PART I

The FAA's History and Politics

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Introducing the FAA and Its Centenary

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Congress enacted the Federal Arbitration Act (FAA) in 1925,[1] just about 100 years ago, with the primary purpose of declaring agreements to arbitrate as enforceable as any other contract. During its century of existence, the FAA has been the subject of so much praise and criticism. A centenary offers an opportune moment to take a step back and reexamine the statute. To that end, this book gathers some praise, but largely is a collection of chapters containing critiques and suggestions for reform of either individual sections of the Act or the Act as a whole. Thirty distinct authors, each one an arbitration scholar, arbitrator, and/or arbitration practitioner, collectively created a roadmap for reform of the FAA or jurisprudence interpreting it for lawmakers and courts to consider for the future.

This chapter introduces the FAA itself and the impetus for the book, provides a broad overview of the successes and failures of the FAA to date, and lays the foundation for the chapters that follow. This chapter also briefly summarizes the eight parts of the book, and explains how it is organized.

I THE FAA'S ORIGINS

The FAA was passed by both houses of Congress, without a dissenting vote, and signed by President Calvin Coolidge on February 12, 1925. Effective January 1, 1926, the FAA provided that written agreements to arbitrate are "valid, irrevocable, and enforceable," absent existing state law defenses to the enforceability of any contract. Codified as section 2 of Chapter 1, Congress passed this law to (1) reverse the then-reigning judicial "revocability" doctrine, which declared predispute arbitration agreements revocable; and (2) place arbitration agreements on an equal footing with other contracts, so merchants could rely on the courts to enforce the obligation to arbitrate and the resulting award. In addition to this substantive provision, the FAA includes a few relevant definitions in section 1, and fourteen primarily procedural sections for courts to invoke when addressing matters involving arbitration. While

[1] 9 U.S.C. §1 *et seq.*

case law interpreting sections 1 and 2 of the FAA is voluminous, cases interpreting the procedural sections are far less numerous. Indeed, the Supreme Court has interpreted section 2 of the FAA dozens of times since the middle of the twentieth century.

II THE FIRST HUNDRED YEARS

Congress has amended the FAA only a few times in the past hundred years. In 1958, it added Chapter 2 to incorporate the New York Convention on the Recognition of Foreign Arbitral Awards (the "New York Convention"). In 1975, it added Chapter 3 to govern international arbitration (involving a non-US citizen party or subject matter), and to incorporate the Inter-American Convention on International Commercial Arbitration, better known as the "Panama Convention." Most recently, in 2022, Congress added Chapter 4 – the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA) – barring the enforceability of predispute arbitration agreements for sexual harassment and sexual assault claims. While this book focuses primarily on provisions in Chapter 1 of the FAA, and does not address the New York or Panama Conventions at all, Chapters 16 and 17 of the book examine EFASASHA.

For sixty years, the FAA's effect was limited to contract disputes between commercial entities, because the FAA explicitly excluded many employment (and labor) contracts,[2] and courts declared statutory claims nonarbitrable. Over the last forty years, however, the Supreme Court, through dozens of opinions, interpreted its two substantive sections in ways leading to a significant expansion of the scope of the FAA to include statutory, employment, and consumer claims.

Since the 1980s, the Supreme Court has interpreted section 2 broadly, holding that it reflects "an emphatic federal policy in favor of arbitral dispute resolution"[3] (the process), and a "liberal federal policy favoring arbitration agreements"[4] (the contract to use the process). The Court has held that: (1) lower courts must apply a nearly irrebuttable presumption of arbitrability when deciding challenges to an arbitration agreement;[5] (2) the FAA applies in state and federal court to arbitration clauses in all agreements "involving commerce";[6] (3) the FAA preempts conflicting state law;[7] (4) federal statutory claims are arbitrable as a matter of public policy unless Congress explicitly states they are not;[8] and (5) parties are free to delegate to arbitrators the question of arbitrability.[9]

[2] Unionized labor arbitration is governed under the Labor Management Relations Act (LMRA), 29 U.S.C. §186.
[3] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).
[4] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
[5] *E.g.*, Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010).
[6] *E.g.*, Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003).
[7] *E.g.*, Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1917 (2022).
[8] *E.g.*, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
[9] *E.g.*, Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63, 65 (2010).

Meanwhile, in particular sectors and industries, arbitration has become an integral – often the exclusive – method for resolving disputes. These include the securities and construction industries, labor and employment sectors, many aspects of sports, and both public and private international disputes. Though arbitration can be an ideal method of resolving many disputes, it is less than ideal when the parties have grossly disparate bargaining power and one party is able to foist on the other an adhesive and one-sided arbitration agreement.

III THE NEED FOR REFORM

A confluence of events has turned scholarly and public concern to the need for reform of arbitration law. First, an increasing number of companies have inserted predispute arbitration "agreements" in consumer and employment contracts, creating a growing awareness that, simply by virtue of accepting a job or buying a product or service, consumers and employees have waived their right to bring claims in court. Because arbitration has become ubiquitous, the law should ensure it is fair and equitable.

Second, the Supreme Court's FAA jurisprudence over the past few decades, including its rejection of virtually all challenges to the enforceability of an arbitration clause in an adhesive contract, has sparked legislative proposals for reform. Indeed, one of our chapter authors has noted that, in the most recent session of Congress alone, 170 arbitration-related bills have been introduced in either the Senate or the House of Representatives, and several have been taken seriously by Congressional committees.

Relatedly, in more recent cases, the Supreme Court has declared that the arbitration process contemplated by the FAA is "bilateral" arbitration, not class or collective arbitration. Despite any definition of even the word "arbitration" in the text of the FAA, this declaration sets up the Supreme Court's justification for its consistent view that class arbitration is not the type of process covered by the word "arbitration" in the FAA and therefore class action waivers are enforceable.

Finally, the #MeToo movement inspired a bipartisan Congress to pass historic legislation creating a new Chapter 4 of the FAA, to end forced arbitration of claims alleging sexual assault and sexual harassment. However, that amendment has itself raised as many questions as it answered and spurred calls for further reform.

Despite these events, to our knowledge, no scholar has published a book gathering a comprehensive set of chapters proposing specific reforms to the FAA. This book, written by a diverse array of leading scholars and practitioners, both celebrates the FAA's successes and proposes specific reforms, focusing on domestic commercial and consumer, and employment arbitration.

So, what is wrong with the FAA? Well, the following thirty-one chapters identify some of the problems. They are wide-ranging: the statute's language is severely outdated (both in its use of gendered language and its reference to

era-specific terms); it has serious holes (it does not even define the term "arbitration," leading some courts to apply the FAA to mediation-like processes); and it fails to address modern developments in arbitration such as online hearings, class action waivers, and mass arbitration. Its ambiguous text raises more questions than provides answers: Does its language facially reflect Congressional intent? Does it apply only to business-to-business disputes or also to consumer and employment disputes? Does it apply in federal as well as state court and preempt conflicting state law? Does it define arbitration to exclude class and collective arbitration? Each chapter in this book offers plausible answers and suggestions on how to fix many of these problems.

IV THE CHAPTERS AHEAD

Structurally, the book's organization roughly corresponds to the order of the sections in the statute. Part I introduces the book, comprised of several chapters explaining the history of the statute and how its subsequent interpretation has created the need for reform. This part of the book traces the history of the FAA's passage, situating it squarely as a product of societal and political values prominent in the 1920s, and also explores the bipartisan and cross-ideological political trends relevant to the postenactment development of the Act.

The next six parts of the book correspond with a particular section of the statute in need of reform. Chapters within each part, each written by a different author, propose a variety of reforms to address the critique of that section of the statute. These proposals may not always be entirely consistent with each other, and no one person (including the editors) is likely to agree with each proposal. In our view, this is a major strength of the book – it collects many paths forward, allowing the proponents of each to make their best case and allowing reform-minded lawmakers to choose from among various options.

Specifically, Part II of the book includes chapters proposing various reforms to sections 1 and 2 of the Act. These chapters address structural bias, and definitional and other fairness concerns surrounding mandatory arbitration agreements. They also propose language to carve out mandatory arbitration of certain securities-related disputes – the law is arguably conflicting because Congress has already spoken clearly on the Securities and Exchange Commission's preeminent role in regulating investor arbitration at FINRA Dispute Resolution Services. In addition to statutory reform, this part of the book proposes a doctrinal tweak to courts' enforcement of delegation clauses.

Part III explores the role of state law under current FAA jurisprudence. Chapters in Part III propose eliminating the FAA preemption doctrine and the FAA's application to adhesive arbitration agreements, and propose incorporating the Revised Uniform Arbitration Act into the FAA to permit more states to regulate arbitration as they see fit.

Part IV explores various procedural provisions of the FAA and how federal courts have been interpreting them. In this part, chapter authors untangle complex issues of federal court jurisdiction over arbitration-related lawsuits, the purported right to a jury trial in section 4, and subpoena powers of arbitrators in section 7, especially in the online environment.

Part V focuses on interpretations of the FAA in the employer and consumer contexts. The chapters here explore ways in which current FAA language as well as jurisprudence hamper employees and consumers in pursuit of their statutory rights, and propose solutions to facilitate that pursuit.

Part VI considers the way the FAA provisions governing review of arbitration awards (sections 9, 10, and 11) can be modified to provide for better oversight over arbitration and accountability of arbitrators, and to better enable disputants to select truly neutral decision-makers.

Part VII considers how arbitral institutions and disputants themselves can better diversify the rosters of arbitrators rendering decisions on so many disputes, and whether the values of diversity, equity, and inclusion should be applied more forcefully in the arbitration process.

Finally, Part VIII boldly looks forward, and includes chapters proposing wholesale modernization of the FAA's terminology, suggesting the FAA as currently written and interpreted should remain, and proposing eliminating the statute altogether.

V CONCLUSION

This book brings together the best dispute-resolution scholars working today. We have assembled a balance of empiricists and theorists, legal scholars and leaders of dispute-resolution organizations, senior luminaries, and rising stars. Uniquely for books on dispute-resolution topics, the scholars espouse diverse political perspectives. This makes internal dissension inevitable, but also produces a robust debate on how arbitration reform is best effectuated.

In the end, this book's collection of reform proposals should leave our policymakers, legislators, and judges with much to think about to reform a process that impacts so many people but is based largely on a statute that turns 100 years old very shortly. May a celebration of the centennial of the FAA spur revision and reform to protect all those subject to binding arbitration agreements.

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The Birth of an Arbitration Nation

Imre Stephen Szalai

I INTRODUCTION

Sparked by expansive Supreme Court interpretations of the landmark Federal Arbitration Act (FAA), arbitration clauses have proliferated throughout the United States in connection with all types of transactions. One study found that, conservatively, there were more than 826 million consumer arbitration agreements in the country.[1] Also, in the workplace, about 80 percent of the largest companies in the US have used arbitration agreements for employment disputes, and more than 60 million workers are bound by such agreements.[2] No other country in the world uses arbitration as expansively. How did the US become an arbitration nation?

A particular political, legal, social, and economic environment during the early 1900s gave birth to the FAA, and the statute was originally designed to be more limited in scope to address specific needs from this period. To demonstrate this original intent and to provide context regarding the need to amend the FAA as its centennial approaches, this chapter explores the FAA's birth.

II A HISTORY OF THE FAA'S BIRTH

A deadly global pandemic; innovation and disruptive technologies rapidly changing how business is conducted; frustrations with an overburdened judiciary; war in Europe; panics in the financial sector. Sound familiar? This environment gave birth to the landmark FAA and similar state arbitration statutes during the 1920s.

Parts of this chapter are based on the author's prior work about the history of the Federal Arbitration Act, Outsourcing Justice: The Rise of Modern Arbitration Laws in America (2013).

[1] Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233 (2019).

[2] Imre Stephen Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, Employee Rights Advocacy Institute (2018); Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst. (2018).

A The Birthplace and the Chamber

New York City, which has deep connections to commercial arbitration, was the birthplace of modern arbitration laws in the US. New York enacted the first such law in 1920, and the same drafters and supporters of this law were the main driving force behind the FAA's enactment a few years later. To better understand the FAA's origins, it is helpful to understand the development of the related New York arbitration law.

By the time of the Revolutionary War, Manhattan had become an important commercial center. To promote commercial interests, a group of merchants met in Lower Manhattan in 1768 and organized the New York Chamber of Commerce, a core mission of which included "adjusting disputes relative to trade and navigation."[3] The Chamber's members immediately created an arbitration committee through which merchants could resolve disputes, and the Chamber's earliest arbitration records provide a window into the past and reflect New York's role as a leading maritime center. For example, one dispute involved the nondelivery of rum after the ship carrying rum crashed "a few leagues off sandy [*sic*] Hook" because of a sudden storm, and other disputes involved responsibility for the loss or damage of goods such as butter, fabric, flour, pork, and sugar.[4] From the founding of the United States and up through the 1800s, the New York Chamber actively resolved commercial disputes through its arbitration committee.[5] Although arbitration awards could generally be entered in court as a judgment, predispute arbitration agreements were not enforceable before the 1920s.[6]

During the 1870s, the nature of the Chamber's arbitration work became more formal. In 1874, the New York legislature established a "Court of Arbitration" to hear "mercantile disputes" through the Chamber.[7] New York's governor, with the consent of New York's senate, would appoint someone to serve as an arbitrator for this tribunal, which functioned as a joint undertaking between the State and Chamber. This Court of Arbitration would generally hear disputes related to New York's port or disputes between the Chamber's members.

The Chamber's Court of Arbitration operated for a quarter century, from 1874 to 1900, but tensions arose regarding this tribunal. The governor appointed a former judge as the permanent arbitrator,[8] and merchants believed this individual operated

[3] John Austin Stevens, Jr., Colonial Records of the New York Chamber of Commerce, 1768–1784, at 3 (1867).

[4] Arbitration Records of the Chamber of Commerce of the State of New York 6–8, 12, 28, 58, 59 (1913).

[5] Securities arbitration also has a long history in the US. Jill I. Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. Disp. Resol. 171 (2016).

[6] Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization 19–20 (1992) (prior to the 1920s, there was a "relative lack of enforceability of such agreements before an award was made").

[7] Act of April 28, 1874, ch. 278, 1874 N.Y. Laws 336.

[8] Chamber of Commerce of the State of New York, Commercial Arbitration 7 (1911).

the tribunal with excessive formality.[9] Also, funding problems arose because some people believed the government should not support what was perceived as a private, specialized tribunal.[10] When the official arbitrator, the former judge, died in 1900, the New York governor did not appoint anyone to replace him, and the operation of the Chamber's Court of Arbitration abruptly stopped.

By the dawn of the twentieth century, before modern arbitration laws were developed in the US, New York's environment was ripe for such development. New York was always the country's most populous city, and by 1900 it had become the leading financial, commercial, and manufacturing center, with more corporate headquarters than any other city and with easy access to railroad lines and maritime routes for shipping.[11] In this bustling environment, commercial disputes would naturally arise, along with a desire for an efficient system to resolve disputes.

Unfortunately, by 1900, New York's court system had "one of the most elaborate and least workable schemes ever devised for the resolution of disputes."[12] During the 1800s, New York's court procedures had grown excessively complicated, technical, and burdensome.[13] A New York judge, recognizing the business community's frustrations, said that merchants were "willing to do almost anything" to avoid submitting disputes to New York's complex and inefficient court system, and instead "[b]usiness men go to arbitration to avoid legal procedure."[14]

B The Father of Commercial Arbitration

During the early 1900s, reforming arbitration law became desirable in New York's business community, and the timing was perfect for a leader to arise. Charles Leopold Bernheimer, a dry goods merchant in Manhattan and a member of the Chamber, would eventually become obsessed with arbitration and spearhead these reform efforts in New York and nationwide.

A stroke of bad luck catalyzed Bernheimer's introduction to arbitration. After the Panic of 1907, with a major financial crisis rocking the country, Bernheimer experienced some business difficulties, such as canceled contracts. A Chicago merchant who had purchased clothing from Bernheimer wanted to cancel the transaction. The merchant therefore shipped the goods back to Bernheimer in New York, but the returned goods were not the original merchandise and instead were outdated,

[9] Julius Henry Cohen, They Builded Better Than They Knew 153 (1946).
[10] *The Court of Arbitration Bill*, N.Y. Times, May 1, 1875.
[11] Francois Weil, A History of New York 173, 182–84 (Jody Gladding trans., 2004).
[12] Paul D. Carrington, *Teaching Civil Procedure: A Retrospective View*, 49 J. Legal Educ. 311, 322 (1999).
[13] *Id.*; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 940 (1987).
[14] William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 Cornell. L. Q. 186, 199–201 (1917).

less valuable goods purchased during a prior season. Bernheimer felt cheated and grew frustrated with the limited options for resolving this dispute.[15] New York courts were viewed as inefficient and as having unnecessarily complex procedures, and most likely, such courts would not easily have jurisdiction over the Chicago merchant. Chicago courts were not an attractive option for Bernheimer; he probably felt uncomfortable litigating in distant, unfamiliar courts in Chicago.

Bernheimer therefore began exploring alternatives to resolve this dispute, and he learned about the use of commercial arbitration, including the Chamber's prior extensive experience with arbitration before 1900. Bernheimer, a German immigrant, wrote a letter to a lawyer friend in his birthplace in Germany to ask advice. His lawyer friend replied and observed that the US judicial system must be unworkable if it could not handle such a simple dispute, and Bernheimer's friend mentioned that German businesses often included arbitration clauses in their contracts.[16] Such clauses were fully enforceable under the German code of civil procedure, a copy of which he provided to Bernheimer. This German code was revolutionary because it made agreements to arbitrate future disputes enforceable.[17]

After learning of the German law and the successful use of arbitration in different commercial settings, Bernheimer reestablished commercial arbitration facilities at the New York Chamber in 1911, and Bernheimer became the head of the Chamber's arbitration committee for decades. In reaction to critiques of the more formal Court of Arbitration, which had ceased operating in 1900, the Chamber's newly formed arbitration committee under Bernheimer developed simple rules for "mercantile disputes"; the Chamber emphasized this system did "not attempt to deal with intricate questions of law which properly belong to courts."[18] Bernheimer also began lobbying for the modernization of arbitration laws in New York based on the revolutionary German code, which made predispute arbitration agreements enforceable. However, a few years later, when the First World War began – accompanied by anti-German sentiment in the US – Bernheimer avoided telling others about the German roots of his idea to modernize arbitration laws. When Bernheimer successfully reinstituted the Chamber's arbitration facilities, he also began extensive educational efforts to help other business organizations around the world engage in arbitration. Eventually, Bernheimer would spearhead efforts to enact modern arbitration laws at the state and federal level in the US, as well as help develop international arbitration treaties.

[15] Clarence F. Birdseye, Arbitration and Business Ethics 94 (1926).
[16] Letter from Benno Gump to Charles Bernheimer, April 1909, New York Chamber of Commerce and Industry Records Archival Collection, Series V, Rare Book & Manuscript Library, Columbia University in the City of New York, Box 311, Folder 43.
[17] E.J. Cohn, *Commercial Arbitration and the Rules of Law: A Comparative Study*, 4 U. Toronto L.J. 1, 16 (1941).
[18] Chamber of Commerce of the State of New York, *Monthly Bulletin* (Feb. 1914).