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PERSPECTIVE

ARBITRATION ANGLE

Recent SCOTUS opinions on arbitration statutes

By Gary A. Watt and Patrick Burns

The Supreme Court in Washington on Aug. 7, 2022. | New York Times News Service

In recent months, the United States Supreme Court issued opinions in arbitration cases that were the subject of previous Arbitration Angle columns. This column circles back and discusses how those opinions will impact arbitration going forward. Though the decisions arise in different contexts, both provide important insights into how the Court navigates interpreting Congressional arbitration statutes, legislative purpose, and how public policy arguments inform such analysis.

Badgerow and FAA Section 9 Jurisdiction

The first decision considered whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act (FAA) when the only basis for jurisdiction is that the underlying dispute involved a federal question. Resolving a circuit split, the Court held that when a federal court determines whether it has jurisdiction to decide a motion to confirm, vacate, or modify an arbitration award, it may not "look through" the face of the application to the underlying substantive controversy between the parties. *Badgerow v. Walters*, 142 S. Ct. 1310, 1320-21 (2022).

Badgerow arose because the FAA does not, on its own terms, grant federal jurisdiction to district courts. Thus, a party seeking federal court resolution of an FAA dispute must establish an independent jurisdictional basis such as diversity of citizenship (28 U.S.C. § 1332) or federal question jurisdiction (28 U.S.C. § 1331).

The Court had previously held that for motions to compel arbitration brought under FAA section 4, the district court was permitted to "look-through" the petition and consider the underlying dispute to determine whether the case arises under federal law. *Vaden v. Discover Bank*, 556 U.S. 49, 62-65 (2009). The Court relied on FAA Section 4's language, which allows a party to move for an order to enforce an arbitration agreement in "any United States district court which, save for such agreement, would have jurisdiction" to compel arbitration. 9. U.S.C. § 4 (emphasis added). In *Vaden*, the Court concluded that the "save for such agreement" language demonstrated an intent by Congress to bestow jurisdiction on courts where the underlying dispute raises federal questions, even if the motion to compel arbitration did not raise federal questions.

In *Badgerow*, the question was whether the same "look-through" approach applied to a district court's determination as to subject matter jurisdiction for a motion to confirm, vacate, or modify an arbitration award governed by FAA Section 9. Circuits had split on the issue, with some answering "no" because Section 9 did not contain the same "save for such agreement" language as in FAA Section 4. *See, e.g., Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d 242, 252 (3d Cir. 2016). Other circuits, including the Fifth Circuit in *Badgerow*, extended *Vaden's* look-through approach to post-award motions reasoning that despite the lack of the same statutory language, the same standard should govern so that the FAA is applied uniformly. *See also Quezada v. Bechtel OG & C Construction Service, Inc.*, 946 F.3d 837, 842 (5th Cir. 2020).

In an 8-1 decision, *Badgerow* held that district courts may not "look through" a motion to confirm, vacate or modify an arbitral award, and the basis for jurisdiction must be apparent from the motion itself. The Court distinguished *Vaden* because FAA Section 9 did not contain the "save for such agreement" language that applied to petitions to compel arbitration under FAA Section 4. In so holding, the Court also rejected a number of public policy arguments for adopting the look-through approach, such as that the FAA should be applied uniformly or that it is easier for district courts to apply in practice.

The Court noted that "[e]ven the most formidable policy arguments cannot overcome a clear statutory directive." "However the pros and cons shake out, Congress has made its call. We will not impose uniformity on the statute's non-uniform jurisdictional rules." *Badgerow*, 142 S. Ct. at 1321.

Justice Stephen Breyer authored a dissent arguing that the "literal words" of the statute should not be the only thing considered, but the "statute's purposes and the likely consequences" of such an interpretation of the statute. Breyer noted that Sections 5, 7, and 11 of the FAA also lacked the "save for such agreement" language and the result could create "curious practical consequences" which predicated jurisdiction on distinctions that are "totally artificial." *Id.* at 1323 (Breyer, J., dissenting).

ZF Automotive and Section 1782(a) Discovery Assistance

The second recent decision resolved a circuit split regarding whether a district court's power to order a resident in its district to testify or produce documents for "use in a proceeding in a foreign or international tribunal" under 28 U.S.C. § 1782(a) applies to foreign, private arbitration disputes. The Court answered "no" and held that foreign private arbitrations are not proceedings in a "foreign or international tribunal." *ZF Automotive US, Inc. v. Luxshare, Ltd.* 142 S.Ct. 2078, 2091 (2022).

ZF Automotive involved two matters with foreign arbitrations: one in Germany, and the other where an ad hoc arbitration panel was created by a treaty between Russia and Lithuania. In both cases, district courts within the United States permitted requests for discovery under Section 1782(a). The Court granted certiorari over the first case before judgment issued and the Sixth Circuit did not address whether the private arbitration in Germany was a foreign or international tribunal. In the second case, the Second Circuit held the ad hoc panel was a foreign or international tribunal. *Fund for Protection of Investor Rights etc. v. AlixPartners, LLP* (2d Cir. 2021) 5 F.4th 216, 225.

The Supreme Court granted certiorari to resolve the general circuit split that had emerged around what constitutes a "foreign or international tribunal." Some circuits held that private arbitral forums are not "foreign or international tribunals." *E.g., Republic of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880, 883 (5th Cir. 1999). Other circuits concluded they are. *In re Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.)*, 939 F.3d 710, 731-31 (6th Cir. 2019).

ZF Automotive concluded that section 1782(a) does not extend to private arbitration forums. The Court analyzed the word "tribunal" (with the modifiers "foreign" and "international"), and concluded it is best understood to refer to an adjudicative body that exercises some type of governmental authority. "'Tribunal' is a word with potential governmental or sovereign connotations, so 'foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation." *ZF Automotive*, 124 S.Ct. at 2087.

The Court also emphasized that Section 1782's history supported its interpretation of "tribunal" because the statutory purpose has always "been about respecting foreign nations and government and intergovernmental bodies they create." *Id.* at 2088. Therefore, with comity as a central purpose, Congress never envisioned having district courts open their doors to "any interested person seeking assistance for proceedings before a private adjudicative body – a category broad enough to include everything from a commercial arbitration panel to a university's student disciplinary tribunal." *Id.*

Arbitration Angle

Badgerow and *ZF Automotive* will each have a considerable impact. Badgerow will mean that fewer district courts will find they have jurisdiction to resolve motions to vacate, confirm, or modify an arbitration award because they cannot "look through" the motion to the underlying dispute to find subject matter jurisdiction. As for *ZF Automotive*, it shut the door on an otherwise wide opening for parties to foreign arbitration proceedings to use domestic federal courts to compel discovery. But what are some of the other, broader implications of the two decisions?

One lesson is that the current Court's approach to interpreting the arbitration statutes follows a strict adherence to text, which will govern a dispute without regard to practical or public policy concerns. The *Badgerow* decision soundly rejected the public policy concerns of the dissent, finding no support for a contrary result in the statutory language. And in *ZF Automotive*, the Court's analysis was deeply textual, limiting interpretation to the meanings of "foreign tribunal" and "international tribunal."

But at the same time, neither case involved a straightforward application of statutory language. In *ZF Automotive*, Congress had not considered whether foreign arbitrations were within the ambit of the statute (because the statute was passed long before private arbitration existed). And in *Badgerow*, as Justice Breyer's dissent points out, though FAA Section 9 does not have the "save for such agreement" language like Section 4, there was nothing in the text of Section 9 that would prevent the Court from adopting the look-through approach as a viable way to determine jurisdiction.

Therefore, public policy concerns were not irrelevant in the two cases – they merely needed to relate to, and be couched in, persuasive arguments regarding the statutory purpose. For example, in *ZF Automotive* the Court emphasized "the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance." It continued by noting that a "broader reading" of the statute would "open district court doors to any interested person seeking assistance for proceedings before any private adjudicative body." That is a public policy argument, so the Court likes some public policy arguments better than others. Perhaps only the ones that coincide with its textual conclusions.

And in *Badgerow*, public policy arguments convinced Justice Breyer to author his dissent, as he emphasized the FAA's goal is "rapid and unobstructed enforcement of arbitration agreements," and therefore a uniform approach for courts regarding FAA Sections 4 and 9 is the most consistent with the overarching statutory purpose. The majority simply did not agree that the FAA's purpose was enough to overcome a "clear statutory directive."

Is a "good" public policy argument like what Justice Potter Stewart once said about porn? The Court knows it when it sees it? Overall, both cases are a good reminder that while statutory interpretation always starts with the text, at the current Court it is more likely to end there too. Absent truly ambiguous text, public policy arguments appear to be taking on a diminishing role. Then again, so has stare decisis. There's a new Court in town, but that's a subject for a different column.

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