

Table of Contents

ACKNOWLEDGMENTS	v
First Impressions and Introductions	1
Chapter 1. What's Arbitration and How Does It Differ from Litigation and Other Forms of Dispute Resolution?	3
1. What's Judge Judy Got to Do with It?: The Essential Characteristics of Arbitration	5
A. The Essential Characteristics of Arbitration	5
B. Wait, What? Entertainment as Adjudication?	7
2. A Really, Really, Really Brief History of Arbitration	9
3. Apples, Oranges, and Guavas: Comparing Arbitration to Other Modes of Dispute Resolution	13
A. A Summary Comparison of Dispute Resolution Processes	14
B. The Prevalence of Arbitration in Comparison to Other Dispute Resolution Processes	17
4. The Many Faces of Arbitration: Stages of the Arbitral Process	19
A. The Parties Agree to Arbitrate	20
B. The Parties Proceed to Arbitration or One of Them Resists and the Other Must Compel Arbitration	22
C. The Parties Choose an Arbitrator (or Arbitrators)	24
D. The Parties Prepare for and Participate in the Arbitral Hearing	24
E. The Arbitrators Issue an Award	25
F. The Parties Comply with the Award or a Party Resists and the Other Must Seek Judicial Aid to Enforce It	26
Chapter 2. Pros and Cons: Assessing When Arbitration Works Best	29
1. Some Pros	31
A. Pro: Arbitration Is Cheaper (Maybe?)	31
B. Pro: Flexibility (if Parties Use It?)	32
C. Pro: Expert Adjudicators	34
D. Pro: Privacy/Confidentiality (Though This Could Be a Big Con Too)	36
E. Pro: Assuring Standards of Decision	37
F. Pro: International Benefits	38
G. Pro: Class Action Waiver (Well, a Pro for Businesses, at Least)	39

2.	Some Cons	40
A.	Con: Lack of Error Correction in High-Stakes Cases (No Appeals)	40
B.	Con: Risk of Split-the-Difference Awards (Maybe?)	41
C.	Con: Higher Up-Front Costs.....	41
D.	Con: Lower Damages Awards (Maybe?)	42
E.	Con: Repeat Player Problems with Arbitrators (Possibly but . . .)	42

Chapter 3. Five Core Concepts at the Heart of

	Arbitration	45
1.	Freedom of Contract (and Its Limits)	45
A.	General Contract Law Limits	46
B.	Procedural Due Process Limits	47
C.	Functus Officio Limits	50
2.	Arbitrability	51
A.	Subject Matter Arbitrability	52
B.	Contractual Arbitrability	54
i.	Flaws in the Arbitration Agreement	55
ii.	Scope of the Arbitration Agreement	56
iii.	Preconditions to Arbitration	57
3.	Separability	58
4.	Kompetenz-Kompetenz.....	62
5.	Limited Judicial Involvement and Review.....	64

Chapter 4. Arbitration Laws and Federalism

1.	The Various Roles of Arbitration Laws	68
2.	A Brief Tour of the FAA.....	72
A.	Section 1 of the FAA: Scope of the Act	72
B.	Section 2 of the FAA: Heart of the Act	74
C.	Sections 3 and 4 of the FAA: Remedies for Breach of Arbitration Contracts.....	75
D.	Sections 5 and 7 of the FAA: Aids to the Arbitral Process	77
E.	Sections 9, 10, and 11: Limited Judicial Oversight	78
F.	Section 16 of the FAA: Appeals	81
3.	What the FAA---?!? Federal Preemption	81
4.	State Laws of Arbitration	88

Chapter 5. Arbitration Institutions and Rules

1.	Procedural Rules	94
----	------------------------	----

2. Arbitrator Lists	96
3. Administrative Services	97
Chapter 6. Enforcing Arbitration Agreements	99
1. To Go to Arbitration or Not to Go to Arbitration, That's the Question	101
A. Who Decides if the Dispute Is Arbitrable? (Conflict 3)	102
i. Separability.....	103
ii. Kompetenz-Kompetenz.....	104
a) Flaws in the Agreement and Scope of the Agreement	104
b) Procedural Preconditions.....	106
iii. Putting the Pieces Together	106
B. Is the Dispute Arbitrable? (Conflict 2).....	107
i. Flaws in the Agreement	108
a) Formation Requirements	108
b) Defenses Enforcement or Excuses for Non-Performance	110
ii. Scope of the Agreement.....	111
iii. Procedural Preconditions	112
2. An Example.....	112
Chapter 7. Enforcing Arbitral Awards.....	117
1. The Preclusive Effect of Enforceable Arbitral Awards	118
A. Claim Preclusion.....	119
B. Issue Preclusion.....	119
2. Litigating About Arbitration: Trusting Arbitrators	121
A. Fraud, Corruption, or Undue Means	123
B. Evident Partiality and Bias of Arbitrators	123
C. Procedural Misconduct	128
D. Excess of Authority.....	129
E. Manifest Disregard of the Law.....	132
3. Judicial Modification of Awards.....	135
4. The Frontiers of Judicial Review	135
Chapter 8. Is Arbitration Fair?: Consumers, Employees, and Other Disparate Parties.....	137
1. A Primer on a Few Key Public Policy Issues Surrounding Disparate Party Arbitration.....	139
A. Concerns About Formation of the Arbitration Agreement.....	140

- B. Concerns About the Fairness of the Arbitral Process Itself 145
- C. Concerns About the Outcomes in Arbitration 147
- 2. Class Action Waivers 148
- 3. Unconscionability and Adhesive Arbitration 152

Chapter 9. A Peek at International Commercial

- Arbitration 155**
- 1. The 10,000 Meter View 156
 - A. The Validity of the Arbitration Agreement 157
 - B. The Arbitral Process 162
 - C. The Review and Enforcement of Arbitral Awards 163
- 2. The New York Convention Overview 163
 - A. Does the Convention Apply? 164
 - B. Are There Any Grounds for Non-Enforcement of the Award? 165
 - i. Incapacity and Invalidity 165
 - ii. Lack of Notice or Fairness 166
 - iii. Excess of Authority 166
 - iv. The Tribunal or the Procedure Was Not Consistent with the Parties' Agreement 166
 - v. The Award Is Not Yet Binding or Has Been Vacated 167
 - vi. The Subject Matter of the Award Is Not Arbitrable 168
 - vii. The Award Violates Public Policy 168
- 3. Intro to Investor-State Arbitration 169
 - A. Consent 171
 - B. A Dispute Between Contracting State and a National of a Different Contracting State 172
 - C. A Legal Dispute Arising out of an Investment 173
- 4. Some Criticisms of Investor-State Arbitration 174