

Table of Contents

About the Authors	vii
Table of Chapters	xvii
Foreword	xxxi
Introduction	xxxv

PART ONE: AN INTRODUCTION TO ARBITRATION I-1

Chapter 1 When to Arbitrate; When to Litigate

§ 1:1	Introduction	1-1
§ 1:2	Definition of Arbitration.....	1-2
§ 1:3	Arbitration’s Traditional Advantages.....	1-2
§ 1:4	Arbitration’s Traditional Disadvantages.....	1-3
§ 1:5	Matters Better Arbitrated Than Litigated.....	1-3
§ 1:6	Matters Better Litigated Than Arbitrated.....	1-4
§ 1:7	The Business Point of View	1-4
§ 1:8	Conclusion	1-5

Chapter 2 Historical Background of Arbitration in the United States

§ 2:1	Introduction	2-1
§ 2:2	Early Judicial Attitudes	2-3
§ 2:3	Legislative Reform	2-4
§ 2:4	Federal Legislation	2-5

Chapter 3 The Institutional Environment

§ 3:1	Introduction	3-2
§ 3:2	Types of Arbitration	3-2

§ 3:3 International Chamber of Commerce 3-3

 § 3:3.1 International Court of Arbitration..... 3-4

 § 3:3.2 Secretariat 3-4

 § 3:3.3 Rules..... 3-5

 [A] Terms of Reference; Procedural Timetable—
 Article 18 3-5

 [B] Making the Award—Article 25(2); Scrutiny of
 the Award by the Court—Article 27..... 3-6

§ 3:4 American Arbitration Association..... 3-7

 § 3:4.1 Rules..... 3-8

 [A] Commercial Rules 3-8

 [A][1] Expedited Procedures 3-9

 [A][2] Pilot Flexible Fee Schedule 3-9

 [A][3] Procedures for Large, Complex
 Commercial Disputes..... 3-10

 [A][4] Emergency Measures of Protection..... 3-10

 [A][5] Standard Commercial Rules..... 3-10

 [B] International Rules 3-11

§ 3:5 CPR Institute for Dispute Resolution 3-12

 § 3:5.1 Rules..... 3-13

 [A] Domestic Rules 3-13

 [A][1] Rule 14: Interim Measures of Protection
 by a Special Arbitrator..... 3-15

 [B] International Rules 3-15

§ 3:6 Conclusion 3-16

Chapter 4 Drafting the Arbitration Agreement

§ 4:1 Introduction 4-2

§ 4:2 Initial Questions 4-2

§ 4:3 Checklists 4-3

 § 4:3.1 Checklist for Domestic Arbitrations 4-3

 § 4:3.2 Checklist for International Arbitrations 4-3

§ 4:4 Domestic Arbitrations 4-4

 § 4:4.1 Scope of the Arbitration Clause 4-4

 § 4:4.2 Entry of Judgment Provision 4-5

 § 4:4.3 What Institution or Set of Rules Should
 Be Selected? 4-5

Table of Contents

§ 4:4.4 What Venue Should Be Selected?4-7
§ 4:4.5 What Substantive Law Should Be Chosen?4-7
§ 4:4.6 Should the Tribunal Consist of One or
Three Arbitrators?.....4-8
§ 4:4.7 How Should the Tribunal Be Chosen?.....4-9
§ 4:4.8 Are Interim Measures Likely to
Be Required?.....4-10
§ 4:5 International Arbitrations4-10
§ 4:5.1 Language.....4-10
§ 4:5.2 What Should Be the International Venue?4-11
§ 4:6 Conclusion4-14

Chapter 5 Conducting the Arbitration

§ 5:1 Introduction5-1
§ 5:2 Commencing the Arbitration5-1
§ 5:3 Appointing the Arbitrator5-3
§ 5:4 Pre-Hearing Conference.....5-5
§ 5:5 Pre-Hearing Disclosure5-6
§ 5:6 Briefing5-6
§ 5:7 Demeanor at the Hearing5-7
§ 5:8 Fact Witnesses.....5-7
§ 5:9 Expert Witnesses.....5-8
§ 5:10 Conclusion5-8

Chapter 6 Enforcing the Award

§ 6:1 Introduction6-1
§ 6:2 Federal Arbitration Act.....6-2
§ 6:2.1 Confirmation Procedures.....6-3
§ 6:2.2 Grounds for Refusal to Enforce.....6-3
§ 6:2.3 Can the Parties by Their Agreement
Change the Act’s Statutory Standardsfor
Review?.....6-5
§ 6:3 New York Convention of 1958.....6-6
§ 6:3.1 Enforcement Procedures6-7
§ 6:3.2 Grounds for Refusal to Enforce.....6-8

[A]	Absence of a Valid Arbitration Agreement— Article V(1)(a).....	6-8
[B]	Lack of Fair Opportunity to Be Heard— Article V(1)(b)	6-8
[C]	Award Was Not Within Scope of Arbitration Clause—Article V(1)(c).....	6-10
[D]	Improper Composition of Tribunal— Article V(1)(d)	6-11
[E]	Award Not Binding—Article V(1)(e)	6-12
[F]	Additional Challenges—Article V(2).....	6-12
§ 6:4	Conclusion	6-13

PART TWO: THE AMERICAN LEGAL ENVIRONMENT.....II-1

Chapter 7 The Legal Environment

§ 7:1	Introduction.....	7-2
§ 7:2	Federal Policy Favoring Arbitration	7-3
§ 7:2.1	Federal Arbitration Act.....	7-3
§ 7:2.2	International Conventions.....	7-5
[A]	New York Convention.....	7-5
[B]	Panama Convention	7-6
§ 7:2.3	State Arbitration Laws	7-7
§ 7:2.4	Federal Supremacy	7-8
[A]	Federal Preemption	7-8
[B]	When State Law Applies	7-9
§ 7:3	Enforcing the Agreement to Arbitrate	7-9
§ 7:3.1	Federal Court Jurisdiction and Venue	7-10
[A]	Jurisdiction	7-10
[B]	Venue	7-11
§ 7:3.2	Staying Litigation and Compelling Arbitration.....	7-12
[A]	Staying Litigation.....	7-12
[B]	Compelling Arbitration	7-13
§ 7:3.3	Who Decides Arbitrability?	7-14
[A]	When Judges Decide	7-14
[B]	When Arbitrators Decide	7-14

Table of Contents

§ 7:3.4 Resisting Enforcement: Public Policy..... 7-16
§ 7:3.5 Resisting Enforcement: Contract Law..... 7-17
§ 7:4 Provisional Remedies 7-19
§ 7:5 Multiple Parties, Issues, and Proceedings 7-20
 § 7:5.1 Classwide Arbitration 7-21
 § 7:5.2 Joinder of Parties..... 7-22
 § 7:5.3 Consolidation 7-22
 § 7:5.4 Concurrent Proceedings 7-24
§ 7:6 Discovery 7-25
§ 7:7 Judicial Appointment of the Arbitrator 7-26
§ 7:8 Enforcing an Award 7-26
 § 7:8.1 Confirmation and Judgment..... 7-26
 § 7:8.2 Challenging an Award 7-28
 [A] Corruption, Fraud, or Undue Means 7-29
 [B] Evident Partiality or Corruption 7-30
 [C] Refusing to Postpone a Hearing 7-31
 [D] Refusing to Hear Evidence 7-32
 [E] Prejudicial Misbehavior..... 7-32
 [F] Arbitrator Exceeded His or Her Powers..... 7-32
 [G] Arbitrator Failed to Make a Mutual, Final,
 and Definite Award..... 7-33
 [H] Manifest Disregard of the Law 7-33
 [I] Public Policy 7-35
§ 7:9 Preclusion 7-35

**PART THREE: THE ARBITRATION OF PARTICULAR
TYPES OF DISPUTES..... III-1**

Chapter 8 Securities ADR

§ 8:1 Introduction 8-3
§ 8:2 Background of Securities Arbitration 8-4
 § 8:2.1 Judicial Developments 8-5
 § 8:2.2 Creation of SICA and the Role of
 the SEC 8-7
§ 8:3 The SICA Code 8-12
 § 8:3.1 Jurisdiction 8-12

[A]	Application of the Code.....	8-13
[B]	Industry Obligation to Arbitrate.....	8-13
[C]	Predispute Arbitration Agreements.....	8-13
[D]	Class Actions.....	8-14
[E]	Employment Cases.....	8-15
[F]	Six-Year Rule for Eligibility of Claims.....	8-17
§ 8:3.2	Small Claims and Simplified Arbitration.....	8-18
§ 8:3.3	Requirement of Hearing.....	8-19
§ 8:3.4	Dismissal of Proceedings.....	8-19
§ 8:3.5	Settlements.....	8-20
§ 8:3.6	Tolling of Time Limitations.....	8-20
§ 8:3.7	Classification and Qualification of Arbitrators.....	8-21
§ 8:3.8	Selection of and Challenges to Arbitrators.....	8-28
§ 8:3.9	Required Disclosures by Arbitrators.....	8-30
§ 8:3.10	Commencement of Proceeding.....	8-31
[A]	Pleadings.....	8-31
[B]	Joinder and Consolidation; Multiple Parties.....	8-33
[C]	Acknowledgement of Pleadings by Arbitrators.....	8-33
[D]	Amendment to Pleadings.....	8-33
§ 8:3.11	Representation by an Attorney.....	8-34
[A]	NARs Report.....	8-34
[B]	Clinical Representation.....	8-37
§ 8:3.12	Designation of Time and Place of Hearing.....	8-38
§ 8:3.13	Prehearing Procedures; Information Gathering.....	8-38
[A]	Discovery Orders and Compliance.....	8-39
[B]	Witness Lists.....	8-40
[C]	Subpoenas.....	8-40
[D]	Depositions.....	8-41
[E]	Resolution Format.....	8-41
§ 8:3.14	Expedited Procedures for the Elderly or Seriously Ill.....	8-42
§ 8:3.15	Hearings.....	8-43
[A]	Attendance at Hearings.....	8-43
[B]	Record of Proceedings.....	8-44
[C]	Oaths of Arbitrators and Witnesses.....	8-44
[D]	Adjournments.....	8-44

Table of Contents

[E]	Evidence	8-46
[F]	Reopening of Hearings	8-46
[G]	Confidentiality	8-46
§ 8:3.16	Rulings of Arbitrators and Awards	8-48
[A]	Interpretation of Code and Enforcement of Arbitrators' Rulings.....	8-48
[B]	Determinations of Arbitrators	8-48
[C]	Awards.....	8-48
[D]	Payment of Awards	8-51
[E]	Scope of Award	8-52
§ 8:3.17	SRO Arbitration Fees	8-54
§ 8:3.18	Large and Complex Cases	8-55
§ 8:3.19	Tracing Uniform Code into SRO Codes	8-55
§ 8:3.20	Conduct of Participants	8-57
§ 8:3.21	Joint Administration	8-60
§ 8:4	Alternatives to SRO Arbitration	8-60
§ 8:4.1	Single, Independent Forum	8-61
§ 8:4.2	Alternative Pilot Program	8-64
§ 8:4.3	Back to Court	8-66
§ 8:5	Mediation.....	8-67
§ 8:6	Perceptions of Fairness: SICA Survey.....	8-69
§ 8:7	The Changing Landscape	8-72
§ 8:8	Conclusion	8-74
Appendix 8A	Uniform Code of Arbitration	App. 8A-1
Appendix 8B	SRO Composite Arbitration Statistics	App. 8B-1
Appendix 8C	SRO Mediation Statistics.....	App. 8C-1

Chapter 9 Intellectual Property Arbitration

§ 9:1	Introduction.....	9-3
§ 9:2	The Nature of Intellectual Property	9-3
§ 9:2.1	What Is Intellectual Property?	9-3
§ 9:2.2	How Do Intellectual Property Rights Arise?	9-4
§ 9:2.3	How May Intellectual Property Rights Be Exploited?	9-5
§ 9:2.4	How May Intellectual Property Rights Be Enforced?.....	9-5

§ 9:3	Intellectual Property Disputes and the Pros and Cons of Arbitration	9-5
§ 9:3.1	Overview	9-5
§ 9:3.2	Why Arbitration?	9-6
§ 9:3.3	Why Not Arbitration?	9-7
§ 9:4	Agreeing to Arbitrate	9-8
§ 9:5	Arbitrability of the Dispute and Enforceability of the Award	9-10
§ 9:5.1	The New York Convention	9-11
§ 9:5.2	Arbitrability of IP Rights: International Perspective	9-12
[A]	Trade Secrets	9-12
[B]	Licensing	9-13
[C]	Ownership	9-14
[D]	Scope and Infringement of Patents, Copyrights, and Trademarks	9-14
[E]	Validity and Enforceability of Patents, Copyrights, and Trademarks	9-15
[F]	ICC Report	9-15
§ 9:5.3	Arbitrability of IP Rights: United States	9-16
[A]	Patent Validity, Enforceability, and Infringement Issues	9-16
[B]	Patent Interference Issues	9-18
[C]	Copyright Issues	9-18
[D]	Trademark Issues	9-20
[E]	Trade Secret Misappropriation Issues	9-26
[F]	Uniform Dispute Resolution and Domain Name Disputes	9-27
§ 9:5.4	Suggested Contract Language with Respect to Arbitrability and Enforceability	9-30
§ 9:6	Enforceability of an Award that Includes an Intellectual Property Component	9-32
§ 9:7	Provisional Relief	9-33
§ 9:7.1	Arbitral Law	9-33
§ 9:7.2	Arbitral Rules	9-34
§ 9:7.3	Ad Hoc, Self-Help Arrangements	9-35
§ 9:8	Privacy and Confidentiality	9-35

Table of Contents

§ 9:8.1 Post-Award Cracks in the Privacy and Confidentiality Walls 9-35

§ 9:8.2 Confidentiality During Arbitral Proceedings 9-37

§ 9:9 The Arbitral Tribunal 9-39

§ 9:10 Party-Appointed Arbitrators 9-41

§ 9:11 Multiple-Party Proceedings 9-41

§ 9:12 Multiple Proceedings 9-42

§ 9:13 Governing Law and Rules 9-43

 § 9:13.1 Arbitral Law 9-43

 § 9:13.2 Substantive Law 9-43

§ 9:14 Issues to Be Arbitrated 9-44

§ 9:15 The Site of the Arbitration 9-44

§ 9:16 Prehearing Information Exchanges 9-45

§ 9:17 The Evidentiary Hearing 9-47

§ 9:18 Experts 9-48

 § 9:18.1 Party-Appointed Experts 9-48

 § 9:18.2 Tribunal-Appointed Experts 9-50

§ 9:19 Remedies Available 9-51

 § 9:19.1 Monetary Relief 9-51

 § 9:19.2 Equitable Relief 9-51

 § 9:19.3 Punitive Damages and Sanctions 9-52

 § 9:19.4 Appellate Relief 9-55

§ 9:20 Form of the Award 9-55

§ 9:21 Arbitral Rules 9-56

§ 9:22 IP Arbitrator As IP Mediator 9-56

 § 9:22.1 Ethical Issues 9-57

 § 9:22.2 Repairing the Relationship Versus Determining Rights 9-58

 § 9:22.3 Some Ground Rules for Participating in Settlement Discussions 9-58

Chapter 10 International Arbitration

§ 10:1 Introduction 10-2

§ 10:2 International Arbitration’s Advantages Over Litigation 10-3

 § 10:2.1 Enforceability of Awards Under International Conventions 10-3

[A]	U.S. Legislation Implementing International Conventions.....	10-5
[B]	What Is an “International” Arbitration Under U.S. Law?.....	10-6
[C]	Why Does It Matter Whether the Arbitration Is “International”?.....	10-7
§ 10:2.2	Efficiencies.....	10-8
§ 10:3	International Arbitration As Shaped by Local Ideas About Litigation	10-9
§ 10:4	Institutions and Rules	10-11
§ 10:4.1	AAA Rules and Procedures Applicable to an “International” Case	10-11
§ 10:4.2	Other International Arbitration Procedures in the United States	10-13
§ 10:4.3	Administered Arbitration Systems Based Outside the United States	10-15
[A]	International Chamber of Commerce Arbitration	10-15
[B]	The LCIA Court of Arbitration	10-16
[C]	National Arbitration Centers	10-17
[D]	Regional Arbitration in the Americas	10-18
§ 10:4.4	Specialized Types of International Commercial Arbitration	10-18
[A]	Investment Disputes	10-18
[B]	Intellectual Property Disputes.....	10-19
[C]	Trade Disputes	10-20
[D]	Sports Disputes	10-20
§ 10:5	Drafting an International Dispute Resolution Clause.....	10-20
§ 10:5.1	Place of Arbitration	10-21
§ 10:5.2	Multi-Tier Clauses.....	10-22
§ 10:6	Selecting Arbitrators	10-22
§ 10:6.1	International Standards of Independence and Impartiality	10-23
§ 10:6.2	Arbitrator Disclosure.....	10-23
§ 10:6.3	Where to Find Arbitrators.....	10-24
§ 10:7	Conducting the Proceedings	10-24
§ 10:8	Enforcing the Award.....	10-27

Chapter 11 Construction Arbitration

§ 11:1 Introduction 11-2

§ 11:2 Historical Changes 11-2

§ 11:3 Construction Arbitration Today 11-4

 § 11:3.1 Complexity 11-4

 § 11:3.2 Requirements for Effective Arbitration 11-5

 [A] Rules 11-5

 [B] Experienced Arbitrators 11-6

 [C] Effective Management 11-6

 [C][1] Requiring Early Disclosure of Issues,
 Contentions, and Proof 11-7

 [C][2] Filing Prehearing Factual Briefs 11-7

 [C][3] Changing the Conventional Order
 of Proof 11-7

 [C][4] Submitting Direct Testimony in Writing 11-8

 [C][5] Simultaneous Testimony of Opposing
 Expert Witnesses 11-8

 [C][6] Simultaneous Testimony of Fact
 Witnesses 11-9

 [C][7] Attorneys’ Summaries of Evidence 11-9

 [C][8] “Chess Clock” Management of Time 11-9

 [C][9] Photographs of Witnesses 11-10

§ 11:4 Newly Developed Alternatives to Arbitration 11-10

§ 11:5 A Look Forward 11-13

Appendix 11A Selective Bibliography App. 11A-1

Chapter 12 Labor and Employment Arbitration

§ 12:1 Introduction 12-2

§ 12:2 Labor Arbitration in the Unionized Sector 12-5

§ 12:3 Labor Arbitration and Public Law 12-10

§ 12:4 Individual Employee-Employer
Arbitration Disputes 12-27

§ 12:5 Arbitration Process Issues in Both the
Union and Nonunion Sector 12-32

 § 12:5.1 Encouragement of Arbitration 12-32

 § 12:5.2 Identity of the Arbitrators 12-35

§ 12:6 The Fairness of the Arbitral Process 12-40

 § 12:6.1 Notice and Information 12-40

 § 12:6.2 Confidentiality 12-45

 § 12:6.3 The Costs of Arbitration 12-56

 § 12:6.4 Judicial Review 12-63

§ 12:7 Conclusion 12-69

Appendices App. A-1

Appendix A ICC Rules A-1

Appendix B AAA Commercial Rules B-1

Appendix C AAA International Rules C-1

Appendix D CPR Domestic Rules..... D-1

Appendix E CPR International Rules E-1

Appendix F Federal Arbitration Act
 (9 U.S.C. § 1 *et seq.*) F-1

Appendix G New York Convention G-1

Table of Authorities TOA-1

Index I-1