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Post-Arbitration Judicial Proceedings: Implementing Badgerow v. Walters and Returning to State Court

How Badgerow May Shift the Balance of Power When Vacating or Confirming an Arbitration Award

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Post-Arbitration Judicial Proceedings

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Post-Arbitration Judicial Proceedings

- Options Upon Receiving an Arbitral Award
- Determining What Law Applies
- Determining Where to File
- *Badgerow* and Its Impact
- Motions to Confirm
- Motions to Vacate and their Bases
- Motions to Modify
- Additional Developments in Arbitration Law

You've Received an Arbitration Award – Now What?

- Arbitration awards are not self-executing. If you have received a judgment awarding relief in your favor, you must seek to ***confirm*** that award in a court of competent jurisdiction in order to enforce it.

- In turn, if you believe the award should be overturned, you must seek to ***vacate*** the award in court.

- In certain limited cases, you may also seek to ***modify or correct*** the award in court.

Determining What Law Applies

- In seeking to confirm, vacate, or modify an arbitration award, the first question to ask is: what law applies?

- State arbitration acts govern *intrastate* disputes; *i.e.*, disputes involving business activities that occur only within the state.

- The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, governs disputes involving interstate commerce (with an exception set forth in Section 1 for disputes involving employment contracts for seamen, railroad employees, and other workers engaged in interstate commerce).

Determining What Law Applies

- State arbitration acts often mirror the FAA in their procedural requirements for filing a post-arbitration petition. However, they should always be reviewed carefully.
  - In some cases, ***both*** the FAA and a state analog may apply.
  - In particular, a party seeking to vacate an award should determine the allotted time by which it must file its motion to vacate.
- Approximately half the states have adopted the Revised Uniform Arbitration Act (RUAA). The RUAA provides the procedures by which parties may move to confirm, modify, or vacate awards. The grounds for vacatur are essentially the same as those in the FAA.

Determining *Where* to File

- After you have determined what law applies, the next question is *where* to file the post-arbitration motion.

- If you are proceeding under a state arbitration act, check the relevant statute but typically you must file your post-arbitration petition in the state court in the county where the arbitration was held.

- What if the arbitration is held outside of the state? Usually, you must file in the county where the parties entered into the arbitration agreement.

Determining *Where* to File

- But what if your arbitration is governed by the FAA? Compare Section 4 of the FAA (which governs motions to *compel* arbitration):

  "A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement may petition any United States district court which, ***save for such agreement, would have jurisdiction*** . . . of the subject matter of a suit arising out of the controversy between the parties[.]" (Emphasis added).

- With Section 9 (which governs motions to *confirm* arbitrations):

  "If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made."

Determining *Where* to File

- Section 4 provides for *"look-through"* jurisdiction: the federal court may "look through" the arbitration agreement and ask if it would have had subject matter jurisdiction over the underlying dispute but for the agreement. If so, the court has subject matter jurisdiction over a motion to compel arbitration.

- But Section 9 (along with Section 10, governing motions to vacate, and Section 11, governing motions to modify) contains no such provision. While it states that a petition may be filed in the "United States court in and for the district within which such award was made," it says nothing about when that court would have ***jurisdiction***.

Determining *Where* to File

- Until recently, courts took different views on how they should assess their jurisdiction over post-arbitration proceedings. Some courts adopted the "look-through" analysis utilized when confronted with a motion to compel under Section: Look through the arbitration agreement and ask, but for its existence, would the court have jurisdiction?

- Other courts stuck to the plain language of the Sections regarding post-arbitration proceedings in the FAA, holding that they do not provide for the "look-through" analysis set forth in Section 4.

Badgerow v. Walters

- On March 31, the Supreme Court resolved this split in *Badgerow v. Walters*, No. 20-1143.

- "Sections 9 and 10, in addressing applications to confirm or vacate an arbitral award . . . do not have Section 4's 'save for' clause. . . . [T]hey do not instruct a court to imagine a world without an arbitration agreement, and to ask whether it would then have jurisdiction over the parties' dispute." In fact, "they do not mention subject-matter jurisdiction at all."

Badgerow's Impact

- Following *Badgerow,* "enforcement of the [Federal Arbitration] Act . . . is left in large part to the state courts."
- The Court reasoned this accords with the "normal – and sensible – judicial division of labor" because a petition to confirm, vacate, or modify is, at its heart, an adjudication of "state-law contractual rights" set forth in an arbitration agreement.
- As a result, a party cannot file a post-arbitration petition in federal court and claim the court has jurisdiction because it would have had subject matter jurisdiction over the underlying dispute. The court must have an *independent basis* for federal jurisdiction.
- One possible result: a federal court had jurisdiction to hear your motion to *compel* arbitration, but not your subsequent motion to *confirm* (or vacate or modify) the award.

Motions to Confirm

- Relatively straightforward and, absent an opposition, are often granted quickly and without a hearing. File within one year of the award.

- File a petition for confirmation, a copy of the arbitration award, the arbitration agreement, and any documents evidencing the selection of additional arbitrators or extensions of time to render the award. *See* Section 13 of the FAA.

- "The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." FAA § 13.

Motions to Vacate

- But what if you are on the losing side? You have only 3 months to file a motion to vacate. The bases for vacatur are set forth in Section 10 of the FAA and are ***heavily*** circumscribed:
  - Where the award was procured by corruption, fraud, or undue means.
  - Where there was evident partiality or corruption in the arbitrators, or either of them.
  - Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
  - Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Motions to Vacate

- Courts interpret these provisions extremely narrowly and apply a highly deferential standard of review. The court must "give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1014 (11th Cir. 1998).

- Most disputes revolve around the "evident partiality" standard. The majority position among the Circuit courts is that "evident partiality" means an objective appearance of bias:

  - "[E]vident partiality within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Ben. Fund.*, 748 F.2d 79, 84 (2d Cir. 1984).

- The alleged partiality must be "direct, definite, and capable of demonstration rather than removed, uncertain or speculative."

Motion to Vacate: Arbitrator Bias

- A showing of "evident partiality" usually requires the arbitrator to have an "actual conflict of interest," or to have failed to disclose information which would lead a reasonable person to believe a conflict exists.

- If you believe an arbitrator is biased, can you seek judicial relief *during* the arbitration award?

- The majority position (endorsed by the Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits) is ***no.*** You must wait until the conclusion of the arbitration and issuance of a final award prior to raising the issue of evident partiality with a court of competent jurisdiction.

Motion to Vacate: Other Bases

- What if the arbitrator granted a motion in limine against you, or otherwise refused to allow you to present certain evidence?
  - You must show that the arbitrator's refusal to hear your evidence caused you prejudice – and courts are extremely reluctant to second-guess arbitrators' evidentiary rulings.
- What about the provision in the FAA that allows for vacatur where "arbitrators exceeded their powers"?
  - You must show that the arbitrators meted out "their own brand of industrial justice." This means the arbitrators wholly ignored a provision of a contractual agreement or substituted their own interpretation for the actual language of the agreement.

Motion to Vacate: Other Bases

- What if you think the arbitrators applied the facts to the law in a manner that is plainly wrong?
  - That is almost never sufficient. Courts refuse to vacate awards simply because they would have reached different results.
- What if you think the arbitrators simply got the law wrong?
  - Usually that is insufficient. Mere misinterpretation or misapplication of the law does not constitute grounds for vacatur.

Motion to Vacate: Other Bases

- But what if you think the arbitrators ***really*** got the law wrong?
- Some (but not all) jurisdictions recognize additional non-statutory grounds for vacating an arbitration award if the award is "arbitrary and capricious" or in "manifest disregard of the law."
- This requires demonstrating "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that principle." *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012).
- "A court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision." *Remney v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994).

Motions to Modify

- Almost as difficult as motions to vacate. Also must be filed within 3 months. Three grounds:
  - There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property in the award.
  - The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
  - The award is imperfect in manner of form not affecting the merits of the controversy.

Additional Developments in Arbitration Law

- You represent a company being sued by an employee in federal court. The employee signed an agreement to arbitrate any dispute. However, you believe that you will succeed on a motion to dismiss the claim in federal court. You file the motion but lose. Can you then compel to arbitration?

Additional Developments in Arbitration Law

- Until recently, the law in most Circuits was that a party waives its right to compel arbitration only when its litigation conduct has prejudiced the other side. This prejudice requirement is not a feature of federal waiver law generally. But courts adopted it based on their reasoning that the FAA embodies a "policy favoring arbitration."

Additional Developments in Arbitration Law

- On May 23, 2022, the Supreme Court issued *Morgan v. Sundance, Inc.,* No. 21-328, in which it held that "federal courts may not create arbitration-specific variants of federal procedural rules, like those concerning, waiver, based on the FAA's 'policy favoring arbitration.'"

- "Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice." Rather, "the court focuses on the actions of the person who held the right" and whether he or she intentionally relinquished it.

- There is no "bespoke rule of waiver for arbitration." The FAA's policy favoring arbitration "does not authorize federal courts to invest special, arbitration-preferring procedural rules. . . . The policy is to make arbitration agreements as enforceable as other agreements, but not more so. Accordingly, a court must hold a party to its arbitration contact just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation."

Additional Developments in Arbitration Law

- The company you are representing is a major airline. The employee who has sued you is a "ramp agent:" she loads and unloads cargo from airplanes. Can you compel?

Additional Developments in Arbitration Law

- Section 1 of the FAA exempts from the statute "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

- On June 6, the Supreme Court issued *Southwest Airlines Co. v. Saxon*, No. 21-309, holding ramp agents are among the "class of workers engaged in foreign or interstate commerce" covered by the Section 1 exemption. "Airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods."

Questions or Comments?

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