

# The Arbitrators Have Decided the Construction Dispute: What Do I Do Now?

By Daniel E. Toomey and Susan M. Euteneuer



Daniel E. Toomey



Susan M. Euteneuer

You have just received in the mail the arbitration panel's decision after a 25-day hotly contested construction arbitration awarding significant damages. You have either won it or lost it, or a little bit of both. You are either euphoric, depressed, or confused.

You know there is no traditional right of appeal, but you also know that unless your opponent's client (or your own) concedes defeat, the award is not self-executing. If you have won, you are undoubtedly aware that in order to collect, you will have to reduce the award to judgment, or, in arbitration parlance, "confirm" the award somehow. On the other hand, if you have lost and believe that there are potential grounds to contest the award, you will need to go to court in an attempt to have the arbitration award modified or vacated (so-called *vacatur*). If you really do not know what the arbitration panel has done, or if you think that the panel made some mistakes, you may need to go back to the arbitration panel for clarification. All such decisions are affected by different time limitations and standards of proof, which you will need to know.

In this article, we will explore procedural steps and standards of review of arbitration awards—*postaward*—including timing, burden of proof, and what needs to be presented in asking the court to confirm or vacate an award under the Federal Arbitration Act (FAA).<sup>1</sup> In addition, we will highlight recent developments in the viability of certain grounds supporting *vacatur*; specifically, whether the award may be vacated because it constitutes a "manifest disregard of the law." Historically, *manifest*

*Mr. Toomey is a partner in the Washington, DC, office of Duane Morris, LLP and a member of its Construction Group. Ms. Euteneuer is an associate in the Baltimore, MD, office of Duane Morris, LLP and also a member of its Construction Group.*

*disregard* has been a frequently utilized basis for attempting to overturn an arbitration award. However, in light of recent Supreme Court and lower federal court decisions, there now exists a real question of whether and to what extent manifest disregard is still viable.

Additionally, we will discuss other issues relating to appeals *postconfirmation* of an award, i.e., after the award is reduced to judgment, including rights of appeal and the necessity of supersedeas bonds.

We will also discuss what to do when a matter is on appeal and the possible employment of other means of ensuring that assets of the loser-in-arbitration are not dissipated during the time of an appeal. This could be a real concern when no supersedeas bond has been posted and the assets of the debtor are beyond the jurisdiction of the court entering judgment on the award.

Oftentimes, obtaining the award is the "easy" part, because there is a lot more to do before an awardee can enjoy the fruits of victory. We will also discuss what the loser in arbitration can do to challenge the award, and what either party can do to try to modify the award. We have included some practice tips to consider as well.

## Technical Requirements for Confirming or Challenging an Award

Without the acquiescence of the loser in an arbitrated case, an arbitration award is, in and of itself, unenforceable.<sup>2</sup> Generally, after receiving the award, the parties will attempt to negotiate a settlement, or work out the payment arrangements, finalizing the matter by consent. What if the nonprevailing party(ies) does nothing and refuses to pay the award? In that event, the prevailing party should (1) take steps to reduce the award to a judgment by filing a motion to have the award "confirmed" and then (2) do whatever is necessary to jump-start the appropriate collection processes for that judgment. Although there are options in both state and federal courts for having the award confirmed and reduced to a judgment, this article will focus on the federal mechanisms. However, recognize that states' statutes and rules often mirror federal statutes and rules.<sup>3</sup>

## When and Where to Confirm an Award

Awards will typically state whether prejudgment interest is also awarded, and, if so, at what rate and on what date accrual begins. For instance, an award may say that the nonprevailing party has a certain period, e.g., 30 days, within which to satisfy the award, after which interest of 6 percent (the local/state rate) will begin to accrue.<sup>4</sup> There

is an ongoing debate throughout the country regarding whether interest may be awarded for the period between the issuance of the award and the confirmation/judgment (which could be a period of up to a year), and, if so, who might have authority to award such interest. Some have said that this question rests solely within the discretion of the arbitrator, while others have indicated a presumption that the district court include postaward prejudgment interest in confirming the award and reducing it to a judgment.<sup>5</sup>

The parties' agreement giving rise to the arbitration in the first place may not prohibit the prevailing party from proceeding to court to seek to have the award confirmed and reduced to judgment immediately, even during that period before postaward interest may begin accruing. Depending on the creditworthiness of the nonprevailing party, it may be critically important to move quickly to confirm the award and obtain a judgment, particularly when the potential dissipation of the losing party's assets is at stake. Nothing in the language of the FAA prohibits a federal court from exercising jurisdiction as soon as it is asked to rule on a motion to confirm. Nonetheless, the nonprevailing party might well raise the question of ripeness if the motion to confirm were filed before a reasonable period had elapsed within which the nonprevailing party could satisfy the award. Once an award is reduced to a judgment, as long as it is sufficiently "definite" and "certain," postjudgment interest may begin to accrue to the benefit of the prevailing party.<sup>6</sup>

In proceeding to reduce an arbitration award to judgment, the winner must first request that a court confirm the award.<sup>7</sup> This is accomplished by filing an action on the miscellaneous calendar of the particular district court, in the form of a Motion to Confirm Arbitration Award and for Entry of Final Judgment.<sup>8</sup> Parties may specify in their agreements which federal district court will enter judgment on an award.<sup>9</sup> If the parties do not specify jurisdiction, and as long as there is federal jurisdiction, then jurisdiction lies with the federal district court where the award was entered.<sup>10</sup> FAA section 9 also spells out the procedures for serving a losing party, whether inside or outside the district, with the notice of the filing.

The FAA prescribes that a party has *one year* "after the award" to file a motion to confirm.<sup>11</sup> Importantly, the accrual of the one-year period is defined as beginning "after the award" *but not* the date it is received by anyone, which can be some time later.<sup>12</sup> The failure to seek confirmation of the award within this time period may effectively result in the award being unenforceable.<sup>13</sup>

The impact of FAA section 9 is far broader than merely conferring jurisdiction on a particular federal district court. This is because FAA section 9 requires that the district court "*must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."<sup>14</sup> Therefore if the prevailing party files a timely motion to confirm and follows the procedural rules, then unless the court specifically vacates or

modifies the award, the court must grant the motion to confirm.<sup>15</sup>

FAA section 9 does not state *when* the court "must" grant the order, other than the implication that the confirmation, vacatur, or modification of an award should be an "expedited" process.<sup>16</sup> Moreover, in the absence of any local rule, there is no requirement that the court even hold a hearing on a motion to vacate, confirm, or modify an award. Depending upon the district judge before whom the motion to confirm is pending, even when uncontested and procedurally complete, the motion may not be ruled upon for several months after it has been filed. Correspondingly, the resolution of contested motions will likely take considerably longer.

Importantly, an unfavorable award that has neither been confirmed nor reduced to a judgment is simply an unsecured debt with no priority. As such, nothing precludes the losing party, in the interim while the motion to confirm is pending, from continuing to operate its business. The continuation of the nonprevailing party's business operations could well benefit the winner by generating revenue needed to pay the award. However, if the arbitration award is only one of many debts of the loser-in-arbitration, then, without more than an unconfirmed

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award, this losing party could begin dissipating assets by paying creditors other than the arbitration winner, which, depending on the circumstances, may be entirely proper. In collection matters, unwinding transactions already completed (even if improper) can be far more difficult than preventing them from occurring in the first place. Therefore, depending on the circumstances, and particularly when dealing with either a disreputable party or one in difficult financial straits, obtaining a prompt ruling on a motion to confirm may be critical if the prevailing party is to have any expectation of recovery on the award.

Regrettably, an attorney representing the successful party in arbitration may have no control over the timing of *when* a court turns to the motion to confirm because the control of the calendar is left to each individual judge. Calling the judge's clerk and writing to the court, possibly asking the court to schedule a hearing on the motion to confirm, or making some other request to gain a busy judge's attention may be the only options in regular cases. In an extreme case, where there is an obvious effort by the

losing party to dispose of assets, the attorney may be forced to pursue a Motion for a Temporary Injunction and Preliminary Injunction. The ancillary benefit of such an effort may be that the court finally resolves the motion to confirm and may even be more willing to require posting of a supersedeas bond of sufficient amount to protect the prevailing party's judgment should the nonprevailing party appeal. Of course, the failure of a party to post a supersedeas bond does not prevent the party from pursuing an appeal, but merely prevents execution on the debtor's assets.

#### Requisites for Filing a Motion to Confirm

In moving to confirm an award, the moving party "shall" include several items with the motion papers. These things will enable the clerk of the court to docket the judgment properly.<sup>17</sup> Specifically, the prevailing party must provide the clerk copies of (a) the agreement between the parties providing for arbitration, (b) a copy of the award, and (c) "[e]ach notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application."<sup>18</sup> Once the motion to confirm is granted and the award is reduced to a judgment, the clerk "shall" then docket the judgment in the same manner as any other civil judgment rendered after full adjudication by the district court.<sup>19</sup>

### The failure of a party to post a supersedeas bond does not prevent the party from pursuing an appeal.

*Practice tip:* To facilitate the ultimate enforcement of the judgment and to ensure clarity of the record, even in instances when the judge prefers to use her own form of order instead of the movant's proposed one, the movant should strongly suggest that, at a minimum, the judge's order state the *sum certain on the face of the order*, rather than simply stating that the motion to confirm is granted. Any subsequent collections' actions against the debtor will require production of "the judgment." If the judgment's dollar figure is buried in an award or an order confirming the judgment and not on the face of the one- or two-page order judgment, the collections filings against the debtor will be more cumbersome.

*Practice tip:* The winner ought to consider requesting that the district court require the debtor to post a supersedeas bond of adequate monetary amount.<sup>20</sup> Otherwise, the loser's assets could be dissipated (either properly or improperly) during the appeals process, which can take a long time to complete.<sup>21</sup> Without the protection of a supersedeas bond, the ultimate appellate victory could be

Pyrrhic, whereby the unsuccessful party has nothing left against which the successful party can collect on her judgment. Moreover, debtors with financial difficulties are unlikely to be able to post a bond, in which case, assuming that the debtor is located within the district court's jurisdiction, the successful party will be able to begin collection efforts immediately, as discussed further below.

Providing evidence to the district judge of the debtor's financial difficulties may be helpful in persuading the court to require the judgment creditor to post a supersedeas bond of sufficient size, as well as providing the court of evidence of the availability of such bonds.<sup>22</sup> The obvious benefit of the bond is that, even though the prevailing party is prevented from executing on the confirmed judgment while the matter is on appeal, the prevailing party is protected if and when the debtor's appeal is unsuccessful and the debtor is either unable or unwilling to satisfy the judgment. In that instance, the bonding company is responsible for paying the judgment to the penal limit of the bond and, in turn, the surety will debit the amount paid against the debtor's posted collateral.

A party may move to stay the judgment pending appeal. However, because the constraints on reviewing arbitration awards mean the chance of reversal is low, the threshold for obtaining a stay of a judgment is (or should be) correspondingly high.<sup>23</sup>

#### Proof Requirements for Seeking Confirmation of an Award

As the word implies, *confirmation* of an arbitration award is a summary proceeding that merely converts what is already a final arbitration award into a judgment of the court.<sup>24</sup> It is well settled that "[r]eview of an arbitrator's award is severely circumscribed. Indeed the scope of review of an arbitrator's valuation decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all."<sup>25</sup>

The role of the district court in reviewing a motion to confirm an award is limited by the FAA to reviewing simply whether the arbitrators did their jobs, and does not permit the court to play Monday morning quarterback:

Thus, in reviewing arbitral awards, a district or appellate court is limited to determining "whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it." . . . Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts. In the Federal Arbitration Act, 9 U.S.C. §§ 1–16, Congress has limited the grounds upon which an arbitral award can be vacated.<sup>26</sup>

The proof requirements for seeking confirmation of an award are formulaic. In most instances, the contract and the award will suffice as support for the motion to confirm.<sup>27</sup> If there are any unique or potentially confusing

issues with the award, the motion should also be accompanied by an affidavit and/or other documents supporting the award and the motion. For example, if the timing of payments may have been discussed during the arbitration and evidenced in billing, but that timing is unclear on the face of the award, the motion to confirm may need to be supported by the invoices referenced in the award and an affidavit authenticating them. If an appeal is anticipated, as discussed above, counsel should consider requesting the posting of a supersedeas bond in a sufficient amount to protect the judgment and any accrued interest, attorneys' fees, and costs.

*Practice tip:* The judgment creditor should consider obtaining a copy of the certified judgment *immediately* after it is issued and, as soon as possible, registering it in every district court where it is known that the judgment debtor has property, and *before* the judgment debtor decides whether or not to appeal. The successful party merely completes a Form AO 451, entitled "Clerk's Certification of a Judgment to Be Registered in Another District," for the clerk to execute.<sup>28</sup> If the property of the judgment debtor cannot be found within the jurisdiction of the district court that has issued the judgment, the successful party's only alternative may be registering the clerk's certification in other district courts where the judgment debtor has property subject to execution against.<sup>29</sup>

The reason for doing so if possible before the judgment debtor files her notice of appeal is that, under present law, once the judgment debtor files a notice, the clerk of the district court apparently does not have the authority to issue a certified copy of the judgment that can be enrolled in other jurisdictions, including state courts. This is regardless of whether the debtor has posted a supersedeas bond.<sup>30</sup> Under this law, including its 1988 amendments, once the nonprevailing party appeals, the prevailing party has to convince that court that "good cause" exists to allow a judgment lien to be placed on the foreign property of the debtor pending appeal, adding additional cost to the effort without the certainty that the district court will so find.<sup>31</sup>

### **Procedural Requirements for Seeking Vacatur or Modification of an Award**

Because the costs related to construction litigation are so high (all the more so when ediscovery is involved), many parties to construction contracts are opting for mandatory mediation and arbitration, similar to what is found in earlier versions of the AIA forms as well as the optional language found in the current AIA Document A201-2007.<sup>32</sup> As such, it should come as no surprise that challenges to arbitration awards are on the rise.<sup>33</sup>

If someone is going to challenge the actual award, there is a statutory time, manner, and place to do so—or forever hold your peace.<sup>34</sup> The only option for challenging an award under the FAA is to file a motion to vacate or modify an award.<sup>35</sup> Most importantly, the process to challenge the award is governed by time frames and standards that are *different* from the timelines and standards to con-

firm the award. Given that a court's right to scrutinize the legitimacy of an arbitration award is extremely narrow, it should not be surprising that the process for challenging an award is far more onerous than that required merely to confirm an award. This simply reflects the stated intent of the FAA in favor of upholding awards.<sup>36</sup>

A motion to modify or vacate an award must be filed *and served* within three months of the date the award is "filed or delivered," as opposed to a motion to confirm an award, which, as noted above, can be filed up to a year after the award is made.<sup>37</sup> Consequently, if the prevailing party does not file a motion to confirm until, say, four months after the award, and the nonprevailing party has not already filed and served a motion to vacate, modify, or correct the award, then it is too late for the nonprevailing party to do so. Moreover, the nonprevailing party cannot simply counter with a motion to vacate, modify, or correct the award because the right to do so will have been waived by the lapse of time. On the opposite side, even if a motion to vacate or modify has been timely filed within

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the three-month window, the respondent still has the right to counter with a motion to confirm the award, provided that the motion to confirm is filed within one year of the award. This, too, is consistent with the intent of the FAA favoring arbitration and disfavoring efforts to interfere judicially with arbitration awards.

The three-month deadline for filing and serving a motion to vacate or modify is generally strictly enforced.<sup>38</sup> In *Taylor v. Nelson*, the Fourth Circuit held that music promoter Donald Taylor failed to act with due diligence in seeking vacatur within three months of the award favoring the famous musician Willie Nelson. The court also held that Nelson's motion to confirm should therefore have been granted.<sup>39</sup> The Fourth Circuit thereby applied a rule of strict adherence to the three-month deadline in FAA section 12 for filing a motion to vacate. The court's strict adherence included Taylor's motion to vacate, which was filed in opposition to Nelson's timely filed motion to confirm. The court rejected Taylor's argument that the deadline to file a motion to vacate was tolled.<sup>40</sup> More recently, the Fourth Circuit and other courts have left no question that a party may not "sleep on its right" to request vacatur, independent of the procedural posture of any request by the other side to confirm the award.<sup>41</sup>

It is crucial that a party moving to vacate an award must not only file the motion, but must also *serve* it within three months of the award. Recently, in *Argentine Republic v. National Grid PLC*,<sup>42</sup> the Court of Appeals for the

District of Columbia Circuit strictly enforced the deadline for serving a motion to vacate or modify an award as per the language of FAA section 12. In that case, the United Kingdom had won an award of \$53 million plus costs and interests from Argentina. Argentina filed a motion to vacate three days *before* the three-month deadline under FAA section 12, as well as filing a motion to extend the time to serve the motion to vacate, relying on Federal Rule of Civil Procedure 6(b)(1). Argentina argued that it was impossible to serve the notice of a motion to vacate internationally within three months. On appeal, the court did not reach the merits of Argentina's service of process argument because it concluded that Rule 6(b)(1) only permits a federal court to extend deadlines set by the Federal Rules or by the court itself but does not permit a court to extend deadlines dictated by statute. As a result, even though Argentina *filed* a motion to vacate within three months of the arbitration award being issued, because Argentina had failed to *serve* notice of the motion within the three months dictated by statute, Argentina was therefore out of time to seek vacatur.<sup>43</sup>

**The burden of establishing a factual predicate for denial of confirmation rests with the party resisting confirmation.**

Procedurally, once the three months to seek vacatur or modification have elapsed, the only basis for challenging a motion to confirm is that it fails to meet the minimum standards governing motions to confirm. The burden of establishing a factual predicate for denial of confirmation rests with the party resisting confirmation.<sup>44</sup> Moreover, it appears clear that an opposition to a motion to confirm may not serve the function of a motion to vacate or modify an award, because to do so would negate the strict filing requirements for a motion to vacate.<sup>45</sup> However, if it is otherwise timely, a court may, *sua sponte*, treat a party's motion to dismiss the motion to confirm as if it were called a motion to vacate.<sup>46</sup>

**Proof Requirements for a Motion to Vacate, Modify, or Correct an Arbitration Award**

The grounds for overturning an arbitration award are specific, narrow, and limited. The US Supreme Court recently reiterated that "review under § 10 [of the Federal Arbitration Act] focuses on *misconduct* rather than *mistake*."<sup>47</sup> The statutorily enumerated grounds for vacating an award are:

- (1) where the award was procured by corruption, fraud,

or undue means;

- (2) where there was evident partiality or corruption in the arbitrators, or either of them;

- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

- (4) where the arbitrators *exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>48</sup>

In challenging an arbitrator's unfair bias under paragraph (2), the movant must provide a specific basis for the allegations because merely reciting poor—even "silly"—fact-finding will likely be insufficient.<sup>49</sup> Another option for challenging an award is that the arbitrator had no authority to issue it at all under paragraph (4), or not to issue that particular award.<sup>50</sup>

FAA section 10(a)(4) has been called the "irrationality" standard. Although the reviewing court may disagree with the arbitrator's decision, as the Third Circuit recently emphasized, unless there is "absolutely no support at all in the record justifying the arbitrator's determinations," the reviewing court must confirm the award.<sup>51</sup> Anyone seeking to vacate on the grounds of irrationality "faces a steep uphill battle to show that the arbitration award rendered . . . was completely irrational and could not be supported on any theory of relief."<sup>52</sup> The *Ario* appeal did provide one small bright spot for the unsuccessful movant—the Third Circuit reversed the Rule 11 sanctions for frivolous filings against the attorneys who filed the motion to vacate.<sup>53</sup>

Asserting the right to vacatur based upon "evident partiality or corruption in the arbitrators" or "other misbehavior by which the rights of any party may have been prejudiced"<sup>54</sup> may be a deceptively complicated basis. In other legal settings, the mere hint of a possible conflict of interest is enough to prompt a flurry of activity within the court and the likely recusal of the judge. The difficulty in selecting an arbitrator, though, is that the parties insist on prominence and industry experience, but sometimes that could appear to be a bent or leaning toward one side in a dispute. Although the Supreme Court wrote in 1968 that arbitrators "must avoid even the appearance of bias," that notion has been distilled over the years.<sup>55</sup> Mere inferences of such bents or leanings, without more, are unlikely to be sufficient to convince the district court to overturn an award.<sup>56</sup>

The FAA also lists grounds for modifying or correcting an award, including a more general provision in the last paragraph "so as to effect the intent thereof and promote justice between the parties":

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the descrip-

tion of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.<sup>57</sup>

A motion to modify or correct an award under FAA section 11 may be filed by any party. For instance, a prevailing party may need to have an award corrected by the court if the arbitrator erred in some respect, such as by miscalculating a figure. If possible, though, the prevailing party's efforts will probably be more efficacious and expedient if such issues are raised immediately with the arbitrator before doing so with the court. The prevailing party must be mindful of the three-month deadline for filing and serving a motion to modify or correct an award with the court.<sup>58</sup>

#### Requesting Review of Errors by the Arbitrator

As indicated above, any party dissatisfied with the award may request the arbitrator to reconsider. Although the FAA itself contains no provision for making such requests, reconsideration by the arbitrator may be authorized by the applicable contract or rules. For instance, under the AAA rules, any party may request that the arbitrator "correct any clerical, typographical, technical or computational errors in the award."<sup>59</sup> Nonetheless, the AAA rules do not provide the arbitrator with the authority to "re-determine the merits of any claim already decided."<sup>60</sup> State law, however, may permit such a substantive modification.<sup>61</sup>

There is authority for the proposition that, on review of a motion to confirm an award, a district court may remand the matter to the arbitrator(s) if the award is ambiguous. Some courts have held that remand is only an option for resolving ambiguities, provided there is still time to do so under the arbitration agreement.<sup>62</sup> Other courts have held that there is no fixed deadline for remanding to the arbitrator for clarification of the award.<sup>63</sup>

Importantly, "ambiguity" in assessing an arbitration award is not viewed in the same way as it may be in a traditional court adjudication. For instance, if an arbitrator issues a lump-sum award without disclosing in detail the rationale behind it, some courts may be unwilling to disturb the award solely on the basis of ambiguity.<sup>64</sup> Others may expect to see grounds, reasons, and explanations by the arbitrator if a challenge to the award arises.<sup>65</sup> Unless the parties have requested that the arbitrators provide a "reasoned opinion" to support their award, the district court may not require that they do so.<sup>66</sup>

If an award is ambiguous and therefore unenforceable,

such as if a contingency later arises leading to ambiguity, then the reviewing court will likely remand to the arbitrator for clarification of the award, rather than requiring the parties to incur the expense of relitigating or re-arbitrating the matter from scratch.<sup>67</sup> A court *may not*, however, interpret an award in order to resolve an ambiguity.<sup>68</sup>

#### "Manifest Disregard of the Law": Does It Still Exist as a Ground for Vacating an Arbitration Award?

For many years, in addition to the enumerated grounds for vacating an award, many courts heard and granted motions to vacate awards on the basis of "manifest disregard of the law" by the arbitrator(s) in issuing the award.<sup>69</sup> The term *manifest disregard* appears nowhere in the FAA but may be a feature of state statutory or common law that could be applied to vacate an arbitration award subject to state law. In the federal arena, manifest disregard of the law is often brought into the discussion via the contention that when an arbitrator manifestly disregards the law, the resulting award "exceeds" the arbitrator's authority. Motions on this ground continue to be brought. Based on recent Supreme Court case law, a serious question has arisen as to whether or not this additional "ground" exists in federally enforced arbitration.

**Although the FAA itself contains no provision for making such requests, reconsideration by the arbitrator may be authorized by the applicable contract or rules.**

In 2008, the Supreme Court concluded in the *Hall Street Associates, LLC v. Mattel* case that while state statutory or common law grounds for vacatur may include "manifest disregard of the law," that is not itself a ground for vacating an award under federal law.<sup>70</sup> In *Hall Street*, after litigation had begun between the parties, they entered into a contract agreeing to arbitrate their disputes. In formulating their agreement to arbitrate, the parties had included the following requirement for any court that might review the ultimate award:

[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.<sup>71</sup>

The parties proceeded to arbitrate, and the award that

was issued favored Mattel. Hall Street filed a motion to vacate the award, citing the parties' agreement in support of the assertion that the arbitrator's conclusions of law were "erroneous." The district court—adopting the ground that the parties had agreed could be utilized, though not specifically set forth in the FAA, i.e., the right to review conclusions of law that were erroneous—sided with Hall Street. On appeal, and after additional machinations in the trial and appellate courts, the Ninth Circuit reversed, holding that the grounds for vacating an award as stated in the FAA were exclusive and could not be expanded, even by the parties' express agreement.<sup>72</sup> The Supreme Court granted certiorari and affirmed that ultimate holding of the Ninth Circuit.

## The Court held that manifest disregard is not in and of itself a proper ground for vacating an award.

Hall Street had argued that grounds in the FAA are not exclusive, and therefore parties may contract to expand them. Hall Street pointed to numerous decisions, starting with a Supreme Court case in 1953 in which manifest disregard of the law appeared to have been an additional ground for vacatur.<sup>73</sup> The Supreme Court, disagreeing with the interpretation of the holding in that 1953 case as well as Hall Street's arguments, noted that references to "manifest disregard" might be a "shorthand" used by courts referring to the enumerated grounds in FAA section 10(a), either individually or collectively, but the Court held that manifest disregard is not in and of itself a proper ground for vacating an award.<sup>74</sup>

The impact of *Hall Street* is still being felt in cases working their way through the courts, and there is skepticism about whether and when "manifest disregard of the law" can now be relied upon as a valid ground for vacatur under the FAA.<sup>75</sup> The Supreme Court's recent musings about whether the "'manifest disregard' standard survived [*Hall*] as a 'judicial gloss' on the enumerated grounds for vacatur" did nothing to determine what remained of manifest disregard after *Hall*, if anything.<sup>76</sup> Suffice it to say, reliance upon manifest disregard has been severely undercut.<sup>77</sup>

*Practice tip:* A motion to vacate an award should connect the relevant reasons and the language of FAA section 10(a) to the facts of the specific case, citing as many specific reasons as possible while avoiding the language *manifest disregard of the law* as a federal basis for the motion. If there are common law or state statutory grounds for raising manifest disregard of the law, these should be

cited and specifically referenced. The *Hall Street* decision clearly states statutory and common law grounds must be considered if properly raised.<sup>78</sup> Alternatively, consider filing a motion to modify or correct an award under one of the enumerated grounds in the FAA (as opposed to a motion to vacate) because the law governing modification and correction *does* extend to the reviewing court the power to modify or correct an award "so as to effect the intent thereof and promote justice between the parties."<sup>79</sup>

Other language in *Hall Street* prompts additional questions about the authority of the courts under the FAA. For instance, although parties may contract to arbitrate their disputes, in what form the award is to be issued, how arbitrator(s) will be selected, and the like, parties may not be free to contract what the judicial standard of review of an award will be. That authority may rest exclusively with the courts.<sup>80</sup>

On balance, in reviewing these procedures, the scale is heavily tipped in favor of granting a motion to confirm over granting a motion to vacate or modify an award. A motion to confirm requires minimal effort and information and may be filed within a year. In contrast, a motion to vacate or modify an award must fit within an enumerated ground and must be filed and served within just three months.

### The Arbitration Transcript: Worth the Cost?

The FAA requires that a party moving to vacate or modify an award "*shall*" support its motion with substantial support beyond bald allegations of violation of the FAA. As discussed further *supra*, the initial motion must be accompanied by affidavits and whatever evidence is available to support the filing.<sup>81</sup> Although the time constraints on the initial filing could be onerous, the movant should not presume that there will be some other later opportunity to supplement or support the motion.<sup>82</sup> Any new information not otherwise contained in the award should be supported by sworn testimony, either in the form of citations to the arbitration record or by affidavit (or declaration). This then begs the question of whether and when it is necessary, or at least advisable, to obtain a transcript of the arbitration.

There is no requirement in the FAA that a transcript of the arbitration be created or produced. Moreover, there is no requirement that the arbitrators render a written opinion in support of their award unless specifically requested by the parties.

Given the high hurdle for vacating (or even modifying or correcting) an award, however, it makes sense that this task will be even more difficult without a hearing transcript. For example, a transcript would be extremely helpful in showing that the arbitrator unfairly prevented the nonprevailing party from presenting its case. Without a transcript, in this scenario, the court would have to be convinced through other means that the aggrieved party properly proffered the evidence and that the arbitrator wrongly refused to allow it be heard. In the end, this could

redound to a swearing contest between the parties to the arbitration, which the district court will be very unlikely to resolve. The AAA Rules do provide for having a stenographic record if the arrangements are made by a party (and at that party's cost) at least seven calendar days in advance of the hearing.<sup>83</sup>

A transcript in a multiday arbitration can cost thousands of dollars, which may be cost-prohibitive to some parties. Although the transcript is often the clearest evidence of certain issues in the arbitration, such as unfair arbitrator bias, other evidence may possibly suffice to support a motion to vacate. For example, if the arbitrator is requested to issue a written opinion in support of the award, the decision could potentially contain sufficient information to support a challenge to the arbitrator's refusal to hear certain evidence, as well as a challenge of unfair bias. An affidavit by the party or witness to the arbitration could support the claim that evidence was improperly excluded for unfair bias. Similarly, contemporaneously filed written motions, detailing the events that occurred during the arbitration giving rise to such claims, may also suffice.

In the end, whether to obtain a transcript or not will largely be a cost/benefit analysis. If the construction claim at issue is of sufficient size and the hearing is to be a lengthy one, there are additional benefits of a transcript beyond the ability to either support or rebut a motion to vacate. These include the potential impeachment of witnesses on cross-examination and to aid in the preparation of posthearing briefs. These other benefits may provide justification tipping the balance for undertaking this expense. It cannot be gainsaid, however, that the ability to make a convincing vacatur argument is substantially hampered without an arbitration transcript.<sup>84</sup>

*Practice tip:* Unless waived by the parties, the arbitrator will probably only issue a concise, written financial breakdown with the award.<sup>85</sup> As noted, the AAA Rules do not require the arbitrator to issue a written opinion unless one is requested.<sup>86</sup> A written opinion from the arbitrator is not necessary for the confirmation of the award but could be instrumental in a party's efforts to vacate or modify the award. Although it is always difficult to predict whether you will win or lose in arbitration, cues during the hearing may give you a sense of which way the proverbial wind is blowing. If it is not blowing in the "right" direction, and particularly where there is no transcript, it may make sense to request a written decision to support the award, providing the potential "grist" to attack the award. Conversely, if winds appear favorable, it may make sense not to ask for a reasoned opinion, because the less record there is for the district judge to consider, the less likely she will take the extraordinary step of vacating or modifying the award.

#### **Appellate Issues Regarding Confirmation and Vacatur**

The appellate court's review of the award is, not surprisingly, "extremely limited." The court "do[es] not sit to hear claims of factual or legal error by an arbitrator" in

the manner that an appeals court would review other decisions of a lower court.<sup>87</sup>

On appeal from the confirmation of an award, questions of law are reviewed de novo, and any factual findings made by the district court in affirming the award must be accepted on appeal, unless they meet the very high *clearly erroneous* standard.<sup>88</sup> Those questions of law that will be reviewed de novo should be limited to the district court's conformance with the FAA and should not include the legal issues raised in the underlying arbitration.

The record on appeal, in most cases, will be quite thin, unless a party had anticipated an appeal from an unfavorable award, understanding that the likely nonprevailing party would benefit from a larger record to support her motion to vacate. For instance, the record should typically consist, minimally, of a short motion to confirm with two exhibits thereto (the contract provisions showing the parties agreed to arbitrate and a copy of the award), the opposition to that motion and any reply, and a short order from the district court.

**Unless waived by the parties, the arbitrator will probably only issue a concise written financial breakdown with the award.**

Even with de novo review, such a minimal record is almost always doomed to failure on appeal. As with other appeals, but especially in connection with a failed motion to vacate, the record must be created at the district court level to be effective on appeal. Accordingly, the appellate record for a motion to vacate should, if properly created, become much larger than the minimum, including exhibits to the motion to vacate, such as affidavits, transcript references, key documents, and various interhearing motions and post-trial briefs. Any helpful filings from the arbitration must have been, therefore, submitted to the district court with the motion below, and possibly supplemented in the context of any hearing that the district court, in its discretion, determines to have. If not, the opportunity to build the record about the propriety of the award will be waived. Because neither the district court nor the appellate court is even required to hold a hearing, the failure to include this material with the motion to vacate may, in all likelihood, be fatal.

*Practice tip:* Most district judges will exercise their discretion and not hold hearings on otherwise routine motions. An uncontested or barely contested motion to confirm an award without a contemporaneously filed motion to vacate, supported by affidavits, transcripts, and so



forth, generally will not trigger the district court to set a hearing. If, however, a nonprevailing party truly feels aggrieved and believes it has just cause to have an arbitration award vacated or modified, in addition to filing with its motion and attaching thereto its affidavits, transcripts, and so forth, the movant should specifically request a hearing both to argue the issues and potentially to enhance the record for the likely appeal.

Parties may agree in their construction contracts to eliminate judicial review of any arbitration award by clearly stating that intention in the contract. A vague or general reference to a “final” or “binding” arbitration is likely to be insufficient, but a “clear and unequivocal” waiver should be honored.<sup>89</sup>

### **Should a Nonprevailing Party Always File a Motion to Vacate?**

The question arises whether a nonprevailing party should always file a motion to vacate. Given the narrow grounds

**A party may dismiss its motion if the prevailing party refuses to negotiate.**

on which a court can grant vacatur, the nonprevailing party potentially runs the risk of incurring the court’s wrath and potentially prompting the prevailing party’s counsel to seek Rule 11 sanctions. On the other hand, the failure to file and serve such a motion timely will mean that, almost inevitably, the motion to confirm will be granted (even if simply opposed without seeking vacatur). This will then result in nothing to appeal and place the nonprevailing party in the position of being subject to collection actions sooner rather than later.

Tactically, in addition to the reasons discussed above, filing such a motion may be a way to negotiate some reduction of the award in favor of her client. A party may dismiss its motion if the prevailing party refuses to negotiate. Moreover, the district court will have no authority to impose Rule 11 sanctions *sua sponte* and may only do so if the opposing party invokes Rule 11(c) and conforms to the “safe harbor” requirements.<sup>90</sup>

### **Involuntary Bankruptcy: A Rarely Utilized Mechanism for Collections**

When very experienced bankruptcy court veterans say, “I’ve never filed an involuntary before,” that speaks volumes to how rare a creditor’s invocation of the right to place the debtor into involuntary bankruptcy really is.<sup>91</sup> Although it is used infrequently, the mechanism does exist

under the Bankruptcy Code.<sup>92</sup> If a debtor refuses to pay the award/judgment but may have assets to do so, an involuntary petition is an option to be considered under appropriate circumstances.

Appropriate circumstances may include when (a) a nonprevailing party’s assets are beyond the jurisdiction of the district court issuing the judgment; (b) the clerk’s office in the district court where the arbitration award has been confirmed will not issue the certificate of judgment to be filed in the district court(s) where the assets are located because of the pendency of an appeal by the nonprevailing party; and (c) there is evidence that the nonprevailing party is dissipating assets. The filing of an involuntary bankruptcy petition would obviously be for the purpose of preventing further dissipation of assets by placing these assets under the jurisdiction of the bankruptcy court.

As most lawyers having some knowledge of bankruptcy know, the filing of a bankruptcy petition does at least three things: (1) it provides a mechanism for the automatic stay of all litigation against the debtor, at least temporarily;<sup>93</sup> (2) the filing date sets in time the so-called look-back period of the finances of the debtor to determine whether such transactions by the debtor may come within the purview of the bankruptcy court;<sup>94</sup> and (3) the court will likely appoint a bankruptcy trustee to manage the bankruptcy estate and determine how to distribute it.<sup>95</sup> These three things apply, of course, to both voluntary and involuntary bankruptcy matters.

The bankruptcy stay has the overall effect of holding all creditors at bay, at least until certain procedures can be put into place. The debtor or a creditor may simply notify courts of the bankruptcy wherever a matter is pending by filing what is typically called a “suggestion of bankruptcy.” Immediately upon receipt of the suggestion of bankruptcy by the court, the litigation—even midtrial—must come to a halt. Even if the debtor files nothing, a creditor or attorney who knows of the bankruptcy filing is precluded from proceeding against the debtor. Notably, the stay does not necessarily apply to actions initiated by the debtor. For instance, a debtor in bankruptcy may still be allowed to pursue a collections case on an accounts receivable balance on a contingent fee arrangement because it could put more money into the bankruptcy estate.

The look-back period provided by the Bankruptcy Code is the automatic time frame, generally 90 days, during which anyone who received a “preference payment” against a prior existing (antecedent) debt is likely to receive a notice to pay that amount back to the estate.<sup>96</sup> Preference payments are designated by the Bankruptcy Code to prevent a debtor from thwarting the priority system in bankruptcy by giving an unfair preference payment to a creditor who otherwise would have had a lower priority and would have received less, if anything at all, from the estate. Even if the debt involved was legitimate and payment was owed to the creditor, if it is determined that the payment was an improper preference payment, it will have

to be repaid to the estate.

There are several look-back periods in bankruptcy. For example, there is (a) an automatic 90-day look-back period for all preference payments and (b) a one-year look-back for payments to insiders, such as the company's owners and their relatives.<sup>97</sup> The bankruptcy court (or, more practically speaking, the trustee) can also (c) unwind any fraudulent transfers within two years prior to the bankruptcy filing date.<sup>98</sup> In addition to these time frames enumerated in the Bankruptcy Code, the trustee may also (d) follow local state laws on limitations of actions for fraudulent conveyances, which are often longer. All of these actions are in accordance with the bankruptcy court's equitable powers.<sup>99</sup>

For those unaccustomed to equity courts, such jurisdiction may feel unusual or unnatural. It is not unusual for many bankruptcy judges to have started out as debtors' counsel who, as bankruptcy judges, may take an approach that is least oppressive to the debtor. The appointed bankruptcy trustee also wields enormous equitable powers.<sup>100</sup> If the trustee concludes that the estate has assets, the trustee will assess the assets, prioritize the creditors, and make a recommendation as to the proper and equitable way to distribute the estate's assets to the creditors. This can include selling property, unwinding transactions, and even hiring someone to run a debtor/company in the interim while the bankruptcy is ongoing. If, however, the debtor is deemed to have no assets, or minimal assets, then the trustee will pronounce the estate a "no asset" bankruptcy, and the arbitration award/judgment will be discharged with nearly all other debts, rendering the award forever uncollectible, even if the company later resurrects itself and becomes profitable again.

The involuntary bankruptcy petition itself is a short printed form.<sup>101</sup> It does not provide any space for an arbitration award/judgment-holder to educate the court and the trustee about any concerns, such as the possibility that the debtor may be either dissipating or hiding assets, or whether the debtor has made undisclosed preference payments warranting further review. The trustee is first in line to be paid from the assets in the estate. Consequently, it follows that if the trustee determines that there are no real assets even to pay the trustee, then the trustee's compensation will be minimal. Such circumstances create a disincentive for the trustee to dig too deeply (and costly) for any potential problems with the finances of the debtor. Once the trustee is appointed, the creditor may provide the trustee with evidence of the debtor's finances and articulate any such concerns. A preliminary motion requesting the emergency appointment of an interim trustee to prevent the continued, improper dissipation of assets, if properly grounded, could also alert the court and trustee of such concerns.

It will be in the trustee's discretion to determine whether there are either enough existing assets or potential assets to proceed with an "asset" bankruptcy. If the trustee determines that there are enough to pay the award, at least

in significant part, then the prevailing party will have been justified in pursuing the involuntary bankruptcy.

If the involuntary petition is uncontested, then the bankruptcy court should appoint a bankruptcy trustee without delay. The bankruptcy court at that time may deem the matter to be a voluntary bankruptcy under the appropriate chapter.<sup>102</sup>

Even if the debtor's business is struggling, the debtor may oppose the bankruptcy for a number of reasons, including that the mere filing of bankruptcy could trigger a default and acceleration on the debtor's other business loans. The creditor(s) who initiates an involuntary bankruptcy petition may only do so in good faith, or run the risk of having the bankruptcy court award sanctions and attorneys' fees, in addition to dismissing the involuntary bankruptcy petition.<sup>103</sup>

Normally, it takes at least three creditors of a debtor to initiate an involuntary bankruptcy, unless the total number of creditors of the debtor is fewer than 12 (excluding debts to employees and other insiders), in which case a single creditor can act alone, provided that the creditor's claim is

**It will be in the trustee's discretion to determine whether there are either enough existing assets or potential assets to proceed with an "asset" bankruptcy.**

at least \$10,000.<sup>104</sup> The counting of creditors is an often-litigated issue in contested involuntary bankruptcies.

When the debtor has 121 or more creditors, a single creditor may be permitted to initiate the petition, but two others must join it promptly thereafter. The debts of all three creditors may not be contingent as to liability, nor may they be the subject of a bona fide dispute. While a single creditor acting alone must hold a claim of at least \$10,000, three creditors acting collectively can file together, provided that their claims aggregate at least \$10,000. These requirements of three creditors claiming at least \$10,000 apply equally for all bankruptcies regardless of the size of the estate, whether it be \$25,000 or \$25 billion.

In cases involving smaller or closely held companies, it may be very difficult for a creditor to discern how many other creditors the debtor has. Procuring a Dun & Bradstreet report may help, as well as review of other public records. Those searches should be carefully reviewed and retained before filing on behalf of a single creditor to demonstrate and provide evidence that the petition was filed in good faith. It is also permissible (and often necessary to preserve the right to pursue an involuntary bankruptcy) to contact creditors once identified by the debtor

to see if they will join in the action. It is not uncommon for a single, large creditor to accept assignment of a few small debts to other creditors for the purposes of collection in order to reach the three-creditor threshold.

If the debtor opposes the involuntary petition by one creditor by claiming to have 12 or more creditors, then the debtor must file with its answer “a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof.”<sup>105</sup> The court will then evaluate whether or not the creditors meet the criteria required, particularly whether they are disqualified from consideration because of their connection to the debtor. If it appears that there are 12 or more creditors, the court may still allow the petitioner to conduct discovery or otherwise have time to contact the other creditors to see if anyone else wishes to join. Failing that, there is a risk that the court may hold that the involuntary petition was filed in bad faith, potentially levying sanctions and awarding to the debtor its attorney fees and costs. As such, deciding to petition for an involuntary bankruptcy of a debtor by a single creditor is an action that should only be dictated by the circumstances and after a careful consideration of the creditor’s situation.

### Summary

The prevailing party in an arbitration may have much to do to convert a favorable award into a judgment and then collect on it. Prudence may dictate that counsel for the prevailing party act quickly to have the award confirmed by the district court and, if permitted, to obtain “Clerk’s Certification of a Judgment to be Registered in Another District” and file the same in any district court where the debtor has property *before* the debtor files a notice of appeal, because the mere filing of a notice of appeal will likely preclude the clerk from issuing a certification necessary for registering the judgment in other district courts.

Both the winning party and losing party need to be particularly mindful of the dates for filing a motion to confirm (one year) and to file *and serve* a motion to vacate (three months), because failure to adhere thereto will be fatal.


Those seeking to vacate an arbitration award have an extremely heavy burden, which appears to be getting even heavier with the apparent demise of the *manifest disregard of the law* ground for overturning awards. Additionally, in filing a motion to vacate, counsel for the nonprevailing party should be sure to attach all documentation supportive of the motion *with the motion*. This is because district courts have the discretion not to hold a hearing on such a motion, and there may be no chance to supplement the record later.

Appeals from denials of motions to vacate are also extremely difficult to win, with the appellate court only reviewing whether the district court has properly conformed with the FAA in confirming an award and denying vacatur.

Having the arbitration transcribed can be extremely

expensive but critical if a nonprevailing party has any chance of overturning an arbitration award. Without a transcript it may be almost impossible to demonstrate bias or the failure of arbitrator(s) to allow a full and fair hearing.

Parties who feel reasonably certain that they will prevail in arbitration may not want a reasoned decision because this may be the source of any possible ground for vacating an award. Of course, the opposite is true for the nonprevailing party.

In instances where the debtor’s property is not found within the confirming district court’s jurisdiction, but in other districts, and where the debtor has not provided a supersedeas bond, the prevailing party, after careful analysis, may want to consider filing a petition to have the debtor placed into involuntary bankruptcy as an effort to ensure that assets are not dissipated. 

### Endnotes

1. 9 U.S.C. §§ 9–11 (2006). Pertinent sections of the FAA are referred to herein as “FAA §” followed by section number 9, 10, or 11.

2. *See, e.g.,* Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1293 (11th Cir. 2010) (“[a]rbitration awards are not self-enforcing, [but] . . . must be given force and effect by being converted to judicial orders’ on an appropriate motion to confirm or vacate”) (quoting D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 104 (2d Cir. 2006)).

3. It can be very important to determine where to initiate confirmation efforts or attempts to vacate awards, whether in federal or state court, because the statutory rights and case law may be very inconsistent, depending on the state. In a somewhat different context, selection of the right court was critical to the court’s determination concerning whether a matter would be arbitrated or not. In the case of *Developers Surety and Insurance Company v. Resurrection Baptist Church*, 759 F. Supp. 2d 665 (D. Md. 2010), the surety brought a declaratory judgment action in the Maryland federal district court, despite a mandatory arbitration disputes clause in its defaulted principal’s construction contract. In response, Resurrection Baptist Church moved that the litigation be stayed pending arbitration. The surety argued that, under Maryland law, the arbitration clause was inapplicable to it, unless there was specific reference to the clause in the surety bond, rather than simply by language in the bond that incorporated the construction contract into the bond, citing *Hartford Accident & Indemnity Co. v. Scarlett Harbor Assocs.*, 695 A.2d 153 (Md. 1997). The district court, applying federal law interpreting the FAA, disagreed, citing numerous cases (none from Maryland) in which courts interpreting the FAA had found that the mere incorporation of the construction contract into the bond was sufficient to require mandatory arbitration (and mediation). Had the surety filed its declaratory action in state court, however, and had the church not removed the action to federal district court, the result might have been different.

4. This is consistent, for example, with the American Arbitration Association’s (AAA) Construction Industry Arbitration Rule, R-45 (d), which states that the scope of the award may include “(i) interest at such rate and from such date as the arbitrator may deem appropriate.” The availability of prejudgment interest in arbitration likely falls under state law. *See, e.g.,* Hicks v. Cadle Co., 385 F. App’x 186 (10th Cir. 2009) (“In diversity actions, interest is to be calculated according to the statutory rate

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## THE ARBITRATORS HAVE DECIDED THE CONSTRUCTION DISPUTE

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prescribed by the law governing the contract.”).

5. *Hicks*, 3835 F. App’x 186. Cf. AAA CONSTR. INDUS. ARB. R. R-45 (d) (prejudgment interest within the discretion of the arbitrator); see also *McCabe Hamilton & Renny Co., Ltd. v. Int’l Longshore & Warehouse Union, Local 142, AFL-CIO*, 557 F. Supp. 2d 1171 (D. Haw. 2008) (disputing that such a presumption in favor of prejudgment interest should apply, at least in the labor context, and instead holding that whether to award prejudgment interest rests within the sound discretion of the court).

6. 28 U.S.C. § 1961 (“(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . .”). See, e.g., *Ministry of the Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 2011 WL 6225235, at \*7 (9th Cir. Dec. 15, 2011) (citing, *inter alia*, *Penn Terra Ltd. v. Dep’t of Env’tl. Res.*, 733 F.2d 267, 275 (3d Cir. 1984); *Eaves v. Cnty. of Cape May*, 239 F.3d 527, 533 (3d Cir. 2011)) (holding that 28 U.S.C. § 1961 applies to allow postjudgment interest to accrue on a judgment issued by a district court confirming an arbitration award); cf. *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268 (10th Cir. 2010) (holding that parties may contract to provide a rate of postaward postjudgment interest other than as established by 28 U.S.C. § 1961, even if higher than the statutory rate); but see *Carte Blanche (Sing.) Pte., Ltd. v. Carte Blanche Int’l, Ltd.*, 888 F.2d 260 (2d Cir. 1989) (holding that the mandatory “shall” language of 28 U.S.C. § 1961 does not permit the court to uphold a contractual arrangement by the parties to pay a different rate than the amount set by statute); *Woods v. P.A.M. Transp. Inc.-L.U.*, 440 F. App’x 265, 2011 WL 3831306 (5th Cir. 2011) (same).

7. FAA § 9.

8. Each federal district court has its own local rules governing form, format, and even substance of papers and pleadings. Those local rules must also be followed.

9. FAA § 9.

10. *Id.* Note, in a somewhat unique and deliberate statutory construction, the FAA does not, in and of itself, confer subject-matter jurisdiction upon the federal courts, so there must be other grounds for conferring federal jurisdiction, such as diversity to seek enforcement or relief from an award in a federal court, and the federal amount in controversy requirements must be satisfied as well. See, e.g., *Trs. of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc. v. Patterson*, 300 F. App’x 170 (3d Cir. 2008). See also *N. Am. Thought Combine, Inc. v. Kelly*, 249 F. Supp. 2d 283 (S.D.N.Y. 2003) (citing *Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 140 (2d Cir. 2002)); *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001–02 (11th Cir. 2007) (explaining that because the FAA does not itself confer federal jurisdiction, and because no “affirmative ‘countervailing federal interests’ are at stake that warrant the application of federal law,” diversity jurisdiction requires the application of the state law governing prejudgment interest); see also *In re Arbitration Between Westchester Fire Ins. Co. v. Massamont Ins. Agency, Inc.*, 420 F. Supp. 2d 223 (S.D.N.Y. 2005) (same). See also *United States v.*

*Park Place Assocs., Ltd.*, 563 F.3d 907, 918–19 (9th Cir. 2009) (“As the Supreme Court has explained: The [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction. . . . [T]here must be diversity of citizenship or some other independent basis for federal jurisdiction.”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)).

11. FAA § 9. The enforcement of *foreign* arbitral awards, however, is governed by other sections with different deadlines and procedures, including a longer prior for filing a request for an order confirming an award. See 9 U.S.C. § 207 (“Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”).

12. FAA § 9. Consult local rules for deadlines that may be extended by mailing of papers. However, in an abundance of caution, it would be unwise to presume that such mailing extensions apply to the issuance of an arbitration award.

13. Failing to file a timely motion does not undo the award, but it is likely to make it more difficult, if not impossible, for the prevailing party to collect on it if the nonprevailing party does not capitulate. For instance, the party may still be permitted to file a new action outside the scope of the FAA seeking to enforce the award. See, e.g., *Gen. Elec. Co. v. Anson Stamping Co.*, 426 F. Supp. 2d 579 (W.D. Ky. 2006).

14. FAA § 9 (emphasis added).

15. See, e.g., *Smith v. Tele-Town Hall, LLC*, 798 F. Supp. 2d 748 (E.D. Va. 2011); *Affinity Fin. Corp. v. AARP Fin., Inc.*, 794 F. Supp. 2d 117 (D.D.C. 2011); *Medicine Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010); *Householder Grp. v. Vaughnan*, 354 F. App’x 848 (5th Cir. 2009).

16. See, e.g., *Hall St. Assocs., LLC v. Mattel*, 552 U.S. 576, 578 (2008) (“The Federal Arbitration Act . . . provides for expedited judicial review to confirm, vacate, or modify arbitration awards.”).

17. FAA § 13:

**Papers filed with order on motions; judgment; docketing; force and effect; enforcement.**

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect,

in all respects, as, and be subject to, all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

18. *Id.*

19. *Id.*

20. Local rules govern the amounts of bonds and what they cover. For instance, Local Rule 110 for the District of Maryland states that the amount of any supersedeas bond filed to stay execution of a monetary judgment pending appeal shall be 120% of the judgment plus an additional \$500 to cover costs of appeal. *Cf.* Local Rule 62.2 for the District of Massachusetts, which states that a supersedeas bond shall be in the amount of the judgment plus 10% to cover interest and costs of delay and \$500 to cover costs, with the caveat “unless the court directs otherwise.”

21. It could take a year or more for this process to be completed.

22. Although there are many surety companies who will write supersedeas bonds, it is important to remember that a surety bond is not insurance but a credit instrument. *See, e.g.,* Capitol Indem. Corp. v. Aulakh, 313 F.3d 200 (4th Cir. 2002) (citing BLACK’S LAW DICTIONARY 181 (6th ed. 1990)). As such, except in instances where the judgment debtor is financially very solvent and has solid assets to pledge as collateral as well as, oftentimes, a longtime relationship with a surety, ordinarily a surety will require that the amount being bonded is fully collateralized. Thus, for many judgment debtors, particularly where the judgment is for a considerable amount, obtaining a bond will likely be beyond their reach. Courts can and will consider letters of credit in lieu of surety bonds, but, of course, these require full collateralization, too.

23. *See, e.g.,* Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1293 (11th Cir. 2010) (citing Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A., 210 F.3d 1309, 1313–14 (11th Cir. 2000)); *see also* *In re* Arbitration Between Interdigital Commc’s Corp. & Samsung Elec. Co., Ltd., 528 F. Supp. 2d 340 (S.D.N.Y. 2007) (a stay of confirmation of an award should not be lightly granted lest it encourage abusive tactics by the non-prevailing party).

24. *See* Hall St. Assocs., LLC v. Mattel, 552 U.S. 576, 582 (2008) (“The Act supplies mechanisms for enforcing arbitration awards: a judicial decree conforming an award, an order vacating it, or an order modifying or correcting it. §§ 9–11. An application for any of these orders will get *streamlined treatment as a motion*, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court.”) (emphasis supplied). *See also* Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986).

25. Three S Delaware, Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520 (4th Cir. 2007) (citing Apex Plumbing Supply v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998)); *see also* Winfrey v. Simmons Foods, Inc., 495 F.3d 549 (8th Cir. 2007).

26. Remmy v. PaineWebber, 32 F.3d 143, 146 (4th Cir. 1994) (citing Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Commc’ns Int’l Union, 973 F.2d 276, 281 (4th Cir. 1992) (quoting Bhd. of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914, 921 (7th Cir. 1985))). *See also, e.g.,* Contech Constr. Prods., Inc. v. Heierli, 764 F. Supp. 2d 96 (D.D.C. 2011) (citing O.R. Sec., Inc. v. Prof’l Planning Assocs., 857 F.2d 742, 745–46 (11th Cir. 1988)).

27. FAA § 13.

28. Some courts may use variations of this standard form.

29. 28 U.S.C. § 1963:

**Registration of judgments for enforcement in other districts.**

A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district or,

with respect to the Court of International Trade, in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. Such a judgment entered in favor of the United States may be so registered any time after judgment is entered. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien.

The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.

30. *Id.*

31. Because 28 U.S.C. § 1963 provides that these certificates “may be registered . . . in any other district . . . when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown,” clerks in other district courts may be unwilling, however, to accept these certificates when there has been an appeal filed or when the time for filing an appeal has not expired, as we discuss further, *infra*.

32. American Institute of Architects’ (AIA) Document A201-2007 is subject to copyright protection. It is available for purchase at [www.aia.org/contractdocs/index.htm](http://www.aia.org/contractdocs/index.htm).

33. *See, e.g.,* Leigh Jones, *Arbitration Challenges on the Rise*, NAT’L L.J., Feb. 14, 2011 (calculating a 48 percent increase in written decisions between 2005 and 2010).

34. “Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered . . . .” 9 U.S.C. § 12 (emphasis added). Note that the three-month period begins from when the award is either filed or delivered.

35. *See, e.g.,* Contech Constr. Prods., Inc. v. Heierli, 764 F. Supp. 2d 96 (D.D.C. 2011) (citing O.R. Sec., Inc. v. Prof’l Planning Assocs., 857 F.2d 742, 745–46 (11th Cir. 1988)).

36. “The purpose of this bill is to make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts.” *Southland Corp. v. Keating*, 465 U.S. 1, 12–13 (1984) (quoting from the legislative history of the FAA, H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924)). *See also* *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, n.11 (11th Cir. 2011) (“We note that Congress instructed that a court ‘may make an order vacating the award’—as opposed to ‘must’ or ‘shall’—in delineating the grounds for vacatur, further emphasizing the deferential nature of our review.”)

37. *See* FAA § 12 (timing of service of a motion to vacate or modify); FAA § 9 (timing of filing of a motion to confirm).

38. *See, e.g.,* Taylor v. Nelson, 788 F.2d 220 (4th Cir. 1986). *See also* *Choice Hotels Int’l, Inc. v. Shiv Hospitality, L.L.C.*, 491 F.3d 171 (4th Cir. 2007); *E. Seaboard Constr. Co., Inc. v. Gray Constr., Inc.*, 553 F.3d 1 (1st Cir. 2008); *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155 (10th Cir. 2007).

39. Taylor, 788 F.2d at 225–26.

40. *Id.* at 225 (“once the three-month period has expired, an attempt to vacate an arbitration award could not be made *even in opposition to a later motion to confirm.*”) (emphasis supplied).

41. *Choice Hotels Int’l*, 491 F.3d at 177–78. *See also* *Ameser v. Nordstrom, Inc.*, 2011 WL 4561204 (5th Cir. Oct. 4, 2011); *Dalal v. Goldman Sachs & Co.*, 541 F. Supp. 2d 72 (D.D.C. 2008); *Dist. Council 1707 v. Hope Day Nursery, Inc.*, 233 F. App’x 32 (2d Cir. 2007); *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568 (7th Cir. 2007); *Pfannenstiel*, 477 F.3d 1155 (time limit was not equitably tolled under the circumstances of this case).

42. 637 F.3d 365 (D.C. Cir. 2011).

43. Notably, Argentina did not also file an opposition to the motion to confirm, which was then granted. It is a wonder why Argentina would fight so hard for vacatur but then not also file an opposition to the motion to confirm the enormous award, or, alternatively, move to modify the award, in case the “file and serve” timing issue did not resolve in Argentina’s favor. The court’s decision was based on solid precedent regarding interpretation of statutes. Its outcome, though, seems a bit at odds with the intent behind the FAA—namely, although grounds for vacatur should be narrow, they should not be procedurally impossible to satisfy. In light of this case, it would not be surprising to see further amendments to FAA § 12, perhaps mirroring the language of FAA § 9, which requires only that the motion to confirm be filed within the specified time (one year), not also served by that same deadline.

44. *See, e.g., Int’l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12 (D.D.C. 2011).

45. *See, e.g., Taylor*, 788 F.2d at 225; *see also E. Seaboard Constr. Co., Inc. v. Gray Constr., Inc.*, 553 F.3d 1, 6 (1st Cir. 2008) (party filing a motion to confirm may also respond to a motion to vacate or modify by filing its own motion to vacate or modify in the alternative, as long as the motion to vacate or modify is timely).

46. *See, e.g., Sanluis Devs., L.L.C. v. CCP Sanluis, L.L.C.*, 556 F. Supp. 2d 329 (S.D.N.Y. 2008) (citing authority from multiple courts for this premise). Although some judges in some courts may be willing to do this, as long as the request is timely, prudent practice is to frame clear arguments in compliance with the FAA framework.

47. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (emphasis supplied).

48. FAA § 10(a) (emphasis added).

49. *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 1015, 149 L. Ed. 2d 740, 121 S. Ct. 1724 (2001) (“When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator’s ‘improvident, even silly, factfinding’ does not provide a basis for a reviewing court to refuse to enforce the award.”) (internal citations omitted).

50. For an excellent article regarding the arbitrability of disputes and who decides it, see Paul T. Milligan, *Who Decides the Arbitrability of Construction Disputes?*, *CONSTR. LAW.*, Spring 2011, at 23.

51. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 295–96 (3d Cir. 2010) (citing *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995)).

52. *Id.*

53. Nevertheless, as discussed *infra*, an attorney’s filing of a motion to vacate without a real basis, other than delaying the inevitable, places her in danger of the opposition invoking Rule 11 of the Federal Rules of Civil Procedure. Note as well, however, if a party seeks to invoke Rule 11, she must comply with the “safe harbor” requirement of the Rule. *See also Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140 (10th Cir. 2007) (discussing the award of sanctions in the arbitration context, particularly on appeal, to prevent parties from frivolously appealing an otherwise binding arbitration decision).

54. FAA § 10(a)(2), (3).

55. *See, e.g., Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294 (6th Cir. 2008) (citing and updating *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 89 S. Ct. 337 (1968) (concluding that not every nondisclosure by the arbitrator constitutes a violation of the FAA warranting vacatur)).

56. *See, e.g., STMicronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68 (2d Cir. 2011) (holding that although the arbitrator functioned as an expert witness for one party in a prior case, and that testimony was not disclosed in detail, that fact was insufficient to convince the appellate court to vacate the

award).

57. FAA § 11.

58. It could be argued that time expended seeking clarification by the arbitrator tolls the time limits for filing a motion to confirm (FAA § 9) or for filing and serving a motion to vacate (FAA § 12). This is more likely relevant if the arbitrator does clarify or modify the award in response to the request, such that a new award is issued. Given that courts typically strictly enforce the deadlines in the FAA, the prudent practice would be to comply with the original deadlines and not expect tolling to apply or a new deadline to begin.

59. *AAA CONSTR. INDUS. ARB. R. R-48* (emphasis added):

#### **Modification of Award**

(a) Within 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award. *The arbitrator is not empowered to re-determine the merits of any claim already decided.*

(b) If the modification request is made by a party, the other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

(c) If applicable law provides a different procedural time frame, that procedure shall be followed.

60. *Id.*

61. *See, e.g., Dalal v. Goldman Sachs & Co.*, 541 F. Supp. 2d 72 (D.D.C. 2008) (considering the implication of New York’s limitations).

62. *See, e.g., Youngs v. Am. Nutrition, Inc.*, 537 F.3d 1135 (10th Cir. 2008); *Emp’rs Ins. of Wausau v. El Banco De Seguros Del Estado*, 357 F.3d 666 (7th Cir. 2004) (citing *Hyle v. Doctor’s Assocs., Inc.*, 198 F.3d 368, n.1 (2d Cir. 1999); *United Steelworkers of Am., Local 4839 v. New Idea Farm Equip. Corp.*, 917 F.2d 964, 968 (6th Cir. 1990)).

63. *See, e.g., U.S. Entergy Corp. v. Nukem, Inc.*, 400 F.3d 822, n.2 (10th Cir. 2005) (citing *Emp’rs Ins. of Wausau*, 357 F.3d at 670; *Hyle*, 198 F.3d at 371 n.1; *United Steelworkers of America, Local 4839*, 917 F.2d at 968).

64. *See, e.g., MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849 (4th Cir. 2010).

65. *See, e.g., Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836 (11th Cir. 2011) (“A district court may vacate the award if, by not providing a reasoned award, ‘the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.’ 9 U.S.C. § 10(a)(4). Still, this review is circumscribed, as arbitrators ‘do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.’”) (citing *Nat’l Wrecking Co. v. Int’l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993)).

66. The job of the arbitrator is whatever the parties have agreed in their contract. For instance, if the parties agreed the arbitrator must provide findings of fact and conclusions of law, and the arbitrator fails to do that, then that may form the basis of a successful motion to vacate. Requiring the arbitrator to make a “reasoned” award appears to be a lower expectation by the parties, and lower still should be the parties’ expectations of a “standard” award. *See, e.g., Cat Charter*, 646 F.3d 836 (holding that the arbitrator issued the “reasoned” award agreed upon by the parties, and “had the parties wished for a greater explanation, they could have requested that the Panel provide findings of fact and conclusions of law”).

67. *See, e.g., Bhd. of Locomotive Eng’rs & Trainmen v. Union Pacific R.R. Co.*, 500 F.3d 591 (7th Cir. 2007) (citing, *inter alia*, *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000); *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 326 F.3d

772, 781–83 (6th Cir. 2003); Aluminum, Brick & Glass Workers Int'l Union v. AAA Plumbing Pottery Corp., 991 F.2d 1545, 1549 (11th Cir. 1993)). Courts may also consider whether state law provides additional grounds for remanding to the arbitrator.

68. See, e.g., Brown v. Witco Corp., 340 F.3d 209 (5th Cir. 2003).

69. See, e.g., Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133 (2d Cir. 2007); Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C., 487 F.3d 255 (5th Cir. 2007); Remyey v. PaineWebber, Inc., 32 F.3d 143, 149 (4th Cir. 1994); Kiernan v. Piper Jaffray Co., Inc., 137 F.3d 588, 591 (8th Cir. 1998).

70. 552 U.S. 576, 576 (2008).

71. *Id.*

72. In fact, the Ninth Circuit reversed the district court twice because the lower court continued, upon remand, to hold for Hall Street. Thereafter, the Supreme Court granted *certiorari* to ultimately decide whether the grounds for vacating an arbitration award, as set forth in the FAA, were exclusive. *Id.* at 581.

73. *Id.* at 584 (discussing Wilko v. Swan, 346 U.S. 427 (1953)).

74. *Id.* at 585.

75. See, e.g., Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349 (5th Cir. 2009); T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 338–40 (2d Cir. 2010). *But see* Regnery Publ'g, Inc. v. Minitier, 601 F. Supp. 2d 192 (D.D.C. 2009) (declining to determine whether *Hall Street* applied in the District of Columbia and not reaching the issue). See also Amerix Corp. v. Jones, 2011 WL 6118535 (4th Cir. Dec. 9, 2011) (declining to reach the issue).

76. Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758, 1766–67 (2010).

77. See, e.g., Citigroup Global Mkts., 562 F.3d 349 (holding that *Hall* stands for the proposition that the four enumerated grounds in 9 U.S.C. §§ 10 and 11 are the sole grounds for vacatur); *T. Co Metals*, 592 F.3d at 338–40; *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010) (holding that arbitration awards may only be vacated under the FAA “in four limited circumstances” enumerated in 9 U.S.C. § 10); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010) (same); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008). *But see* *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009) (holding that manifest disregard of the law remains a valid ground for vacatur under FAA § 10(a)(4)); and see *Regnery Publ'g*, 601 F. Supp. 2d 192, and *Affinity Fin. Corp. v. AARP Fin., Inc.*, 794 F. Supp. 2d 117 (D.D.C. 2011) (both declining to determine whether *Hall Street* applied in the District of Columbia and not reaching the issue and indicating that, without more guidance from the Supreme Court, the so-called manifest disregard standard is still good law).

Whether the *Hall Street* reasoning impacts the various perspectives of the courts ruling on motions to vacate has yet to be determined. In an interesting article, Donald R. Philbin Jr. wrote for the Litigation Section of the State Bar of Texas about contract clauses governing arbitration and how recent cases should be triggering a rethinking of those clauses. Donald R. Philbin Jr., *Litigators Needed to Advise Transactional Lawyers on Litigation Prenups*, 56 THE ADVOCATE 36 (Fall 2011). That article summarizes findings of two prior studies regarding the “finality” of awards, and how that varies among jurisdictions; for instance, as of 2004, courts of California, Connecticut, and New York were vacating awards about one-third of the time, while Texas was part of a group of nine states in which only one vacatur was granted during the sample period. “The most common successful ground for vacatur was ‘exceeded powers’ (20.8%), and only two of 52 (3.8%) were granted for manifest disregard, which some now suggest is a subset of ‘exceeding powers’ after *Hall Street*.”

78. No such state grounds were raised in *Hall Street*. 552 U.S. at 590.

79. FAA § 11.

80. See, e.g., Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401 (9th Cir. 2011) (although the Supreme Court “speculated” in *Hall Street* whether the FAA is the exclusive permissible standard for judicial review of awards, the *Johnson* court held that parties are not permitted to contract that the district court could decline to consider a motion to vacate, deferring that decision to the appellate court).

81. FAA § 13. See also FED. R. CIV. P. 6 (requiring that supporting affidavits, in order to be considered, must be filed *with* the motion).

82. See, e.g., First Baptist Church of Glenarden v. New Mkt. MetalCraft, Inc., 2010 WL 3037030 (D. Md. July 30, 2010), *summarily aff'd*, 442 F. App'x 789, 2011 WL 3489602 (4th Cir. 2011).

83. AAA CONSTR. INDUS. ARB. R. R-28.

84. Although the AAA rules require a seven-day notice prior to the onset of the hearing, there is nothing to prevent a party to an arbitration from requesting of the arbitrator(s) the right to have the proceedings transcribed when a party deems it necessary. In terms of cost, typically court reporters will negotiate a price, particularly when all or most parties agree to share the costs thereof.

85. See, e.g., AAA CONSTR. INDUS. ARB. R. R-44(b).

86. *Id.* R-44(c).

87. *Affinity Fin. Corp. v. AARP Fin., Inc.*, 794 F. Supp. 2d 117 (D.D.C. 2011) (citing Teamsters Local Union No. 61 v. United Parcel Serv., Inc., 272 F.3d 600, 604 (D.C. Cir. 2001) (quoting *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991)).

88. See, e.g., Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 145 (4th Cir. 1993); McGrann v. First Albany Corp., 424 F.3d 743 (8th Cir. 2005) (citing *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314 (5th Cir. 1994)).

89. See, e.g., *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001) (citing *Dep't of Air Force v. Fed. Labor Relations Auth.*, 775 F.2d 727, 733 (6th Cir. 1985); *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973)).

90. FED. R. CIV. P. 11(c)(2).

91. The one notable exception is in Delaware, the home of many corporations and, correspondingly, many bankruptcy actions. Although they are not unheard of, even in Delaware “involuntaries” are rare.

92. 11 U.S.C. § 303.

93. *Id.* § 362.

94. *Id.* § 547 (governing “preferences” in bankruptcy).

95. *Id.* §§ 544 *et seq.*

96. *Id.* § 547. For instance, this has been a major aspect of the bankruptcy proceedings affecting the Bernard Madoff estate, i.e., the trustee's efforts to recoup preferential payments. The SIPA Trustee, Irving H. Picard, Esq., has established a website, [www.madoff.com](http://www.madoff.com), that details the status of his efforts. These have included seeking return to the bankruptcy estate of \$150 million from various accounts in Gibraltar.

97. 11 U.S.C. § 547.

98. *Id.* § 548. In practical effect, the trustee can become collections' counsel, which can benefit the judgment creditor/arbitration award holder by bringing collectible assets back into the estate from which at least part of the judgment might be satisfied, at no additional cost to the creditor.

99. For instance, in addition to common law fraud, most states have adopted some form of the Uniform Fraudulent Transfer Act, *f/k/a* the Uniform Fraudulent Conveyance Act of 1918.

100. For a helpful discussion of the bankruptcy process and trustee powers, the federal court website [www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx](http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx) provides a

helpful overview.

101. The various bankruptcy forms, including Form B5 for involuntary petitions, can be found at [www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx](http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx).

102. There is a split in the federal circuits as to whether de minimis creditors count to raise the number to twelve. Strict constructionist judges, and others likely to lean more favorably to debtors, will count debts of very small amounts. *See, e.g., In re Evans*, No. 96-21180-S, 1997 Bankr. LEXIS 1073, at \*10-15 (Bankr. E.D. Va. June 6, 1997) (after analyzing substantial information provided by the debtor regarding multiple creditors, the nature of their debts, and a list of other considerations, the court counted all of them, regardless of the size of their claims).

Some judges, though, find this to be unfair to the single creditor with a large claim. *See, e.g., In re Oberle*, No. 06-41515, 2006 Bankr. LEXIS 4463 (Bankr. N.D. Cal. Dec. 21, 2006) (a claim of two dollars was so small that it was invalid for section 303 purposes); *In re Moss*, 249 B.R. 411 (Bankr. N.D. Tex. 2000); *Jefferson Trust & Sav. Bank of Peoria v. Rassi (In re Rassi)*, 701 F.2d 627 (7th Cir. 1983) (small claims, if recurring, might be properly counted); *In re Elsa Designs Ltd.*, 155 B.R. 859 (Bankr. S.D.N.Y. 1993); *In re Hoover*, 32 B.R. 842 (Bankr. W.D. Okla. 1983).

103. 11 U.S.C. § 303.

104. *Id.*

105. BANKR. R. 1003(b).