**Arbitration**

# Fall, 2020

# Joan Stearns Johnsen

Mondays: 9:30 am – 10:30 pm

Online-Synchronous

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# 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. Also, please pay close attention to the reading assigned for each week. The readings are not assigned sequentially. This class will be taught synchronously online. 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.

Arbitration is a binding method of dispute resolution arrived at contractually. Arbitration is used in various contexts and in various forms. It is popular in resolving domestic business to business commercial disputes, cross border commercial disputes, investor state disputes, consumer disputes, labor disputes, employment disputes, antitrust class action disputes, and securities disputes. Arbitration continues to grow in importance and popularity. This course is an introduction to the law of arbitration as well as an introduction to the process and the specific skills relating to arbitration.

At the end of the course you will understand how arbitration fits in the dispute resolution continuum. You will also understand the differences between various arbitration processes including international arbitration. You will learn the foundation of arbitration law in the United States and the direction in which arbitration law is moving. You will also learn how to draft an arbitration agreement, conduct a pre-hearing conference, manage and conduct an arbitration hearing including blind cross, and how arbitrators deliberate and draft awards. In addition, through this class you will learn the practice of conducting a video remote arbitration. Given the current pandemic, arbitrations are increasingly being conducted through Zoom or other similar platforms. 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 final two 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 two hour exam; 2) on your attendance and class participation, in class work including any written assignments and your 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.

**Class Schedule:** We will meet through Zoom. Our remote video synchronous classes will take place once each week on Mondays from 9:30 until 11:30 am. The link will be available through Canvas.

**Office Hours:** I will be available from 11:30-12:00 on Mondays. Additionally, you may sign up for a meeting through the calendar feature in Canvas. I will post new times each week. If you have any difficulty in finding a time that fits in your schedule, you may call, text, or email if you would like to speak with me. My cell phone is listed on this syllabus. (Please identify yourself if you text.) I encourage you to come and talk with me if you are having difficulties with, or simply want to clarify your understanding of, any of the materials covered in the reading or in class, or for any other reason, or for no reason.

**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.](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/)](http://www.dso.ufl.edu/drc/) by providing appropriate documentation. Once registered, students will receive accommodation. Students with disabilities should follow this procedure as early as possible in the semester.

**Attendance**: This is largely a skills class. As such your attendance is essential to your ability to learn the material as well as to apply the theory discussed to your final arbitration exercise. 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, regular and punctual attendance at classes is essential. I do take attendance Please e-mail me to request an excused absence. Anything in excess of 5 hours of unexcused 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 (https://catalog.ufl.edu/ugrad/current/regulations/info/attendance.aspx) and require appropriate documentation.

**Canvas:** Please check Canvas regularly for new postings. I communicate regularly through the email feature of Canvas. Please, verify that you have not disabled this feature. You will miss important information. If you have difficulty accessing or working with Canvas, please let me know as soon as possible or reach out to the Help Desk.

**Assignments and Important Dates and Events:**

Week One: Monday, August 24

**Text Chapter 17--** Introduction and The Big Picture

Week Two: Monday, August 31

**Text Chapter 18 –Arbitration Agreements and Pathological Clauses:**

***Exercise and Assignment due to be submitted on Friday, September 4 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/administered-arbitration-rules-2019>

**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 cases:

* [*Marmet Health Care v. Clayton Brown*](https://supreme.justia.com/cases/federal/us/565/530/)*,* 565 U.S. 530 (2012)
* [*Kindred Nursing Centers v. Clark*](https://www.supremecourt.gov/opinions/16pdf/16-32_o7jp.pdf), 137 S.Ct. 1421 (2017)

**Federal law** preemption cases:

* [*CompuCredit v. Greenwood*](https://www.supremecourt.gov/opinions/11pdf/10-948.pdf)*,* 132 S.Ct. 65 (2012)
* [*Epic Systems Corp. v. Lewis*](https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf), 137 S.Ct. 809 (2018)

**Monday, September 7-- Labor Day—No Class**

Week Three: Monday, September 14

**Text** **Chapter 21**– **(N.B. We will delay our discussion of this chapter and these cases until later in the semester to allow more time for our guest. Please read this chapter and these cases as context for our discussion.)** Judicial Enforcement of Arbitration Agreements: Guest Speaker- Noah Hanft, Acumen ADR.

***Guest****: Noah Hanft, Acumen ADR* *Discuss/Debrief- Arbitration Agreement drafting Exercise*

Mr. Hanft will be reviewing your arbitration clauses and providing feedback.

Please review these cases in addition to Chapter 22 for the purpose of answering the following questions in class- time permitting: What is the current law on delegation? How would you delegate authority to the panel if you would like the panel to decide issues of arbitrability in your arbitration agreement? Is including Institutional Rules that delegate authority to the panel sufficient to meet the current 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*](https://supreme.justia.com/cases/federal/us/561/63/), 561 U.S. 63 (2010) (who decides arbitrability?)
* [*Archer & White Sales v. Henry Schein, Inc*.](https://www.supremecourt.gov/opinions/18pdf/17-1272_7l48.pdf), 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).

Week Four: Monday, September 21

**Text Chapter 19–** Selecting Arbitrators

***Exercise****: Deliberations: As Time Goes By*;

Week Five: Monday, September 28

**Text Chapter 20-** Arbitration Procedures and Awards

***Guests****: Jeff Zaino and Mansi Karol*, American Arbitration Association

Week Six: Monday, October 5

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

(Yes, this is the same reading that was assigned for week three. Please revisit this chapter and the cases.)

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**State Law Pre-emption:**

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* [*Epic Systems Corp. v. Lewis*](https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf), 137 S.Ct. 809 (2018)

Week Seven: Monday, October 12

***Exercise****: Planning the Arbitration Process: Prehearing Conferences (Preliminary Hearings and Procedural Orders*

International Arbitration: Please read Articles I-V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) <http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf>

Week Eight: Monday, October 19

**Text Chapter 23–** Fairness in Arbitration, Part I, Employment; Consumer; and Adhesion Contracts

**Guest:** George Friedman, Fordham Law School

Week Nine: Monday, October 26

**Text Chapter 24 –** Fairness in Arbitration part II: Recent Legislative and Judicial Developments. Please also review the following case.

* [*DIRECTV v. Imburgia*](http://www.supremecourt.gov/opinions/15pdf/14-462_2co3.pdf)*,* 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*)

Week Ten: Monday, November 2

 **Text Chapter 25** – Mixing and Matching the Process to the Dispute and Current Issues:

Monster Energy v. Schechter, et al., California Sp. 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., 605 F.3d 1146 (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.,<https://www.supremecourt.gov/opinions/19pdf/18-1048_8ok0.pdf> (Supreme Court upholds the theory of equitable estoppel as a basis for binding non-party signatories to an arbitration agreement.)

Week Eleven: Monday, November 9

**Arbitration Advocacy (Handouts to be Provided)**

**Guests: Matt Adler and Jeremy Heeps, Troutman Pepper, Guest Speakers**

Week Twelve: Monday, November 16

Review and Preparation for Mock Arbitration

Last Class: Monday, November 23

**Mock Arbitration**