

Arbitration

Tu/Th 10:00AM - 11:15AM via Zoom (see Canvas for links)
Office Hours – MU Connect or by appointment via Zoom

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I expect that many of you don't know a great deal about ARBITRATION. However, it is an essential part of your conflict resolution toolbox! This course is designed to familiarize you with the many kinds of arbitration and equip you with insights that very few members of the public—or even lawyers—have. I also expect that students who do know something about arbitration will deepen their knowledge and skills, and reconsider some of their preconceptions.

I. Course Objectives:

Students completing this class should be able to:

- Differentiate between kinds of arbitration processes and understand how arbitration can be tailored to serve different goals and circumstances;
- Compare and contrast arbitration with mediation, other “ADR” approaches, and litigation in court;
- Demonstrate knowledge and understanding of arbitration usages in business relationships, and the role of arbitrators;
- Show an understanding of key differences in leading arbitration rules and procedures, including differences in arbitration provider institutions, and arbitrator appointment procedures;
- Understand arbitration law under the FAA and important cases flowing therefrom;
- Identify and explain issues or process choices likely to arise before and during the course of an arbitration;
- Show an understanding of the kinds of remedies available in arbitration and ways of framing arbitration awards, and what happens after an award is rendered;
- Demonstrate knowledge and understanding of key principles and legal doctrine supporting arbitration agreements and awards; and
- Demonstrate knowledge and understanding of special fairness concerns associated with arbitration agreements between businesses and consumers or employees.

I am very excited to teach this class! I represented parties in arbitration when in practice and have been teaching and writing in the area for about 30 years. If there is a term or concept that you don't understand or there are areas that you would particularly like to explore, please let me know. I will do my best to find some way to address them in or outside the class.

II. **Covid Syllabus Statement -- Decreasing the Risk of COVID-19 in Classrooms**

This course is online, but you have rooms in the building for attending sessions via Zoom. Accordingly, you may be in the building, where you should pay attention to safety. MU cares about the health and safety of its students, faculty, and staff. To provide safe, high-quality education amid COVID-19, we will follow several specific campus policies in accordance with the advice of the Center for Disease Control and Boone County health authorities. This statement will be updated as information changes.

- If you are experiencing any COVID-related symptoms, or are otherwise feeling unwell, do not attend in-person classes and contact your health care provider and/or student health immediately. COVID symptoms include: fever greater than 100.4 or chills; cough, shortness of breath or difficulty breathing; fatigue; unexplained muscle or body aches; headache; new loss of taste or smell; sore throat; congestion or runny nose; nausea or vomiting; diarrhea.

- We will all wear face coverings while in the classroom, unless you have a documented exemption due to a disability or medical condition.

- We will maintain a 6-foot distance from each other at all times (except in specific lab/studio courses with other specific guidelines for social distancing).

- Online office hours will be available for all students.

Compliance with these guidelines is required for all; anyone who fails to comply will be subject to the accountability process, as stated in the University's Collected Rules and Regulations, Chapter 200 Student Code of Conduct.

Please report safety concerns to the Office of the Dean of Students. You can fill out a COVID Safety Measures Reporting Form here:

https://cm.maxient.com/reportingform.php?UnivofMissouriSystem&layout_id=38

By taking the above measures, we are supporting your health and that of the whole Mizzou community. Thank you in advance for joining me and your peers in adhering to these safety measures.

III. **Mental Health**

The University of Missouri is committed to supporting student well-being through an integrated network of care, with a wide range of services to help students succeed. The MU Counseling Center offers professional mental health care and can help you find the best approach to treatment based on your needs. Call to make an appointment at 573-882-6601. Any student in crisis may call or go to the MU Counseling Center between 8:00 – 5:00 M-F. After hours phone support is available at 573-882-6601.

Visit <https://wellbeing.missouri.edu> to take an online mental health screening, find out about workshops and resources that can help you thrive, or learn how to support a friend. Download Sanvello, a phone app that teaches skills and strategies to help you maintain good mental health.

Log in with your Mizzou e-mail to unlock all the tools available through Sanvello at no cost to you.

IV. Communication, Accommodation, and Pivot

This class is designed for online instruction to be sure we can provide the best instruction possible, given the current health issues. Accordingly, everything you need will be on Canvas: (1) Course website with assignments, announcements, discussions, syllabus, etc.; (2) Online office hours through MU Connect (again on Canvas); and (3) Links to join live Zoom classes. Also, you may always send me an email at schmitzaj@missouri.edu to schedule an online meeting if you have trouble with MU Connect.

I care deeply about teaching and your learning. We may be physically distanced, but I do not want you to feel distanced from me! I am here to assist you with class, and with law school generally. Moreover, please reach out if you are having trouble with the class, have critiques, have questions, etc.!

Course Web Site

This course will make use of a course web page through Canvas. The syllabus and other required course materials will be posted on this website. I will also send email messages to the email account that you designate when you register and will post **announcements** on Canvas. **It is your responsibility to check Canvas and your registered email regularly** (at least once a day) and to make sure the account remains functional and is not too full to accept emails.

Requirement of Consent for Redistribution of Recordings of Classes

University of Missouri System Executive Order No. 38 lays out principles regarding the sanctity of classroom discussions at the university. The policy is described fully in Section 200.015 of the Collected Rules and Regulations. In this class, students may not make audio or video recordings of course activity. Also, the redistribution of audio or video recordings of statements or comments from the course to individuals who are not students in the course is prohibited without the express permission of the faculty member and of any students who are recorded. Students found to have violated this policy are subject to discipline in accordance with provisions of Section 200.020 of the Collected Rules and Regulations of the University of Missouri pertaining to student conduct matters. In addition, a violation may affect a student's grade.

Collaborative Class and Contacting Me

Again, I stand ready to assist with your learning. You can access **office hours through MU Connect or send me an email for a Zoom meeting.**

V. Intellectual Pluralism

The School of Law community welcomes intellectual diversity and respects student rights. Students who have questions concerning the quality of instruction in this class may address concerns to either the Dean or Director of the Office of Student Rights and Responsibilities (<http://osrr.missouri.edu>). All students will have the opportunity to submit an anonymous evaluation of the instructor at the end of this course.

VI. Academic Integrity

Academic integrity is fundamental to the activities and principles of the School of Law. All members of the law school community must be confident that each person's work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The law school community regards breaches of the School of Law's Honor Code as extremely serious matters. In the event that you violate our Academic Integrity rules on any portion of the work required for this class, you may expect a failing grade in this course as well as possible disciplinary sanctions ranging from probation to expulsion. When in doubt about plagiarism, paraphrasing, quoting, collaboration, or any other form of cheating, consult the course instructor.

VII. Disabilities

Please let the Associate Dean or Registrar Boessen know as soon as possible that you anticipate barriers related to the format or requirements of this course; you have emergency medical information to share with me; or, you need to make arrangements in case the building must be evacuated.

If you require disability-related accommodations (such as a note taker, extended time on exams or captioning), please establish an Accommodation Plan with the Disability Center. The Center is located at S5 Memorial Union. You should also contact the Associate Dean for Academic Affairs Mitchell or the Law School's Registrar Boessen, so that they can help coordinate any necessary accommodation.

VIII. Class Attendance

Attendance, preparation, and engagement in the exercises are of the highest importance. Attendance is very important because much of the learning happens in class. Furthermore, this class is online so that you can remain safe while participating in exercises and discussion. These classes will be mainly **synchronous during the appointed class times**, and you should plan on attending during the times as noted in your schedule. **Be sure to consult Canvas for assignments, announcements, and class links!**

Nonetheless, we understand that flexibility is necessary – as Internet issues arise, people may suffer illness, etc. These are uncertain times! Accordingly, I ask that you do your best to attend class meetings, but let me know if there is a reason you need to. I will record class meetings via Zoom and these recordings will be posted on Canvas. **Above all, please let me know if you have questions or concerns as we go through the semester!**

IX. Class Readings:

You need to buy the basic course book, ARBITRATION: THEORY, PRACTICE AND LAW by Folberg, Golann, Stipanowich & Kloppenberg (Custom Edition 2016) (softcover). The ISBN # is ISBN 978-1-4548-8157-5. This is a CUSTOM book, which takes 9 chapters of a larger dispute resolution book. You probably cannot get it on Amazon but there may be used books out there because it is also used at Pepperdine, which offers many sections of the class each year. There should be copies available in the bookstore and there are [electronic copies](#) available online. You

will also be given access to a variety of other sources via Canvas and will need to access other materials that are available for free online. These include:

- [American Arbitration Association \(AAA\)](#), [JAMS](#), [CPR](#) and other arbitration and dispute resolution rules;
- Arbitration statutes including the [Federal Arbitration Act \(FAA\)](#), the [Uniform Arbitration Act \(UAA\)](#) and the [Revised Uniform Arbitration Act](#);
- [The Code of Ethics for Arbitrators in Commercial Disputes](#);
- [The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration](#); and
- Other articles and standards.

Also, check out the [website I help edit](#) for current arbitration issues and interviews with leading minds regarding arbitration. See <https://arbitrate.com/index.cfm>.

X. **Evaluation:**

Grading will be based on the following 2 components:

- Twenty-five percent (25%) of your grade will be class participation. You really need to be prepared to answer questions and discuss the readings, and energetically participate in breakout group discussions and exercises. I keep track of people's participation and believe it is important to reward students for working hard in class.
- Seventy-five percent (75%) of your grade will be based on a Final Exam.

XI. Class Assignments

Unless otherwise indicated, all assignments refer to ARBITRATION: THEORY, PRACTICE AND LAW by Folberg, Golann, Stipanowich & Kloppenberg (Custom Edition 2016), which you need to buy from the bookstore or online. Additional materials will be posted on Canvas. [Note, it is possible the schedule and assignments may be adjusted due to changing circumstances.]

****NOTE: I ask you to “be prepared” for all Questions and Problems but we will not have time to tackle it all!** However, I have kept the reading fairly light and considering the Questions and Problems is good practice as you study and prepare for the final! Also, I hope you will find it interesting—as there are thorny legal issues and policy considerations in Arbitration! Still, please understand that we will not actually discuss all these Problems and Questions during class meetings.

1. Introducing the Course – 1/19

READ CHAPTER 17 A. & most of B. (PP. 543-554) and be prepared to discuss Prob. 1 on pp. 553-54. Also, bring in an arbitration clause to the Zoom meeting – check your own contracts!

- *Introduction to the class*
- *Prob. 1*

2. Arbitration vs. Other Dispute Resolution Tools – 1/21

READ Chapter 17 B and C (PP. 554-556) and be prepared to discuss all Questions included therein. We also will play *The Arbitration Game*.

3. Why Arbitration?/ The Many Kinds of Arbitration – 1/26

READ Chapter 17 D. THROUGH F. (PP. 557-572) and be prepared to discuss all Questions therein.

- Example we will watch in class: Securities arbitration
<https://www.youtube.com/watch?v=1ZhD06brOjU>
- See also: IP Arbitration: <https://www.youtube.com/watch?v=qZS4n1Cd0zA>, Sports Arbitration: https://www.youtube.com/watch?v=dVphHaOW_ds & there are more on Arbitrate.com!

4. Arbitration Agreements: Comparing Institutions, Rules, Panels – 2/2 Special Guest from AAA, Svetlana Gitman, Vice President Commercial Division at American Arbitration Association!

READ CHAPTER 18 A-D (PP. 573-582), and be prepared to learn about Arbitration Associations.

5. Considering Rules in Action – 2/4

Prepare Problem 1 pp. 582-83. You will need to do online research before class and READ the commercial arbitration rules for AAA, JAMS and CPR. In class, you will work in groups to answer the questions on p. 582-83 and have your reasons for what rules you would prefer for the factual scenario.

6. Drafting Arbitration Agreements—2/9

READ CHAPTER 18 Scope and Drafting Issues (PP- 583-589), and be prepared to discuss Problem 2 on pp. 588-89! You will have to consult [the AAA Commercial Arbitration Rules](https://adr.org/sites/default/files/Commercial%20Rules.pdf) to complete this exercise. See <https://adr.org/sites/default/files/Commercial%20Rules.pdf>. We also will watch and talk about this interview in class: <https://www.youtube.com/watch?v=eAh6Irb6bSg> (interview with a great arbitrator on drafting!).

7. Selecting Arbitrators – 2/11 – Special Guest Gilbert Camarena, Manager of ADR Services for AAA
READ CHAPTER 19 Selecting Arbitrators (PP. 591-595) and be prepared to discuss Problem 1 and the Questions. You will have to consider the [AAA Arbitration rules for construction disputes](#). See their website.
 - Also consider diversity in arbitration!
 - See <https://www.youtube.com/watch?v=8C8YYNeGZtI>;
<https://www.youtube.com/watch?v=JsmRRNC95AI>

8. Arbitrator Disclosures and Challenges -- 2/16
READ CHAPTER 19.B (PP. 595-601) and be prepared to discuss all Problems and Questions therein. You will also need to consider the Code of Ethics for Arbitrators in Commercial Disputes (https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_Ann/).

9. Conducting Arbitrations: Pre-hearing Process – 2/18
READ CHAPTER 20 PP. 603-608, and be prepared to discuss Problem 1 and Questions 1-4 in class. Be sure to reference the Rules noted in the Problem and Questions. Again, it may seem like it is “light” reading but you need to reference the rules noted – which you can find online.

10. Interim Measures and Motions – 2/23 Special Guest Nick Gowan!
READ CHAPTER 20 PP. 608-613, and be prepared to discuss Questions 5-10. Again, be sure to read the Rules referenced. Also, please read Dispositive Motions: A Step Change, at <http://arbitrationblog.kluwerarbitration.com/2020/08/12/dispositive-motions-a-step-change/>. What issues come up with Covid and motions?

11. Arbitration Hearing, Award and Basic Process – 2/25
READ CHAPTER 20 PP. 614-627, and be prepared to discuss Questions 12-27 (especially 12-19). Again, please reference rules as needed. As always, we will not have time to tackle all the questions, but preparing ALL of them is good practice as you study and prepare for the final.

12. The Law of Arbitration & Enforcement of Arbitration Agreements – 3/2
READ CHAPTER 21 PP. 629-643, and be prepared to discuss Questions 1-9. As always, we will not have time to tackle all the questions, but preparing them is good practice as you study and prepare for the final.

13. Arbitrability – Deeper Dive – 3/4
READ CHAPTER 21 PP. 644-656, and be prepared to discuss Questions 10-19. As always, we will not have time to tackle all the questions, but preparing them is good practice as you study and prepare for the final.

14. Delegation Clauses – 3/9 (Special Guest Prof. Chris Drahozal to discuss Shein!)
Recall that most prominent arbitration procedures give arbitrators authority to resolve all jurisdictional issues. See, e.g., AAA Commercial Arbitration Rules, R-7. Do such provisions reinforce the doctrine of Prima Paint? Also, read *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019), available at https://www.supremecourt.gov/opinions/18pdf/17-1272_7148.pdf. In this case, the U.S. Supreme Court was asked whether it is consistent with the FAA for a court (rather than an arbitrator) to determine the arbitrability of a dispute when the argument for arbitration was allegedly “wholly groundless.” Do you agree with the result? Why or who not? <https://www.youtube.com/watch?v=KK7oz1DkvcQ>.

15. Preemption – 3/11

READ PP. 657-669, **and** read *Kindred Nursing Centers L.P. v. Clark* (online at https://www.supremecourt.gov/opinions/16pdf/16-32_o7jp.pdf). Be prepared to discuss Questions 20-26. As always, we will not have time to tackle all the questions, but preparing them is good practice as you study and prepare for the final.

16. Judicial Support of Arbitration – 3/16

READ PP. 669-673, and be prepared to discuss all Problems and Questions therein. **Also**, consider the case of video hearings in the age of Covid. How does the FAA § 7 apply for online arbitration hearings? **Read *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019), available on Westlaw.** What does this mean for testimony via video? Do you agree with the court? Why or why not?

17. Labor Arbitration and Practice – 3/18 Special Guest Presenter Dean Emeritus Bob Bailey

18. Enforcing Awards—Part I – 3/23

READ CHAPTER 22 PP. 675-693, and be prepared to discuss the Questions and Problem 1A therein.

19. Enforcing Awards – Part II – 3/25

READ PP. 693-710, and be prepared to discuss the Questions contained therein. *Note we are skipping 711 to the end of the chapter because this is covered in the International Commercial Arbitration course.

20. Fairness in Arbitration Part I – 4/6

READ CHAPTER 23 PP. 715-723, 725-730, and be prepared to discuss the Questions and Problem 1 on pp. 728-729.

21. Fairness in Arbitration Part II – 4/8

READ PP. 736-749, and be prepared to discuss the Questions therein. Also, consider “the other side” and how arbitrators may help address power differentials? Consider <https://www.youtube.com/watch?v=vYmj9pTWh1I>.

22. Recent Developments from the Book – 4/13

READ PP. 765-779, and be prepared to discuss the Questions therein. Also, consider recent bills, such as H.R.1423 - Forced Arbitration Injustice Repeal Act (<https://www.congress.gov/bill/116th-congress/house-bill/1423/text>).

23. More on Interaction Between Arbitration and Class Proceedings – 4/15

Read *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) – You can find both cases online. In light of these cases, read *Sun Coast Resources v. Conrad*, 956 F. 3d 335 - Court of Appeals, 5th Circuit (2020), also on Westlaw. We will have fun discussing this! What do you think of class waivers, and the idea of class arbitration? Get ready to debate!

24. What About Transportation Workers? 4/20

Read *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

25. Mixing and Matching: Med/Arb and the Like— 4/22 – Special Guest Prof. Tom Stipanowich who wrote the book!
READ CHAPTER 25 Mixing and Matching the Process to the Dispute (PP. 783-795), and be prepared to discuss the Problems and Questions in that chapter in class.

26. “Arbitration in the Age of Covid”—Considering Arbitration’s Move Online – 4/27
Read Schmitz, Amy J., *Arbitration in the Age of Covid: Examining Arbitration's Move Online* (DRAFT September 25, 2020). To be edited and published in CARDOZO J. CONFLICT RESOL. (2021). Available at SSRN: <https://ssrn.com/abstract=3699778>.

27. Review and Final Prep! 4/29