Section 9 | Confirming Awards Part III | Post-Award Federal Arbitration Act Enforcement Litigation Businessperson?s Federal Arbitration Act FAQ Guide

In the last two segments of the Businessperson's Federal Arbitration Act FAQ Guide, we discussed the substantive and procedural requirements for confirming under Section 9 Chapter One Domestic Awards, that is, domestic awards that fall under Chapter One of the Federal Arbitration Act, but not under Chapter Two, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (See here] and here].) Now we address additional, FAQs concerning the confirmation under Section 9 of Chapter One Domestic Awards.

Does an Application to Confirm under Section 9 a Chapter One Domestic Award Require One to File a Full-Blown Law Suit to Confirm an Award?

Fortunately, the answer is no. Like all other applications for relief under the FAA, an application to confirm an award under Section 9 is a summary or expedited proceeding, not a regular lawsuit. Rule 81(a)(6)(B) of the Federal Rules of Civil Procedure provides that the Federal Rules ?to the extent applicable, govern proceedings under the following laws, except as these laws provide for other procedures. . . (B) 9 U.S.C., relating to arbitration. . . .? Fed. R. Civ. P. 81(a)(6)(B).

Section 6 of the FAA ?provide[s] for. . . procedures? other than those applicable to ordinary civil actions because it requires applications for relief under the FAA to be made and heard as motions:

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise . . . expressly provided [in the FAA].
9 U.S.C. § 6.

A Section 9 action to confirm an award is, of course, ?[a]n application to the court? under the FAA, and thus, unless the FAA

otherwise provides, must be ?made and heard in the manner provided by law for the making and hearing of motions. . . .?

Confirming Arbitration Awards under Section 9: What Papers does a Party File to Apply for Confirmation of an Award?

Courts usually expect parties to file a summons, notice of application or notice of petition, an application or petition, a brief in support (which in most cases need not be longer than a few pages or so) and any affidavits or certifications that may be required (typically an affidavit or certification from counsel, the client or another appropriate person authenticating the agreement, award and any other pertinent documents is all that's necessary in this context). The summons, notice of application, and petition should, among other things, inform the other party of the date responding papers are due under applicable motion rules. The petition or application is usually in the form of a pleading (including jurisdictional allegations, allegations about the applicability of the FAA and so forth). The brief should set forth the legal basis for the application, including the basis for federal subject matter jurisdiction and the reasons the FAA applies.

What Papers does the Opposing Party File to Oppose a Section 9 Application?

A party opposing a Section 9 application should oppose it like it would any other motion, provided there are colorable grounds for doing so. Assuming there are no issues concerning the timeliness of the application or the existence of an arbitration agreement, then generally the only grounds for opposing the application are those set forth in FAA Sections 10 and 11, which govern applications to vacate awards and applications to modify or correct them. Those grounds are limited and generally difficult to establish. (See, e.g., L Reins. & Arb. Law Forum posts **here**, **here**, **here**, **here, here, here, here, here, here, here, here, here** & **here**.) If the opposing party believes there are such grounds, then ordinarily it will raise them by cross-application or cross-motion.

Can the Opposing Party Move to Vacate, Modify, or Correct the Award?

That depends on when a party files its Section 9 application. While a party making an application under Section 9 to confirm an award generally must do so within one year, a party that wants to vacate, modify or correct an award has to assert its grounds within three-months. See 9 U.S.C. § 12. If the party seeking confirmation makes its application after that three-month period elapses, then the opposing party cannot, as a matter of law, assert Section 10's or 11's grounds for vacating, modifying or correcting an award, even as affirmative defenses to the Section 9 application. See, e.g., **Florasynth, Inc. v. Pickholz**, 750 F.2d 171, 175-76 (2d Cir. 1984).

Does it Make Sense to Delay Filing the Application to Confirm until after the Three-Month Deadline for Applying to Vacate,

Modify, or Correct the Award Expires?

If a party can afford to wait a few months before making its Section 9 application, the other party may not, for whatever reason, make a timely application to vacate, modify or correct the award, the three-month period for doing so will expire, and the party will still have time to move to confirm under Section 9 within the specified one-year period. All else equal, that increases the likelihood that that obtaining confirmation will be relatively quick, easy and inexpensive.

If the opposing party makes a timely application to vacate, modify or correct the award, then the party seeking confirmation still stands to save some money. The award challenger will have to pay the filing fee and the costs associated with preparing, completing, and serving the initial paperwork associated with commencing an action. But all the award proponent has to do is e-file a properly supported cross-motion, allowing the challenging party to bear the costs the award proponent would have had to bear had it been the party who commenced the action. The additional cost that the party seeking confirmation will have to incur to oppose the motion to vacate, modify or correct the award is a wash, because the opposing party would presumably have made the motion anyway had the party seeking confirmation been the party that commenced the proceeding before the challenger did.

Forcing the putative award challenging party to commence a proceeding within three-months if it is going to challenge the award can also be strategically beneficial. As a practical matter, if the challenging party believes its chances of obtaining vacatur, modification or correction of the award are slim (and usually they are), then it might opt to forgo a challenge, particularly if challenging the award would require it to commence an action that may border on the frivolous.

By contrast, if the award proponent commences early on a proceeding to confirm the award, then, all else equal, it is more likely the putative award challenger will err in favor of challenging the award, provided the timely challenge at least barely passes the ?red-face test.?

Parties hauled into court to defend a Section 9 confirmation proceeding generally will assert whatever colorable claims and defenses they believe they might have, even if those defenses are pretty weak, and especially when the only other viable option is not to oppose the motion. That is all the more so when the stakes are relatively high, the claims and defenses are at least colorable, and delaying the proverbial day of reckoning might work in the award challenger's favor, even though the odds are strongly in favor of confirmation. Sometimes it is better not to wake the proverbial sleeping bear, even if you're well-armed and the bear is on its last leg.

Another potential strategic benefit of holding off on a motion to confirm for a few months may be realized irrespective of the other party's perception of the merits of its challenge. The challenging party's lawyers might mistakenly assume their client can raise vacatur, modification or correction grounds as affirmative defenses to a Section 9 application to confirm made after expiration of the three-month limitation period, something that happens more frequently than one might think.

For example, a person who is more familiar with New York State arbitration-law practice than with the FAA could easily make that

kind of mistake, because under New York arbitration law, which is governed by Article 75 of the New York Civil Practice Law and Rules, if a confirmation proceeding "is commenced after the 90-day period, but within the one-year period. . . .[,] a party may, by cross motion to vacate, oppose the petition for confirmation on any of the grounds in CPLR 7511 even though his time to commence a separate proceeding to vacate or modify under CPLR 7511(a) has expired.? Lyden v. Bell], 232 A.D.2d 562, 563 (2d Dep't 1996) (citations omitted); see, e.g., **1000 Second Avenue Corp. v. Pauline Rose Trust**, 171 A.D.2d 429, 430 (1st Dep't 1991) (?an aggrieved party may wait to challenge an award until the opposing party has moved for its confirmation?).

Although in a number of cases it may make sense for an award proponent to postpone its application to confirm until after expiration of the three-month limitations period, that is not necessarily true in all cases. Sometimes, for example, the award proponent needs to obtain a judgment as soon as possible and may thus opt to seek confirmation immediately. Or there may be more than one potential federal or state forum in which an action to confirm or vacate an award might properly be brought, and the award proponent may, for whatever reason, want a federal court within a particular district to preside over the confirmation proceeding.

How do Courts Decide Section 9 Applications to Confirm?

They decide them like motions. As previously discussed confirmation- or vacatur-related applications, supporting affidavits, cross-applications, responses and replies are presented to the court in the form of motions. And like most other motions, courts ordinarily decide them on the papers, sometimes (but not always) holding oral argument. Occasionally, one cross-moving to vacate can make a successful application for limited discovery, an evidentiary hearing, or both. To do so, however, the party seeking discovery and a hearing must show ?clear evidence of impropriety? by one or more of the arbitrators. **Andros Compania Maritima, S.A. v. Marc Rich & Co.**, 579 F.2d 691, 701, 702 (2d Cir. 1978).

Accordingly, the parties must ordinarily establish their competing claims for confirmation and vacatur through affidavits, documentary evidence and briefs, without any fact development through discovery or an evidentiary hearing. In most cases, that is a relatively simple task for the party seeking confirmation, but a difficult one for the party requesting vacatur, modification, or correction of the award.

If there is a cross-motion to vacate, modify, or correct the award (or a cross-motion to confirm if the party seeking vacatur is the first to file), each side usually gets to respond to the other side's motion or application and submit a reply in support of its own motion or application. If the briefing schedule is properly set, that usually means each side files two sets of papers (the second set is a combined response and reply). If there is no motion or cross-motion to vacate, then the other side simply responds to the motion to confirm and typically the party seeking confirmation gets to file reply papers.

The briefing can often be completed within two months or less. Once the briefing is complete, the case is submitted (subject to the possibility of oral argument), and the Court will decide the competing motions and issue an opinion, order and judgment. (Sometimes local rules call for the parties to submit proposed judgments or the court may request that a party do so.)

How Long does it Typically Take to Obtain a Decision on an Application to Confirm?

If the motion to vacate is not particularly persuasive, then typically the party seeking confirmation will receive judgment in its favor in a relatively short period, depending on the state of the assigned judge's docket. If the motion or cross-motion to vacate has more substance, then it might (or not) take the court longer to decide it.

In a large majority of (but not all) cases, the motion to vacate will be denied and the motion to confirm granted.

Will there be an Appeal?

Appeals to the appropriate Circuit Court of Appeals are not unusual in cases involving the grant or denial of a motion to vacate, modify, or correct an award, but all other things being equal, if the only motion made was one to confirm, and there are no potentially controversial issues presented, then an appeal is less likely (but not out of the question).

Do I need an Attorney to Confirm an Award?

If you are an artificial entity that operates through agents, such as a corporation or LLC, then you ordinarily need to appear in court represented by an attorney. The attorney can be an officer of the corporation, for example, provided that he or she is licensed to practice in the court where the application is pending. If you are an individual acting solely on your own behalf (i.e., not an artificial entity), then you can generally appear pro se if you desire.

While we have accurately portrayed the confirmation process as ordinarily a relatively straightforward procedure, we speak from the standpoint of lawyers who are familiar with, and experienced in, arbitration law, practice, and procedure. Its relative simplicity does not mean that it is supposed to be a "do-it-yourself" process.

So if you need to confirm an arbitration award, make sure you are represented by counsel (unless you are an individual and you truly can't afford one). You should consider asking the attorney or law firm that represented you in the arbitration to represent you or retaining a skilled and experienced arbitration lawyer for that purpose.

In terms of whether you want the lawyer or firm that represented you in the arbitration proceeding to handle the post-arbitration FAA litigation, you'll need to consider whether they (or others in their firm) are experienced in handling FAA enforcement

proceedings, and what your fee will likely be. If you believe you might be able to save some money by hiring a reasonably priced arbitration lawyer or firm, then you can either hire one for the limited purpose of assisting your existing counsel with the confirmation proceedings, or handling all of the required FAA enforcement work, including any appeals. One of those two options might be particularly attractive if you anticipate a motion to vacate that might have some merit and want the benefit of an arbitration lawyer who has experience making and opposing such motions. Such a lawyer should, in exchange for a reasonable fee, be able to devise what appears to be the best strategy and present to the court your arguments in a clear, concise and fully-supported manner.

Do Confirmation Proceedings Provide Opportunities for Alternative Billing Arrangements, such as Project Fixed-Fee Billing Arrangements?

Whenever you hire an attorney (or ask your attorney to undertake more work), you should manage your costs. One of the attractive features of FAA-related litigation is that, for the most part, it can generally be divided into a series of discrete projects. The preparation, service and filing of the papers might be one discrete project. Where a motion to vacate is made, preparation, service and filing of the responding papers would be another, which, with the right briefing schedule, may be combined with the reply papers in support of the application to confirm as one submission. Preparing for and handling the oral argument, if any, might be another discrete project.

That means that motions to confirm can be good candidates for alternative billing arrangements. For example, you might be able to obtain a fixed-fee for each discrete project, which is set once the lawyer can make a reasonable estimate of the time required to complete it.

What Should my Expectations be Concerning the Fees I'll have to Pay?

If no motion to vacate is made, you should expect that the fees you will have to pay to be lower. Whether you are charged on a fixed-fee, fee-cap or hourly basis, the additional fee you should expect to pay will likely depend on the strength of the grounds asserted by the party challenging confirmation. Briefing a motion to confirm in a case where the other party has no legitimate defenses or only a few weak ones ordinarily takes less effort than it does when, for example, the other party asserts some potentially viable grounds for vacatur, especially where those grounds are fact-intensive, raise legal questions that are not necessarily settled, or both.

More to Follow. . .]

The next segment will answer FAQs concerning the confirmation of Chapter Two Domestic Awards, that is, awards made in the U.S. that fall under Chapter Two of the Federal Arbitration Act, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Please note. . .]

This guide, including the instalments that will follow in later posts, and prior instalments, does not purport to be a comprehensive recitation of the rules and principles of arbitration law pertinent or potentially pertinent to the issues discussed. It is designed to give clients, prospective clients, and other readers general information that will help educate them about the legal challenges they may face in arbitration-related litigation and how engaging a skilled, trustworthy, and experienced arbitration attorney can help them confront those challenges more effectively.

This guide is not intended to be legal advice and it should not be relied upon as such. Nor is it a ?do-it-yourself? guide for persons who represent themselves pro se, whether they are forced to do so by financial circumstances or whether they elect voluntarily to do so.

If you want or require arbitration-related legal advice, or representation by an attorney in an arbitration or in litigation about arbitration, then you should request legal advice from an experienced and skilled attorney or law firm with a solid background in arbitration law.

Contacting the Author

If you have any questions about arbitration, arbitration-law, arbitration-related litigation, this article, or any other legal-related matter, please contact the author, Phil Loree Jr., at (516) 941-6094 or at **PJL1@LoreeLawFirm.com**.

Philip J. Loree Jr. is a partner and founding member of Loree & Loree. He has 30 years of experience handling matters arising under the Federal Arbitration Act and in representing a wide variety of clients in arbitration, litigation, and arbitration-related litigation.

Loree & Loree represents private and government-owned-or-controlled business organizations, and persons acting in their individual or representative capacities, and often serves as co-counsel, local counsel, or legal adviser to other domestic, and international, law firms requiring assistance or support.

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