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 many differences in practice between the FAA and the UAA, 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 for businesses that are involved in interstate commerce.

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 several States or with foreign nations, on in any territory of 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 the decision 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. *See also, Rent-A-Center v. Jackson*, 561 U.S. 63 (2010).

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. The 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 law applicable only to arbitration provisions." *See also, Preston v. Ferrer*, 522 U.S. 346 (2008)(when parties agree to arbitration, the FAA supersedes state laws placing jurisdiction in another forum); *see also, Marmet Health Care Center, Inc. v. Brown*, ___U.S.___, 132 S.Ct. 1201; *KPMG LLP v. Cocchi,* ___U.S.___, 132 U.S. 23 (2011); *Nitro-Lift Technologies, LLC v. Howard*, ___U.S.___, 133 S.Ct. 500 (2012).

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. There also must be a showing that the contract was in existence at the time of a claim of a violation. *Granite Rock Company v. International Brotherhood of Teamsters*, ___U.S.___, 130 S.Ct. 2847(2010)(ratification of collective bargaining agreement occurred after incident that led to claim). In addition, silence in a contract cannot be construed to compel arbitration.

> From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue. The critical point, in the view of the arbitration panel, was that the petitioners did not "establish that the parties to the charter agreements intended to *preclude* class arbitration." (cit. omitted). Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though Animal Feeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class certification as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

Stolt-Nielsen SA v. Animalfeeds International Corp., 559 U.S. 662 (2010).

A party opposing arbitration must confine its attack to the arbitration provision. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 449 (2006). An attack on the contract as a whole must be determined by the arbitrator. *Rent-A-Center v. Jackson, supra*. A federal court must determine if there is an independent jurisdictional basis before consideration of any motion to compel arbitration. *Vaden v. Discovery Bank,* 556 U.S. 49 (2009)(state courts "are obliged to honor and enforce agreements to arbitrate").

Please note further that the Tenth Circuit has ruled in *Shankle v. B-G Maintenance Management of Colorado, Inc.,* 163 F.3d 1230 (10th 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).

An attack on an arbitration award under the FAA 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. The FAA provides the exclusive grounds to vacate an award. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

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 due to 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).