

Summary of Lecture 12

Arbitration — History & Legislation

 by Roger Batchelor

From ancient Phoenician merchants to the U.S. Supreme Court – the story of how arbitration became a cornerstone of American dispute resolution. This lecture traces arbitration's evolution from informal commercial practice to a legally enforceable, court-approved mechanism embedded in federal and state law.



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Lecture 12 Arbitration Part 1 – Kahoot! Course

This is to supplement the courseware for Crestpoint University – Alternative Dispute Resolution

What Does "Binding" Mean?

Definition

A contract, adjudication, or legal relation is "binding" so long as it remains in force and continues to impose duties and obligations on the parties involved.

– *Black's Law Dictionary, 6th Ed., West Publishing Co., 1990*

Why It Matters in Arbitration

People often say "**binding arbitration**," but since arbitration is generally binding, the adjective adds little. Historically, however, arbitration was **not necessarily binding** – parties were often permitted to withdraw before a decision was rendered.

Understanding this distinction is key to tracing arbitration's legal evolution in the United States. The Federal Arbitration Act is widely seen as having reversed "**centuries of judicial hostility toward arbitration agreements**." The historical basis for this hostility was a belief that arbitration bypassed the jurisdiction of the courts – though this rationale does not hold up under close scrutiny.

Arbitration Through the Ages

Arbitration's roots stretch back thousands of years, long predating any formal legal system. From ancient merchants to America's Founding Fathers, private dispute resolution has always found willing practitioners.

Ancient Phoenicia

1

Archaeologists discovered evidence of arbitration used as a dispute resolution method by Phoenician merchants — among history's earliest recorded examples.

2

Biblical Era

The Biblical stories of King Solomon recount his skills as an arbitrator, representing one of history's earliest named examples of a neutral third-party decision-maker.

3

1281 — England

Arbitration was formally recognized in England as part of its judicial system, establishing the Anglo-American legal precedent that would later cross the Atlantic.

4

Colonial America

Arbitration was common among American colonial merchants. George Washington served as an arbiter and included an arbitration provision in his own will.



George Washington: America's Founding Arbitrator

George Washington not only "**served as an arbiter of private disputes before the Revolution,**" but even included in his will a provision that any disputes arising under the will should be resolved by a panel of **three arbitrators**.

Despite American courts' general hostility toward arbitration prior to the twentieth century, the practice was embraced by the nation's founders and leading merchants alike — a testament to arbitration's practical appeal even without formal legal backing.



Early Institutional Acceptance in New York

New York's consistent institutional support for arbitration across more than 150 years positioned it as the national leader when formal legislation emerged. From its Chamber of Commerce to the Stock Exchange to the state legislature, New York built the foundation for American arbitration law.

1768

New York Chamber of Commerce, upon its founding, permitted arbitration as a formal resolution mechanism.

1817

The New York Stock Exchange provided for arbitration in its constitution – nearly 50 years after the Chamber of Commerce.

1920

New York became the **first state** to pass a statute permitting parties to agree to settle both future and current disputes through binding arbitration.

Early 20th Century

New York's leadership in arbitration made it a natural forerunner during the rise of arbitration legislation nationwide.



The Rise of Arbitration Legislation

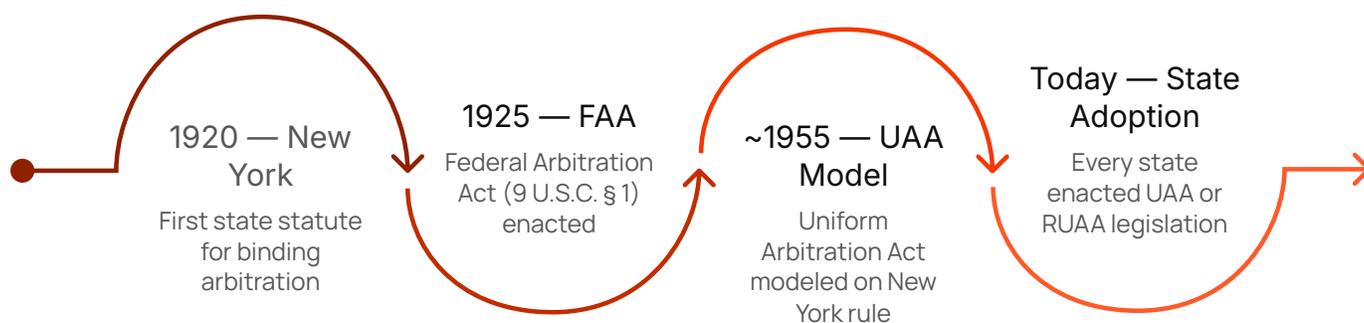
From New York's pioneering 1920 statute to the Federal Arbitration Act and the Uniform Arbitration Act — how America built the legal framework that made arbitration enforceable and permanent. In just forty years from the first state act, arbitration became an integral and permanent part of the American legal landscape.

Subject Matter Jurisdiction

A court's power to hear and decide a case of the type which raises the question at hand. Not every court is empowered to hear every type of case.

Diversity Jurisdiction

A state court case may be removed to federal court if (1) no plaintiff and defendant are from the same state, and (2) enough money is at stake — preventing unfair treatment of out-of-staters.



This legislative progression transformed arbitration from an unenforceable curiosity into a legally binding, court-supported process recognized in every state in the nation.

Why Arbitration Was Unenforceable Before the FAA

The Core Problem

Prior to the FAA and state acts modeled on the UAA, arbitration proceedings were **unenforceable** because the binding power of contract was not extended to agreements to arbitrate. There was **no cause of action** available when a party refused to arbitrate, rendering arbitration clauses useless.

The Craig & Bob Example

Craig gets drunk, neglects Bob's cargo, and refuses to arbitrate: *"Go right ahead – it's just a waste of time, 'cause I ain't showin'."* Without the FAA, Bob cannot force Craig to arbitrate – he can only sue for breach of contract, which is more costly and less speedy.

FAA Chapter 1, § 2: The Driving Force

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be **valid, irrevocable, and enforceable**, save upon such grounds as exist at law or in equity for the revocation of any contract."

This provision directs courts to treat agreements to arbitrate **just as they would any other contractual agreement** – a landmark shift in American law. The FAA is limited to maritime conflicts and transactions "involving commerce," but it was nonetheless a tremendous step forward.

What the FAA Favors

The FAA manifests a **liberal federal policy favoring arbitration agreements**. Questions of arbitrability must be addressed with a healthy regard for this federal policy.

What the FAA Does NOT Favor

There is **no federal policy favoring arbitration under a certain set of procedural rules**. The policy is simply to ensure the enforceability of private agreements to arbitrate, according to their terms.

Not a Universal Mandate

The acts go beyond mere authorization – some see them as **encouraging** arbitration. But this is not a simple proclamation that law favors arbitration over litigation in all cases. – 4 *Am Jur 2d Alternative Dispute Resolution* § 27



The Supreme Court Seals the Deal

1

Textile Workers Union v. Lincoln Mills (1957)

Arbitration was becoming an integral part of the dispute resolution landscape. *353 U.S. 448*. This case signaled the Court's willingness to enforce arbitration agreements in the labor context, paving the way for broader acceptance.



2

The Steelworkers Trilogy (1960)

American Mfg. Co., Warrior & Gulf Navigation Co., and Enterprise Wheel & Car Corp. – three landmark cases cementing arbitration's permanent role. *363 U.S. 564, 574, 593*.

Together, these cases gave arbitration both **legislative authority** and **Supreme Court approval** – making it a permanent fixture of American dispute resolution.



The "Commerce" Limitation — Broadly Read Today

FAA Chapter 1, § 2 gives federal courts **subject matter jurisdiction** over claims involving maritime transactions and "commerce." The commerce limitation is now read **quite broadly**, bringing most disputes under the FAA. *See Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003).*

When the FAA May Not Apply

In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1955), the Supreme Court found the FAA inapplicable where duties did not affect "commerce." Example: Frankie, a NY resident working in Vermont for a NY corporation, could revoke his arbitration agreement under Vermont law — because the FAA did not apply to his purely local employment duties.

Citizens Bank v. Alafabco, Inc. (2003)

Alafabco, an Alabama construction firm, entered debt restructuring agreements with Citizens Bank containing arbitration clauses. The Alabama Supreme Court refused to compel arbitration, arguing insufficient interstate commerce. The U.S. Supreme Court reversed *per curiam*, holding that the "commerce in fact" requirement was satisfied — the restructuring was tied to diverse interstate business activities, including financing out-of-state materials. This case solidified a **broad interpretation** of the FAA's "commerce" requirement, reinforcing the federal policy favoring arbitration.

1 — FAA Inapplicability

If a contract's duties do not affect interstate "commerce," the FAA does not apply — even if the contract attempts to incorporate the FAA.

2 — State Law Revocability

Where the FAA does not apply, state law governs. If state law allows revocation of an arbitration agreement before a decision is rendered, a party may sue in court despite the arbitration clause.

3 — General Contract Defenses

Even under the FAA, an arbitration agreement may be revoked on grounds that exist "at law or in equity for the revocation of any contract" — such as fraud or unconscionability.

Arbitration vs. Mediation vs. Litigation

Understanding how arbitration differs from mediation and litigation is essential for deciding when to offer, accept, or include an arbitration clause in any agreement.

Arbitration

Formal and private. Decision made by a neutral arbitrator. Generally binding on all parties. Faster than court and confidential – the preferred method for commercial disputes requiring finality.

Mediation

Informal and non-binding. A neutral mediator facilitates negotiation between parties. The parties themselves control the outcome. Useful when preserving relationships matters.

Litigation

Formal court process. A judge or jury decides the outcome. Public record. The most costly and time-consuming method – but sometimes necessary when legal precedent or public accountability is at stake.

- The presence and proliferation of arbitration in the United States is impossible to ignore. Understanding these distinctions is **particularly important** in order to decide when to offer or accept arbitration, when to include an arbitration clause in a contract, and how to evaluate whether the FAA or state law will govern.



Why Arbitration Matters: Key Takeaways

Ancient Roots

Arbitration dates to Phoenician merchants and King Solomon – it has always been a preferred tool for resolving commercial disputes outside formal courts.

Legislative Foundation

The FAA (1925) and state acts modeled on the UAA transformed arbitration from an unenforceable curiosity into a legally binding, court-supported process.

Supreme Court Approval

The Steelworkers Trilogy (1960) gave arbitration permanent status in American law, backed by both Congress and the Supreme Court.

Practical Importance

Today, enforceability of arbitration agreements is generally without question – making it critical to understand when and how to use arbitration clauses in contracts.



Summary: Arbitration's Journey in America

From ancient commercial practice to a Supreme Court-endorsed pillar of American law, arbitration's journey spans millennia. Each era added a new layer of legitimacy – from the merchants who used it informally, to the legislators who codified it, to the justices who made it permanent.



Ancient & Colonial Roots

Phoenicians, King Solomon, colonial merchants, and George Washington all embraced arbitration long before it had legal standing.



Judicial Hostility

Early American courts adopted English antagonism toward arbitration, allowing parties to withdraw before decisions were rendered.



State & Federal Legislation

New York (1920), the FAA (1925), and the UAA gave arbitration enforceable legal status across the nation.



Supreme Court Permanence

Lincoln Mills (1957) and the Steelworkers Trilogy (1960) cemented arbitration as a permanent, court-approved dispute resolution method.



Supreme Court's History on Arbitration – 8 Min

Crash Course by Professor Myriam Gilles of Cardozo Law School, one of the most cited civil procedure scholars in the nation.

Further Reading

- *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)
- *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960)
- *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)
- *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)
- *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003)
- Federal Arbitration Act, 9 U.S.C. § 1 et seq. (1925)