Topic 8: Alternative Dispute Resolution

Overview

- ***Introductory Video***:

QUESTIONS & ANSWERS

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

A settlement means that the parties work out a legal dispute 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 by some third-party decision maker. Businesses settle legal disputes primarily to avoid the high cost of litigation, maintain privacy, and to preserve the professional relationship with the other party. Achieving a settlement is a core objective of mediation, which is discussed further below.

- *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.

- *Practice Question*:

- *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 form 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. But, filling a lawsuit does not preclude the use of ADR. Some courts, such a family court disputes, often require ADR in conjunction with litigation. Also, parties can submit part of a dispute to ADR and litigate another part.

- *Practice Question*:
- *Resources Video*:

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

The effective use of ADR processes can save disputing parties many of the costs associated with litigation. This is probably the most common reason for including an ADR clause in a contract or agreeing separately to submit a dispute to ADR. Another reason to prefer ADR over litigation is that 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 resolve the dispute. This is far more practical than letting a random group of jurors resolve the issue. 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. Lastly, 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*:
- *Resources Video*:

4. What is a "focus group"?

A focus group is not a form of ADR; rather, it is simply a technique used to achieve a settlement. Attorneys assemble a group of individuals together and present them with all available evidence surrounding a legal dispute. The focus group members will give their opinion as to who is at fault and how the situation should be resolved. The results of the focus group are frequently used to gauge what a jury's reaction to the case will be. The attorney may then use the results or findings from the focus group as leverage in the negotiation of the dispute. The information obtained from the focus group may convince the parties to settle the dispute.

- *Discussion*: As a business student, you should see the similarities between a focus group in marketing and a focus group for dispute resolution. How effective do you believe this method would be in negotiating a dispute with individuals or businesses? As a party to litigation, would the results of a focus group influence you in your decision to pursue legal action? More specifically, as a manager of a business facing a potential lawsuit, would the results of a focus group influence your decision to either settle the dispute or

fight it through litigation?

- *Practice Question*:
- *Resources Video*:

MEDIATION

5. 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. The mediator generally has special training in dispute resolution and in-depth knowledge of the subject-matter of the dispute. In most instances, a mediator is licensed attorney who has mediator training. This is important, as the mediator should understand the legal principles that will apply to the dispute. Understanding the applicable law and being able to explain those legal principles to the parties will help the mediator in resolving the dispute. 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. Importantly, 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 to settle the dispute.

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

6. What are the advantages and disadvantages of mediation?

There are numerous advantages and few disadvantages mediation, as follows:

- *Control* - Recall that mediation allows the parties to retain control over the dispute. If the parties are free to refuse to negotiate and they are not required to find a resolution to the dispute. The voluntary nature of negotiations in the mediation process allows the parties the decision to later 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 be successful. This lack of certainty can frustrate some 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 avoid court fees, 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 disadvantage of mediation costs is that it can still be expensive. A simple negotiation between the parties can resolve a dispute for free. 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 all allegations, testimony, and presentations of evidence presented in the case. The disadvantage to privacy general concerns the expectations of the aggrieved party. In many cases, the injured party seeks compensation for the harm or loss, but also seeks to make certain that the type of conduct is not repeated. Negotiating a settlement of the dispute outside of the public's knowledge does less to prevent the other party from repeating the illegal conduct. This is particularly true when the other 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 on each other as future business partners, such as in supplier-purchaser relationships. Litigation generally destroys the relationship between parties, 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 business. A negotiated settlement does not achieve this same effect.

The above-mentioned advantages and disadvantages of mediation or 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 are generally see litigation as an favorable or unfavorable option? Why?

- *Practice Question*:

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

7. 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 a court order or pursuant to the law. 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 party in mediation will help them to work out the legal dispute voluntarily 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 may dictate that any legal dispute between the parties must be submitted to mediation before pursuing litigation or other 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. Those individuals assume 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, any mediation of a dispute about the contract would be subject to 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*:

- *Resources Video*:

8. What are the procedures for carrying out mediation?

The voluntary mediation process is far less rigid than 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. The most common format, however, for carrying out mediation of a legal dispute with a business or between businesses is as follows:

- *Delivery of Evidence* - Each party provides the mediator will all of the facts and evidence surrounding the dispute.

- *Introductions* - Mediator introduces everyone and gives an overview of the mediation. The mediator will summarize the dispute at hand.

- *Initial Statements* - The mediator will often allow the parties to give an initial statement directed to the mediator and other party. This serves a couple of purposes. First, it appeases the parties to allow them to voice their opinion on the matter. Further, allows the parties to get out 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 generally means that the parties are placed in separate rooms, while the mediator is charged with moving back and forth between the rooms to negotiate the position of each party. These private sessions are optional at the mediator's discretion. These sessions prove to be very effective in getting the parties to exchange dialogue or enter into negotiations. It breaks down the competitive spirit that present when the parties are together. The mediator is in the position to play devil's advocate and help each party understand the legality of the other parties argument and the likely results at trial if the parties fail to negotiate. Helping the parties understand the potential or probably legal result form litigation 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. Counsel for the parties are then directed to draft a legal contract memorializing the terms of the settlement agreement. Once the parties sign the contract, the dispute is settled and the parties are legally obligated act in accordance with the terms of the contract.

Voluntary 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*:

- *Resource Video*:

9. Challenging the mediation agreement?

As discussed above, 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. 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 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, then the parties would be free to litigate the underlying dispute or pursue other ADR methods.

- *Discussion*:
- *Practice Question*:
- *Resource Video*: http://thebusinessprofessor.com/mediation/

ARBITRATION

10. 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. 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) that you choose acts as judge and jury in deciding the dispute. Unlike in mediation, the arbitrators are a decision-makers. Arbitration is final and results in an arbitrator's award. Parties may generally enforce an arbitrator's award by filing it with a court having subject-matter jurisdiction and personal jurisdiction over the defendant.

- *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).
- *Practice Question*:
- *Resource Video:* http://thebusinessprofessor.com/arbitration/

11. 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 knowledge of professional arbitrators. This may cause the jurors to be less likely to arrive at a fair and just result.

- *Resolution* - Similar to litigation, in arbitration the parties lose control of the dispute once it is submitted to the arbitrators. The benefit of this situation is that the arbitrators will decide the dispute. This may give the parties comfort in knowing that the legal dispute will be resolved following the arbitration.

- *Costs* - There may be significant cost savings associated with arbitration above litigation. 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* - While less effective than mediation in preserving the relationships between the parties, arbitration can have a similar effect of preserving on-going business relationships. The parties may feel comfortable that the case is not arbitrarily decided, 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 advantages aspects of arbitration may be seen by a party as an advantage or disadvantage. For example, a party may hope to sway a jury by appealing to their emotions. This is not as easy when dealing with expert arbitrators. They 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 not want to lose the ability to continue negotiating a settlement.

- *Discussion*: Do you think businesses generally prefer arbitration over 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*:

- *Resource Video:*

12. How do the parties initiate arbitration?

Arbitration can be either voluntary or mandatory. The details of each are discussed below.

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 normally done through a formal, written agreement entered into between the parties. Voluntary arbitration generally takes two forms:

- *Pre-dispute Arbitration Clause* - The arbitration agreement may be a part of a different contract, which is the basis of the dispute. That is, you enter into a contract and it says that any disputes over the contract will be arbitrated. For 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 Clause* - The parties may enter into an arbitration agreement after the dispute arises. That is, the parties have a legal dispute and voluntarily enter into an agreement to resolve the dispute through arbitration. Now, continuing the above example between you and 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. (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.)

Mandatory Arbitration

Certain state and federal laws require parties to arbitrate disputes involving that law. 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 under the Financial Industry Regulatory Authority (FINRA). The requirement to arbitrate may be tied either to the type of dispute and the amount in controversy in the dispute. When the law requires arbitration, there is also a procedure in place for the identification and hire 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*:

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

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

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 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. This is the most common grounds for challenging arbitration awards.

- *Choosing Arbitrators* - In voluntary arbitrations, the parties must undertake the process of choosing arbitrator(s)s to decide the dispute. In most cases, arbitration involves three arbitrators to allow allow for a majority vote. There are numerous methods the parties can employ in selecting arbitrators. In some cases, an arbitration agreement will outline the procedure for selecting arbitrators. For 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 of the industry. 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.

- *Submit to Arbitration* - Arbitration begins by the parties "submitting" their dispute to the arbitrators. Submission is simply the act of contacting the arbitrator and providing them with the dispute information and setting up a time to have an arbitration proceeding. Submitting a dispute to arbitration authorizes an arbitrator to make a decision that binds the parties and resolve their dispute.

- *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: Rules of arbitration under the Federal Arbitration Act are discussed further below.

- *Arbitration Proceeding* - The arbitration 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 in arbitrations. The arbitrator arbitrators have a great deal of latitude in the process. Arbitrators 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. 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 arbitrator may, however, be required to elaborate on their reasoning if required by statute, arbitration agreement, or the submission agreement so requires. If so, the arbitrator generally provides the reasoning for her decision in the form of an opinion or letter. This opinion letter becomes party of the award. Parties are generally bound by the arbitrator's decision.

- *Enforcement* - Courts will generally enforce an arbitration award as if it were a judgment. To seek court assistance in enforcing an arbitration award, the award is generally filed with the clerk of court's office. If no objection is made within a certain period of time, it becomes final and enforceable like a judgment. As discussed further below, the award may be challenged when there is fraud or clearly inappropriate action.

As previously discussed, arbitration is either voluntary or mandatory pursuant to law. In any event, the procedure for carrying out the arbitration is generally similar. In a mandatory arbitration, the statute may prescribe any specific procedures to be used. In a voluntary arbitration, the parties may outline in the agreement any procedures to govern the arbitration. Generally, parties either do not address the arbitration procedure or they make the arbitration subject to some standard or model set of arbitration provisions. The Revised Uniform Arbitration Act of 2000 is such a model law.

- *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*:

- *Resource Video*: http://thebusinessprofessor.com/arbitrators-awards/

14. What rules govern the arbitration process?

The rules governing an arbitration will 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 or model rules will govern the arbitration proceeding. As indicated above, The Revised Uniform Arbitration Act of 2000 is such a model law.

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 applies when the dispute is subject to mandatory federal arbitration. The FAA provides the process and procedure for carrying out the arbitration. The FAA also applies to disputes where there is an voluntary arbitration agreement and the dispute involves federal law. Of course, the parties 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. 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." 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*: 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*:

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

15. Challenging the arbitration award?

An arbitration is a non-judicial process. As such, there is no appeal from an contract award. There is, however, a limited ability to challenge an arbitration award. The standard for challenging an arbitration award differs for voluntary versus mandatory arbitrations.

Review of Voluntary Arbitration Awards

A voluntary arbitration award may only be challenged based upon the arbitrator exceeding her authority or based upon a contractual defense to the validity of the arbitration agreement. If a party wants to attack the validity of an arbitration award, she must file a legal action attacking the validity of the arbitration agreement or the authority of arbitrator. This will generally be based in contract law and contest whether the arbitration agreement is valid or whether the arbitrators exceeded the scope of their authority in making the award. For example, the arbitrator

may have issued an award that affected property that was not subject to the original contract. In general, an arbitration clauses are liberally interpreted when the issue contested is the scope of the clause. If the scope of an arbitration clause 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. Further, 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*:

- *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. There is concern that it violates the 6th and 7Th Amendments of the Constitution. 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' provisions.
- They result in the unconstitutional delegation of legislative or judicial power in violation of state constitutional separation of powers provisions.

Common law holds, however, that mandatory arbitration is 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 judicial review of the awards. Succinctly put, if a party can reject the arbitrator's award and seek *de novo* judicial review, then 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 litigates the case at trial, the court may impose sanctions on the party who fails to improve its positions. 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*:

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

Review Under the Federal Arbitration Act

In cases that involve federal matters (affect interstate commerce) 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. 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. Per the FAA, awards must be confirmed within one year. Any objection to an award must be challenged by the losing party within three months.

- *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*:

- *Resource Video*:

16. How are arbitration awards enforced?

Most state jurisdictions establish a process for enforcing arbitration awards. Consistent with the procedure under the FAA, arbitration awards must 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 certifies the arbitration, it may be enforced in the same manner is a judgment. Enforcing judgments is discussed further in the chapter on Civil Litigation.

- *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*:

- *Resource Video*: