Arbitration CLE Outline: OBA Just the Basics
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1. Background on Arbitration

A. What is Arbitration?

1. Binding private dispute resolution with one or more arbitrators acting as judges after some sort of merits hearing who render an award that is generally enforceable.
2. Creature of contract.

B. Examples of situations where arbitration commonly occurs:

1. Employment contracts.
2. Labor collective bargaining agreements.
3. Financial service contracts.
4. Consumer contracts.
5. Mergers and acquisitions.
6. Long-term supply agreements.
7. Construction.

C. Governing bodies of law for Arbitration

1. Federal Arbitration Act.
2. State law to the extent not preempted. State law generally can't be more restrictive towards arbitration—*e.g.* make it harder to compel arbitration of certain types of claims.
3. These bodies of law generally deal with a court's powers to compel arbitration and enforce an award, and not the procedures and evidentiary rules for an arbitration.
4. Major pro-arbitration presumption in the courts. The courts strongly favor the enforceability of arbitration clauses and awards, with very limited review.

D. Arbitration clauses:

1. Determine the scope of claims to be arbitrated and in what manner they will be arbitrated.
2. May include:
   a) What type of claims are subject to arbitration.
      i) Broad clause: All claims arising under or related to the contract.
      ii) Narrow clause: Certain specific issues.
   b) Under what arbitral rules/institution.
   c) Number of arbitrators.
   d) Arbitrator selection procedure.
   e) Seat of arbitration.
   f) Substantive law governing the arbitration.
   g) That the award is enforceable by any court of competent jurisdiction.
   h) Confidential.

3. Arbitration clauses are very hard to attack in court:
   a) Courts will generally read the scope of claims subject to arbitration under broad arbitration clauses as broadly as possible.
   b) Clauses are separable and separately enforceable from the main contract. The arbitration clause itself must be unconscionable or somehow unenforceable. Example: *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (Clause where company gets to make its own one-sided rules for arbitration against employee was unconscionable.).
   c) Very few types of claims are not arbitrable. For example, courts have held that the following types of claims can be subject to arbitration:
      - Antitrust. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–37 (1985).
      - Federal employment discrimination claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
      - Personal injury and wrongful death claims. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532, 132 S. Ct. 1201 (2012) (pursuant to nursing home agreement).
   d) Class action waivers in arbitration clauses generally enforceable. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

E. Arbitral Institutions

1. Examples:
   a) American Arbitration Association (AAA)
   b) JAMS
   c) FINRA
   d) State bar associations for attorney fee dispute arbitration.

2. Administer cases
3. Provide rules and procedures
4. Roster of arbitrators
5. Institution may have subgroups with special rules/procedures:
   a) Consumer
   b) International
   c) Construction
   d) Employment
   e) Labor

6. Can do ad hoc arbitration without institution

II. **Typical Arbitration Process**

1. File a claim with institution.
2. May litigate any dispute about whether claims are subject to arbitration.
3. Choose panel.
4. Initial scheduling conference.
5. Some limited discovery.

a) Generally no depositions or interrogatories.
b) Some document discovery. Requests must be more targeted than court litigation.
c) Tribunal may issue subpoena to third party for documents or testimony at hearing (FAA § 7). An Eighth Circuit court will also enforce a pre-hearing subpoena for documents (circuit split). *Sec. Life Ins. Co. of Am. V. Duncanson & Holt (In re Sec. Life Ins. Co. of Am.)*, 228 F.3d 865, 870-71 (8th Cir. 2000).

6. Pre-hearing briefing supported by exhibits, witness statements and expert reports.
7. Hearing before the tribunal.
    - Federal/state rules of evidence do not apply. Very limited objections. Tribunal often questions witnesses.
8. Arbitration award.
9. Enforcement.
    - Very limited grounds to challenge enforcement:
        1) Corruption.
        2) Evident partiality.
        3) Failure to postpone hearing or hear pertinent evidence.
        4) Arbitrators grossly exceeded their powers.

III. Some Pros and Cons of Arbitration

A) Pro
1) Can be confidential.
2) May save costs.
3) Less discovery.
4) Can get arbitrators who are experts in the area of dispute.
5) Can choose neutral ground for parties from different places.

B) Con
1) Limited discovery.
2) Few means for early disposition (motion to dismiss/summary judgment).
3) Limited injunctive powers of the arbitral tribunal.
4) Limited reasoning in awards.
5) No jury.
6) Very limited review.
7) May not save money.