

Arbitration

Fall, 2022 Joan Stearns Johnsen

Mondays: 10:00 am – 12:00 pm

Room Holland Hall 285D

E-mail: johnsen@law.ufl.edu

Cell: 617-549-0742

Class Syllabus and Policies

Required Course Materials:

ARBITRATION: THEORY, PRACTICE, AND LAW, FOLBERG, GOLANN, STIPANOWICH, KLOPPENBERG (WOLTERS KLUWER, CUSTOM EDITION, 3RD EDITION, 2016). (“TEXT”)

Please note that this text is taken from a larger textbook for courses that also cover negotiation and mediation. For this reason, the first chapter in this shorter book is chapter 17. *Given the number of exercises and guests, it may be necessary to make changes to this syllabus during the semester to accommodate the schedules of our guests or to allow for additional time to fully explore a particular exercise or assignment.* Thank you in advance for your flexibility and patience.

Description and Goals of the Course: This course is two credit hours. Please note that ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every “classroom hour” of in class instruction. Accordingly, it is expected that you will spend two hours preparing for every hour of in-class instruction each week. While readings will be primarily from the text, you will also be asked to read some recent court decisions and other supplemental materials. In addition, you will be expected to spend time preparing for in-class exercises as part of your outside of class preparation time.

Arbitration is a binding method of dispute resolution arrived at contractually. It is used in many different practice areas which means you may expect to encounter arbitration regardless of your area of specialty. Arbitration is commonly used to resolve- for example- corporate commercial disputes, international disputes, construction disputes, consumer disputes, labor disputes, employment disputes, antitrust class action disputes, intellectual property disputes, and securities disputes. Its popularity is due to its flexibility, finality, and potential savings in time and money. While arbitration superficially appears like litigation in court, it is not.

This course is an introduction to arbitration law, process, and advocacy skills. At the end of the course, you will understand how arbitration differs from litigation in court, how it fits in the dispute resolution continuum, the differences between various arbitration processes, and when and why to choose arbitration instead of litigation in court.

You will also learn how to draft an arbitration agreement, conduct a prehearing conference and an arbitration hearing, and how arbitrators deliberate and draft awards. Given the pandemic,

arbitrations are increasingly being conducted through Zoom or other similar platforms. Although this semester we will be in-person, we will include a discussion of the evolving practice of video remote arbitration. This class will familiarize you with how practitioners utilize the technology as well as how they adapt their skills to accommodate these changes.

Final Mock Arbitration: We will devote our 11th and 12th classes to our mock arbitration. We will discuss this in greater detail during class. **Attendance is mandatory!**

Grading: You will be graded based on 1) a three hour exam to be held in person; 2) on your attendance and preparation and participation in class work including any written assignments, and your preparation and participation in the final mock arbitration hearing. You must participate in the final mock arbitration to satisfactorily complete this course.

Your two-hour exam will count for 75% of your grade; your attendance, in-class participation, participation and performance in your final mock arbitration, and other written work during the semester will count for 25% of your grade.

For questions about delays in submitting assignments, please refer to the law school's policy, available at <https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/current-students/forms-applications/exam-delays-accommodations-form>.

The grading scale for the course is:

<u>Grade</u>	<u>Point</u>	<u>Grade</u>	<u>Point</u>	<u>Grade</u>	<u>Point</u>
A (Excellent)	4.0	C+	2.33	D-	0.67
	0.67				
A-	3.67	C (Satisfactory)	2.00	E (Failure).	0.0
	0.0				
B+	3.33	C-	1.67		
B (Good)	3.00	D+	1.33		
B-	2.67	D (Poor)	1.00		

Information on current UF grading policies for assigning grade points may be found at <https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/current-students/uf-law-student-handbook-and-academic-policies>.

Office Hours: My regular Office Hours are Mondays 12:00-1:00 for in-person meetings and Tuesdays from 8:30 to 9:30 for Zoom meetings. Additionally, I am always available for meetings by appointment. **You will find my remote Office Hours Zoom Link in a Canvas Module called "Office Hours."** I will use the same link each week.

Online Course Evaluations: Students are expected to provide professional and respectful feedback on the quality of the instruction in this course by completing online evaluations online via GatorEvals at <https://evaluations.ufl.edu>. Students will be notified when the evaluation period opens and may complete evaluations through the email they receive from GatorEvals, in their Canvas course menu under Gator Evals. Summary results of these assessments are available to students at <https://evaluations.ufl.edu/results/>.

UF Student Honor Code: Academic honesty and integrity are fundamental values of the University community. Students should be sure that they understand the UF Student Honor Code at <http://www.dso.ufl.edu/students.php>.

Accommodations: Students with disabilities requesting accommodations should first register with the Disability Resource Center (352-392-8565, www.dso.ufl.edu/drc/) by providing appropriate documentation. Once registered, students will receive an accommodation letter which must be presented to the Assistant Dean for Student Affairs (Assistant Dean Brian Mitchell). Students with disabilities should follow this procedure as early as possible in the semester.

Class Recording Policy: The Office of Student Affairs will continue to record all classes via Mediasite in case students must miss class for health reasons. The Office of Student Affairs will determine when students may have access to these recordings and the recordings will be password protected. These recordings will be retained only for a short period of time, and it is the student's responsibility to contact the Office of Student Affairs as soon as possible after an absence.

Preferred Name and Pronouns

It is important to the learning environment that you feel welcome and safe in this class; and that you are comfortable participating in class discussions and communicating with me on any issues related to the class. If your preferred name is not the name listed on the official UF roll, please let me know as soon as possible by e-mail or otherwise. I would like to acknowledge your preferred name, and pronouns that reflect your identity. Please let me know how you would like to be addressed in class if your name and pronouns are not reflected by your UF rostered name. I welcome you to the class and look forward to a rewarding learning adventure together.

You may also change your "Display Name" in Canvas. Canvas uses the "Display Name" as set in myUFL. The Display Name is what you want people to see in the UF Directory, such as "Ally" instead of "Allison." To update your display name, go to one.ufl.edu, click on the dropdown at the top right, and select "Directory Profile." Click "Edit" on the right of the name panel, uncheck "Use my legal name" under "Display Name," update how you wish your name to be displayed, and click "Submit" at the bottom. This change may take up to 24 hours to appear in Canvas. This does not change your legal name for official UF records

Discourse, Inclusion, and the Classroom Ethos

As a law student and future lawyer, it is important that you be able to engage in rigorous discourse and critical evaluation while also demonstrating civility and respect for others. This is even more important in the case of controversial issues and other topics that may elicit strong emotions.

As a group, we are likely diverse across racial, ethnic, sexual orientation, gender identity, economic, religious, and political lines. As we enter one of the great learning spaces in the world—the law school classroom—and develop our unique personality as a class section, I encourage each of us to:

- commit to self-examination of our values and assumptions
- speak honestly, thoughtfully, and respectfully
- listen carefully and respectfully
- reserve the right to change our mind and allow for others to do the same
- allow ourselves and each other to verbalize ideas and to push the boundaries of logic and reasoning both as a means of exploring our beliefs as well as a method of sharpening our skills as lawyers

As part of my commitment to teaching and serving the diverse UF Law community, I have signed the UF Law Anti-Racism Resolution.

Attendance and Preparation: This is largely a skills class. As such your attendance is essential to your ability to learn the material as well as to learn how to apply the skills. This is not material that you can learn from the text exclusively. Also, since you will be working in teams, any absences will not only hurt you, but will also disadvantage those with whom you have been paired. For this reason, please prepare thoroughly, do not miss class, and arrive on time. I do take attendance. Please e-mail me if you will be absent. Excused absences are still absences. Anything in excess of 5 hours of missed class time may render a student ineligible to receive credit for the course. Missing the final mock arbitration may also render a student ineligible to receive credit for the course. Excused absences are consistent with University policies.

Caveat: Given that we continue to be in a pandemic, if you are ill, stay home. your absence is excused!

(<https://catalog.ufl.edu/ugrad/current/regulations/info/attendance.aspx>) and require appropriate documentation.

Canvas: This class requires familiarity with Canvas. Our assignments and role plays as well as supplemental materials will be posted on Canvas. Please check Canvas regularly for new postings, announcements, and information. I also communicate regularly through the email feature of Canvas. **Please, verify that you have not disabled the email forwarding feature.** If you have difficulty accessing or working with Canvas, please let me know as soon as possible and reach out to the Help Desk.

Health and Wellness Resources:

- *U Matter, We Care*: If you or someone you know is in distress, please contact umatter@ufl.edu, 352-392-1575, or visit [U Matter, We Care website](#) to refer or report a concern and a team member will reach out to the student in distress.
- *Counseling and Wellness Center*: [Visit the Counseling and Wellness Center website](#) or call 352-392-1575 for information on crisis services as well as noncrisis services.
- *Student Health Care Center*: Call 352-392-1161 for 24/7 information to help you find the care you need, or [visit the Student Health Care Center website](#).
- *University Police Department*: [Visit UF Police Department website](#) or call 352392-1111 (or 9-1-1 for emergencies).
- *UF Health Shands Emergency Room / Trauma Center*: For immediate medical care call 352-733-0111 or go to the emergency room at 1515 SW Archer Road, Gainesville, FL 32608; [Visit the UF Health Emergency Room and Trauma Center website](#).

Any student who has difficulty accessing sufficient food or lacks a safe place to live is encouraged to contact the Office of Student Affairs. If you are comfortable doing so, you may also notify me so that I can direct you to further resources.

Reading Assignments and Important Dates

Week One (8/22)

Text Chapter 17-- Introduction and The Big Picture

Week Two: (8/29)

Text Chapter 18 –Arbitration Agreements and Pathological Clauses

In-Class Exercise: Deliberations: As Time Goes By;

Additional Reading/ Pre-emption: Please review the following cases keeping in mind that your primary focus in reading is the pre-emption doctrine. **As you read, think about the practical implications of these cases as well as the underlying rationales. I ask that you review these cases although we may not have enough class time to discuss them.**

State Law Pre-emption:

State law pre-emption:

Kindred Nursing Centers Ltd. Partnership v. Clark, 137 S. Ct.1421(2017).

Federal law preemption:

- *Epic Systems Corp. v. Lewis*, 1378 S. Ct. 1612 (2018)

Exercise and Assignment due to be submitted by Friday, 9/3, on Canvas: Client Counseling and Drafting: International House of Crepes / Wee Willie’s Waffelhaus Client Counseling, Negotiation and Drafting. **N.B. You will not be using the AAA Commercial Rules for this Exercise. You will be using the CPR Commercial Administered Rules.** These rules are available online at <https://www.cpradr.org/resource-center/rules/arbitration/administeredarbitration-rules-2019>

-- Labor Day—No Class (9/5)

Week Three: (9/12)

Text Chapter 19– Selecting Arbitrators (First Hour)

During the second hour of class, we will review your arbitration clauses. Allen Waxman, President and CEO, CPR,

Week Four: (9/19)

Text Chapter 21- The Law of Arbitration: Judicial Enforcement of Arbitration **Agreements**

In addition to your text, please review these cases. Be prepared to answer the following

questions: How would you delegate authority to the panel in your arbitration agreement if you would like the panel to decide issues of arbitrability? How should you draft your clause if you would like the court to decide issues of arbitrability? Is including Institutional Rules that delegate authority to the panel sufficient to satisfy the current legal standard? **I ask that you review these cases although we may not have enough time in class to discuss them.**

- [Rent-A-Center, West, Inc. v. Jackson](#), 130 S. Ct. 2772 (2010) (who decides arbitrability?)
- [Henry Schein, Inc. et al v. Archer and White Sales, Inc.](#), 139 S. Ct. 524 (Jan. 8, 2019) (no “wholly groundless” FAA exception to delegation); [Archer and White Sales, Inc. v. Henry Schein](#), No. 16-41674, (5th Cir., Aug. 19, 2019).

https://www.supremecourt.gov/opinions/20pdf/19-963_2c8f.pdf (dismissing second cert petition as improvidently granted January 25, 2021).

Week Five: (9/28)

Text Chapter 20-- Arbitration Procedures, Rules, and Awards

Guest speaker for the first hour, from the American Arbitration Association

Week Six: (10/3)

Text Chapter 21 – The Law of Arbitration: Judicial Enforcement of Arbitration Awards.

In addition to your text, please also read the following cases:

[Monster Energy v. Schechter, et al., California](#) S. Ct., Case No. S251392 (July 11, 2019).

(Arbitrator’s failure to disclose as grounds for vacatur)

[Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc., et al.](#), 939 F.3d 1145ge (11th Cir. 2019). (FAA and pre-hearing discovery. N.B. Contrast this application of the FAA with the provisions contained within the Florida Arbitration Act).

[GE Energy Power Conversion France SAS, Corp., v. Outokumpu Stainless USA, et al.](#), 140 S. Ct. 1637 (2020) (Supreme Court upholds the theory of equitable estoppel as a basis for binding non-party signatories to an arbitration agreement.)

([Outokumpu Stainless USA, LLC v. Covertteam SAS](#) Fifth Circuit decision on remand.

Not reported in Fed. Reporter. July 8, 2022 WL 2643936)

Prepare for In-class Exercise for next week: Planning the Arbitration Process Pre-hearing

Week Seven: (10/10)

Text Chapter 23– Fairness in Arbitration, Part I, Employment; Consumer; and Adhesion Contracts. In class exercise: Prehearing. You will be appearing before professional arbitrators. I will be observing your presentations. **Please prepare thoroughly!**

Week Eight: (10/17)

Guest Speakers! Prof. Homer LaRue, Howard University School of Law and Imre Szalai, Loyola University New Orleans College of Law

Text Chapter 24- Fairness in Arbitration part II: Recent Legislative and Judicial Developments. Please also review the following case. We will have guest speakers today. Today's class will be on Zoom and open to the public. We will discuss this in class.

- *DIRECTV v. Imburgia*, 136 S.Ct. 463 (2015) (while parties can agree to application of state law in their arbitration agreement, the Federal Arbitration Act requires application of valid law. In this case, the FAA does not permit application of California law that was held preempted by *Concepcion*)
- *Viking River Cruises Inc. v. Moriana*, 142 S. Ct. 1906 (June 15, 2022), holding that the Federal Arbitration Act mostly preempts California's Private Attorneys General Act of 2004, Employees who have agreed to mandatory arbitration must arbitrate their individual Private Attorney General Act ("PAGA") claims.

Week Nine: (10/24)

Text Chapter 25 – Mixing and Matching the Process to the Dispute and Current Issues:
Preparation for Mock Arbitration

Second Hour: Current Legislative Issues: Guest: Larson Frisby, Associate Director of Governmental Affairs, American Bar Association.

Week Ten: 10/31

Arbitration Advocacy (Handouts to be Provided)

Week Eleven: 11/7

Mock Arbitration

Week Twelve: 11/14

Mock Arbitration and Debrief

Week Thirteen: 11/21 Final Class-- Review

Review