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Answers, and Questions, on Jurisdiction Over FAA Confirmation Motions

By Robert E. Bartkus

The Third Circuit has answered a seemingly straightforward question of federal court subject-matter jurisdiction, but in so doing, raised several more.

The issue: "[How do] Article III standing principles apply in proceedings to confirm arbitration awards under § 9 of the Federal Arbitration Act …?"

First, the answer, in the case, *Teamsters Local 177 v. United Parcel Service*, — F.3d — , No. 19-3150, 2020 U.S. App. LEXIS 22102 (3d Cir. July 16, 2020):

The court held that an *application* under Section 9 to confirm an arbitration award — even where the respondent does not challenge the award — does not require a separate showing of a "present" case or controversy as would be required for a federal *complaint*. Note the italicized words.

The confirmation process established by Section 9 is but a part of the arbitration process that, necessarily, begins with an actual dispute. The Third Circuit thus joined courts in the Second Circuit in this view; and in reversing the district court, 409 F. Supp. 3d 285 (D.N.J. 2019), it disagreed with the First Circuit.

Background

The facts of this case present the context but are not terribly important given the court's analysis. Local 177 filed a grievance with the members' employer, UPS, regarding several drivers' work location assignments. UPS denied the grievance, and Local 177 went to arbitration as required by its collective bargaining agreement. The arbitrator issued an award in Local 177's favor, and UPS agreed to abide by the terms of the award. When violations occurred — by drivers being improperly assigned to different work centers — UPS corrected them. UPS also promised not to do it again, though mistakes inevitably were made … and were remedied. UPS

did not move to vacate or modify the award within the 3-month limitations period set by Section 12 of the FAA.

Apparently not satisfied by mere promises of compliance, Local 177 filed a motion in federal district court under Section 9 to confirm, and UPS countered with a motion to dismiss for lack of subject-matter jurisdiction. The district court had statutory federal-question jurisdiction under the Labor Management Relations Act, 29 U.S.C. § 185, but UPS argued that Local 177 lacked Article III standing (always part of a jurisdictional inquiry) since UPS had agreed to abide by the award and was not moving to vacate it.

Absent an actual injury-in-fact, a key element of a case or controversy, as required by cases such as *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), UPS argued that the "case" could not go forward. The district court agreed. Relying on *Derwin v. General Dynamics Corp.*, 719 F.2d 484 (1st Cir. 1983), it denied confirmation and dismissed the action. Given Local 177's ability to enforce the award under Section 301 of the LMRA or the common law (by direct action or principles of res judicata or estoppel), if a material breach of the award occurred after the one-year time to confirm under Section 9, the district court thought Local 177 still had recourse, just not under the FAA.

The Appellate Opinion

On appeal, the Third Circuit reversed, siding with a line of cases in the Second Circuit, including *Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2d Cir. 1984), and *NFL Players Ass'n v. NFL Mgmt. Council*, No. 08-3656, 2009 U.S. Dist. LEXIS 24859 (S.D.N.Y. Mar. 26, 2009), that the district court acknowledged but thought less persuasive than *Derwin* (decided a year before *Florasynth*).

The Third Circuit's reasoning was direct and based on the scheme of the FAA generally and the terms of Sections 9 and 13 specifically. Absent collusion, an arbitration begins with a live controversy, not only on the merits but, often, on whether the dispute should be resolved by arbitration. I suggest: Consider a matter that begins with a court order to compel arbitration. The case is stayed pending the award. Should it make any difference if the parties' first foray into court is, instead, to confirm the award? The court essentially said no.

When the arbitrator renders an award, the process envisioned by the FAA has not ended. Section 9 says the award "shall" be confirmed (absent limited grounds for vacatur or modification) upon "*appl[ication]*" to a court. And Section 13 goes on to the say that the resulting order shall be entered as a judgment and have "the same force and effect, in all respects, as, and be subject to all provisions of law relating to, a judgment in an action" and be enforced "as if it had been rendered in an *action* in the court in which it is entered." (Emphasis added.)

Confirmation is thus integral to the scheme of the FAA, intended to provide benefits to the parties that any litigant expects from a judgment at the end of a litigated case — the prospect of court enforcement, including the power of a court order of contempt, attachment, injunction and, for example, the preclusive effect of a federal judgment. To require a separate action, outside

the FAA, once a “dispute” arises over enforcement of the award, would reduce the arbitration to a status less than intended by Congress.

As the court noted, an award is different conceptually and procedurally from a confirmed award or a judgment — the entry of which is virtually automatic once the award is confirmed. “Enforcing” an award is a *non sequitur*. As conceived by the FAA, the immediate recourse for a victor in an arbitration is to confirm the award. Absent FAA confirmation, or access to state arbitration laws, the award requires litigating a separate case on a contract theory without the award-protecting limits in sections 10 and 11 of the FAA. Thus, only upon confirmation of the award and entry of a judgment is the scheme of the FAA, to insulate arbitration from judicial hostility, fully satisfied.

Requiring a new case or controversy could allow a losing party to delay challenging an award, past the one-year limitations period in which the winning party must move to confirm, without the award-protective features of the FAA. This also would upset the pro-arbitration balance between motions to confirm and motions to vacate or modify. The Third Circuit thought ignoring this structure was illogical and would incentivize game playing. Indeed, any opposition to the award filed outside the strict three-month period in the statute — as by UPS here — would be prohibited by the statute.

By designating the confirmation motion “the process through which a party to arbitration completes the award process under the FAA [and] the award becomes a final and enforceable judgment,” the court emphasized that the proceeding is a motion and not a complaint and should not be confused with processes under the Federal Rules of Civil Procedure for asserting claims and defenses. In fact, no separate claim or defense may be interposed opposing an application to confirm — other than a timely cross motion raising the statutory grounds to vacate or modify. As with most states' processes, counterclaims or independent setoffs are not permitted unless they had been stayed as non-arbitral.

Future Issues

What issues does the Third Circuit opinion raise?

First, the opinion suggests in footnote 3 that failure to abide by the statutory scheme set out in Section 9, *i.e.*, confirmation, may violate a statutory right sufficient to satisfy injury-in-fact standing under *Spokeo*.

Second, UPS’s litigation tactic might violate a separate contractual right, in the arbitration clause, for a “final and binding” arbitration that may be entered as a judgment. Opposing confirmation on standing grounds deprives the other party of the contract right to a judgment, assuming this would meet standing requirements under the circumstances.

Third, even though the case arises from a labor arbitration grounded in the LMRA, the opinion is clear that it is relying on the enforcement mechanism of Section 9 of the FAA. But then the court appears to limit the holding to labor arbitrations in which the parties are seeking an interpretation or enforcement of the labor contract language.

Thus, the most striking oddity of the opinion lies in footnote 3: “we limit our holding to an award for equitable relief and express no opinion as to whether a party that receives an arbitration award for money damages has standing to confirm the award in federal court after the damages have been paid.” The opinion thus has no direct effect on the bulk of commercial arbitrations seeking money damages.

However, many of the reasons for entering judgment apply equally to money awards and equitable or declaratory relief. For example, the collateral consequences of the award are expanded, on entry of a federal judgment, to constitutional and full faith and credit doctrines, as opposed to common law principles of estoppel and bar. This is particularly the case in discussions of the district court opinion regarding the “importance” of the award or saying that having to institute a new case to enforce the award, other than confirming it, is “illogical” — or as the text says, a “practical absurdity” with “harmful consequences” of requiring a “new dispute.”

Practice Pointers

- Describe the arbitration, in the arbitration clause, as “final and binding,” language that will enhance the likelihood a court will require a judgment.
- Always include a sentence that judgment may be entered upon the award — a common law requirement repeated in the statutes that some may neglect to include in reliance on the similar provision in AAA, JAMS and other provider rules.
- Where the arbitration’s losing party paid the money required by an award, emphasize the legal and factual disputes resolved in the arbitration giving rise to money damages.

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