Arbitration

Arbitration

Cases, Problems, and Practice

SECOND EDITION

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For Loretta

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Preface to the Second Edition

As with the introduction to the first edition of this book, this introduction to the Second Edition is written on the eve of a new Presidential Administration in the United States. It is a testament to the importance of arbitration in our society that these changes in government have so significant an impact on arbitration law. What was (and still remains) a means of dispute resolution among "merchants" has become a battleground on fundamental issues of access to courts. As a result, the law of arbitration is far more sensitive to political changes than is, for example, the law of contracts or property or civil procedure.

It therefore makes sense to prepare a second edition at this time and take stock of the last four years. In that time, the subjects in this book have been buffeted by many of the issues in our society. Battles over equality and individual rights have played out in arbitration law, including the entertainer Jay-Z's battle in a New York arbitration to expand arbitrator pools to persons of color. The #MeToo movement has had an impact in the efforts of several states to cut back on the availability of arbitration (and thus privacy and confidentiality) in sexual harassment cases.

Meanwhile, the elevation of arbitration as a basis for eliminating class actions, and its primacy when balanced against other statutes of arguably competing interest, continues—and, given the nature of judicial appointments over the past four years, has if anything accelerated. The exclusion hurdles to class actions and other multiparty proceedings in arbitration, which took on headwinds in Justice Scalia's seminal opinions in *Concepcion* and *Italian Colors*, both covered at length in the first edition, have been picked up by his ideological successors. Justices Kavanaugh and Gorsuch both rendered important arbitration decisions shortly after being sworn in.

These and other topical issues are treated here, all within the structure that this edition continues: the formation of the arbitration clause, the conduct of the arbitration, and its enforcement. It is my hope that students and professors using this book find this structure useful and accomplish in turn a three-party win: understanding arbitration law, mastering arbitration practice, and doing so against the background of the public policy issues we cover here.

In preparing this work I have had the great good fortune to work with a team of outstanding legal professionals. Their judgment was essential. It was, in many ways, easier to write the first edition on a blank slate than it was to decide which new materials merited inclusion in the second edition and which old materials had to walk the plank—especially since my wonderful editor then and now, the inestimable Carol McGeehan, wisely kept me to the same page limit. Here as always, from start of this project to its end, Carol's judgment, advice and friendship was not merely a reason for these books: she remains THE reason.

That task was made incredibly easier, and a lot more fun, by Sara Pitt and Danni Shanel. Sara was a colleague at Pepper Hamilton LLP where she and I worked on several arbitrations in which she repeatedly distinguished herself as an exceptional lawyer of any level and amazed people when they learned she was just a junior associate. When Sara moved on in firms, she asked to stay involved in the book. Sara's version of "involved," as always, was to run the project. I was touched by her wanting remain on the team, and elated at the result she helped produce. We then enlisted the particular help of Danni Shanel, a student in my first class at the George Washington Law School in Spring 2020. When the COVID-19 virus (itself a topic of coverage in the second edition) freed up Danni's summer, we jumped on that, and the result may be seen in the plethora of new and topical cases. Both Danni and Sara (helped by Craig Steen, to whom I also owe thanks) are on their way to glorious careers. That I got to work with them early in their distinctive road to come is a distinct thrill of my own career. They will forever have my gratitude and this book quite plainly would not have happened without them.

Two newcomers over the last four years also supported this work. First, with the arrival of my daughter as a student at the University of Virginia Law School, where I had been teaching, I elected that it might be better to switch schools. The George Washington University School of Law was kind enough to offer me an adjunct position, thereby cutting my train ride to school from Philadelphia (in the Land Before Zoom). I am particularly indebted to Jeremy Pam and Lisa Schenck for being so supportive in my first year and showing how valued adjuncts are to the School, and look forward to a long association. Second, my law firm of many years, Pepper Hamilton, merged this past summer with the Troutman Sanders firm, and we are now Troutman Pepper Hamilton Sanders LLP. The new firm was equally supportive of this work as was legacy Pepper, and I again look forward with gratitude to a long association.

The new edition benefited as well from critical and specific commentary from two outstanding former UVA students who took the class with the First Edition, Luke Zaro and Michael Atkins. Both offered extremely useful comments, especially in the Unit I chapters. A special thank you as well to Ben Eichel, who co-authored with me several of the articles excerpted in the book and who was kind enough to critically review those and other chapters in Unit II. Thanks also to my Troutman

Pepper colleagues Martha Guarnieri, Mia Rosati, Jeremy Heep and Will Taylor, who critically reviewed various portions of the work.

I wish to thank my family in particular for putting up with this during what was a challenging year for all for reasons both global and local. My daughter was home for much of this, not by choice, and ran the family during some challenging times, impeccably as she does everything.

Finally, and most importantly, I thank my students. At UVA and now at GW they continue to offer an enthusiastic and informed take on arbitration law which has elevated any presentation I could ever hope to make. They allow me to see everything in a fresh way that private practice could never replicate. It is a privilege to appear before them each week, and I hope this book is in some way reflective and deserving of their own work.

This field will continue to change, and I suspect at warp speed. Enjoy.

Matt
Voorhees, New Jersey
March 2021

Preface to the First Edition

I have been reading acknowledgments for books for most of my life. At the end the author usually thanks his or her spouse for being so supportive and without whom the book could not have been written. I never knew how true those words were until I tried my own hand at a book, and so my only addition is to move those parting words to the front. Loretta, you make everything possible, starting but hardly ending with this book. I would never have written it unless you had repeatedly urged me to do so, and once I started, you were as supportive as you have been with everything else in our blessed marriage. Thank you.

From there, I would like to thank my editor, Carol McGeehan, for believing in the idea of this book when it was just a thought and I was considerably less engaged. To say that she inspired this book is to make the real something trite. She literally brought this to life, and for that I shall always be grateful.

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Matt
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Introduction and Overview

This book follows the same chronological approach to arbitration that faces practitioners in the field. That chronology has three distinct phases: creating the arbitration, conducting the arbitration, and enforcing the arbitration's result. The courts are most active in the first and third phases, because they frequently have to order (or prevent) an arbitration, and after the arbitration they have to enforce it (or not). The middle part is the arbitration itself.

The book devotes a unit to each of these phases. We will look at how courts, parties, commentators, and arbitration institutions address the following questions.

Unit I: Creating the Arbitration

What is arbitration? What is the difference between arbitration and mediation? How does an arbitration get created? What makes for a good arbitration clause, and how can one avoid a bad clause that plunges clients into court without resolving the merits of their dispute?

What happens when parties ignore an arbitration clause, and who decides — the court or the arbitrator — when and to what degree an arbitration takes place?

Are arbitrations compatible with class actions, and are class action waivers fair to consumers?

Unit II: Conducting the Arbitration

Once the parties have an arbitration clause and have agreed on the parameters of the arbitration, they need to conduct that exercise.

How do parties select an arbitrator? What conflicts and contacts between arbitrators and parties are permissible? What conflict rules should apply?

When can third parties be bound to, or allowed to participate in, arbitrations?

Are arbitration institutions like the American Arbitration Association advisable to use in arbitrations or do they add unnecessary expense?

What discovery rules are appropriate in arbitration? What evidence rules? When can discovery reach third parties?

What are the differences between arbitration and litigation in witness testimony and trial techniques?

Unit III: Enforcing the Arbitration

An arbitration award is merely a piece of paper until it is "confirmed" by a court. The Federal Arbitration Act has particular sections that speak to when arbitration awards should and should not be confirmed.

When should an arbitration award be modified?

When should it enforced as written?

Can "wrong" arbitration awards be enforced?

What is the present level of appellate review of arbitration awards?

How are arbitration awards enforced?