



ARBITRATION: CASES AND MATERIALS

THIRD EDITION



Stephen K. Huber
Maureen A. Weston



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ARBITRATION: CASES AND MATERIALS

THIRD EDITION

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For Wendy, Jennifer, and Robert — S.K.H

For Frank and Dolly Weston — M.A.W.

Preface

Arbitration is sweeping the American legal landscape. Simply stated, arbitration is everywhere. Almost every American business and individual with the legal capacity to contract has entered into an agreement that specifies arbitration as the forum for resolving most or all disputes that might arise between the parties. The importance of arbitration as the preferred mode of dispute resolution has grown dramatically during the last ten to twenty years, and this trend has not yet run its course. Since 1983, the leader in promoting the enforcement of arbitration terms has been the United States Supreme Court. This favorable legal environment has prompted business organizations to dramatically expand the use of arbitration provisions in their contracts with both individuals and other firms.

A few examples of contexts in which arbitration is commonly used should suffice to prove its importance in the domestic economy. Arbitration has long been the norm for multinational transactions because businesses do not relish the prospect of litigation in the courts of another country. At the most sophisticated end of the business spectrum, reinsurance contracts between insurance companies mandate arbitration, as do maritime bills of lading. Numerous trade associations have long mandated arbitration of all disputes among members. Collective bargaining agreements have called for arbitration of grievances at least since World War II and now many contracts with individual employees do so as well. Franchise agreements call for arbitration, at least where favorable to the franchisor. Sellers of computers and many other consumer products require arbitration. Contracts between securities brokers and their customers all mandate arbitration. Most proprietary schools provide for arbitration of disputes in their enrollment contracts. The contracts of banks, providers of medical services, and attorneys frequently specify arbitration for the resolution of disputes. Even contest rules at McDonald's call for arbitration.

Another reflection of the importance of arbitration is the vast amount of litigation it has generated, a rather ironic standard because a central purpose of arbitration is to avoid the courts. According to Professor Charles Knapp, author of a leading contracts casebook, "far and away" the single most litigated contract-related issue is whether to enforce a written arbitration term in an apparently binding arbitration agreement. "And, the court's answer usually is yes."

That there has been more litigation about arbitration in recent years is not an understatement. At both the state and federal levels, courts have been issuing hundreds of arbitration decisions per year. In a single year time period, between June 1, 2002 and May 30, 2003, the U.S. Court of Appeals for the Fifth Circuit produced written opinions on the merits in twenty-three arbitration cases. Since 1983, the U.S. Supreme Court has decided more than thirty arbitration cases, including sixteen since the turn of the century. During the 2002-2003 Term alone, the Supreme Court handed down four arbitration decisions. From 2006-2011, the Court issued eight decisions. The U.S. Supreme Court under Justice Roberts has evidenced a continued pro-arbitration stance in recent cases such as *Stolt-Nielsen S.A. v. Animal Feeds, Int'l*, 130 S. Ct. 1758 (2010); *Rent-a-Center v. Jackson*, 130 S. Ct. 2772 (2010), and *AT&T v. Concepcion*, ___ U.S. ___ (2011 U.S. ___, 79 L. Ed. 2d 742, 2011 U.S. LEXIS 3367. These caseload numbers bespeak considerable disputation about arbitration, as well as the central importance of arbitration

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as an ever more important form of binding dispute resolution. Congress and state legislatures, as well as federal and state courts, the business community, and consumer rights groups, will undoubtedly continue to be concerned with arbitration law issues.

While the full text of the cases and articles included in this book provide the interested reader with a wealth of citations to the relevant literature, we have not attempted to compile a complete bibliography of all state and federal arbitration cases and commentary. Recent writing about arbitration and related topics are far too extensive to make the inclusion of an extensive list of references a worthwhile endeavor.

Throughout this Third Edition, we have focused on many of the recent cases issued by the United States Supreme Court, the federal courts, and state supreme courts. Although the courts, led by the United States Supreme Court, are leaders in promoting the growing use and finality of arbitration, the explosive growth in the use of arbitration is not regarded as entirely beneficial by all commentators. Critiques of the important recent developments are found throughout these materials. Chapter 1(C) provides an historical perspective on arbitration in America, but our focus is on the many recent developments in arbitration law and practice.

These materials have two central objectives: to provide an introduction to the law of arbitration, and to show how arbitration works in a variety of contexts. While it is the nature of teaching materials to focus on problems, the reader needs to remember that arbitration nearly always works as planned. The chapters are structured to take the reader chronologically through the primary issues that may arise in an arbitration setting. The introductory chapter provides an overview on the nature and scope of arbitration, while Chapter 2 focuses on “gateway” issues of arbitrability and defenses to arbitration. Chapter 3 introduces the Revised Uniform Arbitration Act (RUAA) and the interaction between federal and state arbitration law, including issues of preemption. Chapters 4 through 7 focus on the arbitration proceeding itself, including arbitrator selection and ethical standards, and an arbitrator’s vast remedial powers. Chapter 8 then examines issues relating to judicial review of arbitration awards. Chapter 9 addresses arbitration in the context of multiple forums, including arbitral class actions. The final two chapters address the interaction of FAA and other statutes and arbitration and international arbitration.

Arbitration law is grounded in statutes. This edition also contains an extensive Appendix which presents the unexpurgated text of the Federal Arbitration Act, the Uniform Arbitration Act (1955), and the [Revised] Uniform Arbitration Act (2000). These texts should be consulted every time that reference is made to their provisions in the text. A good approach to any particular arbitration issue is to compare the approach (which may be silence) taken by each Act.

Many of the authors whose writings appear in this book have strong views on arbitration issues, and no attempt is made to hide them. Indeed, some of the selected (judicial opinions as well as articles) were chosen precisely because they present diverse points of view. We have exercised “best efforts” to present works that are seriously argued and accurate, but the reader must bear in mind that authors are often advocates for particular positions.

Most footnotes from articles and cases, and citations within the text of cases, are omitted without specific notation. Some of the retained footnote or endnote materials have been incorporated into the texts. Where notes are reproduced, the original

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numbering is retained. Omissions from text are indicated by ellipses.

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