Circuit Split Emerges in Federal Question Jurisdiction over Arbitration Award

A circuit split has recently emerged regarding the circumstances under which a federal district court may exercise federal question jurisdiction under 28 U.S.C. Section 1331 in a proceeding to vacate an arbitration award brought under 9 U.S.C. Section 10.

By **Brian T. Feeney** | Mar 5, 2018 A circuit split has recently emerged regarding the circumstances under which a federal district court may exercise federal question jurisdiction under 28 U.S.C. Section 1331 in a proceeding to vacate an arbitration award brought under 9 U.S.C. Section 10. The prevailing view has long been that Section 1331 jurisdiction does not attach unless the motion to vacate the arbitration award itself presents a federal question. Even where the underlying claims arbitrated presented a federal question, courts almost uniformly concluded that this alone is insufficient to confer Section 1331 jurisdiction over a proceeding to vacate an arbitration award.

The circuit split has its origin in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), where the Supreme Court held, in connection with a motion to compel arbitration under Section 4 of the Federal Arbitration Act, that a court should determine subject matter jurisdiction by "looking through" to the claims in the underlying arbitration, and evaluating whether they arise under federal law. The court reached this result by examining the text of Section 4, which differs from the language in Sections 9, 10, and 11 of the FAA, relating to proceedings to confirm, vacate, and modify arbitration awards, respectively. Section 4 allows a party to move for an order compelling arbitration in any district court that, "save for" the agreement to arbitrate, "would have jurisdiction under title 28." The court interpreted "save for" the arbitration agreement to mean that the district court must assume the absence of the arbitration agreement and determine whether it would have jurisdiction under title 28 without it. The rule in *Vaden* thus permits district courts to "look through" to the underlying dispute and exercise federal question jurisdiction over a proceeding to compel arbitration where the claim to be arbitrated arises under federal law, such as a claim under the federal securities laws or anti-discrimination statutes.

In the years since, some federal courts have held that *Vaden* applies only to motions to compel arbitration under Section 4 of the FAA. These courts have rejected arguments to extend *Vaden* to permit "look through" in the context of proceedings to confirm or vacate arbitration awards under Sections 9 or 10. For example, in *Goldman v. Citigroup Global Markets*, 834 F.3d 242 (3d Cir. 2016), and *Magruder v. Fidelity Brokerage Services*, 818 F.3d 285 (7th Cir. 2016), the U.S. Court of Appeals for both the Third and Seventh circuits declined to extend "look though" to a Section 10 motion to vacate because Section 10 lacks the "save for" language that caused the Supreme Court to permit look through in the context of a Section 4 motion to compel arbitration. These courts further reasoned that Congress may have elected to treat motions to compel and vacatur motions differently because the central federal interest the FAA embodies is in enforcement of agreements to arbitrate, not in judicial review of arbitral awards.

The First and Second circuits, on the other hand, have since issued rulings permitting district courts to "look through" and find that Section 1331 jurisdiction attaches to motions under Sections 9 and 10 to confirm and vacate arbitration awards if the underlying claims arbitrated present a federal question. In *Ortiz-Espinosa v. BBVA Securities of Puerto Rico*, – F.3d – (1st Cir. 2017), the First Circuit acknowledged that Section 4's "save for" language, on which the *Vaden* court relied, does not appear in Section 10. It nevertheless decided the "mere difference in statutory text between the sections does not itself compel a holding that the sections are to be interpreted differently." It then found that policy reasons supported "look through" in the section 10 context. First, the court disputed that the FAA's primary objective was to enforce agreements to arbitrate. Rather, it concluded that "look through" would advance broad federal court jurisdiction over proceedings to confirm and vacate arbitral awards, which the court described as a clear FAA objective. Second, the court found it anomalous to permit look through only in proceedings to compel arbitration in a federal question dispute, but not in an action to confirm or vacate an arbitration award in the same dispute. Finally, the court found that judicial review of an award rendered in an arbitration of a federal question dispute may implicate federal law, and that it would be "strange" to deny a federal forum under those circumstances. The Second Circuit applied similar rationale to permit "look through" in vacatur proceedings in *Doscher v. Sea Port Group Securities,* 832 F.3d 372 (2d Cir. 2016).

Where does this leave the practitioner who desires a federal forum for post-arbitration proceedings? Section 9 of the FAA permits the parties to select by agreement the forum to which either may apply for an order confirming the award. Thus, nondiverse parties who select fora in circuits that do not permit "look though" will generally be required to apply for the confirmation of arbitral awards in state court. If the parties do not specify a forum in their agreement, Sections 9, 10, and 11 provide that the venue for post-arbitration proceedings will be the district court in the district in which the award was made. Nondiverse parties to a federal law arbitration may seek confirmation or vacatur in federal court of an arbitral award rendered in the First and Second circuits, but if the award is rendered in the Third or Seventh circuits, they may seek confirmation or vacatur only in state court.

Practitioners who fail to appreciate these points could unwittingly forfeit their clients' rights. Assume the losing party to an arbitration of federal claims files a motion to vacate in federal court, mistakenly believing that the federal court has jurisdiction because the claims arbitrated were federal. Under Section 12 of the FAA, that party generally has three months to serve notice of the motion to vacate on the winner. If the losing party waits until the end of the three-month period and then finds that the district court has dismissed the vacatur proceeding for lack of subject matter jurisdiction, it may have forfeited its opportunity to seek vacatur in state court if state law provides for a shorter period of time to file vacatur proceedings. In Pennsylvania, for example, an arbitral award must be confirmed unless the petitioner seeks vacatur within 30 days. A proceeding to vacate an arbitration award filed in a federal court that lacks jurisdiction would be deemed filed in state court as of the date it was filed in federal court. Thus, if the vacatur proceeding is filed in federal court within three months but more than 30 days after the award was rendered, and it is later transferred to state court because the federal court lacks jurisdiction, the vacatur proceeding would be untimely and the rights lost.

Federal court jurisdiction of post-arbitration proceedings may also turn on whether the parties proceeded directly to arbitration without need for proceedings in court to resolve a dispute over arbitrability. Where litigation is commenced by a party filing federal claims, whose adversary then seeks to compel arbitration, or seeking to compel arbitration of federal claims, federal question jurisdiction arises under the "look through" doctrine set out in *Vaden*. Assuming the court then compels arbitration

and stays the case pending arbitration (rather than dismissing the case), the federal court would retain jurisdiction to rule on any post-arbitration applications to confirm or vacate the award. If, however, the same parties to the same dispute proceeded directly to arbitration without first litigating arbitrability, or if the court dismissed rather than stayed the case after compelling arbitration, a federal court would not have federal question jurisdiction over post-arbitration proceedings in circuits like the Third and Seventh.

Practitioners thus need to consider their desired forum for post-arbitration proceedings at the outset of their cases. Depending upon the factors discussed above, federal court may not be available for post-arbitration proceedings even though the claims arbitrated arose under federal law. And if federal court is not available, more restrictive state law deadlines may apply to cause the unwary to forfeit rights.

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