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CASES AND MATERIALS

# ARBITRATION LAW AND PRACTICE

Sixth Edition

Thomas E. Carbonneau

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# on
# ARBITRATION LAW AND PRACTICE

## Sixth Edition

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*To my daughter:*
***Sara Lucille Carbonneau***

# PREFACE

Arbitration occupies a dominant place in the U.S. legal system. Its significance and stature are unquestioned. Only the foolhardy would ignore its existence and impact upon the legal process. It has become, in effect, the primary means for resolving civil disputes.

Arbitration now exceeds its traditional range of application by a very substantial margin. Its use is no longer relegated to commercial relationships and contract disputes between merchants. Its jurisdictional reach extends to the purchase of securities and other consumer transactions. It is the remedy by which employment disputes are resolved. It also governs controversies that involve federal rights created by congressional statutes, the regulation of commerce, and fundamental civil liberty guarantees. Few, if any, disputes are deemed inarbitrable.

The most controversial question in the current law of arbitration centers upon the validity and enforceability of arbitration agreements. There appears to be resistance among some courts to the enforcement of adhesive arbitration agreements, especially in the consumer and employment areas. This development has centered upon class action waivers and is most pronounced among the state and federal courts in California. There, arbitration agreements are more frequently voided on the basis of unconscionability or for a lack of mutuality. These courts, it seems, have concluded that legal procedural regularity must be fully guaranteed in unilateral contracts for arbitration. The U.S. Supreme Court's recent decision in *Rent-A-Center v. Jackson,* 561 U.S. ___, 130 S. Ct. 2772 (2010), substantially dampened that development. Courts in other jurisdictions have periodically invoked the costs of arbitration and their distribution among the contracting parties to nullify arbitration agreements. No matter the basis, opposition to arbitration agreements is confined to a relatively insignificant minority of courts. Their reluctance to enforce arbitration agreements is an uncharacteristic judicial position. In the vast majority of cases, courts give full effect to arbitration agreements.

Arbitral awards or judgments are also generally favored by courts and enforced. Vacatur or nullification is a rare result. The Federal Arbitration Act (FAA) codifies a policy that sustains the recourse to arbitration. It limits the judicial supervision of arbitral awards to procedural matters that are vital to the legitimacy of adjudication. Moreover, courts have interpreted the narrow grounds for review restrictively. Recent practice, however, has somewhat eroded the policy of near automatic enforcement of awards by developing an action to clarify awards and broadening the evident partiality ground for vacatur with a regime of arbitrator disclosure. Because of the new emphasis upon disclosure, alleging partiality in either neutral or party-appointed arbitrators has become the most effective means for challenging awards.

The action to clarify awards—despite its practical value—is likely to have a pernicious effect because it will eventually service the ends of adversarial representation. Under the decisional law, it is a common law doctrine that allows courts to remand an award to the arbitral tribunal to have opaque determinations explained or clarified. As a result, losing parties have already asked courts and tribunals to "clarify" arbitral determinations that go against their interests. The procedure then introduces full blown appeal into the arbitral process by the back door.

Challenging the neutrality of arbitrators on the basis of disclosures and their determinations for a would-be lack of clarity is ominous. It underscores the tension in arbitration law between the protection of rights and the functionality of the adjudicatory process. It highlights the difficulty of providing simultaneously for due process in and access to adjudication. The U.S. Supreme Court has nonetheless been unwavering and unequivocal over the last forty years in its support for arbitration. *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. ___, 130 S. Ct. 1758 (2010), *Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468 (1989), and *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) are the primary exceptions. During that period, it has decided more than forty arbitration cases and articulated a judicial doctrine that admits of few, if any, exceptions or conditions to the right to arbitrate. All but matters of criminal liability fall within the purview of arbitration. Moreover, the arbitrator is the sovereign decider of the merits, the procedure, and even jurisdiction.

At this stage in the development of the U.S. Supreme Court's decisional law on arbitration, it is clear that the Court is using the FAA as a stepping stone to elaborating a judicial doctrine on arbitration. The Court has added significantly to the content of the legislation. For example, FAA § 2—unquestionably the key provision of the Act both historically and doctrinally—establishes that the surrender of judicial remedies by contract does not violate public policy and thereby validates arbitration agreements as a legitimate exercise of contract freedom. Nonetheless, in the Court's rulings, arbitration agreements are not simply contracts. In the words of Justice Black, when he reacted critically to the majority's endorsement of the separability doctrine in his dissent in *Prima Paint Corp. v. Flood & Conklin Mfg. Co*, 388 U.S. 395 (1967), they are "super" contracts, "[e]levate[d]—above all other contractual provisions." Glossing the FAA, the Court has made arbitration agreements nothing less than the means for correcting the dysfunctional provision of adjudicatory services in American society.

The Court has altered the governing legislation in other respects. The federal preemption doctrine, pieced together by the Court over a number of cases, has been instrumental to the creation and maintenance of the "strong federal policy on arbitration." It guaranteed that a set of uniformly favorable principles to arbitration would apply in all United States jurisdictions. In establishing the doctrine, the Court literally rewrote the express content of the FAA, extending the statute's application to state courts and legislatures. Federal preemption also allowed the Court to "promulgate" an implied federal right to arbitrate. The case law nevertheless acknowledged that several FAA provisions were directed to federal district courts and the governing legislation did not create federal question jurisdiction. These would-be anomalies did not impede the Court's policy on arbitration. Federalization of the law is well-established; since *Dobson*, 513 U.S. 265 (1995), and *Doctor's*

*Associates, Inc.*, 517 U.S. 681 (1996), it is essentially unquestioned. An expansive view of interstate commerce governs and states cannot enact laws restricting—directly or indirectly—arbitration agreements.

The Court has exhibited singular determination in upholding the federal policy on arbitration. It admits of no exceptions to settled views and demands compliance to them regardless of logic, legal tradition, or intrinsic truth. In this regard, the Court is more perspicacious than it is single-minded or arbitrary. It is generally acknowledged that exceptions, additions, or modifications to legal rules, once recognized, mutate over time and progressively swallow up or transform the original rule. The U.S. law of arbitration would not be as cohesive, viable, or effective were it riddled with the twists and turns of qualification. The campaign for federalization was waged to create a disciplined, uniform, and unambiguous regulation of arbitration. After all, the goal that is contemplated is nothing less than the building a workable system of civil adjudication and justice in U.S. society.

While there are misgivings, debates, and controversies, arbitration—despite imperfections—is in a golden era. The Court sustains every aspect of the operation of the arbitral process in both the domestic and transborder sphere. Doctrine is adapted to achieve the objectives of policy; everything is sacrificed to bring about an accessible form of adjudicatory justice. The judicial support not only is consistent, but it also is unequivocal. As a consequence, arbitration has expanded its range to new dispute areas and its scope of application beyond contract itself. With the extension of the contract to nonsignatory parties and the deference paid to adhesionary agreements, arbitral clauses implied at law may soon become a new feature of the U.S. court doctrine on arbitration. The critique, and possibly impairment, of arbitration can only effectively proceed from the legislative branch. It is to it that forces antagonistic to arbitration have directed their primary efforts.

These course materials convey a comprehensive picture of the arbitral process. In particular, they seek to provide legal professionals with the knowledge and understanding necessary to participate effectively in counseling on arbitration, the drafting of arbitration agreements, conducting arbitral proceedings, and managing court actions relating to arbitration. The principles, rules, and procedural structures that are described are basic to the law of arbitration and apply to all systems of arbitration.

The chapters describe the various stages of an arbitration, define the issues that are vital to its operation, assess the legal doctrines and concepts that regulate it, and point to critical doctrinal and practical developments. In some respects, the availability of recourse to arbitration has changed the face of traditional law-making and lawyering. Arbitration dislodges the application and activity of the traditional judicial process. Although arbitration is effective and valuable, it is hardly without drawbacks. Lawyers and clients need to assess the remedy and make a judgment about its transactional viability for them. The materials point to problems that are likely to arise in the practice of arbitration law and propose a framework for elaborating solutions.

The volume begins with a presentation of essential terms and definitions. It then introduces the basic statutory law in the area (the FAA and the

RUAA). Thereafter, it addresses the major themes in the decisional law on arbitration: federalization, contractualism, and arbitrability. It investigates particular applications of the arbitral remedy (traditional and nontraditional), *e.g.*, labor and employment, securities, consumer, and maritime arbitration. The issues that relate to the enforcement of arbitral awards are thoroughly outlined and discussed. Finally, in terms of domestic arbitration, the most recent and difficult problems of practice are identified and treated comprehensively.

The consideration of international commercial arbitration is equally complete and thorough. It begins with an evaluation of the contributions of the international commercial arbitration process to the conduct of transborder commerce and the harmonization of law and legal procedure. The central significance of the 1958 New York Arbitration Convention is highlighted in terms of the language of the treaty and the decisional law that underlies it.

The presentation emphasizes the importance of practical problems and underscores the fragility of existing rules and the need for professionals in the field to be analytically rigorous as well as creative in their approach to problems. The text that follows seeks to educate through a comprehensive presentation of relevant and timely information, the rigorous analytical evaluation of that data, and the identification of the practical implications of the "findings of fact" and "conclusions of law."

* * *

Postscript

The Court granted *certiorari* to two cases for its 2011–2012 term. In *CompuCredit Corp. v. Greenwood*, 615 F.3d 1204 (9th Cir. 2010), the Ninth Circuit held that the Credit Repair Organizations Act (CROA) prohibits the enforcement of an arbitration agreement against a consumer in a consumer credit agreement. The Act specifically invalidates any agreement entered into by the consumer that constitutes a waiver of any protection or right under the Act. The Court will address whether CROA claims are arbitrable under a valid arbitration agreement 563 U.S. ___ (2011).

The Court decided *CompuCredit*, 132 S.Ct. 665, on January 10, 2012, holding that CROA was silent on the arbitrability of claims and that the FAA requires the enforcement of arbitration agreements as written. The decision can be fully aligned with *AT&T Mobility* and *Rent-A-Center (infra)*. In *Stok & Associates v. Citibank*, 58 So.3d 366 (3d Dist. Ct. App. Fl. 2011), the Court would have considered the more technical issue of what type and quantum of behavior are necessary to establish a waiver of the right to arbitrate. 131 S.Ct. 1556 (2011). The federal circuits are split on this question—with some maintaining that any judicial recourse amounts to a waiver, while others adopt a variable prejudice-to-the-rights-of-the-other-party standard. Because the parties settled, the granting of the petition for *certiorari* was dismissed on June 2, 2011, pursuant to Rule 46. *See* www.scotusblog.com/case-files/cases/stok-associates-v-citibank/.

Finally, on November 7, 2011, the Court rendered a *per curiam* opinion in *KPMG v. Cocchi*, 132 S.Ct. 23 (2011), in which it confirmed the strength of the arbitrability mandate in U.S. arbitration law, which requires the enforceability of arbitration agreements in nearly all circumstances.

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