement of a contractual warranty provision covering a new TV most likely file suit? In state court with the UAA or RUAA applying? Or, in the federal court with the FAA applying?
  - c. Did the U.S. Supreme Court have a legitimate concern that parties would shop for the forum offering the “best” law governing arbitration of claims? Does the definition of the “best” law depend on the perspective and interests of the contracting party – consumer or business? How?
  - d. How would manufacturers and employers respond in a world in which the FAA did not preempt state arbitral law? How would they change their corporate operations or their contracts to get disputes into arbitration?
13. Carbinneau explains:

[The U.S. Supreme Court] referred to three constitutional concepts to expand the reach of the FAA and to achieve a uniform national legal position on arbitration: a broad view of interstate commerce under the Commerce Clause [*Terminex*], the dominance of federal law under the Supremacy Clause [*Southland*], and the constitutional power of the Congress to direct the conduct of the federal courts. As a result, the FAA was binding upon federal courts in diversity cases and upon state courts ruling on matters that had some link to interstate commerce. The FAA also overrode the legislative authority of a state to regulate arbitration given the supremacy of federal law. In effect, all statutes and litigation in the United States that implicate arbitration must conform to the provisions and underlying policy of the FAA [as interpreted by the U.S. Supreme Court]. (Carbonneau at 104-05.)

14. What kinds of state legislation are clearly preempted by the FAA?
15. Are procedural provisions in state arbitration acts valid, so long as they do not explicitly conflict with provisions in the FAA?
16. Under what circumstances, if any, should the FAA preempt a state’s conclusion that a particular arbitration clause is unconscionable under state contract law? In other words, should a state’s substantive contract law apply to the validity of an arbitration clause? Who should apply that law to determine if an arbitration agreement is valid? The arbitrator or the judge? As we discussed in Class 3, the parties can delegate that “validity” question to an arbitrator by contract, but they need to keep in mind the inherent conflict of interest that exists.
17. Should states be allowed to “supplement” the FAA when it is silent on a particular issue, like class-wide arbitrations?

*Compare*



- a. *Comb v. Paypal, Inc.*, No. C-02-1227 JF (PVT), 2002 WL 2002171, at \*8 (N.D. Cal. Aug. 30, 2002) at \*8 (holding that while preemption would prevent California from adopting a statute that would prevent enforcement of arbitration covered by the FAA, ordinary state law such as unconscionability doctrines are not preempted)
- b. *with Discover Bank v. Superior Court*, No. B161305, 2003 WL 116143, \*1 (Cal. App. Jan. 14, 2003) (concluding that “where a valid arbitration agreement governed by the FAA prohibits class-wide arbitration, section 2 of the FAA preempts a state court from applying state substantive law to strike the class action waiver from the agreement.”).

Reverse Preemption:

18. The McCarran-Ferguson Act (giving regulation over the insurance business to the states) creates the only body of law that consistently allows state arbitration law to “reverse preempt” the FAA. In other words, the state arbitration law continues to operate despite the FAA preemption doctrine. (See Carbonneau at 131-37.) Most of the successful cases arise in the insurance insolvency context. Federal bankruptcy law also allows the application of state arbitration law in narrowly defined situations. (See Carbonneau at 116-20.)
19. In both situations, the state insurance receivership and federal bankruptcy courts, respectively, are charged with marshalling the assets of the insolvent party, approving claims against the estate of the insolvent party, and paying out claims.
20. For instance, in the Transit Casualty Company insurance insolvency, its receivership court managed the insurance coverage claims of over 200,000 claimants, including a quadriplegic injured by one of Transit’s policyholders.
  - a. The largest pool of potential assets took the form of reinsurance payments due from over 600 reinsurers located in 30 countries. Reinsurers are insurers for insurance companies. They help spread the risk of loss.
  - b. So, for example, if Transit sold 50,000 homeowner policies on the gulf coast, it could sell off the risk to reinsurers (for a percentage of the policy premium) to protect it from hurricane losses that could otherwise wipe out the company. If reinsurer, ABC Co., took 10% of that risk for 9% of the policy premium paid on that “book” of business, it would then pay 10% of the value of the claims to Transit after the hurricane hit. If all goes as planned, all the reinsurers pay up, Transit gets the money, and then pays it to the claimants.
  - c. Most of the contracts between the reinsurers and Transit contained agreements to arbitrate.
  - d. However, assume that later, Transit becomes insolvent and can’t pay the hurricane claims.<sup>8</sup> It had previously submitted those claims to ABC Co., but the

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<sup>8</sup> An insurance company becomes insolvent when the claims of its policyholders exceed the funds the insurer has available to pay them. The industry is structured so that anticipated investment income, plus the premiums, exceeds the value of claims. The insurer invests the premiums paid by policyholders in the stock market, real estate, and other investments. An insurer can become insolvent if the insurer cannot earn an expected rate of interest on the premiums that exceeds the actual pay-out on claims. The 2008 down-turn in the stock and real estate markets will likely lead to several insurance insolvencies. Alternatively, the insurer can become insolvent when the claims are higher than the company predicted. For instance, the

- company has refused to pay the claims. In the meantime, the homeowners are waiting for insurance proceeds with which to rebuild.
- e. If the arbitration clause and the FAA applies, private arbitrators, who did not have to apply the relevant insolvency law and whose decisions were final and binding, would have the power to determine the quantity of assets Transit receivers could recover from reinsurers.
  - f. Each arbitrator could apply different criteria or “law” for determining the amount due from each reinsurer, especially in the application of the priority of claims in the estate.
  - g. But, the amount of the reinsurance recovery would affect the 200,000 claimants (including the hurricane claimants) who were not parties to the agreements to arbitrate.
  - h. In contrast, if the state arbitration law precludes arbitration in insurance insolvency claims (substantive inarbitrability), the state receivership court would apply the same statutory standards to the reinsurers and claimants and would likely interpret those statutes to maximize the recovery of assets for the insolvent estate and its claimants. (*See Supplemental Materials at 2-23.*) Transit and its claimants would do better in court under its uniform administration of asset collection and claims pay-out.
  - i. I will discuss this example more in class.

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companies that insured many of the victims (mostly corporate) of the 9/11 attacks became insolvent. For instance, the insurers who insured the Twin Towers never expected the towers to collapse. They probably set the premiums (assessed the risk) at a rate that expected only a couple of floors to catch on fire under the typical scenario for office building fires.

## Class 6 (1<sup>st</sup> & 2d Hours): Arbitration in Consumer Contracts, Part 1

Deadline: Provide an annotated bibliography for your paper. You will need to include at least a parenthetical summary, beginning with a gerund, for each source you have found.<sup>9</sup> This summary will show me you have at least skimmed the listed research sources.

**Note to Students: I doubt I have to say this to you, but let's impress this Harvard-trained lawyer with the depth of our ADR knowledge and understanding. Make ASL look good!**

*Objectives of Class:* To consider the debate over pre-dispute arbitration clauses in consumer contracts. To discuss consumer arbitration with a national consumer rights activist, F. Paul Bland, Jr. (by phone or teleconference).

### *Readings:*

- Carbonneau, pp. 156-163.
- Supplemental Materials, pp. 2-38 to 2-132 **(plan ahead this may take awhile)**
  - Resume of Paul Bland.
  - Photo of Paul Bland.
  - Mission of Public Justice Foundation.
  - Arbitration clause in Prof. Young's Chase Bank Master Card credit card agreement.
  - Excerpts from Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBL. 55 (2004).
  - Justin Kelly, *Feingold Says Report Shows Need to Limit Mandatory Arbitration*, ADRWORLD.COM, Aug. 17, 2008, available at <http://www.adrworld.com/sp.asp?id=41506>.
  - Excerpts from Public Citizen, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (Sept. 2007), available at <http://www.adrworld.com/si.asp?id=2290>.
  - Robert Berner & Brian Grow, *Banks vs. Consumers (Guess who Wins)*, BUSINESSWEEK, June 16, 2008, at 72.
  - Resume of Professor Elizabeth Bartholet.
  - Excerpts from Deposition Testimony of Elizabeth Bartholet (3d Jud.Cir., Madison County, Ill. Sept. 26, 2006).
  - Justin Kelly, *House Bill Would Bar Mandatory Arbitration Clauses in Mortgages*, ADRWORLD.COM, Aug. 17, 2008, available at <http://www.adrworld.com/sp.asp?id=41552>.
  - Excerpt from THE ARBITRATION TRAP (relating to campaign contributions from credit and finance industry).

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<sup>9</sup> For example: Elizabeth Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 PEPP. L. REV. 1, 3 (1984) (asking whether the activity should be presumed harmful to the public interest, thereby demanding public protection from incompetent practitioners).

- Excerpt from THE ARBITRATION TRAP (advising what consumers can do to fight arbitration and protect themselves).
- *The Redbook*, pp. 89-97 (numbers); 19-24 (quotation marks).

*Possible Discussion/Quiz Topics (On TWEN. See instructions for Module 2 Quizzes in Supplemental Materials at 2-1):*

1. What kinds of claims is a consumer likely to bring against a manufacturer of goods?
2. What kinds of claims is a consumer/credit card holder likely to bring against a credit card company, broker or brokerage account manager, bank, or other financial services provider?
3. What kinds of claims is a manufacturer of goods likely to bring against a consumer?
4. What kinds of claims is a credit card company, broker or brokerage account manager, bank, or other financial services provider likely to bring against a consumer of those services?
5. Should we allow consumer product manufacturers and credit card companies to require arbitration of disputes through arbitration clauses found in adhesion contracts? Why or why not?
6. How would the defenders of this type of arbitration argue that arbitration in these contexts is not “mandatory” arbitration at all?
7. Do you believe that consumers benefit from price reductions passed on by manufacturers and the financial services industry that reflect the efficiencies of their use of arbitration to resolve disputes with consumers? (See Carbonneau at 158.)
8. Based on the “average consumer” data, can you predict how many of the contracts you’ve entered likely include an arbitration clause?
9. What provisions of the sample Chase Master Card arbitration clause seem most unfair to you? Why?
10. Carbonneau describes a number of more onerous arbitration clause provisions that manufacturers tried to impose on consumers. (See Carbonneau at 158-163.) Does the sample Chase Master Card arbitration clause seem to avoid many of these onerous clauses? Does it suggest that the companies are staying this side of the law but that the pendulum has swung back towards consumers?
11. What struck you most in the Business Week story or the excerpts from *The Arbitration Trap* about the NAF arbitration program for businesses and consumers?
12. Would you draw the same conclusion from the Bartholet deposition that Public Citizen has drawn about bias in the NAF arbitrator pool? Why or why not?
13. The Arbitration Fairness Act of 2007 –
  - Declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights or *to regulate contracts or transactions between parties of unequal bargaining power*.
  - Declares, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the

arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

- It exempts arbitration provisions in collective bargaining agreements.
- The full act appears at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-3010>.

14. The Arbitration Fairness Act would regulate *contracts or transactions between parties of unequal bargaining power*. Don't most all contractual relations reflect some imbalance of negotiating power? How could Congress make a distinction, for purposes of this Act, between adhesion contracts with "average Joe" consumers and contracts like those involving cotton mills?
15. In light of the campaign finance links between members of Congress and the credit card and financial services industries, is it likely Congress will impose limits on pre-dispute arbitration clauses in consumer and employee contracts?

*Bonus Quiz Questions (open book, in-class quiz):*

- In text, should you spell out the numeral 9? The numeral 33? The numeral 115?
- In citations, should you spell out the numerals 9, 33, or 115?
- Should you begin a sentence with a numeral?
- Is the legal convention to use 2d or 2<sup>nd</sup>? 3d or 3<sup>rd</sup>?
- Should you use an apostrophe with numbers? Ex. 1920's or 1920s?
- When should you elide (drop some numerals) to two digits in a range of pages? Ex. pp. 101-05 or 101-105?
- Do you use quotation marks around a quotation of 50 words or less?
- Do you use quotation marks around a block indented quote of 51 words or more?
- If the quoted material consists of several paragraphs do you put beginning and ending quotation marks around each paragraph? Or, only at the beginning of the first paragraph and at the end of the last paragraph?
- When do you use single quotation marks around a quotation?
- If you are using a word as a term (rather than for its actual meaning), what two options do you have to indicate that use?
- Where do periods and commas go in relation to the ending quotation mark? Inside or outside the mark?
- Where do semicolons and colons go in relation to the ending quotation mark? Inside or outside the mark?
- Where do question marks and exclamation marks go in relation to the ending quotation mark? Inside or outside the mark?
- When do you reproduce the punctuation found in the original text of a document you are quoting? Why do you think this rule exists?

## Class 7 (1<sup>st</sup> & 2d Hours): Arbitration in Consumer Contracts, Part 2

Deadline: Provide an outline of your paper to me by noon and to your peer reviewers using the paper format at Supp. Materials pp. 2-133 to 2-134. Send it to me by email so I can comment on the electronic copy. Sign up for a conference with me to discuss your progress on the paper and possible research sources.

*Objectives of Class:* To further consider arbitration of consumer contracts. To discuss consumer arbitration with a NAF arbitrator, John Murrey.

### *Readings:*

- Carbonneau, pp. 68-72 (review of motions to compel arbitration); 200-53 (enforcement of arbitral awards).
- Packet, pp. 165-215 (NAF Code of Procedure).
- Supplemental Materials, pp. 2-133 to 2-192.
  - Seminar Paper Format.
  - E-mail from AALS Dispute Resolution List on behalf of Robert N. Leitch, Adjunct Professor of Law, Georgia State University College of Law, to Paula M. Young, Associate Professor of Law, Appalachian School of Law (April 1, 2008, 13:21 CST).
  - E-mail from AALS Dispute Resolution List on behalf of Jean Sternlight, Professor of Law, UNLV Boyd School of Law, to Paula M. Young, Associate Professor of Law, Appalachian School of Law (April 2, 2008, 8:57 CST).
  - NAF, *Consumer Arbitration: Fair for All* (undated).
  - NAF, *Debunking Myths about Arbitrator Selection – Responding to Neely and Bartholet* (undated).
  - Excerpts from THE ARBITRATION TRAP (describing public efforts by NAF to defend arbitration).
  - NAF claim file for Chase Bank vs. [redacted], Forum File No. MX0802002047034 (filed Feb. 2008), assigned to Professor John Murrey, as arbitrator.
  - ABA Model Rule 1.2 and comments.
- *The Redbook*, pp. 99-102 (typographical symbols); 24-28 (parentheses).

*Possible Discussion/Quiz Questions (On TWEN. Instructions: Each student should answer Question 6; then answer one other question, but try not to leave any unanswered questions, as a group):*

1. What provisions of the NAF Code of Procedure seemed unfair to you, if any? Why?
2. Compare the rules of the NAF Code of Procedure to the rules of either the AAA Commercial Arbitration Rules or the JAMS Comprehensive Arbitration Rules and Procedures. (See Packet at 121-44 or 107-18, respectively.) Which of the two third-party administrator's rules seems to offer more procedural protection or due process for parties to the dispute – the NAF rules or the other provider's rules?

3. What affect does the NAF defense of arbitration have on your opinions about consumer arbitration?
4. You serve as an aid to the senior U.S. Senator of Virginia. He/she has asked you to put together a short memo summarizing the available empirical evidence on the terms and provisions contained in consumer arbitration clauses. The memo should advise her whether that evidence indicates the fairness of pre-dispute consumer arbitration clauses and the administered proceedings that arise under those clauses. How would you respond to the senator? Would you recommend that he/she sponsor a bill somehow limiting consumer arbitration? What would you recommend?
5. What if you represented instead a national bank? Your client asks you to draft an arbitration clause that will go out in the next round of bank account statements.
  - a. He wants the clause to limit the time in which a consumer can file a claim to three months after the ending date of the statement.
  - b. He wants the clause to preclude the recovery of attorneys' fees, to preclude the recovery of punitive damages, and to preclude any class-wide arbitrations.
  - c. Finally, he wants the roster of arbitrators to include only persons currently employed at other banks in the same city at the level of manager or assistant manager.
  - d. Although you say nothing to the client at the time of his call, you are uneasy about drafting such a one-sided arbitration clause.
  - e. Is it ethical to draft an agreement you believe to be unfair? *See* Model Rule 1.2 and its comments that deal with the scope of representation and allocation of authority between a client and a lawyer.
  - f. Is it ethical to refuse to do so?
  - g. What practical considerations may come in to play if the client uses this arguably unfair agreement?
  - h. What do you do?

*For Guest Speaker Prof. John Murrey (not on quiz):*

- Do you think you can sufficiently handle the number of arbitration claims submitted to you in the time frame provided?
- Do most of the cases you handle involve the collection of credit card debt?
- Do you handle the claims of one particular company or companies more than other companies?
- If so, do you risk developing a “repeat player” bias?
- The Public Citizen report, *The Arbitration Trap*, found that, in California, businesses chose arbitration in 99.6 % of cases, with consumers<sup>10</sup> choosing arbitration in the remaining cases? Do you see many cases instituted in arbitration by consumers? What do you make of that pattern?
- *The Arbitration Trap* found that, in California, arbitrators ruled in favor of the business party in approximately 95 % of cases. Do you rule that frequently in favor of business parties in the claims you arbitrate? What do you think explains this pattern?

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<sup>10</sup> “Consumer,” as used in these questions, also includes credit card debtors.

- Do you believe arbitrators have strong financial interests to stay on the NAF arbitrator roster?
- What is the hourly rate you charge to serve as an arbitrator?
- What is the most you have earned in fees in a day or a month as an NAF arbitrator?
- Do you include in your awards against consumers the cost of arbitration, including your arbitrator fees?
- What do those costs typically run in an uncontested collection action?
- Do you independently determine that the arbitration clause permits an award of the costs of arbitration to the winning party?
- Do you assess against the losing party the attorneys' fees of the winning party?
- Do you independently determine that the arbitration clause permits recovery of those fees?
- How are you chosen to serve as an arbitrator in a typical collection case?
- Do you believe a business would no longer choose you as the arbitrator if you began to require greater proof of the claim or of the contractual right to arbitrate? If you ruled more often in favor of the consumer?
- Has any consumer ever asked that you be removed as arbitrator? If so, what happened?
- Has any consumer asked if you have any financial interests in credit card companies or other financial service companies that may create a potential conflict of interest or bias in an arbitrated collection case? If so, how did you respond?
- Has any consumer asked you how many NAF arbitrations you have done? How did you respond?
- Has any consumer asked you how many arbitrations you have done for the party bringing the collection action? How did you respond?
- Have you seen any systematic bias in your selection as the arbitrator?
- Have you seen any systematic bias in favor of the financial services industry by NAF?
- How are consumers notified of the arbitration claim filed against them? Does your file contain proof of service? What does the NAF Code of Procedure require as proper service?
- Does NAF provide copies of the documents filed in the arbitration in a language other than English? Does it provide translators in the arbitration hearing for persons who do not speak English?
- Who should decide if a "valid" arbitration clause exists? The arbitrator or the judge? What does the sample Chase Master Card clause provide on this issue?
- Do you independently determine that the arbitration clause gives you the authority to make the "validity" decision?
- Does your file include the original documents showing the consumer agreed to the arbitration clause? If not, does the business simply assert in its first pleading that the dispute is subject to a written arbitration clause?
- In how many arbitrations do you get an answer from a consumer?
- In how many of these answers do consumers contest the contractual jurisdiction of the arbitrator?



- Do you review the arbitration clause to determine if it covers the dispute? (i.e. “scope” of clause).
- Have you ever ruled that no valid arbitration clause exists or that the clause does not cover the referred dispute?
- Do you consider whether any contractual defenses -- especially unconscionability -- might apply to prevent enforcement of the arbitration clause itself?
- Have you ever dealt with a party who alleges the defense of identity theft?
- Has a consumer ever asked for a class-wide arbitration? If so, how did you rule? If not, how likely would you grant that request? Does the typical arbitration clause in a credit card agreement permit class-wide arbitrations? Does the sample Chase Master Card clause permit class-wide arbitration? (See Supplemental Materials at 2-41 to 2-42.) Does the NAF Code of Procedure allow class-wide arbitrations?
- *The Arbitration Trap* mentions a 90-day deadline within which a party to the arbitration may file the appeal. Do you know whether NAF advises consumers of the deadline within which they can file an appeal with a court? Does notice of that deadline appear in your award? Is the deadline imposed by the NAF Code of Procedure or is it statutory (i.e. FAA §§ 9, 10, 11 or 16)? Or, neither? See Supplemental Materials at 2-156.
- Do you know how long it takes NAF to mail your award to the consumer?
- Do you know, under the NAF Code of Procedure, when your award becomes “final” for purposes of the 90-day deadline? What triggers the running of the 90-days?
- Have you had any requests from consumers for discovery? How did you handle them? What does the NAF Code of Procedure provide about discovery?
- Have you seen any evidence that NAF does not follow its Code of Procedure, especially as to disclosing the potential conflicts of interest of arbitrators or granting extensions of time to file materials with NAF? Who rules on motions filed by the parties – the arbitrator or an NAF staffer?
- Do you believe states, in addition to California, should require third-party administrators – like NAF, AAA, or JAMS -- to disclose statistics on case dispositions?
- Is it fair to say that NAF acts like a debt collector and so should be subject to the Fair Debt Collection Practices Act? Why or why not?

*Quiz Questions (open book, in-class quiz):*

- Does the *Bluebook* insist that section and paragraph symbols appear only in citations and not in text? What is the ALWD rule?
- Does the *Redbook* disagree with the *Bluebook* on the use of section and paragraph symbols in text?
- How do you indicate with symbols the words “sections” and “paragraphs” (the plural forms)?
- Do you insert a space between the symbol § or ¶ and the referenced section or paragraph number under the *Redbook* guidance or examples? Is that the same rule required by the *Bluebook*? By ALWD?

- Can you use an ampersand in case name citations under the *Redbook*? What is the rule under *Bluebook*? Under ALWD?
- What is a nesting parenthetical? Give an example.
- What is a kissing parenthetical? Give an example. How many spaces do you put between the kissing parentheticals under *The Redbook*? Under *The Bluebook*? Under ALWD?
- Under *The Redbook*, in defining a quick reference for a longer term -- like Association of Legal Writing Directors (ALWD) -- should you typically put quotation marks around the defined term so it would appear as (“ALWD”)? Under *The Bluebook*? Under ALWD?
- Should you use a set of parentheses around a number or letter used in a list or just an end parenthesis? I.e., (a) or 1).
- Where does the terminal punctuation go if the entire sentence is in parentheses? Inside or outside the end parenthesis?
- Where does the terminal punctuation go if only the parenthetical phrase requires a quotation mark or exclamation point? Do you add that punctuation mark inside the end parenthesis and then also put a period outside the end parenthesis?
- Where does the question mark go if the sentence is a question but it ends with a parenthetical phrase that is not a question? Inside or outside the end parenthesis?

**Class 8 (1<sup>st</sup> & 2d Hour): Arbitration in Employment Contracts; Arbitration of Statutory Claims (Substantive Arbitrability); Unconscionability of Arbitration Clauses**

**Deadline: Provide your peer review of the outlines submitted to you by your colleagues, following the recommendations in the Supplemental Materials at 2-193 to 2-200.**

Review Scenario 6 on Arbitration Insight 20/20 DVD (copies on reserve).

*Objectives of Class:* To review Supreme Court precedent on whether employment agreements are arbitrable in light of the jurisdictional limit found in FAA § 1. To discuss the arbitration of statutory claims (substantive arbitrability) that arise in the employment context (civil rights, discrimination, and harassment). To briefly consider the defense of unconscionability in the context of employment arbitration.

*Readings:*

- Carbonneau pp. 59-68; 112-16; 124-25 (Title VII statutory claims); 164-99 (labor and employment arbitration).
- Packet pp. 148-51 (employment due process protocols).
- Supplemental Materials, pp. 2-193 to 2/236.
  - Peer review guidelines
  - Library search results for books on statutory interpretation.
  - Excerpt from Age Discrimination in Employment Act.
  - Case briefs for:
    - [Gilmer v. Interstate/Johnson Lane Corp.](#), 500 U.S. 20 (1991).
    - [Circuit City Stores, Inc. Adams](#), 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001).
    - *Hooters America, Inc. v. Phillips*, 173 F. 3d 933 (4<sup>th</sup> Cir. 1999).
  - Margaret A. Jacobs, *Men's Club – Riding Crop and Slurs: How Wall Street Dealt with a Sex-Bias Case*, WALL STREET J., June 9, 1994, at A1 available at 1994 WL-WSJ 337147 (Lexis);
  - Patrick McGeehan, *Discrimination on Wall St.? The Numbers Tell the Story*, N. Y. TIMES, July 14, 2004, at C1;
  - Susan Antilla, *Money Talks, Women Don't*, N. Y. TIMES, July 14, 2004, at A19.
  - Excerpt from Vanishing Trial Discussion Questions relating to employment disputes.
- *The Redbook*, pp. 103-199 (spelling); 29-31 (brackets).

*Possible Discussion/Quiz Topics (On TWEN. Each student should answer Questions 18 and 26, provide the first answer to one other question, and answer or comment to two other questions):*

## Arbitrability of Employment Contracts:

1. Take a look at one of the books circled on the library results printout at Supplemental Materials at 2-201 to 2-206. What general impressions can you make about the process of statutory interpretation or construction?
2. What does *ejusdem generis* mean? Can you find a different rule of statutory construction that would support a different or opposite interpretation of the statute?
3. Should we allow employers to require arbitration of disputes through arbitration clauses found in adhesion contracts? Why or why not?
4. How would the defenders of this type of arbitration argue that arbitration in these contexts is not “mandatory arbitration” at all?
5. The authors of a leading treatise have criticized the use of phrases such as “mandatory arbitration” or “compulsory arbitration” in this context.

Where . . . the very issue is the genuineness of consent or the harshness of the alternatives to consent, using such terms as compulsory or mandatory in such circumstances is, at best, highly confusing. At worst, it constitutes question-begging: The very question at stake . . . is whether whatever consent to arbitrate as has been manifested should or should not be given full contractual effect.

*See* 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW, § 17.1.2.2, at 17:8 to 17:9 (Supp. 1999).

6. Based on your recollection of contract law, when does the law tolerate other situations that might be deemed unfair to consumers or employees who have signed adhesion contracts? Why should we care more about unfairness in the arbitration clause context than we do in other adhesionary contract situations?
7. Carbonneau says processing of employment claims that involve statutes guaranteeing basic political rights “raises a host of concerns.” (*See* Carbonneau at 189-90.) He notes the distinction between a waiver of a judicial forum and waiver of substantive rights. He asks: What does the arbitrability of statutory claims do to the legislative scheme? Is civil liability solely a matter of private interest?
8. Does it matter whether a civil rights statute, like Title VII, has been around long enough to get a lot of judicial gloss or interpretation, so that the public policy is clear? What about arbitrating a relatively new civil rights statute, like the Americans with Disabilities Act? Do we want to give courts the opportunity to interpret it and build a clear statement of public policy? If too many of these cases go to arbitration, can we reach that goal?
9. Carbonneau also asks: Are courts able to respond to these claims in a meaningful fashion? Is private resolution not fully sufficient in the vast majority of cases?
10. But, we do not know how many of these claims settle before the arbitration hearing in the same way they would likely settle before trial. If so, does the ultimate forum, when unused by the parties, matter that much? Can it affect a party’s bargaining

power in a way that encourages a party to settle rather than go to the arbitral hearing? How? Does a party have any more power if the case was in a judicial forum? How? Does it matter if the arbitral forum is more affordable because it is less formal and quicker? (See Carbonneau at 190.)

11. Review the statements and questions in the Vanishing Trials Discussion Questions at Supplemental Materials pp. 2-231 to 2-236. How does this data affect your opinion of mandatory arbitration of employment disputes?
12. Do you think Congress should pass federal legislation limiting mandatory employment arbitration in the United States? If so, what sort of legislation would you favor? Who would lobby on behalf of non-labor union employees against the lobbyists representing employers?
13. When courts find that a particular arbitration clause would prevent a plaintiff from effectively vindicating her rights under the relevant federal statute, they differ as to the appropriate remedy.
  - Some courts invalidate the entire arbitration clause on this ground. See, e.g., *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (holding that “rescission [of the entire contract] is the proper remedy”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 776 (Cal. 2000) (holding that the court “must void the entire agreement”).
  - Other courts merely sever the offending portion of the arbitration provision and permit arbitration to proceed under modified terms. See, e.g., *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (holding that the punitive damages clause in arbitration agreement should be severed); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1287-88 (N.D. Ala. 2000) (holding that the “arbitration clause at issue should be modified in accordance with the severability/conflict of law provision” of the contract).
  - Which approach seems most appropriate?
  - Does the nature of the unconscionable provision affect the preferred approach to remedying the contractual defect?
14. **DVD Scenario 6:** What is the source of the arbitrator’s power to award punitive damages? May the parties contractually limit the type of damages an arbitrator may award? Can they do so even if the limit on damages is inconsistent with available statutory remedies?
  - a. FAA (Carbonneau at 139-40; 162):
  - b. RUA §§ 21(a), 21 comment 1:
  - c. AAA Rule 43(a):
  - d. JAMS Rule 24(c):
  - e. NAF Rule 37:
15. What authority permits the arbitrator to award attorneys fees?
  - a. FAA (Carbonneau at 23, 159, 190-93):

- b. RUAA § 14:
  - c. AAA Rule 43(b):
  - d. JAMS Rules 24, 31:
  - e. NAF Rule 37C:
16. (Not on DVD). You are serving as the chair/umpire of a panel of three arbitrators hearing a sexual harassment claim brought by a woman working as a securities broker. Her lawyer has requested extensive discovery, including the files of plaintiff and the supervisor who allegedly harassed her, as well as the files of male co-workers who allegedly received superior treatment despite inferior work. Plaintiff's lawyer also seeks to depose the supervisor, the supervisor's supervisor, and two male co-workers. The supervisor and co-workers are not parties to the arbitration. The arbitration clause provides that the parties shall be entitled to "such discovery as the arbitrators deem necessary." How would you handle the request under each of the following statutes or rules? Why? Can the arbitrator subpoena non-party witnesses to testify? To comply with pre-hearing discovery requests?
- a. FAA §§ 7, 10 (Carbonneau at 24, 75-76, 181, 195, 204):
  - b. RUAA §§ 15 comment 2, 17(a), (b), (c), (f), & (g), 17 comment 3:
  - c. AAA Rules 21(a)-(c):
  - d. JAMS Rules 17, 17(b), 20(a)-(b), 21(a), 22(e):
  - e. NAF Rules 29, 30, 31:
17. Is an arbitrator likely to allow some latitude in discovery given the grounds for vacatur at FAA § 10?
18. Taken together, the cases studied in this module indicate that the Supreme Court has told Congress that Congress will have to pass legislation that limits the applicability of the FAA to statutory claims, to actions filed in state courts, and to disputes that only marginally affect interstate commerce. The Supreme Court "ain't" doing it. In light of that, should you expect to be handling plenty of arbitrations in the future?

#### Unconscionable Arbitration Clauses:

19. If contract defenses such as fraud or duress can be used to attack or avoid an arbitration clause (rather than the "container" contract itself), can you think of a scenario in which an employee could credibly argue that the arbitration clause itself (not the "container" contract) was procured by fraud or duress?
20. Do you agree with the *Gilmer* Court that a securities industry employee can effectively vindicate his or her statutory rights in arbitration? Why or why not?

21. When can a court consider parol evidence? In *Circuit City*, do you think the Court had a basis for considering parol evidence, including the legislative history of the FAA?
22. Does the narrow interpretation of the exception under FAA § 1 for people actually moving stuff in interstate commerce make sense to you as you read the statutory language? Why or why not?
23. Name five reasons the court found the *Hooters* arbitration clause unconscionable and therefore invalid? Which one particularly gets your goat?
24. If a client asked you to draft a *Hooters*-like arbitration agreement that you thought a court might declare unconscionable, what would you advise the client and why?
25. If a client ignored this advice and insisted that you draft a *Hooters*-like arbitration agreement, what would you do to protect yourself from any legal malpractice claims the client might bring against you in the future relating to the clause?
26. After reading the assigned readings and discussion questions through Class 8, what is your overall impression of arbitration in the United States?

*Bonus Quiz Questions (closed book, in-class quiz):*

- Correctly spell five words that appear on the list at § 7.27 that you tend to misspell frequently.
- Can you recite the “i” before “e” rhyme/rule? See § 7.5(a).
- Be prepared to complete an exercise relating to possessives. See §§ 7.11-7.15.
- What is the difference between an open compound and closed compound formed of two nouns? Give an example of each.
- In “trip-planning,” which word is the “gerund.” See § 7.21.

## Module 3: Designing Dispute Resolution Systems

### Class 9 (1<sup>st</sup> hour): Third-Party Arbitration Providers

*Objectives of Class:* To learn about the role of third-party providers in the arbitration context. To review some of the websites maintained by these providers and the resources they make available to neutrals and parties to arbitration agreements.

Take a look at

<http://www.arbitration-forum.com/programs/> (National Arbitration Forum program and rules);

<http://www.jamsadr.com/rules/rules.asp> (JAMS rules and clauses);

<http://www.cpradr.org/Landing.asp?M=9.0> (model ADR contract clauses);

[http://www.cpradr.org/CMS\\_disp.asp?page=industry\\_employment&M=9.2](http://www.cpradr.org/CMS_disp.asp?page=industry_employment&M=9.2) (rules and procedures for different types of cases);

<http://www.seclaw.com/centers/arbcent.shtml> (securities arbitration home page);

<http://www.finra.org/index.htm> (Financial Industry Regulatory Authority home page).

*Possible Discussion/Quiz Topics:*

- 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?
- What is the difference between a “for-profit” and “not-for-profit” arbitration provider?
- What kinds of matters can be covered by arbitration rules offered by a provider?  
*See Packet pp. 103-147.*



## **Class 9 (2d hour): Designing Dispute Resolution Systems: Diagnosis & Design**

*Objectives of Class:* To remind students of the three approaches people can take to resolving disputes: power–rights-interests. To introduce students to the diagnostic approaches DR system designers use and to identify the six basic principles of DR system design.

*Readings:*

- *Getting Disputes Resolved*, pp. xi-64 (introduction & Chaps. 1 to 3);
- Supplemental Materials, pp. 9-1 to 9-8;
- *The Red Book*, pp. 123-34 (citations); 31-33 (ellipsis dots).

*Possible Discussion/Quiz Topics:*

- What are the three approaches parties can take to resolving disputes?
- What forms do power procedures typically take?
- How do the parties rights and power affect reconciliation of party interests?
- What are the two forms of withdrawal from conflict?
- What criteria should we consider for determining which dispute resolution approach – interest, rights or power – is “better”?
- When are rights and power procedures needed or desirable?
- What are the factors a system designer should consider in diagnosing the existing DR system?
- What are the obstacles that hinder the use of interest-based negotiations?
- What procedures were parties using at Caney Creek? What role did interest-based processes play?
- Why do you think the surrounding Appalachian culture emphasized fighting for your rights?
- What are the six basic principles for designing an effective DR system?
- Which citation format do you intend to use? ALWD? Bluebook?
- Which of the following are essential rules a legal writer should know?
  - The formats for citing cases, constitutions, statutes, regulations, rules of evidence, rules of procedure, books, articles, and legal encyclopedias;
  - The rules about using signals;
  - The methods of citing electronic materials (websites, legal databases, and materials on CD-ROM).
- Be prepared to practice some citations as a take-home assignment for next class.
- What is a pin-point citation?
- Explain the different meanings of the signals “see” and “see generally”?
- Explain the different meanings of the signals “E.g.,” “Cf.,” and “But see.”
- When do you use a short-form citation? Why use them?
- When should you use a parenthetical gerund phrase to elucidate a citation?
- Why should you never trust citations (what they are cited for not the citation format) in another document?



**Class 10 (1st & 2d Hours): Designing Dispute Resolution Systems: Comparison to the U.S. Postal Service REDRESS System; Consideration of Court-Connected Mediation Program in Virginia.**

**Deadlines: Provide a “vomit” draft of your paper.**

*Objectives of Class:* To examine three other system designs. To hear from two neutrals in two of the systems about how well they meet design goals.

*Readings:*

- Supplemental Materials pp. 10-1 to 10-45;
- *The Red Book*, pp. 34-42 (em-dashes, en-dashes, hyphens), 135-139 (footnotes).

**Guest Speaker: Joe Beatty, REDRESS mediator**

*Possible Discussion/Quiz Topics:*

- Why did the Postal Service decide to design a dispute resolution system to handle employment-related claims?
- Why do you think the designers chose to use outside mediators trained in the transformative approach to mediation?
- What are the hallmarks of the transformative style of mediation? How would those hallmarks serve employees in conflict?
- What is the point of making sure mediators are available 24-7?
- What do the statistical charts reveal about the success or failure of the REDRESS program?
- Do you think it wise for a court to use non-binding arbitration for lower value cases? Why or why not?
- Should the arbitrators have subject-matter expertise?
- Do you feel the arbitrators are adequately compensated? If not, how would low compensation affect their performance as arbitrators in this type of program?
- What does the lawyer survey indicate about the procedural justice parties are likely to experience in this program?
- Why do you think so many lawyers wanted the program to continue on a mandatory basis?
- How would you re-design the program to make lawyers feel that it was more effective in reducing costs, resolving cases faster, ensuring a fair hearing, or providing a non-binding legal neutral evaluation that would facilitate settlement?
- If you were a judge assigning cases to arbitration, would this study encourage you to use arbitration more or less?
- *Take it or Leave it* outlines the design of the regulatory infrastructure affecting mediators in Virginia who wish to participate in court-connected mediation programs. What are your thoughts about the design?
- Is it too much regulation? Too little? About right?

- What aspects of the regulatory design would enhance procedural justice for parties using Virginia certified mediators?
- Why should you provide sufficient numbers of footnotes to sources?
- What factors govern the ratio of text to footnotes?
- Does the footnote superscript go inside or outside a closing quotation mark?

## **Class 11 (1st & 2d hours): Designing Dispute Resolution Systems: Making the System Work**

*Objectives of Class:* To identify the approaches DR system designers can take to make the newly designed system work.

*Readings:*

- Carbonneau, pp. 164-199; review pp. 26 (Steelworkers Trilogy);
- *Getting Disputes Resolved*, pp. 65-83 (Chap. 4);
- Supplemental Materials, pp. 11-1 to 11-2.
- *The Red Book*, pp. 43-45 (periods), 143-150 (nouns and pronouns).

*Possible Discussion/Quiz Topics:*

- What are the three elements of making a new DR system work?
- Why do you think parties wait so long to use available DR processes?
- Why do you think buy-in from high-level insiders is so important to the success of a new DR system design?
- Why do you think participation in the design of the system by the parties who may eventually use it is so important to the success of a new DR system design?
- How would fear on the part of members of management or labor hamper the adoption or use of a new DR system design?
- Why would durability of the new system depend on training and coaching potential users?
- Why bother to evaluate the system on an on-going basis?
- What was the structure of the earlier version of the coal industry's dispute resolution system? What role did negotiation play in it? What role did mediation play in it? What role did arbitration play in it? Of the three approaches to conflict -- interest, rights, power -- what approaches does this DR system emphasize?
- What are the two types of labor arbitration?
- What is the nature of arbitration in the collective bargaining context?
- What were the holdings in the *Steelworkers'* trilogy? What reasons did the court give for the rulings?
- What kinds of disputes are arbitrated in the collective bargaining context?
- Why do people say that arbitration is a form of "governance" in the collective bargaining context?
- When should you use a period in a heading?
- How does ALWD abbreviate the following words:
  - Association
  - Commissioner
  - Department
  - International
  - National
- How does Bluebook abbreviate the following words:

- Association
- Commissioner
- Department
- International
- National
- In a list, should you prefer parentheses around -- or a period after -- the letter or number to set it off from the text. E.g., Limitations on involuntary bankruptcy petitions:
  1. Creditors . . . .
  2. Insurance companies . . . .
  3. The petition . . . .
- Which is correct:
  1. Both lawyers waited until the last minute to file their brief.
  2. Both lawyers waited until the last minute to file their briefs.
- Complete apostrophe exercises before class at Supp. Materials.
- Good writers should avoid “nominalizations.” Nominalizations are nouns forms of verbs. “Investigate” is a verb; “investigation” is a nominalization. Nominalizations require more words and make sentences harder to understand. Find one nominalization in the draft of your seminar paper. Re-write the sentence in “active voice” using a verb instead.

## **Class 12 (1st & 2d hours): Designing Dispute Resolution Systems: Diagnosing Problems in the Coal Industry & Designing the System in the Coal Industry**

**Deadlines:** Provide a “dry heaves” draft of your paper by email to me and to your peer reviewers. Sign up for conferences with me on TWEN.

*Objectives of Class:* To see how the authors of GDR applied the DR system design theory to the situation at Caney Creek.

### *Readings:*

- *Getting Disputes Resolved*, pp. 85-133 (Chaps. 5-6);
- Supplemental Materials, pp. 12-1 to 12-3;
- *The Red Book*, pp. 46-47 (question marks and exclamation marks).

### *Possible Discussion/Quiz Topics:*

- What is a wildcat strike (Chap. 5)?
- What was the wildcat strike history in the 1970s in the coal industry?
- How does this history compare to the data on labor strikes at Supplemental Materials, pp. 12-1?
- What was the typical scenario that led to a wildcat strike?
- What was the design of the DR system set out in the bituminous coal contract of the time?
- What were the process differences at the high strike mines compared to the low strike mines?
- Why did miners at high strike mines think they had to participate in the strikes?
- What recommendations did the authors make to the mine management at the high strike mines?
- What recommendations did they make to the union?
- What other recommendations did they make?
- How did management respond to the increasing tension in March 1980 at Caney Creek (Chap. 6)? Was this an effective response? Why or why not?
- How did the authors begin the system design intervention? Why did they start in this manner?
- What behaviors or problems did they diagnose as contributing to the tense situation? How was the existing DR system dysfunctional? Did the existing DR system satisfy the requirements of procedural justice (voice, consideration, even-handed treatment, and respect & dignity)? Why or why not?
- What was the role of the “informal contract” in the tension between labor and management?

- How does the statement “Don’t Settle the Conflict, Change the System” fit with the causes of conflict as conceived by Moore in his “Circle/Sphere of Conflict” that we talked about in the DR survey class?<sup>11</sup>
- Why did the designers choose to emphasize problem-solving or interest-based procedures?
- How did the designers seek to implement the changes at Caney Creek?
- What form of buy-in did the designers use for foremen and the miners? Was it successful? Why or why not?
- How did the designers respond to these developments?
- How did they evaluate whether the new DR procedures were working?
- Should you start a sentence with § or ¶? Can you otherwise use these symbols in text? In footnotes?
- Should you use §§ (double section sign) when you are referring to more than one section of a statute or rule?
- Can you use & whenever you want instead of the word “and”?

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<sup>11</sup> Causes of conflict include issues relating to data, relationships, interests, structural limits, and values.



## **Class 13 (1<sup>st</sup> hour): The Grievance Mediation Program and The Promise of Dispute Resolution Systems Design**

**Deadlines: Provide your peer review of the “dry heaves” drafts.**

*Objectives of Class:* To see how the authors of GDR applied the DR system design theory to the situation at Caney Creek.

*Readings:*

- *Getting Disputes Resolved*, pp. 134–195 (Chaps. 7 & 8, including endnotes to chapters);
- Supplemental Materials, pp. 13-1 to 13-7
- *The Red Book*, pp. 48-50 (apostrophes), 170-176 (adjectives and adverbs).

*Possible Discussion/Quiz Topics:*

- What were the components of the initial design concept (Chap. 7)?
- How did the concept evolve? Did the components change? Or were they emphasized differently?
- How was the concept refined?
- What were the obstacles they faced to implementing the mediation program? How did the designers try to overcome them?
- What training did they design and use?
- What did the evaluations of the pilot mediation program reveal?
- Has the program been durable? If not, why not?
- Did they successfully diffuse the program?

## **Class 13 (2d hour): Durability of the Coal Industry DR System Design.**

*Objectives of Class:* To see whether the DR system at Caney Creek proved durable.

*Readings:* Supplemental Materials, pp. 13-8 to 13-29 (seminar paper submitted for 2008 Boskey Award).<sup>12</sup>

*Possible Discussion/Quiz Topics:*

- Based on the excerpt from the 2002 Wage Agreement, does it appear that the GDR dispute resolution system design has survived? What is the same? What may be different?
- What do you make of the fact that mediation is discussed in the Jan. 1, 2002 letter to Cecil Roberts?
- Were you surprised by the findings in Wade McGeorge’s paper? Why or why not?

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<sup>12</sup> Used with his permission.

- What was his thesis? Did he adequately prove or support it?
- If you were grading this paper using the criteria at Supplemental Materials, pp. 1-1 to 1-2, how many points would you give it? What level of understanding did this writer reach in the analysis of the chosen paper topic?
- If you allocated percentages to the different parts of this paper, what percent of it is background information or purely descriptive? What percent is new analysis or original thinking?
- What two substantive things might this writer do to improve the paper?
- What two stylistic things might this writer do to improve the paper?

## Class 14 (1st & 2d Hours): Is Arbitration Becoming Too Formalistic?

**Deadline: Final Boskey or WAM award-winning papers due.**

*Objectives of Class:* To give a lawyer who has participated in a high-stakes arbitration involving the coal industry the opportunity to discuss his experience with students. To consider whether arbitration works as envisioned in high-stakes cases. To consider whether, despite the efforts of courts to limit their participation in the arbitration process, they have succeeded in keeping the arbitration process simple, efficient, and cheap.

*Readings:*

- Supplemental Materials, pp. 14-1 to 4-8;
- The Packet, pp. 103-106;
- *The Red Book*, pp. 176-210 (prepositions, conjunctions, interjections, stuffy words, and legalese).

Guest Speaker: Bob Breimann and Ben Street

*Possible Discussion/Quiz Topics:*

- The D.C. Circuit has ruled that parties need to have on appeal a transcript of the arbitration proceeding if the parties presented contested oral testimony as the only evidence presented at the arbitration. How would this requirement affect the identified benefits of arbitration? How might it affect the way you present evidence at the arbitration?
- Given what you have learned over the semester, and the readings in the Class 14 materials, does arbitration still seem to be faster, cheaper, and more predictable than litigation?
- Atlas describes several changes in the arbitration process or rules that responded to the criticisms about arbitration raised in the 1980s. He says these changes have had the unintended consequence of increasing the costs of arbitration. Which one of the identified changes most likely contributed to costs increases? Why?
- What change has most increased the risk in an arbitral award?
- Atlas describes several other sources of risk in connection with the reliability of the arbitral result. What are they?
- Do you agree that mediation can be a compliment to arbitration? If so, as a designer, which of the clauses at Supp. Mats. 14-7 to 14-8 would you prefer to insert in any contract a client asks you to write? Why?
- Masucci suggests several components for designing an in-house dispute resolution culture that thinks first about the effective use of ADR. Which of her suggestions overlap with the suggestions made in *Getting Dispute Resolved*? Which suggestions reflect greater experience over the last ten or twenty years with the process of designing dispute resolution systems?
- Do you know how to add to and edit the custom dictionary on your computer?
- Who do you plan to have proofread your paper other than yourself?

- How many points (maximum) do I allocate on the paper grading sheet for proofreading? How does that allocation relate to the points allocated for other style items?