MEALEY'S®
International Arbitration Report

U.S. Supreme Court Limits Appeals From Decisions Enforcing Arbitration Agreements

By
David N. Cinotti

Pashman Stein Walder Hayden, P.C.
Hackensack, N.J.

A commentary article reprinted from the June 2024 issue of Mealey's: International Arbitration Report

LexisNexis®

Commentary

U.S. Supreme Court Limits Appeals From Decisions Enforcing Arbitration Agreements

By
David N. Cinotti

[Editor's Note: David N. Cinotti is a partner with Pashman Stein Walder Hayden, P.C. He focuses his practice on commercial litigation, international and domestic arbitration, and appellate advocacy. Any commentary or opinions do not reflect the opinions of Pashman Stein Walder Haden, P.C. or LexisNexis®, Mealey Publications™. Copyright © 2024 by David N. Cinotti. Responses are welcome.]

Introduction

In *Smith v. Spizzirri* (decided May 16, 2024), the United States Supreme Court resolved a disagreement among the circuit courts of appeal on an important procedural issue under the Federal Arbitration Act (the "FAA"): when a district court decides that a dispute filed in court is covered by an arbitration agreement, must the court stay the litigation or can it dismiss the case?

The Supreme Court held that Section 3 of the FAA requires a stay rather than dismissal. Under *Smith*, a district court's order that a dispute is covered by an arbitration agreement cannot immediately be appealed, absent the unusual circumstance of certification of a controlling issue of law by the district court for appeal and acceptance of the appeal by the circuit court. That is because an order *staying* a case in favor of arbitration is not a final order subject to appeal; nor is it appealable under Section 16 of the FAA, which authorizes immediate appeals from denials of petitions to compel arbitration or motions to stay litigation in favor of arbitration, but precludes immediate appeals from orders requiring arbitration. An order *dismissing* a case in favor of arbitration, on the other hand, is a final order subject to appeal because it ends litigation in the district court. Following *Smith*, parties who do not believe that they are required to arbitrate will ordinarily have to wait until after the arbitration is over to challenge an order holding that their dispute must be arbitrated.

Moreover, like the Court's June 2023 decision in *Coinbase, Inc. v. Bielski*—which requires a stay of district-court proceedings upon an appeal of a decision that a dispute is *not* arbitrable—*Smith* further confirms the lopsided appellate rights under Section 16 of the FAA. If the district court rejects arguments that a dispute must be arbitrated, the losing party can immediately appeal, and the litigation in the district court must stop. But if a district court orders arbitration, the losing party will not be permitted to appeal (absent the unusual circumstance of a district court certifying a controlling issue of law) until after the arbitration is over. Winning motions to compel arbitration, therefore, might result in litigants foregoing arbitration rather than potentially waiting years to appeal. That is particularly true in consumer class actions, where arbitration will likely be on an individual, not class, basis, and where plaintiffs' lawyers—often on contingency—might not wish to invest time and resources to arbitrate before returning to court to argue on appeal that the arbitration agreement was inapplicable or unenforceable.

Background To Relevant Provisions Of The FAA

Chapter 1 of the FAA establishes general rules applicable to domestic arbitration. It also applies to international arbitration to the extent not in conflict

with Chapters 2 and 3, which implement the New York and Panama Conventions on international arbitration. Much of the FAA establishes procedures to enforce arbitration agreements and awards.

The issue in *Smith* pertains to applications to enforce an arbitration agreement. On that matter, Chapter 1 of the FAA contains two provisions—an application to stay litigation under Section 3 and a petition to compel arbitration under Section 4.[1] Section 3 provides that upon application by a party to a suit pending before the court, a district court "shall . . . stay the trial of the action" until arbitration has occurred, if the court concludes that the dispute is "referable to arbitration under an agreement in writing."[2] Section 4 states that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition" a district court that would have jurisdiction over the underlying dispute "for an order directing that such arbitration proceed in the manner provided for in such agreement."[3] Section 4 also includes the method of serving a petition to compel arbitration and the right to a jury trial if the parties dispute whether an arbitration agreement exists between them or was not adequately followed.[4] Section 4 suggests that a petition to compel arbitration must be filed in the district where the arbitration agreement calls for the arbitration to take place because it requires both that the court order arbitration "in accordance with the terms of the agreement," and that the arbitration proceedings "shall be within the district in which the petition for an order directing such arbitration is filed."[5] Thus, Section 3 contemplates a motion in an existing case arguing that the dispute must be arbitrated, while Section 4 establishes a procedure to file an original proceeding requesting that a district court compel arbitration of a dispute that another person has refused to arbitrate.

Section 16 of the FAA governs appeals from arbitration-related orders. In the U.S. federal system, appeals normally must wait until a final order is entered in the case.[6] A final order is ordinarily one "by which a district court disassociates itself from a case."[7] But Section 16(a) of the FAA creates exceptions to the final-order rule regarding enforcement of arbitration agreements: it permits immediate appeals from orders denying stays of litigation in favor of arbitration under Section 3 and from orders denying petitions to compel arbitration under Sections 4 and 206 (the latter pertaining to agreements falling under the New York Convention).[8] Final decisions with respect to arbitration are also immediately appealable.[9] The Supreme Court held in *Coinbase, Inc. v. Bielski* that an appeal under Section 16(a) automatically stays further proceedings in the district court.[10]

While Section 16(a) permits specified interlocutory appeals, Section 16(b) prohibits appeals from interlocutory orders granting stays of litigation under Section 3 or granting applications to compel arbitration under Sections 4 and 206.[11] A district court is still permitted to certify such orders for immediate appeal under 28 U.S.C. § 1292(b),[12] if it concludes that the non-appealable order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[13] It is rare, however, for a district court to invoke that procedure, and the court of appeals would still need to agree to hear the appeal on certification.[14]

In sum, when a party contends that the subject of an action filed in district court must be arbitrated under a written arbitration agreement, it can move for an order under Section 3 of the FAA staying litigation until an arbitration under that agreement has concluded. On those motions, district courts are sometimes called on to resolve whether a dispute is subject to arbitration—which the Supreme Court has called a dispute about "arbitrability"[15]—including whether an arbitration agreement applies to a nonsignatory (such as a related entity or agent), whether an arbitration agreement covers the particular claim raised in the suit (e.g., tort claims rather than contract claims), and whether an arbitration agreement is invalid or unenforceable for some reason (e.g., it was buried in website terms and conditions that a reasonable consumer would not have noticed). Courts also sometimes must resolve the threshold issue of whether an arbitrability dispute itself is subject to arbitration because, for example, the parties have agreed by contract to delegate arbitrability issues to an arbitrator rather than the court.

Defendants making motions to compel arbitration in response to claims filed in court sometimes invoke Section 4 of the FAA instead of Section 3. As noted,

however, Section 4's procedures govern an original petition to compel arbitration; those procedures do not obviously apply to an application in a pending case. That is evidenced by Section 4's service and jurisdictional provisions, and its apparent limitation that only the court in the district where the arbitration is to take place can compel arbitration, none of which would make sense if Section 4 applied when one party filed a court action and the other argues that the dispute must be arbitrated, particularly when the action is not filed in the district where an arbitration would be sited under the parties' agreement. In addition, Section 16 of the FAA reflects a pro-arbitration bias: parties that lose on applications seeking arbitration can immediately appeal and stay the district-court litigation, while parties that are ordered to arbitrate against their will ordinarily cannot.

The *Smith* Decision

Before *Smith*, the courts of appeal had reached conflicting decisions on whether a district court can dismiss or must stay the litigation when it concludes that a case filed in court belongs in arbitration.[16] A unanimous Supreme Court, in a decision by Justice Sonia Sotomayor, held that a stay is required.

Justice Sotomayor explained that "text, structure, and purpose all point to the same conclusion: When a federal court finds that a dispute is subject to arbitration, and a party has requested a stay of the court proceeding pending arbitration, the court does not have discretion to dismiss the suit on the basis that all the claims are subject to arbitration."[17] Section 3 says that a court "shall" stay the proceeding, which "creates an obligation impervious to judicial discretion."[18] In addition, the word "stay" in the statute imported the settled legal meaning of the term—a "'temporary suspension' of legal proceedings, not the conclusive termination of such proceedings."[19] The FAA's structure further supported the Court's conclusion: "[i]f a district court dismisses a suit subject to arbitration even when a party requests a stay, that dismissal triggers the right to an immediate appeal where Congress sought to forbid such an appeal" in FAA Section 16(b).[20] Finally, Justice Sotomayor noted that a stay is consistent with the court's "supervisory role" under the FAA, which includes the authority to appoint arbitrators, enforce arbitrator subpoenas, and confirm awards.[21] A party could return to the court to seek such relief under the FAA if the case is stayed, but not if it were dismissed.

Practical Implications For Future Cases

The most important practical result of *Smith* is that it cuts off avenues for immediate appeal when a district court decides that a dispute filed in court must be arbitrated. Because stays of litigation in favor of arbitration are only appealable under Section 16(b) of the FAA in the rare case that a district court certifies a legal question for appeal and the court of appeals agrees to decide it under 28 U.S.C. § 1292(b), most decisions resolving, in favor of arbitration, issues relating to the interpretation, enforceability (under the FAA and/or state contract law), validity, and scope of arbitration agreements cannot be appealed until the arbitration proceeding has concluded. Those issues can be varied, complex, and vigorously contested. For example, in the last five years, the Supreme Court has addressed the types of contracts that fall within the scope of the FAA's exemption for transportation workers' employment agreements,[22] whether the FAA preempts state law that invalidates contractual waivers of actions taken in a representative capacity,[23] when a litigant waives its right to compel arbitration,[24] whether class arbitration can be compelled if the arbitration is ambiguous on that topic,[25] when a nonsignatory may enforce an arbitration agreement under the New York Convention,[26] and when courts or arbitrators decide particular threshold arbitrability questions[27].

To have those and similar issues reviewed on appeal, a party that unsuccessfully resisted arbitration might need to raise them again in the district court as a basis to vacate or refuse confirmation of an award after the arbitration is concluded, and then, if the district court rejects those arguments (which it would likely do as law of the case), advance them in an appeal from a final order such as a decision confirming or refusing to vacate the award. In many cases, delay will not be the only consequence of that procedure. In consumer class actions, for example, the issue often arises whether an arbitration agreement requiring individual arbitration and waiving class dispute resolution is applicable or enforceable. If a district court were to hold that such an agreement were enforceable, the plaintiff would need to consider whether to seek Section 1292(b) certification, pursue individual arbitration and wait until it is over to challenge that ruling on appeal, or to simply drop the case because it is not worth the plaintiff's and plaintiff counsel's time and resources to pursue. Thus, the rule that *Smith*

establishes may result in plaintiffs dropping cases sent to arbitration.

The other practical result is that parties can return to the same district court, under the same docket number, to seek relief relating to arbitration. That relief might include appointment of an arbitrator, enforcement of arbitral subpoenas, confirmation or vacatur of an award,[28] and preliminary relief in aid of or pending arbitration[29]. Although Sections 9 to 11 of the FAA contain venue provisions calling for applications for post-award relief to be filed in the district where the arbitration award was made (i.e., the place or situs of the arbitration), the Supreme Court has held that those provisions are only permissive such that they "allow[] a motion to confirm, vacate, or modify an arbitration award to be brought . . . where the award was made or in any district proper under the general venue statute."[30] Thus, the fact that the stayed action was not filed in the same district as the arbitration proceedings would not preclude post-award relief in that action.

One open issue is whether district courts can dismiss actions after deciding that a dispute is arbitrable if neither party requests a stay. Indeed, the Supreme Court in *Smith* framed the question presented as whether a stay is mandatory "[w]hen a federal court finds that a dispute is subject to arbitration, *and* a party has requested a stay of the court proceeding pending arbitration."[31] But that issue should arise infrequently. As explained above, Section 3 supplies the procedure when a defendant in litigation argues that the claims must be arbitrated. Section 3 states that the court "shall on application of one of the parties stay the trial of the action" if it finds that the dispute is subject to a written arbitration agreement.[32] Judge Dennis Jacobs of the Second Circuit has explained: "Read naturally and in context, the referenced 'application of one of the parties' is the application to enforce the arbitration clause. The text does not contemplate (let alone require) a separate application to stay proceedings in district court."[33] Thus, invoking Section 3 of the FAA should be sufficient to require a stay if the court agrees that the dispute is arbitrable. In any event, it would ordinarily be a strategic mistake for a party arguing that a dispute is arbitrable not to request a stay when the arbitrability of the dispute is contested. Acquiescing to the court dismissing rather than staying the action would give away the primary benefit of the *Smith* ruling—blocking one's adversary from an interlocutory appeal to contest the district court's ruling that a dispute must be arbitrated.

Finally, *Smith* further underscores that interlocutory appeals under FAA Section 16 are a one-way street: parties that unsuccessfully invoke an arbitration clause can have a decision reviewed immediately (and thereby stay the district-court litigation), while parties sent to arbitration unwillingly will ordinarily have to wait—potentially for years—to appeal a decision finding that their dispute is arbitrable.

Endnotes

1. *See* 9 U.S.C. §§ 3-4.
2. 9 U.S.C. § 3.
3. 9 U.S.C. § 4.
4. *See id.*
5. *Id.*
6. 28 U.S.C. § 1291.
7. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).
8. 9 U.S.C. § 16(a)(1)(A)-(C).
9. 9 U.S.C. § 16(a)(3).
10. *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 747 (2023).
11. 9 U.S.C. § 16(b)(1)-(3).
12. *See* 9 U.S.C. § 16(b).
13. 28 U.S.C. § 1292(b).
14. *See id.*
15. *Coinbase, Inc. v. Suski*, No. 23-3, slip op. at 4 (U.S. May 23, 2024).
16. *See Smith v. Spizzirri*, 601 U.S. __, slip op. at 2 & n.1 (2024) (noting circuit split).
17. *Id.* at 3.
18. *Id.* at 4 (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998)).

19. *Id.* at 5.

20. *Id.* at 6.

21. *Id.*

22. *Bissonnette v. LePage Bakers Park St., LLC*, 601 U.S. 246 (2024).

23. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022); *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019).

24. *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022).

25. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019).

26. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432 (2020).

27. *Coinbase, Inc. v. Suski*, No. 23-3; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019).

28. *See Smith*, slip op. at 6 (citing FAA §§ 5, 7, 9).

29. *See, e.g.*, *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 894-95 (2d Cir. 2015) ("Where the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration.").

30. *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 195 (2000).

31. *Smith*, slip op. at 3 (emphasis added).

32. 9 U.S.C. § 3.

33. *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655, 665 (2d Cir. 2022) (Jacobs, J., concurring), *vacated and remanded*, 601 U.S. 246 (2024). ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Samuel Newhouse
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397