

Class 12

Alternative Dispute Resolution

General Points about Arbitration

- Usually established by **agreement** between the parties after the dispute arises or forced by arbitration clause.
- Arbitration proceeding leads to an "**arbitration award**," not a judgment; which is enforceable under a contract law theory.
- As a practical matter, arbitration awards must be "**confirmed**" in court before they can actually be enforced. However, a valid arbitration award will usually lead to summary judgment in favor of the victorious party in the arbitration hearing.
- Arbitration clauses are very popular in "**adhesion**" contracts where consumers with little bargaining power are "forced" to sign a long agreement with an obscure arbitration clause.
- Arbitration clauses are often combined with **choice of forum and choice of venue provisions**.

Federal Arbitration Act – Key Features

- Applies only to "maritime" contracts and contracts involving interstate commerce (pretty broad).
- Applies, where applicable, in state AND federal court.
- Very much favors arbitration and specifies that arbitration clauses are enforceable to the same extent as any contract.
- Civil proceedings "stayed" pending arbitration when called for.
- A court must have had a mini-trial to first determine whether the applicable arbitration clause should be enforced.
- Gives arbitrators the power to summon witnesses, documents, etc. (similar to subpoena power) under the same rules that courts can do so.
- Awards must be confirmed (upon motion) by the court unless vacated within one year of the award.
- Similar provisions exist in the Uniform Arbitration Act.

QUIZ TIME!

Choosing an Arbitrator

- In most states, there is no inherent training or licensing requirement for an arbitrator.
- Often, courts do have qualification requirements for those to whom the court will refer a case for court mandated or court-annexed arbitration.
- Arbitrators are often asked to fill out an "arbitrator voir dire" to ascertain the arbitrator's potential biases before being chosen.
- The method of choosing arbitrators is usually established in the arbitration agreement or can simply be left to American Arbitration Association rules.
 - Arbitrators can be chosen by both parties together.
 - In some cases, each side chooses an arbitrator and the two chosen arbitrators together choose a third person to round out the panel.
 - The qualifications for each arbitrator can be set forth in the original agreement.
- The UPL problems we discussed in mediation are not as relevant because the arbitrator obviously does not purport to represent a party.

Arbitration Process

- **Discovery**
 - No formal discovery process unless otherwise agreed. However, arbitrators can subpoena witnesses and documents.
- **Preliminary Conference**
 - Arbitrator may require disclosure of certain information if that may help bring a settlement or make it easier to arbitrate.
- **Hearing**
 - Similar to a civil trial (opening and closing statements, witnesses, etc.) but much less formal.
- **Rules of Evidence**
 - In absence of agreement, they don't apply. The arbitrator may accept hearsay, etc.
- **Applicable Law**
 - Arbitrators are bound to apply applicable law in the jurisdiction, again in the absence of an agreement to the contrary.