Arbitration

Hamline University School of Law – Fall 2010

Professor David A. Larson

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Meeting schedule: Wednesday 2:00 – 3:50 p.m.

Room: Law 4

Required Reading:

1) Arbitration: Cases and Materials by Huber and Weston, LexisNexis (2nd ed. 2006) ISBN 0-8205-7011-7

2) Arbitration Advocacy by Cooley and Lubet (2nd ed. 2003), NITA (National Institute for Trial Advocacy) ISBN 978-155681-799-1

Syllabus revisions that are made during the semester will be posted on TWEN, so please always refer to TWEN for the most up-to-date copy of the syllabus. Because I am hoping to invite at least one guest speaker to our class this semester, we will have to remain flexible and it is likely that the syllabus will be revised during the semester.

Goals and Objectives*:* Students will be introduced to both the arbitration process and controversial legal issues that have arisen in the arbitration context. Arbitration is a binding method of dispute resolution. Students will learn to identify ambiguous and problematic situations. Because parties typically agree to arbitrate disputes before they know what disputes will arise, for instance, those parties sometimes regret that choice and subsequently attempt to escape their arbitral agreements. Arbitration historically has been used primarily in labor-management disputes and commercial disputes. More recently and quite controversially, arbitration has been used to resolve statutory claims that include employment discrimination, antitrust and RICO claims. Credit card collection arbitrations similarly have become quite controversial and receiving significant attention from national and state policy makers.

As the use of arbitration increases, so does the controversy. Students will critically analyze actual arbitration agreements and edit those agreements as necessary. Students also will draft arbitration clauses. Students will engage in simulations and role-playing and will gain experience acting as neutrals, advocates, parties, and witnesses in arbitration hearings. Students will be assigned judicial decisions and will be asked to make presentations regarding

those cases. They will be encouraged to use multimedia resources in making those presentations.

Each student will submit a written paper (at least 4,000 words in length including footnotes) and, if time permits, make a formal presentation to the class at the end of the semester. The student may select a particular subject that he or she finds interesting (subject to the approval of Professor Larson). The students are encouraged to use the technology and media that they believe will support their presentation. Student's performance regarding class discussion and participation in the simulation and hypothetical exercises will be considered when assigning a final grade for the course.

Oral Summary/Synopsis of Final Paper
The oral synopses are designed to provide you with an opportunity to share your work with your classmates. Students are encouraged to share their topics with the class in a natural, engaging and conversational style, and to allow a few minutes for questions/discussion. Students' questions and class discussion will be considered as part of class participation.

Attendance Policy: Fourteen class sessions are scheduled. **Two or more absences will be considered excessive.** Attendance will be taken by circulating the Registrar's attendance sheet. If a student misses two classes, that student will be required to write and submit a 1,000 word paper that discusses one of the issues covered in the classes the student missed. The topic of that paper will be determined by Professor Larson. **Three or more absences will be brought to the attention of the Associate Dean and may result in a course withdrawal (W) or a failing grade (F).**

Testing and Grading: Students will be graded primarily based upon their written paper and presentation. Additional credit will be given for students who make significant substantive contributions during our weekly class meetings. Although no changes are anticipated, if the grading criteria does change then any change will be brought to the students' attention during class and also posted on TWEN.

Papers must be at least 4,000 words in length and must be turned in as instructed by 4:00 p.m. on the last day this class meets. ***If a paper is submitted after the deadline, the grade will be reduced as follows.*** Late paper grades will be reduced one grade level for each day the paper is late. For example, a B+ will become a B if it is one day late. If a paper is two days late, then a B+ paper will be given a B-.

If a student uses classroom time to read or send e-mail messages, visit web sites that the class has not been instructed to visit at that particular time, or engage in any other online or technology based activities (including cellular telephones, text messaging, and social networks) not directly related to the current classroom discussion, that student will be warned one time. If there is a second violation of

this policy, that student will be asked to drop the course and will not receive academic credit for the course.

Important Arbitration Statutes

Arbitration law is largely grounded in statutes. In 1925 the United States Congress passed the Federal (or U.S.) Arbitration Act (FAA). In 1955, the Commissioners on Uniform State Laws (NCCUSL) approved and recommended for adoption by state legislatures the Uniform Arbitration Act (UAA). The UAA was adopted by 35 states and 14 others have adopted substantially similar legislation. The primary purpose for the FAA and the UAA is to make agreements to arbitrate disputes enforceable by courts. In 2000, the Commissioners on Uniform Laws approved and recommended for adoption by the states the Revised Uniform Arbitration Act (RUAA), which addresses many issues not specifically covered by the FAA and the UAA. The RUAA has been adopted by 12 states and the District of Columbia. The RUAA, with the drafters' explanatory comments, can be viewed online at the following website: http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. The comments contain a wealth of information regarding the development of arbitration law since 1925, explanations for modifications to the UAA and discussion of amendments that were considered, but not adopted. They are an excellent resource for research papers and a general understanding of the arbitration process. The FAA, RUAA, and UAA are reprinted as Appendices A-C in the Casebook.

Arbitration References

National Conference of Commissioners on Uniform State Laws
www.nccusl.org
American Arbitration Association (AAA) www.adr.org
JAMS www.jamsadr.com
National Arbitration Forum www.adrforum.com
CPR, ICC, LCIA

Assignments

August 25 – Introduction to Arbitration

1) **Arbitration: Cases and Materials**, read pp. 1 – 38

2) Read Public Citizen Report (9/27/07) The Arbitration Trap: How Credit Cards Companies Ensnare Consumers
http://www.citizen.org/documents/ArbitrationTrap.pdf

3) Read "The Current State of Consumer Arbitration"
http://www.aei.org/publications/filter.all,pubID.28950/pub_detail.asp

4) Read Public Citizen Report (7/29/08) The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration

http://www.citizen.org/documents/ArbitrationDebateTrap%28Final%29.pdf

Introducing and Defining Arbitration

***Read**:* Chapter 1 (pp. 1-38)

Consider: Be prepared to describe how you are a party to an arbitration contract.

If possible, bring a copy of the arbitration provision.

I. The Nature & Scope of Arbitration
   A. History & Modern Use of Arbitration
   B. Arbitration Legislation: The FAA, UAA, RUAA
   C. What is Arbitration?
      1. Defined

Contrast: Appraisal, Valuation & Similar Processes

Sept. 1

1) Video introduction to Arbitration. For the class next week students will draft a brief award based upon the arguments presented in the video. The award should explain which party wins and why that party is the prevailing party.

2) **Arbitration Advocacy** read pp. 1 – 71

Sept. 8

Arbitration Legislation & Scope

Read: **Arbitration: Cases and Materials** Chpt. 1 (pp. *57*-76);

Review text of FAA, UAA, and RUAA, 2000 [Appendices A-C]

***Consider*:** How has the Supreme Court interpreted application of the FAA?

1) Textbook and TWEN Course Materials

A. Arbitration Legislation: Examine the *FAA, UAA.*
B. Arbitration of Statutory Claims
   1. Shifting Judicial Attitudes: Securities Claims
      a. *Wilko v. Swan* (US 1953)
      b. Mitsubishi v. Soler (1985) [class]
      c. Shearson/AmEx v. McMahon (US 1987) pp. 66
      d. Rodriguez v. Shearson/AmEx (1989) pp. 74

2. Labor & Employment Claims:
   a. *Gilmer v. Interstate Johnson*, 500 US 24 (1991) (use this hyperlink to the case on Westlaw)
   b. *14 Penn Plaza v. Pyett*, 120 SCT 1456 (2009) ((use this hyperlink to the case on Westlaw or the TWEN Course Materials)
      (holding that provisions in collective bargaining agreements that clearly and unmistakably require union members to arbitrate statutory claims are enforceable). Case reverses cases holding union members cannot be required to arbitrate statutory claims. *Cf.* Wright v. Maritime (1998); Alexander v. Gardner-D (US 1974).
   c. *Note Related Cases: Circuit City v. Adams* (US 2001) (interpreting 'employment' exception in § 2); *EEOC v. Waffle House* (US 2002) (administrative agency not bound by MAK)

<u>Sept. 15</u>

1) Please take a few minutes to find a print a copy of an arbitration clause you have accepted for a service or product you have purchased (e.g., cell phone, credit card, cable TV)

2) Please download and read the article "Artificial Intelligence: Robots, Avatars and the Demise of the Human Mediator" at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461712 (Be certain to download and read the entire article, not just the abstract)

Please prepare to explain how and where artificial intelligence devices might be integrated into arbitration processes, noting specifically the type and form of artificial intelligence

3) Searle Report (especially the executive summary)
http://www.searlearbitration.org/

4)) Navigant Consulting report (Course Materials)

<u>Preemption & Role of State Law</u>

Read: **<u>Arbitration: Cases and Materials</u>** Chpt. 3 (pp. 179-209, 217-228)
Consider: How can states regulate arbitration? May parties avoid the FAA?

II. <u>Interaction Between State & Federal Law: Preemption</u> [Chapter 3]
   A. The Role of State Arbitration Law

B. FAA Preemption
   1. *Southland Corp. v. Keating*, 465 US 1 (1984) p. 183
   2. *Allied-Bruce Terminex Co. v. Dobson (US 1995)* p. 192
   3. *Doctor's Associates, Inc. v. Casarotto*, (US 1996) p. 200
   4. *Presten v. Ferrer*, 128 S.Ct. 978 (2008) (hyperlink and course materials)

C. Federal Court Jurisdiction & the FAA
   Under FAA, Sec.4, federal court jurisdiction to compel arbitration requires underlying basis of federal court jurisdiction. *Vaden v. Discover Bank*, 129 S.Ct. 1262 (March 9, 2009) (applying "well pleaded complaint rule" requiring independent basis of federal jurisdiction to petition federal court to compel arbitration; state law counterclaims, even if preempted by federal law, do not provide basis to invoke federal court assistance pursuant to section 4 of the FAA).

D. Choice of Law Provisions
   1. *Volt Info. Sciences v. Stanford* (US 1989) p. 217
   2. *Mastrobuono v. Shearson Lehman* (US 1995) p. 223

E. Choice of Forum Provisions [note]
   1. *Carnival Cruise Lines v. Shute* (US 1991) [note]

Sept. 22

Break into small groups to discuss how Southland Corp., Allied Bruce Terminex, Doctor's Associates, Volt and Mastrobuono can be reconciled. Then decide if and, if so, how arbitration clauses can be drafted that will ensure that arbitration will be compelled or, in the alternative, that a judicial forum will remain available (for a least some situations) in spite of a general agreement to arbitrate all disputes.

Analyze and discuss *Presten v. Ferrer*, which we did not have time to discuss last week.

Sept. 29

Arbitrability, Separability

Reading: ***1)*** **Arbitration: Cases and Materials** Chpt. 2 (pp. 77-93, 106-119)
2) **Arbitration Advocacy** read pp. 73 - 126

Consider: When does the court vs. arbitrator decide questions of arbitrability?

III. Disputes Subject to Arbitration
   A. Gateway Issues: Arbitrability and Who Decides -- Arbitrator or Court?

1. * *First Options v. Kaplan* (US 1995) p. 80
2. * *Hosam v. Dean Witter* (US 2002) p. 83
3. "Arbitral" Issues: The Scope of Claims and Issues Referable to Arbitration

B. Contract Formation: Arbitration Provisions
1. *Hill v. Gateway* (7th Cir. 1997) p. 90

C. Separabiltiy Doctrine
1. *Prima Paint* (US 1967) p.106 -115
2. *Primerica Life Ins. v. Brown* (5th Cir. 2002) p. 116
3. *Spahr v. Secco* (10th Cir. 2003) p. 118
4. *Buckeye Check Cashing v. Cardegna* (US 2006)p. 166-169

Oct. 6

Reading: 1) **Arbitration Advocacy** read pp. 126 – 178
2) Please review pages assigned in the preceding weeks in this text in preparation for a simulation exercise

October 13

Contract Law Defenses: Unconscionability

Read Chapter 2 (pp. 47-51, 158-166, 170 - 178); Arbitration Fairness Act

***Consider*:** Under what circumstances may the arbitration obligation be avoided? Who makes that determination? How? Should Congress amend the FAA? How?

D. Unconscionability, Adhesion & Related Contract Defenses

1. *Hooters v. Phillips*, (4th Cir. 1999) p. 47-50
2. *Jenkins v. First Am. Cash Advance* (11th Cir. 2005) pp. 158-166

E. Mutuality of Remedy: Must Arbitration Be a Two-Way Street?

Cordova v. World Finance Corp. of New Mexico, 2009 WL 1456347 (N.M. April 2009) (nonmutual arbitration obligation invalidates arbitration agreement incident to consumer contract)

F. In Summary: Arbitrability, Gateway Issues & Defenses to Arbitration
1. Lehrman, *On Arbitrability* pp. 170-178

G Avoiding Arbitration for Consumer/Employment/Franchisees?

Read: Arbitration Fairness Act of 2009

H.R. 1020, S. 1782 (Course Materials) and be prepared to discuss merits

October 20

Read: Advance reading assignments are posted in the Course Materials section of TWEN

a) China Arbitration Law

b) China Constitution – at a minimum read the Preamble and Chapter One (Articles 1 – 32)

c) Intercontinental Packaging Company v. China National Cereals

d) Wilcocks v. Phillips

e) Sourcing Unlimited Inc. v. Asimco International Inc.

Mr. Chang Wang, guest speaker

As China emerges as an economic power, more and more law firms are clamoring to enter this region of the world. What was once the forbidden territory is now the land of opportunity. However, before any law firm or lawyer can reap the benefits of what China has to offer, it is essential that they have a grasp of Chinese legal and arbitral institutions.

Chang Wang is an associate professor of law at School of American and Comparative Law, China, University of Political Science and Law. He also is a consultant with Thomson Reuters Legal, for whom he has been working on business development in China since 2005.

He is lead advisor to TRL's China Academic Programs and a board member of the Hildebrandt China Law Conference. Most recently, he has been working on the Westlaw China project. In China, Mr. Wang is a member of the Central Civil and Judiciary Committee of China Association for Promoting Democracy, the fourth largest political party in the Mainland. He writes extensively in English and Chinese on constitutional law, legal research, intellectual property, critical theory, and film history, and his articles appear in leading Chinese legal and art journals.

In addition to teaching legal research at China University of Political Science and Law, Mr. Wang speaks frequently at top law schools and government agencies in China on the rule of law and legal research. He spent this past summer working on a project in Beijing, China. In July 2009, he taught a course at the University of Lucerne in Switzerland.

In the U.S., Mr. Wang serves on the China Steering Committee of American Bar Association and the Advisory Board of the University of Minnesota China Art Program. Mr. Wang received his B.F.A. in Film Studies from Beijing Film Academy in 1995; an M.A. in Comparative Literature and Comparative Cultural Studies from Peking (Beijing) University; an M.A. in American Art History from University of Illinois at Urbana-Champaign; and his Juris Doctor from the University of Minnesota Law School. He has been admitted into practice in Minnesota, the District of Columbia, and federal courts.

3) The books China Arbitration Law and Chinese Legal System, Arbitration, and Legal Education also have been posted on TWEN.

Oct. 27

We Continued our discussion regarding the circumstances under which the arbitration obligation may be avoided, who makes that determination, and how that determination is made? We also discussed whether and, if so how, Congress should amend the FAA?

We divided into small groups to draft, and then discuss, a new arbitration clause to replace the one that had been held unconscionable in the Hooters case.

We reviewed the assignment from two weeks ago and discussed the cases that we did not have time to analyze in that earlier class.

G. Unconscionability, Adhesion & Related Contract Defenses

1. *Hooters v. Phillips*, (4th Cir. 1999) p. 47-50
2. *Jenkins v. First Am. Cash Advance* (11th Cir. 2005) pp. 158-166

H. Mutuality of Remedy: Must Arbitration Be a Two-Way Street?

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I. In Summary: Arbitrability, Gateway Issues & Defenses to Arbitration
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G Avoiding Arbitration for Consumer/Employment/Franchisees?

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Nov. 3

A) Mechanics of the Arbitration Process (from previous week)

B) Arbitrator Selection and Ethics

Review from last week: Ch. 4 (pp. 247-64, 275-78, 292-313); Ch. 5 (pp. 315-348, p.359)

Read: Ch. 6 (pp. 373-394, 415-438, 473-478)

Consider: Debrief the arbitration hearing and process. Consider the role (and power) of the arbitrator. Are arbitrators bound by any code of ethics? What is important in selecting an arbitrator? How may be an arbitrator be disqualified (or sued)?

IV. Getting to Arbitration

A. Pitfalls in Getting to Arbitration & How to Overcome Them

B. Losing the Right to Arbitrate: Waiver pp. 258-264
1. *Ivax Corp. v Brau* (11th Cir 2002)

C. RUAA Commentary on Waiver

D. Pre-Arbitration (interim Relief): By the Courts pp. 275-278
1. *Bradford-Scott v. Physician Computer Network* (7th Cir.1997)

E. Recommendations for Addressing Interim Relief Issues pp. 292-294
1. Wauk, *Preliminary Injunctions in Arbitrable Disputes*
2. RUAA, Section 8 Provisional Remedies

F. Interim Relief and Pre-Hearing "Orders by Arbitrators p295—297
1. Interim Relief: The Handoff from Court to Arbitrator
2. Judicial Review of Pre-Award Arbitral Orders

G. Pre-Hearing Conferences, Discovery, and Preliminary Matters pp. 297-300

H. Summary Disposition RUAA 15(b) pp. 306-313

V. The Arbitration Process (pp. 315-348, p.359)

A. Drafting Dispute Resolution Clauses

B. The Arbitration Proceeding pp. 333-348
1. *AAA, A Guide for Commercial Arbitrators*
2. Mentschikoff, *Commercial Arbitration*

C. Modification and Correction of Arbitration Awards: *Functus Officio* p.359
1. RUAA, Commentary to Section 20

VI. Arbitrator Selection, Role & Ethical Standards

A. Arbitrator Selection and Role
1. Party Selection of Arbitrators
2. Provider/Administrative Agency Appointment Rules
3. Court Appointment of Arbitrators
4. Qualification and Standards for Arbitrators

B. Professional Responsibility: Ethical Standards for Arbitrators
1. ABA, Code of Ethics for Arbitrators in Commercial Disputes (2004)
2. Disclosure of Interests and Relationships

C. Grounds for Disqualifying an Arbitrator: Bias
1. *Commonwealth Coatings v. Cont'l Casualty* (US 1968) pp. 416-420
2. *Merit Insurance v. Leatherby Inc.* (7th Cir. 1983) pp. 420-427
3. RUAA Commentary on Sec. 12 and 14 (2000)

D. Liability of Arbitrators and Arbitral Organizations
1. RUAA Section 14, Immunity of Arbitrator
2. Weston, *Reexamining Arbitral Immunity* pp. 474-478
3. *Minnesota Attorney General v. NAF* [class]
What was the basis for the Minnesota AG's 53-page complaint against the National Arbitration Forum? Why did NAF and AAA decide to no longer administer consumer arbitration cases? Was this justified? What role (and impact) does an arbitration provider play?

Nov. 10

A) Arbitrator Remedial Powers

Read: Ch 7 (pp. 479-488, 497-518) and Rev. Univ. Arb. Act.
***Consider*:** Do arbitrators have powers to order equitable relief and punitive damages? Should they?

B) Judicial Review of Arbitral Awards

Read*:* Ch 8 (pp. 519-542, 596-610); "*Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill?"* at http://ssrn.com/author=709717

Topics: Judicial Review of Arbitral Awards

VII. Remedial Powers of Arbitrators
- A. Standard Commercial Contract Provisions
- B. Remedial Authority of Arbitrators
  - 1. RUAA 21 Remedies, Fees, Expenses
  - 2. May Arbitrators Order Remedies Unavailable to Judges?
- C. Equitable Remedies: Specific Performance, Reformation, Injunctions
- D. Award of Punitive Damages by Arbitrators pp. 497-499
- E. Statutory Rights, Arbitral Remedies & Remedy-Stripping Provisions pp. 499-518
  - 1. Comments
  - 2. *DiRussa v. Dean Witters* (2nd Cir. 1997)
  - 3. Halligan v. Piper Jaffrey (2nd Cir. 1998)
  - 4. *Judicial Review of Arbitral Awards: Manifest Disregard*
  - 5. *Remedy-stripping provisions*

VIII. Judicial Review of Arbitration Awards
- A. Obtaining Review of Arbitration Award in Federal Court
- B. Judicial Review of Arbitration Awards is Extremely Limited
  - 1. Olson v. Wexford Cleaning (7th Cir. 2005)
  - 2. Burchell v. Marsh (U.S. 1854)
  - 3. Moncarsch v. Heily & Blasé (Cal. 1992)
- C. Statutory Grounds for Vacating Arbitration Awards
- D. Non-Statutory Grounds for Vacating Arbitration Awards
- E. Contract-Based Standards for Judicial Review
  - 1. *Kyocera* (9th Cir.)
  - 2. *Prescott v. Northlak Christian School* (5th Cir 2004)
  - **3.** *Hallstreet v. Mattel*, 128 S.Ct. 1396 (US 2008)

Nov. 17 ***First Draft of Paper due***

Arbitration Advocacy read pp. 178 – 269; ***student presentations***

Dec. 1 **Arbitration Advocacy** read pp. 271 – 352; ***student presentations***

Dec. 6 – absolute deadline to submit final paper (see above)