

Table of Contents

About the Editor	v
About the Contributors	vii
Table of Chapters	xvii
Recognizing Another Distinguished PLI Treatise	xxxii
Acknowledgment	xxxiii

Chapter 1 Introduction

David C. Singer

§ 1:1	What Is Arbitration?	1-1
§ 1:2	The Arbitration Clause	1-2
§ 1:3	Benefits of Commercial Arbitration	1-2
§ 1:4	Arbitration As More Efficient, Speedier Than Litigation	1-5
§ 1:5	Arbitration Versus Litigation Practice	1-5

Chapter 2 Historical Background

David C. Singer

§ 2:1	Early Days of Arbitration	2-1
§ 2:2	Early Attitudes of U.S. Courts Toward Arbitration	2-3
§ 2:3	The Rise of Arbitration in the Twentieth Century	2-4
§ 2:4	Federal Legislation	2-5

Chapter 3 The FAA Statutory Framework

Michael Young & Cliff Bloomfield

§ 3:1	Introduction	3-1
§ 3:2	Purposes of the FAA	3-3
§ 3:3	Scope of the FAA	3-5
§ 3:4	Concurrent Jurisdiction of State and Federal Courts	3-11
§ 3:4.1	State Jurisdiction	3-11
§ 3:4.2	Federal Jurisdiction	3-12

§ 3:5 Preemption of State Law by the FAA..... 3-18

 § 3:5.1 Preemption of State Law Barring Arbitration
 of Claims 3-18

 § 3:5.2 Preemption of State Procedural Law Impacting
 Arbitration..... 3-20

§ 3:6 Parties' Choice of Governing Rules 3-22

 § 3:6.1 Generally 3-22

 § 3:6.2 Class Arbitration 3-26

Chapter 4 Arbitrability and Jurisdiction

Marc J. Goldstein

§ 4:1 Introduction 4-2

§ 4:2 Who Decides Arbitrability Issues? 4-3

 § 4:2.1 Procedural Context in Which the Question Arises 4-3

 § 4:2.2 Baseline Principle: Arbitrability Is Decided by
 the Courts 4-5

 § 4:2.3 Influence of Federal Pro-Arbitration Policy When
 Courts Decide Arbitrability Issues 4-5

§ 4:3 Deviations from the Baseline Principle:
 The Arbitrability of Arbitrability..... 4-7

 § 4:3.1 The Separability Principle..... 4-7

 § 4:3.2 The Delegation Principle 4-7

 § 4:3.3 Arbitration Rules As “Clear and Unmistakable
 Evidence” of Delegation 4-9

 § 4:3.4 Severability of Clause Delegating Arbitrability
 to the Arbitrator..... 4-10

§ 4:4 Judicial Review When Arbitrators Rule on
 Arbitrability Pursuant to a Valid Delegation 4-11

§ 4:5 “Gateway” Procedural Issues and Preconditions to
 Arbitrating the Merits..... 4-12

§ 4:6 State Laws Inhibiting Arbitration 4-14

 § 4:6.1 General Principles..... 4-14

 § 4:6.2 Whether the Substantive Command of
 FAA Section 2 Applies 4-15

 § 4:6.3 No General Preemption of State Laws
 Concerning Arbitration..... 4-16

 § 4:6.4 Effect of the Parties' Express Adoption of
 State Arbitration Law..... 4-16

 § 4:6.5 Whether the Parties Have in Fact Adopted
 State Arbitration Law..... 4-16

§ 4:7 State Laws Requiring a Nonarbitral Forum Based
 on Subject Matter 4-18

§ 4:8 State Laws Requiring Special Content in an
 Arbitration Agreement..... 4-19

Table of Contents

§ 4:9 State Law Rules Limiting Contractual Waivers of
Collective Arbitration 4-20

§ 4:10 State Law Rules of Contract Interpretation 4-21

§ 4:11 Ongoing Tension in State Courts Between State
Law and FAA 4-22

§ 4:12 Conflicts Between the Arbitration Agreement and
Other Federal Law 4-23

 § 4:12.1 General Principles..... 4-23

 § 4:12.2 Collective Action Waivers As a Practical
 Limitation on Asserting Federal
 Statutory Claims 4-24

§ 4:13 Collective Action Waivers and the National Labor
Relations Act 4-25

§ 4:14 Parties That Did Not Sign the Arbitration
Agreement 4-26

 § 4:14.1 General Principles..... 4-26

 § 4:14.2 Equitable Estoppel 4-27

 [A] Estoppel Against a Signatory to the Agreement 4-27

 [B] Estoppel Binding Signatory to Arbitrate with
 Employees of Other Signatory..... 4-28

 [C] Estoppel Against Nonsignatory Based on
 “Direct Benefit” or “Detrimental Reliance” 4-29

 § 4:14.3 Alter Ego..... 4-30

§ 4:15 Assignment and Assumption..... 4-30

§ 4:16 Third-Party Beneficiary 4-31

§ 4:17 Incorporation by Reference 4-32

§ 4:18 Agency..... 4-32

Chapter 5 Privacy and Confidentiality

Laura A. Kaster

§ 5:1 Generally..... 5-1

§ 5:2 Privacy of the Process Does Not Assure
Confidentiality 5-2

§ 5:3 Impact of Provider Rules on Confidentiality
Obligations of Participants..... 5-3

§ 5:4 Impact of State Law on Confidentiality 5-5

§ 5:5 The Special Case of Patent Arbitration 5-7

§ 5:6 Court Proceedings..... 5-7

§ 5:7 Preserving Confidentiality in Orders and
Confidentiality Agreements..... 5-9

 § 5:7.1 Protective Measures..... 5-10

 § 5:7.2 End-of-Process Procedures 5-11

§ 5:8 Conclusion 5-12

Chapter 6 Commencing the Arbitration

David C. Singer

§ 6:1 Procedural Rules Governing Commencement of an Arbitration..... 6-1

 § 6:1.1 Revised Uniform Arbitration Act 6-2

§ 6:2 Applicable Rules of Arbitral Institutions 6-4

 § 6:2.1 American Arbitration Association 6-4

 § 6:2.2 JAMS 6-5

 § 6:2.3 International Institute for Conflict Prevention and Resolution..... 6-6

§ 6:3 Case Law Addressing Service and Content of the Arbitration Demand 6-6

 § 6:3.1 Consent to Jurisdiction and Due Process..... 6-6

 § 6:3.2 Inadequate Notice of an Arbitration Proceeding As Grounds for Vacating Award 6-9

§ 6:4 Payment of Fees 6-12

Chapter 7 Selecting the Arbitrators

Harrie Samaras

§ 7:1 Overview 7-2

§ 7:2 Selection Framework: The Agreement and the Organizational Rules 7-3

§ 7:3 Selection Criteria 7-5

 § 7:3.1 Impartiality and Independence 7-7

 § 7:3.2 Arbitration Skills 7-8

 § 7:3.3 Availability..... 7-9

 § 7:3.4 Personality and Disposition 7-10

 § 7:3.5 Preparedness and Diligence 7-11

 § 7:3.6 Expertise and Industry Experience 7-11

 § 7:3.7 Respect and Reputation 7-13

 § 7:3.8 Diversity 7-13

 § 7:3.9 Special Considerations for Neutral Party-Appointed Arbitrators 7-14

§ 7:4 Research and Due Diligence 7-16

 § 7:4.1 Biographies or Resumes from Arbitration Institutions..... 7-16

 § 7:4.2 Online Resources and Social Media 7-16

 § 7:4.3 Word of Mouth from Trusted Sources 7-18

 § 7:4.4 Pre-Selection Questions 7-19

 § 7:4.5 Interviewing Prospective Arbitrators 7-19

§ 7:5 Approaches for Selecting Arbitrators..... 7-23

 § 7:5.1 Ad Hoc (Nonadministered) Arbitrations 7-24

Table of Contents

§ 7:5.2 Rules in Administered Proceedings 7-26
 [A] AAA Rules..... 7-26
 [B] JAMS Comprehensive Arbitration Rules and
 Procedures 7-28
 [C] CPR Administered Arbitration Rules 7-28
§ 7:6 Disclosures and Disqualification 7-30

Chapter 8 Requests for Interim Relief

Deborah A. Coleman

§ 8:1 Introduction 8-1
§ 8:2 Definition of Interim Relief 8-1
§ 8:3 Two Procedures for Obtaining Interim Relief from
 an Arbitrator..... 8-2
§ 8:4 Interim Relief by the Arbitrator 8-3
§ 8:5 Interim Relief by an Emergency Arbitrator..... 8-4
§ 8:6 Enforcement of an Award of Interim Relief Requires
 Court Confirmation 8-6
§ 8:7 Court Enforcement of an Emergency Arbitrator’s Order 8-8
§ 8:8 Interim Relief from a Court 8-11
§ 8:9 Contract Option to Seek Interim Relief in Court..... 8-15
§ 8:10 Choosing the Forum in Which to
 Seek Interim Relief 8-17

Chapter 9 The Preliminary Conference

Barbara A. Reeves

§ 9:1 Importance of the Preliminary Conference 9-2
§ 9:2 Timing..... 9-2
§ 9:3 Participants and Logistics 9-3
§ 9:4 Topics to Be Covered 9-3
 § 9:4.1 Rules and Checklists..... 9-3
 § 9:4.2 Party Identity 9-6
 § 9:4.3 Claims, Defenses, Pleadings, and Amendments 9-6
 § 9:4.4 Arbitration Agreement..... 9-6
 § 9:4.5 Applicable Procedural Law, Substantive Law,
 and Rules 9-7
 § 9:4.6 Arbitrability 9-7
 § 9:4.7 Threshold Issues or Preconditions 9-7
 § 9:4.8 Interim Measures 9-7
 § 9:4.9 Consolidation and Joinder 9-8
 § 9:4.10 Bifurcation 9-8
 § 9:4.11 Motions 9-8

§ 9:4.12	Exchange of Information.....	9-8
§ 9:4.13	Prehearing Schedules and Deadlines.....	9-9
§ 9:4.14	Expert Witness Issues	9-9
§ 9:4.15	Prehearing Submissions.....	9-9
§ 9:4.16	Scheduling of the Hearing and Hearing Logistics	9-10
§ 9:4.17	Subpoenas.....	9-11
§ 9:4.18	Manner of Testimony at the Hearing.....	9-11
§ 9:4.19	Nature of the Award	9-11
§ 9:4.20	Post-Hearing Submissions	9-11
§ 9:4.21	Other Matters.....	9-11
§ 9:5	Subsequent Preliminary Conferences.....	9-12
§ 9:6	Preliminary Conference Order	9-12

Chapter 10 Discovery

Michael Young & Cliff Bloomfield

§ 10:1	Introduction	10-2
§ 10:2	Party Discovery.....	10-4
§ 10:2:1	Party Discovery Under Applicable Statutes	10-4
§ 10:2:2	The Arbitration Clause.....	10-7
§ 10:2:3	Customization of Rules	10-8
§ 10:3	Role of the Arbitrator.....	10-9
§ 10:3.1	Arbitrator Authority and Discretion.....	10-9
§ 10:3.2	Court Review of Arbitrator Discovery Orders	10-12
§ 10:3.3	Inherent Power of Arbitrators	10-13
§ 10:4	Failure to Comply with Discovery Orders.....	10-13
§ 10:4.1	Exclusion of Evidence, Adverse Inferences, and Dismissal of Claims.....	10-14
§ 10:4.2	Imposition of Sanctions for Discovery Abuses.....	10-15
§ 10:5	Obtaining Information from Nonparties	10-17
§ 10:5.1	Section 7 of the FAA and “Prehearing Discovery”: Generally.....	10-18
§ 10:5.2	Section 7 of the FAA and “Prehearing Discovery”: Issuance, Service, Enforcement, Remote Appearance, Compliance, and Jurisdiction	10-25
[A]	Issuance, Service, and Personal Jurisdiction.....	10-25
[B]	Place of Compliance	10-26
[C]	Enforcement: Venue and Subject Matter Jurisdiction	10-27
[D]	Enforcement: Objections and Role of the Court.....	10-33
[E]	Remote Appearance	10-35

Table of Contents

§ 10:5.3	Subpoenas Under State Law.....	10-38
§ 10:6	Vacatur of Arbitration Awards Based on Discovery-Related Issues	10-43
§ 10:6.1	Routine Denial of Motions to Vacate Based on Discovery Determinations.....	10-43
§ 10:6.2	Monetary Sanctions Arising from Discovery Abuse	10-47
§ 10:6.3	Adverse Inferences Arising from Discovery Abuses.....	10-48
§ 10:6.4	Exceptions to the General Practice.....	10-50
§ 10:7	Pre-Arbitration Discovery	10-50

Chapter 11 Motions

John Wilkinson

§ 11:1	Introduction	11-1
§ 11:2	Dispositive Motions	11-2
§ 11:2.1	Historical Factors Discouraging Dispositive Motions	11-2
[A]	Growing Acceptability of Dispositive Motions.....	11-3
[B]	Recommendations	11-5
§ 11:3	Discovery Motions	11-7
§ 11:4	Motions to Adjourn Hearing.....	11-9
§ 11:5	Motions to Bifurcate Liability and Damages	11-11
§ 11:6	Conclusion	11-12

Chapter 12 Lead-Up to the Evidentiary Hearing

Philip D. O'Neill, Jr.

§ 12:1	Introduction	12-1
§ 12:2	Prehearing Memoranda.....	12-2
§ 12:3	Fact Stipulations.....	12-3
§ 12:4	Prehearing Consideration of Evidentiary Issues	12-4
§ 12:4.1	Which Rules Will Apply.....	12-4
§ 12:4.2	Impact of Arbitrator Background	12-5
§ 12:4.3	Some Common Evidentiary Issues	12-5
§ 12:4.4	Nonparty Witnesses.....	12-6
§ 12:4.5	Hostile Witnesses	12-8
§ 12:5	Party Representatives	12-9
§ 12:6	Mechanics and Logistics of Evidentiary Presentation.....	12-9
§ 12:6.1	Generally	12-9
§ 12:6.2	Exhibits	12-10

§ 12:6.3	Witnesses.....	12-12
§ 12:6.4	Experts and Their Reports	12-14
§ 12:7	Conclusion	12-15

Chapter 13 The Evidentiary Hearing

John Gardiner, Barry H. Garfinkel & Gunjan Sharma

§ 13:1	Evidentiary Hearings in Arbitration Compared to Trials	13-2
§ 13:2	Structure of the Evidentiary Hearing	13-2
§ 13:2.1	Typical Stages	13-2
§ 13:2.2	Allocation of Time and the “Chess-Clock” Method.....	13-3
§ 13:2.3	Logistics, Including Transcription and Translation Services	13-4
§ 13:3	Opening Statements	13-4
§ 13:3.1	Content and Purpose	13-4
§ 13:3.2	Compared to Opening Statements in Court	13-5
§ 13:3.3	Responding to Arbitrator Questions.....	13-5
§ 13:3.4	Use of Demonstratives	13-6
§ 13:4	Fact Witnesses	13-7
§ 13:4.1	General Observations	13-7
§ 13:4.2	Written Statements As Direct Testimony.....	13-7
§ 13:4.3	Infrequent Use of Depositions	13-8
§ 13:4.4	Cross-Examination	13-8
§ 13:4.5	The Tribunal’s Involvement in Examination	13-9
§ 13:5	Expert Witnesses	13-9
§ 13:5.1	Structure of Examination.....	13-9
§ 13:5.2	Application of Daubert and Frye Standards.....	13-10
§ 13:5.3	Independence and Impartiality	13-11
§ 13:5.4	Witness Conferencing.....	13-12
§ 13:5.5	Tribunal-Appointed Experts	13-13
§ 13:6	Some Evidentiary Matters.....	13-13
§ 13:6.1	Flexible Rules of Evidence	13-13
§ 13:6.2	Admission of Documents	13-14
§ 13:7	Closing Arguments.....	13-15
§ 13:8	Post-Hearing Briefs and the Close of Proceedings	13-16
§ 13:9	Conclusion	13-17

Table of Contents

Chapter 14 The Award

David C. Singer & Christina G. Hanson

§ 14:1	Introduction	14-2
§ 14:2	Finality	14-2
§ 14:2.1	Generally	14-2
§ 14:2.2	Doctrine of Functus Officio	14-8
§ 14:2.3	Exceptions to the Doctrine of Functus Officio	14-10
§ 14:2.4	Reservation of Jurisdiction	14-13
§ 14:2.5	Precedential Value of Award	14-14
§ 14:3	Scope of the Arbitrator's Authority	14-15
§ 14:4	Grant of Relief	14-17
§ 14:4.1	Discretion of Arbitrators	14-17
§ 14:4.2	Interest	14-17
§ 14:4.3	Attorneys' Fees	14-18
§ 14:4.4	Costs	14-21
§ 14:4.5	Punitive Damages and Sanctions	14-21
§ 14:5	Majority or Unanimity; Dissent	14-23
§ 14:6	In Writing and Signed by the Arbitrators	14-24
§ 14:7	Time Limits for Rendering the Award	14-24
§ 14:8	Service of the Award	14-29
§ 14:9	Partial Final, Interim, and Consent Awards	14-29
§ 14:9.1	Partial Final Awards	14-29
§ 14:9.2	Interim Relief	14-33
§ 14:9.3	Consent Awards and Awards by Confession	14-37
§ 14:10	Forms of Award	14-37
§ 14:10.1	Generally	14-37
§ 14:10.2	Standard Award	14-38
§ 14:10.3	Reasoned Award	14-39
§ 14:10.4	Findings of Fact and Conclusions of Law	14-40
§ 14:11	Conclusion	14-41

Chapter 15 Confirmation and Vacatur of Awards

Abigail Pessen

§ 15:1	Overview of Requirements for Confirming and Vacating Awards	15-2
§ 15:1.1	Generally	15-2
§ 15:1.2	Need to Establish Subject Matter Jurisdiction in Federal Court	15-3
§ 15:1.3	Venue	15-4
§ 15:1.4	Role of State Courts	15-4
§ 15:1.5	Confidentiality	15-5

§ 15:2	Confirmation of an Award.....	15-5
§ 15:2.1	Generally.....	15-5
§ 15:2.2	Personal Jurisdiction and Service Requirements	15-6
§ 15:2.3	Time Limits and Procedural Requirements.....	15-7
§ 15:3	Vacatur of an Award.....	15-8
§ 15:3.1	Generally.....	15-8
§ 15:3.2	Time Limits.....	15-8
§ 15:3.3	Grounds Under the Federal Arbitration Act.....	15-9
[A]	Corruption, Fraud, or Undue Means	15-9
[B]	Evident Partiality or Corruption.....	15-10
[C]	Refusal to Postpone the Hearing or to Hear Evidence, or Other Prejudicial Misbehavior	15-11
[D]	Arbitrators Exceeded Their Powers or Imperfectly Executed Them.....	15-12
§ 15:3.4	Nonstatutory Grounds for Vacatur: “Manifest Disregard”	15-14
§ 15:3.5	Procedural Requirements for Motion to Vacate.....	15-15
§ 15:3.6	State Law Grounds for Vacatur	15-16
§ 15:4	Modifying or Correcting an Award.....	15-16

Chapter 16 Appeals Within the Arbitration Process

David C. Singer

§ 16:1	Introduction	16-1
§ 16:2	AAA and ICDR Rules	16-2
§ 16:3	JAMS Rules.....	16-3
§ 16:4	CPR Rules	16-4

Chapter 17 Arbitration Ethics

Richard L. Mattiaccio & Steven Skulnik

§ 17:1	Characteristics of the Arbitrator	17-2
§ 17:1.1	Judicial Characteristics	17-2
§ 17:1.2	Contractual Characteristics	17-2
§ 17:1.3	Advocate for Appointing Party	17-3
§ 17:2	Arbitrator Obligations.....	17-4
§ 17:2.1	Sources of Obligations	17-4
[A]	Federal Arbitration Act	17-4
[B]	State-Specific Laws or Codes.....	17-5
§ 17:2.2	Nature of Obligations	17-5
[A]	Investigation for Potential Conflicts	17-5
[B]	Disclosure.....	17-6
[C]	Confidentiality.....	17-6

Table of Contents

[D]	Limited Ex Parte Communications	17-6
[E]	Due Process	17-7
[F]	Limited Reliance on Tribunal Secretaries and Assistants	17-8
§ 17:2.3	Canon X Arbitrators	17-8
§ 17:3	Counsel Obligations	17-9
§ 17:4	Judicial Remedies for Unethical Arbitrator Conduct.....	17-11
§ 17:4.1	Limitations on Interlocutory Judicial Challenges	17-11
§ 17:4.2	Vacatur for Arbitrator Misconduct or Partiality.....	17-11
§ 17:5	Challenge Procedures in Institutional Arbitral Rules	17-11
§ 17:6	Waiver.....	17-12

**Chapter 18 International Commercial Arbitration in the
United States**

Sherman Kahn & Edna Sussman

§ 18:1	Introduction	18-2
§ 18:2	Applicable Procedural Law	18-3
§ 18:2.1	The New York Convention and Chapter 2 of the Federal Arbitration Act	18-3
§ 18:2.2	The Panama Convention and Chapter 3 of the Federal Arbitration Act	18-5
§ 18:2.3	The Concept of the “Arbitral Seat”.....	18-6
§ 18:2.4	The Law of the Contract.....	18-7
§ 18:3	Cultural Issues	18-7
§ 18:3.1	Civil Law and Common Law Approaches	18-7
§ 18:3.2	Other Cultural Issues	18-8
§ 18:4	Prevailing Practices in International Arbitration.....	18-9
§ 18:4.1	Expectation of Arbitrator Neutrality	18-9
§ 18:4.2	Limited Discovery/Disclosure	18-10
[A]	Reliance Documents	18-10
[B]	Requests for Exchange of Additional Documents	18-11
[C]	Other Discovery Devices Are Discouraged.....	18-12
§ 18:4.3	Exchange of Direct Witness Testimony, in Writing, in Advance of the Merits Hearing	18-12
§ 18:4.4	Exchanges of Briefs or “Memorials” in Advance of the Evidentiary Hearing.....	18-13
§ 18:4.5	Practices Regarding Expert Witnesses	18-13
§ 18:4.6	Introduction of Foreign Law.....	18-14
§ 18:4.7	Arbitration Awards	18-15

§ 18:5 Arbitral Institutions Administering International Arbitration in the United States; Applicable Rules 18-16

§ 18:5.1 International Centre for Dispute Resolution (ICDR) 18-16

§ 18:5.2 International Chamber of Commerce (ICC) 18-17

§ 18:5.3 JAMS 18-19

§ 18:5.4 CPR 18-19

§ 18:5.5 Other Institutions and Ad Hoc Arbitration..... 18-20

§ 18:6 “Soft Law” Resources..... 18-22

§ 18:6.1 IBA Rules on the Taking of Evidence in International Arbitration 18-23

§ 18:6.2 IBA Guidelines on Conflicts of Interest in International Arbitration 18-24

§ 18:6.3 IBA Guidelines on Party Representation in International Arbitration 18-25

Table of Authorities T-1

Index I-1