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Darynne L. O'Neal

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Clarifying the Intent of Congress: Are the Federal Arbitration Act's Venue Provisions Permissive or Mandatory?

*Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*¹

I. INTRODUCTION

The Federal Arbitration Act (“FAA”) allows for arbitration to be a medium by which parties may settle disputes more expeditiously than litigation. Among other provisions, the FAA contains venue provisions that attempt to provide guidance as to where certain post-arbitration motions may be held. However, the language of the venue provisions has not provided a clear-cut answer to where these motions should be filed, as circuits have disagreed about their intended interpretation.

Some circuits have taken the position that the venue provisions are mandatory, thus limiting venue for motions to confirm, vacate, or modify arbitration awards to the district where the award was made. Other circuits, however, have adopted the contrary position that the venue provisions are permissive, allowing such motions to be brought either in the district where the arbitration award was made or in any district that is proper under the general venue statute. This Casenote explores the split among the circuits on the nature of the FAA’s venue provisions. *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.* addressed this issue and, in abrogating preceding cases, held that the venue provisions of the FAA are permissive.

II. FACTS AND HOLDING

Cortez Byrd Chips, Inc. (“*Cortez Byrd*”) and *Bill Harbert Construction Company* (“*Harbert*”) entered into a contract whereby *Harbert* agreed to construct “a wood chip mill for *Cortez Byrd* in Brookhaven, Mississippi.”² Under the terms of the contract, the parties agreed that all disputes arising out of the deal would be arbitrated, and that the agreement to arbitrate and any award rendered by an arbitrator shall be enforceable and entered, respectively, in any court having jurisdiction.³

Cortez Byrd filed a complaint in the United States District Court for the Southern District of Mississippi seeking to vacate or modify an arbitration award resulting from an arbitration proceeding between itself and *Harbert*.⁴ *Harbert* then filed an action in the Northern District of Alabama seeking to have the award

1. 529 U.S. 193 (2000).

2. *Cortez*, 529 U.S. at 196.

3. *Id.*

4. *Id.*

confirmed.⁵ Cortez Byrd moved to have Harbert's action dismissed, transferred, or stayed, arguing that venue was proper in the southern district of Mississippi because the venue provisions of the FAA are permissive and Cortez Byrd filed its action first.⁶

Harbert maintained that venue is restrictive, thus only proper in the district in which the arbitration award was made, the Northern District of Alabama.⁷ The Northern District court agreed with Harbert and, in denying Cortez Byrd's motion, held that venue was only proper in Alabama.⁸ Judgment was entered for Harbert for \$274,256.90 and was affirmed by the Court of Appeals for the Eleventh Circuit.⁹ A writ of certiorari was granted by the United States Supreme Court to ascertain the nature of the FAA venue provisions and resolve the split among the circuits.¹⁰

Relying on statutory history and being cognizant of practical consequences, the Supreme Court reversed the judgment of the Court of Appeals for the Eleventh Circuit and held the FAA's venue provisions to be permissive, allowing a motion to confirm, vacate, or modify to be brought in either the district in which the award was made or in any district proper under the general venue statute.

III. LEGAL BACKGROUND

It is well-settled that §§ 9 and 10 of the FAA must be construed the same, whether they are found to be permissive or mandatory.¹¹ In fact, "every federal circuit court to address the issue . . . has held that §§ 9 and 10 should be interpreted uniformly."¹² Whether both of the provisions are mandatory or permissive, however, is an issue that has split authority throughout the circuits.¹³

Section 9 of the FAA states, in pertinent part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then . . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such applications *may* be

5. *Id.*

6. *Bill Harbert Constr. Co. v. Cortez Byrd Chips, Inc.*, 169 F.3d 693, 694 (11th Cir. 1999).

7. *Cortez*, 529 U.S. at 193.

8. *Id.*

9. *Id.* at 196 (stating that venue for motions to confirm, vacate, or modify awards was exclusively in the district in which the arbitration award was made).

10. *Id.*

11. *See In re VMS Secs. Litig.*, 21 F.3d 139 (7th Cir. 1994); *Sutter Corp. v. P&P Indus.*, 125 F.3d 914 (10th Cir. 1999); *Sunshine Beauty Supplies, Inc. v. United States Dist. Court for Cent. Dist. of California*, 872 F.2d 310 (9th Cir. 1989).

12. *P & P Indus. v. Sutter*, 179 F.3d 861, 861 n.4 (10th Cir. 1999).

13. *Cortez*, 529 U.S. at 196.

made to the United States court in and for the district within which such award was made.¹⁴

Section 10 of the FAA deals with vacatur but is similar to § 9 in that it states that “the United States court in and for the district wherein the award was made *may* make an order vacating the award upon application of any party to the arbitration.¹⁵ The courts of appeal have struggled with whether the nature of the provisions as mandatory or permissive is to be ascertained merely by the language of the statute or if further inquiry is necessary.¹⁶

A number of courts have looked beyond the exact wording of the statute to ascertain the nature of the venue provisions.¹⁷ The Seventh Circuit has held that one is to look beyond the express language of a statute only where (1) the statutory language is ambiguous or (2) a literal interpretation would lead to an absurd result or (3) a literal interpretation would thwart the purpose of the overall statutory scheme.¹⁸ The ambiguity in §§ 9 and 10 of the FAA arises from the *seemingly* restrictive wording Congress chose in drafting the statutes.¹⁹ When Congress intends for a statutory provision to be restrictive, it uses unambiguous terms to express its intention.²⁰ Multiple cases hold that ordinary canons of statutory construction suggest that Congress would have used stronger language than ‘such application *may* be made’ or ‘*may* apply’ if the intention was to restrict the power of a federal court in FAA cases.²¹

The majority of courts of appeal have held the provisions to be permissive²² because a mandatory interpretation would create absurd results. First, a mandatory interpretation of § 9, which would give only the district court in the district where the arbitration award was made power to confirm the award, would render § 3 meaningless.²³ If the district court giving the award did not have the power to confirm or vacate the award, the action must be dismissed rather than stayed, for

14. 9 U.S.C. § 9 (1994) (emphasis added).

15. 9 U.S.C. § 10 (emphasis added).

16. See generally *Sutter Corp.*, 125 F.2d 914; *P&P*, 179 F.3d 861; *In re VMS*, 21 F.3d 139; *Sunshine Beauty Supplies*, 872 F.2d 310; *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985); *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741 (9th Cir. 1985); *Island Creek Coal Sales v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. 1984); *United States v. ETS-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968).

17. See *Sutter Corp.*, 125 F.3d 914; *P&P*, 179 F.3d 861; *In re VMS*, 21 F.3d 139; *Smiga*, 766 F.2d 698.

18. *In re VMS*, 21 F.3d at 144 (citing *United States v. Real Estate Known as 916 Douglas Ave.*, 903 F.2d 490, 492 (7th Cir. 1990)).

19. *Id.* (emphasis added).

20. *P&P*, 179 F.3d at 869 (referencing the Miller Act, 40 U.S.C. § 270b(b), which states that “[e]very suit instituted under this section shall be brought . . . in the United States District Court”).

21. 9 U.S.C. § 9. See *P&P*, 179 F.3d 861; *Apex Plumbing Supply, Inc. v. U.S. Supply Co.* 142 F.3d 188 (4th Cir. 1998); *Smiga*, 766 F.2d 698.

22. *Sutter Corp.*, 125 F.3d 914; *P&P*, 179 F.3d 861; *Apex Plumbing Supply*, 142 F.3d 188; *In re VMS*, 21 F.3d 139; *Nordin v. NutriSystem, Inc.*, 897 F.2d 339 (8th Cir. 1990); *Smiga*, 755 F.2d 698.

23. See *P&P*, 179 F.3d at 869; *In re VMS*, 21 F.3d at 144. Section 3 of the FAA instructs “any of the courts of the United States” to “stay the trial of the action” pending arbitration if that court is “satisfied that the issue involved in such suit or proceeding is referable to arbitration” under the parties’ agreement. 9 U.S.C. § 3.

that court would have no power to take any further action in the case.²⁴ Second, the courts recognize that a mandatory interpretation would prevent a court with jurisdiction from proceeding with a case to its conclusion.²⁵ Thus, a court having jurisdiction must dismiss the parties and force one of them to sue in another forum to confirm or vacate his or her award.²⁶ The United States Supreme Court held this process to be a "pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the Arbitration Act."²⁷

Finally, the majority of courts of appeal hold that a mandatory reading of §§ 9 and 10 would thwart the purposes of the FAA.²⁸ One of the purposes of the FAA, as stated by the United States Supreme Court, is the "rapid and unobstructed enforcement of arbitration agreements."²⁹ A restrictive interpretation of these provisions, thereby restricting venue and compelling parties to file in multiple forums to see their matter through to conclusion, violates this purpose.³⁰

The minority of courts of appeal have held the venue provisions to be mandatory.³¹ The reasons proffered by these circuits for adopting a mandatory interpretation are not extensive. In *Unites States v. ETS-Hokin Corp.*, the arbitration award was made in California, and a motion to vacate was later filed in Arizona.³² The court offered little reason for its holding, but simply stated "we agree with the District Court of Arizona that it was without jurisdiction to set aside the arbitration award."³³ The *Central Valley* court followed its earlier decision of *ETS-Hokin*, finding venue proper only where the arbitration award was made.³⁴ Four years later, the Ninth Circuit again, citing *ETS-Hokin* and *Central Valley* as precedent, held the venue provisions of the FAA to be mandatory.³⁵ Hence, the Ninth Circuit found itself bound by precedent that simply stated a conclusion, devoid of any analysis or reasoning.

The Ninth Circuit is not alone in its propensity to adhere to unpersuasively-reasoned precedent. The Eleventh Circuit simply stated it was bound by the Fifth Circuit's *Naples*' case holding that § 9 was mandatory, calling it "§ 9's command."³⁶ However, the court "did not explain what it meant by '§ 9's command' or why that command compelled or even supported the result reached."³⁷ Further, the *Sutter* court refused to give weight to the *Naples* decision, stating that it does not directly answer the question whether venue under § 9 is mandatory.³⁸ Consequently, circuit

24. See *P&P*, 179 F.3d at 869; *Sutter Corp.*, 125 F.3d at 919.

25. *In re VMS*, 21 F.3d at 145.

26. *Id.*

27. *Id.* at 145 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 27 (1983)).

28. See cases cited *supra* note 22.

29. *Moses H. Cone*, 460 U.S. at 23.

30. *In re VMS*, 21 F.3d at 144; *Moses H. Cone*, 460 U.S. at 23.

31. *Sunshine Beauty Supplies*, 872 F.2d at 312.; *Central Valley*, 762 F.2d at 744; *Island Creek*, 729 F.2d at 1050; *ETS-Hokin*, 397 F.2d at 938-39.

32. 397 F.2d 935.

33. *Id.* at 939.

34. *Central Valley*, 762 F.2d at 744.

35. *Sunshine Beauty Supplies*, 872 F.2d at 312.

36. *Sutter Corp.*, 125 F.3d at 919 (quoting *Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir. 1974)).

37. *Id.*

38. *Id.*

decisions adopting a mandatory reading of the venue provisions were all abrogated by the United States Supreme Court in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*³⁹

IV. INSTANT DECISION

In the instant case, the issue before the United States Supreme Court was whether the venue provisions of the FAA are permissive or mandatory⁴⁰ and in particular whether Cortez Byrd's motion to confirm or modify the arbitration award was properly filed in the southern district of Mississippi.⁴¹

The Court began its analysis by concluding that resolution would not be forthcoming by merely "parsing the language" of the statutes.⁴² As the *Cortez Byrd* Court argued, the use of the word "may" is not per se conclusive of congressional intent to provide for a permissive authority.⁴³ Further, Harbert demonstrated that language seemingly permissive in nature could be held mandatory.⁴⁴ Thus, the Court focused on statutory history and the practical consequences of Harbert's position to resolve the issue before it.⁴⁵

The Court examined the venue provision of § 9, allowing a binding agreement selecting a forum for confirming an arbitration award, and its relation to §§ 10 and 11, as any forum selection agreement must coexist therewith.⁴⁶ The Court reasoned that if §§ 10 and 11 were mandatory in nature then any action to confirm the award brought in a forum by agreement of the parties must be suspended if the responding party objected.⁴⁷ A new action to modify or vacate the award must then be initiated in the district where the award was made, and if the award was upheld, the parties would then move back to the forum agreed upon to resume confirmation of the award.⁴⁸ The Court discarded this effect as one intended by the statute stating that "Congress simply cannot be tagged with such a taste for the bizarre."⁴⁹ The Court further indicated its disapproval of holding such venue provisions mandatory in that "nothing, indeed, would be more clearly at odds with both the FAA's 'statutory policy of rapid and unobstructed enforcement of arbitration agreements,' or with the desired flexibility of parties in choosing a site for arbitration."⁵⁰

39. 529 U.S. 193.

40. *Cortez*, 529 U.S. at 196.

41. *Id.* at 195.

42. *Id.*

43. *Id.* ("The word 'may' . . . usually implies some degree of discretion[, but] [t]his common-sense principle of statutory construction . . . can be defeated by indications of legislative intent to the contrary . . .") (quoting *United States v. Rodgers*, 461 U.S. 677, 706 (1983)).

44. *Id.*

45. *Id.* at 198.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 201 (citing *Moses H. Cone*, 460 U.S. at 23).

Next, the Court examined the effects that a mandatory interpretation of the venue provisions would have upon § 3⁵¹ of the FAA and determined that it would place the provisions in “needless tension” being capable of entanglement only by disruption of existing precedent.⁵² Previous case law dictates, and Harbert even acknowledges, that the court entering a stay order under § 3 retains jurisdiction over the proceeding and power to confirm any forthcoming arbitration award.⁵³ However, a restrictive interpretation of the FAA’s venue provisions would provide that the court having power under § 3 would not retain jurisdiction to confirm an ensuing arbitration award.⁵⁴ The Court declined to follow Harbert’s position and instead affirmed existing precedent and avoided creating tension within the provisions of the FAA.

Finally, the Court considered the effect Harbert’s interpretation of the provisions would have in the wake of arbitrations held abroad.⁵⁵ The FAA provides for “liberal choice of venue for actions to confirm awards subject to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration.”⁵⁶ Adopting Harbert’s position would preclude FAA action in the United States to confirm, modify, or vacate awards rendered abroad not covered by either convention.⁵⁷ The Court stated that while these actions would not necessarily be barred for lack of jurisdiction, they would be defeated by restrictions on venue, and anomalies like that are to be avoided if possible.⁵⁸ Therefore, the Court declined to adopt Harbert’s position due to the “anomalous results” that it would inevitably create.⁵⁹

Consequently, due to the fact that a mandatory interpretation of the FAA’s venue provisions would hinder the rapid enforcement of arbitration agreements and desired flexibility of parties in choosing a forum, place needless tension on provisions within the FAA, and create anomalous results in the aftermath of foreign arbitrations, the United States Supreme Court, abrogating previous contrary decisions of the courts of appeal, held the venue provisions of the FAA permissive.⁶⁰

V. COMMENT

The federal circuits have disagreed for fifteen years as to whether the venue provisions of the FAA are permissive or mandatory.⁶¹ The courts holding the

51. *Id.* (citing 9 U.S.C. §3) (stating “that any court in which an action ‘referable to arbitration under an agreement in writing’ is pending ‘shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement’”).

52. *Id.*

53. *Id.* at 202.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 203.

58. *Id.*

59. *Id.* at 202.

60. *Id.* at 204.

61. *Id.* at 196 (stating that cases in 1968, 1984, 1985 and 1989 held the provisions to be mandatory and cases in 1986, 1990, 1994, 1997, 1998 and 1999 held the provisions to be permissive).

provisions mandatory restrict venue for post-arbitration proceedings to the district where the arbitration award was granted.⁶² Conversely, the courts holding the provisions permissive allow venue for such proceedings not only in the district where the award was made, but also in any other district proper under the general venue statutes.⁶³ The *Cortez Byrd* Court sought to resolve this discrepancy by holding the venue provisions to be permissive and, in so doing, abrogated preceding cases to the contrary.⁶⁴

Holding the venue provisions to be permissive, the Supreme Court has expanded allowable forums for post-arbitration disputes in jurisdictions that previously adopted a mandatory reading of the FAA venue provisions. Rather than be confined to the district that made the arbitration award to bring a motion to vacate or confirm an award, parties to the arbitration dispute may now bring their motions in the district where a substantial part of the events leading to the dispute occurred, or where a substantial part of the property that is subject to the action is located.⁶⁵ Parties may now bring post-arbitration motions in *any* district that has subject matter and personal jurisdiction.⁶⁶ The decision in the instant case has afforded parties the right to choose a convenient forum in which to be heard.

By abrogating the cases holding the venue provisions to be mandatory, the instant case has reinstated the policy behind the FAA of rapid and unobstructed enforcement of arbitration agreements.⁶⁷ The *Cortez Byrd* Court recognized that jurisdictions following a mandatory interpretation of the venue provisions in the FAA were in fact slowing down the process of bringing arbitration proceedings to their conclusions. In those circuits, district courts that would otherwise have jurisdiction over arbitration cases often dismissed parties and forced them to return to the district that made the award.⁶⁸ Mandatory interpretations of the provisions were creating wasteful burdens on courts that otherwise had jurisdiction, effectively postponing parties' abilities to finalize arbitration proceedings. Recognizing that these courts should be allowed to exercise jurisdiction over such parties, the Supreme Court returned swiftness and efficiency to the enforcement of arbitration proceedings.⁶⁹

The *Cortez Byrd* decision laid to rest the impractical consequences of the mandatory interpretation of the venue provisions. It is well-settled that a court with the power to stay an action under § 3 of the FAA has the further power to confirm any ensuing arbitration award.⁷⁰ It is inconceivable "to be open to question that, where the court has authority under the statute . . . to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, ultra vires or other defect."⁷¹ However, a mandatory interpretation of the

62. See *Sunshine Beauty Supplies*, 872 F.2d 310; *Central Valley*, 762 F.2d 741; *ETS-Hokin*, 397 F.2d 935.

63. See *Sutter Corp.*, 125 F.3d 914; *In re VMS*, 21 F.3d 139; *Smiga*, 766 F.2d 698.

64. *Cortez*, 529 U.S. 193.

65. *Id.* at 197 (citing 28 U.S.C. § 1391(a)(2) (1994)).

66. *Apex Plumbing Supply*, 142 F.3d at 191.

67. *Cortez*, 529 U.S. at 198.

68. See *P&P*, 179 F.3d 861; *In re VMS*, 21 F.3d 139; *Smiga*, 766 F.2d 698.

69. See generally *Cortez*, 529 U.S. 193.

70. *Id.* (citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 275-76 (1932)).

71. *Id.*

venue provisions of the FAA would not allow such a court to confirm the award unless it was the same court where the award was made, thereby placing the venue provisions in needless tension with § 3 of the FAA.⁷² In fact, an exclusive reading of §§ 9 and 10 would “effectively read § 3 out of the Act.”⁷³ Examining the FAA in its entirety, it is evident that a permissive interpretation is necessary to reconcile all sections.⁷⁴

A mandatory interpretation also creates impractical results in the proceedings of arbitrations held abroad.⁷⁵ Certain sections of the FAA provide for a liberal choice of venue for actions to confirm awards made subject to specific international and foreign conventions.⁷⁶ In this instance, the result of a mandatory interpretation of the venue provisions would preclude any action under the FAA in the courts of the United States to confirm, modify, or vacate awards rendered in foreign arbitrations that are not covered by the specified conventions.⁷⁷ The United States courts may have jurisdiction over such proceedings, but due to the mandatory interpretation of the venue provisions, they would be without proper venue. *Cortez Byrd* recognized that Congress did not intend to create venue gaps which take away with one hand what it has given by way of jurisdictional grant with the other.⁷⁸

VI. CONCLUSION

This decision gives deference to the practical consequences of the possible interpretations of the venue provisions and reasonably concludes that a mandatory interpretation is impractical and inconsistent with the intent of Congress and the policy of the FAA. Thus, the inconsistency in the circuits that has persisted with regard to the FAA venue provisions is now resolved, and the minority, mandatory position is now abrogated. The future of arbitration proceedings should entail a uniformity among the jurisdictions coextensive with the policy of rapid and unobstructed enforcement of arbitration awards.

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72. *Id.* at 199.

73. Susan C. Rabasca, *Venue for Motions to Confirm or Vacate Arbitration Awards under the Federal Arbitration Act*, 57 *FORDHAM L. REV.* 653, 659 (1989) (citing *NII Metals Servs., Inc. v. ICM Steel Corp.*, 514 F. Supp. 164, 166 (N.D. Ill. 1981)).

74. *Id.*

75. *Id.* at 200.

76. *Id.*

77. *Id.*

78. *Id.*