IADC COMMITTEE NEWSLETTER

# BUSINESS LITIGATION

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## IN THIS ISSUE

*Chris Lam and Jonathan Schulz provide a roadmap for parties seeking vacatur of AAA arbitration awards in North Carolina. They highlight the challenges to success and discuss in detail issues such as forum selection, choice of law, grounds for vacatur, standard of review, and other general procedure.*

# So You're Telling Me There's a Chance: Vacatur of AAA Arbitration Awards in North Carolina

## ABOUT THE AUTHORS

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## ABOUT THE COMMITTEE

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the committee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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As the optimistic wisdom of *Dumb & Dumber's* Lloyd Christmas instructs, the chances of winning a motion to vacate an arbitration award may be "one in a million" . . . but "there's a chance."

You chose arbitration with the American Arbitration Association ("AAA") in North Carolina for a variety of reasons you perceived to be beneficial. However, you just received the arbitration award and you lost. What are your options for attempting to get out from under this unfavorable arbitration award? Can you appeal to the arbitrator or do you have to go to court? If the latter, what court – state or federal? And what forum? What law applies, what are the available grounds for vacating the award, and what is the standard of review? Does an arbitration award require you to pay a damage award immediately? Only with answers to these questions can you make informed decisions about navigating the way forward.

**I. THE ARBITRATOR'S LIMITED ABILITY TO REVIEW HIS OR HER AWARD**

The first question you must answer is whether to seek relief from the arbitrator or whether you must proceed to court. Generally speaking, unless you intend to ask the arbitrator to merely clarify something in the award or correct a mathematical error, you must proceed straight to court.

Under AAA Rule 50, "[w]ithin 20 calendar days after the transmittal of an award, any party . . . may request the arbitrator . . . to correct any clerical, typographical, or computation errors in the award." However, "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided." AAA Rule 50. The North Carolina Revised Uniform Arbitration Act ("NCRUAA"), N.C. Gen. Stat. § 1-569.1, *et seq.*, likewise provides that within 20 days after notice of an award, a party may file a motion with the arbitrator to modify or correct an award for the following three reasons:

> *(1) Upon a ground stated in G.S. 1-569.24(a)(1) [evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property] or (a)(3) [imperfect in matter of form not affecting the merits of the decision];*
> *(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or*
> *(3) To clarify the award.*

N.C. Gen. Stat. § 1-569.20(a).

Based on the foregoing, any review of the substance and merits of an arbitration award will be conducted by a court and not by the arbitrator.

**II. JUDICIAL REVIEW — WHAT FORUM?**

You are now prepared to file a motion to vacate. Do you have a choice between state

and federal court? If you file in federal court, in which district and division should you file your motion? Likewise, if you file in state court, are you limited to a specific county?

If the underlying lawsuit was stayed in a particular court pending the outcome of arbitration, any motion to confirm or vacate would likely have to be filed in the same court. Under the first to file rule, courts "give priority to the first suit absent a showing of a balance of convenience in favor of the second." *EST, LLC v. Smith*, 2009 WL 903923, at *1 (W.D.N.C. March 31, 2009) (internal quotation marks omitted); *see Century Furniture, LLC v. C & C Imports, Inc.*, 2007 WL 2712955, at *2 (W.D.N.C. Sept. 14, 2007) (explaining the "rule simply provides that the forum of the first-filed case is favored unless considerations of judicial and litigant economy and the just and effective disposition of disputes requires otherwise").

Outside of North Carolina, the first to file rule has been applied where a case was initiated and was subsequently stayed pending arbitration. *See Noble v. US Foods, Inc.*, 2014 WL 6603418, at *4 (S.D.N.Y. Nov. 19, 2014) (explaining that court "never relinquished jurisdiction over the matter or the parties, but rather stayed the proceedings pending the conclusion of the arbitration in contemplation of the fact that it may be asked to enter judgment on the arbitration award or issue other rulings after the arbitration is completed" (internal quotation marks omitted)); *Todd Shipyards Corp. v. Cunard Line Ltd.*, 708 F. Supp. 1440, 1444, 1448 (D.N.J. 1989) (noting that "[t]he plain language of Section 8 [of the Federal Arbitration Act] (i.e., 'shall retain jurisdiction to enter its decree upon the award') indicates the [court where the action is stayed] is the proper venue for post-arbitration proceedings" and that "[i]mplicit" in the stipulation to stay the proceedings "was the understanding that once the arbitration concluded with an award, any further court proceedings on the award would be conducted in that action").

Assuming your case was not stayed in a particular court pending arbitration, a review of the forum provisions of the NCRUAA as well as the Federal Arbitration Act ("FAA") is required. The NCRUAA explains that "[a]n agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this article," N.C. Gen. Stat. § 1-569.26(b), defining the word "court" as "a court of competent jurisdiction in this State," *id.* § 1-569.1(3). However, the word "court" may not be limited to state courts. *See Liu v. Motorist Mut. Ins., Co.*, 1993 WL 210557, at *3 (E.D. Pa. June 4, 1993) (concluding that word "court" in comparable section of Pennsylvania's Uniform Arbitration Act includes federal courts in Pennsylvania); *cf. New Jersey v. Merrill Lynch & Co., Inc.*, 640 F.3d 545, 549 (3d Cir. 2011) ("Pennsylvania's Uniform Arbitration Act . . . was not intended to provide exclusive jurisdiction to the Pennsylvania state courts.").

The FAA, 9 U.S.C. § 1, *et seq.*, on the other hand, provides that a motion to vacate may

be filed in "the United States court in and for the district wherein the award was made." 9 U.S.C. § 10(a).

Reading these statutes together, the language of the NCRUAA provides that a North Carolina court (federal or state) is a proper forum, and the FAA provides that the federal district court for the district in which the arbitration award was made is a proper forum. Note, however, that neither statute specifies that a motion to vacate *must* be filed in a North Carolina state court or *must* be filed in a North Carolina federal court. Thus, so long as your case was not pending in a particular court during the arbitration, you may choose to seek vacatur in state or federal court. However, if you proceed in federal court, you must have subject matter jurisdiction independent of the FAA. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) ("The [Federal] Arbitration Act 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 . . . .").

**III. CHOICE OF LAW**

You have decided to proceed to court and have made a decision about the appropriate forum. Now you must determine what law to apply – state law, federal law, or some combination of both.

The FAA will apply – regardless of whether you proceed in state or federal court – so long as the underlying contract providing for arbitration evidences a transaction involving interstate commerce. *Advantage Assets, Inc. II v. Howell*, 190 N.C. App. 443, 445–46, 663 S.E.2d 8, 9–10 (2008); *see Choice Hotels Int'l, Inc. v. Chewl's Hospitality, Inc.*, 91 F. App'x 810, 814 (4th Cir. Dec. 17, 2003).

In addition, the NCRUAA will likely apply, even in federal court. *See Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) ("The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."); *Thomas v. Right Choice MWM, Inc.*, 2014 WL 1632946, at *1 (W.D.N.C. April 23, 2014) (applying FAA and NCRUAA); *Schmitt v. SSC Statesville Brian Ctr. Operating Co., LLC*, 2008 WL 1745870, at *1 (W.D.N.C. April 11, 2008) (same).

However, "the FAA preempts conflicting state law." *N.C. Farm Bureau Mut. Ins. Co. v. Sematoski*, 195 N.C. App. 304, 306, 672 S.E.2d 90, 92 (2009) (internal quotation marks omitted); *see Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 90 (4th Cir. 2005) (noting "[t]he preemptive force of the FAA, as combined with the Supremacy Clause"). This means that the NCRUAA is only preempted "to the extent that it actually conflicts with federal law." *Volt Info.*, 489 U.S. at 477; *see Penn Va. Oil & Gas Corp. v. CNX Gas Co., LLC*, 2007 WL 593578, at *6 (W.D. Va. Feb. 22, 2007) ("[I]n deciding whether the FAA or the [Virginia Uniform

Arbitration Act] applies to the review of the arbitration award, the court must decide whether the specific provision of the [Virginia Uniform Arbitration Act] at issue here conflicts with the policies underlying the FAA."). Unsurprisingly, a choice of law provision cannot be relied upon to avoid application of the FAA. *King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) ("If the FAA is applicable, courts must apply it, even in the face of contractual provisions calling for the application of state law.").

## IV. GROUNDS FOR VACATING ARBITRATION AWARD

Winning a motion to vacate a AAA arbitration award in North Carolina is possible but extremely difficult. The arguments that you might assert are limited to the vacatur grounds set forth in the FAA and the NCRUAA, along with a few additional common law grounds. When these narrow grounds for relief are coupled with the exacting standard of review that courts will apply to any motion to vacate (*see infra* Section VI), it becomes clear that the deck is stacked against you.

### A. Statutory Grounds

1. The FAA

The FAA provides, in relevant part, as follows:

*In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—*

*(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.*

9 U.S.C. § 10(a).

2. NCRUAA

The NCRUAA similarly provides as follows:

*(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:*

*(1) The award was procured by corruption, fraud, or other undue means;*

*(2) There was:*

*a. Evident partiality by an arbitrator appointed as a neutral arbitrator;*

*b. Corruption by an arbitrator; or*

*c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;*

*(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;*

*(4) An arbitrator exceeded the arbitrator's powers;*

*(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or*

*(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required by G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.*

N.C. Gen. Stat. § 1-569.23(a).

**B. Common Law Grounds**

In addition to the above-referenced statutes, there are common law grounds on which to vacate an arbitration award.

Under applicable federal law, "[t]he permissible common law grounds for vacating . . . an [arbitration] award . . . include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law." *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006). The Fourth Circuit has expressly found that the "manifest disregard of the law" standard survives the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) ("we find that manifest disregard did survive *Hall Street* as an independent ground for vacatur"). "A court can [also] vacate an arbitration award if it violates well-settled and prevailing public policy." *Van Pelt v. UBS Fin. Serv., Inc.*, 2007 WL 2997598, at *6 (W.D.N.C. Oct. 12, 2007) (internal quotation marks omitted).

By means of comparison, North Carolina state courts previously applied the manifest disregard of the law standard, *see Pinnacle Grp., Inc. v. Shrader*, 105 N.C. App. 168, 171, 412 S.E.2d 117, 120 (1992), but its continuing vitality is unclear, *see In re Fifth Third Bank, Nat'l Ass'n*, 216 N.C. App. 482, 487–88, 716 S.E.2d 850, 854 (2011) (noting that "'manifest disregard of the law' may no longer be a valid basis for vacating an

arbitration award" because "the United States Supreme Court has not decided whether [that standard] survives the decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 . . . (2008)" (internal quotation marks omitted)).

No other common law grounds for vacatur have developed in North Carolina state courts. *See generally Parrett v. Gore*, 2005 WL 1805037, at *3 (N.C. Ct. App. Aug. 2, 2005) (unpublished disposition) ("Unless an objective showing can be made that one of the statutory grounds exists for vacating the arbitration award, the court must confirm the award."); *Carteret Cnty. v. U. Contractors of Kinston, Inc.*, 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995) ("If the dispute is within the scope of the arbitration agreement, then the court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists."). Therefore, North Carolina state law is not more favorable than federal law and, indeed, appears to be less favorable.

## V. ANALYSIS OF APPLICABLE LEGAL STANDARDS

Several of these bases for vacatur are as clear as they are uncommonly asserted. For instance, corruption and fraud, along with partiality and misconduct of an arbitrator, are generally easy to identify and simultaneously not a common basis for seeking vacatur of an arbitration award. The same can be said for the absence of an agreement to arbitrate or improper notice of initiation of an arbitration. However, the more common bases for seeking vacatur – including exceeding arbitral powers, manifest disregard of the law, failure of an award to draw its essence from a contract, violation of public policy, and other misbehavior – are less clear cut and, as such, frequently form the basis on which a party might seek to have an arbitration award vacated. What do these abstract standards mean in practice?

### A. Exceeding Arbitral Powers

"In evaluating whether an arbitrator has exceeded his power, . . . any doubts concerning the scope of arbitrable issues as well as any doubts concerning the scope of the arbitrators' remedial authority are to be resolved in favor of the arbitrators' authority as a matter of federal law and policy." *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 531 (4th Cir. 2007) (internal quotation marks omitted); *accord Trilogy Capital Partners, LLC v. Killian*, 2015 WL 7125010, at *5 (NCBC Nov. 13, 2015). "[T]he record must objectively disclose that the arbitrators did exceed their authority in some respect." *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., Inc.*, 85 N.C. App. 684, 689, 355 S.E.2d 815, 818 (1987). When an arbitrator "strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice, . . . an arbitration decision may be vacated . . . on the ground that the arbitrator exceeded his powers." *Sonic Auto., Inc. v. Price*, 2011 WL 3564884, at *11 (W.D.N.C. Aug. 12, 2011) (internal quotation marks and alterations omitted); *see In re Fifth Third*

*Bank, Nat'l Ass'n*, 216 N.C. App. at 488, 716 S.E.2d at 854–55 (same). However, the mere misconstruction of a contract or agreement is insufficient. *See Miller v. Prudential Bache Sec., Inc.*, 884 F.2d 128, 130 (4th Cir. 1989). The "sole question" for the court in evaluating whether an arbitrator exceeded his powers is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013).

**B. Manifest Disregard of the Law**

"In evaluating whether an arbitrator has manifestly disregarded the law, . . . a court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award." *Three S Del., Inc.*, 492 F.3d at 529 (internal quotation marks omitted). Indeed, the standard "requires more than showing that the arbitrators misconstrued the law." *Blackwell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 22 F. Supp. 3d 565, 572 (W.D.N.C. 2014) (internal quotation marks omitted). "Rather, [a party] is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision." *Three S Del., Inc.*, 492 F.3d at 529 (internal quotation marks omitted). "In order to overturn an arbitration award on the basis of the arbitrator's manifest disregard of the law, the party pursuing that effort must sustain a heavy burden, and is obliged to show that the arbitrator knowingly ignored applicable law when rendering his decision." *Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 351–52 (4th Cir. 2008). An arbitrator also acts in manifest disregard of the law if he "disregards or modifies unambiguous contract provisions." *Patten,* 441 F.3d at 235 (internal quotation marks and alterations omitted).

The Fourth Circuit applies the following two part test: an arbitrator does not act in manifest disregard of the law unless "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle." *Brand*, 671 F.3d at 483 (internal quotation marks omitted).

**C. Failure to Draw Essence from Contract**

"[A]n arbitration award does not fail to draw its essence from the agreement merely because the court concludes that an arbitrator has misread the contract." *Patten,* 441 F.3d at 235 (internal quotation marks omitted). Rather, "[a]n arbitration award fails to draw its essence from the agreement only when the result is not rationally inferable from the contract." *Id.* (internal quotation marks omitted). "Such a circumstance can arise when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong." *Three S. Del., Inc.*, 492 F.3d at 528.

**D. Violating Public Policy**

"A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in common law, that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987). "That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *Id.*

**E. Other Misbehavior**

The "other misbehavior" language appearing in 9 U.S.C. §10(a)(3) has been described as a "catch-all" phrase, *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 74 (2d Cir. 2011), but it is not otherwise defined or discussed in relevant case law.

**VI. STANDARD OF REVIEW**

Although the above standards provide various arguments you might assert as a basis for vacating the arbitration award, the arguments are evaluated using the most deferential standard of review possible. Generally speaking, so long as the arbitrator did his or her job, a court on review will not disturb the arbitration award.

"[J]udicial review of an arbitration award in federal court is severely circumscribed." *Brand*, 671 F.3d at 478 (internal quotation marks omitted). "[I]n fact, it is among the narrowest known to the law." *United States Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (internal quotation marks omitted). "Vacatur of an arbitration award is only proper when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice." *EST, LLC*, 2011 WL 2118984, at *2 (internal quotation marks omitted). "A court, therefore, may not disturb the arbitrators' judgment, even if convinced that 'serious error' infected the panel's award." *Id.* (internal quotation marks omitted). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious errors does not suffice to overturn his decision." *United States Postal Workers,* 204 F.3d at 527 (internal quotation marks omitted). "A court sits to determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it." *Brand,* 671 F.3d at 478 (internal quotation marks omitted).

Review by a North Carolina state court is virtually identical. There, "[j]udicial review of an arbitration award is severely limited in order to encourage the use of arbitration

and in turn avoid expensive and lengthy litigation." *First Union Sec., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005). The "foundation of the arbitration process is that by mutual consent the parties have entered into an abbreviated adjudicative procedure." *Turner v. Nicholson Props., Inc.*, 80 N.C. App. 208, 211, 341 S.E.2d 42, 45 (1986) (internal quotation marks omitted). "[T]o allow fishing expeditions to search for ways to invalidate the award would tend to negate this policy." *Id.* (internal quotation marks omitted). Indeed, "an arbitration award is ordinarily presumed to be valid," *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 572, 654 S.E.2d 47, 51 (2007), and the general rule is that "errors of law or fact, or an erroneous decision of matters submitted to arbitration, are insufficient to invalidate an award fairly and honestly made." *Turner*, 80 N.C. App. at 212, 341 S.E.2d at 45 (internal quotation marks omitted).

**VII. OBLIGATION TO PAY UNFAVORABLE DAMAGE AWARD, TIMEFRAME, AND GENERAL PROCEDURE**

Given the likelihood of success for a motion to vacate a AAA arbitration award, the one silver lining for your client may be that an arbitral award does not ripen into a legally enforceable obligation to pay the winning party unless and until a court confirms the arbitration award and enters it as a judgment. Given the applicable procedure for moving to confirm an award (and, relatedly, the procedure for a motion to vacate) and the associated briefing potentially involved, a large amount of time generally elapses between the time an arbitration award is issued and the time a court confirms an award and enters it as a judgment.

Where "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . then at any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award." 9 U.S.C. § 9. It should be noted, however, that despite this clear statutory language setting forth a one year limitations period for confirmation, the Fourth Circuit has concluded that "§ 9 must be interpreted . . . as a permissive provision which does not bar the confirmation of an award beyond a one-year period." *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 156 (4th Cir. 1993). So, it remains unclear under Fourth Circuit law how long a prevailing party might have to file a motion to confirm.

North Carolina's counterpart to § 9 of the FAA – N.C. Gen. Stat. § 1-569.22 – does not contain a one year statutory limitation on filing a motion to confirm. *See* N.C. Gen. Stat. § 1-569.22, uniform law cmt. No. 2 ("The Drafting Committee considered but rejected the language in FAA Section 9 that limits a motion to confirm an award to a one-year period of time. The consensus of the Drafting Committee was that the general statute of limitations in a State for the filing and execution on a judgment should apply.")

Unless and until a court confirms the award and enters it as a judgment, the losing party has no legally enforceable obligation to pay a damage award. *See Donel Corp. v. Kosher Overseers Ass'n of Am., Inc.*, 2001 WL 1135625, at *1 (S.D.N.Y. Sept. 26, 2001) ("The arbitration award . . . was therefore not enforceable until it was confirmed by this Court."); *Consol. Rail Corp. v. Del. & Hudson Ry. Co.*, 867 F. Supp. 25, 31 (D.D.C. 1994) (noting that "awards that are confirmed within one year have the effect of a court judgment and awards not confirmed are unenforceable under the FAA"). So, before any damage award ripens into a court judgment obligating a losing party to pay, the prevailing party would have to file a motion to confirm, the losing party is customarily entitled to file a response in opposition (and perhaps a motion to vacate), the prevailing party would then customarily be entitled to file a reply brief, and the court would subsequently rule.

Motions to vacate and motions to confirm are routinely filed and addressed simultaneously by one court in the same judicial order. In some circumstances, a motion to confirm is filed first, followed by an opposition to the motion to confirm and a motion to vacate. In other circumstances, a motion to vacate is filed first, followed by an opposition to the motion to vacate and a motion to confirm. Thus, the timing of who files which motion first is generally immaterial, and arguments asserted in support of a motion to vacate can be asserted in opposition to a motion to confirm, and vice versa.

In terms of timing for motions to vacate, both the FAA and the NCRUAA provide that an aggrieved party has ninety (90) days within which to file a motion to vacate an arbitration award. *See* 9 U.S.C. § 12 ("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."); N.C. Gen. Stat. §1-569.23(b) ("A motion under this section shall be filed within 90 days after the moving party receives notice of the award . . .").

**VIII. FURTHER APPEAL IF NECESSARY**

Even if your motion to vacate is denied by a trial court, you can continue to challenge the arbitration award. Both the FAA and the NCRUAA provide that an appeal may be taken from an order denying a motion to vacate. *See* 9 U.S.C. § 16(a)(1); N.C. Gen. Stat. § 1-569.28(a); *see generally Brand,* 671 F.3d at 478 (addressing "appeal from a district court's denial of vacatur"). The appellate court would review the trial court's determinations of law *de novo*, *see Patten*, 441 F.3d at 234; *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (2000), and would review the district court's factual findings for clear error, *see Brand*, 671 F.3d at 478; *Carpenter*, 139 N.C. App. at 750, 534 S.E.2d at 645.

**IX. CONCLUSION**

In sum, an unfavorable arbitration award is not the end game. A path exists through

which you can seek vacatur of the award. While motions to vacate in some circumstances are granted, the likelihood of success is low. By understanding this law and its inherent limitations, you can better advise your client about how to proceed.

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