Arbitration

Arbitration

Law, Policy, and Practice

SECOND EDITION

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For Robert and Bonny Israeloff—**J.I.G.**

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Preface to the Second Edition

Arbitration remains a prevalent method of domestic dispute resolution, and the Supreme Court of the United States continues to issue rulings favorable to arbitration. Simultaneously, arbitration remains controversial, particularly when pre-dispute arbitration clauses are used in adhesive contracts for employment and consumer goods and services.

Since this book's original publication in 2018, the Supreme Court has decided an additional 10 arbitration cases, including five in 2022. While most of these cases expand access to arbitration, three cases from 2022 are notable exceptions. *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), clarified that employees who load cargo onto airplanes fall within the Federal Arbitration Act's exception regarding transportation workers, even if those cargo loaders do not cross state lines themselves. In *Morgan v. Sundance*, 142 S. Ct. 1408 (2002), decided in the same term, the Court reversed a growing trend in the lower courts that made arbitration agreements harder to waive than ordinary contracts. *Badgerow v. Walters*, 142 S. Ct. 1310 (2002), restricts access to federal courts to enforce arbitration awards.

Perhaps the biggest change in arbitration law since the last edition has been the enactment of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFASASHA). EFASASHA invalidates pre-dispute agreements to arbitrate claims of sexual assault and sexual harassment. Although limited in scope, Congress passed this legislation with bipartisan support. Indeed, these and other updates to the law necessitated that this edition pay increased attention to the arbitration of federal claims. Thus, rather than covering the topic as part of a chapter, we now devote Chapter 4 entirely to this topic.

In addition to changes in the law, in this edition we highlight two major developments in the arbitration process since the last edition. First, courts' strict enforcement of class action waivers has led to the advent of "mass arbitration." A mass arbitration involves the filing of dozens, hundreds, or even thousands of identical or nearly identical, but separate, claims against the same defendant, usually an entity. These mass claims place incredible financial stress on the common defendant to pay filing and administrative fees for each separate claim, and create logistical and management burdens on arbitration service providers. However, as businesses continue

to include class action waivers, the mass action has been a response to the age-old problem of remedying large numbers of small-dollar claims.

Second, in light of the COVID-19 global pandemic, which started in early 2020, coverage of the arbitration process itself undoubtedly must mention the increased use of videoconferencing platforms (e.g., Zoom, Teams, Skype) for arbitration hearings. Due to convenience, lower costs, and time savings, online arbitration is likely here to stay.

The authors gratefully acknowledge and thank Ryland Bowman and Linda Lacy at Carolina Academic Press. We are also grateful to those of you who have chosen to adopt our book. We welcome any and all comments on these materials.

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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.

The authors gratefully acknowledge and thank Elisabeth R. Ebben and Susan Trimble at Carolina Academic Press. We are also grateful to those of you who have chosen to use our book. We welcome any and all comments on these materials.

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