

TABLE OF CONTENTS

FOREWORD.....	V
ABOUT THE AUTHORS	XI
PREFACE	XIII
THE LABOR LAW GROUP	XVII
ACKNOWLEDGMENTS AND PERMISSIONS	XXV
TABLE OF CASES	XLVII

PART 1. LABOR ARBITRATION

Chapter I. History and Background	3
A. Early Judicial Hostility.....	3
Tobey v. County of Bristol, et al	4
A Note on the Arbitration Process and Nomenclature	7
B. The Development and Acceptance of Labor Arbitration.....	10
1. Before the Second World War.....	10
American Labor Arbitration: The Early Years.....	12
2. The Second World War.....	13
American Labor Arbitration: The Maturing Years	13
3. Post-War Judicial and Legislative Acceptance.....	15
Chapter II. Introduction to Grievance Resolution	21
A. Grievance Procedures	21
B. Various Arbitration Systems	23
C. Arbitrator Selection.....	24
D. The Arbitration Profession	26
E. Advocates in Arbitration.....	29
F. The Arbitration Hearing	30
Notes and Questions	31
G. The Resolution of Labor Grievances in Other Countries	33
H. Alternative Mechanisms for Grievance Resolution	34
1. Joint Fact-Finding	34
2. Grievance Mediation	35
3. Expedited Arbitration	36
4. Teamster Joint Committees.....	36
5. System Boards Under the Railway Labor Act.....	38
Chapter III. Federal Common Law	41
A. Creation of the Federal Common Law	41
1. Introduction	41

2.	Decisions of the Supreme Court	43
	Textile Workers Union v. Lincoln Mills	43
	Notes and Questions	47
	A Note on Labor Arbitration and the Federal Arbitration Act	48
	Local 174, Teamsters, Chauffeurs, Warehousemen Helpers v. Lucas Flour Co.	51
	Notes and Questions	55
B.	Judicial Determination of Arbitrability	56
1.	Introduction	56
2.	Establishing the Basic Standards of Arbitrability	58
	United Steelworkers v. Warrior & Gulf Navigation Co.	58
	United Steelworkers v. American Manufacturing Co.	63
	Notes and Questions	65
C.	When Does a Judge or an Arbitrator Decide Arbitrability Questions?.....	72
	The Mixture of Federal Common Law Under § 301 and the FAA	72
1.	Judges, Not Arbitrators, Must Decide Whether the Parties Have Agreed to Arbitrate a Particular Dispute	72
	Howsam v. Dean Witter Reynolds, Inc.	74
2.	Contract Formation Is an Arbitrability Question for a Judge to Decide	77
3.	Delegations of Authority to Arbitrators to Decide Arbitrability Issues Are Permissible on a Limited Basis.....	79
	Mohamed v. Uber Technologies.....	81
4.	Arbitrators, Not Judges, Decide Procedural Arbitrability Questions	85
	Notes and Questions	87
D.	Arbitrators' Decisions on Procedural and Substantive Arbitrability Questions	89
1.	Procedural Arbitrability.....	90
	Yokohama Tire Corp.	90
	Notes and Questions	94
2.	Substantive Arbitrability.....	96
	Problem	96
	Notes and Questions	97
E.	Judicial Review of Labor Arbitration Awards.....	101
1.	Articulating the Basic Standard for Judicial Review	102
	United Steelworkers v. Enterprise Wheel & Car Corp.	102
	Notes and Questions	105
2.	Refining the Standard for Judicial Review.....	112
	United Paperworkers International Union v. Misco, Inc.	113
	Notes and Questions	119
	Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17	121
	Notes and Questions	128
	Major League Baseball Players Association v. Garvey	132
	Notes and Questions	136

National Football League Management Council and National Football League v. National Football League Players Association	139
Note and Questions	149
Note on the Need for More Clarity About the Overlapping LMRA and FAA Judicial Review Standards	149
F. Injunctions	151
A Further Note on Injunctions and No-Strike Obligations	152
G. Arbitration and Other Workplace Laws	154
Alexander v. Gardner-Denver Co.....	155
Notes	161
H. Section 301 Preemption	161
1. Overview of Section 301 Preemption Jurisprudence	161
2. Application of the Preemption Doctrine Under Section 301.....	166
Boogaard v. National Hockey League	167
Notes and Questions	171
Chapter IV. Impact of Law	177
A. The Duty of Fair Representation	177
1. Introduction	177
2. Origins of the Duty of Fair Representation in the Context of Collective Bargaining.....	178
3. Defining the Duty of Fair Representation in the Context of Grievance Arbitration	182
Vaca v. Sipes	182
Notes and Questions	191
4. Remedial and Procedural Issues in Enforcing the Duty of Fair Representation.....	196
Bowen v. United States Postal Service	196
Notes and Questions	202
A Note on Additional Remedial and Procedural Issues.....	204
B. The Role of External Law in Arbitration.....	205
1. Introduction	205
2. The Debate.....	207
Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?.....	207
When Should Arbitrators Follow Federal Law?	213
Notes and Questions	215
3. Applying the Theories	217
Evans Products Co.....	217
International Paper Co., Southern Kraft Division, Bastrop Mill.....	221
Notes and Questions	224
A Note on Current Issues of External Law.....	227

Chapter V. Evidence and Procedure	231
A. Evidence.....	231
1. Introduction	231
A Pragmatic Suggestion to Address the Limited Use of the Rules of Evidence in Arbitration	232
Problems of Proof—Evidence in Arbitration	234
Evidence	235
Notes and Questions	238
2. Admissibility of Evidence.....	241
Ambassador Convalescent Center, Inc	241
Notes and Questions	246
B. Due Process of Arbitration.....	252
1. Introduction	252
Notes and Questions	254
2. Access to Arbitration, Separate Representation, and Third- Party Intervention.....	254
(a) Access to Arbitration	254
Notes and Questions.....	257
(b) Separate Representation.....	257
(c) Third-Party Intervention	258
3. Evidentiary Concerns Bearing on Due Process.....	259
(a) Self-Incrimination.....	259
Notes and Questions.....	260
(b) Search and Seizure.....	263
Commodity Warehousing Corp.....	263
Notes and Questions.....	266
(c) Confrontation	267
(d) Surprise	269
Problem	271
4. Contractual Due Process Rights.....	271
General Dynamics Convair Div.....	271
Notes and Questions	276
C. Discovery.....	277
1. Contractual Provisions.....	278
2. Discovery Under the National Labor Relations Act.....	279
3. The Authority of the Arbitrator.....	281
Ralston Purina Co.	283
Notes and Questions	285
D. The Role of Precedent	287
1. Introduction	287
2. The Effect of Prior Arbitration Awards.....	290
A Note on Arbitrator Considerations in Assessing Prior Arbitration Decisions.....	290
Notes and Questions	291
A Note on Arbitral Second Guesses and the Courts	296
Notes and Questions	298

3.	The Effect of Prior Administrative or Judicial Determinations on Labor Arbitration	300
	Notes and Questions	302
Chapter VI. The Subjects of Labor Arbitration		305
A.	Discipline and Discharge	305
1.	Introduction	305
2.	Articulating a Theory of Just Cause	308
	Notes and Questions	310
	Toward a Theory of “Just Cause” in Employee Discipline Cases.....	312
	Major League Baseball Players Association and Office of the Commissioner of Baseball	318
	Notes and Questions	330
3.	Common Reasons for Discharge and Requirements for Just Cause.....	331
	Stroehmann Bakeries, Inc.	331
	Notes and Questions	337
	American Medical Response	341
	Notes and Questions	348
	Chicago Tribune Company.....	350
	Notes and Questions	357
4.	Off-Duty Conduct and Appropriate Penalties	362
	Vista Nuevas Head Start	362
	Major League Baseball Players Association and Office of the Commissioner of Baseball	369
	Notes and Questions	374
	Morton Salt Company	376
	Notes and Questions	379
5.	Remedial Issues in Discipline Cases	383
	Ralph’s Grocery Co.	389
	Notes and Questions	393
B.	Management Rights	397
	The Concept of Management Rights: An Overview	399
	Chanute Manufacturing Company	402
	Notes and Questions	408
C.	Past Practice	411
	Past Practice and the Administration of Collective Bargaining Agreements	412
	In re Wright County [Minn.] and American Federation of State County and Municipal Employees, AFSCME Council 65.....	420
	Notes and Questions	431
D.	Seniority.....	437
1.	Introduction	437
2.	The Acquisition and Calculation of Seniority.....	441
	(a) Seniority Units.....	441
	(b) Seniority Dates	441

Notes and Questions	442
3. Retention, Accumulation, and Loss of Seniority	442
4. The Uses of Seniority	443
City of Fond Du Lac	443
Notes and Questions	450
5. Superseniority.....	456
E. Wages and Hours	457
1. Introduction	457
2. Wage Disputes	460
(a) Job Classifications	460
Broward County School Board.....	460
Notes and Questions.....	467
(b) Overtime.....	468
Lithonia Hi Tek—Vermillion	469
Notes and Questions.....	473
A Note on Job-Evaluation Systems	480
3. Hours Disputes	484
Goodyear Tire and Rubber Co.	484
Notes and Questions	487
F. Fringe Benefits	491
1. Introduction	491
2. Holiday Pay.....	492
Outboard Marine Corp.....	492
Notes and Questions	497
3. Vacations.....	499
Reichold Chemicals, Inc.	500
Notes and Questions	502
4. Leaves of Absence.....	505
(a) Medical or Sick Leave.....	505
A Note on the Impact of Federal Statutes on Sick Leave Rules	507
(b) Funeral or Bereavement Leave	508
(c) Union Business Leave	509
5. Insurance	509
G. Subcontracting.....	512
1. Introduction	512
2. Contractual Provisions on Subcontracting	515
Fairmont General Hospital, Inc.	516
Notes and Questions	522
3. Subcontracting Disputes Under Silent Contracts.....	525
Allis-Chalmers Mfg. Co.	529
Notes and Questions	535
Chapter VII. Arbitration in the Public Sector	539
A. State and Local Government.....	539
1. Introduction	539

2.	Grievance Arbitration	540
	County of Chautauqua v. Civil Service Employees Association, Local 1000, AFSCME	540
	Notes and Questions	545
	City of Bradford v. Teamsters Local No. 110.....	548
	Notes and Questions	555
3.	Interest Arbitration.....	557
(a)	Constitutional Issues.....	559
	Judicial Response to Public Sector Arbitration	559
	Notes and Questions.....	563
(b)	Decisional Criteria.....	564
	Notes and Questions.....	565
(c)	Types of Interest Arbitration	567
1.	Conventional Arbitration	567
	City of Inver Grove Heights	567
	Notes and Questions	576
2.	Final Offer Arbitration	578
	West Des Moines Education Association v. Public Employment Relations Board	578
	Notes and Questions.....	584
(d)	A Broader View of Interest Arbitration	585
1.	Interest Arbitration in the Private Sector	585
2.	The Employee Free Choice Act and Comparative Experience.....	586
	Fairness and Opportunity for Choice: The Employee Free Choice Act & the Canadian Model	587
3.	The Public Sector Backlash.....	588
	Notes and Questions.....	591
4.	Union Security in the Public Sector	591
	Note and Question.....	592
B.	The Federal Government.....	592
1.	Differences from Private Sector Labor Arbitration.....	593
2.	The 2018 Executive Orders.....	595
(a)	The Three Executive Orders	596
1.	Executive Order 13,836—the Collective Bargaining Procedures Order	596
2.	Executive Order 13,837—the Official Time Order	596
3.	Executive Order 13,839—the Removal Procedures Order.....	596
(b)	Litigation Challenging the Executive Orders.....	596
	Notes and Questions.....	597
3.	Standards for FLRA Review of Arbitration Awards	598
	Greenstreet v. Social Security Administration.....	599
	Notes and Questions	604
	United States Department of Justice Federal Bureau of Prisons and American Federation of Government Employees, Local 817	605

4.	Notes and Questions	615
4.	Federal Sector Impasse Resolution	616
4.	Note and Question.....	616
Chapter VIII. Perspectives on Labor Arbitration		617
A.	Arbitral Ethics.....	617
1.	Introduction	617
2.	Prehearing Conduct.....	619
	Ethical Boundaries Between Arbitrators and the Parties.....	619
	Notes and Questions	624
	Problems.....	626
3.	Hearing Conduct.....	628
	Teamsters Local 506 v. E. D. Clapp Corp.	628
	Notes and Questions	635
	A Note on the Ethical Obligations of Party-Appointed Arbitrators.....	636
4.	Posthearing Conduct	638
	Philadelphia Newspapers, Inc. v. Newspaper Guild of Greater Philadelphia, Local 10	638
	Notes and Questions	644
	A (Very Brief) Note on the Ethical Obligations of Advocates	649
B.	Criticism of Labor Arbitration.....	650
1.	Introduction	650
2.	Arbitration's Increasing Legalism.....	651
	Creeping Legalism in Labor Arbitration: An Editorial	651
	Labor Arbitration: The Problem of Legalism.....	655
	Notes and Questions	657
3.	Arbitration's Biases.....	661
	Notes and Questions	662
PART 2. INDIVIDUAL EMPLOYMENT ARBITRATION		
Chapter IX. History and Background.....		667
A.	Introduction	667
B.	The Legal Background	674
	Gilmer v. Interstate/Johnson Lane Corporation	674
	Notes and Questions	681
	Circuit City Stores, Inc. v. Adams.....	684
	Notes and Questions	689
	14 Penn Plaza LLC v. Pyett.....	690
	Notes and Questions	702
	A Note on EEOC v. Waffle House	705
	Notes and Questions	706
Chapter X. Judicial Application of the FAA		709
A.	Introduction	709
B.	Mandatory Arbitration Clauses and Class Action Waivers	711
	Notes and Questions	718

A Note on Strategies to Get Around Class and Collective Action	
Waivers	720
A Note on Rent-A-Center West, Inc. v. Jackson.....	728
C. Contract-Formation Issues	730
Soto v. State Industrial Products, Inc.....	730
Notes and Questions	738
D. Unconscionability	741
Chavarria v. Ralphs Grocery Co.....	742
Notes and Questions	750
E. Arbitration Fees	753
Cole v. Burns International Security Services	755
Green Tree Financial Corp.—Alabama v. Randolph	758
Morrison v. Circuit City Stores	759
Notes and Questions	766
F. Discovery.....	769
Continental Airlines, Inc. v. Mason	769
Guyden v. Aetna, Inc.....	770
Walker v. Ryan's Family Steak Houses, Inc.....	771
Williams v. Katten, Muchin & Zavis.....	772
Poublon v. C.H. Robinson Company Eyeglasses	773
Notes and Questions	776
Note on Electronic Discovery.....	777
G. Arbitrators' Use of External Law	779
General Dynamics Land Systems	779
Notes and Questions	781
Globe Furniture Rentals, Inc.....	781
Notes and Questions	784
H. Judicial Review.....	785
1. Bargained-For Review Standards	785
Hall Street Associates, L.L.C. v. Mattel, Inc.	785
Notes and Questions	791
2. Manifest Disregard.....	793
Notes and Questions	795
A Note on Using FAA Judicial Review Doctrine in § 301 Cases ...	798
Chapter XI. Employment Arbitration in Practice.....	801
A. Employment Arbitration Opinions.....	801
1. Evidence	801
Arbitration Opinion and Award Issued by William H. Ewing on April 12, 2000.....	801
Notes and Questions	804
2. Dismissal as Discovery Sanction	804
Arbitration Opinion and Award Issued by Robert S. Brandt on August 25, 2006	804
Notes and Questions	807

3.	Summary Judgment.....	808
	Arbitration Opinion and Award Issued by David H. Stacy on August 4, 2011	808
	Notes and Questions	815
4.	National Origin Discrimination Claim	816
	Hobby Lobby Stores, Inc. and Individual Grievant.....	816
	Notes and Questions	823
5.	Sexual Harassment, Tort Claims, and Worker's Compensation Exclusivity	824
	Arbitration Opinion and Award Issued by Robert A. Alston on May 12, 2006	824
	Notes and Questions	828
6.	Incorporating Arbitration Rules by Reference	829
	Collins v. Diamond Pet Food Processors of Cal.....	829
	Belnap v. Iasis Healthcare.....	832
	Notes and Questions	836
7.	Damages.....	837
	Arbitration Opinion and Award Issued by Melissa H. Biren on Sept. 29, 2011.....	837
	Notes and Questions	844
B.	Normative and Empirical Studies of Employment Arbitration	845
	An Empirical Study of Employment Arbitration: Case Outcomes and Processes.....	849
	Notes and Questions	858
	A Comparative Note on Protecting Non-Union Workers.....	860
C.	Ethical Issues in Employment Arbitration.....	861
	Ethical Concerns in Drafting Employment Arbitration Agreements After <i>Circuit City</i> and <i>Green Tree</i>	861
	Notes and Questions	864

PART 3. MEDIATION AND OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION

Chapter XII. Mediation	871	
A.	Description of the Process.....	872
	Alternative Dispute Resolution: An Introduction	872
	The Mediation Process: Practical Strategies for Resolving Conflict.....	873
	Notes and Questions	877
B.	Why Parties Choose Mediation	879
	The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts	879
	‘A Grin Without a Cat’: Civil Trials in the Federal Courts	881
	Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes	882
	The Many Lanes Out of Court: Against Privatization of Employment Discrimination Disputes.....	885
	Notes and Questions	893

C.	The Mediator's Role.....	896
	“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit.....	896
	Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits.....	899
	The Theory and Practice of Mediation: Reply to Professor Susskind... Notes and Questions	900 903
D.	How Lawyers Represent Clients in Mediation.....	904
	Alternative Dispute Resolution: An Introduction	904
	Notes and Questions	908
	Culture Change? A Tale of Two Cities and Mandatory Court- Connected Mediation.....	910
	Notes and Questions	913
E.	The Law Affecting the Mediation Process	914
1.	Confidentiality	914
	Nielsen-Allen v. Industrial Maintenance Corp.	914
	Uniform Mediation Act	917
	Notes and Questions	920
2.	Enforceability of Mediated Agreements.....	923
	Jacobs v. New York Financial Center Hotel.....	923
	Notes and Questions	925
F.	Mediation Ethics	926
1.	Ethics and the Mediator.....	926
	A Note on Mediator and Arbitrator Ethics	926
	Notes and Questions	930
2.	Ethics and the Advocate.....	934
	Some Ethical Issues Surrounding Mediation	934
	Notes and Questions	939
G.	Grievance Mediation	941
	Thovson v. Behavioral Health Res.....	942
	Low Profile/High Potential: A Look at Grievance Mediation	945
	How Interest-Based, Grievance Mediation Performs Over the Long Term	947
	Notes and Questions	948
	Chapter XIII. Other Methods.....	951
A.	Open Door Policies	951
	Korslund v. DynCorp Tri-Cities Services, Inc.	951
	Notes and Questions	956
B.	Ombuds	957
	Kientzy v. McDonnell Douglas Corp.	958
	Carman v. McDonnell Douglas Corp.	960
	Notes and Questions	963
C.	Peer Review Systems	964
	Bernholc v. Kitain	965
	Bernholc v. Kitain	967

Notes and Questions	968
D. Early Neutral Evaluation	969
Notes and Questions	970
E. Multistep Approaches	971
Drafting ADR Programs: Management-Integrated Conflict Management Systems	971
Notes and Questions	972
F. International Approaches	974
Settlement of Disputes over Interests and Rights	974
Developing a Documentary Credit Dispute Resolution System: An ICC Perspective	977
Dispatch from Cambodia: Workplace Dispute Resolution in Transition.....	981
Notes and Questions	984
Appendix A. Statutory Excerpts	987
Appendix B. On Writing the Post-Hearing Brief	1007
Appendix C. Writing the Post-Hearing Brief Part II	1013
INDEX.....	1017