TOPIC 7: ALTERNATIVE DISPUTE RESOLUTION

Overview

This chapter explores the resolution of disputes between individuals. More specifically, it explores the methods that individuals use to resolve disputes without resorting to civil litigation. Alternative dispute resolution includes any method or procedure for achieving this purpose; however, there are two commonly recognized processes - arbitration and mediation. Employing these resolution methods may be mandatory or voluntary. Further, these methods may not be exclusive. That is, the parties may employ mediation, arbitration, and litigation, all within the realm of a single dispute. This chapter will explore the procedures and general legal principles applicable to these processes.

VIDEO LESSON - INTRODUCTION

VOCABULARY & CONCEPTS

- Settlement
- Alternative Dispute Resolution (ADR)
- Advantages of ADR
- Mediation
  - Advantages & Disadvantages
- Voluntary & Mandatory Mediation
- Mediation Procedures
- Challenging a Mediation
- Arbitration
  - Advantages & Disadvantages
- Voluntary and Mandatory Arbitration
- Arbitration Procedures
  - Award
- Federal Arbitration Act
- Challenging an Arbitration
  - Voluntary
  - Mandatory
  - FAA Review
- Enforcing Arbitration Awards

TOPIC 7: ALTERNATIVE DISPUTE RESOLUTION - QUESTIONS & ANSWERS

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1. What is "settlement" of a legal dispute?

Settlement means that the parties to a legal dispute work out their differences and enter into an agreement to resolve the situation. The benefit of a settlement is that the parties maintain control over the outcome of the dispute. The parties are not subjected to a ruling, judgment, or award of a third-party decision maker. Businesses often settle legal disputes to avoid the high cost of litigation, maintain privacy, and to preserve the professional relationship with the other party. Also, juries tend to show favor to individual plaintiffs to the detriment of businesses. Individuals, on the other hand, settle disputes to avoid the long, tenuous litigation process and to make certain of some level of recovery. Achieving a settlement is a core objective of mediation, which is discussed in a separate section.

- ***Discussion***: Can you think of any other benefits of privately settling a matter, as apposed to pursuing litigation? Can you think of any situations where the above benefits of settlement are undesirable? Hint: Think about situations where you want to get your message or reason for dispute out to the public.

- ***Resource Video***: http://thebusinessprofessor.com/settlements/

2. What is "Alternative Dispute Resolution" (ADR)?

ADR, as the name implies, is an alternative to resorting to litigation to resolve a legal dispute between parties. The most common forms of ADR are:

- *Mediation*

- *Arbitration*

Since ADR is an alternative to litigation, disputing parties do not have to begin a lawsuit prior to using any form of ADR. Also, filling a lawsuit does not preclude the use of ADR in conjunction with the litigation. Some courts, such a family court, often encourage or require parties to undertake some form of ADR prior to moving forward with litigation.

- ***Resources Video***: http://thebusinessprofessor.com/what-is-alternative-dispute-resolution-2/

3. What are the advantages of using ADR to resolve disputes?

The effective use of ADR offers several distinct advantages:

- *Costs* - ADR may reduce the costs associated with litigation for the disputing parties. This is probably the most common reason for including an ADR clause in a contract or agreeing separately to submit a dispute to ADR.

- *No Jury* - Businesses generally prefer ADR to litigation because it avoids allowing a jury to decide a dispute.

ADR, unlike a jury trial, generally involves the use of one or more knowledgeable professionals to either decide or assist in resolving the dispute. This is far more practical than letting a random group of jurors resolve the issue.

- *Privacy* - Another reason to use ADR is that it is a private process; whereas, litigation and court records are open to the public. Individuals concerned with public knowledge of the dispute harming the company's brand or reputation strongly prefer the use of ADR to resolve disputes.

- *Business Relationship* - ADR can preserve the on-going business relationship between the parties, where litigation often destroys the relationship.

- ***Discussion***: Can you think of any other benefits to ADR over litigation? Should businesses include ADR clauses in all contracts? Should individuals dealing with businesses agree to an ADR clause or should they attempt to eliminate ADR clauses? Why?

- ***Practice Question***: Ryan runs a consulting business. All of his clients enter into an agreement to mediate any disputes arising under the agreement. If the mediation does not work, the client agrees to submit the dispute to arbitration. What are the advantages to the business of pursuing all available ADR methods rather than pursuing litigation?

- ***Resources Video***: http://thebusinessprofessor.com/what-are-the-advantages-of-alternative-dispute-resolution/

MEDIATION

4. What is "Mediation"?

Mediation is the process by which parties to a legal dispute employ a third party, called a "mediator", to assist in resolving the dispute. The mediator is an unbiased and disinterested third party. She generally has undergone special training in dispute resolution and possesses in-depth knowledge of the subject matter of the dispute. In most instances, a mediator is a licensed attorney who has mediator training. This is important, as the mediator should understand the legal principles that will apply to the dispute and be able to explain those legal principles to the parties. The mediator can honestly communicate with each party the process and possible results if the parties cannot resolve the dispute and decide to move forward with litigation. Mutual understanding of the parties is import in resolution of the dispute.

- *Note*: The mediator is not a decision maker; rather, she is a facilitator helping to bring the parties together toward a negotiated settlement. As such, she cannot deliver a binding decision on a matter. The parties must ultimately agree or refuse to settle the dispute.

- ***Resources Video***: http://thebusinessprofessor.com/mediation/

5. What are the advantages and disadvantages of mediation?

There are numerous advantages and a few disadvantages to mediating a dispute, as follows:

- *Control* - Recall that mediation allows the parties to retain control over the dispute. They are free to refuse to negotiate, and they are not required to find a resolution to the dispute. The voluntary nature of negotiation in the mediation process allows the parties to decide to pursue litigation or some other form of ADR. The level of control retained by the parties can also be seen as a disadvantage. Neither party can be certain that the mediation will result in a settlement. This lack of certainty can frustrate the parties with the process.

- *Costs* - There is significant cost savings associated with mediation. While the parties generally share the responsibility of paying the mediator, it avoids court fees, some legal fees, and other expenses associated with going to trial. Further, the cost of mediation is generally far lower than the cost of other ADR approaches, such as arbitration. The cost disadvantage of mediation is that it can still be expensive and not result in a resolution. A simple negotiation between the parties can resolve a dispute for free; but, employing counsel to represent the parties at mediation and employing the mediator can cost significant money. Generally, the mediator takes a small percentage of the total settlement amount between the parties.

- *Privacy* - As with other types of ADR, mediation is a private process. The parties do not have to disclose the dispute or any of the facts of the situation to the rest of the world. Litigation, on the other hand, is generally a public affair. Unless the court orders otherwise, anyone can attend a public trial and can access the court records. This includes access to all allegations, testimony, and the evidence presented in the case. The disadvantage to privacy generally concerns the expectations of the aggrieved party. In many cases, the injured party seeks compensation for the harm or loss to make certain that the alleged wrong is not repeated. Negotiating a settlement of the dispute outside of the public's knowledge does less to prevent a party from repeating the allegedly illegal conduct. This is particularly true when that party's conduct is intentional.

- *Relationships* - Disputes between parties can destroy their on-going relationship. Being able to work out a mutually agreeable settlement of the dispute can serve to preserve the relationship. This is important for businesses that depend upon each other as future business partners (such as in supplier-purchaser relationships). Litigation generally destroys the business relationship, as the process is highly competitive and confrontational. The negative aspect of mediation is that relationships can still be strained without any resolution to guide the relationship going forward. A judicial determination that one party's conduct is not legal establishes precedent to guide the future conduct of a business. A negotiated settlement does not always achieve this same effect.

The above-mentioned advantages and disadvantages of mediation are general examples. There may be any number of party or case-specific benefits or detriments to mediation.

- ***Discussion***: Can you think of any other benefits to pursuing mediation over litigation? Why do you think mediators are often successful in negotiating a settlement between parties? Do you think businesses generally see litigation as a favorable or unfavorable option? Why?

- ***Practice Question***: Mark and Sam are in a business relationship. They are now in a dispute over the quality of the last shipment of goods. While they generally get along well, they are unable to reach a resolution on this dispute. Mark and Sam are considering submitting their dispute to a mediator. What are the advantages of pursuing mediation?

- ***Resource Videos***: http://thebusinessprofessor.com/mediation-pros-cons/

6. How do the parties initiate mediation?

Mediation can be either mandatory or voluntary. General principles applicable to each are below:

- *Mandatory Mediation* - Mandatory mediation is initiated pursuant to a court order or pursuant to the law (statute or regulation). For example, it is common for jurisdictions or courts to mandate that the parties to a family dispute, such as a divorce, work with a government sanctioned mediator prior to initiating litigation. Remember, mediation does not involve a decision-maker. Mandatory mediation, therefore, simply requires that the parties begin the process. The parties are not forced to negotiate or arrive at a settlement. The hope is that requiring the parties to take part in mediation will help them to voluntarily work out the legal dispute without having to resort to litigation.

- *Voluntary Mediation* - Voluntary mediation is initiated pursuant to agreement among the parties. The parties may establish this agreement before a legal dispute arises or afterward. Pre-dispute mediation agreements are generally part of a separate contract between the parties. That is, the parties enter into any form of contract. A clause in the contract dictates that any legal dispute between the parties must be submitted to mediation before pursuing litigation or another dispute resolution method. A post-dispute mediation agreement generally arises pursuant to a separate agreement between the parties to employ a mediator to resolve the dispute. That is, the parties seeking to resolve a legal dispute recognize the value of pursuing mediation and voluntarily enlist the services of a mediator.

People often confuse mandatory and voluntary mediation by assuming that mediation is mandatory because there is a mediation clause in a contract. Even though a contract contains a mediation clause, it was still a voluntary decision to enter into that contract. As such, this is voluntary mediation. Mandatory mediation only arises pursuant to law or judicial procedure.

- ***Discussion***: Why do you think some jurisdictions, either through statute or court procedure, impose mandatory mediation? Do you think mandatory mediation is effective when the parties always retain the ability to refuse a settlement or resolution of the dispute?

- ***Practice Question***: Jonathan enters into a service contract with Melinda. Soon after entering into the agreement, the relationship begins to sour. Now Jonathan and Melinda do not want to continue doing business together and they have a dispute over the amount owed under the contract for services. The parties are considering undertaking mediation in an attempt to resolve the dispute. How would Jonathan and Melinda go about submitting their dispute to mediation?

- ***Resources Video***: http://thebusinessprofessor.com/how-do-parties-initiate-mediation/

7. What are the procedures for carrying out mediation?

The voluntary mediation process is far less rigid than that of mandatory mediation. Involuntary mediation is somewhat of an informal process. The mediator may employ any number of techniques to help the parties arrive at a negotiated settlement. Mandatory mediation procedure may be subject to law or court order. The most common format for carrying out voluntary or mandatory mediation of a legal dispute with or between businesses is as follows:

- *Delivery of Evidence* - Each party provides the mediator with all of the facts and evidence surrounding the

dispute. The mediator will set a date for the mediation.

- *Introductions* - At the mediation, the mediator will introduce everyone, give an overview of the mediation process, and summarize the dispute at hand.

- *Initial Statements* - The mediator will often allow the parties to give an initial statement directed to the mediator and the other party. This serves a couple of purposes. First, it appeases the parties to allow them to voice their opinion on the matter. Second, it allows the parties to state a summary of their belief and facts in a persuasive manner.

- *Private Sessions* - Following the initial statements, the mediator will generally break the parties out into private sessions or caucuses. This means that the parties are placed in separate rooms, while the mediator moves back and forth between the rooms to negotiate the position of each party. These private sessions are optional at the mediator's discretion, though, they prove to be very effective in getting the parties to exchange dialogue or enter into negotiations. They tend to break down the competitive spirit that is present when the parties are together. The mediator is in the position to play devil's advocate and help each party understand the logic and legality of the other party's argument. Importantly, the mediator explains the likely results at trial if the parties proceed to litigation. This can be the strongest tool of the mediator in opening the parties up to negotiation.

- *Formalization of Agreement* - If the mediator is successful, she will assist the parties in negotiating a resolution to the dispute. Once a consensus is reached, counsel for one party is then directed to draft a legal contract memorializing the terms of the settlement. The parties sign the contract to settle the dispute. They are legally obligated act in accordance with the terms of the contract.

Involuntary mediation may follow the same or similar steps, but the process is more closely dictated by court procedure, statute, or regulation.

- ***Discussion***: Do you think it is important to give a mediator autonomy in carrying out the mediation process? Why or why not? Can you see any disadvantages to employing the process outlined above? Can you think of any techniques that could help the disputing parties arrive at a negotiated settlement?

- ***Practice Question***: How and why do mediators use the isolation of the parties and conducting private sessions to help them reach a resolution of their dispute?

- ***Resource Video***: http://thebusinessprofessor.com/what-is-the-process-of-carrying-our-mediation/

8. Challenging the mediation agreement?

A successful mediation results in a negotiated settlement between the parties. This is a formal contract that memorializes the agreed-upon resolution of the legal dispute. Once the parties enter into this agreement, it takes the place of the underlying dispute. The parties can no longer pursue litigation for the underlying dispute without breaching this contract. If, after the settlement agreement is signed, the parties wish to dispute the agreement, they must bring a contract action in court attacking the validity of the agreement. In this situation, however, the suing party is not suing regarding the underlying dispute but is arguing that the settlement agreement is not valid based upon some contract law principle. If the party is successful in rescinding (doing away with) the mediation agreement, the parties would be free to litigate the

underlying dispute or pursue other forms of ADR.

- ***Discussion***: Should parties be able to revisit the subject of the mediation even if the mediation resulted in a settlement agreement? What are the arguments for and against disregarding the settlement agreement?

- ***Practice Question***: Venus and Maria submit their dispute to mediation. After several hours, they reach a resolution of their dispute and sign a settlement agreement. The next morning, Venus regrets having signed the settlement agreement. She thinks that the hours of mediation unduly pressured her into reaching an agreement. What are Venus's options for pursuing litigation of the original dispute?

- ***Resource Video***: http://thebusinessprofessor.com/how-do-parties-challenge-a-mediation-agreement/

ARBITRATION

9. What is "Arbitration"?

Arbitration is a form of ADR in which the parties choose to forgo litigation and solve their problems through a third-party decision maker, known as an "arbitrator". The key characteristic of arbitration is that the parties are hiring one or more unrelated and unbiased third parties to decide the legal dispute. Basically, the arbitrator(s) acts as judge and jury in deciding the dispute. Unlike in mediation, the arbitrators are decision makers. Arbitration yields a final resolution of the dispute in the form of an arbitrator's "award". The award generally consists of monetary damages, but may include equitable remedies as necessary. Parties may generally enforce an arbitrator's award similarly to a judgment.

- *Note:* It may surprise you to know that popular reality court television shows are actually arbitrations, as apposed to trials. The proceeding is made to look like a trial proceeding, with the arbitrator acting like (and even taking the title of) a judge.

- ***Discussion***: How does the core principle behind arbitration compare to that of mediation? (Hint: Think about the role of a decision maker versus that of a facilitator).

- ***Resource Video***: http://thebusinessprofessor.com/arbitration/

10. What are the advantages and disadvantages of arbitration?

There are numerous advantages and a few disadvantages of arbitration, as follows:

- *Expertise* - Arbitrators are generally chosen based upon their expertise in the subject matter of the dispute. This is a key advantage over litigation, which generally involves the use of jurors as fact-finders. The jurors will lack the subject-matter knowledge of professional arbitrators chosen by the parties. Some argue that this fact makes it less likely that jurors will arrive at a fair and just result.

- *Resolution* - Similar to litigation, in arbitration the parties lose control of the dispute resolution process. The benefit of this situation is that the arbitrators will decide the dispute and issue an award. This may give the parties

comfort in knowing that the legal dispute will be resolved.

- *Costs* - There may be significant cost savings associated with arbitrating rather than litigating a dispute. While the parties generally share the responsibility of paying the arbitrators, it avoids many of the court fees, legal fees, and other expenses associated with going to trial. The primary point of savings is the lack of formality in the discovery process. Generally, the arbitrators control the proceeding and request from the parties whatever evidence they require in deciding the dispute.

- *Privacy* - As with other types of ADR, arbitration is a private process. The parties do not have to disclose the dispute or any of the facts of the situation to the rest of the world. Privacy in arbitration offers the same advantages and disadvantages as mediation.

- *Relationships* - Arbitration can have the effect of preserving on-going business relationships. The parties may feel comfortable that the dispute is not decided arbitrarily, as experts are reviewing the facts and deciding the case. In this way, the parties are less likely to feel that they were treated unfairly by the system.

The above aspects of arbitration may be seen by a party as an advantage or disadvantage. For example, a party may hope to sway jurors by appealing to their emotions. This is not as easy when dealing with expert arbitrators who are more likely to apply the law without regard to personal emotions. Further, arbitration will lead to a decision on the dispute. One party may see this finality as a benefit, while other parties may want to retain the ability to continue negotiating a settlement.

- ***Discussion***: Do you think businesses generally prefer arbitration to litigation? Why or why not? Do you think individuals in a dispute with a business generally prefer litigation or arbitration? Why or why not?

- ***Practice Question***: Bernie and Hillary do business together. Unable to reach a compromise in a dispute, they decide to submit their issue to arbitration. What advantages does arbitration offer to Hillary and Bernie?

- ***Resource Video****:* http://thebusinessprofessor.com/what-are-the-advantages-of-arbitration/

11. How do the parties initiate arbitration?

Arbitration can be either voluntary or mandatory.

- *Voluntary Arbitration* - Voluntary arbitration, as the name indicates, means that the parties voluntarily agree to submit a dispute (or any dispute) to arbitration. This is also known as “arbitration at common law”. This is normally done through a formal, written agreement entered into between the parties. Voluntary arbitration generally takes two forms:

    - *Pre-dispute Arbitration* - A contract between parties may contain an arbitration clause. These agreements require that any dispute over the contract will be arbitrated.

        - *Example*: Assume you enter into a contract to purchase a vehicle. The contract contains a clause stating that any legal disputes about the contract will be arbitrated. This is a pre-dispute arbitration clause.

- *Post-dispute Arbitration* - The parties may enter into an agreement after the dispute arises to resolve a dispute through arbitration.

    - *Note*: Even if the contract has an arbitration provision that makes arbitration of any disputes mandatory, it is still voluntary arbitration. The reason is because the parties voluntarily entered into the contract.

    - *Example*: Now, continuing the above example between you and the car salesman, suppose the agreement does not contain an arbitration clause. If a dispute arises, you and the car salesman may enter into an agreement to submit the dispute to arbitration rather than litigate it.

- *Mandatory Arbitration* - Certain state and federal laws require parties to arbitrate specific types of disputes. When a statute or court requires the parties to arbitrate a matter, this is known as "mandatory arbitration". This is common in some very technical areas of law, such as alleged violations of rules put forward by the Financial Industry Regulatory Authority (FINRA). The requirement to arbitrate may be tied either to the type of dispute or the amount in controversy in the dispute. When the law requires arbitration, there is also a procedure in place for the identification and hiring of certified arbitrators.

- ***Discussion***: How do you feel about laws requiring that individuals arbitrate their dispute? Does this have any constitutional implications (such as the right to Due Process under the law)?

- ***Practice Question***: Carlos has a dispute with his employer. He believes that he has been discriminated against in the promotion selection process. In his employment contract, there is a clause requiring arbitration of any dispute under the agreement. Also, a state employment law requires arbitration of any employee-employer, discrimination disputes. In this situation, is the arbitration between the parties voluntary or mandatory?

- ***Resource Video***: http://thebusinessprofessor.com/statutorily-mandated-arbitration/

12. What are the procedures for carrying out an arbitration?

The rules and procedures applicable to an arbitration depend on the jurisdiction. Some jurisdictions rely upon common law to supply the rules applicable to arbitrations. In these jurisdictions, judges often draw heavily upon model laws or other influential sources in the development of the law. Historically, common law arbitration jurisdictions have far less developed procedural rules. Notably, these jurisdictions vary in the degree to which they support the arbitration process. Other jurisdictions pass statutes controlling the arbitration process. In such jurisdictions, the general procedure for carrying out an arbitration proceeding is as follows:

- *Subject Matter of the Arbitration* - The dispute may be a question of fact, law, or a mixed question of fact and law. There is a great deal of controversy surrounding what issues the arbitrator has the ability to decide. The arbitration agreement should be clear about the extent of the arbitrator's authority.

    - *Note*: The arbitrator exceeding her authority is the most common grounds for challenging arbitration awards.

- *Choosing Arbitrators* - In voluntary arbitrations, the parties choose the arbitrator(s) to decide the dispute. In most cases, arbitration involves three arbitrators, which allows for a majority vote on the matter. There are numerous methods the parties can employ in selecting arbitrators. In some cases, an arbitration agreement will outline the procedure.

    - *Note*: Mandatory arbitration may identify or provide a limited pool of certified arbitrators. Otherwise, the parties have latitude in choose an arbitrator. Most jurisdictions do not require that arbitrators have any special training.

    - *Example*: Each party may select one arbitrator and those arbitrators select the third arbitrator. The parties will seek to select experts with experience in the particular industry and with knowledge of the customs and practices.

- *Submit to Arbitration* - Arbitration begins by the parties "submitting" their dispute to the arbitrators. Submission is simply the act of contacting the arbitrators and providing them with the dispute information and setting up a time to have an arbitration proceeding. Submitting a dispute to arbitration authorizes arbitrators to make a decision that binds the parties and resolves their dispute. In mandatory arbitrations, many jurisdictions require that the parties submit the matter to arbitration within 6 months of the dispute arising.

- *Agreement with Arbitrator(s)* - In voluntary arbitration, the parties must enter into an agreement with the arbitrators to resolve the dispute. The terms of the arbitration agreement and the dispute are passed on to the arbitrator. The parties may propose the rules governing the arbitration. In most cases, however, the arbitrator will agree to arbitrate the matter based upon model arbitration procedural rules. Mandatory arbitration may have formalized documents or procedures for this purpose.

    - *Note*: Many arbitrations employee the rules provided in the Federal Arbitration Act.

- *Arbitration Proceeding* - The arbitration procedure follows a semi-formal format with the arbitrators controlling the process. Often the arbitrators will orchestrate the arbitration similarly to a trial. The judicial rules of evidence and procedure do not apply, so the arbitrators have a great deal of latitude. They look beyond strictly legal criteria to other factors that bear on the proper resolution of a dispute. They can look at such factors as the state of the law, fairness, productivity, consequences on morale, and whether tensions will be heightened or diminished. Of note, they can generally request any evidence from the parties that is necessary to arrive at a decision.

    - *Note*: The arbitrator will often follow a form of model arbitration rules in holding the proceeding. Mandatory arbitrations will always follow the procedure proscribed by the law or court mandating arbitration.

- *Award* - Arbitrators do not issue a judgment, as in civil trials. Rather, they decide the matter and hand down an "award" in favor of one party or the other. The arbitration agreement and the rules employed by the arbitrators may limit the amount or type of award the arbitrators can issue. Generally, the arbitrators do not need to set forth findings of fact, conclusions of law, or reasons for the award. The arbitrators may, however, be required to elaborate on their reasoning if required by statute or arbitration agreement. If so, the arbitrators generally provide the reasoning for their decision in the form of an "opinion letter". This opinion letter becomes part of the award. Regardless of the reasoning, parties are generally bound by the arbitrator's decision.

- *Enforcement* - Courts will generally enforce arbitration awards either through contract law or through recordation and recognition as a judgment. Enforcement of arbitration awards is discussed in greater detail in a separate section.

- ***Discussion***: What differences do you see between the arbitration and mediation process? What differences do you see between the arbitration and litigation process? Do you think it is wise for businesses to include arbitration clauses in contracts? Is it wise for individuals?

- ***Practice Question***: You work for ABC, Inc. ABC is involved in arbitration of a major business dispute. Your boss wants you to attend the arbitration and provide evidence to the arbitrators. Concerned that you perform well, you begin researching the arbitration process. In a short memo, explain the process for carrying out an arbitration.

- ***Resource Video***: http://thebusinessprofessor.com/procedure-for-carrying-out-an-arbitration/

13. What rules govern the arbitration process?

The rules governing an arbitration vary depending upon whether the arbitration is voluntary or mandatory. In a voluntary arbitration, the parties may agree upon the rules to govern the proceeding. It is rare that the parties will specifically state all of the governing provisions; rather, the agreement to arbitrate will agree that statutory provisions or a set of model rules will govern the arbitration proceeding.

- *Note*: The Revised Uniform Arbitration Act of 2000 is a model law commonly employed in voluntary arbitrations.

In a mandatory arbitration, state law or court order dictates the rules governing the arbitration. Notably, in 1925, Congress passed the Federal Arbitration Act (FAA) to encourage the use of arbitration to resolve conflicts. The FAA provides the process and procedure for carrying out the arbitration. The FAA applies when the dispute is subject to mandatory federal arbitration or when there is an voluntary arbitration agreement and the dispute involves federal law. Of course, the parties to voluntary arbitration may agree to a different set of laws, but applying FAA standards may affect a party's ability to enforce the arbitrator's award through the court system. Importantly, the FAA requires that where the parties have agreed to arbitrate, they must do so in lieu of going to court.

- ***Discussion***: Why do you think Congress found it necessary to establish uniform Federal Arbitration Procedures? How do you feel about a federal law attempting to control the state court procedure for recognizing and enforcing arbitration agreements?

- ***Practice Question***: Pam and Lisa enter into a contract with an arbitration clause covering any disputes. When a dispute arises, Pam and Lisa decide to submit the matter to arbitration. If the contract does not indicate, what rules apply to the arbitration process?

- ***Resource Video***: http://thebusinessprofessor.com/federal-arbitration-act/

14. Challenging the "arbitration award"?

An arbitration is a non-judicial process. As such, there is no appeal available. There is, however, a limited ability to challenge an arbitration award in an Art. III court. The standard for challenging an arbitration award differs for voluntary and mandatory arbitrations.

- *Review of Voluntary Arbitration Awards* - Parties may challenge an arbitration award based upon the arbitrator exceeding her authority or based upon a contractual defense to the validity of the arbitration agreement. That is, the court will not disturb an arbitrator's award based upon an error in the application of law or determination of a fact. The challenging party must file a legal action attacking the validity of the arbitration agreement or the authority of the arbitrator. For example, the arbitrator may have issued an award that affected property that was not subject to the original contract.

In general, arbitration clauses are liberally interpreted when a party contests the scope of the clause. If the scope is debatable or reasonably in doubt, the clause is construed in favor of arbitration. In summary, the fact that the arbitrator made an erroneous ruling or reached erroneous findings of fact are not grounds for setting aside the award. Of course, an error of law may render the award void when it requires the parties to commit a crime or otherwise to violate a positive mandate of the law. In any event, judicial review of the arbitration award may correct fraudulent or arbitrary actions by an arbitrator.

- ***Discussion***: Why do you think courts, when reviewing a challenge to an arbitration award, refuse to revisit the facts or procedures of the arbitration? Do you believe they should revisit the facts and procedures?

- ***Practice Question***: Brad and Angela agree to arbitrate their contract dispute. At the end of the arbitration, Angela is not happy with the award handed down by the arbitrators. What are her options for challenging the arbitration award.

- ***Resource Video***: http://thebusinessprofessor.com/judicial-review-voluntary-arbitration/

- *Review of Mandatory Arbitration* - Mandatory arbitration effectively cuts off the parties' access to a trial court. Many courts have held that mandatory arbitration statutes that close the courts to litigants are void as against public policy and are unconstitutional. The arguments against enforcing mandatory arbitration statutes include:

    - they deprive one of property and liberty of contract without due process of law;

    - they violate the litigant's 7th Amendment right to a jury trial and or state's constitutional access to courts; and

    - they result in the unconstitutional delegation of legislative or judicial power in violation of state constitutional separation of powers provisions.

  Mandatory arbitration is generally deemed constitutional if fair procedures are provided by the legislature and ultimate judicial review is available. As such, statutorily mandated arbitration requires a higher level of access to judicial review of the awards by the court. If a party can reject the arbitrator's award and seek *de novo* judicial review, mandatory arbitration is generally considered constitutional. The right to reject the award and to proceed

to trial is the sole remedy of the parties. If a party rejects an arbitrator's award and challenges the case at trial, the court may impose sanctions on the party who fails to improve its position. Also, failing to attend the arbitration could forfeit the right of a party to reject the award and proceed to trial.

- ***Discussion***: What is your opinion with regard to the above-mentioned arguments against mandatory arbitration? Do you think that allowing a party to refuse an arbitrator's award makes mandatory arbitration constitutional? Why or why not?
- ***Practice Question***: Brad and Angela have a dispute that is subject to a state law requiring mandatory arbitration. At the end of the arbitration, Angela is not happy with the award handed down by the arbitrators. What are her options for challenging the arbitration?
- ***Resource Video***: http://thebusinessprofessor.com/judicial-review-mandatory-arbitration/

- *Review Under the Federal Arbitration Act* - In cases involving federal matters, the Federal Administration Act controls the procedures. The procedures of the FAA are binding upon both state and federal courts when called upon to review an arbitration. Once an award is entered by an arbitrator or arbitration panel, it must be "confirmed" in a court of law. Per the FAA, awards must be confirmed within one year. A losing party must object and challenge the award within three months.
    - *Note*: As a federal law, the FAA trumps state statutes that conflict with its provisions. For example, the FAA trumps state laws that allow for challenge of arbitration awards in a manner that differs from the provisions of the FAA.

- ***Discussion***: Do you think that the provisions of the FAA requiring a court to confirm an arbitration award make the arbitration process more fair? Why or why not? Do these provisions help to ensure the mandatory arbitration statute observes Constitutional rights? Why or why not?
- ***Practice Question***: Erica is a party to an arbitration under the Federal Arbitration Act. She receives an award from the arbitrators. What is the process for enforcing the arbitration award?
- ***Resource Video***: http://thebusinessprofessor.com/review-under-the-federal-arbitration-act/

15. How are arbitration awards enforced?

The method of enforcing an arbitration award will vary depending upon the jurisdiction. In a common-law arbitration jurisdiction, a party must generally initiate a legal action to enforce an arbitration award as a contract. Most statutory-arbitration jurisdictions establish a process for enforcing arbitration awards. This may include seeking court recognition and approval of the award. Many jurisdictions require arbitration awards be registered with the court system to receive judicial assistance in enforcement. Generally, the holder of the award will file the award with the Clerk of Court's office. The clerk will prepare a certification of judgment order for a judge's signature. Once a judge signs and certifies the order, it may be enforced in the same manner is a judgment. Once confirmed, the award is then reduced to an enforceable

judgment, which may be enforced by the winning party in court, like any other judgment.

- *Note*: Under the FAA, state courts are encouraged to enforce arbitration agreements. Arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

- ***Discussion***: What do you think about the process for enforcing an arbitration award? Should it be easier or require more effort to enforce? Should the courts get involved at all?

- ***Practice Question***: Josh receives an arbitration award in an arbitration governed by the Federal Arbitration Act. What process can Josh follow to enforce his arbitration award?

- ***Resource Video***: http://thebusinessprofessor.com/how-are-arbitration-awards-enforced/