ARBITRATION AND CONTRACTS: WHAT ARE LAW SCHOOLS TEACHING?

by

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I. INTRODUCTION

A. The Arbitration Revolution

Arbitration is sweeping the American legal landscape. Simply stated, arbitration is everywhere. Almost every American business and individual with legal capacity to contract has entered into an agreement that specifies arbitration as the forum for resolving most or all disputes that might arise between the parties. The importance of arbitration as the preferred mode of dispute resolution has grown dramatically during the last ten to twenty years, and this trend has not yet run its course. Since 1983, the leader in promoting the enforcement of arbitration terms has been the United States Supreme Court.[1] This favorable legal environment has prompted organizations to dramatically expand the use of arbitration provisions for contracts with both individuals and other firms.

A few examples of contexts in which arbitration is commonly used should suffice to prove its importance in the domestic economy. [Arbitration has long been the norm for multinational transactions, because businesses do not relish the prospect of litigation in the courts of another country.[2]] At the most sophisticated end of the business spectrum, reinsurance contracts between insurance companies mandate arbitration, as do maritime bills of lading. Numerous trade associations have long mandated arbitration of all disputes among members.[3] Collective bargaining agreements have called for arbitration of grievances at least since World War II, and now many contracts with individual employees do aw well. Franchise agreements call for arbitration, at least where favorable to the franchisor. Sellers of computers and many other consumer products require arbitration. Contracts between securities brokers and their customers all mandate arbitration. Most proprietary schools provide for arbitration of disputes in their enrollment contracts. The contracts of banks, providers of medical services, and attorneys frequently specify arbitration for the resolution of disputes. Even contest rules at McDonald's call for arbitration.

Another reflection of the importance of arbitration is the vast amount of litigation it has generated, a rather ironic standard since a central purpose of arbitration is to avoid the courts. According to Professor Charles Knapp, author of a leading contracts casebook, "far and away" the single most litigated contract-related issue is whether to enforce a written arbitration term in an apparently binding arbitration agreement. "And, the court's answer usually is yes."[4]

For some years, in speeches and continuing legal education presentations, I have been asserting that the federal courts of appeals are writing about 100 arbitration decisions per year.[5] While believing this number to be accurate I did upon occasion worry that 100 might be too high, but consoled myself with the "about" limitation. In preparation for writing an article about recent arbitration decisions by the Court of Appeals for the Fifth

Circuit, I was forced to actually count cases.[6] Between June 1, 2002 and May 30, 2003 the Fifth Circuit produced written opinions in twenty-three (23) arbitration cases. Every one of these is a full decision on the merits; the count does not include cases that only make incidental mention of arbitration, petitions for rehearing, and other tangential matters. Clearly, my assertion of 100 court of appeals arbitration decisions per annum is low rather than high.

The highest court in the land has decided more than thirty arbitration cases since 1983, including ten since the turn of the century. The Supreme Court handed down four arbitration decisions during the 2002-2003 Term alone.[7] These caseload numbers bespeak considerable disputation about arbitration, as well as the central importance of arbitration as an ever more important form of binding dispute resolution.[8]

B. Arbitration And The Contracts Casebooks

The arbitration revolution, which is a creature of contract, has produced dramatic changes in the resolution of disputes, but these developments are not reflected in most of the contracts courses or casebooks. Furthermore, arbitration is quite incidental to the topic under which it is most commonly found in the casebooks: the battle of the forms, and related questions about what proposed terms became part of a contract.

What is the explanation for this disconnect between current contracting practices and the casebooks? Inertia and tradition provide the most likely explanation. Integration of a new topic into the structure of an existing casebook is a difficult and time-consuming proposition. To a certain extent, this approach is not fully satisfactory, because it can be seen as restating the conclusion rather than truly providing an explanation.

Lag time might provide an explanation, but in most instances the casebooks have been updated recently so time lag is not the answer. The most recent editions of the Farnsworth, Knapp, and Murphy casebooks provide more than passing attention to arbitration, and the Macauley and Macneil casebooks have done so for years. The original edition of the Fuller casebook included more extensive coverage of arbitration than the current edition.[9]

Perhaps, most casebook authors do not regard arbitration as sufficiently important to warrant substantial attention, or fail to provide such coverage because arbitration does not fit conveniently into the doctrinal framework of contract law. Some authors may respond that they cover arbitration through the comprehensive method, considering it as and when arbitration arises in contract cases. Indeed, to the extent that arbitration is considered, that is the approach taken by nearly all the casebooks, whatever the level of arbitration coverage. The defects of this approach are discussed in the final part of the article.

Arbitration might be considered to be a structural misfit for the course in contracts. Arbitration law is grounded in statutes at both the state and federal level, albeit short and general statutes that leave many matters open to judicial interpretation. Contracts traditionally has been a common law, case-based, state law course. Many contracts courses and casebooks do not even give serious attention to the UCC, so it is an easy step to ignore a statutory topic such as arbitration. [In my judgment, the first year of law school dramatically overemphasizes case law and underemphasizes statutes, but that is a topic for another day.] Contract law is fundamentally state law, while arbitration is largely governed by a federal statute, the Federal Arbitration Act (FAA).[10] The most important arbitration cases come from the U.S. Supreme Court, but the highest court in the land has little place in basic contract law and contracts casebooks.

Arbitration might be regarded as unsuitable for use in teaching contracts because there is not a conventional body of law to teach about. Professor Knapp characterizes arbitration as "not ... the kind of findable, studiable, arguable, appealable, Restateable kind of law that has characterized the Contract area for over a century."[11] Perhaps the best evidence of the teachable importance of arbitration is provided by the remainder of the article from which this quotation is taken. That arbitration can and should be taught is evidenced by the 2003 edition of the Knapp casebook (but not the earlier editions).

It is conceivable, but extremely unlikely, that some contracts casebook authors are simply unaware of the arbitration revolution that has taken place over the last twenty years. Since arbitration proceedings take place outside the courts, and typically do not generate written opinions (outside the labor context), these developments might "pass below the radar" of scholars, particularly because they learned little if anything about arbitration in law school.[0] However, the radical expansion in the use of arbitration has been accompanied by a huge amount of arbitration litigation and reported cases, as well as a large body of law review literature.

There is some positive evidence that the casebook authors are well aware of developments in arbitration law. While Knapp writes of "a quiet revolution," it is difficult to believe that these developments have escaped the attention of contracts casebook authors, who necessarily keep up with current developments. Two authors of contracts casebooks, Ian Macneil and Richard Speidel, are also co-authors of the leading treatise on arbitration law.[13] Both casebooks have recently updated editions, and each devotes considerable attention to arbitration.

Perhaps the best evidence of a disconnect between what a casebook author knows and what is presented in the casebook is the Fuller casebook.[14] Arbitration barely rates a mention, and the Index does not list arbitration as a topic. The Source Materials Supplement by Professors Steven Burton and Melvin Eisenberg, two of our most distinguished contracts scholars and casebook authors, includes four important, complex, and lengthy Sample Form Contracts.[15] All are promulgated by industry organizations rather than individual firms:

1. American League of Professional Baseball Clubs, Standard Contract Between Member Teams and Baseball Players;

2. Writer's Guild of America, Freelance Television Writers Employment Contract;

3. American Institute of Architects, Standard Form Agreement Between Owner and Contractor [AIA-A101 and AIA-A201]; and

4. California Association of Realtors, Residential Purchase Agreement [RPA-14, BIA-14, and TDS-14].

These forms are carefully crafted standardized arrangements that heave been in use for some years, and which have been adjusted over time to reflect experience with their use. What do these contracts say about dispute resolution? Let's take a look.

The American League contract [the National League agreement is materially identical] specifies that disputes are to be settled under the Grievance procedures specified in the Basic Agreement between the two major leagues and the Major League Baseball Players Association (MLBPA). The Basic Agreement calls for arbitration, above all, of salary disputes under a final offer format. Indeed, this approach – where each disputant states a final number and the arbitrator must choose one or the other – is commonly referred to as "baseball arbitration."

The WGA contracts provide that "any disputes" concerning the "interpretation or application" of the agreement must be submitted for arbitration by the Guild's arbitration committee, pursuant to the Guild's arbitration procedures. The determination of the arbitration committee is "conclusive and binding upon the parties."

The AIA has provided form construction contracts since early in the 20th century, which are in regular use throughout America. Like AIA-A101, these contracts incorporate by reference AIA-A201, General Conditions of the Contract for Construction. Article 4.5 calls for arbitration under the Construction Arbitration Rules of the AAA, of any controversy or claim "arising out of or related to" the agreement. This is the classic broad form arbitration language employed by the AIA and the AAA since before World War II. Most adjudicated construction disputes are decided by arbitrators, not by judges. [Readers of contracts casebooks, however, would conclude that adjudicated contract dispute are heard predominantly, if not entirely, by courts.]

The California Association of Realtors (CAR) residential purchase agreement broadly calls for arbitration of "any dispute or claim in Law or equity," subject to listed exceptions – foreclosure, unlawful detainer; matters within the jurisdiction of probate, small claims, or bankruptcy courts; filing or enforcement of a mechanic's lien; and personal injury claims. There is a notice about arbitration in bold print, followed by a place for the initials of the buyer(s) and seller(s). Arbitration provisions in residential real

estate contracts, as illustrated by the CAR, are in increasingly common use throughout the country.

The dispute resolution provisions of the four important types of form contracts selected by Professors Burton and Eisenberg have one thing in common: each calls for the resolution of many if not all of all disputes between the parties. Clearly, contracts teachers know about the transformation of dispute resolution through the inclusion of arbitration provisions in agreements, but that knowledge has not yet been translated into the casebooks and the teaching of contracts.

C. Overview Of The Article

The contract-based arbitration revolution has dramatically changed dispute resolution in America, but (with limited exceptions) these developments are not reflected in contracts courses or casebooks. The goal of this article is to explore what the casebooks have to say about arbitration, and to propose some better alternatives.

This article adopts two closely related approaches. The text consists of a general discussion about arbitration and contracts, as reflected in contracts casebooks. A detailed examination and critique of the individual casebooks is presented in the Appendix. The casebooks are considered in alphabetical order (based on the name of the senior author), so the reader can easily find the discussion of a particular casebook, or review the supporting evidence for the conclusions in the general discussion.

The article is built on a fundamental assumption, which is that the contents of the contracts casebooks accurately reflect the substantive material covered in the universally required first year course in contracts. There are, of course, variations from school to school and from professor to professor, but the casebooks provide a broadly accurate reflection of what is taught in American contracts classes.

After a review of the research methodology that produced the results reported here, I set out my conclusions in the form of a series of assertions about arbitration and contracts. The article will demonstrate the accuracy of each of these statements. Taken together, these propositions constitute a clear critique of what contracts casebooks teach about arbitration law and practice.

One goal of this project was to identify and examine the leading arbitration cases in contracts casebooks. There turned out to be few leading cases, but they do reflect the most important arbitration topics found in contracts casebooks: formation, unconscionabilty, and remedial powers of arbitrators. Accordingly, the leading cases are considered within these categories. The ensuing discussion focuses on, but is not limited to, the leading cases

and topics. Of particular importance is the conclusion that contracts teachers are generally hostile to arbitration, at least in the context of consumer and employment transactions.[16]

No article about contracts would be complete without an examination of the relevant provisions of the Second Restatement of Contracts. Only a short discussion is required, because the Restatement has almost nothing to say about arbitration. The critique presented in the article makes it incumbent on the author to offer some alternatives, and that task is undertaken at the end of the article.

II. ARBITRATION IN THE LAW SCHOOL CURRICULUM

A brief examination what is taught elsewhere in the law school curriculum arbitration will provide helpful context for the ensuing discussion of contracts and arbitration. The short answer is: not much. What limited exposure to arbitration does occur is in specialized and low-enrollment courses that are not taken by most students. None of the large enrollment (mostly bar examination) law school courses provides an opportunity for the more than passing mention of arbitration. If it is important for law students to receive an exposure to arbitration, it will happen in contracts or not at all.

The sweeping generalization that most law students will receive little if any exposure to arbitration outside of the course in contracts is based on a 2001 survey of American law schools about the teaching of arbitration by the Tulane Arbitration Institute, under the leadership of Professor Thomas Carbonneau.[17] **Responses were received from 168 (of 184) nationally accredited law schools, an overwhelming response rate. Nearly all (155) claimed to teach arbitration as a separate course or as part of an ADR course. Of course, self-reported data must be viewed with caution, and the extent of arbitration coverage is probably exaggerated.**[18]

While 116 law schools teach some sort of arbitration course, only seven claim to teach more than one. Many of these courses are specialized, with Labor Arbitration (32) and International Arbitration (29) being be by far the most common. Only about thirty percent the law schools teach a general arbitration course (51). The Tulane questionnaire also asked law schools to report additional courses that included "reference to" arbitration. The only ones that received significant mention were Labor Law (16) and International Business Transactions (7).

Sixty-three law schools teach arbitration only as part of an ADR course. With the dramatic growth in the use of mediation, the consideration of arbitration commonly is modest. ADR supporters regard voluntary participation as a hallmark of ADR, so much so that a leading scholar has suggested that arbitration should be drummed out of ADR movement.[19]

Labor law is a subject in which arbitration should have a central role. After all, virtually every collective bargaining agreement (CBA) since World War II has specified a multi-step dispute resolution process that culminates with binding arbitration. [Of the contracts casebooks, only Macauley and Macneil provide more than passing mention of CBAs, and the settlement of disputes thereunder.] Instead, arbitration has less of a place than it did in 1950.[20] Arbitration was a central topic in labor law courses after World War II, because many of the faculty were participants in the dispute resolution process during and shortly after the War.[21]

Over the decades, arbitration largely disappeared from labor law courses, which adopted the traditional law school pedagogy and content (cases and statutory analysis). Even the rise of ADR in the 1980s had "only modest effect" on the teaching of labor law.[22] As for employment arbitration, it went unnoticed. As recently as 1994, Professor Cooper's labor arbitration "coursebook" devoted only one page to employment arbitration.[23] The rise of ADR in the workplace may actually decrease coverage of arbitration. The latest edition of the leading casebook changed its title from Labor Arbitration to ADR in the Workplace.[24]

Even now, dispute resolution, which includes much more than arbitration, is accorded only "modest treatment" in employment law casebooks.[25] In addition, the subject of the law related to the workplace is being further sundered by specialty courses. Not only are there separate course dealing with labor law and employment law, the narrower topic of employment discrimination is the subject to two casebooks.[26] Even if such specialized courses taught a good deal about arbitration, the lessons learned will be about labor arbitration or employment arbitration, rather than arbitration in general.

None of the courses that address arbitration are central to the law school curriculum, and the enrollments typically are small.[27] Another measure of marginality of arbitration/ADR courses is that so many are taught by adjunct faculty (40 percent). In sum, the vast majority of law students need to receive some exposure to arbitration in contracts, or they will not receive it at all.

III. RESEARCH METHODOLOGY

A. Review Of The Casebooks

The universe for this research was all the casebooks designed for teaching a first year Contracts. No modern "casebook" is limited to cases, and some of the published contracts materials range far beyond cases, but the term casebook is conventional and

convenient. This approach excludes books of readings about contracts, sets of problems, and hornbooks. The casebooks are referred to by the name of the first author, even if that person is deceased. Except where otherwise indicated, all references are to the latest edition of each casebook. Earlier editions of several casebooks are discussed, particularly those that have recently appeared in a new edition.

Although I began this undertaking with a general familiarity about the array of contracts casebooks, having at least glanced at all of them at some time, I had not carefully reviewed most of them. The first thing that struck me was the large number of published contracts casebooks – no less than 23 of them.

My review of a casebook began with the preface, to learn about the goals of the authors and changes from the prior edition. Arbitration hardly ever rated so much as a mention, but in many casebooks there was considerable rhetoric about teaching students how the real world of contracting works, and about being up-to-date. [Some authors focus on contract theory and doctrine, rather than how contracts works in practice, or on recent developments.] One might hypothesize that arbitration would be prominently featured – anyway, somewhat featured – in the casebooks that seek to focus on current developments and the law in action, but that clearly has not happened.

Seeking to determine the contents of law school casebooks about a particular topic is a challenging task. Casebooks have a purpose, which is to provide material for teaching a course; they are not designed as research tools. Thus it is not a criticism of the casebooks to say that using them to research a particular topic is difficult.

For each casebook, I reviewed the Index and Table of Contents for references to arbitration. In addition, I checked the Table of Cases for the names of the cases most commonly discussed in the arbitration literature. One lesson from this exercise is that the indexes in contracts casebooks are modest in length and scope. (The best index award goes to the Farnsworth casebook.) What is lacking in indexes is more than made up for by the detailed table of contents that is found in almost every contracts casebook. In addition to chapter names and subheadings, every major case is listed by name, and other materials as well.

All the casebooks have tables of cases; most also include tables of citations to the Uniform Commercial Code (UCC) and the Restatement Second of Contracts (Restatement). These proved to be of little value for this project because the UCC does not address the subject of arbitration, and the Restatement has little to say on the topic.

It can be stated with some confidence that this review of the casebooks unearthed every significant consideration of matters related to arbitration, and nearly all minor references to the topic. No doubt, there are a few casual references to arbitration buried in note material that escaped my attention. Because the resort to arbitration has become so widespread, it might receive mention under almost any topic. An example from the Knapp casebook (716) will illustrate the problem. In the notes after one of the cases in the material on third party beneficiaries, note 5 is about defenses available to the promisor.

Buried in the middle of a paragraph there is a single sentence about arbitration: it states that a person making a claim as a third party beneficiary of a contract is bound by an arbitration provision in the contract, and cites two cases to that effect.

B. Determination Of The Leading Cases

To the extent that contracts casebooks consider arbitration, it was expected that a small number of cases would appear with relative great frequency. This expectation was not borne out, but it was possible to identify a few leading cases, which are discussed at length in part IV of this article. To facilitate the process of identifying leading cases, and to ensure objectivity, I created a simple scoring system that awarded points in the following manner:

a.	**Main Case**	**5 points**
b.	**Substantial Coverage**	**3 points**
b.	**Some Coverage**	**2 points**
c.	**Minimal Coverage**	**1 point**

This approach requires little defense because the numbers are designed to show only than rough orders of magnitude.

The main case designation reflects the decisions made by the casebook authors. The only discontinuity in the scoring system is for the main cases, because they are regarded as of particular importance by authors, teachers, and students. Law school class discussion commonly focuses on a single case, with subsidiary material being introduced through questions that explore the meaning of the main case. Distinctions between minimal, some, and substantial coverage presented a few close calls, but nothing of consequence turns on these decisions.

No case was awarded more than five points, even if it was both a main case and also the subject of additional discussion. The most common example is the pairing of the Hill and Klocek decision– precisely because, on materially identical facts, Klocek discusses Hill but reaches the opposite conclusion about whether the arbitration term (and others) became part of the contract.

IV. Research Conclusions

This section of the Article sets forth my conclusions about what is taught about arbitration law and practice in Contracts courses, in the form of a series of assertive statements. The evidence in support of these statements is found in the discussion of the individual casebooks in the Appendix, and in other parts of this article. Accordingly, there is no discussion of the research conclusions here.

1. Discussion about the law and practice of arbitration in contracts casebooks is extremely modest, reflecting a judgment that arbitration has little if any place in the first year contracts course.

2. The nature and extent of arbitration coverage in contracts casebooks varies widely, ranging from absolutely none to quite substantial.

3. Most of the arbitration cases are presented in the context of a substantive contracts topic, with the arbitration context being quite incidental.

4. There is hardly any discussion in the contracts casebooks of arbitration as a discrete topic – one that might be worthy of separate consideration.

5. Among the arbitration cases that appear in the casebooks, there is an almost complete lack of consensus about which ones are the leading cases.

6. To the limited extent that some leading arbitration cases can be identified in the contracts casebooks, few if any would be considered leading cases by persons who work in the field of arbitration.

7. Conversely, few if any of the leading arbitration cases are among those receiving primary attention in the contracts casebooks.

8. The coverage of arbitration that does appear in contracts casebooks fails to address some of the most important topics – above all, the allocation of authority between courts and arbitrators.

9. The arbitration materials in contracts casebooks are full of errors, inaccuracies, and misleading statements; in some instances, once accurate statements have been rendered inaccurate by subsequent developments.

10. Much of the arbitration material in the contracts casebooks is out-of-date, and should be changed to reflect more recent developments.

11. To the extent that the casebook authors have a normative view about arbitration, they are broadly hostile to arbitration.

12. The casebooks systematically overuse lower court opinions and state rather than federal decisions. In particular, relevant U.S. Supreme Court opinions are regularly ignored.

13. The casebooks systematically fail to recognize the importance of federal preemption of state law restrictions on arbitration, whether statutory or judicial in origin.

14. The casebooks have virtually nothing to say about the central role of arbitration in contracts that involve more than one nation, and the vital importance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

IV. THE LEADING CASES

A. AND THE WINNERS ARE

To the extent that contracts casebooks consider arbitration, just a few cases are used with even modest frequency. At one point a Top 10 list seemed in the offing, but there turned out to be only nine arbitration cases that merit specific mention. Given that any main case used in a single casebook was awarded five points, the fact that only nine cases garnered even seven points demonstrates a remarkable absence of consensus. The maximum number of points a case could receive is 115 (23 casebooks x 5 points). A simple listing of the point scores for the leading cases is striking:

2.	**Hill (1997)**	**42**
2.	**Garrity (1976)**	**26**
3.	**Klocek (2000)**	**25**

4.	**Itoh (1977)**	**20**
5.	**Grayson-Robinson (1960)**	**19**
6.	**Brower (1997)**	**15**
7.	**TWA (1965)**	**10**
8.	**Graham (1981)**	**8**
9.	**Armendariz (2000)**	**7**

With a single exception, the leading arbitration cases (and most of the lesser cases as well) fit comfortably into three doctrinal categories: contract formation, unconscionability, and remedies. The exception is a labor grievance arbitration decision (TWA), which topic is rarely covered in contracts casebooks. The doctrinal categories will be discussed in this order, which also reflects their importance for contracts and arbitration.

Perhaps the most striking fact about these cases, obscured by the use of only one name to identify cases, is that a single firm was the defendant in three of them – Gateway Computer. All three of these cases were decided since 1997.[28] Only one of the other leading cases was decided that recently.

B. Contract Formation

1. Overview

The two leading cases, and three of the top four, are found in this category: Hill,[29] Klocek,[30] and Itoh.[31] Hill and Klocek are a matched pair of consumer cases that reach opposite results on materially identical facts. Itoh and similar commercial cases are briefly considered, followed by a discussion of whether an arbitration provision constitutes a material alteration under U.C.C. sec. 2-207(2)(a). Finally, I suggest that while consumers win the occasional battle about arbitration with a merchant, they are destined to lose the arbitration war.

The usual rubric for the topic discussed here is "the battle of the forms." It arises commonly in the sale of goods, but the issue is not limited to transactions governed by the Uniform Commercial Code (UCC). The merits of this vexed and much discussed topic are not considered here, apart from the arbitration context.[32] The expression "contract formation" follows conventional usage, but the central problem only rarely is whether or not the parties have entered into a contract.[33] Instead, the problem is to identify the terms of a contract that clearly exists, because performance has already taken place (at least in part) but the parties have not in fact concurred in the terms of their agreement.

2. Hill and Klocek

There are four leading cases regarding the terms of contracts formed through some combination of forms, terms in the product container, telephone calls, and electronic communication in the purchase, lease, or licensing of goods. Two are opinions by Judge Frank Easterbrook: Zeidenberg and Hill. Zeidenberg is the earlier decision, has more interesting facts than Hill, and is the more comprehensive opinion. Hill relies heavily on Zeidenberg. Hill involves arbitration, while Zeidenberg does not. Most of the recently published casebooks include one or the other, but the fact that Hill involves arbitration has no role in the decision.

The two leading cases that reject the Easterbrook approach are Step-Saver and Klocek. Step-Saver features an excellent opinion by Judge John Minor Wisdom, but it was decided before the two Easterbrook opinions, and so cannot directly join issue with them.[34] Klocek is the more recent decision; in it, Judge Vraitel discusses Hill at length, and rejects its reasoning.[35]

Zeidenberg and Step-Saver are the more interesting opinions, and they involve more sophisticated commercial transactions, but they already have been eclipsed by the pairing of Hill and Klocek in the casebooks, a trend that will accelerate as new editions of casebooks are published. Hill and Klocek both involve arbitration, while Zeidenberg and Step-Saver do not, but the arbitration context is entirely coincidental to the contract formation issues.

Hill and Klocek involved materially identical transactions: telephone purchases of computers from Gateway [formerly known as Gateway 2000, when that name sounded futuristic]. Payment was by credit card, and when the computer arrived the papers in the box stated additional terms, including arbitration, to which the buyer was subject unless the computer was returned in thirty days. In each instance the buyer became dissatisfied with the purchase after the expiration of the thirty days, and filed a law suit claiming breach of contract. Gateway sought to have the disputes submitted to arbitration in Chicago, under South Dakota law, as provided by the papers enclosed with the computer.

Judge Easterbrook has sought to reintroduce the "last shot" doctrine into contract law by allowing incorporation of contract terms in a "rolling contract." This approach strongly favors sellers, and is regarded by many as inconsistent with conventional contract formation law. In UCC terms, Easterbrook ruled that there was only one form, so 2-207 was inapplicable. As for the contract terms, the offeror is master of the offer, and the buyer accepted the seller's terms by not returning the computer within 30 days. [This return period is unusually generous, and provides a surface appeal to Easterbrook's decision, but the result would be the same if the return period was five days, or even in the absence of any return period.] Since the buyer in Hill telephoned the seller, and paid for the good prior to shipment (by authorizing a credit card charge), one might think that the buyer rather than the seller is the offeror.

Hill conveys to students the important and accurate message that arbitration terms in contracts are enforced as a matter of course. This message is conveyed in the most fundamental way: it is taken for granted by Judge Easterbrook. Whether the arbitration term became part of the contract between the parties was disputed, but once found to be part of the contract the consequence of sending the underlying controversy to arbitration was clear, and hardly merited discussion. Arguments based on contract defenses, including fraud, are treated dismissively ["do not require more than a citation to Prima Paint"]. Students will not know what the reference to Prima Paint means, but that is true of many references during the opening months of law school. As for the costs and benefits of the use of arbitration, "which the Hills disparage," that is a matter "for Congress and the contracting parties to consider." In short, if you do not like arbitration, negotiate a different contract. Klocek focuses on the contract terms issue, and has little to say about arbitration.

3. Itoh and Similar Cases

Itoh is one of the classic commercial battle of the forms cases, and it is used to illustrate UCC section 2-207. Due to an "expressly made conditional" provision, the absence of an express agreement regarding arbitration led the court to apply 2-207(3), whereupon the contract consisted of the terms actually agreed to by the parties plus UCC gap fillers. Since the UCC does not address arbitration, the default position is no arbitration. This approach avoided the need to consider whether an arbitration provision is a material alteration, the most important 2-207 arbitration issue. Some of the 2-207 standards, such as Dorton (also an arbitration case) and the much maligned Roto-Lith decision are steadily disappearing from the contracts casebooks.[36] Itoh is destined for the same fate, perhaps being replaced by a decision based on the revised Article 2 of the UCC.

4. Material Alteration

The materiality of arbitration for purposes of 2-207(2)(b), in transactions between merchants, is of only modest consequence for contract law generally. Accordingly, this important arbitration topic receives little consideration in the casebooks, even those that use arbitration cases to illustrate 2-207 issues.[37]

Whether an arbitration provision not actually agreed to by merchants negotiating a deal becomes part of the contract between the party depends on whether arbitration is a material alteration under 2-207(2)(b), and secondarily on which party has the burden of proof on that issue. [Where agreement is "expressly made conditional" on acceptance of the terms of a party, so no contract is formed by offer and acceptance, the teaching of Itoh is that 2-207(3) governs, and the arbitration proposal drops out.]

Under New York law, arbitration is a material alteration, and the burden of proof is on the proponent of arbitration, but not all courts agree.[38] The New York approach has the great merit of not giving either party an unbargained for term. As for the presumption in favor of arbitration, that comes into effect only after there has been a determination that the parties have agreed to arbitrate. Even so, agreement to arbitration might be based on course of dealing or trade usage, as New York has recognized.[39]

The burden of proof situation is more difficult, because sec. 2-207(2) specifies that between merchants, additional terms "become part of the contract unless ...."[40] Conventional reading of this language would place the burden on the party opposing inclusion of the additional term, but this approach rewards strategic behavior and undermines the default position of no arbitration.

Different outcomes under identical statutory language may require a choice of law determination prior to making the arbitration determination. This situation arose in the Avedon case, where the choice was between New York and Colorado law (which at least arguably would require arbitration).[41] Adoption of a per se rule that arbitration is material would short-circuit this sort of difficult, and perhaps result-oriented, inquiry.

A related issue is the need for a written agreement to arbitrate. The basis for the writing requirement is not the Statute of Frauds, but arbitration statutes. For transactions that are governed by the FAA "an agreement in writing" is required, while the UAA speaks of a "written agreement."[42] Unlike the UCC, however, the FAA and UAA do not require that the writing be signed. Even a jurisdiction that puts arbitration into an agreement under 2-207(2)(b) might decline to order arbitration because the written agreement requirement was not satisfied. None of the casebooks consider these differences.

5. Why Merchants Will Win the Arbitration War

The occasional consumer success in litigation with sellers of computers or other products are more apparent than real, because merchants can nearly always adjust their contracting practices to achieve the desired result – such as an enforceable arbitration term. Contracting though modern technology will be harnessed by sellers to serve their interests. The point is nicely illustrated by a recent 2d Circuit decision, Specht v. Netscape.[43] The consumer was invited to download software, with additional contract terms (one of which called for arbitration) being found by scrolling down the electronic "page" beyond the download icon that reflected agreement by the purchaser.

Rejecting the Easterbrook approach, the court held that terms appearing below the place where the buyer indicated assent came too late, and thus were not part of the contract between the parties. The buyer won on the arbitration issue in this case, but Specht clearly shows the way to seller success in subsequent dealings with consumers. Nothing more is required than to relocate the arbitration provision above the contracting

icon (send, order, agree, or similar name) instead of below it. This approach garnered for Microsoft its selection of Washington State as the forum for litigating its dispute with a New Jersey customer.[44] The additional contract terms need not clutter the progress toward a sale; all that is required is an icon that leads the interested customer to the additional terms. Uninterested customers (i.e., most rational customers, including lawyers) can scroll past that icon and proceed with the transaction. The practical impact of Klocek will be similarly modest.

Only foolish merchants (or their counsel) will engage in legal analysis of the varying approaches to contract formation. Instead, they will adjust their behavior to make their contract terms available to customers on a web page, and so state in their advertisements, and on the boxes that contain the product. For electronic purchases, buyers easily can be offered the option of examining the contract terms or clicking through to make a purchase. For telephone purchases, the customer need simply be told that the contract terms are "available on our web page." There is no need to read contract provisions to potential customers – as Judge Easterbrook disingenuously suggested in Hill.[45]

While contract formation issues in a world of electronic commerce will continue to be of central importance for the first year course in contracts, merchants will have little difficulty in mandating arbitration of disputes. There will continue to be the occasional case where a customer escapes arbitration through the application of state contract law, but these situations will be unusual and merchants (with the advice of counsel) will promptly and successfully adjust their contracting behavior accordingly.

C. Unconscionability

1. Overview

The leading unconscionability decisions in the casebooks are Brower,[46] Graham,[47] and Armendariz,[48] respectively numbers six, eight, and nine among the leading cases. Despite these weak rankings, unsconscionability is clearly the most important and most discussed arbitration topic in contracts casebooks. The reason for the focus on unconscionability is that this is usually the sole realistic state contract law defense available to a person seeking to avoid arbitration. [Under the separability doctrine, other contract law defenses will thwart arbitration only if the defense relates specifically to the making of the arbitration provision.][49] Most of the successful unconscionability claims are decisions from state courts. The casebooks present a variety of such decisions; no single case has captured the attention of authors.

Apart from the lack of consensus among casebook authors about the leading arbitration unconscionability cases, not a single one even discusses let alone reproduces what most people who toil in the arbitration vineyard would identify as the leading employment unconscionability decision: Hooters, Inc. v. Phillips.[50] A decision from the 4th

Circuit, with the opinion written by Chief Judge Wilkerson, is a precedent that will be taken seriously by courts that are reflexively suspicious of California innovations. The Epstein casebook does reprint the Hooters decision, but the district court rather than the court of appeals version.

Two of the three leading unconscionability cases, Armendariz and Graham, are decisions by the California Supreme Court. The California courts have taken the lead in the aggressive resort to unconscionability doctrine in general, and to thwart arbitration in particular. Even Professor Harry Prince, coauthor of the Knapp casebook (and Knapp's colleague at Hastings College of Law) is critical of the widespread resort to unconscionability by the California courts, led by the California Supreme Court. He uses terms like "significant doubt about the soundness and consistency;" "capriciousness;" and "disturbing, if not alarming, tendencies."[51]

2. Armendariz

Armendariz is clearly the most significant of the leading unconscionabilty cases, even though it garnered the fewest points of the three. Armendariz illustrates the application of the unconscionability doctrine in the context of arbitration provisions in employment contracts. More precisely, the first arbitration requirement is often found in the job application, so that claims by persons who are not hired are also subject to arbitration. Typically, the subsequent employment agreement also mandates arbitration of mostor all disputes.

The relatively recent vintage of Armendariz, the importance of the court, and the employment arbitration topic all suggest that the point system used here undervalues Armendariz. As a decision of the California Supreme Court, it is cited in almost every subsequent arbitration unconscionability case, but these are too recently decided to appear in contracts casebooks. Such citations are not counted in my simple scoring system. However, the shelf life of leading arbitration decisions can be short, and Armendariz has already been supplanted as the leading employment arbitration case by a subsequent California Supreme Court decision, Little v. Auto Stiegler, that includes an extensive discussion of Armendariz.[52]

Armendariz offers a comprehensive tour of the anti-arbitration arguments by a distinguished jurist, Stanley Mosk. The court held that the employment agreement was both substantively and procedurally unconscionable, and affirmed the refusal of the trial court to sever the unconscionable portions of the agreement. Although the court declined to enforce the arbitration agreement, it went on to state that an agreement to arbitrate constitutes implied consent to discovery sufficient for the employee to vindicate her claim; the employer must pay the costs unique to arbitration; and the absence of mutuality in the arbitration provision constitutes substantive unconscionability. Two concurring judges questioned the breadth of the majority opinion, but there were no dissenters.

One consequence of Armendariz has been to generate considerable litigation by employees in California. Other courts, notably the Supreme Court of Texas, have expressly rejected the reasoning of Armendariz.[53]

Armendariz has been supplanted by the Little decision as the leading California arbitration case. In Little, a four judge majority of the California Supreme Court extended the Armendariz principles, developed in the context of statutory rights, to judicially created "public policy" claims. The court did so despite the intervening Green Tree decision by the U.S. Supreme Court, that requires a case-by-case analysis of arbitration costs rather than categorically placing the costs unique to arbitration on the employer. The California Supreme Court determined, surely incorrectly, that the FAA does not require states to comply with federal standards regarding costs of arbitration. On the merits of the debate, the California Supreme Court saw "no reason to reevaluate" its position in light of Green Tree.[54] **Little refused to follow the approach of the D.C. Circuit, whose Cole decision was heavily relied upon in Armendariz, that refused to extend Cole to public policy claims.**[55] **Three judges strongly disagreed with this extension of Armendariz.**

In addition, the California Supreme Court in Little unanimously held unconscionable, and severed from the arbitration agreement, a provision that an award in excess of $50,000 required a reasoned written opinion that either party could appeal to a second arbitrator.[56] **While this provision applied equally to both parties, the reality is that it is entirely favorable to the employer. The Little decision teaches a great deal about the law and practice of employment arbitration, and about unconscionability as well. Little is likely to replace Armendariz as a leading case in the contracts casebooks.**

A striking aspect of the coverage of employment arbitration in contracts casebooks, of which Armendariz is the leading example, is the assumption – without discussion or explanation – that arbitration is a bad option for employees. This is not the place to discuss the costs and benefits of employment arbitration, but some important benefits are worth noting. Arbitration is quick, usually inexpensive, possible (if not prudent) without a lawyer, and makes continuation of employment a possibility. The judicial alternative is more apparent than real for most employees, because claims rarely are large enough to justify a contingent fee arrangement and few terminated workers can afford to retain counsel. Employers prevail in the vast majority of employment cases, and at best a court victory by the employee comes years later.

None of the casebooks use Judge Harry Edwards' excellent opinion in Cole, which in sweeping dicta (of which Judge Henderson is sharply critical) states that employers are welcome to insist on arbitration of statutory claims, but they may not require employees to pay more for costs specific to arbitration (filing fees and arbitrator compensation) than they would for court filing fees.[57] **After the Supreme Court ruled in 1991 that statutory employment claims were subject to arbitration, employers adopted arbitration provisions that called for the arbitration of all disputes.**[58] **This development is enormously beneficial**

for employees as a class, above all for lower income employees. The result is that employees obtain a forum for disputes that would be rejected out of hand by the courts under the employment at will doctrine. Lawyers are the only clear winners from increased employment litigation. As the strongly pro-worker Professor Clyde Summers, put the matter: "This is scarcely a legal remedy process but rather a redistribution device which enriches lawyers at the expense of both employer and employee."[59]

3. Graham

Graham involved a standard music industry concert contract between the once well-known singer Leon Russell (Scissor Tail was wholly owned by Russell) and Bill Graham, a leading concert promoter. The contract was a standard form agreement promulgated by the American Federation of Musicians (AFM). It called for prompt and final resolution of any disputes through arbitration, with AFM members serving as the arbitrators. [This approach is common in trade association arbitration, with the attendant benefits of prompt, procedurally informal, and expert decisions. The association members serving as arbitrators typically are not compensated for their efforts.] A dispute arose, arbitration took place, and a decision was rendered that was unsatisfactory to Graham. Russell sought confirmation of the arbitration award, whereupon Graham raised unconscionability as a defense.

The California Supreme Court informs us that Graham had been a party to the AFM form agreement "literally thousands of times," including fifteen contracts with Scissor Tail. He also was a party to arbitration of prior disputes under the AFM form agreement. This scenario seems to present an unlikely set of circumstances for Graham to claim that he was taken advantage of in an unconscionable manner. Not to be deterred, the California Supreme Court reduced this wealthy and sophisticated concert promoter to a "humble supplicant" in this contract of adhesion.

Under the contract, the arbitrator is appointed by the AFM, and therefore was "presumptively biased," which made the arbitration provision unconscionable and unenforceable. As a result, the arbitration procedure failed to meet a "minimum level of integrity." The case was remanded for a new arbitration before a neutral arbitrator. Failing agreement by the parties on the selection of an arbitrator, the trial court was instructed to appoint one under the California Arbitration Act (CAA).

Graham is a terrible decision, and certainly should not be included in contracts casebooks. The statute considered by the Court was the CAA rather than the FAA, although the transactions clearly involved interstate commerce. It may be responded that this was not obvious in 1981, because the primacy of the FAA was not definitively established by the U.S. Supreme Court until its Southland decision in 1984.[60] **Even if this excuses the court's reliance on the CAA, it does not excuse the use of Graham in contracts casebooks today.**

Arbitrators are not normally subject to removal by a court because of presumptive bias based on occupation or affiliation with an organization. Rather, evidence of actual or likely bias must be presented. Removal prior to an arbitration proceeding, as opposed to after a final award, is rare. Even if the result reached by the California Supreme Court was correct, the proper legal basis for doing so is "evident partiality" rather than unconscionability.[61]

Resort to unconscionability in commercial disputes is a suspect (and unusual) approach in general, and particularly so with respect to arbitrations agreements. In practice, such claims succeed about as often as National League pitchers hit home runs – rarely indeed. The prudent attorney should warn a commercial client, in writing, that an unconscionability defense is unlikely to succeed, and that the costs associated with doing so (notably payments to counsel) are likely to be wasted money. Professor Prince, in his examination of California unconscionability law, singles out Graham as perhaps the most awful among many awful California unconscionability decisions. He rightly regards the use of unconscionability doctrine in commercial cases as "particularly troubling." Several "alarming" cases are characterized as "notorious" by Prince, of which Graham is "preeminent."[62]

Merchants are generally deemed capable of looking out for their own interests, and may find it commercially advantageous to agree to dispute resolution provisions that are quite different from the judicial model. A potentially biased decision maker, even a decision by one party to the dispute, is common practice. The leading case grew out of a contract for the sale of "power rectifier equipment" to the New York City Transit Authority (NYCTA).[63] **The contract (and the request for bids) specified that any disputes that arose would be decided by the Supervisor of the NYCTA (acting personally), and that "his decision shall be conclusive, final and binding on the parties." Westinghouse, of course, made the expected "fox guarding the henhouse," neutral decider as the essence of a fair decision, and unconscionability arguments. The New York Court of Appeals rejected the Westinghouse position, and did so unanimously. The goal of the unconscionability doctrine is to prevent "oppression and unfair surprise ... and not of disturbance of allocation of risk."**[64] **Commercial parties dealing at arms length should be left to themselves. Westinghouse was not entitled "to "pick and choose" among the provisions of its contract in this fashion.**

The Westinghouse court observed that "billions of dollars of commercial transactions and thousands of public work contracts" contain similar provisions. These are common in private as well as public contracts. The AIA standard construction forms call for the architect, who is hired by the project owner, to make numerous final determinations. Such decisions, whether by an architect or the NYCTA, are not immune from judicial review. However, success requires a showing that the official failed to make a good faith decision on the merits, and this burden of proof is rarely satisfied.

Even if one thinks that Westinghouse goes too far, and that a party to a dispute should not be permitted to also serve as a judge because of the enormous risk of bias, it would not follow that Graham was rightly decided. Mere membership in a trade association is a long way from having an interest in the outcome of a particular dispute, and trade

associations have rigorous, usually written, conflicts procedures for the selection of arbitrators.

There were no demonstrated (or even alleged) problems with AFM arbitration, and many thousands of such proceedings had been conducted without complaint by either Bill Graham or other "mere supplicants." The reason why this arbitration was different is clear: Graham lost on the merits, and was looking for a way to avoid confirmation of the arbitration award.

Even worse than the misguided reliance on unconscionability in Graham is the fact that the California Supreme Court decided a different case than the one before it. At most, uconscionability provides a defense to the enforcement of an arbitration agreement; it does not provide a basis for vacatur of an arbitration award. The bases for vacating an award are specified in the FAA and UAA, and unconscionability is not among them.

There is an arguable basis for vacating the award in Graham: evident partiality (or corruption) by an arbitrator. Unfortunately for Graham (and the court), there was no factual basis to support this statutory basis for vacatur. In the absence of actual or apparent partiality, structural bias is the only available option, and this approach has been almost universally rejected by the courts.[65] As for the argument that the award should be vacated because the underlying arbitration agreement was unconscionable and therefor not enforceable, failure to make this argument at or before the arbitration proceeding provides a classic example of waiver.[66]

4. Brower

Brower is another computer purchase case with Gateway as the seller. The customer brought suit, Gateway sought to enforce its arbitration term, and the customer raised unconscionability as a defense. At that time, the Gateway contract called for arbitration in Chicago, under the auspices of the International Chamber of Commerce (ICC).[67] Correspondence with the ICC was to be directed to its Paris headquarters. The ICC normally is used only for large dollar commercial cases, a fact reflected in its cost structure. The minimum filing fee is $4,000, half of which is a nonrefundable registration fee.[68] Since this sum was greater than the cost of the computer, the unconscionablity theory was readily accepted.

Gateway's did not defend the ICC arbitration provision. Instead, Gateway pointed out that its sales agreement had already been changed to provide for AAA arbitration. The new policy applied to past as well as present customers. Notification of the change was provided in a quarterly magazine sent to all Gateway customers, so this was not an eve of litigation concession made to an unusually persistent customer. The customer's response was that the purported change was only a proposed modification, and it had not been accepted. Also, there was no information in the record about the AAA's fee structure. The appellate court sent the case back to the trial court for the appointment of a substitute arbitrator. Thus the customer won the ICC battle, but lost the arbitration war.

In the world of computers things change rapidly, and this 1997 decision is already long out of date because Gateway subsequently has changed its approach to arbitration several times.[69] Brower merits no more than brief mention in future contracts casebooks, and it surely will soon disappear from the leading cases.

5. The Fitzgibbon Approach

Professor Susan Fitzgibbon, in the only article that discusses the teaching of arbitration in contracts, recommends the use of employment arbitration cases as a vehicle for teaching about unconscionability.[70] Her well thought out and balanced approach to the subject is to be commended, and is preferable to the absence of any serious discussion of arbitration in most contracts casebooks. The problem with this approach is that the consideration of arbitration is a means to a different end – an analysis of unconscionability doctrine and practice.

Fitzgibbon informs readers of the simple truth that much of the criticism of employment arbitration reflects the discredited – in the courts if not the academy – view that arbitration is "inferior" to litigation, and that most of this critique "flies in the face" of the law as developed by the Supreme Court.[71] Employees are far more likely to actually get a "day in court" via arbitration than in a judicial forum. Fitzgibbon also explores the evidence that litigation is not a useful option even for employees that get to court.[72] The majority of employment cases in federal trial courts are disposed of before trial, and 98 percent of these decisions favor employers.[73] Of the cases that actually get to trial, the employee prevails about one-third of the time.[74] In sum, "far more employees win in arbitration than in court," and employees as a class win more in arbitration than in court.[75]

A dose of reality about employee concerns is important. The employment at will doctrine is alive and well in America, however much it may be disparaged in the academy. Hardly any aggrieved employees, even if they immediately obtain other employment, possess the means to pay for counsel. Such clients do not "retain" counsel; they audition before counsel in the hope of finding a lawyer who will take a case on a contingent fee basis. And, like auditions in the theater, the answer usually is no.

Fitzgibbon recommends the use of three cases for teaching about arbitration and unconscionability: Cole,[76] Hooters,[77] and Stirlen.[78] Cole is Judge Harry Edwards' thoughtful consideration of statutory arbitration claims that requires the employer to bear the costs unique to arbitration, at least where they are greater than court filing fees. Hooters is the leading unconscionability case, and as a decision from the 4th Circuit has far greater precedential value than California state court decisions. In Stirlen, the court refused to enforce the arbitration provision in a contract of employment negotiated by the chief financial officer of Supercuts, which included a salary of $150,000, a $10,000 signing bonus, stock options, bonus plan, and supplemental retirement. Indeed, the court determined that the arbitration provision, which favored the employer in important

respects, was so "unconscionably one-sided and unfair in numerous respects" that the unconscionable part could not be excised, so the entire arbitration term was invalid. Need it be added that this is a California state court decision?

D. Remedial Powers of Arbitrators

1. Overview

The two arbitration remedies cases are Grayson-Robinson[79] and Garrity,[80] each a quite dated decision from the New York Court of Appeals. Both should be excised from contracts casebooks: Garrity because it does not reflect the law, and Grayson-Robinson because it is old and unimportant. The most these decisions merit is brief mention in note material.

There is an interesting contrast between the two arbitration remedies cases: Garrity held that arbitrators have less power than courts in the context of punitive damages, while Grayson-Robinson suggests that arbitrators in some instances have broader remedial powers than courts. These two cases, or more recent ones, could be put together to provide a nice comparison of the remedial authority of arbitrators and courts. No casebook has adopted this approach.

2. Garrity

It says much about the law of arbitration as it appears in contracts casebooks that the third most important case is a dated state court decision that reflects a minority position at best, and probably is no longer the law even in New York.[81] Garrity does have its attractions as a teaching tool. The court split 4-3, with thoughtful majority and dissenting opinions. Whether an arbitrator (a private decider) should be permitted to award exemplary damages presents an important issue of principle, and thereby illuminates the nature of arbitration. (The punitive damages award was modest, both in absolute and relative terms – $45,000 compensatory and $7,500 punitive.) The majority position was that sanctions beyond compensation should be limited to the State; punishment is not a function that may be exercised by a privately appointed arbitrator, even if the parties purport to expressly grant that power.

Readers of most contracts casebooks would not learn that Garrity is the minority position among the states, or that Garrity is of little consequence today even in New York because of federal preemption of state law. Few casebooks note that the Supreme Court's Mastrobuono decision eviscerated the Garrity approach in the most important substantive context -- securities law claims.[82] Mastrobuono involved an NASD arbitration under the standard industry form agreement. The contract said nothing about punitive damages, but it had a New York choice of law provision. The NASD Code provided arbitrators with plenary remedial power, and in fact NASD arbitrators had often made punitive damages

awards. The Court concluded that the arbitration clause "surely does not support – indeed it contradicts" the assertion that punitive damages are prohibited. The most that could be said of the choice of law term is that it created an ambiguity, and in that event the principle of contra proferentum required that any ambiguity be interpreted against the drafting party.[83] The Supreme Court determined that the best way to give meaning to both the choice of law and the arbitration provision was to include substantive principles of New York law, but to exclude "special rules limiting the authority of arbitrators."[84]

After Mastrobuono, not even cases decided under New York law will be governed by Garrity, where there is a nexus to interstate commerce. Subsequently, the New York Court of Appeals adopted the Mastrobuono approach in its Sacharow decision.[85] In Sacharow, the court ruled that "attention must be paid" to Mastrobuono, and that a New York choice of law provision incorporates substantive state law, but not restrictions on the authority of arbitrators.[86] Whatever little remains of state law restrictions on the remedial power of arbitrators in New York, it is at least incumbent on casebooks that mention the Garrity issue to point out these later developments.

Many federal and state statutes provide for the award of extra damages beyond compensation for actual losses. A prohibition of such awards by arbitrators would preclude arbitration of these claims. In authorizing arbitration of statutory claims, the Supreme Court has emphasized that a claimant "does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum."[87]

3. Grayson-Robinson

Grayson-Robinson is correctly decided, but it is dated and not sufficiently important for inclusion in contracts casebooks. The court divided 4-3, with a strong dissenting opinion, so the case teaches well. The court recognized the traditional reluctance to order specific performance of construction contracts, but replied that this approach is entirely prudential. A court in the exercise of equitable power has the discretion to refuse a request for specific enforcement, but it equally has discretion to grant such a request. As for concerns about difficulty of supervision, mere speculation did not provide a basis for refusing to enforce an arbitral award.

In a brief coda, the court states that there was no statutory basis for declining to enforce the arbitration award. It also notes the policy of promoting arbitration, and concerns about congested court calendars.

The dissenters would not enforce an order of specific relief beyond that which a court would order, an approach that would require a determination of what a reasonable trial court faced with the same situation would do. The dissent notes that supervision of the ensuing performance will fall to the courts not the arbitrator, and that this "long and acrimonious" dispute between these parties was likely to flare up anew during performance.

E. Labor Arbitration

For better or worse, the resolution of grievances under a collective bargaining agreement (CBA), a process that culminates in arbitration, is not discussed in most contracts casebooks or courses. Only the Macauley and Macneil casebooks, both of which devote particular attention to relational contracts, provide more than passing mention of labor-management relations topics. Each reproduces an arbitration award, Trans World Airlines (TWA).[88] No other casebook mentions TWA, yet this use in two casebooks was sufficient for TWA to rank number seven among the leading cases.

It certainly is a good idea for contracts students to see a real arbitration award rather than just reading cases about arbitration. Alas, the award is from 1965, and involved the "grooming and appearance" of a stewardess who was stationed at an airport called Idlewild and employed by an airline named Trans World. Talk about dated! Many faculty, not to mention students, will not recognize the former name of John F. Kennedy International Airport in New York City.

To the extent that students conclude from reading TWA that arbitrators generally produce substantive written opinions, they are misled. Written opinions are common in labor-management grievance proceedings, but they are unusual in other domestic contexts. Parties to an arbitration are, of course, free to require a reasoned written opinion, but the consequence will be delay, expense, and an increased likelihood of a judicial appeal. Since an important goal of arbitration is to avoid these consequences, written opinion requirements are uncommon in domestic (unlike international) commercial arbitration.

VI. THE ARBITRATION CASES IN THE CASEBOOKS

A. Overview

The central observation about the leading arbitration cases in contracts casebooks is that there are so few of them. And, hardly any of these cases can, in any meaningful sense, be called leading. As indicated by the headings in the preceding part, arbitration cases do fit easily into a small number of doctrinal categories, of which contract formation and unconscionability are the most important. The discussion in this part focuses of the leading cases and categories, but it is informed by the entire body of arbitration cases in contracts casebooks.

B. Precedent Value of Cases

Precedent value should be an important factor in the selection of cases for inclusion in a casebook, which means higher court decisions should be preferred to lower court decisions. Where a decision does not reflect the usual state law approach, as in Garrity, that fact should be clearly noted. One objective is to teach students about the law of a jurisdiction, if not of the land. Outdated decisions and lower court opinions simply do not perform that function.

To the extent that arbitration cases are presented at all in contracts casebooks, a surprising number were decided by lower courts. Even a few unpublished decisions (in the official reporters) are used as main cases. A reasonable reader might conclude, wrongly, that there are no published cases on point. In all events, unpublished decisions (which typically may not be cited in courts) should be relegated to notes and questions. Strangest of all is the inclusion in the Murphy casebook of an unreported arbitration decision by a U.S. district court that was reversed in a published court of appeals decision – in the material on capacity to contract no less.[89] [Probably the casebook was in the last stages of production when the court of appeals reversed, so the only option was to include a citation to the later opinion.] The Epstein casebook uses Hooters as a main case, but the district court rather than the court of appeals version. Clearly, the higher court opinion should be used in these situations; particularly noteworthy facets of the lower court decision can be addressed in note material.

A distinctive feature of arbitration law is that the U.S. Supreme Court is a central player, a feature that is all the more striking because the highest court in the land is largely absent from the law of contracts. This circumstance suggests that casebook authors ought to make a special point of using U.S. Supreme Court cases to elucidate arbitration issues. At a minimum, U.S. district court and mid-level state appellate court opinions ordinarily should be avoided. The pairing of the Klocek and Hill decisions is an instance where use of a lower court opinion makes sense.

A majority of the leading casebook arbitration cases are badly dated: Grayson-Robinson (1960); TWA (1965); Garrity (1976); Itoh (1977); and Graham (1981). These decisions all precede the modern arbitration revolution, and generally do not reflect current arbitration law and practice. They should all be replaced with more recent cases or materials. The pace of change in arbitration law means that even recent decisions by important courts have a short shelf life. Armendariz (2000) is already outdated, and should be replaced by the Little decision (2003) – also from the California Supreme Court.[90] Gateway has changed its approach to arbitration several times since the Brower (1997) decision, which suffers from the further defect of being decided by a lower court.

Of the leading cases, only the Hill and Klocek decisions are worthy of inclusion in contracts casebooks, and discussion of arbitration in these cases is minimal. Thus, in considering alternatives to what is presently in the casebooks, authors can begin with a largely clean slate.[91]

C. Leading Jurisdictions

In terms of the jurisdiction of origin, both among the leading cases and other arbitration cases in contracts casebooks, two states predominate: California and New York. As the two leading commercial states in the country, this outcome is not surprising. These states are also well represented in contracts casebooks on other topics. Perhaps more surprising is the considerable reference to cases that originated in Alabama – predominantly from the state courts, but from the federal courts as well. The reason is that Alabama is the most anti-arbitration state in the country (with Montana in second place), and casebook authors are generally sympathetic to the anti- arbitration approach.

Two 7th Circuit decisions are on the list of leading cases – Hill and Itoh. Decisions from the 7th Circuit are having an increasing impact in law school casebooks, largely due to the prodigious output of former University of Chicago Law School Professors Richard Posner and Frank Easterbrook. Their Chicago colleague Diane Wood appears to be continuing this tradition,

The casebooks give far more attention to state cases and state law than to federal cases and federal law, both because contract law is state law and because there are far more state than federal decisions. It may also be that state cases are used, notably those from Alabama and California, because they reflect a position that doubts the value of arbitration in a way not seen in federal court decisions. The central place of federal law in the context of arbitration is not adequately reflected in the casebooks. In particular, far greater use should be made of U.S. Supreme Court decisions.

D. Gateway Arbitration

A truly remarkable feature of the leading cases is that the same firm was the defendant in the top two cases, and three of the top five – Gateway.[92] **[The former name, Gateway 2000, was dropped as the turn of the millennium approached, and the "2000" appellation became dated instead of futuristic.] There are additional Gateway appellate cases, and an unknowable – but surely exponentially larger – number of trial court decisions.**[93]

By way of contrast, Dell Computer – which also sells computer equipment by mail and mandates arbitration of disputes – has avoided litigation about the arbitration term in its form contract.[94] **The strength of Dell's economic performance compared to that of**

Gateway, suggests that engaging in litigation with customers, win or lose, is a poor business strategy. Lawyers need to know about, and even be prepared to remind their commercial clients of, this business reality.

Gateway has used at least three different approaches to requiring arbitration of customer disputes. The transaction in Brower took place in 1995. At that time the Gateway form contract called for arbitration in Chicago, under South Dakota law, before a single arbitrator, pursuant to the ICC Rules of Conciliation and Arbitration. The ICC process is designed for (and limited to) large commercial disputes, for which the initial fee of $4,000 is a modest sum.

By the time Brower was decided in 1998, Gateway had offered all its customers, past and present, the option of AAA instead of ICC arbitration. And, although court regularly upheld the Chicago choice of forum provision, Gateway now allowed for the arbitration at a mutually agreeable place, with consent "not ... unreasonably withheld."[95] This change was clearly beneficial to customers. The new provisions were widely publicized by Gateway, not just offered when litigation arose.

By December, 1998 the Gateway contract had dropped the ICC, and specified that arbitration would be administered by the AAA – of course, for a fee.[96] (Whatever Gateway may have intended, the prior contract called for use of the ICC rules but did not specify ICC administration.) The contract also stated that the arbitrator was without authority to award "special, exemplary, consequential, punitive, incidental or indirect damages, or attorneys' fees," and that the parties waived any right to recover such damages. [Such limitations should not be enforced by courts or arbitrators where they are inconsistent with consumer protection or other statutes.]

The AAA's Consumer Due Process Protocol establishes minimum standards for arbitration plans that it will administer. The Protocol specifies that customers must have the option of bringing their claims in local small claims courts. The objective is to provide a judicial alternative for modest sized claims. In many states, claims of up to $5,000 may be brought in small claims courts. Even where the dollar limit is lower, it still exceeds the price of virtually all consumer computer systems. This approach, which effectively would allow customers to opt out of arbitration, was unsatisfactory to Gateway, so the company made an alternative arrangement for dispute resolution services.

By 2001, Gateway's form arbitration agreement called for administration of disputes by the National Arbitration Forum (NAF).[97] The NAF has found a market niche by providing low cost arbitration of small dollar disputes. NAF offers a cafeteria plan to consumers, with higher prices for more expansive hearings. For claims up to $5,000, there is a $49 filing fee, which purchases a documentary hearing. An additional $75 is charged for a participatory hearing of up to one hour. Gateway pays an administrative fee of $250 per case. While NAF can tailor its services (and prices) to the needs of business customers, the Gateway procedures (and prices) are typical.

The economic viability of NAF depends on the satisfaction of Gateway (and other merchants) with their dispute resolution process. This "repeat player" factor does not mean that Gateway expects to win most of the time, or that it would casually shift to a different dispute resolution provider. Gateway really does want a decently fair process, and the costs associated with shifting to a different system are substantial. Still, consumers might legitimately be concerned that NAF is ultimately concerned with satisfying its regular customers, not "one shot" players.

The one constant in the Gateway arbitration provisions has been the use of South Dakota law. The use of a single forum offers simplicity, and therefore lower costs, for Gateway (and the many firms that adopt this approach). The choice of South Dakota does not reflect any particular legal advantage; rather it was chosen because Gateway's business home is there. South Dakota has enacted the UCC, and the common law of contracts is generally the same as that throughout the country. Besides, virtually all disputes between Gateway and its customers revolve around questions of fact rather than issues of law. Thus the difficulty of finding a lawyer with knowledge of South Dakota law has not been a practical problem for Gateway customers.

E. The Anti-Arbitration Animus in the Academy

Judging by the selections of casebook authors, together with the law review literature, opposition to arbitration has mostly disappeared from the courts but it remains alive and well in the law schools. Often the tenor of the professorial view is evident from the titles of articles. For example, Jean Sternlight writes about "Debunking the Supreme Court's Preference for Binding Arbitration."[98] Mark Budnitz regards arbitration as "A Serious Threat to Consumer Protection."[99] According to David Schwartz, the Supreme Court in its arbitration decisions "has created a monster."[100] While these critiques focus on consumer and employment arbitration, other attacks are not so limited. Professors Carrington and Haagen tell us: "Those who have been prejudiced by the Court's handiwork include many American consumers, patients, workers, investors, shopkeepers, shippers, and passengers."[101] Shopkeepers is a quaint word designed to evoke "Mom and Pop" stores, but these are usually substantial businesses, and most people would think that commercial shippers – typically large corporations – are able to protect their own interests.[102]

The views of Professor Charles Knapp are worthy of particular attention because he is the author of a leading contracts casebook. His recent arbitration article closes on this baleful note:

> **"Can powerful private interests, with the ability to control most of the terms of most of the contracts they make, deprive large segments of American society of their access to the courts for which all of us pay, and to which all of us have historically had access. The answer until now is – sadly, to some of us – that apparently they can.**

And do.

And will."[103]

Earlier in the article, Professor Knapp drew an analogy between arbitration and the Nazi holocaust: "Left unchecked, mandatory arbitration will effectively 'solve' the adhesion problem ... in much the same way as the Austrians in the 1938 Anschluss solved their Nazi problem: by handing over the keys to the city." Almost nobody takes such an apocalyptic view of arbitration, but there are many other critics and few supporters of arbitration in the academy.[104]

The choice of arbitration materials in the contracts casebooks suggests considerable doubt about the value of arbitration, at least for consumer and employment claims. This conclusion is necessarily a tentative one, because the purpose of casebooks is to raise questions and alternatives rather than to offer value judgments. To the extent that arbitration is considered at all, there is an almost obsessive focus on unconscionability. The focus of whether merchant sellers can succeed in imposing hidden terms, including arbitration, on consumers does not present arbitration in a favorable light.

Just to be sure there is no doubt, let me state clearly that scholars can and should make informed judgments, and criticism of courts is perfectly appropriate. However, the contracts casebooks provide students with a jaundiced view of arbitration, while teaching little about how the process works or its benefits. I suggest that this approach may reflect adverse views of arbitration by the casebook authors.[105]

VII. ARBITRATION IN THE CONTRACTS RESTATEMENT

No article about contract law would be complete without a discussion of the relevant provisions of the Restatement of Contracts. The Restatement has almost nothing to say about arbitration, so this topic can be treated with dispatch. The Restatement was adopted by the American Law Institute in May 1979, and reflects the culmination of a process that began in 1962. This timing explains why this most important persuasive authority in the field of contract law has little to say about arbitration. The Index to the Restatement includes precisely two entries under the heading of Arbitration – the same number as for Habitual Drunkards, and far fewer than Intoxicated Persons (five entries) and Mentally Ill Persons (six entries plus six subheadings).

Thanks to the wonders of computer assisted research, it is possible to state with reasonable confidence that the body of the Restatement (excluding the accompanying illustrations) contains only three references to arbitration, and that the only discussion of any consequence is in the context of judicial remedies, albeit not in the black letter provisions.

Section 345 lists the available judicial remedies. Comment e addresses the enforcement of arbitration awards. It states that arbitrations has an "important and growing role" in the resolution of private contract disputes, as well as a decline in judicial hostility toward arbitration. Although arbitration is not a judicial remedy, court are involved through the confirmation (or vacatur) of arbitration awards. However, this topic is beyond the scope of the Restatement because judicial review of arbitration award is based on state statutes. The FAA is not mentioned.

In the material on specific enforcement, section 366 addresses the difficulty in enforcement or supervision for a court as a factor in granting or denying specific performance. Comment a, closes with the observation favoring judicial enforcement of an order for specific relief by an arbitrator. Due to the limited statutory review of arbitral awards, courts might confirm an award granting specific relief even though it would not itself order specific performance in the same situation. No mention is made of the enforcement of agreements to arbitrate, although such enforcement is an important example of specific relief.

The other two mentions of arbitration in the Restatement – and they are no more than that – can be quickly stated. The Introduction to Chapter 5, The Statute of Frauds, notes that there are additional writing requirements for some contracts, of which arbitration agreements are an example. The supporting reference is to the UAA, but the parallel provision of the FAA goes unmentioned. The Introduction to Chapter 8, Unenforceability on Grounds of Public Policy, states that rules are not included for fields in which legislation is preeminent, such as arbitration.

The illustrations to the Restatement might contain additional references to arbitration, but only a single instance has come to my attention: illustrations 2 and 3 to section 261. These two illustrations are found in the materials on express conditions, and are used to illustrate the distinction between promises and conditions. Two provisions from insurance policies are contrasted. An agreement that calls for disputes to be submitted to arbitration is a promise to arbitrate, but does not make an award a condition precedent to the insurer's obligation to pay. By way of contrast, if the agreement states that a loss shall not be payable until 60 days after an award then an award is a condition of the insurer's obligation to pay. These illustrations do suggest that arbitration provisions are often used in contracts of insurance, which is more true now than it was some twenty-five years ago.

VIII. CONTRACTS AND ARBITRATION: SOME SUGGESTIONS

Better coverage of arbitration could be readily achieved, in large part because the bar has been set so low. Essential to success is considering arbitration as a self-contained topic, rather than as an aspect of formation, unconscionability, remedies, or some other doctrinal category. For the many casebooks and courses that give little if any attention to arbitration,

Samuel Gompers offered the classic one word answer: "More."[106] The purpose of the discussion in this part is to be a bit more specific.

My proposals begin with an essentially clean slate because, for a variety of reasons discussed earlier in the article, none of the arbitration materials commonly appearing in the contracts casebooks merit continued use. Hill and Klosek are fine cases for addressing contract formation and terms questions, but the arbitration setting context is quite incidental. These cases do not address the possibility that the contract dealings do not satisfy the FAA writing requirement – "a written provision in ... a contract ... to settle by arbitration" – that is distinct from any applicable Statute of Frauds.[107]

A. Arbitration as Statutory Law

The beginning approach should be to explore the ways in which arbitration is fundamentally different from the rest of contract law. While contract law is based on state law and cases (apart from the UCC), arbitration is grounded in a federal statute that largely preempts state law, including state statutes. The FAA is short, and little changed since its original enactment in 1925, so it makes sense to reproduce the full text of the statute.

At the same time, the UAA (1955) should be introduced; it largely tracks the FAA, and has been enacted in most states. The RUAA is important because of its recent provenance – promulgated by the Conference of Commissioners on Uniform State Laws in 2000. The RUAA is more comprehensive than, but not inconsistent with, the UAA (or FAA). The major innovation is to address a considerable number of topics not covered in the UAA or FAA. Examples (with section number) are: provisional remedies (8, 18); consolidation (10); arbitrator disclosure standards (12); immunity from suit of arbitrators and provider organizations (14); powers of arbitrators to manage the arbitration process (15); and remedial powers of arbitrators, including forum costs, attorneys' fees, and punitive damages (21).[108] The RUAA (unlike the FAA and UAA) includes commentary (like the UCC), that provides a useful discussion of numerous important arbitration topics.

The "tradition" of hostility to arbitration is by now a piece of history – Congress enacted the FAA over 75 years ago. The "official history" of that now discredited tradition is the erudite discussion by Judge Jerome Frank in the Kulukundis case.[109] This decision has been cited with approval in some 200 published opinions, including by the Supreme Court.[110] The modern tradition is the strong public policy in support of arbitration.

B. Division of Authority Between Arbitrators and Courts

1. Arbitrability

As arbitration is a creature of contract, a court will only order arbitration pursuant to a binding agreement. While the courts favor arbitration, there is no presumption that parties agreed to arbitrate. The leading case of First Options v. Kaplan explains , explains the division of authority between courts and arbitrators.[111] Essentially, a court will determine two "gateway" issues: whether the parties agree to arbitrate; and, if so, whether the agreement to arbitrate is sufficiently expansive to include the dispute at hand. Outside the United States, arbitrators have greater authority to determine their own authority (competence-competence).[112]

Before anyone concludes that the dividing line between judicial and arbitral authority is reasonably clear, consider that the U.S. Supreme Court addressed this topic in no less than three cases during the 2002-2003 term. The Howsam decision finally put to rest an issue that had divided the federal circuits, as well as several state supreme courts, by ruling that the "eligibility rule" was to be applied by arbitrators not courts.[113] The universally used standard customer-broker contract specifies that disputes are eligible for arbitration only if the precipitating event occurred within six years of the filing of the claim. The fear of the securities firms was that an arbitrator, outraged by the behavior of a firm, would toll time limits. Claims that are ineligible for arbitration still can be brought in court, in the unlikely event that the limitations period has not yet expired. Eligibility determinations require an examination of the facts surrounding a claim, which is a matter for arbitrators not courts. This is the right result, because the dispute was subject to arbitration, else the eligibility rule is inapplicable, and the issue is whether the dispute is still eligible for arbitration.

In Pacificare a group of physicians brought suit against managed-health-care organizations for failure to make payment for services rendered to covered patients.[114] Among their claims, the physicians sought recovery under the Racketeer Influenced and Corrupt Organizations Act (RICO).[115] That RICO claims are a proper subject for arbitration was already well established, and was not disputed here.[116] Although RICO provides for the award of treble damages, the contracts at issue all expressly limited the authority of arbitrators to award "punitive or exemplary damages." The lower courts declined to enforce the arbitration provision because the remedial limitation prevented the claimants from obtaining "meaningful relief" for their statutory claim.[117]

The Court declined to address the remedial limitation issue at all, because such a ruling would be "premature;" put another way, the matter failed the test of "ripeness."[118] The damages limitation was deemed to be "ambiguous," and there was "uncertainty" about what the parties intended by the damages limitation. [One is tempted to ask, which part of "no punitive or exemplary damages" doesn't the Supreme Court understand?] The Court refused "on the basis of mere speculation" to consider how an arbitrator might interpret "these ambiguous agreements ... and the antecedent question of how the ambiguity is to be resolved."[119] Would the same result pertain if the physicians sought a judicial declaration that the damages limitation was unconscionable under state contract law?

Finally, in Bazzle the Court held that the question of whether a contract permitted class arbitration was an issue for the arbitrator rather than a court.[120] Therefore, the Court remanded the case so that the arbitrator, instead of the trial court, could make the

determination whether the contract language allowed for class arbitration. The Court did so notwithstanding that the class arbitration had taken place, the arbitrator rendered an award, and the Supreme Court of South Carolina had confirmed the award.[121]

Arbitrability issues are likely to continue to vex the courts. Apart from the two basic gateway questions of whether the parties agreed to arbitrate, and whether an arbitration agreement covers the dispute at hand, any and all issues are potentially subject to initial determination in arbitration. It is uncertain whether even clearly drafted contract provisions will succeed in redirecting issues from arbitrators to courts.

2. The Separability Doctrine

The most important single arbitration contract topic is the "separability doctrine," and the leading case is the Supreme Court's Prima Paint decision.[122] **Hardly any of the casebooks address separability, and not one makes use of Prima Paint.**[123] **The underlying dispute presented a classic contract scenario: the sale of a business gone sour.**[124] **Buyer claimed fraud in the inducement (and perhaps other contract defenses). Seller responded that full information was available to buyer, and the claims amounted to nothing more than "buyer's remorse" by someone who lacked the knowledge and background to run the business properly. Absent an arbitration provision, the parties would proceed through the litigation process and eventually a court would sort out the rights and duties of the parties, and order appropriate remedies.**

Now, consider the impact of an arbitration provision under this scenario. The claimant (buyer) brings suit, while seller wants the dispute to be settled in arbitration. Buyer argues that but for the fraud in the inducement it would not have entered the contract, so the arbitration term should not be enforced. Instead, the court should proceed to consider the fraud claim, and only if that claim is rejected should the dispute be sent to arbitration. This is the standard contract law model, and Justice Black's dissent vigorously argued favor of this approach.

The majority, however, enforced the arbitration term because the fraud claim related to the contract in general, rather than the the arbitration provision in particular. The majority read the FAA as mandating the separability approach, because the Act calls for couts to order arbitration upon being satisfied that "the making of the agreement for arbitration is not in issue ...."[125] **This approach honored both the language of the FAA, and the statutory goal that arbitration be speedily available rather than "subject to delay and obstruction in the courts."**[126] **The statutory language certainly permits this reading, but Justice Black seems right that the FAA does not require this result. However, the majority has the better of the policy argument. Fraud in the inducement was the only real issue in Prima Paint, and its resolution required a fact-intensive inquiry. If courts undertake this determination, any colorable claim of fraud in the inducement would postpone arbitration,**

and would enmesh the courts in the merits of the dispute, thereby effectively preempting arbitration.

The separability doctrine states that the arbitration term must be considered separately from the substantive contract provisions. If a party claims that it was fraudulently induced to agree to arbitration, that claim is heard by a court, which will order arbitration only if this defense is rejected. Otherwise the dispute is sent to arbitration for a decision on the merits. The separability doctrine has two important consequences. First, it sends most breach of contract claims directly to arbitration. Second, the arbitrator is empowered to render a decision even if the fraud in the inducement defense is successful.

The adoption of separability as federal law under the FAA did not end the matter in Prima Paint, because the dispute arose in a state (New York) that rejected the separability doctrine. So long as the transaction involved interstate commerce, held the Supreme court, the FAA preempted the inconsistent state law.[127] Again, Justice's Black's dissenting opinion vigorously contested this approach. This issue illustrates the importance of the Erie doctrine, which students will have considered in civil procedure, and the determination of whether a matter is determined to be "substantive" or "procedural."[128] Separability also demonstrates a perhaps not previously appreciated consequence of Erie: while the usual impact of Erie is to give greater effect to state law, in tandem with federal preemption the consequence is to reduce the role of state law.[129]

The separability doctrine applies to contract law defenses generally, not just to fraud in the inducement. Some courts have even applied separability to claims of lack of capacity to contract.[130] The doctrine applies equally to all parties to an agreement, although usually it is the seller that seeks arbitration and the buyer who wants to have a matter resolved by a court. What if a buyer claims that a dispute should not be sent to arbitration due to unconscionability? The logic of the separability doctrine suggests that this matter should be resolved by the arbitrator. The courts have not heretofore applied separability to unconscionability claims, but this could easily happen – and the Supreme Court has shown the way. It the Casarotto decision the Court made a point of noting that the FAA imposes the same restrictions on courts as on legislatures, particularly as regards unconscionability. "It bears reiteration ... [that] a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot."[131]

Today the separability doctrine is almost universally accepted by the states, including New York, whose earlier contrary view was at issue in Prima Paint.[132] Even the drafters of the RUAA, strong supporters of state arbitration law, accepted the separability doctrine.[133] Separability is not some American aberration. Indeed, separability is "a conceptual cornerstone of international arbitration."[134] If contracts students could read only a single case about arbitration, my choice would be Prima Paint.

3. Judicial Review of Arbitration Awards

A meaningful introduction to judicial review of arbitration awards can be provided through textual material. The grounds for vacating arbitral awards are specified in the FAA, and are extremely limited – much more limited than judicial review of trial court decisions.[135] Errors of law is not among those grounds. (Unlike the FAA, the English Arbitration Act provides for judicial review of matters of law in arbitration awards.)[136] There are two widely, but not universally, recognized nonstatutory grounds for judicial review: public policy and manifest disregard of the law. Both grounds are quite narrow in scope, and such claims rarely succeed.

Whether parties can by contract expand the scope of judicial review beyond that specified by the FAA is a vexed question, on which the courts have taken a variety of positions. The issue was sufficiently controversial that the drafters of the RUAA could not reach a consensus, and so declined to take no position at all.[137] The most interesting judicial decision is LaPine, where the three judges produced three opinions.[138]

C. How Arbitration Works

An arbitral hearing is a different process from a court trial, so the key features of the proceeding need to be understood. Institutional players (trade organizations) perform a central role in the efficient disposition of disputes through arbitration.

1. Arbitration Procedure

An exclusive focus on lawsuits will teach student little about how the arbitration process differs from judicial trials. Above all, there are no juries. Arbitration procedures are much less formal than in trials. Telephone conferences among the parties and arbitrators are common. Depositions and other forms of discovery typically are quite limited. Hearings take place in hotels or offices, not facilities dedicated to hearing cases. The (exclusionary) rules of evidence are inapplicable. Evidence is more likely to be presented in written rather than spoken form. Oral testimony commonly takes the form of narrative statements rather than the question and answer format of judicial trials. In important ways, an arbitration proceeding is more like an administrative hearing than a court trial.

Arbitrators are selected pursuant to the contract between the disputants. The parties can, and often do, specify particular experience or qualifications. Although many arbitrators are lawyers, and may even be former judges, arbitrators frequently are not lawyers. Arbitrators do normally have expertise or experience with respect to the subject matter of the dispute. In labor arbitration, it is common for the arbitrator to have dispute resolution experience but not a law degree; the representatives of management and union may be salaried staff who are not lawyers. Commercial parties often entrust large dollar disputes for unreviewable decision to arbitrators without legal training.

Unlike in court trials, it is realistic for parties to appear without counsel. Alternatively, the informality of arbitration proceedings allows for quality representation by persons who are not lawyers, but who have other relevant are experienced in the trade or industry..

2. Administering Institutions

Arbitration is an ad hoc procedure. The office of arbitrator expires upon the issuing of a final award in a dispute.[139] (This is an application of the principle of functus officio.) Reviewing courts can send cases back to a trial court for clarification, a new trial, or other action, even if the judge that conducted the trial is retired or deceased. The office continues; only the role incumbent changes. By way of contrast, court normally cannot send a dispute back to an arbitrator. If an award cannot be confirmed it must be vacated, whereupon the parties have to start all over. A court can modify or correct an arbitration award, but only in narrowly limited circumstances specified in the FAA.[140] If this seems obvious, consider that the Supreme Court recently purported to remand a case for "the arbitrator" to decide a contract interpretation issue.[141]

Courts are an institutional presence in a public building that is open to all as stated hours. Court staff perform important if unglamourous administrative functions for prospective litigants, such as assigning cause numbers to newly filed cases, date-stamping documents, and serving as the official repository for "the record" in a case. There are judges in place to whom cases are assigned, a process in which the parties have no role.

Persons who agree to arbitration can leave the selection of an arbitrator to be worked out as needed, but at that juncture they have become participants in a serious dispute so the cooperation essential to prompt selection of an arbitrator may not go smoothly. Better, they can create a mechanism for appointment in the event of a dispute, but implementation still requires some cooperation among disputing parties. The standard version of this approach is that the two parties each appoint an arbitrator, and those two appoint a third.[142] This usually works well for large dollar disputes, but the use of three arbitrators is unduly expensive for smaller disputes. Also, the appointment process often is not completed quickly. The FAA makes provision for judicial appointment of an arbitrator, but that takes control entirely out of the hands of the parties – who cared enough about process control to provide for arbitration.[143]

These situations suggest the need for neutral institutions to administer arbitration proceedings. Among arbitral organizations, the AAA is paramount.[144] The AAA was founded by the leaders of the Chamber of Commerce responsible for the enactment of the 1920 New York arbitration act, which became the model for the FAA. Thus the AAA was literally present at the creation of modern arbitration, and it has been the leading arbitration

institution in the United States ever since. The AAA has regional offices throughout the country.

The AAA has performed a number of important functions for the arbitration community over the decades. It maintains panels of arbitrators by subject matter expertise in different geographical areas. The AAA provides lists of potential arbitrators to disputants, and administers the arbitrator selection process.

The AAA has rules and procedures for arbitration, so that parties do not need to negotiate their own procedures, although they can and sometimes do so. Rather than dispute about how to conduct a dispute resolution process that they do not expect to use, parties can simply state that any disputes will be subject to arbitration under the AAA's Arbitration Rules for Commercial Disputes then in force.[145] [The AAA, of course, wants to be the administering body, but parties can specify the AAA's rules without providing for AAA administration.] The AAA also has standard arbitration clauses for every situation that is likely to arise. Indeed, a reading of these provisions provides a good introduction to the problems that arise during arbitration proceedings. The standard general arbitration clause for future disputes (shorn of the references to AAA administration) provides:

> **"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."**

This approach has been in use for many decades, and has repeatedly been upheld by courts as encompassing (almost) all disputes that arise between contracting parties. [A serious drafting problem is the proclivity of some courts to interpret general arbitration provisions as excluding some disputes.] While the standard law school lesson is not to mindlessly adopt form provisions, the opposite danger also needs to be borne in mind. Quality model provisions promulgated by trade associations such as the AAA have been created by sophisticated experts, and changed periodically to reflect experience with their use. These should be altered only when necessary – else a malpractice claim looms.

In addition, the AAA performs educational functions, produces various publications that cover contemporary arbitration (and related dispute resolution) issues, and generally seeks to promote arbitration. Together with the ABA, the AAA has produced a widely relied upon Code of Ethics for Arbitrators in Commercial Disputes. It has sponsored due process protocols for consumer and employment arbitration that set minimum standards for contracts under which the AAA will administer arbitration, although this approach has resulted in opening a market niche for organizations such as the National Arbitration Forum that are less fastidious about the circumstances under which they will provide arbitration services. Gateway is among the organizations that have switched from the AAA to NAF.

There is a whole world of specialized arbitration rules and requirements organized by trade associations for their members, who commonly are required to settle all disputes with other members through the organization's dispute resolution system. This approach has been in use for centuries, long before the law was willing to enforce arbitration agreements

and awards. The process functions effectively apart from the legal system because trade associations often rely primarily on internal rather than jural sanctions to mandate arbitration of disputes and compliance with awards.[146]

Arbitration is particularly important in the international arena, and institutional structures are of particular importance.[147] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) has been adopted by over 125 countries, including all major commercial nations.[148] (In contrast, no country has been willing to enter a treaty with the United States for the recognition and enforcement of court judgments.) The Model Law on International Commercial Arbitration, promulgated by the United Nations Commission on International Trade Law (UNCITRAL), has been adopted by over 35 nations.[149] The International Chamber of Commerce (ICC) is the leading provider of international arbitration rules and administration. In contrast to domestic arbitration, the number of proceedings are small but the amounts at stake are large.

D. Commerce Clause Preemption of State Law

It is perfectly clear that the FAA preempts inconsistent state statutes, and not just state arbitration laws. Two prominent examples are consumer protection legislation and state statutes designed to level the playing field between local franchisees and national franchisors. The preemptive effect of the FAA is based on the commerce clause, and therefore applies to proceedings in state as well as federal courts. The Court so ruled in Prima Paint, and then it did so more explicitly in Southland, over a powerful dident by Justice O'Connor.[150] In enacting the FAA, Congress exercised its full commerce power.[151]

The Court reaffirmed its Southland decision in Allied-Bruce, despite an amicus brief filed by twenty state attorneys-general requesting the Court to abandon Southland.[152] An amicus brief by a group of law professors in Bazzle seeking the same result did not receive so much as a mention by the Court.[153] This situation nicely encapsulates the different views of arbitration prevailing at the Supreme Court and in the law schools.

Even when transactions are subject to the FAA, disputes are commonly heard in state rather than federal courts. The FAA, unlike many federal statutes, does not provide an independent basis for federal jurisdiction, so there must be another basis to obtain a hearing in federal court – usually diversity of citizenship (plus minimum amount in controversy). In hearing cases subject to the FAA, the state courts use local procedural rules rather than the federal rules. In addition, state contract law is applicable in the resolution of arbitration disputes in both state and federal courts.[154] Thus courts commonly are required to apply a mixture of state and federal law in resolving litigation about arbitration.

One consequence of the considerable place for state law is that it permits state courts hostile to arbitration to frustrate the federal policy that strongly favors arbitration. Alabama and Montana are the leading proponents of this approach. (Apart from the

widespread use of unconscionability to limit arbitration, the California courts are generally supportive of arbitration).

Alabama and Montana are engaged in a campaign of civil disobedience in opposition to arbitration, in open defiance of the Supreme Court. The Court's Allied-Bruce decision reversed the refusal of the Alabama Supreme Court to enforce an agreement to arbitrate.[155] The Court did so again in 2003, after the Alabama courts tried once again to adopt a "misguided" and "improperly cramped" reading of commerce to avoid federal preemption.[156]

The best case for illustrating both the scope of commerce clause preemption, and the "populist" anti-arbitration position is Casarotto. In Casarotto v. Lombardi, the Montana Supreme Court refused to order arbitration.[157] Justice Trieweiler wrote the majority opinion, "in language appropriate for judicial precedent." In addition, he wrote a special concurring opinion that says what he really thinks – this is a well-written and genuinely angry attack on the Supreme Court's arbitration jurisprudence.[158]

In its Casarotto opinion, the Court did not acknowledge let alone address Justice Trieweiler's arguments. Instead, the Court sharply observed, relying on Southland and Allied-Bruce:

> **States may regulate contracts, including arbitration clauses, under general contract law principles .... What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.[159]**

Casarotto was 8-1 decision, with only Justice Thomas dissenting (based on his rejection of Southland). The Court stated its strong support for arbitration, and expressed a thinly veiled irritation at the failure of state courts to get the message.[160]

Montana is still at it, having refused to order arbitration in its recent Kloss v. Jones decision, but this time the Supreme Court declined to review this erroneous decision.[161] The Alabama and Montana courts may continue their anti-arbitration efforts, but their views should not be confused with the law of any other jurisdiction (not even California).

E. Arbitration of Statutory Claims

On the question of whether claims based on statutory rights are subject to arbitration the Supreme Court (and American law) did a 180 degree turn, a development best explicated through securities cases (no securities law background is needed). The purpose is to illustrate the dramatic change in the judicial attitude toward arbitration. Half a century ago, in Wilko v. Swan, the Court held that claims under the Securities Act were not subject to mandatory arbitration, and refused to enforce a contractual arbitration provision.[162] By the

late 1980s, the Supreme Court had rejected its earlier position about the arbitration of statutory claims, and expressly abandoned Wilko.[163] The Court has adopted the same approach to employment arbitration of statutory rights.[164]

F. Employment Arbitration and Unconscionability[165]

Examination of unconscionability and arbitration is best achieved by focusing on employment cases. (The use of arbitration in the consumer transactions is considered in the context of formation and contract terms.) Three recent cases should suffice to canvass the issues. The maximum unconscionability approach is best illustrated by the California Supreme Court's Little decision (in lieu of Armendariz).[166] The 4th Circuit's decision in Hooters should meet should meet the unconscionability standard of nearly all courts.[167] Although this may come as a surprise to many law professors, there are vast swaths of American where a 4th circuit opinion is considered more persuasive than a California Supreme Court decision.

In Martindale, the widely esteemed New Jersey Supreme Court enforced an arbitration term against an employee.[168] In his dissenting opinion, Justice Stein has the integrity to admit that any employment arbitration decisions manipulate contract doctrine to achieve a desired result – one which Stein supports: "In my view, public policy requires this Court to invalidate a mandatory arbitration agreement ... that a prospective employee is forced to sign as a condition of being considered for a job." For better or worse, that is not the law, but the Martindale opinions provide an excellent basis for a discussion of employment arbitration.

IX. CONCLUSION

An arbitration revolution has taken place in recent years that has dramatically reshaped the law and practice of contracting, and the resolution of disputes between parties to contracts. Almost any type of agreement may call for arbitration of disputes, and such provisions are the usual practice in franchise, securities, employment, consumer, maritime, construction, and many other classes of contracts. While arbitration is present throughout our economy, it is largely absent from the course in contracts required of every first year law student. This article has sought to demonstrate the importance of arbitration; examined what little is presently taught about arbitration through an examination of the casebooks used to teach contracts; and offered concrete suggestions to remedy the absence of arbitration in contracts courses.

X. APPENDIX: THE CASEBOOKS

The number of published contracts casebooks is large; twenty-three of them are discussed below. Texts, hornbooks, and collections of readings are not considered. The primary focus is on the latest edition of each casebook, but earlier editions are compared in several instances. Casebooks are referred to by the name of the first named author, and are presented in alphabetical order. Discussion of the leading cases is quite limited, because they have been examined already. Other cases and topics selected by the casebook authors are considered, sometimes at length. Casebook page references are indicated in parenthesis.

The length and depth of the discussion of casebooks varies considerably. In general, the more a casebook has to say about arbitration, the more there is to examine and critique. For the worst sinners – the casebooks that offer little if any coverage of arbitration – there is little to say. Yours author clearly thinks this approach is serious misguided, but there is little point in repeating that conclusion again and again.

My general methodology was to examine the Index, Table of Contents, and Table of Cases (both initially and again after the leading cases were identified). No doubt, there are a few casual references to arbitration buried in note material that escaped my attention. Because the use of arbitration has become so widespread, it might receive mention under almost any topic. An example from the Knapp casebook will illustrate the problem. One of the notes after a third party beneficiary case discusses the defenses available to the promisor. In the midst of the paragraph there is a single sentence about arbitration, which states that a person making a claim as a third party beneficiary is subject to an arbitration provision in the contract, and cites two cases to that effect. (716)

1. Randy E. Barnett, CONTRACTS: CASES AND DOCTRINE (2d ed. 1999).

This casebook has little to say about arbitration. In a discussion of contracting around default damages rules, Barnett devotes one sentence to the availability of ADR, including arbitration, to settle disputes. (170) A section titled "Punitive Damages and Arbitration Clauses" uses Garrity as the main case., but without indicating that it presents a minority rule, or that it is of only modest impact today due to federal preemption of state law related to arbitration. (188) A contrary Alabama district court decision is excerpted at length.[169] (197) Finally, Barnett includes an extensive excerpt from an article about arbitration in the diamond industry.[170]

2. Gerald E. Berendt, Michael L. Closen, Doris E. Long, Marie A. Monahan, Robert J. Nye & John H. Scheid, CONTRACT LAW AND PRACTICE (1st ed. 1998).

The common theme among the Berendt authors is that they all teach at The John Marshall Law School. [One of the authors, Michael L. Closen, was the senior author of a prior casebook, which is discussed below.] There is no Index, but Berendt does include a detailed Table of Contents and a Table of Cases. None of the leading arbitration cases are mentioned, let alone discussed.

The only consideration of arbitration is found in a short section under the topic of equitable remedies, titled "arbitration awards directing contract performance." (1252) Two cases from the New York Court of Appeals are used, Grayson-Robinson and Sprinzen.[171] Each decision confirmed an arbitration award that granted specific relief. Note material at the end of the section cites to the UAA and FAA, and the holding of Allied-Bruce is stated.[172]

3. Brian A. Blum & Amy C. Bushaw, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS (1ST ed. 2003)

Arbitration is first introduced in the 2-207 context, with a truncated version of Klocek that includes the discussion of Hill. (154) Unexpectedly, there is an employment arbitration case in the materials on duress, Quigley v. KPMG.[173] In response to KPMG's motion to compel arbitration, Quigley claimed duress because his manager said had told him: "If you don't sign this, you don't work here any more." The court ruled that the need to retain a job does not constitute duress.

Quigley has one interesting feature that may account for its inclusion in the Blum casebook. In two arbitration agreements, the name signed was "Joseph U.D. Quigley." The U.D. stands for "under duress," but Quigley did not inform his KPMG supervisor of this fact, so KPMG was unaware of the objection. This situation nicely illustrates the objective approach to contracts – what counts is expressed intention not actual (but secret) intention.[174]

Two arbitration cases compose a subsection titled relief for unconscionability. Brower is given a remedial focus. The court found the ICC arbitration approach to be unconscionable, and sent the case back to the trial court for substitution of another arbitrator, as provided in the FAA. Brower is followed by Sosa v. Paulos, in which the underlying dispute was a malpractice action by a patient against a physician.[175] [The use of arbitration provisions in contracts for medical and legal services is increasingly common.] The patient signed several forms, including a separate arbitration agreement, while already in "pre-op" – about one hour prior to surgery.

In my view, any agreement signed under such circumstances should be ruled invalid on the basis of temporary incapacity. A claim of temporary incapacity requires that the

incapacity is known to the other party. Even if the test is actual knowledge of incapacity (rather than the lower standard of reasonably should have known), both the physician and hospital clearly satisfy this standard. Incapacity was not considered by the Sosa court, which instead reached the same result on the more conventional basis of unconscionability.

A matter of interest, albeit only briefly considered by the Sosa court, was the composition of the arbitration panel. The contract called for three arbitrators, all of whom must be board-certified orthopedic surgeons. Quite apart from the potential costs associated with such a proceeding, and the difficulty of locating three qualifying arbitrators whose schedule would permit them to conduct an arbitration in Utah, this structure arguably is inherently biased against patients. This issue was not addressed by the court or by Blum.

4. Steven J. Burton, PRINCIPLES OF CONTRACT LAW (2d ed. 2001).

Most of a section on form contracts is devoted to arbitration.
Burton begins soundly by informing students that arbitration provisions are included in contracts with "dramatically increasing frequency," and quoting a standard arbitration provision. (264)
The major provisions of the FAA are introduced, and Burton provides a summary of the central characteristics of arbitration. The "emphatic federal policy in favor of arbitration" is noted.

The goal of the remaining material is to "explore contract law's capacity to policy unjust arbitral agreements notwithstanding the strong policy in favor of arbitration." As there is a separate section on unconscionability, more space might be given to other arbitration issues, such a federal preemption of state law and the separability doctrine.

Hill is cited in the materials on contract formation. Burton asks whether the buyer was bound by Gateway's limited warranty, without any mention of arbitration.

5. John D. Calamari, Joseph M. Perillo, & Helen H. Bender, CASES AND PROBLEMS ON CONTRACTS (3d ed. 2000).

The Index does not mention arbitration. The only arbitration case listed in the Table of Cases is Garrity (678), which is found in a section on punitive damages. While Garrity is a main case, the majority opinion is reduced to less than one page, and the dissenting opinion is omitted entirely.[176] Nothing is said about arbitration in the offer and acceptance materials. Judge Easterbrook's views are presented through the Zeidenberg case, but there is not so much as a citation to Hill.

6. Michael L. Closen, Richard M. Perlmutter & Jeffrey D. Wittenberg, CONTRACTS: CONTEMPORARY CASES, COMMENTS, AND PROBLEMS (3d ed. 1992).

This casebook will receive only brief consideration because it is dated, and its senior author is among the authors of a more recent contracts casebook.[177] This book has no Index whatsoever, and it lacks the detailed Table of Contents that is a standard feature of contracts (and other law school) casebooks. The short form Table of Contents does not include arbitration among the topics.

The only identifiable arbitration case is Grayson-Robinson, which is summarized briefly in the context of specific performance. (531) The central point is not about arbitration, but rather that equity provides courts with broad discretion to order specific performance of construction contracts, as it also allows courts to refuse to issue such an order.

7. Thomas D. Crandall & Douglas J. Whaley, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS (3d ed. 1999).

Arbitration is not an entry in the Index or the Table of Contents. The only leading case to appear in the text (but not the Table of Cases) is Itoh, and the focus is entirely on the 2-207 issues rather than arbitration. (112) A problem does raise the question of whether an arbitration provision is a "material alteration" under 2-207(2)(b). (122) Nothing else is said about arbitration.

8. John P. Dawson, William B. Harvey & Stanley D. Henderson, CONTRACTS: CASES AND COMMENTS (8th ed. 2003).

Consideration of arbitration is sprinkled through the Dawson casebook. A comment on arbitration reads like it was written years ago. The dates of the cited cases are 1859, 1976, 1979, and 1980. Garrity is among these, but with no indication that the New York position is atypical. A one sentence paragraph has been appended to the end of the note, citing Mastrobuono for the proposition that there is a "division of views" regarding the power of parties to authorize arbitrators to award punitive damages.[178]

The chapter on making of agreements uses Hill as a note case after Zeidenberg. (435) The Broemmer decision (medical services) is used in the section on assent to standardized

forms.[179] (531) Brower appears in the unconscionability materials. It is followed by a comment on "contemporary unconscionability" that makes no mention of arbitration.

In the context of express conditions, arbitration is used to explain the distinction between promises and conditions, with two illustrations from the Restatement. (719) A provision that calls for disputes to be submitted to arbitration is a promise to arbitrate, but does not make an award a condition precedent to the insurer's obligation to pay. By way of contrast, if the agreement states that a loss shall not be payable until 60 days after an award then an award is a condition of the insurer's obligation to pay.[180]

9. David G. Epstein, Bruce A. Markell, & Lawrence Ponoroff, MAKING AND DOING DEALS: CONTRACTS IN CONTEXT (1st ed. 2002).

The Epstein casebook opens with the Hill case, including a full quotation of the arbitration provision. (5) The primary focus in Hill is offer and acceptance rather than the arbitration aspect of the case, which is the right approach for the first week of law school. At the same time, students learn immediately that arbitration is important – not because anyone says so, but because it is there. Epstein asks why the Hills do not want to settle their dispute through arbitration. (Chicago and the ICC Rules are easily explained, leaving the core matter of litigation v. arbitration.) The 2-207 discussion in Hill is omitted initially, but raised later with the Klocek decision. (163)

Two employment arbitration decisions are presented in the materials on unconscionability. One is the well known Hooters case – but the district court rather than the court of appeals version.[181] The other decision is also from a district court.[182] I would use the 4th circuit Hooters decision in lieu of the two opinions presented by Epstein, and utilize the space saved for textual material about arbitration.

10. E. Allan Farnsworth, William E. Young, & Carol Sanger, CASES AND MATERIALS ON CONTRACTS (6th ed. 2001).

Farnsworth provides the most comprehensive Index among the contracts casebooks (21 double column pages), but it actually understates the coverage of arbitration.[183] The opening chapter includes an excellent two page comment about arbitration. (19-21) It introduces the leading institutions in the field – AAA, ICC and UNCITRAL – and informs the student that there are federal and state arbitration statutes. The standard form AAA commercial arbitration term is quoted.

Arbitration receives repeated mention in the materials on the battle of the forms and electronic contracting. (194-223) The material alteration issue under 2-207(2)(b) is explained through the somewhat dated Dorton decision, and ensuing note material.[184] (197) Itoh is used as well. (210)

The Statute of Frauds material include a brief arbitration decision.[185] (279) The expiration date of a written contract with an arbitration provision was orally extended. The initial writing was sufficient to satisfy the writing requirement, and thus the arbitration term was enforced. Students learn that this "passing through" approach has "substantial support in general contract law." (280)

The materials on adhesion contracts deal with arbitration in several places. The cases include Graham (377) and Armendariz. (416) Farnsworth notes that courts sometimes order arbitration after the removal of a limitation on the recovery of damages or other unconscionable provision, although the Armendariz court refused to do so. Several of the arbitration decisions considered previously are revisited: Graham (422), Brower (423), and Klocek (423).

Farnsworth raises a major contract law problem under the name of "add-on arbitration agreements." (397) A banking organization or employer proposes to modify the existing contract to add an arbitration term, with the customer/employee being offered the option of accepting the change or terminating the relationship. The casebook then asks the student to consider the modification of a contract between customer and securities broker that requires arbitration, plus several variants on this theme. Unfortunately, the question misleads because it fails to inform the student that arbitration has been a universal feature of customer-broker form contracts since the early 1990s.

A variety of remedial issues in arbitration are discussed. Arbitration is impacted by the law relating to specific relief in two contexts. When a court orders the arbitration of a dispute, it is mandating specific performance. (20) Grayson-Robinson is used to show that arbitrators sometimes may order specific relief where a court would not do so. (465) The award of punitive damages by arbitrators also is considered. Garrity is mentioned (noting that it was a 4-3 decision), followed by the accurate observation that most courts have rejected the Garrity approach. The impact of Mastrobuono as a limitation on Garrity also is stated. In the questions after a court decision that refused to enforce a liquidated damages term based on gross sales, Farnsworth asks whether a court should confirm an arbitration award that enforced the same liquidated damages term.[186] (551)

All of this (and there is more) is simply wonderful. Not only does Farnsworth provide extensive coverage of arbitration doctrine and practice, the casebook teaches students that arbitration is a central feature of modern business law and practice. It might be though churlish to ask for more, but two additions might be suggested: some coverage of the separability doctrine, and an introduction to the main features of the FAA, UAA, and RUAA.

11. Lon L. Fuller & Melvin Aron Eisenberg, BASIC CONTRACT LAW (7th ed. 2001)

Neither the Index nor the Table of Contents contain any entry related to arbitration. Hill appears as a note case in the contract formation materials. This is the only mention of arbitration in the entire casebook.

The absence of any discussion of arbitration is a particularly striking omission in view of Professor Fuller's writing about arbitration.[187] Indeed, Fuller's original 1947 edition of this casebook presented a typical arbitration award, followed by a comment on The Role of Lawyers in Commercial Arbitration (711-713). In addition, the General Conditions of the Contract for the Construction of Buildings published by the American Institute of Architects (AIA), including the role of the Architect and the arbitration of disputes, were quoted at length (807-809).

The Supplement designed for use with this casebook includes four important and detailed form contracts. Astonishingly, each of them calls for arbitration of subsequent disputes.[188] The total disconnect between the contents of the casebook and the known reality of modern dispute settlement practice is striking.

12. Robert W. Hamilton, Alan S. Rau & Russell J. Weintraub, CONTRACTS: CASES AND MATERIALS (2d ed. 1992).

This casebook does not consider arbitration at all. This is quite surprising because Alan Rau is a noted arbitration scholar and the author of a leading ADR casebook,[189] and Russell Weintraub has also written about arbitration.[190]

13. Fredrich Kessler, Grant Gilmore & Anthony T. Kronman, CONTRACTS: CASES AND MATERIALS (3d ed. 1986).

There is no entry for arbitration in the Index. The material on remedies includes a section on limitation of remedies, with arbitration being one of the topics. (1210-1223) The main case is Garrity, but students are not informed that the New York view is a clear minority position. The notes focus on Aimcee Wholesale, (1221), which rules that antitrust allegations present public policy issues that are not subject to arbitration.[191] (1221) This is not the law today.[192] Securities claims are said not to be arbitrable, citing Wilko v. Swan, which decision was overruled by the Supreme Court after publication of the Kessler casebook.[193] Brief mention is made of the FAA.

14. Charles L. Knapp, Nathan M. Crystal & Harry G. Prince, PROBLEMS IN CONTRACT LAW (5th ed. 2003).

This casebook will receive closer attention than most, with some comparison to the prior editions, because this is the casebook from which I have taught Contracts for the last decade. It also is interesting to determine the extent to which the greatly increased recent importance of arbitration noted by Professor Knapp in his writing is reflected in his casebook.[194] [The other two authors, of course, share joint and several responsibility with Knapp for their final work product.][195] Until the 2003 edition, the Knapp casebook included hardly any coverage of arbitration.

The 1993 edition of this casebook was limited to a three page section at the very end of the book, titled Commercial Arbitration. (1131-1134) This material was repeated in the 4th edition, again at the end. (1203-1206) The materiality, vel non, of arbitration provisions in the context of the battle of the forms and UCC, § 2-207 received brief mention. (317) The one major addition in the 4th edition was the opening case in the book, an absurdly long and complicated arbitration case from an Alabama trial court – twenty pages of material, including comments and a Problem).[196] (18-38) Why the authors selected this admittedly "complicated case with many different legal issues" (28) decided by an obscure trial court from the jurisdiction with the most bizarre arbitration jurisprudence in America is quite beyond me. This material is too difficult, and requires too much background, to use at the start of an upper-division Arbitration course, let alone for the first week of the first year of law school. I omitted Rollins entirely, and substituted other arbitration material later in the course.

Arbitration receives dramatically increased attention in the 5th edition, most of it ranging from critical to hostile. Again, the opening case is about arbitration. Rollins is replaced by Burch, a "considerably less complex" unconscionability decision from the Supreme Court of Nevada.

The note material after Burch provides background about arbitration. The FAA is introduced, as is the preemption of inconsistent state law, and state arbitration statutes are mentioned. The focus is on disadvantages of arbitration; these include expense, procedural limitations (discovery, rules of evidence), no jury trials, lesser relief, no class actions, and the absence of judicial review. The nicest thing Knapp can say about arbitration is that it is "not necessarily an unfair ... method of dispute resolution." (21)

Hill (255) and Klocek (259) are used to illustrate electronic contracting. The question of whether arbitration is a material alteration for purposes of 2-207 is raised, and the casebook notes that the cases go both ways.

The attempt to avoid arbitration based on unconscionability is raised again through a pair of employment cases: Cooper and Adkins.[197] Adkins enforced the pre-dispute arbitration term, while Cooper held it to be unconscionable. Adkins rejects all the arguments against arbitration, and closes by observing:

> **Adkins' claim amounts to little more than an attempt to undermine repeated pronouncements by Congress and the Supreme Court that federal law incorporate a liberal policy favoring arbitration agreements. A refusal on our part to heed these pronouncements would be a dereliction of our duty under the law. (506-507)**

The Cooper approach was rejected by the New Jersey Supreme Court in its Martindale decision.[198] The dissenting opinion by Justice Stein, which relied on Cooper had the integrity to admit that decisions such as Cooper are manipulating contract doctrine to achieve a desired result – one which Stein supports: "In my view, public policy requires this Court to invalidate a mandatory arbitration agreement ... that a prospective employee is forced to sign as a condition of being considered for a job."[199]

The subsequent note material cites five cases where the court found the arbitrtation provision to be unconscionabile, plus a citation to an article by Knapp the provides citations to additional cases, and only one contrary decision.[200] Finally, Knapp quotes at length from an article hostile to arbitration by my colleague Richard Alderman.[201] The discussion of arbitration in Knapp is seriously unbalanced. All five of the main arbitration cases involve consumer or employment arbitration, and three of them address unconscionability.

The world of commercial arbitration – not to put too fine a point on it, the world of clients who can afford to hire lawyers – goes all but unmentioned until a three page commentary at the very end of the casebook that concisely offers much useful information about commercial arbitration, including careful attention to the AAA arbitration procedures. (1003) At last, there turns out to be a reason for the use of arbitration: complaints have long "raged about the slowness and expense of the judicial process." Compared to consumer and employment arbitration, there are "fundamental differences" where two sophisticated parties square off. However, no explanation is offered about why power imbalances matter more in arbitration than in litigation. By itself, the fact that powerful parties have advantages over weaker parties in arbitration as well as litigation is about as shocking as the discovery that there was gambling going on at Rick's Place (in Casablanca).[202]

15. Stewart Macauley, John Kidwell & William Whitford, CONTRACTS IN ACTION (2d ed. 2003).

This casebook is the product of The Wisconsin Contracts Group. The first precursor was created decades ago as a Supplement to the Kessler casebook, then with Malcolm P. Sharp of the University of Chicago Law School as the coauthor. [Your author was introduced to Contracts by Professor Sharp, using his casebook and the Macauley Supplement.] Later, the Wisconsin materials served as a Supplement to the Macneil casebook. Long in use at the University of Wisconsin, and at several other law schools, these materials were not formally published until 1995.

The new edition of Macauley raised high expectations. After all, a work that puts "Law in Action" into its title ought to reflect the exploding importance of arbitration. The Preface confirms this to be the case. In addition to more minor changes in the new edition of the casebook:

> **"the major effort has been devoted to bringing up to date our materials on such matters as unconscionability, form contracts printed in fine print or hidden in other ways (particularly in the area of computer programs), and the growing uses of arbitration to repeal the reform statutes of earlier decades."**

This statement evidences agreement with the views of Professor Knapp (and many others in legal education): arbitration has become very important, and this is a baleful development.

Macauley is a two volume work of almost 1,500 pages.[203] The overall length is not quite as daunting as might initially appear, because Macauley provides students with a great deal of textual materials that explains how deals and dealing are conducted in contemporary America. In effect, this is a casebook together with a book of supplementary readings.[204]

Arbitration is introduced in the context of the resolution of grievances under collective bargaining agreements (CBA). Most contracts casebooks do not consider CBAs, leaving them for a course on labor law, but including them as an important form of contracting is certainly a justifiable approach. The grievance materials appear in a sub-chapter titled Franchise and Employment Relations. The lengthy section about franchising says nothing about arbitration, although modern franchise agreements nearly always include arbitration provisions.

The TWA decision is used to illustrate an arbitration award. (428) The idea is sound, but surely a more recent award can be found, that deals with a more contemporary topic than the "grooming and appearance" of a stewardesses who was stationed at an airport called Idlewild and employed by a now defunct airline named Trans World.

Arbitration is directly considered in a section on commercial relationships and private government. (495-508) After an overview, a critique is provided, from a 1980 article, which concludes that arbitration is problematic in commercial disputes; where consent is lacking "arbitration becomes ineffective and resort to the courts is almost inevitable." [205] (497). This statement is inaccurate, if for no other reason than because courts are strongly supportive of arbitration, and resort to the courts to avoid arbitration is usually a waste of time and money. On the other hand, arbitration is said to be useful for consumer and workplace disputes: "By dispensing with numerous procedural requirements, discovery, and even the need for counsel, arbitration can provide a quick and inexpensive resolution of small disputes." Recent arguments against arbitration, including those of the Macauley authors in their Preface, suggest that arbitration is worrisome in disputes between parties with unequal bargaining power. Apparently, old material was recycled without consideration of its contents.

Macauley informs students that the U.S. Supreme Court "has read" the FAA "as evidencing" a strong pro-arbitration policy; that the FAA preempts state law; that Courts "routinely" enforce boilerplate arbitration provisions in contracts, and that judicial review of arbitral awards is quite limited. (497) The Casarotto decision is a main case.[206] (499)

Next comes a series of New York arbitration decisions that are interesting for students of arbitration, but too much detail for a contracts course. These cases, which include Grayson-Robinson and Garrity, are now dated (the latest one was decided in 1976). Macualey does note that many courts reject the prohibition on arbitrators awarding punitive damages. If New York law is to be explicated, the text should make reference to the Sacharow decision, in which New York followed Mastrobuono.[207]

Hill is among the cases used to illustrate contract formation in the modern world. (638) A note refers the student forward to Brower and the unconscionability materials. Also discussed is the Supreme Court's Shute decision that enforced choice of forum clauses in form contracts between businesses and consumers.[208] (641)

The unconscionability material offers textual material critical of consumer arbitration, and the Brower decision. (721) The notes discuss subsequent Gateway's shifting arbitration practices, and the AAA Consumer Due Process Protocol. Among its requirements are that consumers be entitled to proceed in small claims courts. The ceiling is $5,000 in many states, including Wisconsin and Texas. Macauley notes that in small claims proceedings, the losing party is afforded an "opportunity" to obtain a de novo trial. This is more an opportunity for the merchant than the consumer, because the cost of this "opportunity" is prohibitive. Obtaining a prompt and final decision, as is provided by arbitration, is at least arguably better for moderate income consumers than a "right" of appeal to a court of record – where, unlike in small claims, retaining a lawyer is necessary.

The vehicle for considering employment arbitration is Ramirez, where a mid-level California appellate court found the arbitration provision to be unconscionable and therefore denied enforcement.[209] (728) The subsequent notes begin with a bold print quotation: "The Supreme Court has created a monster."[210] Several other California cases are briefly considered, notably Armendariz and Adams, both of which declined to enforce arbitration provisions due to unconscionability.[211]

Macauley notes one of the numerous efforts to enact federal legislation that would make it an unfair and deceptive trade practice to include an arbitration provision in consumer and employment contracts. So far, none of the proposed arbitration bills have even gotten as far as being approved by a Committee in either house of Congress. The only "consumer" proposal that seems to have even a modicum of support is one to protect automobile dealers from being required to arbitrate disputes with manufacturers.

Volume II is largely devoted to contract performance and the adjustment of on-going relationships, as opposed to formation or picking up the pieces when deals fall apart. Even where it is clear that parties have reached an agreement, there may still be disagreements about the terms of that agreement, because the terms are reflected in multiple documents

exchanged by the parties during the contracting process. Reflecting the importance of this approach to contracting, Macauley devotes seventy-five pages to a section titled Business Documents and Forming Contracts. (157) In the context of the battle of the forms, and the mysteries of UCC sec. 2-207, the authors use arbitration as an example, with the Itoh case. (214) The New York position that arbitration is material as a matter of law is noted, as is the alternative view.

All in all, Macualey offers readers a wide ranging and high quality introduction to arbitration doctrine and practice. Some of the material is out of date, and some important recent developments go unmentioned, notably the RUAA. In view of the concerns about the fairness of arbitration for consumers, the allocation of the costs of arbitration might have been discussed.

16. Ian R. Macneil & Paul J. Gudel, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS (3d ed. 2001).

This revision of Professor Macneil's groundbreaking casebook is almost entirely the work of Professor Gudel.[212] The approach of the casebook is atypically broad for a contracts casebook: "The fundamental assumption is that contract encompasses all human activities in which economic exchange is a significant factor. ..." (v) Macneil includes far and away the most material related to arbitration of any contracts casebook – 140 pages! In undertaking this project, I did not expect find a casebook that devotes too much space to arbitration, but this one does so. More important, the pages are not put to effective use – largely because the materials selected are hardly edited.

Macneil, with its emphasis on continuing relations, devotes considerable attention to the settlement of disputes in the labor-management context, in which process arbitration is the last (and infrequently invoked) step. [Apart from Macauley, the contracts casebooks give little attention to this topic.] The grievance arbitration materials are badly dated. (261-277) The two cases presented are TWA (1965), and Warrior & Gulf.[213] (268) These two decisions consume thirteen pages that could be better used for more recent decisions, or textual matter.

The materials on commercial arbitration are unduly long (1066-1181), yet they do not present a coherent picture of the topic to students. A brief and useful historical introduction is followed by material on enforcing arbitral awards. Grayson-Robinson, is used to illustrate the broad remedial powers of arbitrators. The Raytheorn case holds that arbitrators may award punitive damages, while expressly rejecting the Garrity approach.[214] (1078) So far so good; if the authors had just added some text about how limited are the grounds for vacating an arbitration award, perhaps quoting section 10 of the FAA, the material on arbitration remedies would be a success. Instead they turn to AMD v. Intel, which consumes twenty-four casebook pages.[215] (1085) Subsequently, there is more material on judicial review of

arbitration awards, notably the Perini decision, which consumes another 22 pages.[216] (1147) Perini was rejected by the New Jersey Supreme Court just two years later.[217]

Several other important arbitration cases are reproduced at length: Mitsubishi consumes twenty pages (1127); and Merit Insurance uses up ten more pages (1168).[218] Both are important decisions by high level courts, but at a minimum these decisions should be heavily edited. First Options clearly and concisely covers federal preemption of state law that is inconsistent with the pro-arbitration approach of the FAA, while also providing an introduction to the important subject of securities arbitration.[219] (1109) The casebook also uses Itoh in the battle of the forms material. (927)

Macneil closes with a short section on arbitration planning. Choice of law provisions are discussed, with citation to and brief consideration of the leading Supreme Court decisions. The standard form AIA arbitration provisions are discussed along with the AAA Construction Arbitration Rules.[220] These tasks are accomplished in under four pages; the authors should have adopted a similar approach with arbitration remedies materials.

The dichotomy of commercial (including consumer) and labor arbitration results in the omission of the important topic of employment arbitration. As the union sector of the economy continues to shrink, and arbitration provisions are becoming a standard feature of employment contracts, employment is rapidly becoming the most important type of workplace arbitration – but without the power symmetry that one finds in the labor-management context. This difference, plus the inapplicability of the Labor-Management Relations Act outside the union context, suggests that consumer arbitration might provide a closer analogy than labor arbitration.

17. William McGovern, Lary Lawrence, & Bryan D. Hill, CONTRACTS AND SALES: CONTEMPORARY CASES AND PROBLEMS (2d ed. 2002).

Arbitration is barely mentioned in this "contemporary" casebook. The Hill and Klocek decisions are cited after Zeidenberg, after a computer purchase problem that is based on these two cases. (88)

Graham is a main case in a section on Adhesion Contracts and Unconscionability, and Armendariz is noted. [All three authors teach at California law schools.] A brief comment after Graham sets forth disadvantages of arbitration, specifically high arbitrator costs and lack of formal discovery. Pointing to these factors as weaknesses immediately after Graham is strange because the AFM process was provided without charge, and the absence of discovery facilitated rapid, inexpensive resolution of the dispute without any loss of relevant information. To the extent that Graham teaches students that unconscionability is a viable theory in agreements between merchants, they are badly misled.[221]

18. Edward J. Murphy, Richard E. Speidel & Ian Ayres, STUDIES IN CONTRACT LAW (6th ed. 2003).

The second listed author of this casebook, Professor Richard Speidel, is a coauthor of the leading treatise on arbitration, so one would expect that the arbitration material would be lengthy and excellent.[222] The Murphy casebook gives dramatically increased the attention to arbitration compared to the 5th edition (1997), which devoted only limited attention to arbitration – at the end of the casebook in the chapter on remedies. A brief look at the 5th edition coverage of arbitration offers a striking contrast to the 6th edition material.

The first mention of arbitration in the 1997 edition was toward the end of the casebook, in the materials on remedies. A chart set forth the characteristics of the primary methods of dispute resolution, including arbitration. (1019) A useful section on dispute resolution in construction contracts addressed the use of standardized AIA form contracts for most (private) construction projects, with particular attention to the consequences when the architect refuse to issue a certificate of completion – as happened in the famous case of Jacob & Youngs v. Kent. (1021) A standard AIA arbitration provision was quoted, which specified that disputed would be subject to arbitration under the AAA's Construction Industry Arbitration Rules. (1028) Subsequent textual material set out the basic characteristics of arbitration.[223] The text of the UAA was reproduced but the FAA, which preempts the UAA in almost all instances, went unmentioned. (1028) The 6th edition, by contrast, reflects a quantum leap in arbitration coverage.

The discussion of arbitration begins badly with the Textile Unlimited case, a poorly reasoned decision that is representative, if anything, of the 9th Circuit's lonely position of hostility to arbitration among the federal courts of appeals.[224] (336) Textile was explicitly rejected in the only subsequent reported case on point.[225] Textile discusses venue, a topic more appropriate for civil procedure, before turning to an incomplete discussion of the battle of the forms and UCC, sec. 2-207. The notes after Textile Unlimited cite an unreported district court decision for the proposition that an arbitration term is not material under 2-207(2) in the context of extensive prior dealings between the parties.[226]

The authors do make two important points about arbitration and the battle of the forms. (340) First, the arbitration term in Textile would be enforced under the CISG. The "last shot doctrine" has much more of a place in international contracts than under American law (Judge Easterbrook notwithstanding). Second, the revised version of 2-207 adopts the knockout rule and eliminates the incorporation of unbargained for terms.

The Hill (342) and Klocek (345) decisions are used, followed by two problems for students to consider – one a conventional battle of the forms purchase, and the other a telephone purchase of a computer. Both contracts call for arbitration in New York City under the ICC Arbitration Rules.

The main case is a section titled Electronic Commerce, is the Specht decision.[227] (349) The customer was invited to download software, with additional contract terms being

obtainable by scrolling down the page beyond the send/buy (or similarly named) button. These terms came too late, said the 2d Circuit, and thus did not become part of the contract. The impact of this seemingly important decision will be modest, because merchant sellers can so easily avoid its impact. The moral for sellers is a simple one: place the contract terms above instead of below the send button. Judicial discussion of topics like "the reasonably prudent offeree of downloadable software" are likely to be foolish, and certainly will be quickly dated. Still, Specht is a useful case because it requires students (and teachers) to grapple with offer and acceptance issues in a modern context, instead of days of yore when the mails were the main means of business communication.

Arbitration makes its next appearance in the materials on capacity to contract in the CitiFinancial decision, an unreported case that was reversed on appeal.[228] With all the cases to choose from, why select any unreported case from a trial court, let alone one that was reversed on appeal? [Due to the lag time associated with preparing a casebook, the reversal probably came after the materials were set in print, and it was too late to do anything more than cite to the subsequent decision.] The defense to the bank's motion to compel arbitration was that the customer lacked capacity to contract. The trial court considered (and accepted) this defense, although CitiFinancial argued that the capacity question should be decided in arbitration.

In terms of doctrine, the question was whether the separability doctrine, which I argue is the most important single arbitration topic for purposes of contract law, extends to capacity to contract – and, if so, whether minority and mental incapacity should be treated in the same manner. (Infants will become adults in the normal course of events, but John Brown will never gain competence to contract.) The 5th Circuit applied Prima Paint, and reversed the trial court, ruling that the dispute, including the capacity issue, should be decided in arbitration. There is a division of authority on the topic.[229]

A chapter devoted to alternatives to courts for the settlement of contract disputes includes an informative 27 page section on arbitration (1050). These materials open with a discussion of the role of the architect in standard form construction contracts. While the architect is not an arbitrator with regard to most issues, and the AIA contracts specify arbitration pursuant to the AAA's Construction Industry Arbitration Rules, there is a useful analogy between the limited review of arbitration awards and the limited review for many decisions by the architect. The same is true for appraisers, and various others who are appointed to make specific determinations. Essentially, an honest judgment will be upheld, and proving the contrary is extremely difficult in practice.

The Uniform Domain-Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN) offers another example of dispute resolution that is not arbitration but is similar thereto. This matter is explored via the Parisi decision, which nicely explains the domain name dispute resolution system.[230] (1055)

Then the separability doctrine is considered – for the second time, with no reference to the earlier discussion in the capacity section.[231] Without any introduction, Murphy offers up a deeply edited version (two pages) of the Michael-Curry decision.[232] Michael-Curry is

the oddest possible case to illustrate the separability doctrine (the term does not appear in the opinion) because Minnesota is the only state with an established body of case law that rejects the separability doctrine. Michael-Curry, in which the court orders arbitration, is an exception to the general Minnesota rule that an assertion of fraud in the inducement puts the "making" of the entire contract claim at issue, including the arbitration term, and "that issue is more properly determined by those trained in the law."[233]

The final case is Brook, where the losing party in an arbitration proceeding challenged the award because the appointment process was considerably at variance with the process called for by contract.[234] **[Even worse, this was an administered arbitration, with the AAA being the administering body.] Nevertheless, the award was confirmed because Brook waived his claim failed to object in a timely manner (at the start of the arbitration proceeding).**

The extremely limited place for judicial review of arbitration awards is further elucidated in the note materials that follow Brook, with an introduction to the statutory basis of review (FAA, sec. 10), and a nonstatutory ground recognized by many (but not all) courts: manifest disregard of the law. [The other recognized nonstatutory ground for vacatur, the award is contrary to public policy, is not discussed.] The RUAA is introduced (1066, 1076), as is the preemptive role of the FAA on state law related to arbitration. Finally, the question of whether the parties can expand the scope of judicial review beyond that provided for in the FAA is raised, with a citation to the LaPine decision.[235]

19. John E. Murray, Jr., CONTRACTS: CASES AND MATERIALS (5th ed. 2001).

Murray seeks to be up to date, making a point in the Preface about coverage of the CISG, revised UCC Article 2, and electronic contracting. (iii) Arbitration apparently does not qualify. The Index does not include an entry for arbitration, and there is no mention of the topic in the Table of Contents. The Table of Cases includes two of the commonly used arbitration cases. Itoh (198) illustrates the battle of the forms; the subsequent comments are devoted entirely to 2-207, and do not mention arbitration. Hill is a note case after Zeidenberg. (232) The discussion is entirely about "rolling contracts," and nothing is said about arbitration.

20. Arthur J. Rosett & Daniel J. Bussel, CONTRACT LAW AND ITS APPLICATION (6th ed. 1999).

Rosett has a section on arbitration that presents the topic in an interesting context. (240-256) Chapter 2 deals with contract remedies. Chapter 3 addresses Countervailing Influences on Contract Remedies, and examines four "ways out of contract remedies":

restitution, tort, liquidated damages, and arbitration. Arbitration is a way out because the parties "give power to a new set of tribunals which apply a distinct set of rules." (169)

The arbitration materials open with Judge Jerome Frank's often-quoted explication of the legacy of judicial hostility to arbitration.[236] Note material introduces the FAA, UAA, and New York Convention. Next the authors present some dated materials that could be omitted – a three page excerpt from a 1973 article about arbitration in long-term contractual relationships, and an excerpt from an 1875 insurance case that discusses arbitration.

Two other arbitration decisions are presented. Sims raised a challenge to an arbitral award by the Diamond Dealers Club (DDC).[237] Although DDC procedures were inconsistent with the New York arbitration act, this claim was waived by participation in the arbitration proceeding without making a timely objection. The award was confirmed. LaPine addresses the question of whether parties may by contract expand the scope of judicial review beyond that specified in the FAA. [238] LaPine generated opinions from each of the three judges who heard the case. That circumstance is a teacher's delight; even Judge Kozinski (concurring) confessed that "I find the question closer than most." The tension between quite specific and limited judicial review provisions in the statute, and the central place of freedom of contract in arbitration is a useful context for considering limits on the power of contracting parties to alter the judicial process.[239]

21. Robert E. Scott & Jody S. Kraus, CONTRACT LAW AND THEORY (3d ed. 2002).

The concise Table of Contents does not mention arbitration. Hill is used on a section titled Contract Formation in the Internet Age. (303) The notes after the case address contract formation issues at length, but they do not discuss arbitration. No other arbitration decision is listed in the Table of Cases. Arbitration goes unmentioned in the section on unconscionabilty. The absence of any consideration of arbitration in this recently revised casebook by such distinguished authors is surprising.

22. Robert S. Summers & Robert A, Hillman, CONTRACT AND RELATED OBLIGATIONS: THEORY, DOCTRINE, AND PRACTICE (4th ed. 2001)

The remedies chapter closes with a short section about ADR. The importance of the topic is suggested by its length (4+ pages) and placement (last). An overview of arbitration is presented via a relatively lengthy excerpt (three pages) from a 1952 article by Soia Mentschikoff. [240] Not only is the article badly dated, it is not even the best article on the topic by Professor Mentschikoff.[241] She does, however, rate a full page picture. (356)

Hill is a main case in the Agreement Process chapter (530), but it is not listed under arbitration in the Index. Arbitration does receive attention in the agreement process materials, in a brief section on contract planning. It is suggested that a contract can specify "some mode of dispute resolution, such as arbitration."

Such explication as Summers provides for contract planning about arbitration is through a somewhat unfortunately chosen form provision. The centrally important scope provision is missing: "All disputes subject to arbitration under this Contract shall be submitted to arbitration ...." Whatever the explanation for the omission of the subject disputes, this is a serious error – all the more so in a section on drafting to avoid problems. The standard AAA form provision (edited to omit the AAA as administering body, if desired) would be far better.[242]

23. David H. Vernon, CONTRACTS: THEORY AND PRACTICE (2d ed. 1991).

Vernon includes two cases and one problem about arbitration, but the topic goes unmentioned in the chapters on contract formation and remedies. Vernon does examine the most important arbitration contract issues, separability. The vehicle is the Weinrott decision, in which New York abandoned its former position of hostility to the separability doctrine.[243] **Weinrott is also the source of the principle that a court may refuse to order arbitration where fraud permeates the entire contract. A note after the case cites Southland and Volt regarding the preemptive effect of the FAA.**

The Glen-Rich case offers students an interesting illustration of the problems that can (and often do) arise among owners, builders and subcontractors, and the role of the architect in the construction process.[244] **All this takes place in the context of AIA standard forms, which call for arbitration of most disputes. There is a cogent dissent by Judge Brietel, so Glen-Rich is an excellent teaching tool.**

Vernon focuses on problems, and presents fewer main cases or note material than most casebooks. The only problem that involves arbitration, Problem 11-4, is found in the chapter on third party beneficiaries. The problem is based on a provision in the rules for NASD members that disputes between member firms and their customers subject to arbitration must be arbitrated under the NASD Code of Arbitration. There was no arbitration provision in the agreement between the customer and the firm. The customer wants to compel arbitration of the dispute; the student is asked to devise a theory to achieve this result. Presumably, the theory is that the customer is a third party beneficiary of the agreement between the firm and NASD; the theory almost certainly would fail.

This problem demonstrates one of the difficulties with trying to stress current and real world problems. All customer-broker agreements now mandate arbitration (and many already did in 1991), so the very premise of the question is no longer valid. Indeed, to the extent that the problem purports to inform about contemporary business and dispute resolution reality, it misleads.

Problem 11-5 involved the purchase of a house that was infested with termites, and an insolvent seller. The issue was whether the buyer could successfully sue the licensed inspector who did the pre-sale termite inspection for the buyer. No mention was made of the fact that the form contracts used by termite and pest control firms typically provide for arbitration of all disputes.[245]

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1. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). If forced to identify a single date or event as the beginning of the modern arbitration revolution, I would choose the Moses Cone decision.

2. The Supreme Court decisions are particularly favorable to arbitration in the international context. See Stephen K. Huber & E. Wendy Trachte-Huber, Enforcement of International Arbitration Agreements by American Courts, Yearbook on International Financial and Economic Law 227 (Kluwer 1998).

3. Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846 (1961); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992). NYSE since 1830s; The Andersons (Grain).

4. Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 763 (2002).

5. My guess for the federal district courts is 250 decisions per year, in addition to those that result in subsequent court of appeals decisions (with opinion).

6. Stephen K. Huber, Arbitration in The Fifth Circuit, -- Texas Tech. L. Rev. ___ (2004).

7. Howsam v. Dean Witter Reynolds, 123 S.Ct. 588 (2002); Pacific Health Systems, Inc. v. Book, 123 S.Ct. 1531 (2003); Citizens Bank v. Alafabco, Inc., 123 S.Ct. 2037 (2003); Green Tree Financial Corp. v. Bazzle, 123 S.Ct. ___ (2003).

8. The volume of arbitration decisions is so massive that my general policy is to read only state supreme court, federal court of appeals, and U.S. Supreme Court decisions.

9. For evidence in support for these conclusions, see the discussion of the individual casebooks in the Appendix

10. 9 U.S.C. secs 1 et seq.

11. Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 766 (2002).

0.10. In preparation for a presentation to my faculty colleagues several years ago about the new arbitration law, I conducted an informal survey of law professors to determine what they had learned about arbitration while in law school. With a very few exceptions, the answers ranged from "little if anything" to "absolutely nothing," and no one recalled learning anything about arbitration in first year courses. The few exceptions learned something about arbitration in a labor law or ADR course. Very recently, many law schools have started to offer arbitration courses.

13. Ian R. Macneil, Richard Speidel & Thomas Stipanowich, FEDERAL ARBITRATION LAW (1994).

14. Lon Fuller died in 1986; the recent editions are entirely the work of Professor Melvin Eisenberg, a highly esteemed scholar of contract law.

15. Steven J. Burton & Melvin A Eisenberg, CONTRACT LAW: SELECTED SOURCE MATERIALS 561-601 (2003). The same form contracts have been used for several years. See e.g., pp. 487-527 in the 2001 edition.

16. See e.g., Richard Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform, 38 Hous. L. Rev. 1237 (2001); Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331; Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761 (2002); David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wisc. L. Rev. 33; Richard E. Speidel, Brooklyn L. Rev. ; Jean R. Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U.L.Q. 637 (1996);

17. Thomas E. Carbonneau, World Arb. & Med. Rep. (Aug. 2001). Professor Carbonneau now teaches at the Dickinson College of Law (Pennsylvania State University).

18. Professor Carbonneau finds it "difficult to believe" that this conclusion constitutes "an accurate representation of pedagogical reality.

19. Jean R. Sternlight J. Disp. Res. ( )

20. The discussion here is based on Laura J. Cooper, Teaching ADR in the Workplace Once And Again: A Pedagogical History, 53 J. Legal Ed. 1 (2003).

21. Shortly after the December 7, 1941 attack on Pearl Harbor, a national no strikes, no lockouts agreement was reached between labor and management. Within six months, the War Labor Board had 1,000 part-time personnel engaged in mediation, fact finding, and arbitration. Dennis R. Nolan & Roger Abrams, American Labor Arbitration: The Maturing Years, 35 U. Fla. L. Rev. 557, 564-565 (1983).

22. Cooper, 53 L. Legal. Ed. at 25.

23. See Laura J. Cooper & Dennis R. Nolan, LABOR ARBITRATION: A COURSEBOOK 23-24 (1994).

24. The lead authors of both editions are Laura J., Cooper and Dennis R. Nolan; the 2000 edition added Richard A. Bales as a third co-author.

25. Cooper, 53 J. Legal Ed. at 31.

26. Samuel Estreicher & Michael C. Harper, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW (2000); and Michael J. Zimmer, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (2000).

27. The AALS Directory of Law School Teachers provides a listing of faculty who teach various subject, but it proved unhelpful for present purposes. The AALS Directory lists Alternative Dispute Resolution as a course topic, with the notation that it includes Arbitration, Mediation, and Negotiation.

28. The Gateway approach to arbitration is discussed in part VI(D) of this article.

29. Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

30. Klocek v. Gateway, Inc., 104 F.Supp.2d 1332 (D.Kan. 2000).

31. C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977).

32. For a review of the issues, see James J. White & Robert Summers, UNIFORM COMMERCIAL CODE § 25 (4th ed. 1995).

33. The classic illustration is Poel v. Brunswick-Balke-Collender Co., 110 N.E. 619 (N.Y. 1915).

34. Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991). Judge Wisdom had a long and distinguished career serving on the 5th Circuit, but in this case he was sitting with the 3d Circuit.

35. This circumstance provides a sufficient reason to make an exception to my strong preference for higher court cases.

36. Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962

37. The Farnsworth casebook is a notable exception.

38. Marlene Industries Corp. v. Carnac Textiles, Inc., 380 N.E.2d 239, 242 (N.Y. 1978)

39. Schubtex, Inc. v. Allen Snyder, Inc., 399 N.E.2d 1154, 1156 (N.Y. 1979); Perval Industries, Inc. v. TM Wallcovering, Inc., 871 F.2d 7 (2d Cir. 1989) In practice, the proof problems are substantial. See Diskin v. J.P. Stevens & Cop., Inc., 836 F.2d 47, 51 (1st Cir. 1987); H & W Industries, Inc. v. Occidental Chemical Corp., 911 F.2d 1118, 1122 (5th Cir. 1990).

40. See, e.g., Comark Merchandising, Inc. v. Highland Group, Inc., 932 F.2d 1196, 1201 (7th Cir. 1991).

41. Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1285 (10th Cir. 1997). Also at issue was a provision requiring that arbitration take place within one year after the claim arose. This approach consistent with U.C.C. 2-725, which provides for a four year statute of limitations but allows parties to reduce the limitations period to one year. However, the Colorado version of 2-725 prohibits reduction of the four year limitations period.

42. FAA, secs. 2 and 3; UAA, sec. 1

43. 306 F.3d 17 (2d Cir. 2002). Specht is used in the latest edition of the Murphy casebook to illustrate electronic commerce.

44. Caspi v. Microsoft Network, L.L.C., 732 A.2d 528 (N.J.Super. 1999).

45. "Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rang over the waste of their time. And oral recitations would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them or that they did not remember or understand it." Hill v. Gateway 2000, Inc., 105 F.3d 1147, ---- (7th Cir. 1997).

46. Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 659 (1998).

47. Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981).

48. Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000)

49. The separability doctrine is discussed in Part VIII(B)(2).

50. 173 F.3d 933 (4th Cir. 1999).

51. Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 Hastings L.J. 459 (1995). The quoted phrases are from pages 460, 461 and 465 respectively.

52. Little v. Auto Stiegler, Inc., 63 P.3d 1064 (Cal. 2003).

53. In re FirstMerit Bank, N.A., 52 S.W.3d 749 (Tex. 2001).

54. Little v. Auto Stiegler, Inc., 63 P.3d 1064, 1085 (Cal. 2003).

55. Brown v. Wheat First Securities, Inc., 257 F.3d 821 (D.C.Cir. 2001).

56. A variant found in particularly in medical claims contracts allows a de novo trial if the award exceeds $X. See Benyon v. Garden Grove Medical Group, 100 Cal.App.3d 698; 161 Cal.Rptr 146 (1980); Saika v. Gold, 49 Cal.App.4th 1074, 56 Cal.Rptr.2d 922 (1996).

57. Cole v. Burns International Security Services, 105 F.3d 1465 (D.C.Cir. 1994). Prior to his appointment, Judge Edwards was a distinguished labor law professor and scholar, who was active in workplace issues and ADR. See e.g., Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668 (1986).

58. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

59. Clyde Summers, Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals, 1451 U. Pa. L. Rev. 457, 469 (1992).

60. Southland Corp. v. Keating, 465 U.S. 1 (1984).

61. FAA, sec. 10(a)(2); UAA, sec. 12(a)(2). RUAA, sec. 22(a)(2).

62. Prince, at 501-502. For the discussion of Graham, see pp. 460, 502-512.

63. Westinghouse Electric Corp. v. New York City Transit Authority, 623 N.E.2d 531 (N.Y. 1993).

64. U.C.C., sec. 2-302, comment 2.

65. AAA case, The Andersons, subsequent decision.

66. See RUAA, sec. 23(a)(5). An award should can be vacated if "there was no agreement to arbitrate, unless the person participating in the arbitration proceeding without raising the objecction ... not later than the beginning of the arbitration hearing."

67. The choice of Chicago as the situs for arbitration was upheld on the basis of Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 595 (1991).

68. Reflecting the "loser pays" approach common outside the United States, the consumer would have be responsible for Gateway's legal fees if the claim failed, and vice-versa. Of course, this risk is far more onerous for an individual than for a large business organization.

69. See discussion in section VI(D).

70. Susan Fitzgibbon, Teaching Unconscionability Through Agreements to Arbitrate Employment Claims, 49 St. Louis U.L.J. 1401 (2000).

71. Id. at 1412, 1410.

72. Id. at 1412-1413.

73. Marika F.X. Litras, Bureau of Justice Statistics, U.S. Dep't of Justice, Civil Rights Complaints in U.S. District Courts, 1990-1998 (2000).

74. Id.

75. Lewis L. Maltby, Employment Arbitration: Is It Really Second Class Justice?, Disp. Res. Mag., Fall 1999, at 23-24. See also, Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 57-59 (1998).

76. Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C.Cir. 1997).

77. Hooters, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

78. Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519, 60 Cal.Rptr. 138 (1997).

79. Grayson-Robinson Stores v. Iris Construction Corp., 168 N.E.2d 377 (1960).

80. Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (1976).

81. See e.g., Raytheorn Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989) (expressly rejects Garrity).

82. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

83. The Court quoted Restatement section 206, comment a in support of this position.

84. Parties may expressly limit the authority of an arbitrator to award exemplary or punitive damages, but they did not do so in the standard securities contract. [Of course, such a provision is trumped by a statutory authorization of punitive damages, and an overbroad prohibition of punitive damages may provide a court with the opportunity to declare the arbitration provision unconscionable and therefore unenforceable.] Some firms can and do seek to limit or prohibit punitive damages awards, but this approach has been expressly rejected in the securities industry. The NASD Rules prohibit member firms from including in their customer contracts and provision that "limits the ability of the arbitrator to make any award." NASD Rules of Fair Practice, Rule 21(f)(4).

85. Smith Barney Shearson Inc. v. Sacharow, 689 N.E.2d 884 (N.Y. 1997). At issue was the NASD's eligibility (for arbitration) rule. The court found that eligibility was to be determined by the arbitrator not a court, a position subsequently adopted by the Supreme Court. Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002).

86. The quoted language (used by the court without attribution) is from Arthur Miller, Death of a Salesman (19–).

87. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

88. In re Trans World Airlines, Inc., 46 Lab. Rep. 611 (1965).

89. CitiFinancial, Inc. v Brown, 2001 WL 1530352, rev'd 304 F.3d 469 (5th Cir. 2002).

90. See discussion in section V(C)(2).

91. My recommendations are found in part VIII.

92. There are two other instances where a single firm is involved in a hugely disproportionate number of reported arbitration cases. In securities arbitration, the firm is Shearson; in franchise arbitration the firm is Doctor's Associates (DAI), the Subway Sandwich Shop franchisor. For a collection of DAI cases, see Stephen K. Huber & E. Wendy Trachte-Huber, ARBITRATION: CASES AND MATERIALS 199-214 (1998) and Supplement (2002).

93. Smith v. Gateway, Inc., 2002 WL 1728615 (Tex.App.) (arbitration; subsequent award confirmed); Borowiec v. Gateway 2000, Inc., 772 N.E.2d 256 (Ill.App. 2002) (no arbitration); Licitra v. Gateway, Inc. 189 Misc,2d 721, 734 N.Y.S.2d 389 (Sup.Ct. 2001) (no arbitration); Edmond v. Gateway 2000, Inc. 2001 WL 359176 (Conn.Super.) (arbitration); Westendorf v. Gateway 2000, Inc., 2000 WL 307369 (Del.Ch.) (arbitration); Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (App.Div. 1998) (arbitration, but ICC provision struck); Filias v. Gateway 2000, Inc., No. 97C 2523 [N.D.Ill., January 15, 1998], *transferred by* 1997 U.S. Dist. LEXIS 7115 [E.D.Mich., Apr. 8, 1997, Zatkoff, J] (unreported decision discussed in Brower) (AAA arbitration, Gateway did not argue for ICC provision). See also Parnes v. Gateway 2000, Inc. 122 F.3d 539 (8th Cir.)(unsuccessful securities fraud claim).

94. A Westlaw search using the terms “Dell Computer” & “Arbitration” generated no cases. The search terms that produced the Gateway cases were “Gateway Computer” & “Arbitration.” Some older cases were found through “Gateway 2000" & “Arbitration.”

95. Hill, which involved the same contract terms as Brower, upheld the choice of forum on the basis of Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

96. Smith v. Gateway, Inc., 2002 WL 1728615 (Tex.App.).

97. The provision is quoted in Licitra v. Gateway, Inc., 189 Misc,2d 721, 723; 734 N.Y.S.2d 389, 391 (Sup.Ct. 2001).

98. Jean R. Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U.L.Q. 637 (1996);

99. Mark E. Budnitz, Arbitrtion of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection, 10 Ohio St. J. Disp. Res. 267 (1995).

100. David Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wisc. L. Rev. 33, __.

101. Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 333 (1997).

102. The reference is to Vimar Seguros y Reaseguros, S.A. v. M?V Sky Reefer, 515 U.S. 528 (1995), which upheld the arbitration provisions in standardized international maritime bills of lading in use throughout the world, and based on the Hague Rules to which the all the leading maritime nations including the United States are parties. As for the consequences of the Sky Reefer decision, a lawyer who specialized in litigation of cargo disputes in American courts, identified two: lower freight rates due to a decrease in cargo claims litigation, and lower legal fees – “most U.S. cargo plaintiff and defense lawyers will be will be looking for other employment.” Charles M. Davis, Sky Reefer: Foreign Arbitration and Litigation Under COGSA, 8 U.S.F. Maritime L.J. 73, 88 (1996). Arguably, these consequences should be seen as salutary developments for both shippers and carriers, with result in lower prices for the consumers about whom we all profess to be concerned.

103. Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761 (2002).

104. The leading supporters are Christopher R. Drahozal and Stephen J. Ware, both of whom now teach at the University of Kansas Law School. Both can be classified as being of the pro-business “law and economics” persuasion, who like arbitration because it is a creature of contract, and removes cases from courts and juries. Professor Ware is critical of the separability doctrine, which favors arbitration, because it undermines the pure contract model. Indeed he writes of “the branch

of contract law known as arbitration law ...." Stephen J. Ware, Employment Arbitration and Voluntary Consent, 25 Hofstra L. Rev. 83, 160 (1996).

105. Placement of materials is a relevant factor. The Knapp casebook takes a measured approach to commercial arbitration, in a useful three page section on that topic – but it is found in the las three pages of the casebook, where it is likely to be omitted or to be overlooked in the rush to complete the course materials.

106. This was Gompers' answer to the question: What do the unions want? Add citation.

107. FAA, sec. 2. The reference to a written contract allows the argument that the contract was formed before the arbitration term was conveyed to the other party. Judge Easterbrook's rolling contract approach is more difficult to sustain for arbitration than for other purported terms of an agreement.

108. For a complete specification of the RUAA innovations, see Stephen K. Huber & E. Wendy Trachte-Huber, Arbitration in the 1990s: The Top Ten Developments, Disp. Res. J. 24, 32-33 (Nov. 2000 – Jan. 2001).

109. Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 982-985 (2d Cir. 1942).

110. See e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, --- (1989); Mitsubishi Motors Corp. v. Soler Chyrsler-Plymouth, Inc., 473 U.S. 614, ___ (1985);

111. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Howsam v. Dean Witter Reynolds, Inc., 123 S.Ct. 588 (2002).

112. See Willian W. Park, The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetence Has Crossed the Atlantic, 12 Arb. Int'l 137 (1996).

113. Howsam v. Dean Witter Reynolds, 123 S.Ct. 588 (2002). The decision was unanimous (8-0). Justice Thomas concurred, and O'Connor did not participate.

114. Pacificare Healthy Systems, Inc. v. Book, 123 S.Ct. 1531 (2003). The decision was unanimous (8-0). Justice Thomas did not participate.

115. 18 U.S.C. sec. 1961 et seq.

116. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 241. For an argument that RICO claims are "not appropriate for arbitration," see Ronald J. Offenkrantz, Arbitrating RICO: Ten Years After McMahon, 1997 Colum. Bus. L. Rev. 45, 61.

117. See Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1062 (11th Cir. 1998).

118. 123 S.Ct. at 1534.

119. 123 S.Ct. at 1535-1536.

120. Green Tree Financial Corp. v. Bazzle, 539 U.S. ___, 123 S.Ct. ___ (2003). [Green Tree now is part of Conseco Financial Corporation.] Bazzle did not produce a majority opinion in the Supreme Court. There is a plurality opinion for four Justices by Justice Breyer, with Justice Stevens providing the fifth vote to produce a majority result.

121. For a critique of Bazzle, see Stephen K. Huber, Confusion About Class Arbitration, 6 J. Tex. Consumer L. ___ (2003).

122. Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

123. The Murphy casebook offers the most coverage of separability, but it does so in two different places with two different cases, without any cross-reference between them.

124. This is a highly stylized and generalized rendition of a considerably messier set of facts.

125. FAA, section 4.

126. 388 U.S. at ___.

127. The FAA commerce language is unique: "contract evidencing a transaction involving commerce ...." FAA, sec. 2. The Court subsequently held that this language encompasses the full extent of the commerce power. Allied-Bruce Terminex Companies, Inc. v. Dobson, 513 U.S. 265 (1995).

128. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

129. The Court has repeated reiterated the broad preemptive impact of the FAA. Southland Corp. v. Keating, 465 U.S. 1 (1984); Allied-Bruce Companies, Inc. v. Dobson, 513 U.S. 265 (1995) (despite brief by twenty state attorneys general arguing that FAA did not apply to state court proceedings); Green Tree Financial corp. v. Bazzle, 123 S.Ct. 2402 (2003) (despite brief by a large number of law professors arguing that FAA did not apply to state court proceedings).

130. CitiFinancial v. Brown, 304 F.3d 469 (5th Cir. 2002).

131. Id. at 687, quoting Perry v. Thomas, 482 U.S. 483, 492 (1987).

132. Citation to New York case.

133. RUAA, sec. 2(b). The Commentary specifies that "section 2(b) is intended to follow the separability doctrine outlined in Prima Paint ...."

134. W. Lawrence Craig, et. al., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION sec. 5.04 (1991).

135. FAA, section 10. The UAA, section 12, and the RUAA, section 19, are in accord.

136. For a comparison of the major provisions of the English Act and the FAA, see Adam Samuel, Arbitration Statutes in England and the USA, Arb. & Disp. Res. J. at 2 (March 1999).

137. The nature of the uniform laws process militates against taking controversial positions, because the goal is to create a model statute that will be enacted without material changes throughout the country.

138. LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997). This topic has generated considerable commentary in the law reviews.

139. A person could be retained to arbitrate all the disputes between two parties. Such arrangements are sometimes used in the labor-management arena, where the person is called an "umpire."

140. FAA, section 11.

141. Green Tree Financial Corp. v. Bazzle, 539 U.S. ___, ___ (2003).

142. A stronger party may use the attendant delay to its advantage. See e.g., Engalla v. Permanente Medical Group, 938 P.2d 903 (Cal. 1997)

143. FAA, sec. 5.

144. Full disclosure: my wife was formerly a Vice-President (one of many) at the AAA.

145. The "then in force" language ensures that the dispute is governed by the AAA Rules at the time the dispute arises, rather than those in use when the parties made their contract.

146. See e.g., Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846 (1961); Lisa Bernstein Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992).

147. See William Dodge, Why Contracts Teachers Fail to Teach the CISG, ___ J. Legal Ed. ___ (20__).

148. 21 U.S.T. 2517 (1970). See generally, Albert Jan van der Berg, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981).

149. See generally, Howard M. Holtzmann & Joseph E. Neuhaus, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989).

150. Southland Corp. v. Keating, 465 U.S. 1 (1984). Prima Paint is discussed in section VIII(B)(2).

151. Allied-Bruce Terminex Cos v. Dobson, 513 U.S. 265 (1995). The FAA applies to any contract "evidencing a transaction involving language." Section 2. This language is unique to the FAA, leaving room for the argument about its meaning.

152. Allied-Bruce Terminex Cos v. Dobson, 513 U.S. 265 (1995). This time Justice O'Connor concurred, even though she continued to believe that her Southland dissent was correct, based on considerations of stare decisis. She concluded that Southland had not proven to be unworkable, and of course Congress is free to amend the FAA. Accordingly, the proper forum for considering preemption arguments is Congress not the courts.

153. Green Tree Financial Corp. v. Bazzle, 123 S.Ct. 2402 (2003). For the professors brief, see 2003 WL --------.

154. Arbitration is "outcome determinative," see Guaranty Trust Co. v. York, 326 U.S. 99 (1945), and therefore "substantive" for Erie purposes. Bernhardt v. Polygraphic Co. of American, 350 U.S. 198 (1956).

155. Allied-Bruce Terminex Cos v. Dobson, 513 U.S. 265 (1995).

156. Citizens Bank v. Alafabco, Inc., 123 S.Ct. 2307 (2003).

157. 886 P.2d 931 (Mont. 1994)

158. For afficionados of such literature, the closest analogy is found in some of the opinions of former Pennsylvania Supreme Court Justice Michael Musmanno.

159. Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

160. "In Southland we held"; "In Perry we reiterated"; "In Allied-Bruce we restated"; "Repeating our observation in Perry"; "What states may not do"; "By enacting section 2, we have several times said"; "Courts may not"; "Montana's statute directly conflicts"; "It bears reiteration"; and "this Court's precedents indicate."

161. 54 P.3d 1 (2002), cert. Denied, 123 S.Ct. 1633 (2003). See Carroll E. Neesmann, Montana Court Continues Its Hostility to Mandatory Arbitration, ABA Disp. Res. J. 22 (Feb./April 2003).

162. Wilko v. Swan, 346 U.S. 427 (1953).

163. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (1934 Act, RICO); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) [Wilko reversed and disavowed].

164. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)

165. This topic is discussed at length in section V(C).

166. Little v. Auto Stiegler, Inc., 63 P.3d 1064 (Cal. 2003).

167. Hooters, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

168. Martindale v. Sandvik, Inc., 800 A.2d 872 (N.J. 2002).

169. Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc. 598 F.Supp. 353 (N.D.Ala. 1984). A reasonable student might conclude – incorrectly in this instance – that between the highest New York court and a trial court in Alabama, the former is the better authority.

170. Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992). This excellent article nicely illustrates how the "law" applied by a trade association can differ from the law of the land.

171. Matter of Sprinzen, 389 N.E.2d 974 (N.Y. 1979).

172. Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265 (1995).

173. Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405 (N.J.Super. 2000).

174. Recently the New Jersey Supreme Court, in a decision upholding an employee arbitration agreement, cited Quigley for the proposition that "in New Jersey, continued employment has been found to constitute sufficient consideration to support certain employment-related agreements." Martindale v. Sandvik, Inc., 800 A.2d 872 (N.J. 2002). This 4-3 decision, with a strong dissent, would make a better teaching tool for those who want to explore arbitration in the employment context.

175. 924 P.2d 357 (Utah 1996).

176. This circumstance provided a severe temptation to award less than five points here (which I resisted), and illustrates that an apparently objective point system provides only an approximation of reality.

177. Berendt, et. al., discussed above.

178. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

179. Broemmer v. Abortion Services of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992). The court declined to enforce the arbitration provision there was no need to discuss any arbitration issues.

180. Restatement 2d, sec. 261, illustrations 2 and 3.

181. Hooters, Inc. v. Phillips, 173 F.3d 933 (4th cir. 1999).

182. Morrison v. Circuit City Stores, Inc. 70 F.Supp.2d 815 (S.D.Ohio 1999).

183. The items not listed include Itoh, a main case (210); note coverage of Hill (221); note coverage of Brower (222); and a summary of Klocek (222).

184. Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972).

185. In re Arbitration Between Acadia Company & Irving Edlitz, 165 N.E.2d 411 (N.Y. 1960).

186. The case of Wasserman's Inc. v. Township of Middletown, 645 A.2d 100 (N.J. 1994)

187. See particularly, Lon Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc. L. Rev. 3.

188. See Steven J. Burton & Melvin A. Eisenberg, CONTRACT LAW: SELECTED SOURCE MATERIALS 562-601 (2003). Earlier editions of the Supplement made use of the same four contracts.

189. John S. Murray, Alan Scott Rau & Edward P. Sherman, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS (2d ed. 1996).

190. Russell J. Weintraub, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING (2d ed. 1997).

191. Aimcee Wholesale, 237 N.E.2d 223 (N.Y. 1968).

192. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Gilmer v. Intrerstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Nghiem v. NEC Electronics, Inc., 25 F.3d 1437 (9th Cir. 1994); San Juan v. American Board of Psychiatry and Neurology, Inc., 40 F.3d 247 (7th Cir. 1995); Kotam Electronics, Inc. v. JBL Consumer Products, Inc. 93 F.3d 724 (11th Cir. 1996) (en banc).

193. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express Inc., v, McMahon, 482 U.S. 220 (1987).

194. Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761 (2002), discussed at fn. .

195. As commonly happens with casebooks revisions, the authors divide up the material with each taking primary responsibility for different parts. Still, this is a mater, for better and for worse, of joint and several responsibility.

196. Rollins, Inc. v . Foster, 991 F.Supp. 1426 (M.D. Ala. 1998).

197. Cooper v. MRM Investment Co., 199 F.Supp.2d 771 (M.D.Tenn. 2002); Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002).

198. Martindale v. Sandvik, Inc., 800 A.2d 872 (N.J. 2002).

199. Id. at 888.

200. In re Halliburton, 80 S.W.3d 566 (Tex. 2002). I regularly tell my students not to assume that the law of Texas is the same as that in California.

201. Richard Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call For Reforem, 38 Hous. L. Rev. 1237 (2001).

202. See Marc Galanter, Why The Haves Come Out Ahead: Reflections on the Limitations of Judicial Law Reform, __ Law & Soc'y Rev. ___ (19).

203. Macauley comes in two forms: the two volume soft cover version discussed here, and a one volume hard cover version that is titled CONTRACTS IN ACTION: THE CONCISE COURSE (2003). The later is 1,100+ pages in length, with the reduction in pages achieved largely by reduced textual material. [The hard cover book does not explain how the two differ; an item-by item comparison of the arbitration materials in the two versions of Macauley would involve more detail than is likely to interest even the most dedicated readers.]

204. I approve of this approach. See E. Wendy Trachte-Huber & Stephen K. Huber, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS (1996), which weighs in at about 1,400 pages.

205. Fabyanske and Halverson, Arbitration: Is it an Acceptable Method of Resolving Construction and Contract Disputes?, 16 The Forum 281 (1980) (publication of the ABA section of Insurance, Negligence and Compensation Law).

206. Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

207. Smith Barney Shearson Inc. v. Sacharow, 689 N.E.2d 884 (N.Y. 1997).

208. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

209. Ramirez v. Circuit City Stores, Inc., 76 Cal.App.4th 1229, 90 Cal.Rptr.2d 916 (1999).

210. David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an age of Compelled Arbitration, 1997 Wisc. L. Rev. 33.

211. Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002), on remand after the court's initial decision was reversed by the Supreme Court. Circuit City Stores v. Adams, 532 U.S. 105 (2001).

212. Macneil states that he "played only a very modest reviewing role in this revision." (xii)

213. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). Warrior & Gulf is one of the "Steelworkers Trilogy," three cases involving the United Steelworkers decided by the Court on the same day with opinions by Justice Douglas, and appearing in consecutive pages of the United States Reports.

214. Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989)

215. Advanced Micro Devices v. Intel Corp., 885 P.2d 994 (Cal. 1994).

216. Perini Corp. v. Greate Bay Hotel & Casino, Inc., 610 A.2d 364 (N.J. 1992),

217. Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 640 A.2d 788 (N.J. 1994). Macneil notes this fact, but uses Perini instead of Tretina anyway.

218. Broemmer v. Abortion Services Of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Merit Insurance Co. v. Leatherby Insurance Co., 714 F.2d 673 (7th Cir. 1983).

219. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 838 (1995).

220. Volt Information Services, Inc. V. Stanford University, 489 U.S. 468 (1989); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

221. Harry G. Prince, Unconscionability in California: A Need For Restraint and Consistencey, 46 Hastings L.J. 459, 502-512 (1995).

222. Ian R. Macneil, Ricard E. Speidel & Thomas Stipanowich, FEDERAL ARBITRATION LAW (1994).

223. Much of the material was drawn from Richard E. Speidel, Arbitration of Statutory Rights Under the Federal Arbitration Act: The case for Reform, 4 Ohio St. Disp. Res. J. 157 (1989).

224. Textile Unlimited, Inc. v. A .. BMH and Co., Inc., 240 F.3d 781 (9th Cir. 2002).

225. Roe v. Gray, 165 F.Supp.2d 1164 (D.Col. 2001).

226. Deer Stags, Inc. v. Garrison Industries, 2000 WL 1800491 (S.D.N.Y. 2000).

227. Specht v. Nescape Communications Corp., 306 F.3d 17 (2d Cir. 2002). Specht consumes 9+ casebook pages, as much as the three previously discussed arbitration cases.

228. CitiFinancial, Inc. v. Brown, 2001 WL 1530352 (N.D.Miss.), rev'd sub. nom. Primerica Life Insurance Co. v. Brown, 304 F.3d 469 (5th Cir. 2002)

229. See Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000).

230. Parisi v. Netlearning, Inc., 139 F.Supp.2d 745 (2001). The RUAA and ICANN provisions are compared in Richard E. Speidel, ICANN Domain Name Dispute Resolution, The Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law, 6 J. Small & Emerg. Bus. L. 167 (2002).

231. Since I regard the separability doctrine as the most important single matter for a contracts student to know about, there are many worse sins of omission and commission in contracts

casebooks, but as one who has to cover contracts in a four-credit, first semester course, duplication is an unaffordable luxury.

232. Michael-Curry Co. v. Knutson Shareholders, 449 N.W.2d 139 (Minn. 1989)

233. Atcas v. Credit Clearing Corp., 292 Minn. 334, 350 (1972), quoted with approval in Michael-Curry.

234. Brook v. Peak Int'l, Ltd., 294 F.3d 668 (5th Cir. 2002) (1069).

235. In an error, the book states that the 5th circuit takes a contrary position, followed by a citation to Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001). The 5th circuit was the first to recognize expanded judicial review by contract. Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 996-997 (5th Cir. 1995).

236. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982-985.

237. Sims v. Siegelson, 246 A.D.2d 374, 668 N.Y.S.2d 20 (1998). Professor Lisa Bernstein's excellent article on arbitration in the diamond trade is not cited, although it would make a nice pairing with this case.

238. LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997)

239. This topic has generated several inconsistent court of appeals decisions, and an extensive scholarly literature. For an overview of the topic, see Richard C. Solomon, Appeals of Arbitration Awards by Agreement: Why They Should be Allowed, Disp. Res. J., May-July 2003, at 58.

240. Soia Mentschikoff, The Signifigance of Arbitration – A Preliminary Inquiry, 17 Law. & Contemp. Prob. 698 (1952).

241. See Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846 (1961).

242. "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction."

243. Matter of Weinrott (Carp), 298 N.E.2d 42 (1973). Prima Paint would have been a far less interesting or important case had New York embraced separability earlier.

244. In re Methodist Church of Babylon and Glen-Rich Construction Corp., 267 N.E.2d 88 (N.Y. 1971)

245. See e.g., Allied-Bruce Terminex Cos., Inc. v. Dobson, 513 U.S. 265 (1995); State Farm Fire and Casualty Co. v. Gwin, 658 So.2d 426 (Ala. 1995) (case based on the same transaction as Dobson decision); Terminex Int'l Co. v. Stabbs, 930 S.W.2d 345 (Ark. 1996). The southern origins of these cases is not accidental. It reflects the fact that regular pest control treatment is

often a way of life, and not just something one does upon the sale of a residence. [Quarterly treatment is recommended in the greater Houston area.]