



American Arbitration Association
Dispute Resolution Services Worldwide

FEDERAL ARBITRATION ACT AT 80: A TRIBUTE
ANNIVERSARY LECTURE SERIES

Federal Arbitration Act at 80: A Tribute
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Keynote Speaker

The FAA—Going the Distance: Elements of Legislative Durability
By: William H. Webster

Thank you Dr. Billington¹ for such a gracious introduction. I am honored that you would take time away from home base to help us celebrate the 80th anniversary of one of our most important legal documents.

Thank you Archivist Carlin² for making this beautiful new auditorium available for this lecture.

I am very pleased that former Attorney General Janet Reno is present for this lecture. I want to acknowledge the profound influence she has had in bringing departmental and other government agencies to the table to resolve disputes by alternative dispute resolution. Designated department officials continue to support these worthy efforts and it is one of her most important legacies.

On Saturday, February 12, the FAA has its actual birthday—80 years young. The FAA and I grew up together—one year apart. Some might say it's in better shape than I am. My talk today concerns going the distance—the elements of legislative durability that account for her good shape.

When I first practiced law in the federal courts in my home district in St. Louis, we had a chief judge³ who gave the same admonishment to all the lawyers: “Be brief and to the point and on time.” Perhaps in those wise words, we have the elements of legislative durability that has served the FAA so well.

First, it was timely. Arbitration was not new to our society. It had been in use in our country and in England for centuries and dated back to our earliest civilizations.⁴ But in the early 1920's, the awards were largely unenforceable in the courts and predispute agreements to arbitrate could be breached before the award under a common law doctrine of revocability.⁵ The courts were overloaded with cases that could have been handled by ADR. States, particularly New York and New Jersey, were beginning to develop statutory frameworks to legitimize the use of ADR, to make agreements to arbitrate irrevocable and enforceable. It was time for Congress to act.

Second, the legislation was brief. Consisting originally of 14 short sections⁶, codified the same in 1947, Section 4 (enforcement procedures) was amended in 1954 to conform to present terms and practice; Sections 15 and 16 were added in 1988 to make inapplicable the Act of State doctrine⁷ and provide for limited appeals. All other modifications were technical and minor.

Section one defines “maritime transactions” and “commerce,” the key to its application. It excludes, perhaps not so clearly, “contracts of employment” of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

Section two makes clear that as to such activities, a contract provision to arbitrate controversies arising out of such activities “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

Section three provides that in these circumstances a federal court shall, on application, stay any suit or proceeding brought before it until the arbitration has taken place.

Section four provides for enforcement, by the U.S. District Court, where there has been a failure to arbitrate despite an agreement to do so.

Section five allows the court to appoint the arbitrator or panel if the agreement does not specify a procedure or no action is taken to do so.

Section six facilitates these procedures by allowing them to be handled by making and hearing them as motions rather than as a new action in court.

Sections seven and eight deal with compulsion of witnesses and rationalize arbitration in admiralty proceedings.

Section nine spells out the confirmation proceeding for an order confirming the award.

Sections 10 and 11 set forth the circumstances under which a court may vacate or grant rehearing on an award or on application to modify or correct its order. (These are important sections in the limited role the courts play in reviewing arbitral decisions and will be discussed later in more detail.)

These 14 sections have survived substantially intact since their adoption in 1925. Two sections were added in 1988.⁸ Section 15 makes inapplicable the Act of State doctrine. Section 16 authorizes appeals from the order of the District Court and limits the use of interlocutory appeals in ways that facilitate and do not obstruct the use of agreements to arbitrate.

Chapter two of the Codified Act was enacted in 1970 and incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁹ The global implications of the FAA will be the subject of a third lecture in May and will not be discussed here. Likewise, the role of the FAA in modern labor arbitration will be the subject of the fourth and final lecture in October.

Third, (and returning to the Chief Judge's tri-partite admonition), this legislation was timely, it was brief, and it was also to the point. It came down firmly in support of the use of arbitration agreements to serve the interests of those in commercial and maritime transactions where disputes were frequent, precedent was not as important and delay was an enemy. By diverting these cases from the courts, it also served the interests of litigants who wanted and needed a full adjudication of their rights and had not agreed to arbitration procedure. The point was this: arbitration agreements properly made are valid; they are no longer revocable and they are enforceable.

Thus, the key elements of durable legislation were met: the FAA was as my late Chief Judge postulated, brief and to the point and on time.

This does not mean that all the answers were incorporated in the 1925 legislation. Title 9 of USC (the FAA) merits one entire volume of annotations of cases wrestling with the implications of the Act. But the Act has stayed intact. Dean John Feerick observed in his brilliant lecture "Why a Federal Arbitration Act?" given as the first of these lectures, that the greatest characteristic of the FAA is its "adaptability" to the changing periods of its 80 year history.

Judicial Review

From the beginning, the federal courts showed great hesitancy in becoming an automatic path of review for arbitral determinations and awards. It would defeat the purposes of arbitration if a conventional standard of judicial review were incorporated in the process. Moreover, those utilizing arbitration as a practical, speedier method of procedure, and with some control over the selection of the arbitrator(s), were normally prepared to have the award be binding and enforceable. (Some agreements—e.g. the Wellington asbestos cases—do provide for non-judicial appeal within the arbitration framework, but these are not the norm.)

Congress apparently wanted both to limit attempts to appeal to the district court and at the same time protect against misconduct by the arbitrator, including corruption, fraud, undue means, evident partiality, exceeding powers and the like. The District Court is authorized in Section 10 to vacate an award in such specific circumstances. Section 11 further authorizes the court to make an order modifying or correcting the award where there was an evident material miscalculation of figures or other such errors in the award, to perfect form rather than substance. These are obvious safety nets rather than review on the merits or even a clearly erroneous standard.

In addition, courts have reviewed decisions on non-statutory grounds, derived from dictum in a 1953 Supreme Court decision¹⁰, and called “manifest disregard for the law.” In such cases the court may not substitute its judgment for that of the arbitrator. It is only where, on the record it appears that a governing principle of law was called to the attention of the arbitrator and he or she chose not to follow it. This is the court’s way of protecting a disputing party from the arbitrary arbitrator. There are many cases in the books of challenges based on manifest disregard for the law, but only a very few cases in which the court has found the necessary ingredients have been present to warrant vacating the award.¹¹

Another non-statutory basis for vacating an arbitral award is called the “irrationality” test, where it can be shown that the arbitrator did not draw his conclusions from the essence of the agreement in dispute.¹² It has been used in only a few circuits.

One area that was not clearly resolved by Congress is the relationship of the FAA to arbitration statutes of the several states. For a period of time there was a tendency (and so argued in a divided Supreme Court) to view the FAA as a procedural statute that did not preempt inconsistent state laws.¹³ The current inexorable trend is to hold that the FAA is the law in all areas covered by the statute (maritime and commercial) and that states must conform.¹⁴

A more difficult issue occurs where the parties themselves in their agreement to arbitrate have designated a state’s law as governing the arbitral process. In a very recent opinion, the Eighth Circuit reviewed the order of a district court that vacated an arbitral decision granting substantial punitive damages. The arbitral agreement waived punitive

damages to “the fullest extent permitted by law.” The appellate court reversed and sustained the arbitrator because the law of Missouri prohibited waiver of punitive damages for the claimed violation.¹⁵ These issues will continue to percolate among the circuits but there is no strong congressional indication that more legislation is needed.

Other issues not entirely answered by the FAA include which federal law will govern where arbitration is agreed to in a matter governed by a different federal statute. For example, in a case in which a securities customer would have a statutory unwaivable right to shift the burden of proof to the broker (a more favorable position), a divided Supreme Court held that the customer was not compelled to arbitrate under FAA.¹⁶

In another case, arbitration in an antitrust case was not ordered because the public interest in obtaining a precedential opinion overcame the embedded arbitration issue.¹⁷

Conclusion

The overall history of the Federal Arbitration Act reflects a steady trend toward expanding rather than constricting the areas subject to compelled and enforceable arbitration—the interstate commerce nexus has now been reduced to minimal requirements by the courts.¹⁸

On the other hand, the courts have held firm in limiting the review of arbitral decisions that the parties have agreed in advance to accept as binding and have largely entrusted to the arbitrator any issues of arbitrability. Access to the courts must still be established on jurisdictional grounds other than the Act itself.¹⁹

As discussed in Dean Feerick’s lecture, many wise heads were at work in the formulation and enactment of the 1925 legislation that we call today the Federal Arbitration Act. It reflects the sound thinking of some of the most outstanding leaders of the bench, bar and academia in a tremendous coming together that, incidentally, produced in the process the American Arbitration Association. Congress addressed the legislation in a highly professional manner.

Like many other Americans, I have labored in this vineyard as an advocate, as an arbitrator and a judge. I continue to be amazed at the durability of this Act and must credit the coming together of some of the best minds that ever addressed such an important subject. They marshaled their best efforts to produce a work that was, as I have said, brief, to the point, and on time. May it continue to serve us for many years to come.

Endnotes

1. Dr. James H. Billington, The Librarian of Congress.
2. Governor John W. Carlin, former Archivist of the United States.

3. Honorable James H. Meredith, former Chief Judge, United States District Court, Eastern District of Missouri, Deceased.
4. See “Why a Federal Arbitration Act” by Dean John D. Feerick, AAA 2004.
5. The doctrine of revocability, established under English common law and perpetuated in America, was repudiated by Section 2 of the FAA.
6. 9 U.S.C.A. §§ 1-24 Rev. Statutes at Large, 6213, §§ 1-15, 43 February 12, 1925, Codified 1947.
7. Id. § 15, 16. The Act of State Doctrine relates to inquiries about a nation’s act on its own soil. It may not be used to defeat a right connected with the arbitral process.
8. See note 7, supra.
9. 9 U.S.C.A. §§ 201-208.
10. Wilco v. Swan, 336 U.S. 427 at 436, 74 S.Ct. 182 at 187 (1953).
11. Dawahare v. Spencer et al., 210 F.3d 666, 670 (6th Cir. 2000).
12. Local 970 v. B.F. Nelson Folding Cartons, Inc., 151 F.2d 748, 750 (8th Cir. 1998) quoting United Paperworks Int’l Union v. Misco, Inc., 484 U.S. 29, 40, 108 S.Ct. 364, 371 (1987).
13. Prima Paint Corp. v. Flood & Conlkin Manufacturing Co., 388 U.S. 395 (1967).
14. Southland Corporation v. Richard D. Keating, 465 U.S. 1 (1984).
15. Stark et al. v. Sandberg et al., 2004 U.S.App. LEXIS 21356, 104 S.Ct. 582. (8th Cir. 2004).
16. Wilco v. Swan, 346 U.S. 427, 74 S. Ct. 182 (1953).
17. Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983); Armcee Wholesale Corp. v. Tomar Products, Inc., 21 N.Y.2d 621, 289 N.Y.S.2d 968 (1968); American Safety Equipment Corp. v. J.P. Maquire and Co. v. Hickok Mfg. Co., 391 F.2d 821 (2d Cir. 1968). See also AE Plastik Pak Co. Inc. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968), which enjoined the antitrust issues but permitted arbitration of other issues raised.
18. Citizens Bank v. Alafalco, Inc., 539 U.S. 52 (2003), 123 S.Ct. 2037.

19. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25, 32 (1983).