The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
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July 2022

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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THE FAA AND FEDERAL COURT JURISDICTION
Badgerow v. Walters, 142 S. Ct. 1310, 212 L. Ed. 2d 355, 2022 U.S. LEXIS 1794 (2022)

The Federal Arbitration Act (9 U.S.C. §1 *et seq*.) ("FAA") does not create federal court jurisdiction.[2] This requires an "independent jurisdiction basis" for the federal court assistance described in the FAA.[3] The U.S. Supreme Court decided in 2009 that jurisdiction for federal court enforcement of 9 U.S.C. §4 (motion to compel) could be determined by examining the parties' underlying dispute, employing a "look through" the petition to compel to the "underlying substantive controversy."[4] But *Vaden* did not address how federal jurisdiction should be determined for 9 U.S.C. §§9 (award confirmation), 10 (award vacation), or 11 (award modification or correction) applications that do not alone establish federal jurisdiction.[5]

Badgerow's employment contract required arbitration when she was allegedly terminated improperly by Walters and other owners of a financial services firm in Louisiana. Badgerow's state and federal claims were dismissed by the arbitrators.[6] She then sued her employer in Louisiana state court to vacate the award. The employer removed the suit to vacate to federal district court and filed its motion to confirm the award. Badgerow requested remand urging that 9 U.S.C. §§10 (vacation) and 9 (confirmation) did not provide federal court jurisdiction for the respective applications pending in federal district court.[7] The court acknowledged that *Vaden* construed 9 U.S.C. §4 and that its "reasoning was grounded on specific text" in Section 4 that did not exist in FAA Sections 9 and 10.[8] But the trial court chose to "look through" to the underlying dispute that contained federal law claims and decided to apply *Vaden* to the pending Sections 9

[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.
[2] Badgerow v. Walters, 142 S. Ct. 1310, 1315-16 (2022).
[3] Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576, 582 (2008).
[4] Vaden v. Discovery Bank, 556 U.S. 49, 62 (2009).
[5] Badgerow, 142 S. Ct. at 1314 ("The Act's **authorization** of a petition does not itself create **jurisdiction**.") (Emphasis added.).
[6] Badgerow, 142 S. Ct. at 1313.
[7] *Id.* at 1314-15.
[8] *Id.* at 1315.

(confirmation) and 10 (vacation) applications based on "consistent jurisdictional principles"[9] not on the language differences between Section 4's "save for" clause and Sections 9 and 10 absence of "save for" language.[10] The Fifth Circuit affirmed the federal district court, having just previously decided to overlook textual differences between Section 4 and Sections 9 and 10, finding jurisdiction in all sections of the FAA based on a "principle of uniformity."[11]

The U.S. Supreme Court reversed and remanded with Justice Kagan writing the opinion for the Court (8 to 1, Breyer dissenting). "The question presented here is whether that same 'look-through' approach to jurisdiction [as established in *Vaden*] applies to requests to confirm or vacate arbitral awards under the FAA's Sections 9 and 10. We hold it does not."[12]

Hall Street and *Varden* found that FAA §§4, and 9 – 11 authorize the **filing** of the applications described in each of these specified sections but these FAA sections, alone, do not create or support federal jurisdiction.[13] Any FAA action in federal courts requires, contrary to the usual rule,[14] an "independent jurisdictional basis."[15] This "independent jurisdictional" requirement may be found (i) in the application itself that shows diversity of citizenship plus claims over $75,000,[16] or (ii) allegations of federal law beyond Sections 9 and 10.[17] Neither of these sources work in this case because (i) the parties are citizens of the same state and (ii) the issue on appeal is "enforceability of an arbitral award" (essentially a contract action)[18] not Badgerow's termination (the source of the federal law claims).[19] There is no "save for" statutory language of FAA §4 in FAA§§ 9 and 10.[20] "Ordinary principles of statutory construction" do not authorize the insertion of the Section 4 save-for language in Sections 9 and 10.[21] There is no need to apply "save-for" language of Section 4 to all other FAA Sections because there are apparent distinctions among Sections 4, 9, and 10 – "a court can tell in an instant" the FAA section under which an application arises![22]

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[9] *Id.*
[10] *Id.* at 1317 ("[T]he preceding save-for clause [in *Vaden*] … 'directed courts' to assume [the arbitration clause] away [for purposes of determining the 'underlying substantive controversy'.").
[11] Quezada v. Bechtel OG&G Constr. Servs., Inc., 946 F. 3d 837, 843-846 (5th Cir. 2020), and as well in the Fifth Circuit's opinion in Badgerow v. Walters, 975 F.3d 469 (5th Cir. La., Sept. 15, 2020).
[12] Badgerow, 142 S. Ct. at 1314.
[13] *Id.* at 1315-16.
[14] Gunn v. Minton, 568 U.S. 251, 257 (2013) ("Typically, an action arises under federal law if that law 'creates the cause of action asserted'."), cited at Badgerow, 142 S. Ct. at 1316.
[15] Hall Street, 552 U.S. at 581-82.
[16] 28 U.S.C. §1332(a).
[17] 28 U.S.C. §1331.
[18] Badgerow, 142 S. Ct. at 1318.
[19] *Id.* at 1316.
[20] *Id.* at 1317 ("They 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.").
[21] *Id.* at 1318 and 1321 ("Congress has made its call. We will not impose uniformity on the statute's non-uniform jurisdictional rules.").
[22] *Id.* at 1321.

OBSERVATIONS

1. *Hall Street Associates* makes clear that the FAA itself does not grant federal jurisdiction but requires an "independent jurisdictional basis."[23]

2. *Varden* creates a "look through" method for locating an "independent jurisdictional basis" based on FAA §4's "save for" clause limited to the enforceability of a petition to compel.[24]

3. *Badgerow* recognizes the need for federal jurisdiction in FAA §§9 and 10 but without the use of the Section 4 "look through" method.

4. The state courts are normally the place to go for FAA §9 (application for confirmation) and FAA §10 (application for vacation) enforcement.[25]

5. If the application for Section 9 or 10 enforcement does not meet the usual federal jurisdiction tests, the federal court has no power to hear and decide the application.[26]

6. If an FAA §9 application does not demonstrate diversity or include a federal question, then the federal court cannot grant the application, but the state court can.

7. If an FAA §10 application does not demonstrate diversity or a federal question, then the federal court cannot grant the application, but the state court can.

8. State courts are required by the FAA to honor arbitration agreements and have a "prominent role" in arbitral enforcement.[27]

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[23] *Supra* fn1.
[24] *Supra* fns2 and 7; Badgerow, 142 S. Ct. at 1320 ("The look-through method, as noted before, is a jurisdictional outlier.").
[25] Badgerow, 142 S. Ct. at 1321-22 ("'[E]nforcement of the Act,' we have understood, is left in large part to the state courts."); citing Moses H. Cone Memorial Hospital; Vaden; and Hall Street.
[26] *Id.* at 1321-22.
[27] *Id.* at 1316 ("The FAA requires [state courts], too, to honor arbitration agreements, and we have long recognized their 'prominent role' in arbitral enforcement."), citing *Vaden* and *Southland Corp. v. Keating*.