

In The News

Scott M. Kessler Explores Why the Second Circuit Now Treats Arbitration Agreements Like Any Other Contract in the ABA’s *Business Law Today*

June 10, 2026

Akerman Litigation Practice Group Partner [Scott M. Kessler](#) contributed “Four Recent Second Circuit Decisions Make Arbitration Just Another Contract” to the American Bar Association’s *Business Law Today*, a peer-reviewed publication of the Business Law Section, examining how certain 2025 decisions are redefining the enforceability and scope of arbitration agreements.

On formation, Scott examines *Davitashvili v. Grubhub Inc.* and *Sudakow v. CleanChoice Energy, Inc.*, noting that courts now require genuine assent at the point of contracting. A cluttered checkout interface or an arbitration clause introduced weeks after enrollment, without adequate notice, will not establish the consent necessary to compel arbitration. On scope, he explains that even broadly worded clauses will not automatically reach statutory claims — such as antitrust or consumer protection theories — that are conceptually distinct from the underlying transaction. On waiver, Scott notes that *Doyle v. UBS Financial Services, Inc.* eliminated the prior prejudice requirement, meaning a party that litigates before moving to compel arbitration now risks forfeiting that right entirely. On judicial oversight, he discusses *Frazier v. X Corp.*, in which the Second Circuit held that fee allocation

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disputes in mass arbitration proceedings belong in the arbitral forum, not federal court.

Scott counsels businesses and practitioners to make assent unmistakable at the time of contracting, draft arbitration clauses with precision as to scope, move to compel arbitration early, and expect procedural disputes — including fee allocation in mass-arbitration campaigns — to be resolved within the arbitral forum rather than in court.

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