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Arbitration and Alternative Dispute Resolution

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Badgerow v. Walters—SCOTUS issues a technical arbitration decision with practical consequences

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SCOTUS favors strict textual construction over consistency when it comes to federal jurisdiction in confirming or vacating arbitration awards.

What's the Impact?

- Courts cannot "look through" an arbitration award to find federal jurisdiction for confirming or vacating it
- More requests to confirm or vacate awards will have to be brought in state court
- Arbitration clause drafters may want to consider clearer venue clauses and even separate award clauses

Last week, the United States Supreme Court resolved a six-year-old split in the Courts of Appeals as to whether—in considering a petition to vacate or confirm an arbitration award under section 9 or 10 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the FAA)—a federal court may "look through" the petition and award to see if the dispute underlying the arbitration would support jurisdiction in federal court. The Supreme Court answered this technical jurisdictional question with a firm "no." It based its "no" primarily on the absence in Sections 9 and 10 of the FAA of "distinctive language" found elsewhere in that statute, *see* 9 U.S.C. § 4, asking whether, "save for" the

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arbitration agreement itself, a federal court would have had jurisdiction over the underlying dispute.[1] While the Court's decision is relatively straightforward, its consequences may be somewhat more complex.

Background

The Petitioner in the Supreme Court, Denise Badgerow, commenced an arbitration against her former employer and three of its owners or principals. In the arbitration itself, she alleged unlawful termination under both federal and state law. She lost.

Rather than accept her loss, however, Petitioner sued in Louisiana state court to vacate the arbitration award on grounds of fraud in the arbitration. The Respondents (the winners of the arbitration) removed the case to federal court and asked it instead to confirm the award. Petitioner replied by moving to remand the case to state court.

More than a decade ago, in *Vaden v. Discover Bank*,[2] the Supreme Court held that a lower court could "look through" a request to compel arbitration to see if the underlying dispute would (but for the parties' arbitration clause) have supported federal jurisdiction. In *Badgerow*, the District Court considering Petitioner's request to vacate the award against her used this theory to "look through" the underlying arbitration. It found that the arbitration had included a federal claim and concluded that it could therefore exercise jurisdiction over applications to confirm or vacate the arbitration award.[3]

In reaching this result, the District Court acknowledged that "*Vaden's* 'reasoning was grounded on specific text' in Section 4 [of the FAA] that Sections 9 and 10 of that statute 'do[] not contain.'"[4] But to be "consistent," it held that the same reasoning should apply to petitions to vacate or confirm as to petitions to compel arbitration in the first place.[5]

This did not help Petitioner much as a practical matter. After deciding that it had jurisdiction, the District Court rejected her claims of fraud in the arbitration and confirmed the award against her.

Appealing to the United States Court of Appeals for the Fifth Circuit did not help her, either. It affirmed the District Court's decision.[6] But she persevered and sought review in the Supreme Court. And this time, she won.

The Supreme Court's decision

After granting certiorari to resolve the circuit split on the jurisdictional issue,[7] the Supreme Court reversed on that issue, eight to one, in an opinion by Justice Kagan. In effect, the decision requires the case to return to state court.

Justice Kagan began by reaffirming that the FAA does not itself create federal jurisdiction. Any case brought to a federal court under the FAA must have an "'independent jurisdictional basis.'"[8] Otherwise, the case belongs in state court.[9]

Justice Kagan then explained why Petitioner could not show any such "independent jurisdictional basis." Petitioner and Respondents were all citizens of the same state, so there

could not be diversity jurisdiction under 28 U.S.C. § 1332. The requests below to vacate or confirm the arbitration award asserted on their face no federal question, so they did not establish jurisdiction under 28 U.S.C. § 1331. The arbitration award itself did not involve a federal question because an arbitration "award is no more than a contractual resolution of the parties' dispute—a way of settling legal claims."[10] According to Justice Kagan, "quarrels about legal settlements—even settlements of federal claims—typically involve only state law, like disagreements about other contracts."[11] And here, only Petitioner's *claim* in the arbitration, not the resolution of that claim in an award, had any federal content.

Third, Justice Kagan examined whether, despite this lack of any independent federal jurisdictional basis in the efforts to confirm or vacate the award (or in the award itself), the federal claim embedded in the arbitration would be enough to support federal jurisdiction. Applying a strict textual analysis, the answer was "no." While the Court had approved of such a "look-through approach for a Section 4 petition" to compel arbitration, this depended on "that section's express language," which provided that a "United States district court which, save for [the arbitration] agreement, would have jurisdiction" over "the controversy between the parties" could hear a request to compel those parties to arbitrate.[12]

In contrast to Section 4, Sections 9 and 10 of the FAA "contain none of the statutory language on which *Vaden* relied. Most notably, those provisions do not have Section 4's 'save for' clause."[13] In effect following the trend of textualism currently in favor among several of the Justices, Justice Kagan therefore concluded that "under ordinary principles of statutory construction, the look-through method for assessing jurisdiction should not apply."[14]

After this analysis, Justice Kagan disposed (also on textual bases) of Respondents' arguments for a more flexible approach. And she rejected the similar arguments of Justice Breyer in dissent for much the same reason, noting that "the (nigh-inevitable) connection among a statute's diverse provisions does not give a court carte blanche to move rules or concepts from any one section to any or all others. For the reasons already stated, we cannot read this non-uniform statute—setting out a jurisdictional rule in one section by conspicuously omitting it in all others—as though it applied a single rule throughout."[15][16]

Nor was Justice Kagan swayed by any concerns that the Court's decision would "give state courts a significant role in implementing the FAA."[17] Instead, she noted that "enforcement" of the FAA is already "left in large part to the states."[18]

Consequences of the decision

It would be easy to categorize the decision in *Badgerow* as a technical one primarily of interest to law professors and other aficionados of jurisdictional theory. But, in fact, it has some very practical consequences.

First, by moving more cases to state court, *Badgerow* will likely make outcomes less predictable. This is because some state courts have shown a penchant for ignoring the Supreme Court's broad preemptive view of the FAA.[19]

Second, *Badgerow* increases the need to pay attention to residual venue clauses. Such clauses typically make provision for state and federal courts in a particular venue to handle matters not covered by an arbitration clause. Organizations should review existing clauses of this kind to make sure they are adequate. They also should not ignore the importance of such clauses in future drafting—because now such clauses may more often determine which state courts hear requests to vacate or confirm an arbitration award.[20]

Finally, *Badgerow* may encourage drafters seeking additional access to federal courts for confirmation or vacatur to become creative with their arbitration clauses. For example, it would be possible to draft a clause to require the entry of separate identical awards in multiparty claims, rather than a single joint award, if the drafter contemplates facing arbitrations involving a mix of parties with only partial diversity of citizenship.

For more information on the content of this alert, including issues of drafting or enforcement of arbitration clauses, please contact your Nixon Peabody attorney or:

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[1] *Badgerow v. Walters*, No. 20-1143, 2022 WL 959675, at *3-5 (Mar. 31, 2022).

[2] *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

[3] *See Badgerow v. Walters*, No. 19-cv-10353, 2019 WL 2611127, at *2 (E.D. La., June 26, 2019).

[4] *Id.*

[5] *Id.*

[6] *Badgerow v. Walters*, 975 F.3d 469, 472-74 (5th Cir. 2020).

[7] *See, e.g., Badgerow*, 2022 WL 959675 at *4 n.1 (citing cases on each side of the split).

[8] *Id.* at *4 (quoting *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008)).

[9] The Supreme Court, as it has in the past, expressly refused to decide if state courts must adhere to all sections of the FAA, including its "more procedural provisions" such as "Sections 4 and 9 through 11." *Id.* at *4 n.2 (citations omitted). But it reaffirmed that state courts must at least "provide certain enforcement mechanisms equivalent to the FAA's." *Id.*

[10] *Id.* at *5 (citation omitted).

[11] *Id.* (citation omitted).

[12] *Id.* (quoting 9 U.S.C. § 4).

[13] *Id.*
[14] *Id.* (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) for the proposition that "'[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we generally take the choice to be deliberate.").

[15] *Id.* at *6 n.5.

[16] Justice Breyer, alone in dissent, took the position that "when interpreting a statute, it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation. Otherwise, we risk adopting an interpretation that, even if consistent with text, creates unnecessary complexity and confusion." *Id.* at *9. While detailed and careful in explaining this position, his dissent had no effect on the majority's textual approach.

[17] *Id.* at *9.

[18] *Id.* (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n.32 (1983)).

[19] *See, e.g., Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (reversing West Virginia's continuing disregard of the FAA with respect to agreements to arbitrate claims against nursing homes); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (reversing California law, going back to *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), refusing to enforce contractual class action waivers under the FAA); *cf., e.g., Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (U.S. Mar. 30, 2022, argued) (question of whether California state courts, going back to *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), properly hold that the state's private attorney general statute, Cal. Lab. Code §§ 2698-2699.8, is beyond the reach of the FAA).

[20] It is common for arbitration clauses to provide for enforcement of an award in "any court of competent jurisdiction" or similar language. *See, e.g.*, American Arbitration Association Standard Arbitration Clause Commercial (U.S. domestic) ("Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."). The *Badgerow* decision raises new issues about whether to use such language or not.