Arbitration's year at the Supreme Court

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With four Federal Arbitration Act (FAA) cases on the Supreme Court's 2021-2022 docket — each involving a different, frequently litigated issue — expectations were high for significant new guidance regarding the FAA's protection of arbitration agreements. Those seeking a limit to the FAA's reach were hoping for an end to what they saw as a string of pro-arbitration rulings. Others anticipated expansion of prior FAA holdings enforcing arbitration agreements.

The Court did neither. It instead issued unanimous, or virtually unanimous, decisions that ruled narrowly — reaffirming prior principles and expanding them marginally but declining to address broader questions teed up by the parties and amici. These consensus holdings, avoiding the polarized 5-4 divide in a number of prior FAA cases, demonstrate broad acceptance of the Court's FAA precedents and no interest in substantial modifications of current law.

But the narrow rulings provide little guidance on issues that could well return to the Court for resolution, depending on how the lower courts decide them.

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Badgerow v. Walters presented a simple question: When a party seeks to confirm, or contest, an arbitration award, does the ability to access federal court turn on the availability of diversity jurisdiction, or may a federal court "look through" the complaint and take jurisdiction if the underlying claim rested on federal law?

The Court held, 8-1, that look-through jurisdiction is not available in that context — even though it can be used to bring before a federal court an action seeking to compel arbitration. The majority relied on the plain language of the FAA, a theme that recurs frequently in this Term's decisions.

The question in *Morgan v. Sundance, Inc*. at first appeared simple: Does a party waive a right to arbitrate by waiting too long to invoke the arbitration agreement while litigating in court — or must the party opposing arbitration also show that it suffered prejudice from the delay, as most circuits had concluded.

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The Supreme Court's unanimous ruling held only that, *if* a federal-law waiver standard governs, then a prejudice requirement could not be based on "the FAA's 'policy favoring arbitration.'" The Court rested its decision on Section 6 of the FAA, which states that applications to courts should be "heard in the manner provided by law for the making and hearing of motions." That provision, the Court explained, directs courts to "apply the usual federal procedural rules, including any rules relating to a motion's timeliness," and "is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration."

But the Court emphasized it was deciding only that "single issue," and not "all the arguments the parties have raised" — arguments showing that the waiver question is much more complicated than whether proof of prejudice was required — including:

(1) whether federal law governs the waiver issue, or state law applies because arbitration is a contract right;

(2) if federal law applies, whether the relevant rule is based on waiver, forfeiture or "a different procedural framework"; and

(3) whether, if federal-waiver is the right test, the defendant "knowingly relinquished the right to arbitrate by acting inconsistently with that right."

The third case, *Southwest Airlines v. Saxon*, required the Court to interpret the provision of the FAA excluding from the statute's protection employment contracts of a "class of workers engaged in foreign or interstate commerce." (The author filed an amicus brief in the case on behalf of the defendant.)

The opinion, again unanimous (with Justice Amy Coney Barrett not participating), rejected the plaintiff's broad argument that every airline employee falls within the exclusion and Southwest's contention that only workers who physically move goods across state or national boundaries are excluded. It focused on the particular responsibility of airline ramp workers — who, the parties agreed, "physically load and unload cargo on and off airplanes on a frequent basis" — holding only that "airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods."

Amicus briefs in *Southwest Airlines* brought to the Court's attention the barrage of lower court cases addressing whether the FAA excludes contracts involving Amazon delivery drivers; Lyft and Uber drivers; and drivers who deliver restaurant meals, food, and other essentials. The Court recognized those issues in a footnote, but — as in *Morgan* — kept its ruling narrow and expressly declined to address them.

Some observers have suggested that the narrow focus of these rulings, and *Morgan*'s rejection of a waiver standard based on the FAA's pro-arbitration policy, signal a reduction in the Court's willingness to protect arbitration. But *Morgan* rested squarely on the plain language of the FAA — as *Southwest Airlines* explained in rejecting a similar policy argument that conflicted with the statute's words: The Court properly relies on purpose "when 'that purpose is readily apparent from the FAA's text,'" but it "ha[s] no warrant to elevate vague invocations of statutory purpose over the words Congress chose." That conclusion is wholly consistent with FAA precedents.

The last case, *Viking River Cruises, Inc. v. Moriana*, involved the application of the FAA to California's Private Attorneys General Act, which allows an employee to recover civil penalties associated for labor violations that she suffered as well as penalties for the same or different violations relating to any other employee. The employee retains 25% of the penalties and the remaining 75% is paid to the state. (The author filed an amicus brief in the case on behalf of the defendant.)

The California Supreme Court had held unenforceable arbitration agreements that limit PAGA claims to violations affecting the claimant alone and prevent the claimant from asserting violations experienced by other employees. Both the California Supreme Court and the 9th U.S. Circuit Court of Appeals held that the FAA principle protecting individualized arbitration did not preempt this state-law rule.

The U.S. Supreme Court reversed, with only Justice Clarence Thomas dissenting based on his view that the FAA does not apply to actions in state court. The Court reasoned that California's all-or-nothing rule regarding arbitration of PAGA claims meant that "[t]he only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding." Such a result — conditioning arbitration on allowing a claimant to seek remedies in arbitration on behalf of other employees — "is incompatible with the FAA."

Because the parties' agreement provided for individualized arbitration of PAGA claims, the Court concluded that the claims relating to other employees could not proceed in court, determining that California standing law barred such actions. It therefore directed dismissal of the PAGA action.

Justice Sonia Sotomayor wrote a concurring opinion, suggesting that the PAGA action seeking penalties for violations affecting other employees would be able to proceed in state court if California courts, or the California Legislature, concluded that a different state-law standing rule should apply. Plaintiff-side lawyers, in commentary and postings, have seized upon her suggestion, contending that California law allows them to end-run *Viking River* by having a plaintiff assert only claims involving other employees. Defense-side lawyers claim California law precludes such claims.

But even if California law permits plaintiffs to pursue PAGA actions asserting only violations affecting others, defendants will argue that such actions are preempted by the FAA—a question *Viking River* did not have to address in light of its interpretation of California law. They will rely on the Supreme Court's decisions holding that parties agreeing to individualized arbitration are barred from instituting class proceedings in court as well as in arbitration. And plaintiffs will say those decisions don't apply.

Does *Viking River*'s failure to invoke federal preemption as to non-individualized PAGA claims indicate that the Court may be backing away from enforcing the FAA? I don't think so. Rather, it is consistent with the theme of this Term's arbitration cases — rule narrowly, addressing only the issues necessary to resolve the question before the Court, and reserve decision on broader matters. That judicial modesty may not satisfy arbitration aficionados looking for broad declarations, but it says nothing about how the Court will rule when the issues come back before it. And it certainly guarantees additional litigation about those issues in the lower courts.

About the author

Andrew J. Pincus, a litigation partner in **Mayer Brown**'s Washington, D.C. office, focuses his practice on briefing and arguing cases in the U.S. Supreme Court and other courts, and has argued precedent-setting arbitration-related Supreme Court cases, including *AT&T Mobility v. Concepcion*. He filed amicus briefs in *Viking River Cruises, Inc. v. Moriana* and *Southwest Airlines v. Saxon*, which are discussed in this article. He can be reached at apincus@mayerbrown.com.

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