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The Limited Nature of Post-Arbitration Judicial Proceedings

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In the United States District Court, the parties have numerous post-judgment options. They may move for a new trial or to alter or amend a judgment,[1] or they may move for relief from a judgment.[2] The parties may also appeal as of right to the Circuit Court of Appeals under the final judgment rule.[3]

Experienced trial lawyers, after their first arbitration hearing, are often surprised to discover that their post-award options under the Federal Arbitration Act (FAA)[4] are extremely limited. No general right to appeal exists under the FAA; rather, the parties are exclusively limited to applications to confirm, vacate, or modify the award.[5]

This article will briefly review the grounds for confirmation, vacatur, or modification of arbitration awards under the FAA and will review recent developments in post-arbitration review pursuant to the recent Supreme Court decision in *Hall Street Associates, Inc., v. Mattel, Inc.*[6]

Congress enacted the FAA to replace judicial hostility to arbitrations with a national policy favoring it, and, as part of this policy, the FAA supplied a mechanism for enforcing arbitration awards through a judicial decree confirming an award, an order vacating an award, or an order modifying or correcting it. Such "[a]n 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."[7]

Confirmation of an Award

Section 9 of the FAA provides that, if the arbitration agreement so provides, any party may seek judicial confirmation of the award.

> 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 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.[8]

The Submission Agreement used by the Financial Industry Regulatory Authority (FINRA) Dispute Resolution for securities arbitrations between brokerage firms and their customers contains the required language permitting a court to confirm the award and provides, in pertinent part:

> The parties further agree that a judgment and any interest due thereon may be entered upon such award(s) and, for these purposes, the parties hereby voluntarily consent to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.[9]

Procedurally, an application to confirm, vacate, modify, or correct an award is heard by the court in the same manner as a motion.[10] Since the FAA does not itself provide subject matter jurisdiction to the United States District Court, an independent basis of federal jurisdiction, such as diversity of citizenship with the requisite amount in controversy or the existence of a federal question, must exist.[11]

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Courts have repeatedly held that the FAA expresses a presumption that arbitration awards will be confirmed,[12] and the judicial review of an arbitration award is "one of the narrowest standards of judicial review in all of American jurisprudence."[13] As the Supreme Court recently stated in *Hall Street*:

> On application for an order confirming an arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies.[14]

As a practical matter, the application for confirmation of an award is relatively straightforward. The court must grant the motion for confirmation of the award as long as the court has subject matter jurisdiction, the arbitration agreement provides for judicial confirmation, and the award has not been vacated, modified, or corrected pursuant to sections 10 or 11of the FAA.[15] A representation to the effect that the award has not been vacated, modified, or corrected should be sufficient to establish that no such order has been entered.

Vacating, Modifying, or Correcting an Award

Motions to vacate, modify, or correct an award must be made within three months after the award is filed or delivered.[16] Section 10 of the FAA lists four grounds supporting the issuance of an order vacating an arbitration award:

(1) When the award was procured by corruption, fraud, or undue means.
(2) When there was evident partiality or corruption in the arbitrator or either of them.
(3) When 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 any other misbehavior by which the rights of any party have been or prejudiced.
(4) When the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.[17]

Section 11 of the FAA lists three grounds for modifying or correcting an arbitration award:

(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.[18]

In addition to the statutory grounds set forth above,[19] courts have also vacated awards upon certain limited non-statutory grounds. The continued viability of such non-statutory grounds has been called into question by the Supreme Court decision in *Hall Street*.

The door to the use of non-statutory grounds for vacating arbitration awards was first opened by the Supreme Court in 1953 in *Wilko v. Swan*.[20] *Wilko* involved a lawsuit brought by a customer against a securities brokerage firm to recover damages under Section 12 of the Securities Act of 1933 (the Securities Act).[21] Defendants moved to stay the trial pursuant to the FAA until the matter could be arbitrated pursuant to an arbitration clause contained in margin agreements.

The Supreme Court held that the right to select the judicial forum could not be waived by an arbitration agreement under Section 14 of the Securities Act[22] because of the lack of any means for judicial determination that the arbitrators decided the legal issues correctly.

> While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section of the Federal Arbitration Act," that failure would need to be made clearly to appear. *In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation*.[23]

Thus was born the concept of "manifest disregard of the law" as an additional non-statutory ground for judicial vacatur of an arbitration award. Ultimately, every circuit adopted manifest disregard of the law as a ground for vacating an award.[24] Generally, to vacate an award on the grounds of manifest disregard of the law, it must be clear from the award that (1) the arbitrators knew about the law they disregarded and (2) the arbitrators deliberately ignored the law.[25] Some circuits required that the disregarded law be "well-defined, explicit, and clearly applicable to the case." In the Sixth Circuit, a court could find manifest disregard of the law if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed the legal principle."[26] The Seventh Circuit simply held that manifest disregard of the law supports vacatur only when either "(i) the arbitrator directs the parties to violate the law, or (ii) the arbitrator fails to adhere to the principles specified by the parties'contract."[27]

Manifest disregard of the law, however, is not the only recognized non-statutory ground for vacatur. Arbitrariness and capriciousness are recognized grounds for vacatur in the

Eleventh Circuit.[28] The Third, Eighth, and Ninth Circuits recognized irrationality as supporting vacatur.[29] The denial of a fundamentally fair hearing was a stand-alone ground for vacatur in the Tenth Circuit.[30] Finally, all the circuits recognize violation of public policy as a ground for vacating an arbitration award based upon the long-standing legal principle that courts cannot enforce contracts that are contrary to public policy.[31]

The law of vacatur under the FAA changed dramatically in 2008 with the Supreme Court's holding in *Hall Street* that the statutory grounds for vacatur and modification of arbitration awards pursuant to Sections 10 and 11 of the FAA were exclusive.[32]

The arbitration agreement at issue in *Hall Street* provided for an expanded scope of review of the award. It provided, in part, that the "court shall vacate, modify or correct any award: (i) where the arbitrator's findings are not supported by sustainable evidence or (ii) where the arbitrator's conclusions of law were erroneous."[33]

The Supreme Court noted that the various circuit courts of appeal had split over the exclusiveness of the statutory grounds when parties used the "FAA shortcut" to confirm, vacate, or modify an award. Some courts (e.g., the Ninth, Tenth, and Federal Circuits) held that the recitations were exclusive and could not be expanded by the parties. Other courts (e.g., the First, Third, Fifth, Sixth, and Eighth Circuits) treated the statutory grounds as mere threshold provisions that the parties could contract to expand.

The Supreme Court held that sections 10 and 11 of the FAA, respectively, provided the FAA's exclusive grounds for expedited vacatur and modification of arbitration awards and that the scope of judicial review of arbitration awards could not be expanded by agreement of the parties. The Court held that reliance on *Wilko* was misplaced; the leap from a supposed judicial expansion by interpretation to a private expansion by contract was too much for *Wilko* to bear—especially since the statement in *Wilko* relied upon expressly rejecting a general review of the arbitrator's legal errors.

The Court further noted that even the phrase used by the *Wilko* court was vague:

> Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the §10 grounds collectively, rather than adding to them. . . . Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." . . . We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, . . . and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.[34]

To the extent that manifest disregard serves as a ground for vacating an arbitration award, it will remain a difficult standard to satisfy.

The Court dismissed the argument that the agreement to review for legal errors should be enforced because the FAA expresses Congress's desire to enforce the arbitration agreement of the parties. Rather, the Court noted that the question was whether the text of the FAA was inconsistent with enforcing a contract to expand judicial review following arbitration:

> To that particular question we think the answer is yes, that the text compels a reading of §§ 10 and 11 categories as exclusive. To begin with, even if we assumed that §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] . . . powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted"; the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and mistake of law are not cut from the same cloth.

The Court also noted that expanding the detailed categories would "rub too much against the grain" of the language of Section 9 where the provisions for judicial confirmation carry no hint of flexibility. The Court summed up its analysis as follows:

> Instead of fighting the text, it makes more sense to see the three provisions, §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtues of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely as prelude to a more cumbersome and time-consuming judicial review process."[35]

After *Hall Street*, it was unclear whether manifest disregard of the law continued as an independent basis for vacating an arbitration award under the FAA. In its immediate aftermath, various courts came up with different conclusions and rationales. The First Circuit, in dicta and with little discussion, concluded that *Hall Street* abolished manifest disregard of the law as a ground for vacatur.[36] The Sixth Circuit, in an unpublished decision, narrowly construed the holding in *Hall Street* to apply only to contractual expansion of the grounds for vacatur.[37] The Second Circuit held that manifest disregard survived *Hall Street* by re-characterizing it as shorthand for the statutory grounds in Section 10 (a)(4) of the FAA.[38] The Ninth Circuit held that *Hall Street* did not abolish manifest disregard because its case law had already defined it as shorthand for Section 10(a)(4).[39] The Fifth Circuit, however, held that "manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected. . . . Thus, from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10."[40]

The Supreme Court has not yet decided the fate of manifest disregard. In the *Stolt-Nielsen* case decided in 2010, and holding that class arbitrations are not permitted when the arbitration agreement is silent on the issue, the Supreme Court stated that it has not decided whether manifest disregard survived *Hall Street* as an independent ground for review of an arbitration award or as a judicial gloss on the enumerated grounds for vacatur set forth in Section 10 of the FAA.[41] The Court noted that the manifest disregard standard, as set forth by respondent, requires a showing that the arbitrator knew of the relevant legal principle, appreciated that the principle controlled the outcome of the disputed issue, and nevertheless willfully flouted the governing law by refusing to apply it. The Court concluded that "[a]ssuming, *arguendo,* that such a standard applies, we find it satisfied."[42]

To the extent that manifest disregard still serves as a ground for vacating an arbitration award, it will remain a difficult standard to satisfy. In *Fitzgerald v. H&R Block Financial Advisors, Inc.*,[43] the district court, in a decision after *Hall Street*, granted Fitzgerald's motion to confirm a FINRA arbitration award and denied the respondents' motion to vacate on grounds of manifest disregard of the law. The court held that since the arbitration panel did not provide any reasoned analysis for its decision, the only means by which the court could possibly decide that the arbitration panel manifestly disregarded the law is, "if from an analysis of the transcript of the arbitration proceeding and the evidence presented to the Panel, absolutely no rational means could be determined by which the Panel may have come to its decision. If any such path to the Award may be forged, the court must affirm the Panel's decision."[44] The court held that respondents failed to meet this high standard.

The Supreme Court may yet decide whether manifest disregard is still a viable ground for vacatur since it is not as great an expansion of the scope of review of an arbitration award rejected in *Hall Street*. But until this issue is further clarified, parties seeking to vacate an arbitrator's award as manifestly disregarding the law should be prepared to argue that it is shorthand for or a judicial gloss on one or more of the listed statutory grounds for vacatur in section 10 of the FAA. ■

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Endnotes

1. Fed. R. Civ. P. 59.
2. Fed. R. Civ. P. 60.
3. 28 U.S.C. §1291.
4. 9 U.S.C. §§ 1, *et seq.*
5. While the FAA is not the sole means of enforcing or vacating an arbitration award, it provides the only expedited means of such review. The parties are still free to choose to commence a plenary action after an award.
6. Hall Street Associates, Inc., v. Mattel, Inc., 552 U.S. 576, (2008).
7. *Id.* at 582.
8. 9 U.S.C. § 9.
9. *See* www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009438.pdf.
10. 9 U.S.C. § 6.
11. *Hall Street Associates,* 532 U.S. at 581–82 (2008).
12. Nationwide Mutual Insurance Corporation v. Home Insurance Company, 429 F.3d 640, 642 (6th Cir. 2005).
13. Uhl v. Komatsu Forklift Co., 512 F.3d 294, 305 (6th Cir. 2008) (quoting Lattimer-Stevens Co. v. United Steelworkers, 913 F.2d 1166, 1169 (6th Cir. 1990).
14. *Hall Street*, 552 U.S. at 587.
15. 9 U.S.C. §§ 10 and 11.
16. 9 U.S.C. §12.
17. 9 U.S.C. §10.
18. 9 U.S.C. §11.
19. For more detailed discussions of the statutory grounds for vacatur and modification, *see* Sandra D. Grannum & Christine Lazaro, Practicing Law Institute, *Recent Developments in the Law of Vacatur and the Standard of Manifest Disregard of Law*, PLI Order No. 11419 (Aug. 8, 2007), and Bradford D. Kaufman & Jon A. Jacobson, Practicing Law Institute, *What Happens in Arbitration, Stays in Arbitration*, PLI Order No. 11419 (Aug. 8, 2007).
20. 346 U.S. 427 (1953).
21. 15 U.S.C. §77a, *et seq.*
22. This ruling was overturned by the Supreme Court in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S., 477, 484 (1989).
23. 346 U.S. at 436–37 (emphasis added).
24. *See* James E. Berger & Charlene Sun, *The Evolution of Judicial Review under the Federal Arbitration Act*, 5 N.Y.U. Journal of Law & Bus., 745, 763.
25. *See, e.g.*, D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 110–11 (2d Cir. 2006).
26. Daware v. Spencer, 210 F.3d 666, 669 (6th Cir.) *cert. denied* 521 U.S. 878 (2000) quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995).
27. George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 581 (7th Cir. 2011), *Wise v. Wachovia Sec., LLC,* 450 F.3d 265, 268 (7th Cir. 2006).
28. Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992).
29. McGrann v. First Albany Corp., 424 F.3d 743, 749 (8th Cir. 2005); GC and KB Invs., Inc. v. Wilson, 326 F.3d 1096, 1105 (9th Cir. 2003); Roadway Package Sys. v. Kayser, 257 F.3d 287, 292, n.2 (3d Cir. 2001).
30. Hicks v. Bank of America, N.A., 218 Fed.Appx. 739, 745 (10th Cir. 2007).
31. *See* Berger & Sun, 5 N.Y.U. Journal

of Law & Bus. at 764–765 and the cases cited therein.

32. *Hall Street*, 552 U.S. at 581.

33. *Id.* at 579.

34. *Id.* at 585 (citations omitted).

35. *Id.* at 587 (citations omitted).

36. Ramos-Santiago v. United Parcel Service, 524 F.3d 120, 124, n.3 (1st Cir. 2008).

37. Coffee Beanery Ltd v. WW, LLC, 300 Fed. Appx. 415, 418–19, 2008 U.S. App. LEXIS 23645 (6th Cir. 2008).

38. Stolt-Nielsen SA v. AnimalFeed Int'l Corp., 548 F.3d 85, 93-95 (2d Cir. 2008) *rev'd and remanded on other grounds,* 2010 U.S. LEXIS 3672 (23010).

39. Comedy Club, Inc., v. Improv West Associates, 553 F.3d 1277, 1290 (9th Cir. 2009).

40. Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009).

41. Stolt-Nielsen SA v. AnimalFeed Int'l Corp., 2010 U.S. LEXIS 3672, 19 (2010).

42. *Id.* at n. 3.

43. 2008 U.S. Dist Lexis 45472 (E.D. Mich. 2008)

44. *Id.* at 12 (citations omitted).