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A Review of Leading Developments in U.S. Courts That Impact International Arbitration

We review four major decisions relating to U.S. arbitration that have been decided by the U.S. Court of Appeals, the U.S. Supreme Court or have been granted certiorari.

First, in the *Coinbase, Inc. cases*, the Supreme Court agreed to decide a recurring arbitration related issue that has divided the federal appeals courts - whether an appeal of a district court's denial of a motion to compel arbitration automatically stays the case while the appeal is pending.

In the second case, *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 34 F.4th 1290 (11th Cir. 2022), the U.S. Court of Appeals for the 11th Circuit is poised to overturn existing precedent in that Circuit concerning the grounds available to vacate international arbitration awards when the seat of the arbitration is in the U.S. or U.S. law provides the decisional law for the dispute.

In the third case, *Badgerow v. Walters*, 142 S.Ct. 1310 (2022), the Supreme Court ruled that, unlike petitions to compel arbitration, petitions to confirm or vacate an arbitration award cannot be brought in federal court simply because the underlying dispute involves a federal question.

In the fourth case, *ZF Automotive US, Inc. v. Luxshare*, 142 S. Ct. 2078 (2022), the Supreme Court resolved an issue regarding international arbitrations by ruling that, contrary to what at least two appellate courts had previously ruled, a U.S. statute (Section 1782 (a)) that authorizes federal courts to order discovery "for use in a proceeding in a foreign or international tribunal" does not apply to proceedings in foreign and international arbitrations before private adjudicatory bodies.

DOES AN APPEAL OF A DISTRICT COURT'S DENIAL OF A MOTION TO COMPEL ARBITRATION AUTOMATICALLY STAY THE CASE?

The court of appeals for the 3rd, 4th, 7th, 10th, 11th, and D.C. Circuits have ruled that a non-frivolous appeal of a district's court's denial of a motion to compel arbitration divests a district court of jurisdiction over the case while the appeal is pending, meaning the case is stayed. The 2nd, 5th, and 9th Circuits, however, have ruled that district courts retain discretion to proceed with the litigation while such an appeal is pending.

The issue has been raised in a pair of cases involving the cryptocurrency company Coinbase, Inc. on appeal from decisions in the 9th Circuit. Both cases arise from consumer suits against Coinbase filed in federal court in which Coinbase moved to compel arbitration of the dispute based on the arbitration provision in Coinbase's user agreement. In *Coinbase, Inc. v. Bielski*, the district court denied Coinbase's motion to compel arbitration, ruling that, in the circumstances of the case, the arbitration provision was unconscionable. In *Coinbase, Inc. v. Suski*, the district court denied Coinbase's motion to compel arbitration on the ground that another agreement purportedly superseded the user agreement.

Under § 16(a) of the Federal Arbitration Act (FAA), when a district court denies a motion to compel arbitration, the party seeking arbitration may file an immediate interlocutory appeal, which Coinbase did in the *Bielski* and *Suski* cases. Coinbase also filed motions to stay the cases pending appeal. In both cases, the district court declined to issue a stay pending appeal. Coinbase then moved for a stay in the 9th Circuit, which also declined to stay the

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litigations based on an earlier 9th Circuit decision — *Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990) In Briton, the court of appeals held that an appeal of the denial of a motion to compel arbitration does not automatically divest the district court of jurisdiction to continue the litigation. The 9th Circuit adopted this rule in part based on the belief that automatic jurisdictional ouster would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.

Subsequent to *Britton*, the 2th and 5th Circuits have similarly ruled that a district court has discretion to deny a stay pending appeal of a decision denying a motion to compel arbitration. The 3rd, 4th, 7th, 10th, 11th, and D.C. Circuits, however, have disagreed, ruling that such an appeal automatically divests the district court of jurisdiction to proceed with the case pending the appeal. In *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504 (7th Cir. 1997), for example, the court ruled that, when a party appeals arbitrability, the court of appeals must decide whether the litigation may go forward in the district court, and continuation of the litigation pending appeal would largely defeat the point of the appeal.

Coinbase filed a petition for certiorari in the *Bielski* and *Suski* cases, asking the Supreme Court to resolve the circuit split in favor of the majority rule adopted by the 3rd , 4th, 7th, 10th, 11th, and D.C. Circuits. The Supreme Court granted certiorari on December 9, 2022, case number 22-105

CAN AN INTERNATIONAL ARBITRATION AWARD BE VACATED WHEN THE SEAT OF ARBITRATION IS THE US OR US LAW IS THE SUBSTANTIVE LAW?

Under existing precedent in the 11th Circuit, which includes Florida, federal courts cannot overturn international arbitration awards on the ground that the arbitrators "exceeded their powers," a frequently invoked ground for overturning domestic arbitrations. But, in *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 34 F.4th 1290 (11th Cir. 2022), a three-judge panel of the 11th Circuit ruled that the existing precedent is incorrect and conflicts with Supreme Court precedent and casesin other Circuits. While the panel was required to apply existing precedent to decide the appeal in *Corporacion AIC*, the panel took the unusual step of explaining why existing precedent was wrong and called upon the full court to rehear the appeal en banc so that the existing precedent could be overturned. The court granted rehearing and scheduled oral argument on the issue in February 2023.

Corporacion AIC involves a dispute between two companies arising out of the construction of a hydroelectric power plant in Guatemala. Pursuant to the parties' contract, the dispute was arbitrated in the International Court of Arbitration, before a three-member arbitration panel in Miami, Florida. Dissatisfied with the panel's decision, Corporacion AIC, initiated a case in the U.S. District Court for the Southern District of Florida to vacate the award on the basis that the panel exceeded its powers. The District Court denied the petition, ruling that 11th Circuit precedent foreclosed a party to a New York Convention international arbitration from challenging an arbitration panel's award on the "exceeding powers" ground that is available under the FAA for domestic arbitrations, citing *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International GmbH*, 921 F3d 1291 (11th Cir. 2019)

and *Industrial Risk Insurers v. M.A.N. Guterhoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

On appeal, a three-member 11th Circuit panel agreed that those cases barred an "exceeding powers" challenge, but concluded that the cases had been wrongly decided. The panel believed that the cases did not properly distinguish between an international arbitration case in which a U.S. court has primary jurisdiction — when the seat of the arbitration is in the U.S. or U.S. law is the decisional law — and where the court has only secondary jurisdiction (when the U.S. court is asked to enforce an award decided outside the U.S. involving foreign law). The panel concluded that existing precedent is at odds with decisions in the 2nd, 3rd, and 10th Circuits, as well as with the U.S. Supreme Court's opinion in *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014). Only the 11th Circuit sitting en banc can overturn the Court's prior precedent, which it now appears poised to do.

PETITIONS TO CONFIRM OR VACATE ARBITRATION AWARDS CANNOT BE BROUGHT IN FEDERAL COURT SIMPLY BECAUSE THE UNDERLYING DISPUTE INVOLVES A FEDERAL QUESTION.

The Supreme Court's 8-1 decision in *Badgerow v. Walters*, 2022 WL 959675 (U.S. March 31, 2022), resolves an issue over which the federal courts of appeals were split. This means motions to confirm or vacate arbitration awards will now be able to be brought in federal court rather than in state court, only if there is diversity of citizenship between the parties or the application itself (as opposed to the underlying dispute) involves a federal question. The decision marks a triumph of the "textualist" approach to statutory interpretation, even among members of the Court's so-called "liberal" wing, as opposed to a more policy-oriented approach.

The Supreme Court addressed the issue of federal jurisdiction over motions to compel arbitration under Section 4 of the FAA over a decade ago in *Vaden v. Discover Bank*, 556 U.S. 49 (2009). In *Vaden*, the Court rejected the standard articulation of the well-pleaded complaint rule ordinarily used to analyze federal jurisdiction, under which courts would look to the face of the federal court petition for a basis for federal jurisdiction. Instead, the Court adopted the so-called "look through" approach. Under this approach, "[a] federal court may 'look through' a § 4 petition to determine whether it is predicated on an action that 'arises under' federal law." Id. at 62. Whereas the well-pleaded complaint rule would require that the Section 4 motion to compel itself evinces a federal cause of action, under *Vaden*, courts examine the underlying dispute potentially subject to arbitration to determine whether that dispute presents a federal question.

In reaching this result in *Vaden*, the Court relied in part on the language of Section 4, which states that a proponent of arbitration may seek an order compelling arbitration in "any U.S. district court which, save for [the arbitration] agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." (Emphasis added.) The Court also held that the look-through approach was consistent with basic jurisdictional tenets and practical considerations, because failure to look through to the arbitration proceeding's subject matter "would permit a federal court to entertain a § 4 petition only when a federal-question suit is already before the court, when the parties satisfy the requirements for diversity-of-citizenship jurisdiction, or when the dispute over arbitrability involves a maritime contract." Id. at 65. Such an "approach would not accommodate a § 4 petitioner who could file a federal-question suit in (or remove such a suit to) federal court, but who has not done so." Id.

Subsequent to *Vaden*, the federal courts of appeals have been split over whether to apply the same "look through" approach to applications to confirm or vacate an arbitration award pursuant to Sections 9 and 10 of the FAA. The 1st, 2nd, 4th, and 5th Circuits ruled that federal courts can apply the "look through" approach to such applications, while the 3rd and 7th Circuits ruled that the "look through" approach does not apply to such applications, and that there must instead be a basis for federal jurisdiction—such as diversity of citizenship—on the face of the complaint. *See Goldman v. Citigroup Global Markets, Inc.*, 834 F.3d 242 (3d Cir. 2016); *Magruder v. Fid. Brokerage Services LLC*, 818 F.3d 285 (7th Cir. 2016).

The issue arose in *Badgerow* because, in the underlying dispute, the plaintiff, Denise Badgerow, brought employment-related claims against her employer under state and federal law. The arbitrator sided with the employer, dismissing Badgerow's claims. Badgerow then sued the employer in Louisiana state court to vacate the arbitral decision based on alleged fraud. The employer responded by removing the case to the federal district court in Louisiana and, once there, applied to confirm the award. Badgerow moved to remand the case to state court, arguing that the federal court lacked jurisdiction over the case. The district court assessed its jurisdiction under the "look through" approach of *Vaden* and found that it did have jurisdiction under that approach, and then confirmed, denying Badgerow's application to vacate, the arbitral award. The 5th Circuit affirmed the district court's finding of jurisdiction, relying on *Quezada*, which it had just issued.

The Supreme Court reversed and rejected the "look through" approach that the 1st, 2nd, 4th, and 5th Circuits had applied in connection with applications for confirm or vacate awards under Section 9 and 10 of the FAA, ruling that this approach was contrary to the statutory text.

The Court noted, under Section 4 of the FAA—which governs application to compel arbitration—that statute provides a party to an arbitration agreement may petition for an order to compel arbitration in a "U.S. district court which, save for [the arbitration] agreement, would have jurisdiction" over "the controversy between the parties." The Court quoted *Vaden* as saying it was that text that "drives our conclusion that a federal court should determine its jurisdiction by 'looking through' a §4 petition to the underlying substantive controversy"—to see, for example, if that dispute "'arises under' federal law." 556 U. S., at 62.

In contrast, the Court noted, Sections 8 and 9 of the FAA—the provisions concerning petitions to confirm or vacate awards—"contain none of the statutory language on which *Vaden* relied. Those provisions do not have Section 4's 'save for' clause. 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. Sections 9 and 10 do not mention the court's subject-matter jurisdiction at all." 2022 WL 959675, at *2.

The Court ruled, "under ordinary principles of statutory construction, the look-through method for assessing jurisdiction should not apply . . . We have no warrant to redline the FAA, importing Section 4's consequential language into provisions containing nothing like it. Congress could have replicated Section 4's look through instruction in Sections 9 and 10. Or for that matter, it could have drafted a global look-through provision, applying the approach throughout the FAA. But Congress did neither. And its decision governs." Id. at *5.

As a practical matter, the Court's decision means applications to confirm or vacate arbitration awards can be brought in federal — rather than state — court only when there is diversity of citizenship between the parties — i.e., the plaintiff and defendant are residents of different states — or there is some other basis for federal jurisdiction on the face of the complaint, such as admiralty. The mere fact the underlying dispute in the arbitration involves a federal claim or question will not be sufficient to establish federal jurisdiction. It is unclear whether state courts will be more willing to vacate arbitration awards than federal courts are in the wake of *Badgerow*.

THE SUPREME COURT SAYS NO TO USING FEDERAL COURTS TO OBTAIN DISCOVERY FOR FOREIGN AND INTERNATIONAL ARBITRATIONS BEFORE PRIVATE, NON-GOVERNMENTAL ADJUDICATORY BODIES.

In its unanimous decision in *ZF Automotive US, Inc. v. Luxshare, Ltd*., Case No. 21-401, the Court ruled that the statute, 28 U.S.C. § 1782(a), applies only to proceedings before foreign governmental or intergovernmental adjudicative bodies. By narrowing the application of Section 1782(a) in federal courts, the Court reduced the potential tension between Section 1782(a) and the FAA, which governs domestic arbitration, because Section 1782(a) provides for broader discovery than the FAA allows.

The Court's ruling dealt with an arbitration proceeding before the German Institution of Arbitration e.V. (DIS), a private dispute resolution organization in Berlin, and an ad hoc arbitration con-

ducted in accordance with arbitration rules of the United Nations Commission on International Trade Law, finding that neither of those arbitral bodies is the type of governmental or intergovernmental adjudicatory body that falls within the scope of Section 1782.

Recent decisions in New York District Courts held that a tribunal in an ICSID arbitration lacked governmental authority and did not qualify as a foreign or international tribunal under Section 1782. In re Webuild S.P.A., 2022 WL 17807321 (Dec. 19, 2022), In re Alpene, Ltd., 2022 WL 15497008 (Oct. 27, 2022).

The Court's ruling involved appeals in two consolidated cases. One case involved an arbitration between Luxshare, Ltd., a Hong Kong-based company that alleged fraud in a sales transaction with ZF Automotive US, Inc., a Michigan-based automotive parts manufacturer and subsidiary of a German corporation, before the German Institution of Arbitration. Luxshare sought discovery in federal court in the U.S. pursuant to Section 1782, and the U.S. Court of Appeals for the 6th Circuit denied ZF's motion to stay the discovery, ruling that the German arbitration panel was a "foreign or international tribunal" under Section 1782.

The other case involved an arbitration between AB bankas SNORAS, a failed Lithuanian bank that had been nationalized by Lithuanian authorities, and a Russian corporation that had been assigned the rights of Russian investors in the bank. Under a bilateral investment treaty between Lithuania and Russia, the parties had four options for dispute resolution, and they chose an ad hoc arbitration under the Arbitration Rules of the United National Commission on International Trade. The Russian corporation sought discovery in a federal court in the U.S. from a temporary administrator of the bank and Alix Partners, LLP, a New York-based consulting firm where the administrator worked. AlixPartners sought to block the discovery, arguing that the ad hoc panel was not a "foreign or international tribunal" under Section 1782, the district court rejected that argument and the U.S. Court of Appeals for the 2nd Circuit affirmed.

The Supreme Court finally resolved a disagreement among the circuit courts regarding the ability to obtain discovery in the U.S. where an arbitration is pending in a foreign country. The federal law, 28 U. S. C. §1782(a), is a provision authorizing a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal." If the provision was interpreted to allow private arbitrations merely held in foreign country to have a federal discovery mechanism, the provision creates significant tension with the FAA, which governs domestic arbitration, because section 1782(a) provides broader discovery than the FAA allows.

In a unanimous opinion authored by Justice Amy Coney Barrett, the Supreme Court reversed the lower court rulings in both cases.

The Court concluded Section 1782 was intended to increase cooperation between the U.S. and foreign countries, and not merely with private arbitral tribunals located in foreign countries. Quoting an earlier ruling by the U.S. Court of Appeals for the 7th Circuit, the Court noted "it's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the U.S. while precluding such discovery assistance for litigants in domestic arbitrations."

The Court ruled that applying its interpretation of Section 1782 to the Luxshare/ZF arbitration was straightforward: the German arbitral body there does not qualify as a governmental body and therefore does not fall within the ambit of Section 1782.

The Court found that, while the treaty provided the parties an option of arbitrating before a pre-existing governmental body, the parties chose to arbitrate before an ad hoc arbitral panel that was not cloaked with governmental authority and did not fall within the ambit of Section 1782.

The Court noted: "None of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority. Governmental and intergovernmental bodies may take many forms, and we do not attempt to prescribe how they should be structured. The point is only that a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it. The relevant question is whether the nations intended that the ad hoc panel exercise governmental authority. And here, all indications are that they did not. ■

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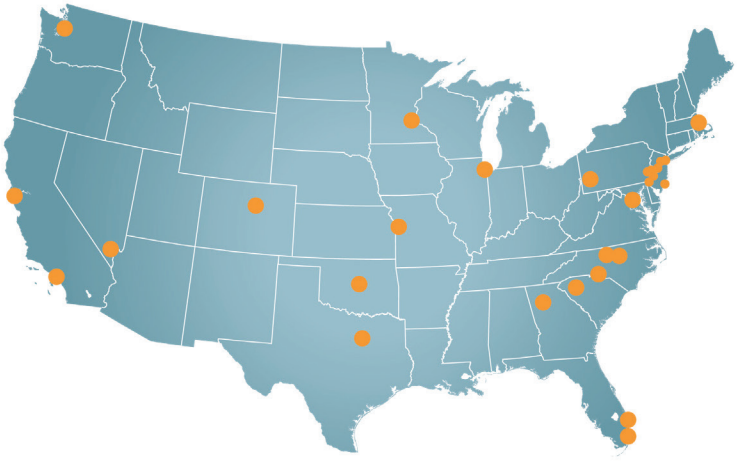

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