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Badgerow v. Walters: Supreme Court Hears Argument On Federal Jurisdiction To Confirm Arbitration Awards

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The Supreme Court heard argument this week in what may be the most important case on the Court's docket this Term involving disputes between private parties: *Badgerow v. Walters*. The case concerns when federal courts have jurisdiction to confirm or vacate an arbitration award under the Federal Arbitration Act.

How the Court answers this question could have an enormous impact on the availability of federal courts to confirm or vacate arbitration awards when the underlying dispute concerns federal law. The effects could be felt across the legal spectrum, in disputes involving commercial law, employment law, intellectual property law, and beyond.

Factual Background. Plaintiff Denise Badgerow initiated arbitration against her (now-defunct) employer and principals of her employer bringing, in part, federal law claims. She lost. The arbitration panel issued an award dismissing her claims.

Her next move was to file a petition in state court to vacate the arbitration award. Defendants removed to federal court, where their petition to confirm the award was already pending. Badgerow moved to remand claiming the federal court had no jurisdiction over the proceedings. The district court denied the motion to remand, and the Fifth Circuit affirmed.

Legal Background. At both the beginning and end of the life cycle of an arbitration, courts often get involved when one party to a dispute wants to—one way or another—get out of the arbitration.

At the beginning of the dispute, a court may get involved to *enforce* an agreed-upon arbitration clause when one party does not want the dispute to be resolved by arbitration in the first place. Those proceedings are governed by Section 4 of the FAA.

Just over 10 years ago, the Supreme Court determined when federal courts have jurisdiction to handle § 4 petitions to enforce arbitration clauses in *Vaden v. Discover Bank*, 129 S.Ct. 1262 (2009). What makes this topic difficult is that the underlying dispute may arise under federal law, but the petition to enforce an arbitration clause, on its own, could be viewed as simply a contract claim normally governed by state law.

In *Vaden*, the Court resolved this conundrum by adopting a "look through" analysis. Specifically, a "federal court may 'look through' a § 4 petition to determine whether it is predicated on an action that 'arises under'; federal law."[1] If so, then federal courts have jurisdiction over the action.

The Question Before The Court. After an arbitration concludes, courts once again often become involved in the dispute. This time, either the winning party seeks to "confirm" the arbitration award or the losing party seeks to "vacate" the arbitration award—or both. Post-arbitration proceedings are governed by § 9 (to confirm) and § 10 (to vacate) of the FAA.

The question posed in *Badgerow v. Walters* is whether or not *Vaden*'s "look through" approach should apply to determine federal jurisdiction in confirmation or vacatur proceedings, as it does in enforcement proceedings.

What makes this question tricky is that in *Vaden*, the Court relied on the text of § 4 governing enforcement proceedings, expressly stating: "The text of § 4 drives our conclusion."[2] But the text of § 9 and § 10 governing confirmation and vacatur proceedings uses different language, including differences in the language the Supreme Court relied on. So the case turns on whether those differences are enough to change the result.

This is the puzzle that the Supreme Court waded into earlier this week during oral argument. The answer will have a major impact on the number of confirmation and vacatur proceedings that can be brought in federal court when the underlying dispute involves federal law.

The Oral Argument – Plaintiff. Badgerow's counsel began the argument. The Justices were particularly focused on why it would make sense for Congress to have permitted federal courts to *enforce* arbitration disputes over certain claims at the beginning of the life cycle, but then have prohibited federal courts from confirming or vacating the arbitration awards for those exact claims after the arbitration had concluded.

As Justice Breyer put it: "Now, to me, it doesn't seem to make very much sense to say: Okay, go there, get an injunction. Hey, but when it comes time to enforce it, you can't go there." Further suggesting that he may be leaning towards applying the *Vaden* "look through" approach, Justice Breyer characterized the text of § 9 and § 10 as having only "a little bit of different language" from § 4. He asked no questions of counsel for the defendants, another sign he may be leaning in their favor.

Another concern that arose during argument involved the Supreme Court's previous statements that the FAA's provisions do not themselves confer jurisdiction. If the statute does not affect jurisdiction at all, that would cut against the argument that the different language in the provisions would change the jurisdictional rules.

Justices Thomas zeroed in on this issue, asking: "Counsel, we have said or suggested from time to time that the FAA doesn't provide federal question jurisdiction. So how do you square that with the notion that Section 4 . . . provides such jurisdiction?" Justice Kavanaugh expressed the same concerns: "I just don't . . . know how you get around our repeated statements that the Act does not confer jurisdiction or affect jurisdiction, as Justice Thomas said."

As Justice Kavanaugh put it: "Their argument, I think, is that the look-through applies to at least some proceedings under the Act, that we've repeatedly said that the Act doesn't affect jurisdiction, however, and, therefore, you put those two things together, that look-through must apply to all the FAA proceedings."

Justice Kagan was separately concerned about why it made sense for state courts—and not federal courts—to handle confirmation and vacatur proceedings for claims involving federal law. She said: "Isn't that a little bit backwards, that it ends up that you put the diversity cases in the federal court system and you take all the cases that involve federal questions and say, oh, the federal courts don't have anything to do with those cases?"

The Oral Argument – Defendants. The Justices expressed some of these same concerns during the defendants' argument. Justice Kagan pointed out that the Court's prior statements that the Federal Arbitration Act does not affect jurisdiction are not so easily squared with the *defendants'* position either.

She said: "[The] precedent . . . that the FAA doesn't do anything with respect to jurisdiction, is equally a problem for you." In Justice Kagan's view: "Both of you are doing something with respect to federal jurisdiction. You're doing it by way of a default rule. He's doing it by way of a selective Section 4/Section 8 rule."

Chief Justice Roberts also wondered whether the defendants' position was consistent with those prior does-not-affect-jurisdiction statements. He combined that concern with another one: Whether the "look through" approach would bring too *many* cases to federal court. He said: "[T]o sort of go to the 30,000 feet perspective, the consequence of your position is to federalize a lot more of FAA actions,

procedures, than it seems would make sense if you buy the idea that this is a statute that doesn't give generally federal jurisdiction."

The Chief Justice analogized the arbitration situation to settlement agreements: "[W]hat's wrong with his analogy to settlements? I mean, you have a federal dispute. It's a federal case. You're in federal court. And you say, well, let's settle this. You reach a settlement. It's a contract. If there's a violation of that settlement, you don't go back to federal court. It's a state contract matter. You go to state court. Why isn't that just like what he's talking about here?"

Justice Sotomayor's only question came during defendants' argument, and it appeared to signal that she is leaning toward applying the look-through approach. She described defendants' arguments in favor of that method as "very logical." She noted only "one thing that gives me pause," which was how to reconcile that approach with a provision dealing with admiralty actions. We will have to wait for the opinion to see if this was a minor issue that she wanted to discuss how to square away or a more serious problem for the defendants.

Conclusion. The Justices' leanings were not clear enough to strongly signal how this case will turn out, particularly since Justices Alito, Gorsuch, and Barrett did not ask any questions at argument—a full third of the bench.

According to Badgerow's counsel, 380,000 arbitrations were adjudicated by the American Arbitration Association alone last year, in contrast with 332,000 civil filings in federal district courts nationwide. Either result will affect which courts litigants head toward after an award is issued in a large number of arbitrations.

Last Term, the Supreme Court took on average 100 days to issue an opinion after oral argument, with the shortest taking 18 days and the longest 196 days.

[1] *Vaden*, 556 U.S. at 62
[2] *Id*.