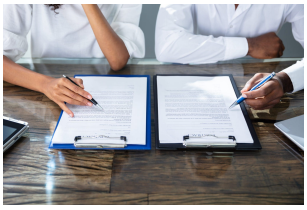

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The Supreme Court's Quartet of Arbitration Decisions

The 2021 Term saw the U.S. Supreme Court issue a quartet of decisions addressing enforcement of arbitration agreements and confirmation of arbitration awards under the Federal Arbitration Act (FAA).

***Badgerow v. Walters*, 142 S.Ct. 1310 (Mar. 31, 2022): Closing the federal courthouse doors to confirmation proceedings**

In *Badgerow v. Walters*, the Court significantly narrowed the scope of federal courts' authority to hear petitions to either confirm or vacate arbitration awards under Section 9 or 10 of the FAA. This ruling will have the likely effect of requiring a much larger share of those motions to be brought in state court, rather than federal court.

The Court in *Badgerow* held that federal courts have jurisdiction only to hear post-arbitration motions to confirm or vacate an arbitration award when federal jurisdiction – typically either diversity or federal question jurisdiction – is presented by the petition to confirm or vacate the award itself. Federal jurisdiction cannot be based on the underlying dispute that was arbitrated. Thus, federal jurisdiction over a motion to confirm or vacate an award will typically exist only where there is complete diversity of citizenship between the parties (all petitioners citizens of different states than all respondents), or when the petition claims a federal law (other than the FAA itself) requires confirmation or vacatur of the award. The fact that federal law claims were adjudicated in the underlying arbitration does not provide a basis for federal court jurisdiction.

This narrow analysis differs from the jurisdictional rule applicable to pre-arbitration motions to compel arbitration under Section 4 of the FAA. In that scenario, the Supreme Court has held that federal jurisdiction can be established by "looking through" the petition to determine if there would be federal jurisdiction over the underlying dispute that is sought to be arbitrated. But the *Badgerow* Court concluded that "look through" federal jurisdiction was grounded in

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language unique to Section 4 of the FAA and did not apply to Sections 9 or 10.

***Morgan v. Sundance, Inc.*, 142 S.Ct. 1708 (May 23, 2022): Parties wanting to compel arbitration must "use it or lose it."**

In *Morgan v. Sundance, Inc.,* a unanimous Supreme Court held that a party can waive arbitration by first litigating its claims in state court—even if the other party was not prejudiced by that conduct. Thus, it is now easier to oppose arbitration on waiver grounds.

In an opinion authored by Justice Elena Kagan, the Supreme Court examined the waiver of arbitration rights through a contractual lens. The Court noted that outside the context of arbitration, determining whether a party has waived a contractual right typically focuses solely on the conduct of that party – i.e., whether they have engaged in conduct that suggests an intentional decision to relinquish a known right – and does not turn on harm to the other party.

So, too, for the right to compel arbitration, the Court ruled. Thus, a party who initially litigates a case in court for some period of time before seeking to compel arbitration may have waived its right to compel arbitration, whether or not the delay caused any prejudice to the opposing party.

In reaching this conclusion, the Court rejected the analysis of the Eighth Court of Appeals, which held that the FAA's policy favoring arbitration meant that waiver of the contractual right to arbitrate specifically could only be found upon a showing that the party opposing arbitration was prejudiced. The Supreme Court disagreed. In the Court's view, the FAA's general policy favoring arbitration does not authorize courts to "invent special, arbitration-preferring procedural rules" that treat arbitration clauses differently than other contractual rights.

***Southwest Airlines Co. v. Saxon*, 142 S.Ct. 1783 (June 6, 2022): Airline ramp workers (and their employers) "need not apply" for arbitration.**

Southwest Airlines Co. v. Saxon narrowed the scope of arbitration under the FAA. In *Saxon*, the Supreme Court held that employment

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contracts for airline ramp supervisors, who assist in loading baggage and cargo onto planes, are excluded from the FAA. Section 1 of the Act excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Following an extensive discussion of proper and improper uses of the *ejustem generis* canon of construction, the Court held that ramp supervisors were sufficiently similar to other classes of excluded workers (seamen and railroad employees), by virtue of their involvement with the interstate transportation of cargo, and thus fell within the FAA's exclusion. The Court rejected the employee's broad interpretation that anyone employed by an airline fell within the Section 1 exclusion, but also rejected the airline's narrow interpretation that the exclusion applies only to those who work on board vessels transporting cargo.

***Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (June 15, 2022): "Once more unto the breach" of arbitration provisions restricting class and aggregate litigation.**

Viking River Cruises, Inc. v. Moriana addressed the effect of arbitration clauses on plaintiffs' rights to bring aggregate litigation—i.e., asserting claims on behalf of a large class of claimants, not only the individual plaintiff.

Unlike recent cases addressing arbitration in the context of traditional class actions, *Moriana* dealt with the effect of arbitration clauses on claims brought under California Labor Code's Private Attorneys General Act (PAGA). The PAGA allows private employees to step into the shoes of the California Labor and Workforce Development Agency and bring suit for civil penalties payable to the state for violations of state employment laws affecting the state employees, as well as for any violations affecting other, non-state employees.

States generally cannot require a party to submit to class action-style arbitrations that aggregate large numbers of nonparty claims. Thus, an arbitration clause that requires arbitration of a party's individual claims, but does not include consent to arbitration of class claims, is enforceable. *Moriana* addressed how this rule

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applied to California law concerning PAGA suits, which shared some of the attributes of class actions but not others.

The Supreme Court focused on two rules established by California case law:

- a rule that declared unenforceable contractual provisions requiring parties to waive their rights to bring representative PAGA claims altogether; and
- a rule that invalidates agreements by parties to litigate or arbitrate PAGA claims for an employee's own injury separately from representative PAGA claims for injuries to other employees.

In an opinion by Justice Samuel Alito, the Court held that the first rule was not preempted by the FAA, because the FAA only applies to the enforceability of arbitration agreements, not contractual waivers of substantive rights or remedies. However, the Court held that the second rule conflicted with the FAA (and was therefore preempted) because it interfered with parties' rights to agree to arbitrate a particular type of claim (*i.e.*, individual PAGA claims) and to limit their arbitration agreement to only that type of claim. Thus, California state law could invalidate contract provisions that waived representative PAGA claims altogether but could not preclude parties from agreeing to separately arbitrate an employee's individual PAGA claims, apart from any representative claims on behalf of others.

This left the question of what to do with an employee's representative PAGA claims for injuries to other employees, which were not arbitrable under the parties' agreement, after compelling arbitration of an employee's individual PAGA claims for her own injuries. In a somewhat unusual move, the Court held that as a matter of California ***state*** law, a plaintiff who separately arbitrated their individual PAGA claims did not have statutory standing to continue to assert representative PAGA claims in separate litigation that did not include the plaintiff's individual claims.

Justice Sonia Sotomayor concurred fully in the opinion but wrote separately to note that because the question of statutory standing was one of state law, it was ultimately up to the California courts

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and legislature if they disagreed with the Supreme Court's analysis on this issue. Justices Amy Coney Barrett, Brett Kavanaugh, and Chief Justice John Roberts concurred in the portion of the Court's opinion invalidating the second rule regarding the division of individual and representative claims but found the remainder of the Court's opinion unnecessary and improperly addressed to disputed questions of state law.

Key Takeaways:

- Three of these cases pulled back the scope of the FAA in certain respects, by restricting federal jurisdiction to hear petitions to confirm arbitration awards (*Badgerow v. Walters*); making it easier to prevail on a claim that a party waived its right to compel arbitration (*Morgan v. Sundance, Inc.*); and expanding the scope of the FAA's provision exempting employment contracts for workers engaged in foreign or interstate commerce (*Southwest Airlines v. Saxon*).
- The fourth opinion, *Viking River Cruises, Inc. v. Moriana*, reaffirmed the enforceability of arbitration clauses require arbitration of individual claims, while precluding "class" arbitration that aggregate large numbers of claims in a single proceeding. But *Moriana* also clarified that the FAA does not require enforcement of provisions that simply require individuals to waive their rights to proceed with certain types of rights and remedies.

Explore the full wrap-up and analysis from Frost Brown Todd's Appellate practice group on the most consequential rulings during the 2021 U.S. Supreme Court term for businesses and industries.

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