

Arbitration

Arbitration

Cases, Problems, and Practice

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For Elizabeth

Contents

Table of Principal Cases	xv
Table of Practice Problems	xvii
Preface	xix
Acknowledgments	xxi
Introduction and Overview	xxiii

UNIT I

CREATING THE ARBITRATION

Chapter 1 · Why Study Arbitration?	3
I. Why Study Arbitration?	3
II. Roadmap	5
III. What Is Arbitration?	6
<i>AMF, Inc. v. Brunswick Corp.</i>	7
<i>Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.</i>	11
IV. Arbitration vs. Mediation	15
§ 1.01 Mediation and Arbitration—The Leading Alternative Dispute Resolution (“ADR”) Modalities	16
V. Drafting the Arbitration Clause	22
VI. Practical Exercises	29
Chapter 2 · Formation and Federalism	31
I. Formation and Federalism	31
II. The FAA’s Presumption in Favor of Arbitration	32
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i>	33
III. Formation of the Arbitration Agreement:	
Contract Principles at Work	37
<i>Nguyen v. Barnes & Noble Inc.</i>	38
<i>Atalese v. U.S. Legal Services Grp., L.P.</i>	44
<i>James v. McDonald’s Corp.</i>	56
IV. <i>Moses Cone</i> and Federalism	60
<i>Southland Corp. v. Keating</i>	61
V. State Law v. Federal Presumption of Arbitrability	67
<i>Volt Info. Scis. v. Board of Trs.</i>	67
<i>Marmet Health Care Ctr., Inc. v. Brown</i>	72
<i>Caudle v. American Arbitration Ass’n</i>	75
VI. The Scope of the Arbitration Clause	78

<i>Matthews v. Rollins Hudig Hall Co.</i>	78
<i>Alford v. Dean Witter Reynolds, Inc.</i>	82
<i>Securities Industry Ass'n v. Connolly</i>	85
VII. Federalism After <i>Moses Cone</i>	94
VIII. Practice Exercises on Scope	94
IX. Failure to Arbitrate: Specific Remedies	96
A. The Threshold Question of Arbitrability	96
B. The Statutory Remedies for Failure to Arbitrate	96
C. Specific Remedies Applied	97
Chapter 3 · Severability	101
I. Who Decides Arbitrability?	101
II. Roadmap	101
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i>	102
<i>First Options of Chi., Inc. v. Kaplan</i>	112
<i>Green Tree Fin. Corp. v. Bazzle</i>	117
<i>Buckeye Check Cashing, Inc. v. Cardegna</i>	126
<i>Rent-A-Ctr., W., Inc. v. Jackson</i>	131
<i>Puleo v. Chase Bank USA, N.A.</i>	144
Chapter 4 · Arbitration and Class Actions	161
I. Introduction to Arbitration and Class Actions	161
II. Examples of Class Action/Arbitration Clauses	162
III. <i>Concepcion</i> and Its Progeny: The Supreme Court's Class Action Arbitration Jurisprudence	165
<i>AT&T Mobility LLC v. Concepcion</i>	165
<i>Oxford Health Plans LLC v. Sutter</i>	179
<i>Am. Express Co. v. Italian Colors Rest.</i>	182
<i>DIRECTV, Inc. v. Imburgia</i>	193
IV. Pro-Consumer, Extra-Judicial Reaction to the <i>Concepcion</i> Line	205
V. The Dodd-Frank Act and the Consumer Fraud Protection Bureau	205
A. The Consumer Fraud Protection Bureau's Proposed Rulemaking	205
B. The Uncertain Future of Class Action Arbitration Reform	207
UNIT II	
CONDUCTING THE ARBITRATION	
Chapter 5 · Choosing an Arbitrator	213
I. Choosing an Arbitrator—Options for Party Participation in Arbitrator Selection	213
A. The Parties Can Simply Name a Particular Person as Arbitrator	213
B. The Parties Can Specify the Expertise of the Arbitrator	213
C. The Parties Can Specify a Three-Arbitrator Arbitration	214
D. The Parties Can Agree on Institutional Rules and the Institution Then Controls the Appointment Process	215

II. Researching the Potential Arbitrator	216
III. Challenging the Arbitrator	218
<i>Commonwealth Coatings Corp. v. Continental Casualty Co.</i>	223
<i>Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC</i>	227
IV. Timing in Arbitrator Challenges	236
<i>Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.</i>	237
Chapter 6 · Getting Started	247
I. Getting Started—The Claim	247
II. Responsive Allegations	248
III. Jurisdictional Allegations	248
IV. The Organizational Conference	249
A. Discovery	250
B. Dispositive Motions	250
C. Hearing Dates	251
D. Briefing Schedule	252
E. Bifurcation	252
F. Testimony at the Hearing	252
G. Expert Witnesses and Reports	253
H. Motion Practice Generally	254
I. Form of Award	254
J. Appeal	255
Chapter 7 · Discovery in Arbitration	259
I. The Old School: Is There Discovery in Arbitration?	260
<i>Burton v. Bush</i>	260
II. Legal Bases of Discovery in Arbitration	262
A. The Arbitration Clause	262
B. Institutional Rules	262
C. Electronically Stored Information (“ESI”)	266
D. Former Employees	267
III. Discovery in International Arbitration	268
IV. Section 1782: US Discovery in International Arbitration	275
V. Procedural Orders	276
Chapter 8 · Third-Party Discovery	285
I. Third-Party Discovery	285
<i>Hay Grp., Inc. v. E.B.S. Acquisition Corp.</i>	286
<i>Sec. Life Ins. Co. of Am. v. Duncanson & Holt</i>	293
<i>Am. Fed’n of Television & Radio Artists v. Storer Broad Co.</i>	299
Evidence and Discovery in American Arbitration:	
The Problem of “Third Parties”	300
II. Former Employees as Third Parties	302
<i>Alliance Healthcare Servs. v. Argonaut Private Equity, LLC</i>	305
<i>Amgen Inc. v. Kidney Ctr.</i>	310
<i>Dynegy Midstream Servs. v. Trammochem</i>	315

Chapter 9 · Third Parties and Arbitration	323
I. Third Parties and Arbitration	323
<i>Arthur Andersen LLP v. Carlisle</i>	323
II. Incorporation by Reference	328
<i>Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC</i>	328
III. Assumption	333
<i>Gvozdenovic v. United Air Lines, Inc.</i>	333
IV. Agency	337
<i>Grand Wireless, Inc. v. Verizon Wireless, Inc.</i>	337
V. Veil-Piercing/Alter Ego	343
<i>Keystone Shipping Co. v. Textport Oil Co.</i>	343
VI. Estoppel	346
<i>Noble Drilling Servs. v. Certex USA, Inc.</i>	347
VII. Third-Party Beneficiary	350
<i>Flexi-Van Leasing, Inc. v. Through Transp. Mut. Ins. Ass'n</i>	350
VIII. Third-Party Arbitrations in the International Context	355
<i>Intergen N.V. v. Grina</i>	355
Non-Signatories and International Arbitration in the United States: The Quest for Consent	369
Chapter 10 · Injunctions	371
I. The Judicial Dispute Concerning Arbitration and Injunctions	372
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey</i>	373
<i>Performance Unlimited v. Questar Publishers</i>	375
II. Injunctions in Arbitration Clauses	381
<i>American Express Fin. Advisors v. Thorley</i>	381
III. How Far Can a Court Go? Mandatory vs. Permissive Injunctions	384
IV. Injunction Orders by the Arbitrator	386
V. Is there a Conflict Between Arbitrator Injunctions and Court Injunctions?	388
<i>Toyo Tire Holdings of Ams., Inc. v. Cont'l Tire N. Am., Inc.</i>	388
VI. Emergency Injunctions in the Arbitration: A New Phase?	391
<i>Yahoo! Inc. v. Microsoft Corp.</i>	391
VII. Injunctions Limited to Specific Areas	398
VIII. Wrapping Up: The Drafting	401
Chapter 11 · Consolidation	403
I. Consolidation Scenarios	403
II. Consolidation and Arbitrability: Who Decides	404
<i>Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n</i>	405
<i>Specialty Bakeries v. RobHal, Inc.</i>	407
<i>Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.</i>	412
III. Which Arbitrator Consolidates?	419

IV. Consolidation and the Arbitration Clause	420
V. Institutional Arbitration and Consolidation	420
Chapter 12 · The Arbitration: Before, During, and After the Hearing	425
I. Overview	425
II. Procedural Order No. 1	428
A. Injunction	431
B. Adoption of AAA Rules	431
C. Pre-hearing Discovery	431
D. Written Discovery Disputes	432
E. Third-Party Discovery	433
F. Depositions	433
G. Dispositive Motions	433
H. New Facts	434
III. Procedural Order No. 2	436
A. The Liability Hearing	438
IV. Partial Final Award on Liability	440
A. Builder’s Appeal (Motion for Vacature)	441
B. The Damages Phase	442
C. The Request to Take Expert Depositions	444
D. The Motion to Strike Claimant’s Expert	444
E. The Damages Hearing	444
F. The Partial Final Award on Damages	445

UNIT III

ENFORCING THE ARBITRATION

Chapter 13 · Enforcing and Appealing Arbitration Awards	449
I. The Mechanics of Arbitration Enforcement	450
II. The Grounds for Vacating an Arbitration Award	452
<i>Oxford Health Plans LLC v. Sutter</i>	453
A. “Procured by Fraud” (subsection 10(a)(1))	458
<i>Bonar v. Dean Witter Reynolds, Inc.</i>	458
B. Evident Partiality (subsection 10(a)(2))	463
<i>ErgoBilt, Inc. v. Neutral Posture Ergonomics, Inc.</i>	464
<i>Morelite Constr. Corp. v. N.Y.C. Dist. Council</i>	
<i>Carpenters Ben. Funds</i>	465
<i>Savers Prop. & Cas. Ins. Co. v. Nat’l Union Fire Ins. Co.</i>	470
C. Misconduct/Evidence (subsection 10(a)(3))	483
<i>White v. Valero Ref. New Orleans, LLC</i>	483
<i>Trademark Remodeling, Inc. v. Rhines</i>	487
<i>Hoteles Condado Beach, La Concha & Convention Ctr. v.</i>	
<i>Union de Tronquistas Local 901</i>	491
D. “Exceeded Powers” (subsection 10(a)(4))	492
1. “Exceeded Powers” in General	492

<i>Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.</i>	493
2. “Exceeded Powers” and the Essence Test	499
<i>ErgoBilt, Inc. v. Neutral Posture Ergonomics, Inc.</i>	499
<i>Hoteles Condado Beach, La Concha & Convention Ctr. v.</i> <i>Union de Tronquistas Local 901</i>	500
<i>ErgoBilt, Inc. v. Neutral Posture Ergonomics, Inc.</i>	501
3. “Exceeded Powers” and Remedies	503
<i>Bonar v. Dean Witter Reynolds, Inc.</i>	503
<i>Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG</i>	506
4. “Exceeded Powers” and Manifest Disregard	511
Chapter 14 · The Rise, Fall, and Uncertain Life of Manifest Disregard	515
I. What Is “Manifest Disregard”?	515
<i>Hall St. Assocs., L.L.C. v. Mattel, Inc.</i>	516
A. Should the Grounds for Arbitration Review Be Exclusive?	525
B. SCOTUS Further Muddies the Waters: Animal Feeds	526
II. The Circuit Courts and Manifest Disregard After Hall Street and Animal Feeds	527
A. Manifest Disregard Lives	527
<i>Dewan v. Walia</i>	527
<i>Comedy Club, Inc. v. Improv West Assocs.</i>	535
B. Manifest Disregard Is Dead	541
<i>Citigroup Global Mkts. Inc. v. Bacon</i>	541
C. Manifest Disregard Survives but Only as a “Gloss”	549
<i>Raymond James Fin. Servs. v. Fenyk</i>	549
III. What Lies Ahead?	559
ADDITIONAL PERSPECTIVES	
Chapter 15 · International Commercial Arbitration	563
I. The Trend Toward International Arbitration	564
II. Getting the International Arbitration Started	565
A. The International Arbitration Clause	565
B. Institutions in International Arbitration	566
1. LCIA Article 25: Interim and Conservatory Measures	567
2. ICC Article 28: Conservatory and Interim Measures	568
3. Arbitration Institute of the Stockholm Chamber of Commerce Article 37: Interim Measures	568
C. The Law of the Seat	569
III. Arbitrator Selection in International Arbitration	578
1. LCIA Article 5: Formation of Arbitral Tribunal	578
2. ICC Article 12: Number of Arbitrators	579
3. ICC Article 13: Appointment and Confirmation of the Arbitrators	580
4. Nationality of International Arbitrators	581

IV. Conflicts of Interest in International Arbitrator Selection	582
A. IBA Guidelines on Conflicts of Interest in International Arbitration	583
1. Non-Waivable Red List	583
2. Waivable Red List	583
3. Orange List	585
4. Green List	587
V. Presenting the Case in International Arbitration	588
A. Pre-Hearing Discovery and Disclosure in International Arbitration	589
1. LCIA Article 15: Written Statements	589
2. Arbitration Institute of the Stockholm Chamber of Commerce Article 29: Written Submissions	590
B. The Scope of Discovery in International Arbitration	591
VI. Evidence in International Arbitration Hearings	592
VII. Investment Arbitration: The Special Case of Suing the Sovereign	594
A. Bilateral Investment Treaty Example	595
B. Dispute Resolution in Investment Disputes: ICSID Arbitration <i>Rusoro Mining Ltd. v. the Bolivarian Republic of Venezuela</i>	598
VIII. Enforcement of International Arbitration Awards	600
A. Enforcement of International Arbitral Awards	601
Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the “New York Convention”], Articles I, II, and III	601
Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the “New York Convention”], Article V <i>Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.</i>	604
<i>Iran Aircraft Industries v. Avco Corp.</i>	617
IX. Final Practice Problem	623
Index	625

Table of Principal Cases

- Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 11
- Alford v. Dean Witter Reynolds, Inc., 82
- Alliance Healthcare Servs. v. Argonaut Private Equity, LLC, 305
- Am. Express Co. v. Italian Colors Rest., 182
- Am. Fed'n of Television & Radio Artists v. Storer Broad Co., 299
- American Express Fin. Advisors v. Thorley, 381
- AMF, Inc. v. Brunswick Corp., 7
- Amgen Inc. v. Kidney Ctr., 310
- Arthur Andersen LLP v. Carlisle, 323
- AT&T Mobility LLC v. Concepcion, 165
- Atalese v. U.S. Legal Services Grp., L.P., 44
- Bonar v. Dean Witter Reynolds, Inc., 436, 481
- Buckeye Check Cashing, Inc. v. Cardagna, 126
- Burton v. Bush, 260
- Caudle v. American Arbitration Ass'n, 75
- Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 412
- Citigroup Global Mkts. Inc. v. Bacon, 519
- Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n, 405
- Comedy Club, Inc. v. Improv West Assocs., 513
- Commonwealth Coatings Corp. v. Continental Casualty Co., 223
- Dewan v. Walia, 505
- DIRECTV, Inc. v. Imburgia, 193
- Dynegy Midstream Servs. v. Trammochem, 315
- ErgoBilt, Inc. v. Neutral Posture Ergonomics, Inc., 442, 477, 479
- First Options of Chi., Inc. v. Kaplan, 112
- Flexi-Van Leasing, Inc. v. Through Transp. Mut. Ins. Ass'n, 350
- Grand Wireless, Inc. v. Verizon Wireless, Inc., 337
- Green Tree Fin. Corp. v. Bazzle, 117
- Gvozdenovic v. United Air Lines, Inc., 333
- Hall St. Assocs., L.L.C. v. Mattel, Inc., 494
- Hay Grp., Inc. v. E.B.S. Acquisition Corp., 286
- Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901, 469, 478
- Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG, 484
- Intergen N.V. v. Grina, 355
- Iran Aircraft Industries v. Avco Corp., 615
- James v. McDonald's Corp., 56
- Keystone Shipping Co. v. Textport Oil Co., 343
- Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC, 328
- Marmet Health Care Ctr., Inc. v. Brown, 72
- Matthews v. Rollins Hudig Hall Co., 78
- Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 373
- Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Ben. Funds, 443
- Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 33
- Nguyen v. Barnes & Noble Inc., 38
- Noble Drilling Servs. v. Certex USA, Inc., 347

- Oxford Health Plans LLC v. Sutter, 179,
431
- Performance Unlimited v. Questar
Publishers, 375
- Prima Paint Corp. v. Flood & Conklin
Mfg. Co., 102
- Puleo v. Chase Bank USA, N.A., 144
- Raymond James Fin. Servs. v. Fenyk, 527
- Rent-A-Ctr., W., Inc. v. Jackson, 131
- Rusoro Mining Ltd. v. the Bolivarian
Republic of Venezuela, 596
- Savers Prop. & Cas. Ins. Co. v. Nat'l
Union Fire Ins. Co., 237, 448
- Sec. Life Ins. Co. of Am. v. Duncanson &
Holt, 293
- Securities Industry Ass'n v. Connolly, 85
- Southland Corp. v. Keating, 61
- Specialty Bakeries v. RobHal, Inc., 407
- Stolt-Nielsen S.A. v. AnimalFeeds Int'l
Corp., 471
- Tenaska Energy, Inc. v. Ponderosa Pine
Energy, LLC, 227
- Toyo Tire Holdings of Ams., Inc. v.
Cont'l Tire N. Am., Inc., 388
- Trademark Remodeling, Inc. v. Rhines,
465
- Volt Info. Scis. v. Board of Trs., 67
- White v. Valero Ref. New Orleans, LLC,
461
- Yahoo! Inc. v. Microsoft Corp., 391
- Yusuf Ahmed Alghanim & Sons, W.L.L.
v. Toys "R" Us, Inc., 603

Table of Practice Problems

Arbitrability, 37
Arbitration Clause, 23, 29–30
Arbitrator Bias, 235
Choosing an Arbitrator, 215, 218
Choosing an International Arbitrator, 580
Conflicts of Interest in International Arbitration, 586
Consolidation, 422
Consumer Financial Protection Bureau rule, 207
Cooling off period, 21
Discovery in Arbitration, 265, 267, 284
Discovery in International Arbitration, 590
Fraud in the Arbitration, 460
Injunctions, 384, 398
International Arbitration, 268 and 621
Law of the Seat, 567
Severability, 116–17
Scope, 94–95
Starting an Arbitration, 255
Third Party Discovery, 303, 322

Preface

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.

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was “just like building a snowman. You make one snowball at a time.” I thank him for inspiring the rolling of those early snowballs.

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Lastly, I wish to acknowledge my legal home since 1989, the law firm of Pepper Hamilton LLP. Andy Fletcher, Jeremy Heep and Will Taylor, my arbitration partners, manage to be demanding and supportive at the same time, and nobody has taught me more. Jim Rosener never lets me forget the client perspective, and I hope some of his practical wisdom is in this book. Ben Eichel, TJ Griffin, Lydia Furst, Whitney Redding, and our former colleague Professor Brian Berkley have each sat at arbitration hearings with me for weeks on end, and have made the time practicing with them in this field a joy ride. Andy, Will, TJ and Ben each made extremely incisive comments on various chapter drafts of this book. My sister from another mother, Jan Levine, my former co-chair as head of the Commercial Litigation Practice Group, supported every step of this work and covered some extra meetings as a result. *Mensch* does not begin to describe Jan. Pepper Hamilton generally has my distinct gratitude for giving me the time to do this despite a myriad of other demands. Thank you, partners.

Matt

Union River Bay, Maine

June 2017

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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?