

# The Federal Arbitration Act

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The Federal Arbitration Act (FAA), *9 U.S.C. § 1, et seq.* governs arbitration in contracts that involve interstate commerce. There are some differences in practice between the FAA and RUAA, and a lawyer needs to understand those differences.

The FAA is an act that may be litigated in either state or federal court. In light of recent United States Supreme Court decisions, the FAA has taken on more significance in business.

Section 1 of the FAA reads as follows:

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts or employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

This section forms the basis for recent decisions. In *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), the Court upheld the validity of an arbitration clause in an employment contract. That clause required arbitration of all claims related to employment, including claims of discrimination and tort. The employee had argued that §1 of the FAA precluded inclusion of employment contracts, but the Court disagreed. An arbitration

clause in an employment contract that involves interstate commerce would be valid, except to the extent that the contract could be revoked on legal or equitable grounds. 9 U.S.C. §2. Please note that transportation workers, such as railroaders, are excluded from the operation of §1. Thus, an employee who signs an employment contract with an arbitration clause can be compelled to arbitrate claims under Title 7, the ADEA, and ADA.

The United States Supreme Court's decision in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) reflects the breadth of the FAA. A franchise agreement involving a Subway Sandwich store included an arbitration clause. The State of Montana refused to enforce the arbitration clause because it did not comply with a state statute that required a notation on the first page of the contract in underlined capital letters that an arbitration clause was part of the contract. A Montana state statute precluded enforcement of the arbitration clause unless the proper notification was present. The Court held that the FAA pre-empted state law. The Court ruled that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2." The Court further held that "[c]ourts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions."

The FAA becomes the controlling statute in contracts that involve interstate commerce. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court upheld an arbitration clause in a contract between homeowners and a termite control company. This decision followed the Court's holdings in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Perry v. Thomas*, 482 U.S. 483 (1987) which also discuss pre-emption on matters involving commerce.

Please note that the Court has upheld the principle that a party must have contractually agreed to arbitration. In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court held that the EEOC was not bound by an arbitration clause in an employment contract. The employee had chosen not to individually pursue a claim, and the EEOC was not a party to the employment contract. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court noted that there must be a

showing that a party signed and is bound by a contract that includes an arbitration clause.

Please note further that the Tenth Circuit has ruled in *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230 (10<sup>th</sup> Cir. 1999) that an arbitration clause that required the employee to pay a portion of the arbitrator's fees was unenforceable ("Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum."); *also see, Fuller v. Pep-Boys-Manny, Moe & Jack of Delaware, Inc.*, 88 F.Supp.2d 1158 (D.Colo. 2000).

Enforcement of an arbitration clause under the FAA may be sought in either state or federal court. In order to seek enforcement in federal court, there must be jurisdiction that is separate and apart from the FAA. *Woodmen of the World Life Ins. v. Manganaro*, 342 F.3d 1213 (10<sup>th</sup> Cir. 2003). The same is also true for confirmation of an award.

Review of an arbitration award under the FAA or other federal statute is very limited. 9 U.S.C. §10; *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001) (review of arbitration award under labor agreement is extremely limited). The time limit for filing a motion to vacate, modify or correct an award is three months.

It is important to note that the FAA applies to contracts involving "commerce." Even if the FAA is not mentioned in the contract, it still may have applicability. The FAA is applicable in state court proceedings. It is not necessary to seek relief under the FAA in federal court. Indeed, it may be necessary to seek relief in state courts under federal jurisdictional limitations. *Chilcott Entertainment LLC v. John G. Kinnard Company, Incorporated*, 10 P.3d 723 (Colo.App. 2000)(federal court had dismissed the petition to vacate an FAA award on basis of lack of complete diversity and lack of subject matter jurisdiction).

## **Federal Arbitration Act**

**9 U.S.C. § 1, et seq.**

**Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.**

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts or employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

**Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate.**

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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**Section 3. Stay of proceeding where issue therein referable to arbitration.**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the application for the stay is not in default in proceeding with such arbitration.

**Section 4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction to order to compel arbitration; notice and service thereof; hearing and determination.**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which,

save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial shall be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

**Section 5. Appointment of arbitrators or umpire.**

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of

either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

**Section 6. Application heard as motion.**

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions except as otherwise herein expressly provided.

**Section 7. Witnesses before arbitrators; fees; compelling attendance.**

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

**Section 8. Proceedings begun by libel in admiralty and seizure of vessel or property.**

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court

shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

**Section 9. Award of arbitrator; confirmation; jurisdiction; procedure.**

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

**Section 10. Same; vacation; grounds; rehearing.**

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title.

**Section 11. Same; modification or correction; grounds; order.**

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration -

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

**Section 12. Notice of motions to vacate or modify; service; stay of proceedings.**

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If

the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

**Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.**

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

- (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.
- (b) The award.
- (c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

**Section 14. Contracts not affected.**

This title shall not apply to contracts made prior to January 1, 1926.

**Section 15. Inapplicability of the Act of State doctrine.**

Enforcement of arbitral agreements, confirmation or arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

**Section 16. Appeals.**

(a) An appeal may be taken from -

(1) an order -

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel Arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order -

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.