



This is “Alternative Dispute Resolution”, chapter 4 from the book [Business and the Legal and Ethical Environment \(index.html\)](#) (v. 1.0).

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Chapter 4

Alternative Dispute Resolution

LEARNING OBJECTIVES

After reading this chapter, you should understand alternative dispute resolution (ADR) options, including the benefits and drawbacks to different methods of dispute resolution. You will know the legal basis for mandatory arbitration, as well as why parties enter into voluntary ADR methods. You will understand current debates regarding the fairness of ADR. Additionally, you should be able to answer the following questions:

1. What are the benefits and drawbacks of ADR as compared to litigation?
2. What legal basis supports the use of ADR rather than litigation?
3. What unique challenges exist in ADR efforts among B2B (business to business), B2C (business to consumer), and B2E (business to employees)?
4. What are the ethical implications of ADR between parties that are unequal in power?

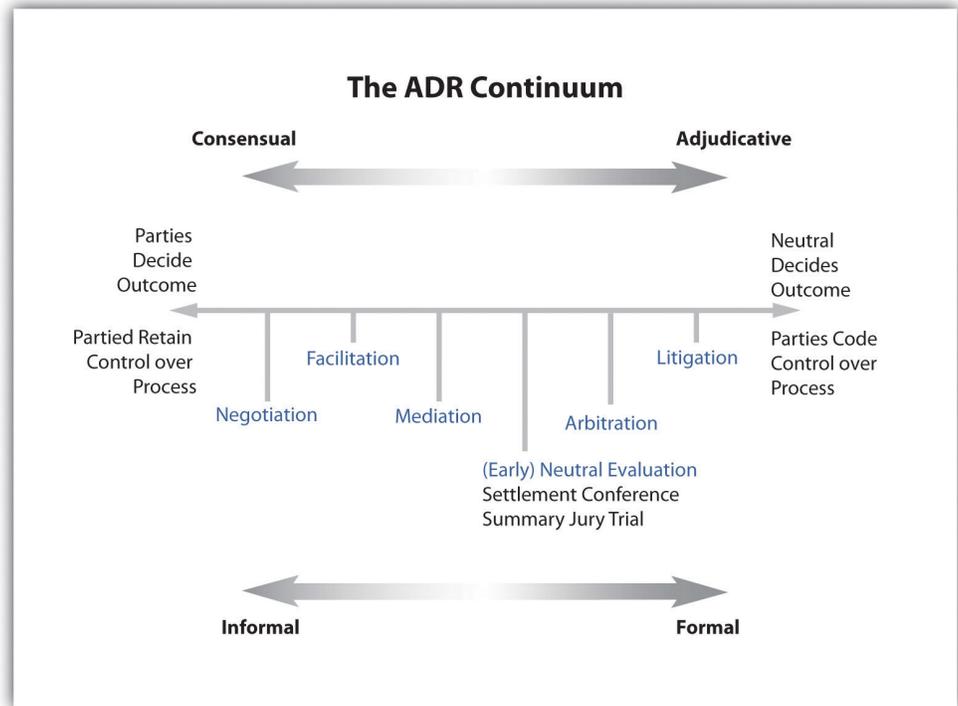
Imagine that you've been wronged by a supplier, by your employer, or by a business where you are a customer. You've correctly determined that you have an actionable legal claim. What are you going to do? You probably *won't* run to the courthouse to file a formal complaint to initiate litigation. This is because litigation is very expensive and time consuming. Besides, you may wish to continue doing business with the supplier, employer, or business. Perhaps the matter is of a private nature, and you do not want to engage in a public process to determine the outcome. You would like the dispute to be resolved, but you do not want to engage in public, time-consuming, expensive litigation to do it.

A common method of dispute resolution that avoids many of the challenges associated with litigation is alternative dispute resolution. **Alternative dispute resolution (ADR)**¹ is a term that encompasses many different methods of dispute resolution *other than* litigation. ADR involves resolving disputes outside of the judicial process, though the judiciary can require parties to participate in specific types of ADR, such as arbitration, for some types of conflicts. Moreover, some ADR methods vest power to resolve the dispute in a neutral party, while other strategies vest that power in the parties themselves. See [Figure 4.1 "A Continuum of Different](#)

1. Encompasses many different methods of dispute resolution *other than* litigation or trial.

ADR Methods" for a continuum of different ADR methods based on where power to solve the dispute is vested.

Figure 4.1 A Continuum of Different ADR Methods



Source: Adapted from New York State Unified Court System, <http://www.nycourts.gov/ip/adr/images/continuum2.jpg>.

Common methods of ADR include negotiation, mediation, and arbitration. Lesser used methods of ADR include minitrials, hybrid forms of mediation-arbitration (with elements of both), and collaborative goal-oriented processes. ADR is often used to resolve disputes among businesses, employers and employees, and businesses and consumers. ADR can also be used in many other types of conflicts. For instance, ADR strategies can be used in domestic law cases, such as divorce, or in international legal issues, such as issues relating to transboundary pollution. This chapter limits its focus to the use of ADR methods in business. Particularly, we will examine the common methods of ADR, including the benefits and drawbacks to each. We will also examine potential consequences to parties that have unequal bargaining power. Additionally, we will examine the use of ADR methods in situations where ADR may not be the most appropriate method of dispute resolution, such as civil rights violations.

ADR methods are used outside of the courtroom, but that does not mean that they are outside of the interests of our legal system. Participation in ADR has important legal consequences. For instance, parties that have agreed by contract to be subject to binding arbitration give up their constitutional right to bring their complaint to court. The **Federal Arbitration Act (FAA)**² is a federal statute under which parties are required to participate in arbitration when they have agreed by contract to do so, even in state court matters. Indeed, the FAA is a national policy favoring arbitration. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The *Southland Corp.* Court said that “in enacting...[the FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” This is an example of **federal preemption**³ exercised through the **Supremacy Clause**⁴ in the U.S. Constitution.

There is a very good chance that you will—or already have—signed a contract that contains a mandatory arbitration clause. This means that if a dispute arises under that contract, then you will be required to arbitrate your claim rather than going straight to court. Under a binding arbitration clause, you will have waived your constitutional rights to go to court. Even if you have never signed such a contract and never will, there is still a good likelihood that you will be involved in a commercial dispute at some point in your life. Because of this, it’s important to understand the ADR process, situations in which litigation is a better choice than ADR, and special issues that arise when parties have unequal bargaining power.

2. A federal statute that requires parties that have entered into contracts with mandatory arbitration clauses to submit to arbitration to resolve disputes arising under such contracts if the contract involves commerce. The U.S. Supreme Court interpreted the Federal Arbitration Act as Congress’s declaration of a national policy in favor of arbitration.
3. A judicially developed doctrine that recognizes the federal government’s power, derived from the Supremacy Clause of the U.S. Constitution, to control a particular area of law, either expressly or impliedly, and to take priority over state law or state attempts to regulate in a particular area.
4. A clause in Article VI of the U.S. Constitution that declares federal law supreme, which means that in the event that federal and state law conflict, federal law trumps state law.

Key Takeaways

Alternative dispute resolution (ADR) is a body of dispute-resolution methods outside of the litigation process. ADR is often faster, less expensive, and more private than litigation. For this reason, ADR can be the preferred dispute-resolution method, particularly when an ongoing relationship between disputants is desired. However, some types of disputes might be best resolved through litigation, such as in cases where parties have unequal power or resources or in civil rights violations. Common methods of dispute resolution are negotiation, mediation, and arbitration. Mandatory arbitration clauses are common in contracts, and such clauses are enforceable against the parties even if they wish to litigate their claims.

4.1 Negotiation

LEARNING OBJECTIVES

1. Understand the role of negotiation in avoiding and settling disputes.
2. Explore negotiation as it is commonly employed in business.
3. Understand the implications of bargaining power during negotiation.
4. Become familiar with the benefits and drawbacks of negotiation as a form of alternative dispute resolution (ADR).

Imagine that you are a tent manufacturer. Your supplier of tent fabric routinely supplies you with appropriate water-resistant fabric to construct your tents, so that you can produce your products and bring them to market. After many years of a good working relationship, your fabric supplier delivered **nonconforming goods**⁵. Specifically, the fabric delivered was not water-resistant, despite your need for water-resistant fabric to produce your tents. However, on your notifying the supplier of the problem, the supplier denied that the fabric was nonconforming to your order. You refused to pay for the goods. The fabric supplier insisted on payment before future delivery of any additional fabric. Without water-resistant fabric, you cannot continue to produce your tents.

This is an example of a business to business (**B2B**⁶) dispute. Despite the problem, you will likely wish to continue working with this supplier, since you have a good, long-standing relationship with it. This problem seems to be a “hiccup” in your regular business relationship. Accordingly, you will probably want to resolve this dispute quickly and without hard feelings. It is very unlikely that you will immediately hire an attorney to file a formal complaint against your supplier. However, that does not change the fact that there is a dispute that needs to be resolved.

One of the first strategies that you and your supplier are likely to employ is negotiation. **Negotiation**⁷ is a method of alternative dispute resolution (ADR) that retains power to resolve the dispute to the parties involved. No outside party is vested with authoritative decision-making power concerning the resolution of the dispute. Negotiation requires the parties to define the conflicts and agree to an outcome to resolve those conflicts. Often, this can take the form of a compromise. Note that a compromise does not mean that anyone “loses.” Indeed, if both parties are satisfied with the result of the negotiation and the business relationship can

5. Goods that do not conform to the buyer’s order. Under the Uniform Commercial Code (UCC), nonconforming goods can be rejected by the buyer.

6. Business to business.

7. A method of ADR that retains power to the parties involved. It is often seen as a win-win ADR strategy, where both parties try to reach a mutually satisfactory outcome.

continue moving forward, then both parties will be very likely to consider this as a “winning” situation.

Benefits to negotiation as a method of ADR include its potential for a speedy resolution, the inexpensive nature of participation, and the fact that parties participate voluntarily. Drawbacks include the fact that there are no set rules, and either party may bargain badly or even unethically, if they choose to do so. In a negotiation, there is no neutral party charged with ensuring that rules are followed, that the negotiation strategy is fair, or that the overall outcome is sound. Moreover, any party can walk away whenever it wishes. There is no guarantee of resolution through this method. The result may not be “win-win” or “win-lose,” but no resolution at all. Also, generally speaking, attorneys are not involved in many negotiations. This last point may be seen as a drawback or a benefit, depending on the circumstances of the negotiation.

Though our example involves B2B, the parties may or may not have equal **bargaining power**⁸. If your business and your supplier are both dependent on each other for roughly equal portions of the respective businesses, then they are most likely relatively equal with respect to bargaining power. However, in our example, if your business is a very small business but your supplier is a very large business—perhaps with a patent protecting the rights to the specialty fabric that you need—then we might say that the B2B negotiation is potentially unbalanced, since one party has a much more powerful bargaining position than the other. Specifically, your business needs that particular type of fabric, which is only available from one supplier. But your supplier does not need your business because it has a legal monopoly in the form of a patent for its product, and it probably sells to many manufacturers. This would be an example of **unequal bargaining power**⁹.

When the negotiation occurs as a result of a dispute, but not a legal dispute per se, then the party with the weakest bargaining position may be in a very vulnerable spot. This is illustrated in [Note 4.13 "Hyperlink: Rubbermaid’s Unequal Bargaining Power"](#). When Rubbermaid’s raw materials price for resin increased, it needed to raise its prices. However, Wal-Mart refused to accept the necessary price increase for Rubbermaid products. This refusal had a substantial negative impact on Rubbermaid’s business, since Wal-Mart was its main customer. In short, Rubbermaid needed Wal-Mart, but Wal-Mart did not need Rubbermaid.

8. The relative power of a party with respect to another party or parties that influences abilities to set agendas, influence outcomes, and negotiate terms during bargaining.

9. When parties possess different power relative to each other, and this difference creates opportunities or obstacles with respect to setting agendas, influencing outcomes, and negotiating terms during.

Hyperlink: Rubbermaid's Unequal Bargaining Power

A Question of Ethics

<http://www.pbs.org/wgbh/pages/frontline/video/flv/generic.html?s=frol02s48aq71&continuous=1>

Watch “Muscling Manufacturers,” a clip from *Is Wal-Mart Good for America?* to see how unequal bargaining power can affect the least powerful party in a negotiation.

As economist Brink Lindsey from the Cato Institute commented, “We’ve definitely seen a shift in the balance of bargaining power between manufacturers and retailers...Back in the old days, manufacturing was a high-productivity endeavor; retailing and distribution was fairly low-productivity...And so manufacturers called the shots.” Hedrick Smith, “Who Calls the Shots in the Global Economy?” *PBS*, November 16, 2004, <http://www.pbs.org/wgbh/pages/frontline/shows/walmart/secrets/shots.html> (accessed on August 23, 2010).

That doesn’t appear to be the case anymore.

Negotiation is a skill often developed by people who are charged with settling existing disputes or with creating new agreements. Since we are focusing on dispute resolution in this chapter, we will limit our discussion to the resolution of disputes rather than the negotiation of new contract terms, but keep in mind that these activities essentially draw on the same skills.

In *Getting to Yes*, written by members of the Harvard Program on Negotiation, the goal of negotiation is viewed as “win-win.” Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes* (New York: Penguin Books, 1991). Note that this is a substantially different goal from litigation. Our adversarial legal system requires one party to “win” and the other party to “lose.” *Getting to Yes* focuses on principled negotiation, and it sets forth specific steps and discusses strategies to allow participants to achieve the “win-win” goal. This book’s popularity perhaps suggests that people have a real interest in learning about ADR, avoiding litigation, and ensuring that all parties leave the resolution process as “winners.” Some concepts common in negotiation include the BATNA, WATNA, and the bargaining zone. For

example, the authors of *Getting to Yes* encourage negotiators to know their best alternative to a negotiated agreement (**BATNA**¹⁰). This ensures that unfavorable terms will not be accepted and terms consistent with a negotiator's interests won't be rejected. Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes* (New York: Penguin Books, 1991), 100. Likewise, the worst alternative to a negotiated agreement (**WATNA**¹¹) is a concept used by some negotiators prior to entering negotiations. The **bargaining zone**¹² is the area in which parties to a negotiation are willing to trade, barter, or negotiate their positions, within which parties can find an acceptable agreement. If you think of a Venn diagram, the bargaining zone would be where the two ovals overlap. The **reservation point**¹³ is essentially a party's "bottom line," beyond which it will not agree to terms.

Let's go back to our example. Imagine that after negotiating with your fabric supplier, the following facts emerged: The fabric supplier believed that it sent the correct fabric to you, because one of your new employees inadvertently ordered the wrong fabric. You reviewed your business records and determined that this allegation was true. This sounds like a misunderstanding that would be easy to clear up in negotiation, doesn't it? Imagine the embarrassment and hard feelings that would have been caused by immediately filing a formal complaint in court, not to mention the great expense that both parties would have incurred. Through negotiation, chances are very good that this misunderstanding will be resolved in a win-win outcome and that you will be able to continue your working relationship with your supplier.

KEY TAKEAWAYS

Negotiation is a method of alternative dispute resolution (ADR) in which the parties retain power to decide on a resolution of the issue themselves, without relying on a neutral decision maker. Negotiation is also used between parties entering into agreements, when there is no legal dispute. Negotiation is often the first method of dispute resolution attempted, because it is inexpensive and relatively fast. Additionally, parties that wish to continue working together in the future often employ negotiation as a friendly method to resolve disputes. Negotiation between parties with unequal bargaining power can result in the stronger party being heavy-handed at the negotiation table, which can result in unfair outcomes for the weaker party. Since negotiation does not follow an externally imposed set of rules, parties may negotiate as their conscience dictates. However, negotiation is often considered a dispute-resolution option that can result in a win-win situation for all parties, as illustrated by the popular book *Getting to Yes*, in which negotiation strategies are set forth in detail.

10. Acronym for best alternative to a negotiated agreement. The concept is discussed in *Getting to Yes* and used by negotiators to ensure that favorable terms are not rejected and unfavorable terms are not accepted.
11. Acronym for worst alternative to a negotiated agreement, which is a concept used by some negotiators.
12. The area in which parties to a negotiation are willing to trade, barter, or negotiate their positions, within which parties can find an acceptable agreement.
13. A party's "bottom line" in negotiation.

EXERCISES

1. Visit <http://www.sfhgroup.com/ca/training/online-training/test-your-skills.php> and click “Negotiate with Bill” under “Online Negotiation Course.” This is a free interactive negotiation exercise. After completing the negotiation, answer the following questions: How far did you get? (If you did not get to level three, go back and try it again. See if you can get all the way through to level three.) What negotiation strategies did you learn? In other words, what works? What doesn’t work?
2. What are the benefits of negotiation as a dispute-resolution method? What are the drawbacks?
3. How can parties that have unequal bargaining power negotiate meaningfully, without one party taking advantage of the other? Have you ever negotiated with someone who had more bargaining power than you? What were your strategies during the negotiation? Did you obtain your goal by the conclusion of the negotiation?
4. Watch the video in [Note 4.13 "Hyperlink: Rubbermaid’s Unequal Bargaining Power"](#). If you were a manufacturer and you had to raise prices due to an increase in price for your raw materials, and if Wal-Mart was your most important customer, what strategies would you employ so that both parties would have a chance to have a “win-win” outcome?

4.2 Mediation

LEARNING OBJECTIVES

1. Learn what mediation is.
2. Explore the process of mediation as an alternative dispute resolution (ADR) strategy.
3. Identify disputes suitable to mediation as a form of ADR.
4. Become familiar with the benefits and drawbacks of mediation as a form of ADR.

Mediation¹⁴ is a method of ADR in which parties work to form a mutually acceptable agreement. Like negotiation, parties in mediation do not vest authority to decide the dispute in a neutral third party. Instead, this authority remains with the parties themselves, who are free to terminate mediation if they believe it is not working. Often, when parties terminate mediation, they pursue another form of ADR, such as arbitration, or they choose to litigate their claims in court. Mediation is appropriate only for parties who are willing to participate in the process. Like negotiation, mediation seeks a “win-win” outcome for the parties involved. Additionally, mediation is confidential, which can be an attractive attribute for people who wish to avoid the public nature of litigation. The mediation process is usually much faster than litigation, and the associated costs can be substantially less expensive than litigation.

Unlike in many negotiations, a third party is involved in mediation. Indeed, a neutral **mediator**¹⁵ is crucial to the mediation process. Mediators act as a go-between for the parties, seeking to facilitate the agreement. Requirements to be a mediator vary by state. See [Note 4.23 "Hyperlink: Mediators"](#) to compare the requirements between states. There are no uniform licensing requirements, but some states require specific training or qualifications for a person to be certified as a mediator. Mediators do not provide advice on the subject matter of the dispute. In fact, the mediators may not possess any subject-matter expertise concerning the nature of the dispute. However, many mediators are trained in conflict resolution, and this allows them to employ methods to discover common goals or objectives, set aside issues that are not relevant, and facilitate an agreement into which the parties will voluntarily enter. Mediators try to find common ground by identifying common goals or objectives and by asking parties to set aside the sometimes emotionally laden obstacles that are not relevant to the sought-after agreement itself.

14. A method of alternative dispute resolution (ADR) in which parties work to form a mutually acceptable agreement.

15. A person who facilitates a mediation to achieve an acceptable, voluntary agreement between parties.

Hyperlink: Mediators

<http://www.mediationworks.com/medcert3/staterequirements.htm>

Visit this site to see the various requirements and qualifications to become a mediator in the different states.

Disputants choose their mediator. This choice is often made based on the mediator's reputation as a skilled conflict resolution expert, professional background, training, experience, cost, and availability. After a mediator is chosen, the parties prepare for mediation. For instance, prior to the mediation process, the mediator typically asks the parties to sign a mediation agreement. This agreement may embody the parties' commitments to proceed in good faith, understanding of the voluntary nature of the process, commitments to confidentiality, and recognition of the mediator's role of neutrality rather than one of legal counsel. At the outset, the mediator typically explains the process that the mediation will observe. The parties then proceed according to that plan, which may include opening statements, face-to-face communication, or indirect communication through the mediator. The mediator may suggest options for resolution and, depending on his or her skill, may be able to suggest alternatives not previously considered by the disputants.

Mediation is often an option for parties who cannot negotiate with each other but who could reach a mutually beneficial or mutually acceptable resolution with the assistance of a neutral party to help sort out the issues to find a resolution that achieves the parties' objectives. Sometimes parties in mediation retain attorneys, but this is not required. If parties do retain counsel, their costs for participating in the mediation will obviously increase.

In business, mediation is often the method of ADR used in disputes between employers and employees about topics such as workplace conditions, wrongful discharge, or advancement grievances. Mediation is used in disputes between businesses, such as in contract disputes. Mediation is also used for disputes arising between businesses and consumers, such as in medical malpractice cases or health care disputes.

Like other forms of dispute resolution, mediation has benefits and drawbacks. Benefits are many. They include the relative expediency of reaching a resolution,

the reduced costs as compared to litigation, the ability for parties that are unable to communicate with each other to resolve their dispute using a nonadversarial process, the imposition of rules on the process by the mediator to keep parties “within bounds” of the process, confidentiality, and the voluntary nature of participation. Of course, the potential for a “win-win” outcome is a benefit. Attorneys may or may not be involved, and this can be viewed as either a benefit or a drawback, depending on the circumstances.

Drawbacks to mediation also exist. For example, if disputants are not willing to participate in the mediation process, the mediation will not work. This is because mediation requires voluntary participation between willing parties to reach a mutually agreeable resolution. Additionally, even after considerable effort by the parties in dispute, the mediation may fail. This means that the resolution of the problem may have to be postponed until another form of ADR is used, or until the parties litigate their case in court. Since mediators are individuals, they have different levels of expertise in conflict resolution, and they possess different backgrounds and worldviews that might influence the manner in which they conduct mediation. Parties may be satisfied with one mediator but not satisfied in subsequent mediations with a different mediator. Even if an agreement is reached, the mediation itself is usually not binding. Parties can later become dissatisfied with the agreement reached during mediation and choose to pursue the dispute through other ADR methods or through litigation. For this reason, parties often enter into a legally binding contract that embodies the terms of the resolution of the mediation immediately on conclusion of the successful mediation. Therefore, the terms of the mediation can become binding if they are reduced to such a contract, and some parties may find this to be disadvantageous to their interests. Of course, any party that signs such an agreement would do so voluntarily. However, in some cases, if legal counsel is not involved, parties may not fully understand the implications of the agreement that they are signing.

KEY TAKEAWAYS

Mediation is a method of ADR in which the parties retain power to decide the issue themselves without vesting that power in an outside decision maker. However, mediation relies on neutral mediators who facilitate the mediation process to assist the parties in achieving an acceptable, voluntary agreement. Mediation is more formal than negotiation but less formal than arbitration or litigation. Mediation is relatively inexpensive, fast, and confidential, unlike litigation. Though nonbinding mediation resolutions are not binding on the parties, these resolution agreements may be incorporated into a legally binding contract, which is binding on the parties who execute the contract. Mediation does not follow a uniform set of rules, though mediators typically set forth rules that the mediation will observe at the outset of the process. Successful mediation often reflects not only the parties' willingness to participate but also the mediator's skill. There is no uniform set of rules for mediators to become licensed, and rules vary by state regarding requirements for mediator certification.

EXERCISES

1. Visit the link in [Note 4.23 "Hyperlink: Mediators"](#) and find your state's requirements and qualifications for mediators. What would it take for you to become a mediator in your state? Do you think that your state requirements ensure that only qualified mediators practice? Why or why not?
2. Identify a situation in which you would choose mediation as your preferred method of dispute resolution. Why is mediation the best method in this situation? What are the potential benefits and drawbacks of mediation in this situation?
3. Should mediators be required to be licensed, like attorneys or physicians, before practicing? Why or why not?
4. Visit <http://www.sfhgroup.com/ca/training/online-training/test-your-skills.php> and scroll down to Mediation game. Click on "play game" under "The Angry Neighbours." This is a free interactive mediation exercise. After completing the mediation, answer the following questions: Were you able to successfully mediate this dispute? If you did not reach a successful resolution, go back and try it again. See if you can reach a successful resolution. What mediation strategies did you learn? What works? What doesn't work?

4.3 Arbitration

16. A method of alternative dispute resolution (ADR) in which parties vest authority in a third-party neutral decision maker who will hear their case and issue a decision.
17. An arbitrator's decision rendered after hearing the cases presented by the parties to an arbitration. The arbitration award can be confirmed and converted into a judgment by a court.
18. A federal statute that requires parties that have entered into contracts with mandatory arbitration clauses to submit to arbitration to resolve disputes arising under such contracts if the contract involves commerce. The U.S. Supreme Court interpreted the Federal Arbitration Act as Congress's declaration of a national policy in favor of arbitration.
19. A clause in Article I, Section 8 of the U.S. Constitution that gives Congress the power to regulate interstate commerce. This power is broadly construed.
20. A contractual clause that requires the parties to a contract that contains such a clause to submit to mandatory arbitration in the event of a dispute arising under the contract. Mandatory arbitration clauses frequently foreclose any possibility of appealing arbitration awards in court.

LEARNING OBJECTIVES

1. Explore the option of arbitration as an alternative dispute resolution (ADR) strategy.
2. Explore contemporary issues of fairness in arbitration.
3. Determine when arbitration is a viable option for dispute resolution.
4. Examine the benefits and drawbacks of arbitration as a form of ADR.

Arbitration¹⁶ is a method of ADR in which parties vest authority in a third-party neutral decision maker who will hear their case and issue a decision, which is called an **arbitration award**¹⁷.

An arbitrator presides over arbitration proceedings. Arbitrators are neutral decision makers who are often experts in the law and subject matter at issue in the dispute. Their decisions do not form binding precedent. Arbitrators may be members of the judiciary, but in arbitrations they are not judges. Arbitrators act in an analogous capacity to judges in trials. For instance, they determine which evidence can be introduced, hear the parties' cases, and issue decisions. They may be certified by the state in which they arbitrate, and they may arbitrate only certain types of claims. For instance, the Better Business Bureau trains its own arbitrators to hear common complaints between businesses and consumers (B2C).

Participation in the arbitration proceeding is sometimes mandatory. Mandatory arbitration results when disputes arise out of a legally binding contract involving commerce in which the parties agreed to submit to mandatory arbitration. Arbitration is also mandatory when state law requires parties to enter into mandatory arbitration.

Although perhaps not obvious, federal law lies at the heart of mandatory arbitration clauses in contracts. Specifically, Congress enacted the **Federal Arbitration Act (FAA)**¹⁸ 9 U.S.C. §1 et seq. through its **Commerce Clause**¹⁹ powers. This act requires parties to engage in arbitration when those parties have entered into legally binding contracts with a **mandatory arbitration clause**²⁰, providing the subject of those contracts involves commerce. 9 U.S.C. §2. In *Southland Park v. Keating*, the U.S. Supreme Court interpreted this federal statute to apply to matters of both federal and state court jurisdiction. Indeed, the Court held that the FAA created a national policy in favor of arbitration. It also held that the FAA preempts

state power to create a judicial forum for disputes arising under contracts with mandatory arbitration clauses. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In a later decision, the Court held that the FAA encompasses transactions within the broadest permissible exercise of congressional power under the Commerce Clause. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). This means that the FAA requires mandatory arbitration clauses to be enforceable for virtually any transaction involving interstate commerce, very broadly construed.

Some states require mandatory arbitration for certain types of disputes. For instance, in Oregon, the state courts require mandatory arbitration for civil suits where the **prayer for damages**²¹ is less than \$50,000, excluding attorney fees and costs. ORS 36.405. Many parties accept the arbitration award without appeal. However, when state law requires mandatory arbitration of certain types of disputes, parties are permitted to appeal because the arbitration is nonbinding. In nonbinding arbitration, the parties may choose to resolve their dispute through litigation if the arbitration award is rejected by a party. However, some states have statutory requirements that, in practice, create a chilling effect on appealing an arbitration award. For example, in the state of Washington, if the appealing party from a nonbinding mandatory arbitration does not do better at trial than the original award issued by the arbitrator, then that party will incur liability not only for its own expenses but also for those of the opposing side. Washington State Court Rules of Procedure, Superior Court Mandatory Arbitration Rules 7.3. In nonbinding arbitration, this is a powerful incentive for parties to accept the arbitration award without appealing to the judicial system.

- 21. A litigant's request for remedy or judgment,
- 22. An arbitration whose outcome is binding on the parties, without possibility of appeal to the courts.
- 23. An arbitration in which the arbitration award can be appealed to a court.
- 24. A court decision that sets forth the rights or duties of parties to a dispute.
- 25. In the context of arbitration, the process by which a court converts an arbitration award to a judgment.
- 26. A uniform statute adopted in whole or in part by some states, which seeks to create uniformity in arbitration proceedings between states.

Voluntary arbitration also exists, and it is frequently used in business disputes. Sometimes parties simply agree that they do not want to litigate a dispute because they believe that the benefits of arbitration outweigh the costs of litigation, so they choose voluntary arbitration in hopes of a speedy and relatively inexpensive outcome. Other times, parties are not certain how strong their case is. In such cases, arbitration can seem much more attractive than litigation.

Arbitration awards can be **binding**²² or **nonbinding**²³. Some states, like Washington State, have codified the rule that arbitration decisions are binding when parties voluntarily submit to the arbitration procedure. Uniform Arbitration Act, RCW 7.04. In binding arbitration, the arbitration award is final; therefore, appealing an arbitration award to the judicial system is not available. In many states, an arbitration awards is converted to a **judgment**²⁴ by the court, thereby creating the legal mechanism through which the judgment holder can pursue collection activities. This process, called **confirmation**²⁵, is contemplated by the FAA and often included in arbitration agreements. But even if the FAA does not apply, most states have enacted versions of either the **Uniform Arbitration Act**²⁶ or the

Revised Uniform Arbitration Act²⁷. These state laws allow confirmation of arbitration awards into judgments as well.

Like any other form of dispute resolution, arbitration has certain benefits and drawbacks. Arbitration is an adversarial process like a trial, and it will produce a “winner” and a “loser.” Arbitration is more formal than negotiation and mediation and, in many ways, it resembles a trial. Parties present their cases to the arbitrator by introducing evidence. After both sides have presented their cases, the arbitrator issues an arbitration award.

Rules related to arbitration differ by state. The rules of procedure that apply to litigation in a trial do not typically apply to arbitration. Specifically, the rules are often less formal or less restrictive on the presentation of evidence and the arbitration procedure. Arbitrators decide which evidence to allow, and they are not required to follow precedents or to provide their reasoning in the final award. In short, arbitrations adhere to rules, but those rules are not the same as rules of procedure for litigation. Regardless of which rules are followed, arbitrations proceed under a set of external rules known to all parties involved in any given arbitration.

Arbitration can be more expensive than negotiation or mediation, but it is often less expensive than litigation. In *Circuit City Stores Inc. v. Adams*, the U.S. Supreme Court noted that avoiding the cost of litigation was a real benefit of arbitration. *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105 (2001). The costly discovery phase of a trial is nonexistent or sharply reduced in arbitration. However, arbitration is not necessarily inexpensive. Parties must bear the costs of the arbitrator, and they typically retain counsel to represent them. Additionally, in mandatory arbitration clause cases, the arbitration may be required to take place in a distant city from one of the disputants. This means that the party will have to pay travel costs and associated expenses during the arbitration proceeding. The *Circuit City* Court also noted that mandatory arbitration clauses avoid difficult choice-of-law problems that litigants often face, particularly in employment law cases.

Arbitration is faster than litigation, but it is not as private as negotiation or mediation. Unlike mediators, arbitrators are often subject-matter experts in the legal area of dispute. However, as is true for mediators, much depends on the arbitrator’s skill and judgment.

27. A revised version of the Uniform Arbitration Act.

28. Business to business.

A common issue that arises is whether mandatory arbitration is fair in certain circumstances. It’s easy to imagine that arbitration is fair when both parties are equally situated. For example, business to business (**B2B**²⁸) arbitrations are often perceived as fair, especially if businesses are roughly the same size or have roughly

equal bargaining power. This is because they will be able to devote approximately the same amount of resources to a dispute resolution, and they both understand the subject under dispute, whatever the commercial issue may be. Moreover, in B2B disputes, the subjects of disputes are commercial issues, which may not implicate deeper social and ethical questions. For example, contract disputes between businesses might involve whether goods are **conforming goods**²⁹ or **nonconforming goods**³⁰ under the Uniform Commercial Code (UCC). No powerful social or ethical questions arise in such disputes. Indeed, resolving such disputes might be seen as “business as usual” to many commercial enterprises.

However, issues of fairness often arise in business to employee (B2E³¹) and business to consumer (B2C³²) situations, particularly where parties with unequal bargaining power have entered into a contract that contains a mandatory arbitration clause. In such cases, the weaker party has no real negotiating power to modify or to delete the mandatory arbitration clause, so that party is required to agree to such a clause if it wants to engage in certain types of transactions. For example, almost all credit card contracts contain mandatory arbitration clauses. This means that if a consumer wishes to have a credit card account, he will agree to waive his constitutional rights to a trial by signing the credit card contract. As we know, the FAA will require parties to adhere to the mandatory arbitration agreed to in such a contract, in the event that a dispute arises under that contract. In such cases, questions regarding whether consent was actually given may legitimately be raised. However, the U.S. Supreme Court has held that in B2E contexts, unequal bargaining power alone is not a sufficient reason to hold that arbitration agreements are unenforceable, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). and it is not sufficient to preclude arbitration. *Lozano v. AT & T Wireless*, 504 F.3d 718 (9th Cir. 2007).

Additionally, concerns about fairness do not end at contract formation. If a dispute arises and mandatory arbitration is commenced, the unequal power between parties will continue to be an important issue. In the case between a credit card company and an average consumer debtor, the credit card company would clearly be in a more powerful position vis-à-vis the debtor by virtue of the company’s financial strength and all that comes with it, such as experienced attorneys on staff, dispute-resolution experience, and contractual terms that favor it, rather than the consumer debtor. In such cases, if the consumer debtor is the aggrieved party, he may very well decide to drop the matter, especially if the arbitration clause requires arbitration proceedings to occur in a distant city. The credit card company will have vast financial resources as compared to the consumer debtor. Moreover, in this example the credit card company’s legal counsel will know how to navigate the arbitration process and will have experience in dispute resolution, processes that often confound people who are not trained in law. Additionally, the list of arbitrators may include people who are dependent on repeat business from the

29. Goods that conform to the buyer’s order.

30. Goods that do not conform to the buyer’s order. Under the Uniform Commercial Code (UCC), nonconforming goods can be rejected by the buyer.

31. Business to employee.

32. Business to consumer.

credit card company for their own livelihoods, thereby creating—or at least suggesting—an inherent conflict of interest. Many mandatory arbitration clauses create binding awards on one party while reserving the right to bring a claim in court to the other party. That is, a mandatory arbitration clause may allow the credit card company to appeal an arbitrator's award but to render an award binding on the consumer debtor. Obviously, this would allow the credit card company to appeal an unfavorable ruling, while requiring the consumer debtor to abide by an arbitrator's unfavorable ruling. To a consumer debtor, the arbitration experience can seem like a game played on the credit card company's home court—daunting, feckless, and intimidating.

Additionally, some types of disputes that have been subjected to mandatory arbitration raise serious questions about the appropriateness of ADR, due to the nature of the underlying dispute. For example, in some recent B2E disputes, claims relating to sexual assault have been subjected to mandatory arbitration when the employee signed an employment contract with a mandatory arbitration clause. Tracy Barker, for example, was reportedly sexually assaulted by a State Department employee in Iraq while she was employed as a civilian contractor by KBR Inc., a former Halliburton subsidiary. When she tried to bring her claim in court, the judge dismissed the claim, citing the mandatory arbitration clause in her employment contract. After arbitration, she won a three-million-dollar arbitration award. As KBR Inc. noted, this “decision validates what KBR has maintained all along; that the arbitration process is truly neutral and works in the best interest of the parties involved.” Despite this statement, KBR Inc. has filed a motion to modify the award. Juan A. Lozano, “Woman Awarded \$3M in Assault Claim against KBR,” *AP News*, November 19, 2009, <http://www.thefreelibrary.com/Woman+awarded+%243M+in+assault+claim+against+KBR-a01612064743> (accessed September 24, 2010).

In a similar case, employee Jamie Leigh Jones worked for KBR Inc. in Iraq when she was drugged and gang raped. She was initially prohibited from suing KBR Inc. in court because her employment contract contained a mandatory arbitration clause. However, when considering this case, the Fifth Circuit Court of Appeals ruled that sexual assault cases may, in fact, be brought in court rather than being subjected to mandatory arbitration, despite the contract language requiring mandatory arbitration. *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009). Jones's claims were beyond the scope of the arbitration clause, because sexual assault is not within the scope of employment. Moreover, under Senator Al Franken's lead, the Senate took action to prohibit the Department of Defense from contracting with defense contractors that require mandatory arbitration for sexual assault claims. If such action is passed, it would essentially allow the Fifth Circuit's holding to apply in all federal jurisdictions rather than just in the Fifth Circuit. Check out [Note 4.44 "Video Clip: Al Franken"](#) to hear the details of Senator Franken's work on this matter. One

might think that passing such a law would be a “no brainer” to lawmakers. However, some Senators voted against the measure, arguing that the federal government should not insert itself into rewriting contracts. Instead, some argued that the use of arbitration and mediation should be expanded for such cases.

Video Clip: Al Franken

Watch Senator Al Franken discuss the facts of the Jamie Leigh Jones case [here](#):

[\(click to see video\)](#)

In B2C cases, different issues of fairness exist. As noted previously, when the disputants possess unequal power, these issues can be magnified. Public Citizen, a nonprofit organization that represents consumer interests in Congress, released a report concerning arbitration in B2C disputes. Specifically, the report argued that arbitration is unfair to consumers in B2C disputes and that consumers fare better in litigation than in arbitration. According to the report, incentives exist to favor businesses over consumers in the arbitration process. It pointed to the lack of appeal rights, lack of requirement to follow precedents or established law, limits on consumers’ remedies, prohibitions against class-action suits, limitations on access to jury trials, limitations on abilities to collect evidence, and greater expense as additional factors speaking to the unfairness of arbitration over litigation in B2C disputes. Check out [Note 4.45 "Hyperlink: Arbitration"](#) for the full report.

Hyperlink: Arbitration

[http://www.citizen.org/documents/ArbitrationDebateTrap\(Final\).pdf](http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf)

Check out this Public Citizen report, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration*, which argues arbitration is bad for consumers in B2C disputes.

Importantly, and despite the FAA’s broad interpretation, not all binding arbitration clauses have been upheld by courts in B2C cases. In 2007, the Ninth Circuit Court of Appeals ruled that AT&T’s binding arbitration clause for wireless customers is unenforceable under California state law. *Lozano v. AT & T Wireless*, 504 F.3d 718 (9th Cir. 2007). The court further noted that the relevant state law is not preempted by the FAA, because the FAA does not prevent the courts from applying state law. In

this case, that law involved unconscionability of contract terms. As noted previously, the FAA requires parties to submit to mandatory arbitration when they agree to do so in a legally binding contract, and it preempts state powers to provide a judicial forum in those matters. However, the Ninth Circuit's holding in this case underscores the fact that state contract law is not circumvented by the federal statute.

Arbitration is a widely used form of ADR, but important questions have been raised about its appropriateness in certain types of disputes. Before signing a mandatory arbitration agreement, it's important to realize that under current law, your opportunity to bring your claim in court will be severely restricted or entirely precluded. Moreover, if you sign such an agreement with a party who holds inherently greater power than you, such as your employer, then you may find yourself at an extreme disadvantage in an arbitration proceeding.

KEY TAKEAWAYS

Arbitration is a form of ADR in which parties vest authority to decide a dispute with a third-party arbitrator, who hears the evidence and issues an arbitration award. Arbitration may be binding or nonbinding, and it may be mandatory or voluntary. Arbitration awards issued by arbitrators can be confirmed to judgments by judges. Issues of fairness arise in arbitration when disputants possess unequal power, such as arbitration in employment or consumer disputes. Questions concerning the appropriateness of mandatory arbitration arise in cases involving issues of civil rights violations. The Federal Arbitration Act requires enforcement of mandatory arbitration clauses in contract disputes involving commerce where mandatory arbitration clauses exist. The Arbitration Fairness Act of 2009 would resolve several issues of unfairness, but this act has not yet been passed in to law.

EXERCISES

1. Check out Jon Stewart's perspective on Senator Franken's proposed measure to prevent the Department of Defense from contracting with defense contractors that require mandatory arbitration for disputes arising from sexual assaults at <http://www.thedailyshow.com/watch/wed-october-14-2009/rape-nuts>. Does the comedian accurately portray this issue? What role does popular culture have in shaping our opinions and conceptions of our legal system?
2. In the *Barker v. Halliburton Inc.* case, does the three-million-dollar arbitration award in favor of the sexual assault victim prove that arbitration works, even in violations of civil rights disputes? Why or why not?
3. Choose one argument in *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* in [Note 4.45 "Hyperlink: Arbitration"](#) and develop a counterargument to support the contention that arbitration *is* good in B2C disputes. Compare your argument with the argument in the report. Which side is the most persuasive? After completing this exercise, do you believe that arbitration is good or bad for consumers in B2C disputes? Why?
4. Bank of America announced that it would no longer require mandatory arbitration in disputes arising between it and consumer credit card account holders. Review the story here: <http://www.reuters.com/article/idUSTRE57D03E20090814>. What are the benefits and drawbacks to Bank of America's credit card account customers with respect to this change?
5. In what contexts have you entered into an arbitration agreement (e.g., home purchase, credit card agreement, cell phone agreement)? Write a short essay discussing the implications of entering into that agreement.

4.4 Other Methods of Alternative Dispute Resolution

LEARNING OBJECTIVES

1. Learn about in-house dispute-resolution methods, med-arb, private judging, minitrials, and summary jury trials.
2. Explore the benefits and drawbacks to forms of alternative dispute resolution (ADR) discussed in this section.

Remember that ADR is a broad term used to denote methods to resolve disputes outside of litigation. This can really be any method, whether or not it bears a specific label or adheres to a particular procedure. For instance, negotiation might be a quick meeting in the hallway between disputants, or it might involve a formal round of negotiations where all parties are represented by legal counsel.

However, when parties are attempting to resolve a dispute, it makes sense for them to agree to a specific procedure for doing so beforehand, so that each party understands how to proceed. Negotiation, mediation, and arbitration are the most common forms of ADR. However, these methods might not be appropriate for every dispute. Other forms of ADR exist, ranging from in-house programs to very formal external processes. This section briefly discusses commonly used alternatives to resolving disputes besides negotiation, mediation, arbitration, or litigation.

Some ADR processes or programs are available only to certain groups of people, such as members of a particular organization. For instance, some organizations, like Boeing, have an internal **ethics hotline**³³. This hotline is available for employees to report perceived ethics violation that they have observed. Ethics advisors answer employees' questions and follow up on reports that need further investigation. One major benefit is that reporting parties generally (but not always) remain anonymous. Another benefit is that the company has time to redress problems that could give rise to disputes of much greater magnitude if left unaddressed.

An **open-door policy**³⁴ is an in-house program that allows company employees to go directly to any level of management to file a complaint or grievance, without threat of retaliation for their reporting. In theory, this policy creates an open atmosphere of trust, and it breaks down class barriers between groups of employees. However, many employees may not feel comfortable in making a complaint about a manager's decision. Moreover, supervisors may not be

33. An in-house program in some companies that seeks to redress disputes and observed ethics violations before they escalate to permeate the institutional culture, damage a company's reputation, or rise to criminal or civil offenses.

34. An in-house policy in which company managers allow employees to bring grievances directly to them to truncate any potential disputes and resolve them immediately.

comfortable with their employees bypassing them to file complaints. Open-door policies sound very good in theory, but they may not work as well in practice.

Another type of in-house program is an ombudsmen's office. These stations generally hear complaints from stakeholders, such as employees or customers. **Ombudsmen**³⁵ try to troubleshoot these complaints by investigating and attempting to resolve the issues before they escalate into more formal complaints.

More formal methods of ADR include **mediation-arbitration (med-arb)**³⁶, which is essentially a mediation followed by an arbitration. If the mediation does not produce a satisfactory outcome, then the parties submit to arbitration. The neutral party mediating the dispute also serves as the arbitrator if the dispute-resolution process goes that far. Med-arb has the same benefits and drawbacks as mediation and arbitration alone, with some important differences. For instance, parties in a med-arb know that their dispute will be resolved. This is unlike mediation alone, where parties may walk away if they do not think that the mediation is serving their interests. Moreover, the parties in med-arb have an opportunity to reach a win-win outcome as in mediation. However, if they do not reach a satisfactory outcome, then one party will "win" and one party will "lose" during the arbitration phase. The knowledge that an arbitration will definitely follow a failed mediation can be a strong incentive to ensure that the mediation phase of a med-arb works.

Private judging³⁷, contemplated by many state statutes, is a process in which active or retired judges may be hired for private trials. Private judging is essentially private litigation. The hired judge can preside over a private trial that is not truncated by limits on discovery or abbreviated rules of procedure, as would be the case in arbitration. Additionally, the judge who oversees the process is highly experienced in such matters as evidence and decision rendering. Moreover, the parties who can afford to pay for this service have a substantial benefit in not having to wait to have their cases heard in the public court. The private trial is also private rather than public, which may be important to parties who require confidentiality. In states where statutes permit hiring a judge for such matters, the parties' ability to appeal is often preserved. Drawbacks include the sometimes questionable nature of enforceability of judgments rendered, though some state statutes allow enforceability of those judgments as if they were issued in public court. Moreover, this system may benefit those who can afford to pay for this service, while others must wait for their case to appear on the docket in public court. This raises questions of fairness. See [Note 4.54 "Hyperlink: Private Judges"](#) for one state's frequently asked questions (FAQ) regarding private judges.

35. In-house intermediary or office in which disputes or grievances against a company can be brought. Ombudsmen investigate grievances and work with parties to resolve disputes.

36. A hybrid form of alternative dispute resolution (ADR) in which elements of mediation and negotiation are used in tandem.

37. This process allows judges to hire out privately, to conduct private trials, and to reach a rapid resolution overseen by an experienced judge.

Hyperlink: Private Judges

<http://www.in.gov/judiciary/admin/private-judges/faq.html>

Check out Indiana Courts' Web page with frequently asked questions about private judges.

Does your state permit private judging?

A **minitrial**³⁸ is a procedure that allows the parties to present their case to decision makers on both sides of the dispute, following discovery. This is a private affair. After the cases are presented, the parties enter into mediation or negotiation to resolve their dispute.

A **summary jury trial**³⁹ is a mock trial presented to a jury whose verdict is nonbinding. The presentation is brief and succinct, and it follows a discovery period. The jury does not know that its verdict will be advisory only. This process allows parties to measure the strengths and weaknesses of their cases prior to engaging in litigation, which presumably saves both time and money. After the minitrial, parties are in a better position to negotiate or mediate an outcome that fairly represents their positions.

KEY TAKEAWAYS

Methods of ADR other than negotiation, mediation, and arbitration are available to disputants. For example, minitrials, med-arb, private judging, and summary jury trials are common alternatives, as are in-house programs like ombudsmen, anonymous ethics hotlines, and open-door policies. Benefits and drawbacks to these methods exist relative to other methods of ADR and to litigation.

38. Similar to a mediation and arbitration, where parties present their case to a panel of decision makers who are involved in the dispute (like management), and then work with mediators or other neutral decision makers to reach an agreement.

39. A procedure similar to litigation, though the jury's verdict is nonbinding and advisory only. It is designed to present the merits and weaknesses of each case, after which the parties seek to reach an agreement through negotiation or mediation.

EXERCISES

1. Visit Boeing's Ethics Line Web page: <http://www.boeing.com/companyoffices/aboutus/ethics/hotline.html>. Do you think this program can address all disputes before they get out of hand? Why or why not? What type of dispute might not be appropriate to bring to an ethics hotline program?
2. Locate two "ethics hotline" programs from an online search. Compare these programs. What are the benefits and drawbacks to each?
3. Check out [Note 4.54 "Hyperlink: Private Judges"](#). Do you think that people should be permitted to hire judges to preside over private trials if they can afford to do so? What benefits to litigants in a private trial have over litigants in a public trial? What ethical issues exist with respect to private judges?
4. Why would a party choose med-arb over mediation or arbitration alone?

4.5 Public Policy, Legislation, and Alternative Dispute Resolution

LEARNING OBJECTIVES

1. Explore potential restrictions upon ADR.
2. Review points of access to government to change public policy.
3. Examine the Arbitration Fairness Act Bill.

Alternative dispute resolution can be a very useful alternative to litigation. There are many advantages to disputants, such as expediency, cost savings, and greater privacy than litigation. In business to business (B2B) disputes, alternative dispute resolution (ADR) often makes sense.

The **Federal Arbitration Act (FAA)**⁴⁰ is a federal statute that the U.S. Supreme Court interpreted as a national policy favoring arbitration in *Southland Corp. v. Keating*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984). According to the *Southland Corp* Court, state power to create judicial forums to resolve claims when contracting parties enter into a mandatory arbitration agreement has been preempted by the FAA. However, not all disputes are well suited for ADR. This is an area in which Congress could make substantial changes in public policy through the creation of new law, to ensure fairness between unequal parties and to ensure the protection of civil rights. Congress could do this by making ADR optional, rather than mandatory, for some types of disputes. It could exclude certain types of disputes from being bound to arbitration through mandatory arbitration clauses.

For example, the proposed **Arbitration Fairness Act of 2009 (AFA)**⁴¹ would invalidate mandatory arbitration clauses in employment and consumer disputes, as well as in disputes arising from civil rights violations. See [Note 4.63 "Hyperlink: Arbitration Fairness Act Bill"](#). The AFA is a proposed bill to amend the FAA. Under the Commerce Clause, Congress has the power to limit the use of mandatory arbitration, just as it has the power to enforce mandatory arbitration clauses under the Commerce Clause through the existing FAA. By passing a new law that excludes certain types of disputes from being subjected to mandatory arbitration, Congress could set new **policy**⁴² regarding fairness in dispute resolution. Likewise, if it fails to act, Congress is also acceding to the U.S. Supreme Court's broad interpretation of the FAA as a national policy favoring arbitration. Either way, policy regarding mandatory arbitration exists, and Congress has a central role in defining that policy.

40. A federal statute that requires parties that have entered into contracts with mandatory arbitration clauses to submit to arbitration to resolve disputes arising under such contracts if the contract involves commerce. The U.S. Supreme Court interpreted the Federal Arbitration Act as Congress's declaration of a national policy in favor of arbitration.
41. A bill that, if passed, would invalidate mandatory arbitration requirements for consumers in business to consumer (B2C) disputes and employees in business to employee (B2E) disputes, as well as in disputes involving violations of civil rights.
42. A plan or course of action that directs or influences decisions or processes to desired outcomes or objectives.

Hyperlink: Arbitration Fairness Act Bill

<http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1020>

Review the Arbitration Fairness Act Bill, which would amend the Federal Arbitration Act.

In 1925, when the FAA was originally passed, records indicate that Congress intended that mandatory arbitration clauses be enforced in contracts between merchants, rather than between businesses and consumers or between employers and employees. In the latter relationships, the parties have vastly unequal power. Moreover, despite the existence of mandatory arbitration clauses in contracts, the FAA was not contemplated as a means to preempt state power to provide judicial forums for certain types of disputes. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U.L. Rev. 99 (2006). However, the U.S. Supreme Court has greatly expanded the FAA's applicability since then.

If Congress passed the AFA, this would be an example of one branch of government "checking" another branch's power as contemplated by the U.S. Constitution. Specifically, the legislative branch would be checking the judicial branch's power by passing a law to counteract the U.S. Supreme Court's broad interpretation of the FAA in *Southland Corp. v. Keating*.

This is how our government is supposed to work. One branch checks another branch's power. This "checking" of power maintains relative balance among the branches. Because people have different points of entry into the lawmaking process, this system ultimately balances the many special interests of the American people. For example, some businesses and employers that do not wish the AFA to pass may wonder what recourse they have. After all, the U.S. Supreme Court's interpretation of the FAA currently favors their interests. Since the AFA has not yet passed, they could lobby lawmakers against its passage. Note too that if the AFA becomes law, these interest groups are not simply shut out of the government's lawmaking process. They continue to have access to lawmaking. One point of entry is through the legislative branch. For instance, they could return to Congress and ask it to pass a new law to counteract the AFA, or to repeal the AFA altogether. They also have a point of entry to the lawmaking process through the judicial branch. Specifically, once a case or controversy arose under the AFA in which they had

standing, they could ask the courts to interpret the statute narrowly, or they could ask the courts to strike down the statute altogether.

On the other side of the issue, consumers and employees who do not like the FAA's current broad interpretation can work within our government system to change the law. For instance, they can ask Congress to pass a new law, such as the AFA. They could ask Congress to repeal the FAA. They could also wait for another case to arise under the FAA to try to get the relevant holding in the *Southland Corp.* case overturned. This is perhaps more difficult than the first two options, because any U.S. Supreme Court case produces many progeny at the circuit court level. Each decision at the circuit court level also produces binding precedent within that jurisdiction. It is very difficult to get a case before the U.S. Supreme Court. Even if that happened, there would be no guarantee that the Court would overturn a prior opinion. In fact, the opposite is usually true. Precedent is most often followed rather than overturned.

In the United States, the policy process is open for participation, though changes often take much work and time. People with special interests tend to coalesce and press for changes in the law to reflect those positions. This appears to be what is happening in the world of ADR now. After many years of mandatory arbitration requirements that have yielded perhaps unfair processes or results, groups that believe they should not be forced into ADR by mandatory arbitration clauses are building momentum for their position in Congress. If the AFA passes, that will not be the end of the story, however. New interest groups may form to support the previous law, or a new law altogether.

KEY TAKEAWAYS

Public policy regarding arbitration has been codified in the FAA and expanded by the U.S. Supreme Court. To change public policy, interest groups can access the government lawmaking power through several points, including through the legislative branch and through the judicial branch. To change public policy regarding mandatory arbitration clauses, for instance, Congress could amend or repeal the FAA. Additionally, given another dispute arising under the FAA concerning its scope, the U.S. Supreme Court could overturn prior decisions that broadly interpret the FAA's reach. Our government's structure allows several points of access for those who would protect the status quo of public policy and for those who seek to change it. The U.S. government is a dynamic system that provides opportunities for special interests to coalesce and change the law and public policy.

EXERCISES

1. How many points of entry are there into lawmaking processes? Which point would be the easiest to access if you wanted to change the law? Why?
2. Check out [Note 4.63 "Hyperlink: Arbitration Fairness Act Bill"](#). Do you think that the AFA will solve the issue of perceived unfairness in dispute resolution? Why or why not? Are there any additions that you can make to this bill to make it more likely to achieve the goal of greater fairness in dispute resolution, if passed?

4.6 Concluding Thoughts

Alternative dispute resolution (ADR) is a popular and common group of methods to resolve disputes in many different contexts. In business, ADR is commonly used in business to business (B2B), business to consumer (B2C), and business to employee (B2E) disputes. Several methods of ADR exist. The most commonly employed methods include negotiation, mediation, and arbitration. Under federal law, national policy favors arbitration. Sometimes ADR is perceived as unfair, because parties have unequal power relative to each other or because the subject matter of the dispute is not considered suitable for ADR. Like other areas of law and public policy, ADR is dynamic and subject to change, particularly when special interest groups coalesce successfully and create momentum for change within our legal system. Currently, there is a nascent movement to exclude certain types of disputes from ADR by amending the federal law that requires mandatory arbitration when parties have contractually consented to it.