Chapter 14

Confirmation and Vacatur of Awards

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§ 14:1 Overview of Requirements for Confirming and Vacating Awards

§ 14:1.1 Generally

After the issuance of an arbitration award, the prevailing party may wish to convert it into an enforceable judgment; conversely, the losing party may seek to have it vacated, corrected, or modified. The vast majority of cases involve interstate commerce and are therefore governed by the Federal Arbitration Act (FAA).[1] The procedure for confirming awards is set forth in section 9 of the FAA,[2] which provides that the application to confirm "must be granted," that is, summarily, unless the award is vacated, modified, or corrected. Applications to vacate, modify, or correct an award are governed by sections 10 and 11.

In the rare instances where the FAA does not apply, either because interstate commerce is not involved or because the parties have explicitly agreed to apply state arbitration law instead,[3] state law governs the confirmation and vacatur of awards.[4] Courts in, for example, California and New Hampshire enforce an agreement of the parties

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1. Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003).
2. 9 U.S.C. § 9. It provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

3. Hall St. Assocs. LLC v. Mattel, Inc., 128 S. Ct. 1396 (2008); Wachovia Sec., Inc. v. Gangale, 125 F. App'x 671 (6th Cir. 2006) (vacatur motions filed in state and federal courts.)
4. LGC Holdings, Inc. v. Julius Klein Diamonds, LLC, 238 F. Supp. 3d 452 (S.D.N.Y. 2017) (parties may contract to apply state arbitration law).

for expanded review of arbitration under state law,[5] while courts in Massachusetts, Georgia, and Tennessee do not.[6]

§ 14:1.2 Need to Establish Subject Matter Jurisdiction in Federal Court

A curiosity of Chapter 1 of the FAA is that it does not confer independent subject matter jurisdiction over proceedings that are brought in federal court under its provisions.[7] Therefore, for a confirmation or vacatur application to be heard in federal court, subject matter jurisdiction must be established. In turn, federal subject matter jurisdiction is based on diversity of citizenship, admiralty, or the existence of a federal question.[8]

The circuits are split on the appropriate test for determining federal question jurisdiction under sections 9 and 10 of the FAA. The First[9] and Second[10] Circuits have applied the "look-through" test that the Supreme Court approved for determining jurisdiction to compel arbitration under section 4 of the FAA,[11] reasoning that Congress could not have intended jurisdiction over sections 9 and 10 petitions to exist only in diversity and admiralty. In contrast, the Third, [12] Fourth,[13] and Seventh[14] Circuits have applied the "well-pleaded complaint rule" to determine whether a federal question is presented, declining to "look through" to the underlying subject matter of the arbitration to find jurisdiction under sections 9 and 10.

Courts have also reached differing results regarding how to determine the amount in controversy for purposes of establishing diversity jurisdiction.[15]

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5. Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 1358, 190 P.3d 586, 602 (2008); Finn v. Ballentine Partners, LLC, 169 N.H. 128, 144, 143 A.3d 859, 872 (2016).
6. Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 795, 46 N.E.3d 541, 549 (2016); Brookfield Country Club, Inc. v. St. James-Brookfield, LLC, 287 Ga. 408, 413, 696 S.E.2d 663, 667 (2010); Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252, 260 (Tenn. 2010).
7. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927 (1983). Chapters 2 or 3 of the FAA grant federal courts subject matter jurisdiction where those chapters apply.
8. 28 U.S.C. §§ 1331–1333.
9. Ortiz-Espinosa v. BBVA Sec. of P.R., Inc., 852 F.3d 36 (1st Cir. 2017).
10. Doscher v. Sea Port Grp. Secs., LLC, 832 F.3d 372 (2d Cir. 2016).
11. Vaden v. Discover Bank, 129 S. Ct. 1262 (2009).
12. Goldman v. Citigroup Glob. Mkts. Inc., 834 F.3d 242 (3d Cir. 2016).
13. Crews v. S&S Serv. Ctr. Inc., 474 F. App'x 370 (4th Cir. 2012).
14. Magruder v. Fid. Brokerage Servs. LLC, 818 F.3d 285 (7th Cir. 2016).
15. Pershing, L.L.C. v. Kiebach, 819 F.3d 179 (5th Cir. 2016) (amount in controversy is amount sought in original arbitration); Karsner v. Lothian,

Award creditors do not need to establish subject matter jurisdiction where previous applications have been made to a federal court, for example, to compel or stay arbitration, and the court has retained jurisdiction.[16] Absent that circumstance, a prevailing party seeking to confirm or vacate an award in the Third, Fourth, Seventh, and perhaps the D.C. Circuit as well,[17] whose petition fails to establish the existence of diversity or a federal question, will need to seek confirmation or vacatur in state court under sections 9 to 11 of the FAA.

§ 14:1.3 Venue

Section 9 of the FAA contemplates two venues for seeking confirmation of an award: either the court specified in the parties' agreement as the one which will enter judgment upon the award, or, if no court has been specified, the federal district court "in and for the district within which such award was made." Section 10 provides that an award may be vacated by a court in the district where the award was made.

The Supreme Court in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*[18] resolved a split among the circuits, holding that the venue provisions in sections 9 to 11 of the FAA are permissive and thus allow motions to confirm, vacate, or modify an award to be brought in any district proper under the federal venue statute, 28 U.S.C. § 1391.

§ 14:1.4 Role of State Courts

As noted above, state courts have jurisdiction to enforce the FAA.[19] Accordingly, if federal subject matter jurisdiction is absent, parties may seek to confirm or vacate the arbitration award in state court

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532 F.2d 876 (D.C. Cir. 2008) (same); Theis Research, Inc. v. Brown & Bain, 400 F. 3d 659 (9th Cir. 2004) (award of zero dollars confirmed; diversity satisfied); *cf.* Baltin v. Alaron Trading Corp., 128 F. 3d 1466 (11th Cir. 1997) (amount in controversy requirement not met where claimant's original claim exceeded jurisdictional amount but award did not).

16. Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193 (2000); Davis v. Fenton, 857 F.3d 961(7th Cir. 2017).

17. Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243 (D.C. Cir.1999) (declining to import "look through" analysis even if look through permissible under section 4 of the FAA).

18. *Cortez Byrd Chips*, 120 S. Ct. 1331.

19. Hall St. Assocs. LLC v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008) ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law . . . ."); TCR Sports Broad. Holding, LLP v. WN Partner, LLC, 153 A.D.3d 140 (1st Dep't 2017) (FAA vacatur standards applied by New York state court).

under section 9 or section 10 of the FAA.[20] Alternatively, if the FAA does not apply because interstate commerce is not involved or because the parties have explicitly opted for the application of state arbitration law, then that state's arbitration statute will prescribe the procedure and standards for confirming or vacating an award.[21]

§ 14:1.5 Confidentiality

Privacy is a feature of arbitration, in the sense that the public and the press are not permitted to attend arbitration hearings, and arbitration awards are not published (unless redacted to conceal identities).[22] However, when a party seeks to confirm or vacate an award in court, the award must be attached to its application, which is filed as a public document. Parties may request that their applications be filed under seal, and courts typically weigh the parties' interest in confidentiality against the public's right of access.[23]

§ 14:2 Confirmation of an Award

§ 14:2.1 Generally

Section 9 of the FAA requires, as a prerequisite for judicial confirmation of an award, that the parties "have agreed that a judgment of the court shall be entered upon the award." In cases where the parties have not explicitly agreed to the entry of judgment, litigation has ensued over whether the requirements of section 9 have been satisfied.[24] However, the issue has been resolved in many instances

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20. Builders First Source v. Ortiz, 515 S.W.3d 451 (Tex. App. 2017) (state court had power to apply FAA).
21. Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 630 N.Y.S.2d 27 (1995) (court bound by parties' agreement that only grounds for vacating award were those contained in New York CPLR, rather than FAA).
22. *See* chapter 5.
23. *See, e.g.*, LGC Holdings, Inc. v. Julius Klein Diamonds, LLC, 238 F. Supp. 3d 452, 457 n.1 (S.D.N.Y. 2017) (parties directed to show cause why documents should remain under seal); UBS Fin. Servs., Inc. v. Padussis, 127 F. Supp. 3d 483 (D. Md. 2015) (motion to seal exhibits granted).
24. *See, e.g.*, PVI, Inc. v. Ratiopharm GmbH, 135 F.3d 1252 (8th Cir. 1998) (under the FAA, parties must expressly agree that a federal court may confirm the arbitration award; agreement that arbitration be "final and binding" not sufficient); *cf.* Schoenfeld v. U.S. Resort Mgmt., Inc., 2008 WL 53275 (W.D. Mo. 2008) (district court has jurisdiction to confirm award where parties' agreement expressly intended to be enforceable under the FAA); Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 120 S. Ct. 1331 (2000).

because, even where the parties' contract does not explicitly provide for entry of judgment upon the award, courts have held that, if the arbitration clause provides for arbitration pursuant to a specific set of arbitration rules, that language suffices to incorporate those rules into the agreement. In turn, the American Arbitration Association's rules, for example, provide that "parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."[25] Other providers have similar rules.[26] Thus, an arbitration clause providing merely that disputes will be submitted to the AAA or other provider for arbitration suffices as consent to have judicial confirmation sought under section 9 of the FAA.[27]

In cases where provider rules have not been adopted by the parties, such as in ad hoc arbitrations, parties have the option of commencing a civil action in state court to enforce an award.[28]

§ 14:2.2 Personal Jurisdiction and Service Requirements

Acquiring personal jurisdiction over the adverse party is generally not an issue because courts have held that agreeing to arbitrate in a particular forum equates to consent to personal jurisdiction in that forum.[29] Section 9 requires that notice of the application to confirm an award be given to the adverse party; the type of notice required depends on the adverse party's residence. If the party is a resident of the district "in which the award was made," the party or its attorney may be served in the manner in which a notice of motion is served. If the party is a nonresident, then service must be made by the marshal in any district where the party "may be found," in the manner that service of process is made.[30]

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25. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 52(c) (effective Oct. 1, 2013) [hereinafter AAA RULES].
26. JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES R. 25 (effective July 1, 2014) [hereinafter JAMS RULES].
27. Coudert Bros. LLP v. Li (*In re* Coudert Bros. LLP), No. 16-CV-8237 (KMK) 2017 WL 1944162 (S.D.N.Y. May 10, 2017).
28. Kilgore v. Mullenax, 2017 Ark. 204 (2017) (motion to confirm under section 9 of the FAA properly brought in state court).
29. Associated Indus. Ins. Co. v. Excalibur Reinsurance Corp., No. 13 Civ. 8239(CM), 2014 WL 6792021 (S.D.N.Y. Nov. 26, 2014).
30. Ploetz v. Morgan Stanley Smith Barney, LLC, No. 17–1112 (PAM/DTS), 2017 WL 2303969 (D. Minn. May 25, 2017) (service by marshal unnecessary since corporation held to be resident of district.)

§ 14:2.3 Time Limits and Procedural Requirements

Section 9 of the FAA provides that "at any time within one year after the award is made any party . . . may apply . . . for an order confirming the award." The statute's use of the modifier "may," as opposed to "shall" or "must," has caused federal courts to split on the issue of whether this provision creates a mandatory one-year statute of limitations: The Second Circuit has held that it does,[31] while the Fourth[32] and Eighth[33] Circuits have held that section 9's limitations period is not mandatory. In light of the conflicting judicial interpretations, and particularly since which circuit's law will apply to the issue may be uncertain, it would be prudent for the prevailing party to seek confirmation of its award within the one-year period.

The application for confirmation is sought by filing a petition and notice of petition, akin to a notice of motion. The petition's content and time limits for responding to it are governed by the local rules of the court in which it is filed.[34] As noted by the Second Circuit, the confirmation application is considered a summary proceeding: "[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."[35]

Section 13 of the FAA sets forth requirements for filing the order confirming the award.[36]

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31. Photopaint Techs., LLC v. Smartlens Corp., 335 F.3d 152 (2d Cir. 2003).
32. Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148 (4th Cir. 1993).
33. Val-U Const. Co. of S.D. v. Rosebud Sioux Tribe, 146 F.3d 573 (8th Cir. 1998).
34. *See, e.g.*, Local Rule 6(b) of the U.S. District Court for the Southern District of New York ("On all civil motions, petitions, and applications. . . (1) the notice of motion, supporting affidavits, and memoranda of law shall be served by the moving party on all other parties that have appeared in the action, (2) any opposing affidavits and answering memoranda shall be served within fourteen days after service of the moving papers, and (3) any reply affidavits and memoranda of law shall be served within seven days after service of the answering papers. In computing periods of days, refer to Fed. R. Civ. P. 6 and Local Civil Rule 6.4. (c) The parties and their attorneys shall only appear to argue the motion if so directed by the Court by order or by a Judge's Individual Practice.").
35. Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984).
36. 9 U.S.C. § 13. It states:

> 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:
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> (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.

§ 14:3 Vacatur of an Award

§ 14:3.1 Generally

Judicial review of arbitration awards is one of the narrowest standards of judicial review in all of jurisprudence.[37] The Supreme Court has said that a party seeking to overturn all or part of an arbitration award faces a "high hurdle."[38]

§ 14:3.2 Time Limits

A party has three months from the date that an award is "filed or delivered" to serve a notice of motion to vacate, modify, or correct the award.[39] This time limit has been strictly applied and bars an extension of even one day.[40] Once three months have elapsed, a party may not seek to vacate an award, even in response to a motion to confirm that award,[41] which may be made months later.[42]

(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.

37. Uhl v. Komatsu Forklift Co., 512 F.3d 294 (6th Cir. 2008).
38. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).
39. 9 U.S.C. § 12. It states:

> 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. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

40. Webster v. A.T. Kearney, Inc., 507 F.3d 568 (7th Cir. 2007) (award "delivered" when placed in the mail per AAA Employment Rule, rather than when received, resulting in vacatur motion being held untimely.)
41. Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2d Cir. 1984); W. Int'l Sec. v. Devorah, 181 F. Supp. 3d 85 (D.D.C. 2014).
42. *See* section 14:2.3.

On the rather technical point of whether a summons must be served with a notice of motion to vacate, at least three courts have held it not to be necessary.[43]

§ 14:3.3 Grounds Under the Federal Arbitration Act

Section 10(a) of the FAA contains four grounds for vacating an arbitration award:[44]

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (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
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> (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.[45]

Parties have very limited success in proving any of these grounds. The ground most likely to succeed is "evident partiality or corruption in the arbitrators."

In addition, the arbitrators' "manifest disregard" of the law or the parties' agreement has been a nonstatutory basis for vacatur, but its vitality in the wake of *Hall Street Associates v. Mattel, Inc.*[46] is uncertain.

[A] Corruption, Fraud, or Undue Means

Section 10(a)(1) permits vacatur where the award "was procured by corruption, fraud, or undue means." Among other things, this ground

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43. Associated Indus. Ins. Co. v. Excalibur Reinsurance Corp., No. 13 Civ. 8239(CM), 2014 WL 6792021 (S.D.N.Y. Nov. 26, 2014); Home Ins. Co. v. RHA/Pa. Nursing Homes Inc., 113 F. Supp. 2d 633 (S.D.N.Y. 2000) (no summons required to accompany notice of motion to confirm an award); Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 732 F. Supp. 2d 293 (S.D.N.Y. 2010), *rev'd on other grounds*, 668 F.3d 60 (2d Cir. 2012).
44. Section 10(b) gives a court discretion to remand the case to the arbitration panel if its award is vacated.
45. 9 U.S.C. § 10(a).
46. Hall St. Assocs. v. Mattel, Inc, 128 S. Ct. 1396 (2008). The case is discussed in section 14:3.4.

permits vacatur if the prevailing party succeeded in the arbitration by offering perjured testimony or committed other fraud.

The Second Circuit has held that, to vacate an award for fraud under section 10(a)(1), the movant must show that "(1) [the prevailing party in the arbitration] engaged in fraudulent activity; (2) even with the exercise of due diligence, [the movant] could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration."[47] The court held that material perjured evidence furnished to the arbitrators by a prevailing party would be grounds for vacatur, but on the facts presented, the alleged perjury was not material to the arbitration's outcome.[48] In contrast, where the claimant's expert had lied about his credentials, the Eleventh Circuit vacated an award, holding that, but for the expert's testimony—permitted on the basis of his phony credentials—no damages would have been awarded.[49] Similarly, the Eighth Circuit vacated an award in favor of the claimant based on fraud where the claimant, a security guard seeking reinstatement, testified that he had left his post because his child was reported missing, but was discovered, post-award, to have left for an adulterous assignation instead.[50]

[B] Evident Partiality or Corruption

The "evident partiality" prong of section 10(a)(2) has spawned an enormous number of judicial decisions and much commentary. The Supreme Court has not interpreted the provision since 1968, when it issued a plurality opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[51] Since then—while agreeing that proof of actual bias is too stringent a requirement for vacatur[52]—courts have struggled to devise a standard for determining when an award may be vacated for evident partiality.

Failure to disclose a significant, nontrivial, compromising relationship with a party is one formulation of evident partiality, the Fifth Circuit's.[53] Vacatur only if a reasonable person would have to conclude that the arbitrator was biased in favor of one party is another: Applying this standard, the Second Circuit vacated an award in favor of a

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47. Odeon Capital Grp. LLC v. Ackerman, 864 F.3d 191 (2d Cir. 2017).
48. *Id.* (claimant's allegedly perjurious testimony on tangential issue held not material to the arbitrators' merits decision).
49. Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988).
50. MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499, 345 F.3d 616 (8th Cir. 2003).
51. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).
52. Morelite Constr. Corp. v. N.Y.C. Dist. Council, 748 F.2d 79 (2d Cir. 1984) (award vacated due to father-son relationship).
53. Positive Software Sols., Inc. v. New Century Mortg. Corp., 476 F.3d 278 (5th Cir. 2007).

local union claiming unpaid contributions to its benefits fund, where the arbitrator's father was the president of the international union with which the local union was affiliated.[54] Failure to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality is a third variation: Thus, the Texas Court of Appeals vacated an award where the arbitrator failed to disclose two previous cases in which opposing counsel had appeared before her; her belated disclosure a year later in the arbitration was held inadequate to cure the evident partiality.[55] The Eighth Circuit vacated an award where the arbitrator failed to disclose his firm's substantial business dealings with the respondent in the case.[56] The thread common to these vacaturs is the arbitrator's failure to disclose nontrivial contacts with the prevailing party.

A party must challenge the service of the arbitrator as soon as the party knows of the grounds to assert the challenge. A party with knowledge of facts possibly indicating arbitrator bias or partiality cannot remain silent and later object to the award on that ground.[57]

[C] Refusal to Postpone the Hearing or to Hear Evidence, or Other Prejudicial Misbehavior

Section 10(a)(3) permits challenge to a wide array of arbitrator conduct; however, it only rarely succeeds as a vehicle for vacatur.

Challenges based on the arbitrator's refusal to hear certain evidence are difficult since they require review of an often nonexistent record to determine the significance of the rejected evidence. The Second Circuit held that, "except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review."[58] The Fifth Circuit held that arbitrator misconduct was

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54. *Morelite Constr.*, 748 F.2d 79; Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60 (2d Cir. 2012).
55. Builders First Source—S. Tex., LP v. Ortiz, 515 S.W.3d 451 (Tex. App. 2017) (interpreting FAA § 10(a)(2)).
56. Olson v. Merrill Lynch, Pierce, Fenner, & Smith, 51 F.3d 157 (8th Cir. 1995).
57. *See* LGC Holdings, Inc. v. Julius Klein Diamonds, LLC, 238 F. Supp. 3d 452, 467–68 (S.D.N.Y. 2017).
58. Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997); Odeon Capital Grp., LLC v. Ackerman, 182 F. Supp. 3d 119 (S.D.N.Y. 2016), *aff'd,* 864 F.3d 191 (2d Cir. 2017) (arbitrators' evidentiary rulings did not rise to the level of misconduct or bad faith); *but see Tempo Shain*, 120 F.3d at 20–21 (vacating award where arbitrators closed the proceedings without hearing from a witness who would have provided relevant testimony but who was temporarily unavailable to testify); Attia v. Audionamix, Inc., No. 14 Civ. 706(RMB), 2015 WL 5580501, at *7

demonstrated where the arbitrator denied a party's offer of certain evidence and then held the absence of such evidence against the party.[59]

[D] Arbitrators Exceeded Their Powers or Imperfectly Executed Them

Section 10(a)(4) of the FAA contains the final statutory ground for vacating an award, consisting of two prongs. Regarding the "exceeding powers" prong, the Supreme Court has held that it is "only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable."[60] In the case before it, the Supreme Court vacated an award permitting certification of a classwide arbitration, finding that the arbitrators had substituted their own policy preference for class action treatment for the parties' arbitration agreement. In that situation, the Court held, "an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy."[61]

The Second Circuit has given the "exceeding powers" prong "the narrowest of readings,"[62] holding it to require that the arbitrators decided an issue not submitted to them for decision.[63] In another case seeking vacatur under section 10(a)(4), the court vacated an award on the ground that it was indefinite and imperfectly executed, where the award failed to articulate the remedy if a particular event (a closing)

(S.D.N.Y. Sept. 21, 2015) (vacating award based on arbitrator's refusal to hear evidence that was clearly pertinent and material to the controversy).

59. Gulf Coast Indus. Workers Union v. Exxon, 70 F.3d 847 (5th Cir. 1995).

60. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767 (2010) (internal quotation marks omitted); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013) (The "sole question" in reviewing an arbitrator's interpretation of a contract is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong).

61. *Stolt-Nielsen*, 130 S. Ct. at 1767.

62. Jock v. Sterling Jewelers , 646 F.3d 113 (2d Cir. 2011).

63. Tivo, Inc. v. Goldwasser, 560 F. App'x 15 (2d Cir. 2014) (arbitrators did not exceed their powers by invoking covenant of good faith as reasoning for award); Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 651–52 (5th Cir. 1979) (vacating award that included damages for charter hire despite concession that charter hire not at issue); PMA Capital Ins. Co. v. Platinum Underwriters Berm., Ltd., 659 F. Supp. 2d 631, 637–38 (E.D. Pa. 2009) (vacating award that, inter alia, eliminated provision of agreement where parties disputed only proper calculation under, and consequences of, that provision).

failed to occur; the court remanded the case to the arbitration panel as permitted by section 10(b).[64]

The Sixth Circuit held an award subject to vacatur under section 10(d) where the arbitration record reflected an unambiguous and undisputed mistake of fact—namely, that a discharged employee had pleaded guilty to an offense prior to his discharge for that offense, when in fact he pleaded guilty after being discharged—and the arbitrator relied on that mistake to uphold the discharge. (However, because the employee's ultimate guilty plea did justify his discharge, the court modified the award instead of vacating it.)[65] Similarly, an award was vacated by a federal district court where the arbitrator erroneously stated in his award that claimant had not submitted an affidavit in support of her claim, when in fact she had.[66]

The Ninth Circuit has interpreted the "exceeding powers" prong to require that an arbitrator not merely misinterpret governing law, but issue an award that is "completely irrational" or exhibits a "manifest disregard" of the law. Applying that standard, the court refused to vacate an award where the arbitrator had relied on precedent that subsequently—post-award—changed so dramatically that, had it been applicable, the arbitration would have had the opposite outcome.[67]

In ruling on challenges asserting the arbitrators' "imperfect execution" of their powers resulting in alleged lack of finality, "finality" has been defined to mean that the arbitration award must resolve all issues submitted to arbitration, and must resolve them definitively enough so that the rights and obligations of the parties with respect to the issues submitted do not require further adjudication.[68]

§ 14:3.4 Nonstatutory Grounds for Vacatur: "Manifest Disregard"

In addition to the grounds for vacatur contained in section 10, some courts have long considered challenges to awards based on an arbitrator's "manifest disregard of the law" or of the parties' agreement.[69] The validity of this "judicial gloss" on section 10 was thrown into question

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64. Olympia & York Fla. Equity Corp. v. Gould, 776 F.2d 42 (2d Cir. 1985).
65. Nat'l Post Office Mailhandlers v. U.S. Postal Serv., 751 F.2d 834 (6th Cir. 1985).
66. Mollison-Turner v. Lynch Auto Grp., 2002 U.S. Dist. LEXIS 9491 (N.D. Ill. 2002).
67. Wulfe v. Valero Refining Co.-Cal., 687 F. App'x 646 (9th Cir. 2017).
68. Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 176 (2d Cir. 1998).
69. Schwartz v. Merrill Lynch & Co., 665 F.3d 444 (2d Cir. 2011) (collecting cases).

in 2008 when the Supreme Court in *Hall Street*[70] rejected parties' ability to agree to expanded judicial review of an award beyond that permitted by the FAA, holding that section 10 of the FAA contains the "exclusive grounds" for vacating an arbitration award.

Two years after *Hall Street*, the Supreme Court in *Stolt-Nielsen* declined to decide whether "manifest disregard" survived *Hall Street*. But assuming its survival arguendo, the Court accepted its definition as requiring a showing that the arbitrator "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it."[71]

Since *Stolt-Nielsen*, manifest disregard has been deemed eliminated by the Eighth[72] and Eleventh Circuits,[73] and questioned[74] and upheld[75] by different panels within the Second Circuit. Assuming that it remains a basis for vacatur, the Second Circuit has described review of an award for manifest disregard as "severely limited, highly deferential, and contained to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent."[76]

In *Dewan v. Walia*,[77] the Fourth Circuit vacated an award for manifest disregard post- *Stolt-Nielsen*, without discussing the uncertainty of the doctrine, where the arbitrator upheld the validity of a general release but nevertheless awarded damages to the releasor-employee.

The Federal Circuit stated that manifest disregard remains a ground for vacatur—either as a "judicial gloss" on the statutory grounds, or as an independent ground akin to the arbitrator's exceeding his or her powers—but declined to apply it.[78]

The Tenth Circuit has cited manifest disregard as a basis to vacate an award and, while noting its uncertain validity in the wake of

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70. Hall St. Assocs. v. Mattel, Inc, 128 S. Ct. 1396 (2008).
71. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 n.3 (2010) .
72. Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC, 638 F.3d 572 (8th Cir. 2011).
73. Campbell's Foliage v. Fed. Corp., 562 F. App'x 828 (11th Cir. 2014).
74. GMAC Real Estate, LLC v. Fialkiewicz, 506 F. App'x 91 (2d Cir. 2012).
75. Tully Constr. Co. v. Canam Steel Corp., 684 F. App'x 24 (2d. Cir. 2017) (Second Circuit recognizes as additional basis for vacatur that award was rendered in manifest disregard of the law, or the terms of the parties' relevant agreement).
76. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).
77. Dewan v. Walia, 544 F. App'x 240 (4th Cir. 2013), *cert. denied,* 134 S. Ct. 1788 (2014).
78. Bayer CropScience AG v. Dow Agrosciences LLC, 680 F. App'x 985 (Fed. Cir. 2017).

Hall Street, declined to find its stringent requirements met in the case on appeal.[79] The Ninth Circuit has similarly continued to cite manifest disregard as a ground for vacatur, but held it unavailing on the record before it.[80]

The Fifth[81] and Sixth[82] Circuits have also declined to resolve whether "manifest disregard" has survived *Hall Street*.

In 2014, the Supreme Court had the opportunity to resolve the circuit split on this issue in *Dewan v. Walia*.[83] The Court's denial of certiorari suggests that it is content to let manifest disregard, often a proxy for an arbitrator's exceeding his or her powers or making an irrational decision, continue to evolve in the lower courts as a basis for vacatur.

Importantly, even in those circuits that continue to recognize the doctrine, it is not enough that the arbitrator made an error of law. There must also be a showing that the arbitrator intentionally disregarded the applicable law.[84]

§ 14:3.5 Procedural Requirements for Motion to Vacate

As set forth in section 12 of the FAA, a motion to vacate is made in the manner prescribed by the federal district court for filing petitions. Alternatively, the application may be in the form of a cross-motion opposing the prevailing party's motion to confirm the award.

§ 14:3.6 State Law Grounds for Vacatur

As noted above, the FAA is not the sole vehicle for seeking to vacate an award. In the rare cases where interstate commerce is unaffected, or where the parties have explicitly agreed to apply state arbitration law, state statutory or common law will govern a vacatur petition.

In *Hackett v. Milbank, Tweed, Hadley & McCloy*,[85] the New York Court of Appeals upheld an award governed by New York's arbitration statute (by express party agreement), which, like its federal counterpart, severely restricts judicial review of awards unless they are found

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79. THI of N.M. at Vida Encantada, LLC v. Lovato, 864 F.3d 1080 (10th Cir. 2017).
80. Sanchez v. Elizondo, 878 F.3d 1216, 1223 (9th Cir. 2018).
81. McKool Smith, P.C. v. Curtis Int'l, Ltd., 650 F. App'x 208 (5th Cir. 2016).
82. Samaan v. Gen. Dynamics Land Sys., Inc., 835 F.3d 593 (6th Cir. 2016).
83. *Dewan*, 544 F. App'x 240.
84. Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 217 (2d Cir. 2002) (party challenging the award could not prove that arbitrator "appreciated" the law and "nonetheless intended to ignore it").
85. Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 155 (1995).

to be "totally irrational or violative of a strong public policy." Reversing the lower courts, the court of appeals declined to find irrational the arbitrator's ruling that respondent law firm's reduction in payments to a departing partner was not a forfeiture, contrary to public policy, or violative of the firm's partnership agreement.

In *Star Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh*,[86] the Sixth Circuit applied Michigan law to vacate an arbitration award due to ex parte communications between the arbitrator and the prevailing party.

In *Finn v. Ballentine Partners, LLP*, the New Hampshire Supreme Court applied New Hampshire arbitration law to vacate an award for "plain mistake of law," a far broader ground for vacatur than permitted under section 10 of the FAA. After concluding that the state statute was not preempted by the FAA, the court held that the arbitration panel should have found claimant's claims barred under res judicata because they had been adjudicated in a prior proceeding, and accordingly vacated the award.[87]

§ 14:4 Modifying or Correcting an Award

Section 11 of the FAA permits awards to be corrected for computational and other nonsubstantive errors, such as typographical or numerical errors or misdescriptions of parties or other things.[88] Although subsection (b) permits modification where the arbitrators have awarded "upon a matter not submitted to them," applications

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86. Star Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 656 F. App'x 240 (6th Cir. 2016).
87. Finn v. Ballentine Partners, LLP, 169 N.H. 128, 143 A.3d 859 (2016).
88. FAA § 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> **(a)** Where there was an evident material miscalculation of figures or an evident material mistake in the description 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.

made in this regard generally also seek vacatur under section 10(a)(4) on the ground that the arbitrators "exceeded their powers."

Section 11 is infrequently invoked, because computational errors and the like are permitted to be corrected under arbitration provider rules, without need to resort to court.[89] It has been applied to modify an award, rather than remanding or vacating it, where the arbitration panel failed to include offsets to the amount awarded that had been stipulated by the parties.[90]

Parties may mistakenly seek an order correcting or modifying awards to attack a factual or legal premise on which the arbitrators based their calculations. These challenges are not eligible for modification or correction.[91]

The time limit for seeking relief under section 11 is the same three-month deadline that applies to vacatur applications, as set forth in section 12.[92]

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89. *See, e.g.*, AAA RULES, *supra* note 25, R. 50; JAMS RULES, *supra* note 26, R. 24(j).

90. Lummus Glob. Amazonas, S.A. v. Aguaytia Energy del Peru, S.R.L., 256 F. Supp. 2d 594 (S.D. Tex. 2002).

91. *See* AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1000 (11th Cir. 2007) (arbitrator's award made without the benefit of information withheld by a party is not a mistake for purposes of section 11); Pro-Fit Worldwide Fitness, Inc. v. Flanders Corp., No. 2:00 CV 0985 G, 2006 WL 1073556, at *3 (D. Utah Apr. 20, 2006) (revising award of prejudgment interest would be improper incursion into merits); Cambridge Int'l Trading, Inc. v. Tigris Int'l Corp., No. 99 CIV 10245 MBM, 2000 WL 288354, at *2 (S.D.N.Y. Mar. 17, 2000) (a miscalculation implies inadvertence or an error caused by oversight; a finding of fact, based on evidence, could not be disturbed).)

92. Section 12 of the FAA is set forth in note 39, *supra*.