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Federal Arbitration Act basics: A quick look at the federal act that dominates many arbitrations

AN EXPLANATION OF THE ACT'S 16 SECTIONS WITH RELEVANT CASES

The Federal Arbitration Act (FAA) aims to enforce "valid, irrevocable, and enforceable" private arbitration agreements in both *state and federal* courts. Excluded from FAA enforcement are contracts of employment of seamen, railroad employees, and workers engaged in foreign or interstate commerce.

Enforcement of the FAA has created a vast amount of case law. This article discusses the 16 FAA code sections and a few case interpretations. The 16 section titles in this article are the *actual* FAA titles.

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

This first section excludes enforcement of arbitrations involving "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce." But it does apply to maritime and interstate commerce. It explains "commerce" as "commerce among several states or with foreign nations. . ." Considerable litigation determining this section's preemption over state laws is exemplified in the following cases:

- Congress has expressed "a national policy favoring arbitration." *Southland Corp. v. Keating* (1984) 104 S.Ct. 852.
- To understand FAA Sections 1-4, see *New Prime Inc. v. Oliveira* (2019) 139 S.Ct. 532-539. The case explains that Sections 1 and 2 define the field in which Congress was legislating, and Sections 3 and 4 apply only to contracts covered by those provisions.
- In *Circuit City Stores, Inc. v. Adams* (2001) 121 S.Ct. 1302, the Court acknowledged that Section 1 exempts employment of transportation workers from arbitration agreements.
- See *Epic Systems Corp. v. Lewis* (2018) 138 S. Ct. 1612, 1623, holding a class-wide arbitration cannot be enforced unless the parties contractually consent.
- "Arbitration is strictly a matter of consent," and an ambiguous agreement does not provide consent of both parties. *Lamps Plus, Inc. v. Varela* (2019) 139 S. Ct. 1407, 1415-1416.
- The FAA has no application to a truck driver performing services in interstate commerce – i.e., crossing state lines. *Garrido v.v. Air Liquide Industrial U.S.* (2015) 241 Cal.App.4th 833.
- A delivery driver working for an interstate transportation company is exempt from FAA arbitration enforcement, even if the driver does not personally cross state lines when making deliveries. *Rittman v. Amazon.com, Inc.* (9th Cir. 2020) 971 F.3d 904.
- See *Bissonnette v. LePage Bakeries Park Street, L.L.C.* (2024) 144 S.Ct. 905, where the U.S. Supreme Court expanded the interstate transportation worker exemption to include an employee who sometimes travels across state lines for a company *not* primarily engaged in interstate commerce.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

This section concerns the enforcement of arbitration agreements. It requires that arbitration agreements involving "commerce" to be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . ." This clause is known as the "saving clause;" i.e., it "saves" to states the requirement to evaluate arbitration agreements and determine if they are "valid, irrevocable, and enforceable." Thus, a court may invalidate enforcement of an arbitration agreement if it finds, for example, fraud or unconscionability. (*McGill v. Citibank, NA* (2017) 2 Cal.5th 945 [holding that under the FAA's Section 2 savings clause, an arbitration agreement that is otherwise enforceable under federal law is subject to applicable state-law contract defenses. This case established the "McGill rule" regarding an *injunctive* relief defense].)

If the arbitration agreement is found to be "valid, irrevocable, and enforceable," the matter can be ordered into arbitration. A recent case held that if the parties do not elect in their arbitration agreement whether the FAA or the CAA procedural rules apply, the FAA preempts. (*Hernandez v. Sohnen Enterprises, Inc.* (2024) 102 Cal.App.5th 222.)

The United States Supreme Court has set forth a series of holdings establishing a common law for interpreting Section 2. Some of the more recent Section 2 cases are:

- "[T]his provision contains two clauses: An enforcement mandate, which renders agreements to arbitrate enforceable as a matter of federal law, and a saving clause, which permits invalidation of arbitration clauses on grounds applicable to 'any contract.'" (*Viking River Cruises. Inc., v. Moriana* (2022) 142 S.Ct. 1906, 1917.)
- *Lamps Plus, Inc. v. Varela* (2019) 139 S. Ct. 1407 (2019) held: "Arbitration is strictly a matter of consent," and an ambiguous agreement does not provide consent of the parties. "Courts may not infer from an ambiguous agreement that parties have consented to arbitration on a classwide basis." This holding is contrary to California law, as set forth in *Sandquist v. Lebo Automotive, Inc.*, (2016) 1 Cal.5th 233, 244.
- *Epic Systems Corp. v. Lewis* (2018) 138 S. Ct. 1612, 1623, held a classwide

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arbitration agreement cannot be enforced unless the parties contractually *consented* to it. "In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings."

- *AT&T Mobility L.L.C. v. Concepcion* (2011) 563 US 333 holding the FAA preempts California decisions regarding the *unconscionability* of class arbitration waivers in consumer contracts to arbitrate disputes.
- *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 130 S. Ct. 1758, 1776, holding a classwide arbitration of antitrust claims cannot be compelled if the contract is *silent* on the requirement of such arbitration.
- *New Prime Inc. v. Oliveira* (2019) 139 S.Ct. 532 held that before ordering an employment matter into arbitration, a trial court should determine whether Section 1's exclusion of "contracts of employment . . . [and] class of workers engaged in . . . interstate commerce" include independent contract drivers. The Court held that before a trial court invokes its statutory authority to determine if the employment contract is valid, irrevocable, and enforceable, it must first determine if the parties' agreement is excluded under Sections 1 and 2.

§3. Stay of proceedings where issue therein referable to arbitration

The title is self-explanatory, yet the United States Supreme Court in *Smith v. Spizzirri* (2024) 144 S.Ct. 1173, held Section 3 compels court proceedings to be *stayed* when the lawsuit involves an appealed arbitrable dispute. The rationale protects a potential dismissal of the case by a lower court while the issue of arbitrability is on appeal. Note that Code of Civil Procedure section 1294, subdivision (a) is contrary. It permits trial court proceedings to continue during an appeal of an order dismissing or denying a motion to compel arbitration. Section 1294(a) is probably at odds with Section 3 in that Section 3 applies to "any suit or proceeding . . .brought in any of the courts of the United States upon any issue" within an arbitration agreement.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

This section provides lengthy instructions on enforcing an arbitration agreement in federal district court using the Federal Rules of Civil Procedure. Under this section, the arbitrability of the arbitration agreement is determined by the court, although some arbitration agreements require an arbitrator to determine arbitrability. Recall that FAA Section 2 requires a finding that the contract requiring arbitration "shall be valid, irrevocable, and enforceable," with some exceptions.

If demanded by a party in federal court, FAA Section 4 allows the impaneling of a jury to determine if the agreement requires arbitration. For enforcement of arbitration under California law, see Code of Civil Procedure section 1280 et seq. A few cases are set out below.

- Whether parties have agreed to submit their dispute to arbitration is a matter for the court to decide. (*Granite Rock Co. v. Int'l Bhd. of Teamsters* (2010) 130 S.Ct. 2847.)
- An arbitration agreement can delegate questions regarding the arbitration clause's validity to the arbitrator. (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096.)
- The FAA will apply if the arbitration provision does not designate either governing law or forum for arbitration. (*A.T.S.A. of California, Inc. v. Continental Ins. Co*. (9th Cir. 1983) 702 F.2d 172.)
- Unless the parties expressly select California arbitration codes to apply, the FAA preempts enforcement. (*Hernandez v. Sohnen Enterprises, Inc*. (2024) 102 Cal.App.5th 222.)
- When the parties have conflicting contracts regarding the arbitrability of a dispute, a court and not an arbitrator will determine arbitrability. (*Suski v. Coinbase, Inc.* (2024) 144 S.Ct. 1186.)

§5. Appointment of arbitrators or umpire

This section provides a mechanism for a court appointment of a single neutral arbitrator if the arbitration agreement fails to provide a mechanism for selecting arbitrators. Some arbitration agreements require a panel of three arbitrators, with each party choosing one and an impartial umpire selected by the two-party arbitrators. The term "umpire" is used to designate a third arbitrator who manages the arbitration hearing. The umpire can be chosen by the party arbitrators or agreed on beforehand by the parties. For information about party arbitrators, see this author's article entitled "Ethical Standards for Neutral and Party-Appointed Arbitrators," Advocate magazine, November 2020. For an old case, see *A.T.S.A. of California, Inc. v. Continental Ins. Co.* (9th Cir.1983) 702 F.2d 172, 175-176.

§6. Application heard as motion

This section states: "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." I.e., an application (petition) to a *federal* court to enforce an arbitration agreement is to have the same importance as other subject- matter cases.

In discussing Section 6, the U.S. Supreme Court held that Section 6 "is a bar on using custom-made rules to tilt the playing field in favor of (or against) arbitration." In *Morgan v. Sundance, Inc*. (2022) 142 S.Ct.1708, the Court held that since the usual federal rules of waiver do not include a prejudicial requirement, proof of prejudice is *not required* to an *opposing* party opposing a delayed motion to stay litigation and compel arbitration. In *Quach v.*

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California Commerce Club (2024) __ Cal.5th __, the California Supreme Court adopted the same view as a matter of California law, disapproving its prior decisions that held that proof of prejudice was required to establish a waiver of the right to compel arbitration.

§7. Witnesses before arbitrators; fees; compelling attendance

This section is a guide for arbitrators dealing with federal arbitration hearings. It concerns summons of witnesses, summons for documents, fees for witness attendance, and punishment of witnesses who do not abide by the summons. The FAA has no provisions for prehearing discovery rights. (*CVS Health Corp. v. Vividus, L.L.C* (9th Cir. 2017) 878 F.3d 703.)

Typically, California arbitration agreements have rules for discovery and arbitration hearings that bind the parties. See Code of Civil Procedure sections 1283,1283.05, 1283.1, and 1282.6 for discovery rules. For California statutory arbitration hearing rules, see Code of Civil Procedure sections 1282 et seq.

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

This section is limited to admiralty jurisdiction and should be explored by attorneys dealing with today's admiralty issues.

§9. Award of arbitrators; confirmation; jurisdiction; procedure

This section sets forth the requirements for jurisdiction, filing, and service of notice to *confirm* the arbitration award in federal court. Any party can make the application for confirmation. There is a time limit of *one year* after the award is made to seek confirmation.

Note that Sections 9, 10, 11, and 12 of the FAA concern the award and procedures for confirming (§ 9), vacating (§10), or modifying/correcting (§ 11) an arbitration award. The United States Supreme Court holds the statutory grounds for prompt vacatur and modification are exclusive and cannot be modified by contract of the parties. (*Hall Street Associates, LLC. v. Mattel, Inc.* (2008) 128 S.Ct. 1396 [holding FAA Section 9 does not allow the arbitration parties to expand the scope of review].) In California, however, parties can contract to modify court review. (*Cable Connection, Inc. v. DirectTV, Inc*. (2008) 44 Cal.4th 1334.)

§10. Same; vacation; grounds; rehearing

This section sets forth four grounds for vacating an arbitration award:
(1) The award was procured by corruption, fraud, or undue means;
(2) Evident partiality or corruption of an arbitrator;
(3) The arbitrator(s) were guilty of misconduct in refusing to postpone the hearing, or refusing to hear evidence or any other prejudicial behavior; and
(4) The arbitrator(s) exceeded their powers preventing an award.

"Manifest disregard of law" is a fifth, non-statutory rule for vacating an award. It is allowed in some jurisdictions when an arbitrator knows the law and explicitly disregards it within the award. For a discussion of the rule, see *Hall Street Associates, LLC. v. Mattel, Inc*. (2008) 128 S.Ct. 1396, where the rule is viewed as an excess of power [Section 10, subdivision (4)]. Also see *Cable Connection, Inc. v. DirectTV, Inc*. (2008) 44 Cal.4th 1334, and *EHM Productions v. Starline Tours of Hollywood* (9th Cir. 2021) 1 F.4th 1164, 1176.

§11. Same; modification or correction; grounds; order

This section sets forth the requirements for an order to modify or correct an award to "effect" the intent of the parties and promote justice. When determining jurisdiction, the court looks only at the application, not the underlying substantive controversy. (*Badgerow v. Walters* (2022) 142 S.Ct. 1310.)

Obtaining a modification or correction of an award requires an application by any party to the arbitration that sets forth *any* of the following grounds: [Exact quote from Section 11.]

"(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."

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

This section needs special attention. It requires a *three-month* time limit for filing a notice of motion to vacate, modify, or correct an award. For the 9th Circuit's calculation of the three-month deadline, see *Stevens v. Jiffy Lube International, Inc*. (9th Cir. 2018) 911 F.3d 1249. Also see *Cullen v. Paine, Webber, Jackson & Curtis, Inc*. (11th Cir. 1989) 863 F.2d 851 (Cert. denied) holding failure to move to vacate within the three-month limitation period barred a defense of invalidity.

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

This section sets forth the requirements to enter judgment after the award is confirmed, modified, or corrected in federal court. It also sets out how to enforce the judgment. When seeking an entry of judgment, the following "papers" are to be filed with the clerk: (a) the arbitration agreement, (b) the award, and (c) all documents filed with the court applying for confirmation, modification, or correction of the award with a copy of each court order thereon. The judgment has the same force and effect as any other court action. There are no decisions of note for this section.

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§14. Contracts not affected

This section limits the FAA rules to contracts made *after* January 1, 1926.

§15. Inapplicability of the Act of State doctrine

This section has no application to today's arbitration agreements. The doctrine prevents United States courts from questioning the validity of a foreign country's official act within its territory.

§16. Appeals

Section 16 is set out verbatim below. It is self-explanatory.

"(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; or

(3) a final decision with respect to 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."

Under this section, the U.S. Supreme Court held a district court must stay its proceedings while an interlocutory appeal on the issue of compelling arbitration is ongoing. Section 16(a) "creates a rare statutory exception to the usual rule that parties may not appeal before final judgment." (*Coinbase, Inc. v. Bielski* (2023) 143 S.Ct. 999; *Smith v. Spizzirri* (2024) 144 S.Ct. 1173.)

Other U.S. Supreme Court and 9th Circuit decisions of note are:

- An order compelling arbitration and dismissing underlying claims is a final appealable order. (*Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407.)
- No appellate rights exist from an order compelling arbitration until the arbitration concludes. (*Langere v. Verizon Wireless Services, LLC.*, (9th Cir. 2020) 983 F.3d 1115 [voluntary dismissal with prejudice did not create appellate jurisdiction after the court compelled arbitration].)
- Federal appellate jurisdiction is generally limited to "final decisions" of district courts under 28 U.S.C. § 1291; however the FAA authorizes interlocutory appeals from the orders described in 9 U.S.C. § 16(a)(1). (*Arthur Andersen L.L.P. v. Carlisle* (2009) 129 S.Ct. 1896. Also see *Kum Tat Limited v. Linden Ox Pasture, LLC.*, (9th Cir. 2017) 845 F.3d 979.)
- Orders granting or denying class certification are held interlocutory and, thus, not immediately appealable. (*Coopers & Lybrand v. Livesay* (1978) 98 S.Ct. 2454; see also *Microsoft Corp. v. Baker* (2017) 137 S.Ct. 1702, [a voluntary dismissal does not qualify as a final decision under 28 U.S.C. § 1291].)

Conclusion

The Federal Arbitration Act (FAA) is the more common reference to the United States Arbitration Act (USAA). It was enacted in 1925 and codified at 9 U.S.C. §§ 1-16. Sometimes the FAA code sections are cited as U.S.C.A. (United States Code Annotated). The FAA is frequently compared to, relinquishes to, or overrules the California Arbitration Act (CAA), Code of Civil Procedure section 1280, et seq.

Although few amendments have been made to the 16 FAA sections since its passage in 1925, Congress in 2021 added two new sections when it passed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" (EFAA). The new sections prevent the enforcement of mandatory arbitration agreements for sexual harassment and sexual assault claims. (See, 9 U.S.C. §§ 401-402.)

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