

# Nuts & Bolts: Limitation Periods for Motions to Vacate, Modify, Correct and Confirm Domestic Arbitration Awards Falling Under Chapter 1 of the Federal Arbitration Act

## Introduction

Today we briefly review the limitation periods applicable to motions to vacate, modify, correct and confirm arbitration awards. Our discussion is limited to domestic awards falling solely under Chapter 1 of the Federal Arbitration Act and is not intended to be exhaustive. In a future Nuts & Bolts feature we will discuss the rules applicable to non-domestic awards falling under Chapters 2 and 3 of the Federal Arbitration Act. Our discussion is also limited to the rules that apply in federal courts within the United States Court of Appeals for the Second Circuit in diversity cases where the Federal Arbitration Act governs arbitration matters and New York law governs all other matters. The rules may be interpreted differently by other circuits and, even within the Second Circuit, outcomes may vary depending on, among other things, which state's law applies.

Limitation periods for motions to vacate or for other forms of relief under the Federal Arbitration Act and New York's arbitration statute are construed quite strictly and practitioners should carefully abide by them. Sometimes it is unclear whether a limitation period has accrued or been tolled. In that event practitioners should err on the side of caution. If there is a question whether the period for filing an application has accrued, assume that it has, and file and serve your papers within the shortest allotted period. If there is a question whether the period has been tolled, assume that it has not, and do whatever it takes to toll it.

## Limitation Periods for Motions

### to Vacate, Modify or Correct Awards

FAA Section 12 provides that "[n]otice of a motion to vacate, modify, or correct an award must be served within three months after the award is filed or delivered." Section 12's New York counterpart provides that "[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him." See New York Civ. Prac. L & R. § 7511(a). Because the FAA Section 12 governs only service, not filing, and because the three-month period set forth in FAA Section 12 is frequently longer than the 90 day period set forth in Section 7511(a), practitioners have to take care to comply with both deadlines. See, generally, *Hakala v. J.P. Morgan Sec., Inc.*, 186 Fed. Appx. 131, 133, 2006 WL 1788962 (2d Cir. 2006) (not selected for publication), cert. denied, 128 S. Ct. 126 (2007); *Hakala v. Deutsche Bank AG*, 343 F.3d 111, 113-114 (2d Cir. 2003) (question whether Section 7511(a)'s 90 day limitations period tolled in diversity case).

To make a timely application to vacate, modify or correct an award, one needs to know the date from which the clock begins to run. Section 7511(a)'s limitation period accrues as of the "delivery" date of the award, and FAA Section 12's limitation period accrues on the date the "award is filed or delivered." But what constitutes "delivery" may not be clear where there is a time lapse between the date the award is dispatched and the date it is received, as is the case when an award is dispatched by mail or overnight delivery rather than by personal or electronic delivery. The New York Court of Appeals (New York's highest court) has not definitively addressed the question, but a federal court would likely find that, under New York law, the date of delivery is the date of actual or constructive receipt. See *Lowe v. Erie Ins. Co.*, 56 A.D.3d 130, 132-34 (4th Dep't 2008) (collecting New York cases). The Second Circuit has not definitively addressed the question of what constitutes "filing" and "delivery" for the purposes of FAA Section 12, but there is some federal authority suggesting that the date of actual or constructive receipt controls. See *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 531 (D.C. Cir. 1989), cert. denied, 494 U.S. 1028 (1990); *Possehl, Inc. v. Shanghai Hia Xing Shipping*, 2001 WL 214234, at \*3 (S.D.N.Y. Mar. 1, 2001).

The parties may agree that "delivery" means something other than actual or constructive receipt. For example, if the parties agree that the American Arbitration Association's Commercial Rules will govern the arbitration, then an award dispatched by mail will be deemed to be delivered when placed in the mail:

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

See AAA Commercial Rule 45 (here); *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 573-74 (7th Cir. 2007).

Having ascertained the starting date, the 90 day and three-month periods can be calculated. For rules governing the calculation of

these periods, practitioners should consult N.Y. Gen. Constr. Law §§ 20, 25-a, & 30; and Fed. R. Civ. P. 6.

There is one other important rule practitioners should keep in mind when contemplating a motion to vacate, modify or correct an award in federal court. As a practical matter, the only defenses that can be raised in opposition to a motion to confirm a domestic award are those set forth in Section 10, which deals with vacating awards, and Section 11, which deals with modifying and correcting awards. The three-month and 90 day time limits for vacating, modifying or correcting an award apply even if the grounds provided in those statutes are raised as defenses to a motion to confirm. See *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). Thus, if a party moves to confirm four months after delivery or filing of the award, and the other party has not timely moved to vacate, modify or correct the award, then all Section 10 and 11 defenses are time barred.

#### Motions to Confirm

Under both the Federal Arbitration Act and the New York Civil Practice Law and Rules, a party has one year in which to apply to the court for an order confirming an award. See 9 U.S.C. § 9; New York Civ. Prac. L. & R. 7510; *Photopaint Tech., LLC v. Smartlens Corp.*, 335 F.3d 152, 158 (2d Cir. 2003). The time to move to confirm under FAA Section 9 runs from the date the "award is made", whereas the time to move to confirm under New York's arbitration statute runs from the date the award is "delivered. . . ." That means the limitation period under the Federal Arbitration Act may accrue earlier than New York's limitation period in cases where time elapses between the date the award was made and the date it was received. Since FAA Section 9, unlike FAA Section 12, effectively provides that both service and filing must be accomplished within the limitation period, Section 9's limitation period governs in most cases falling under Chapter 1. See 9 U.S.C. § 9 (providing party may "apply" for confirmation within the one-year limitations period).

A motion to confirm is not the only remedy for enforcing an arbitration award. An award can, in theory, be enforced in an action on the award, which is based on contract. But New York law does not provide a person missing Federal Arbitration Act Section 9's deadline with much or any breathing room. Although New York's contract statute of limitations is six years, the statute of limitations for an action upon an arbitration award is one year. Compare New York Civ. Prac. L. & R. § 213(2) with New York Civ. Prac. L. & R. § 215(5). If time elapses between the date the award was "made" and the date it was "delivered", a petitioner might have an alternative remedy in state court under New York's arbitration law or in federal court based on an action upon the award. A court, however, might find that the accrual date under Section 215(5) runs from the date the award was "made" rather than from the date it was delivered, in which case the alternative remedy of an action on the award would be time barred. Consideration of this matter is beyond the scope of this post.

We will look at the limitation periods applicable to nondomestic awards in a subsequent post, so stay tuned. . . .