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Establishing Jurisdiction Over Federal Court Motions to Confirm, Vacate or Modify Domestic Arbitral Awards

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As discussed in earlier posts, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, does not provide an independent basis for federal subject matter jurisdiction over federal court proceedings concerning domestic arbitrations. *See Vaden v. Discover Bank*, 556 U.S. 44, 50 (2009). (In the case of international and non-domestic arbitrations, where the New York Convention applies, FAA § 203 (9 U.S.C. § 203) establishes a federal district court's subject matter jurisdiction.) Thus, absent diversity jurisdiction in the judicial proceeding in question, a petitioner must show federal question jurisdiction under 28 U.S.C. § 1331 in order to bring an application to confirm, vacate or modify a domestic arbitral award in federal court. But, as is frequently the case in the United States regarding such jurisdiction issues, the Federal Courts of Appeals are split on how that can be done.

In *Vaden*, the U.S. Supreme Court considered the subject matter jurisdiction of a federal court over a motion to compel arbitration under FAA § 4, ruling that the federal court would have such jurisdiction if it would have had jurisdiction over the underlying substantive dispute -- *i.e.*, "look through" jurisdiction.

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All Federal
2nd Circuit (incl. bankruptcy)

Since *Vaden*, the Courts of Appeals have (of course) diverged concerning whether the Supreme Court's reasoning also applies to petitions to confirm, vacate, or modify an arbitral award under FAA §§ 9-11. The Seventh, D.C., and Third Circuits hold that *Vaden*'s "look through" jurisdiction analysis does *not* apply to such petitions. *See Magruder v. Fid. Brokerage Servs. LLC*, 818 F.3d 285, 288 (7th Cir. 2016) (existence of basis for federal question jurisdiction over underlying dispute does not establish district court's subject matter jurisdiction over petition, pursuant to FAA §§ 9 or 10, to confirm or vacate arbitral award); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) (declining to "look through" petition to vacate arbitral award under FAA § 10);*Goldman v. Citigroup Global Mkts., Inc.*, 834 F.3d 242, 255 (3d Cir. 2016) (same).

The Second Circuit, among others, took a different tack, looking to the *Vaden* decision for guidance in considering a petition to vacate an arbitral award under FAA § 10. The Court of Appeals reasoned that (i) "[Section] 4 of the FAA does not enlarge federal-court jurisdiction"; and (ii) the Supreme Court endorsed the 'look through' test for determining whether there is subject-matter jurisdiction pursuant to Section 4, *Vaden*, 556 U.S. at 49, 51, and therefore (iii) "a federal court's jurisdiction under the *same* jurisdictional statute [cannot] *differ* between § 4 and all other remedies under the act[.]" *Doscher v. Sea Port Grp. Secs., LLC*, 832 F.3d 372, 383 (2d Cir. 2016) (emphasis in original). Thus the *Doscher* Court concluded that "a federal district court faced with a § 10 petition may 'look through' the petition to the underlying dispute, applying to it the ordinary rules of federal question jurisdiction and the principles laid out by the majority in *Vaden*." *Id.* at 44. However, the Second Circuit did not opine concerning whether the Supreme Court's decision in *Vaden* also applied to petitions to confirm or modify an arbitral award under FAA §§ 9 and 11, respectively.

Subsequently, the First Circuit embraced and extended the *Doscher* Court's reasoning in *Ortiz-Espinosa v. BBVA Sec. of P.R., Inc.*, No. 16-1122, 2017 U.S. App. LEXIS 1206, at *19 (1st Cir. Jan. 20, 2017), holding that "the look-through approach applies to sections 9, 10, and 11 of the FAA." Likewise, the Fourth Circuit held that the look-through approach should be used to determine jurisdiction over petitions to vacate or modify an arbitral award under FAA §§ 10 and 11. See, *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 684 (4th Cir. 2018).

Second Circuit Expands Applicability of "Look Through" Jurisdiction Analysis

On May 1, 2019, the Second Circuit addressed a federal court's application of the "look through" analysis of subject matter jurisdiction in connection with a motion to confirm a domestic arbitral award under FAA § 9. See*Landau v. Eisenberg,* No. 17-3963, 2019 U.S. App. LEXIS 13137 (2d Cir. May 1, 2019). *Landau* concerned a trademark dispute that was arbitrated before a rabbinical tribunal. After prevailing at arbitration, the petitioner sought to confirm the award in a federal district court, but respondent Eisenberg challenged the petition, claiming,*inter alia*, that the district court lacked subject matter jurisdiction. *Id.* at *2-3. The district court confirmed the arbitral award over respondent's objections, prompting his appeal.

The Court of Appeals affirmed the district court's decision, relying in part on its earlier decision in *Doscher* and on the First Circuit's opinion in *Ortiz-Espinosa*. The Second Circuit reasoned that the justifications for its approval of the use of the "look through" approach in *Doscher* "apply with equal force to § 9, which contains substantially identical language to § 10." *Id.* at *5-6 (internal citations omitted). It held that there was "no reason to employ a different approach for § 9 than § 10," and therefore that "a district court should employ the 'look through' approach described in *Doscher* when determining subject matter jurisdiction over petitions to confirm arbitration awards under § 9." *Id.* at *6.

If presented with a petition to modify pursuant to FAA § 11, one would imagine that the Second Circuit would further extend its reasoning in *Doscher* and hold that the "look through" analysis is appropriate in that case as well.

Conclusion

Nevertheless, the Circuit split on this subject remains deep. Until the Supreme Court resolves it, it is important for litigants to know the law in their respective jurisdictions. That law would determine, as a practical matter, whether your post-domestic arbitration petition ought to be filed in a state or a federal court.