

Five Reasons Why Contracts Teachers Should Consider Teaching an Arbitration Course

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Contracts teachers should consider teaching an Arbitration course. More and more contracts have arbitration clauses so more and more contract cases are going to arbitration rather than to court. And more and more of the cases that do go to court are cases about whether the court should send the case to arbitration.

As arbitration's role in contract grows, Contracts teachers should respond. One response is to give arbitration a larger role in the first-year Contracts course.¹ But the first-year Contracts course is already being asked to do more than enough. Contracts teachers often try to maintain their traditional emphasis on case analysis and legal reasoning, while adding coverage of statutes (first UCC Article 2, then perhaps the CISG or Magnuson-Moss), and adapting to technological developments like electronic contracting. All this is often done in the face of a law school curriculum devoting fewer hours to the traditional first-year courses, Contracts included. In these circumstances, it seems unrealistic to think that arbitration should be given a larger role in the first-year Contracts course.

There are, however, Advanced Contracts courses. And there may be no course more deserving of the title "Advanced Contracts" than an Arbitration course. Teachers of Contracts will find that an Arbitration course easily builds on what they do in their first-year Contracts course. They will find the material in an Arbitration course fascinating for many of the same reasons the material in Contracts is fascinating. They will find that students are enthusiastic about Arbitration for many of the same reasons students are enthusiastic about Contracts. And they will find several strong Arbitration casebooks, many written by Contracts teachers.

So here are five reasons why Contracts teachers should consider teaching an Arbitration course.

Reason #1: "Arbitration is a creature of contract."

This axiom, endorsed by hundreds of courts and commentators, is the foundation of arbitration. With few exceptions, arbitration cannot occur in the absence of contract.

¹ See Stephen K. Huber, *Arbitration and Contracts: What are the Law Schools Teaching?* 2 J. AM. ARB. 209 (2003).

Within broad constraints established by statute and case law, nearly everything about arbitration is determined by contract. The contract determines:

- whether the dispute goes to arbitration,
- who the arbitrator(s) will be or how the arbitrator(s) will be selected,
- whether the arbitration will be administered by an organization - such as the American Arbitration Association - or by the arbitrator(s),
- the rules of procedure on matters such as discovery and dispositive motions,
- the rules, if any, governing the admissibility of evidence.
- the remedies the arbitrator may award,
- whether the arbitrator's decision will be enforceable in court,
- whether the arbitrator's decision must apply the law and, if so, which law, and
- whether the arbitrator's decision must be supported by a written opinion.

Just as contracts generally are usually performed, rather than breached, contracts to arbitrate are usually performed. Year after year, countless disputes are resolved in arbitration - and thus never come to the attention of a court - because parties make and perform agreements to arbitrate.

Reason #2: Arbitration law is contract law.

Because arbitration is a creature of contract, nearly all of arbitration law can be readily understood and appreciated through the familiar lens of contract doctrine. Arbitration law is contract law.

For example, many arbitration cases are cases about contract formation. Did a consumer's use of her credit card to make a purchase manifest assent to the arbitration clause she received in the envelope with last month's credit card bill? How does UCC § 2-207 -- the "battle of the forms" provision -- apply to a case in which the buyer's purchase order does not mention arbitration but the seller's acknowledgment form has an arbitration clause?

Consideration is a topic that receives a lot of attention in many Contracts courses but it is often treated from a historical perspective. How often, after all, do modern cases find a lack of consideration? This actually happens with some frequency in the arbitration context. For example, where is the consideration for an at-will employee's promise to arbitrate? Does the

answer change depending on whether the employee made this promise before or after the employee started working at the job?

Defenses to enforcement -- such as misrepresentation, mistake, duress and unconscionability -- are an integral part of most Contracts courses. These contract defenses are also an integral part of arbitration law because the Federal Arbitration Act requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Remedies for breach – whether you put them at the start of your Contracts course or later – are undoubtedly important to contract law, and perhaps the most important feature of modern arbitration law is its willingness to grant a particular contract remedy, specific performance.

The list of contract law doctrines central to arbitration law could go on to include topics such third-party beneficiaries, waiver, and contract interpretation.

Reason #3: Arbitration Law Pushes Freedom of Contract Toward (Beyond?) Its Limits.

Contracts teachers often like consider the proper scope of contractual freedom. Arbitration provides a terrific vehicle with which to do this.

To what extent should courts use unconscionability and related doctrines to protect consumers, employees and other ordinary individuals from adhesion contracts? In the last decade or two, this question may have been addressed more often in arbitration cases than in all other cases combined.

Leaving aside concerns of adhesion, unconscionability and the like, we know that there are still mandatory rules of law, rules that cannot be varied by contract. But arbitration tests this belief too, because courts generally decide whether to enforce an arbitrator's decision by looking, not at whether the arbitrator correctly applied the law, but at whether the arbitrator did what the contract told the arbitrator to do. It may not be much of a stretch to say that, by agreeing to arbitrate, parties are contracting out of all law and, in its place, substituting whatever grounds for decision, if any, the contract says the arbitrator must apply.

Reason #4: Arbitration law is fun to teach.

The Supreme Court has decided lots of arbitration cases in the last twenty years or so. For Socratic dialog, this is the best body of case law I have seen in any law school course other than Contracts. And, as rich a body of case law as this is, it is mostly based on a statute, the Federal Arbitration Act, so arbitration law is excellent materail for developing students' skills of analyzing statutes and making arguments based on them.

In addition to the combination of statutory and judge-made law, arbitration law features the combination of state and federal law, the combination of domestic and international law, and the combination of government law and privately-made law, which is the law arbitrators make

when they decide cases. Each of these combinations creates a tension that generates the sorts of issues likely to prompt student interest and vigorous class discussion.

Arbitration is also very well suited to various role-playing exercises in which students learn by doing. These exercises can include contract-drafting, negotiation, advocacy, and so forth.

Reason #5: Several good Arbitration casebooks are available.

Teaching a course for the first time is never easy, but an abundance of good teaching materials sure helps. And the Arbitration field is fortunate to have several of its leading scholars producing high-quality casebooks. In addition to casebooks focused on particular areas of arbitration (such as international commercial arbitration and labor/employment arbitration), I counted five casebooks suitable for a general Arbitration course:

- THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* (2d ed. 2000),
- CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* (2002),
- STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION: CASES AND MATERIALS* (1998),
- ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT PEPPETT, *ARBITRATION* (2d ed. 2002),
- KATHERINE V.W. STONE, *ARBITRATION LAW* (2003).

It is no surprise that each of these five books was written by a Contracts professor; each has an author who lists Contracts among his or her courses in *THE AALS DIRECTORY OF LAW TEACHERS* (2004-05). In addition, the leading treatise on arbitration law, IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW* (1994), is written by no less than three contracts professors.

In sum, a Contracts teacher who decides to teach an Arbitration course will find a rewarding experience that has been made even more so by the work of other Contracts teachers who previously decided to teach Arbitration.