

Beware When the Dates to File Motions to Confirm and Vacate Arbitration Awards Conflict

Judge Abraham J. Gafni (Ret.)

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Following the issuance of an arbitration award, a successful party generally starts to consider the filing of a motion to confirm, while the unsuccessful party reviews whether to file a motion to vacate.

Interestingly, however, the time limits within which such motions may be filed differ under the Federal Arbitration Act (FAA). Motions to confirm must be filed within a year after the award is made, whereas motions to vacate, must be filed within three months. See 9 U.S.C. Sections 9 and 12. Accordingly, if the losing party fails to move to vacate timely, it cannot object to a later motion for confirmation based on any of the grounds in the FAA.

But may an award be confirmed before the three-month period to file the motion to vacate has run? In *McLaurin v. The Terminix International*, 13 F. 4th 1232 (11th Cir. 2021), a party, to its dismay, discovered that its failure to respond properly to an early motion to confirm resulted in its motion to vacate not only being denied, but not even being considered on its merits.

The case involved an arbitration proceeding in which homeowners alleged that Terminix had failed to provide required contractual inspections. The arbitrator awarded the homeowners \$2,767,900.

Two days after they received the award, the homeowners filed a complaint in district court to confirm. Two weeks later, Terminix filed an answer that included no arguments of substance, but merely stated that it intended to file a motion to vacate the award on or before Nov. 14, 2019 (the 19th day following the award.) Several days after Terminix filed its answer, the homeowners filed a motion to confirm and enter final judgment. This was followed by the district court ordering that “any opposition to the motion shall be filed no later than Sept. 25, 2019, and any reply to an opposition shall be filed no later than Oct. 2, 2019.” The court’s order made no reference to a separate deadline for a motion to vacate.

On Sept. 25, 2019, Terminix filed a four-page brief that responded to the homeowners’ ‘confirmation motion by merely stating that the motion was “‘premature’ and ‘procedurally improper’ because it was filed within three months of the arbitration award.” Terminix’s brief, however, did not identify any substantive reason for the district court not to confirm the arbitration, seek an extension to oppose the motion, or 3) request that the court delay its ruling.

Eventually, one and one-half months after the court's Sept. 25 deadline to oppose the homeowners' motion, but still within three months of the arbitration award, Terminix, on Nov. 12, 2019, filed a motion to vacate in which for the first time it set forth substantive arguments against confirmation.

The district court granted the homeowners' motion to confirm as substantively unopposed and struck Terminix's motion to vacate as untimely.

Terminix appealed arguing:

- The court erred in confirming an arbitration award without giving it three months to file its motion to vacate.
- Even if the court had correctly rejected the procedural argument, it should have ruled on the merits of the motion to vacate.

The U.S. Court of Appeals for the Eleventh Circuit rejected both of Terminix's arguments. It pointed out that the FAA authorizes a party to file a motion to confirm following the award at any time and for any reason during the year immediately following the arbitration award, which "the court must grant ... unless the award is vacated, modified or corrected."

Section 12 of the FAA states, however, that "any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion to vacate or modify staying the proceedings of the adverse party to enforce the award." The Eleventh Circuit recognized, therefore, that, "Section 12 does grant a court the discretion to stay litigation on a motion for confirmation when it is considering a motion to vacate or modify the award." But, it added, "as the statute provides for this discretionary stay, it makes no sense to conclude that the FAA also imposes a mandatory stay."

Also rejected was Terminix's argument that even if a motion to confirm might be filed within three months after the award, the court cannot confirm if it has "notice" that the losing party "intends" to file a motion to vacate. It recognized, of course, that a motion to confirm may not be granted without giving the opposing party an opportunity to respond or ruling on a timely opposition to the motion. Confirmation, however, need not be delayed solely on the basis of an "expected" motion to vacate.

Rather, the court concluded, "Nothing in the statute prevents a party from moving for confirmation of an award within three months of that award or mandates that the district court wait to rule on such a motion because another party may file a motion to vacate."

The appellate court did suggest, however, that district courts might better employ a different approach. It stated: "When a motion to confirm is filed before the time to challenge an arbitration award has lapsed, we believe that the best practice is for a district court to issue an order that sets forth simultaneous deadlines for a losing party to file an opposition to the motion to confirm, if any, and to file a separate motion to vacate, modify or correct, if any. Individual circumstances may justify a different approach in certain cases. But a district court that follows this best practice will be on sound legal footing and ensure that all issues are fully and fairly litigated."

The court also rejected Terminix's argument that the district court erred when it declined to consider the merits of the motion to vacate as untimely. Rather, it deemed permissible the court's

order shortening the deadline for “any opposition” to the motion to confirm to earlier than 90 days. It noted that courts “routinely set scheduling deadlines for parties to raise claims or defenses that are shorter than the applicable statutes of limitations.”

Moreover, the court found that Terminix’s motion was moot in that it not only did it fail to set forth the reasons why the motion to confirm should be denied (which would have mirrored the reasons for vacating the award), it did not even request that the court delay ruling on the motion to confirm or for more time to respond. Because Terminix failed to identify grounds for denying the motion to confirm by the court’s deadline, “the district court reasoned that Terminix had waived those arguments and concluded that Terminix could not revive its waived arguments in a later-filed motion.”

The warning for a party facing a motion to confirm and considering a motion to vacate is clear. When confronted with a motion to confirm in federal court, assure that you respond with your substantive arguments or, at the very least, a request for an extension to respond or a delay in the court’s ruling. Do not assume that your objections will be preserved by a later-filed motion to vacate, even if you tell the court and your adversary that you intend to file one. Although the better practice for a district court may be to set simultaneous deadlines for the filing of its opposition to the motion to confirm and a separate motion to vacate, the district court may grant a substantively unopposed confirmation motion without awaiting the subsequent motion to vacate.

In short, as the appellate court stated, “the district court is the master of its own docket, and the parties ignore its orders at their peril.” •

Abraham J. Gafni is a retired judge and mediator/arbitrator with ADR Options. He is also a Professor of Law Emeritus at the Villanova University Charles Widger School of Law.

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