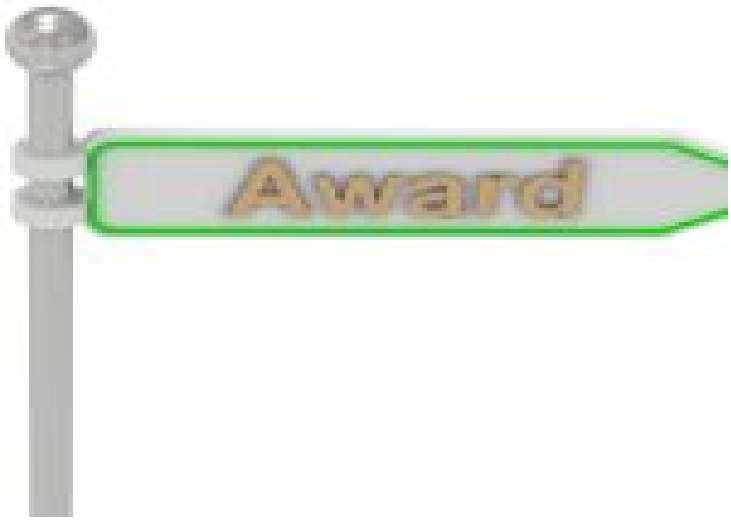
Arbitration Law FAQ Guide: Challenging Arbitration Awards under the Federal Arbitration Act ? Part II



Awards Under the Federal Arbitration Act 1

This is Part II of this two-part Arbitration Law FAQ Guide, which is designed to provide individuals and businesses with a brief and broad overview of challenging awards under the Federal Arbitration Act. Part I (here) addressed eight FAQs concerning this topic. This Part II addresses six more.

These FAQs, like the first eight, assume that a party is seeking to challenge a Federal-Arbitration-Act-governed arbitration award in a federal court having subject matter jurisdiction, personal jurisdiction, and proper venue.

This guide is not legal advice or a substitute for legal advice. An individual or business contemplating a challenge of an award under the Federal Arbitration Act should consult with an attorney or firm that has experience and expertise in arbitration law matters.

What does a person have to prove to convince a Court to grant it vacatur, modification, or correction of an award?

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An arbitration award is presumed valid and an award challenger has a heavy burden of proof to show otherwise. Some courts require clear and convincing evidence of certain grounds, such as evident partiality or corruption in the arbitrators. And even if a challenger

can meet its burden, challenging an award under the Federal Arbitration Act must ordinarily be done in a summary proceeding, which is heard and determined in the same manner as a motion.

Generally, the challenger must establish that the only legitimate inference that can be drawn from the law and undisputed facts is that vacatur, modification, or correction of the award is warranted. Even where there are factual disputes, courts ordinarily will not order discovery or evidentiary hearings absent ?clear evidence of impropriety.? See, generally, **Andros Compania Maritima, S.A. v. Marc Rich & Co**., 579 F.2d 691, 701, 702 (2d Cir. 1978).

What proceedings does a Court usually hold to determine applications to vacate, modify, or correct awards under the Federal Arbitration Act?

These applications are summary proceedings that are made and decided like motions. See 9 U.S.C. § 6. If there is not already pending an action between the parties in which a motion may be made, then a challenger can start a proceeding by filing and serving, among other things, a petition or application, a notice of petition or application, supporting affidavits, and a memorandum of law in support. The responding party serves and files a memorandum in opposition, along with any affidavits in support.

Since the matter is a summary proceeding, and since the ordinary pleading rules do not apply, courts generally require the challenger to make all of its arguments at the time its response is due, including arguments that might be made by pre-answer motion in an ordinary law suit, such as lack of subject-matter or personal jurisdiction. The responding party will also typically file a cross-motion to confirm the award, that is, a request that the Court enter judgment upon the award. See 9 U.S.C. § 9.

The challenger typically serves and files reply papers (usually just a reply memorandum of law), as well as any papers in opposition to the cross-motion to confirm. The award defender can ordinarily file reply papers in further support of its motion to confirm.

By that time, the matter is fully briefed and submitted, and absent any further motion practice over collateral matters, the court will proceed to decide the motion and cross-motion. The losing party has a right to appeal the decision to the United States Court of Appeals for the circuit within which the federal district court sits, assuming there are grounds for an appeal.

What time limits apply to making an application or motion to vacate, modify, or correct awards under the Federal Arbitration Act?

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The time limit for serving such an application or motion is three months. See 9 U.S.C. § 12. That time limit is strictly applied, and sometimes state law may work to shorten the period for filing the initiating document (usually the petition or application itself) even though the three-month deadline applies to the service of the petition or application, notice of petition or application, and supporting papers. Your attorney needs to pay careful attention to the applicable limitations period(s).

The three-month limitation period also applies to situations where a party attempts to defend a motion to confirm an award on Section 10(a) or 11 grounds for vactur, modification, or correction. For example, after expiration of the three-month period, a party may make timely a motion to confirm (i.e., enter judgment upon) the award, which is subject to a one-year period. The other party will not be able to oppose that motion on any of the grounds for vacating, modifying, or correcting an award, whether those grounds are raised as a defense to the motion to confirm, or as a cross-motion seeking an order vacating, modifying, or correcting the award. As a practical matter, that means the would-be challenging party will, in all likelihood, have no legitimate ground upon which to defend against the motion to confirm.

A person or business contemplating a challenge to an award under the Federal Arbitration Act should consult as quickly as possible with experienced arbitration law counsel. If you do not already have arbitration counsel lined up, then it is all the more important that you act quickly once an award is made, because the process of hiring an attorney can take time.

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Your attorney is going to need time to get up to speed on the facts of your case; review pertinent documents (such as the arbitration transcript, the agreement, the pertinent submissions to the arbitrators, and so forth); determine whether you have good grounds for an application; determine the best court in which to file (including whether you must or should file in state court rather than federal); marshal the evidence; and prepare the papers that must be filed, including the petition, notice of petition, memorandum of law in support; and supporting affidavits, including any affidavit necessary to present documentary evidence to the court. The attorney then has to make sure the papers are properly served and filed (these days, service and filing is done electronically in the federal courts (and in many state courts)).

You need to give your attorney the time necessary to get all this work done in time to meet the 3-month deadline. If you wait too long, then attorneys may be reluctant to accept the engagement because they may conclude that there is insufficient lead time to ensure that the papers can be timely served and filed.

Do I or my lawyer have to object during the arbitration proceedings to matters that may later provide a basis for vacating, modifying or correcting an award?

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If a person becomes aware (or should have known) of circumstances during the arbitration that might later provide grounds for vacating an award, then the person (or its lawyer) must bring the matter to the attention of the arbitrators. Failing to do so will usually result in a court ruling that the ground on which the challenge was based has been waived. There are, in addition, special rules governing disclosures of, and objections to, arbitrator relationships and interests, and those rules must ordinarily be followed if one wants at some future date to make a claim for arbitrator evident partiality. A discussion of those rules, however, is outside the scope of this Arbitration Law FAQ guide.

Should a transcript of the arbitration proceeding be made?

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Unless you are a party who is almost guaranteed to win the arbitration, and unless you are prepared to accept without challenge an award that might go the other way, then you should have a court-reporter present at the arbitration to transcribe the proceedings. If no transcript of the hearing is made, then any account (by affidavit or otherwise) of what transpired will likely be disputed by the other party, and looked upon by the court as a matter of ?he-said-she-said.? Courts routinely find that such accounts fail to satisfy the

burden of proof necessary to sustain a challenge.

All too often parties try to save money by not transcribing the proceedings, but that is almost always a penny-wise but pound-foolish tactic if you are a person who wants to ensure that it can protect its rights under the FAA. Transcript costs can be high, but unless those costs make up a substantial portion of the total amount a person stands to win or lose in the arbitration, then they represent a necessary investment a party should make, if only to help protect its rights in the event that it may later seek vacatur, modification, or correction of an award.

Are there other significant hurdles to overcome when contemplating a challenges to awards under the Federal Arbitration Act?

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The limited scope of the challenge is not the only obstacle one seeking relief from an award must overcome. Courts tend to be skeptical of challenges, even ones arguably having a solid basis.

For that reason and all the others discussed in this Arbitration Law FAQs guide, and because arbitration law, practice, and procedure is nuanced and sometimes counterintuitive, a person contemplating a challenge to an award should select an attorney or firm with significant expertise and experience in handling Federal Arbitration Act enforcement matters.

Photo Acknowledgments:

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