Arbitration

Arbitration

Law, Policy, and Practice

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Preface

Arbitration has become a standard method of private dispute resolution designated in commercial contracts in the United States. 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 twenty-five years, and this trend has not yet run its course. Since 1983, the U.S. Supreme Court has been the leader in promoting the enforcement of arbitration terms. 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. Virtually all contracts between securities brokers and their customers mandate arbitration. Most contracts used by banks, providers of medical services, and online retailers specify arbitration for the resolution of disputes.

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. Hotly litigated issues relate to whether to enforce a written arbitration term in an apparently binding arbitration agreement. The court's (and arbitrator's) answer is generally yes.

That there has been more litigation about arbitration in recent years is not an understatement. At both the state and federal levels, courts issued hundreds of arbitration decisions per year. Since 1983, the U.S. Supreme Court has decided more than fifty arbitration cases, including twenty-five since the turn of the century. During the 2002–2003 Term alone, the Supreme Court handed down four arbitration decisions. From 2006 to 2010, the Court issued eight decisions, and another ten between 2011 and 2017. The U.S. Supreme Court under Justice Roberts has evidenced a continued pro-arbitration stance. These caseload numbers bespeak considerable disputation

about arbitration, as well as the central importance of arbitration 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, undoubtedly continue to be concerned with arbitration law issues.

Throughout *Arbitration: Law, Policy, and Practice*, we focus on many of the recent cases decided 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(B) 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. 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 presents the legal framework governing arbitration, principally examining the federal and state arbitration law, including how these laws interact and issues of preemption. Chapters 3 and 4 address "gateway" issues of arbitrability and defenses to arbitration. Chapters 5 through 8 focus on the arbitration process itself, including arbitrator selection and ethical standards, an arbitrator's vast remedial powers, and issues relating to judicial review of arbitration awards. Chapters 10 and 11 examine arbitration in the context of multiple forums, including arbitral class actions. The final chapter considers international arbitration. The Appendices contain the text of the Federal Arbitration Act, the Uniform Arbitration Act (1955), and the [Revised] Uniform Arbitration Act (2000), as well as an Arbitration Case File, and a chronology of U.S. Supreme Court arbitration decisions.

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

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