

Table of Contents

PREFACE	V
NOTE TO TEACHERS	VII
Chapter 1. What Is Arbitration	1
§ 1 Arbitration Defined	1
§ 2 Contractual Arbitration and Non-Contractual Arbitration; Constitutional Right to Jury Trial	2
§ 3 Arbitration Law Summarized.....	3
(a) Post-Dispute and Pre-Dispute Agreements to Arbitrate.....	3
(b) Enforcement of Arbitration Agreements.....	4
(c) The Arbitration Process	5
(d) Enforcement of Arbitrator’s Decision or “Award”.....	5
Chapter 2. Sources of Contemporary American Arbitration Law	7
§ 4 State Law	7
§ 5 Federal Law	8
(a) Sources of Federal Arbitration Law	8
(b) The FAA’s Specific Enforcement of Arbitration Agreements	9
(c) The FAA’s Broad Applicability: Interstate Commerce, Including Consumer Transactions	12
(d) The FAA’s Exclusions for Employment and Labor Arbitration.....	14
(e) Other Exceptions to the FAA’s Enforcement of Arbitration Agreements	16
(1) Federal Statutory Claims—from Wilko to McMahon and Gilmer	16
(2) Sexual Assault and Sexual Harassment	20
(3) Military Personnel	21
(4) Residential Mortgage Loans and Whistleblowers	21
(5) Auto Dealers and Poultry Farmers.....	22
(6) Consumer Product Warranties	22
(7) Bankruptcy	23
(8) Regulations of Nursing Homes, Student Loans, Securities	24
(9) Bills to Reduce FAA’s Applicability	25

Chapter 3. FAA Preemption of State Law.....	27
A. FAA Preemption Without Creating Federal Jurisdiction.....	28
§ 6 FAA as (Non-Preemptive) Procedural Law	28
§ 7 FAA as (Preemptive) Substantive Law	29
§ 8 FAA Creates No Federal Jurisdiction	30
B. FAA Preemption of State Law Impeding Contract Enforcement.....	33
§ 9 FAA Preemption Generally Enforces Executory Arbitration Agreements	34
§ 10 FAA Preempts State Law Prohibiting Courts from Enforcing Arbitration Agreements	35
§ 11 FAA Preempts State Law Denying Specific Performance to Arbitration Agreements.....	35
§ 12 FAA Preempts State Law Denying Enforcement of Agreements to Arbitrate Certain Claims	37
§ 13 FAA Preempts State Law Denying Enforcement of Arbitration Agreements in Certain Types of Transactions.....	41
(a) Generally Preempted	41
(b) Possible Exceptions.....	42
(1) Child Custody	42
(2) Probate.....	43
§ 14 FAA Preempts State Law Raising the Standard of Assent for Forming an Arbitration Agreement	43
§ 15 Reverse Preemption in Insurance: The FAA and McCarran-Ferguson.....	45
§ 16 Contracting out of FAA Preemption	47
(a) Agreeing to State Arbitration Law, Instead of the FAA.....	47
(b) Rare to Contract out of FAA Preemption	49
Chapter 4. Formation of Enforceable Arbitration Agreements.....	53
A. Formation of Arbitration Agreements.....	54
§ 17 The FAA and State Law in Contract Formation	54
(a) Written and Electronic Agreements	54
(b) The FAA Incorporates State Law of Contract Formation	55
§ 18 Mutual Manifestations of Assent.....	55
(a) Manifesting Assent, Generally.....	55
(b) Apps and Websites.....	56
(c) Assent by Performance	58
(d) Is the Document a Contract?.....	59
(e) Incorporation by Reference	60
(f) Organization's Charter or Bylaws	61

(g) Assent by Agent	63
(h) UCC Article 2 on the Sale of Goods	65
(i) Wills and Trusts.....	66
§ 19 Consideration	67
B. Defenses to Enforcement of Arbitration Agreements	71
§ 20 Defenses Only from Contract Law.....	72
§ 21 The Separability Doctrine	73
(a) The Separability Doctrine Adopted in <i>Prima Paint</i>	73
(b) The Separability Doctrine Preempts State Law	76
§ 22 Separability Applies to Defenses (Validity), Not Formation.....	78
§ 23 Delegation Clauses	83
§ 24 Unconscionability and Similar Regulation of Arbitration.....	87
(a) Unconscionability, Generally	87
(b) The FAA's Constraint on the Scope of the Unconscionability Doctrine	92
(c) The "Prospective Waiver" Doctrine.....	94
(d) Arbitration Organizations' Policing Against Unconscionability.....	96
(e) Quasi-Governmental Policing of Securities Arbitration.....	97
§ 25 Waiver of the Right to Arbitrate.....	99
Chapter 5. Terms of Arbitration Agreements	105
A. Scope of Arbitration Agreements.....	106
§ 26 Scope of Arbitration Agreements.....	106
(a) Two Meanings of "Arbitrable"	106
(b) Scope Is Presumptively Decided by Courts.....	107
(c) Delegating Scope Issues to Arbitrators	109
(d) How Courts Decide the Scope of an Arbitration Agreement	111
(e) Resolving Ambiguities in Favor of Arbitration	113
B. Multi-Party Agreements and Disputes	114
§ 27 Claims by or Against Those Not Party to the Arbitration Agreement	115
(a) Party Plaintiff vs. Non-Party Defendant.....	115
(b) Non-Party Plaintiff vs. Party Defendant.....	118
(c) Assignee's Right to Compel Arbitration	119
§ 28 Consolidation of, and Stays Pending, Related Proceedings	120
§ 29 Class Actions and Mass Individual Arbitrations.....	123
(a) Class Arbitration and Agreements Barring It	123
(1) Class Arbitration's Brief Growth	123

(2) Enforcing Agreements for Individual Arbitration	124
(3) Private Attorneys General Act (“PAGA”)	129
(b) Mass Individual Arbitrations	130
C. Conditions to Arbitration	133
§ 30 Conditions to Arbitration	133
D. Arbitration Procedure	133
§ 31 Procedure by Contract	134
§ 32 Privacy, Confidentiality, and #MeToo	135
§ 33 Pre-Hearing	138
(a) Selection of Arbitrator(s)	138
(1) Methods of Selection	138
(2) Arbitrator Fees	141
(3) Judicial and Regulatory Constraints on Party Selection of Arbitrator(s)	142
(b) Pleadings	145
(c) Filing Fees and Un-Administered Arbitration	146
(d) Discovery	147
§ 34 Hearing	150
(a) General Comparison with Trial	150
(b) Role of Lawyers	151
(c) Rules of Evidence	153
(d) Substitutes for In-Person Hearing	155
(1) Online Arbitration Hearings	155
(2) Arbitration on the Documents (Desk Arbitration) and Dispositive Motions	156
(3) Default or Ex Parte Awards	158
(e) Un/Reasoned Awards, and the Role of Precedent	160
§ 35 Remedies	162
(a) Generally Determined by Contract	162
(b) Typical Contract Terms	164
Chapter 6. Enforcement and Vacatur of Arbitration	
Awards	169
A. Enforcement of Arbitration Awards	170
§ 36 Confirmation	170
§ 37 Claim Preclusion (Res Judicata)	171
§ 38 Issue Preclusion (Collateral Estoppel)	172
B. Vacatur of Arbitration Awards	173
§ 39 Overview of Vacating Arbitration Awards	174
(a) Vacatur of Award Contrasted with Appellate Reversal of Trial Court	174
(b) Narrow Grounds for Vacatur Save Time and Money	175

(c) Arbitration Award as Contract Term	177
§ 40 Statutory Grounds for Vacatur	179
(a) Corruption, Fraud or Undue Means	179
(b) Evident Partiality or Corruption	180
(1) Arbitrator's Disclosure.....	180
(2) Arbitrator's Conduct	184
(3) Tripartite Arbitration	185
(c) Arbitrator Misconduct	186
(d) Exceeded Powers.....	187
§ 41 Formerly Non-Statutory Grounds for Vacatur	190
(a) Un/Restricted Submissions	190
(b) Restricted Submissions: Agreements Requiring Arbitrators to Apply the Law Correctly	191
(1) Hall Street and Interpretation of the FAA	191
(2) State Law Departures from Hall Street	192
(c) Unrestricted Submissions: Agreements Not Requiring Arbitrators to Apply the Law Correctly	194
(1) Uncertainty About When Arbitrators Must Apply the Law	194
(2) Manifest Disregard of Law	200
(3) Public Policy	203
§ 42 Federal Preemption of State Law on Vacatur	205
(a) State Grounds for Vacatur Broader than Federal Grounds	205
(b) State Grounds for Vacatur Narrower than Federal Grounds	208
Chapter 7. Labor Arbitration.....	211
§ 43 Labor Law, Labor Unions, and Labor Arbitration	212
§ 44 Law Governing Labor Arbitration	218
(a) LMRA Rather than FAA	218
(1) Section 301	218
(2) Lincoln Mills.....	219
(b) NLRA	221
(c) RLA.....	222
(d) Public Sector Labor Laws.....	222
(1) Labor Arbitration of Federal Employees.....	222
(2) Labor Arbitration of State and Local Government Employees.....	223
§ 45 Formation of Enforceable Labor Arbitration Agreements	223
(a) Labor Arbitration Only Partly Governed by Contract Law	223

(b) Mutual Manifestations of Assent and Consideration	224
(1) Manifestations of Assent	224
(A) Manifestations of Assent by Employer and Union.....	224
(B) Conditions Sometimes Required to Form a CBA—including Ratification by Employees.....	227
(C) CBA Distinguished from Employment Contract	228
(2) Consideration	229
(c) Defenses to Enforcement of Labor Arbitration Agreements	231
(1) Contract Defenses and the Separability Doctrine	231
(2) Non-Contract Defenses to Enforcement	234
§ 46 Terms of Labor Arbitration Agreements.....	234
(a) Freedom of Contract	234
(b) Scope of Labor Arbitration Agreements.....	242
(1) Court Determines Scope Unless Agreement Clearly Says Arbitrator Does	242
(2) Courts Generally Interpret Labor Arbitration Agreements Broadly	244
(3) Temporal Scope of Labor Arbitration Agreements.....	245
(4) Parallel Contract and Statutory Claims	249
(A) Narrow Arbitration Agreements Covering Only Contract Claims	249
(B) Broader Labor Arbitration Agreements Covering Statutory Claims	251
(C) Broad Versus Narrow Contract Language	252
(c) Multi-Party Agreements and Disputes	255
§ 47 Grievance-Arbitration Process.....	257
(a) The Grievance Process	257
(b) Invoking Arbitration and Arbitrator Selection.....	258
(c) Preparing for the Hearing.....	260
(d) Conferring with the Opposing Advocate	263
(e) The Arbitration Hearing	263
(f) Payment of Fees.....	268
§ 48 The Private Law of Labor Arbitration	268
(a) Written Opinions and Awards	268
(b) Persuasive Precedent	269
(c) Substance of Opinions and Awards	269
(1) Discharge and Discipline.....	269
(2) Contract Interpretation	273

(3) Technology.....	278
(4) Discrimination Cases.....	282
(5) Remedies.....	283
§ 49 Enforcement and Vacatur of Labor Arbitration Awards	284
(a) Enforcement of Labor Arbitration Awards	284
(1) Confirmation of Labor Arbitration Awards.....	284
(2) Claim Preclusive Effect of Labor Arbitration Awards	286
(A) Generally	286
(B) Statutory Claims	286
(b) Vacatur of Labor Arbitration Awards	288
(1) Generally	288
(2) Procedural Unfairness.....	289
(3) Exceeding Authority	290
(4) Public Policy	291
(5) Manifest Disregard of Law.....	292
(6) Breach of DFR.....	292
(c) Modification of Awards.....	293
Chapter 8. International Arbitration.....	295
A. Overview	296
§ 50 Introduction: Commercial Arbitration and Public Law Arbitration	297
§ 51 International Commercial Arbitration: Sources of Law	297
(a) Treaties, Primarily the New York Convention	297
(1) Basic Provisions	297
(2) U.S. Ratification and Implementation of the New York and Panama Conventions.....	300
(3) U.S. Exceptions from New York Convention.....	302
(4) Awards Made in the U.S. but “Not Considered as Domestic”	303
(b) National Law.....	304
(1) Implementing Legislation	304
(2) The Choice of National Arbitration Law: The “Seat” of Arbitration	305
(c) Contracting for the Procedural Rules and Substantive Law to Be Applied to a Particular Case.....	308
B. Formation of Enforceable International Commercial Arbitration Agreements	309
§ 52 Formation	309
(a) Enforcement of Executory Arbitration Agreements.....	309

(b) National Law Governs Formation	310
(c) The Requirement of a Writing	312
§ 53 Separability	314
§ 54 Contract Law Defenses.....	315
§ 55 Non-Contract Law Defenses: Non-Arbitrable Claims.....	317
C. Terms of International Commercial Arbitration	
Agreements	318
§ 56 Scope of Arbitration Agreements.....	319
§ 57 Multi-Party Disputes.....	321
(a) Claims by or Against Those Not Party to the Arbitration Agreement	321
(b) Consolidation of, and Stays Pending, Related Proceedings.....	322
§ 58 Arbitration Procedure.....	322
(a) Overview.....	322
(b) Pre-Hearing	324
(1) Selection of Arbitrators.....	324
(2) Pleadings	325
(3) Discovery.....	325
(c) Hearing	327
(1) General Comparison with Trial	327
(2) Rules of Evidence	328
(3) No Hearing; Dispositive Motions	329
(4) Written Awards; Reasoned Opinions.....	330
(d) Remedies.....	330
D. Enforcement and Vacatur of International Commercial Arbitration Awards.....	331
§ 59 Enforcement of International Arbitration Awards.....	332
§ 60 Vacatur and Non-Enforcement of International Arbitration Awards.....	334
(a) Introduction: National Law of Vacatur	334
(b) The Convention's Grounds for Non-Enforcement of Award.....	338
(1) Arbitration Agreement Invalid	338
(2) Inadequate Opportunity to Present Case.....	339
(3) Arbitrators Exceeded Their Jurisdiction	341
(4) Improper Arbitral Procedure or Composition of Arbitral Authority	342
(5) Set Aside by Court at Seat of Arbitration	343
(6) Non-Arbitrability	344
(7) Public Policy	345
E. International Public Law Arbitration	346
§ 61 Overview of International Public Law Arbitration	346
§ 62 Investment Arbitration	348

§ 63 Treaties Focused on Arbitration of Future Public Law Disputes	351
§ 64 Public International Arbitration Tribunals Arising out of Post-Dispute Arbitration Agreements	353
Chapter 9. Processes Similar to Arbitration.....	355
§ 65 Private Judging and Business Courts.....	355
(a) Private Judging.....	355
(b) Business Courts	358
§ 66 Non-Contractual, Yet Binding, Arbitration	360
(a) Jury-Trial Right Constrains Non-Contractual Arbitration.....	360
(b) Examples of Non-Contractual, Yet Binding, Arbitration.....	362
(1) Federal Programs	362
(2) Government Employees—Federal	362
(3) Government Employees—State and Local.....	363
(4) Railway Labor Act	364
(5) State “Lemon” Laws.....	364
(6) State Auto Insurance Laws	365
(7) Attorney Fee Disputes	366
Appendix A. Federal Arbitration Act.....	367
Appendix B. New York Convention.....	379
Appendix C. Excerpts from Labor Management Relations Act	385
TABLE OF CASES	387
INDEX.....	405