

6.6: Public Policy, Legislation, and Alternative Dispute Resolution

Learning Objectives

- Explore potential restrictions upon ADR.
- Review points of access to government to change public policy.
- 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) 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) would invalidate mandatory arbitration clauses in employment and consumer disputes, as well as in disputes arising from civil rights violations. See "[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 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.

Hyperlink: Arbitration Fairness Act Bill

[thomas.loc.gov/cgi-bin/query/z?c111:H.R.1020](https://www.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.

? Exercise 6.6.1

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 "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?

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