AM I WELCOME HERE? GETTING INTO FEDERAL COURT TO CONFIRM OR VACATE AN ARBITRATION AWARD

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I. INTRODUCTION

To enter a federal district court, you must knock on the door of the federal courthouse and show a jurisdictional ticket.[1] If the judge validates your ticket, you will be welcomed into federal court. On its face, this seems like a straightforward process. However, consider the following example: John and Mike enter an agreement that contains an arbitration clause. When the relationship deteriorates, John chooses to compel arbitration and seeks $100,000 from Mike. After the arbitration, John is awarded $70,000. John sues in federal court to confirm the arbitration award. Assuming John is seeking to establish diversity jurisdiction, John will have to satisfy the $75,000 amount in controversy requirement.[2] Is the amount in controversy satisfied because John originally sought $100,000, or is $70,000 the amount in controversy in this dispute?

The obvious answer is to look at how courts have handled similar disputes. Unfortunately, the answer will change depending on which circuit hears the case.[3] Moreover, some circuits have not provided a clear answer to this question.[4] In fact, some courts within the same circuit reach different

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[1] *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . .").

[2] 28 U.S.C. § 1332 (2012).

[3] U-Save Auto Rental of Am., Inc. v. Furlo, 608 F. Supp. 2d 718, 720–21 (S.D. Miss. 2009) ("Among the circuits, there is a split of authority as to the basis for determining the amount in controversy in a suit to confirm or vacate an arbitration award.").

[4] *Id.* at 721.

results.[5] Federal courts need consistency in determining jurisdiction of disputes.

In these disputes, some courts look to the arbitration award to determine the amount in controversy.[6] Other courts look to the amount sought in the underlying arbitration.[7] Finally, some courts apply a hybrid of the other two approaches and look to the amount of the arbitration award unless remand is requested, in which case the court looks to the amount sought in the underlying arbitration.[8] The Supreme Court needs to resolve this circuit split and give individuals an answer on whether they are welcome into federal court.

This Comment focuses on determining the most appropriate method for the Supreme Court to use in determining the amount in controversy in a suit brought following an arbitration award under the Federal Arbitration Act (FAA). Part II of the Comment introduces the FAA and why it is often necessary to establish the amount in controversy in order for a federal court to have jurisdiction. Part III analyzes the development of the three different approaches taken by various circuits. Part IV illustrates the flaws and deficiencies of each approach. Part IV also explores the principles of arbitration and suggests that the remand approach is the most appropriate approach to be taken by the Supreme Court.

II. THE FEDERAL ARBITRATION ACT AND THE NEED TO ESTABLISH SUBJECT MATTER JURISDICTION

The FAA[9] is an act of Congress that "establish[es] and regulat[es] the duty to honor an agreement to arbitrate."[10] While the FAA regulates arbitration, the FAA does not serve as independent grant of federal question jurisdiction.[11] Thus, a party must establish that the court has some

[5] *See, e.g.*, Mitchell v. Ainbinder, 214 F. App'x 565, 566 (6th Cir. 2007); Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1325 (11th Cir. 2005); *see also infra* text accompanying notes 92–95.

[6] *See* Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997).

[7] Karsner v. Lothian, 532 F.3d 876, 884 (D.C. Cir. 2008).

[8] Sirotzky v. N.Y. Stock Exch., 347 F.3d 985, 989 (7th Cir. 2003), *overruled on other grounds by* Martin v. Franklin Capital Corp., 546 U.S. 132 (2005).

[9] 9 U.S.C. §§ 1–14 (2012).

[10] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

[11] *Id.*

independent form of subject matter jurisdiction in order to get the case into federal court.[12]

This section first explores the FAA and how suits to confirm or vacate arbitration awards arise. Next, the section provides a brief discussion of the need to establish diversity jurisdiction in these cases and the process by which diversity jurisdiction is established.

A. Litigation Involving the Federal Arbitration Act

The FAA primarily allows for two different cases to be brought before the court. First, the FAA provides for actions to compel arbitration.[13] The statute states that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . ."[14] The statute also provides that the district court must have jurisdiction under Title 28 for the district court to hear the case.[15] While this Comment focuses on post-award cases, it is instructive to note that in an order to compel arbitration, jurisdiction must be satisfied by Title 28 rather than an independent grant of jurisdiction.

Second, the FAA allows a post-award case.[16] In a post-award case, the parties may bring an award to court to have it confirmed and have the court grant an order to enforce the award.[17] The parties may also file a claim to have the court vacate an arbitration award.[18] The FAA provides certain conditions that must be met in order for the court to vacate an award.[19] The FAA also provides that "[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."[20] Thus, parties that sue to vacate an arbitration award can request that the award simply be vacated, or they can request that the award be vacated and the case be

[12] Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 326 (2007).

[13] 9 U.S.C. § 4 (2012).

[14] *Id.*

[15] *Id.*

[16] *Id.* § 9.

[17] *Id.*

[18] *Id.* § 10.

[19] *Id.*

[20] *Id.*

remanded so that arbitration is reopened. Finally, the FAA provides that a court may modify an arbitration award in a limited number of circumstances.[21] While the FAA provides that jurisdiction in an action to compel arbitration must be established under Title 28, the FAA is silent as to how jurisdiction is established in post-award suits.

B. The Need to Establish Subject Matter Jurisdiction

Despite the silence of the FAA regarding jurisdiction in post-award suits, the FAA is not an independent grant of jurisdiction.[22] Thus, parties must establish subject matter jurisdiction through a means provided in Title 28.[23] One way to establish subject matter jurisdiction, and the way this Comment explores, is through diversity jurisdiction.[24]

Congress provides specific rules of citizenship diversity that must exist between the parties in the suit in a diversity case.[25] While diversity creates a host of issues, this Comment focuses on cases that satisfy the diversity element. Diversity jurisdiction also requires that "the matter in controversy exceeds the sum or value of $75,000."[26] The amount in controversy is determined when suit is filed.[27] But the statute provides no guidance on how the amount in controversy is calculated. In the context of post-arbitration award suits, courts take a variety of approaches for determining the amount in controversy.

III. APPROACHES TAKEN BY FEDERAL COURTS TO DETERMINE THE AMOUNT IN CONTROVERSY

A circuit split currently exists regarding the appropriate method of determining the amount in controversy in a suit to confirm or vacate an arbitration award under the FAA.[28] Three primary approaches have

[21] *Id.* § 11.

[22] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

[23] Vaden v. Discover Bank, 556 U.S. 49, 52 (2009) (holding that a federal district court can enter suits under the FAA if the court would have jurisdiction outside of the arbitration agreement); *see also* 28 U.S.C. §§ 1331–1332 (2012) (providing district courts with subject matter jurisdiction to hear cases).

[24] 28 U.S.C. § 1332.

[25] *Id.*

[26] *Id.*

[27] Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 570 (2004).

[28] U-Save Auto Rental of Am., Inc. v. Furlo, 608 F. Supp. 2d 718, 720–21 (S.D. Miss. 2009).

surfaced: the award approach, the demand approach, and the remand approach.[29] While other approaches have been suggested, district courts have historically chosen to follow one of these three approaches.[30]

This section details the development of each approach. The section explores the rationale for each approach through a detailed look at why various courts choose to follow one approach rather than the others. By exploring the background and rationale of each approach, this section provides light into the primary benefits and detriments of each approach.

A. Development of the Award Approach

The award approach is historically the most common approach taken by courts.[31] The award approach simply looks at the arbitrator's award to determine the amount in controversy.[32] If the arbitrator awards an amount greater than $75,000, then the amount in controversy requirement is satisfied for purposes of establishing diversity jurisdiction.[33] Conversely, if the arbitrator awards an amount equal to or less than $75,000, diversity jurisdiction cannot exist because the amount in controversy requirement is not met.[34] Under the award approach, the amount sought in the arbitration is irrelevant for establishing jurisdiction.[35]

The Eleventh Circuit adopted the award approach in *Baltin v. Alaron Trading Corp*.[36] In *Baltin*, Alaron sought nearly $70,000 from arbitration.[37] The arbitration tribunal awarded Alaron just over $36,000.[38] The Baltins sued in federal district court in the Southern District of Florida to vacate,

[29] Christopher L. Frost, *Welcome to the Jungle: Rethinking the Amount in Controversy in a Petition to Vacate an Arbitration Award Under the Federal Arbitration Act*, 32 PEPP. L. REV. 227, 237 (2005).

[30] *Id.*

[31] *Id.* at 238.

[32] Karsner v. Lothian, 532 F.3d 876, 882 (D.C. Cir. 2008).

[33] *See id.*; *see also* 28 U.S.C. § 1332 (2012).

[34] *See* Pershing LLC v. Kiebach, 101 F. Supp. 3d 568, 574 (E.D. La. 2015) (holding that the court would lack jurisdiction under the award approach when the award was for $10,000), *aff'd*, 819 F.3d 179 (5th Cir. 2016).

[35] *Karsner*, 532 F.3d at 882 ("Under the award approach, the amount in controversy is determined by the amount of the underlying arbitration award regardless of the amount sought.").

[36] 128 F.3d 1466, 1472 (11th Cir. 1997).

[37] *Id.* at 1468.

[38] *Id.*

modify, or correct the arbitration award.[39] On appeal, the Eleventh Circuit determined that the district court did not have diversity jurisdiction over the case.[40] At the time of the case, the amount in controversy requirement was only $50,000.[41] Thus, if the Eleventh Circuit applied the demand approach, the amount in controversy would have been satisfied.[42] Rather, the Eleventh Circuit reasoned that the amount in controversy was not satisfied because the arbitration tribunal awarded just over $36,000.[43] The court held that there was a legal certainty that the amount in controversy was less than $50,000.[44]

Similarly, the Sixth Circuit adopted the award approach in *Ford v. Hamilton Investment*.[45] In *Ford*, Ford wanted an arbitration award of just over $30,000 set aside.[46] Ford sued in the Eastern District of Michigan to set aside the award of arbitration under the FAA.[47] In an effort to establish jurisdiction, the parties suggested that the amount in controversy was satisfied because Ford claimed more than $50,000 against Hamilton Investments.[48] However, the Sixth Circuit held that because the complaint sought to set aside the award of $30,000, the amount in controversy was not satisfied and the district court did not have diversity jurisdiction.[49]

Based on these cases, the rationale of choosing the award approach seems to be grounded in what the complaint is seeking to accomplish. When a complaint seeks to set aside an arbitration award or confirm an arbitration award, the amount of the arbitration award controls. On a

[39] *Id.*

[40] *Id.* at 1472.

[41] Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996) (current version at 28 U.S.C. § 1332 (2012)).

[42] *See* Karsner v. Lothian, 532 F.3d 876, 882 (D.C. Cir. 2008) ("Pursuant to the demand approach, the amount in controversy is the amount sought in the underlying arbitration . . . ."). In *Baltin*, the amount sought in the underlying arbitration was $70,000, which was greater than the required amount in controversy at the time. *See Baltin*, 128 F.3d at 1468.

[43] *Baltin*, 128 F.3d at 1472.

[44] *Id.*

[45] 29 F.3d 255, 260 (6th Cir. 1994) (holding that when the arbitration award was for less than the required amount in controversy, diversity jurisdiction does not exist).

[46] *Id.* at 257.

[47] *Id.*

[48] *See id.* at 259–260. The amount in controversy at the time of the dispute was only $50,000. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996) (current version at 28 U.S.C. § 1332 (2012)).

[49] *Ford*, 29 F.3d at 260.

fundamental level, this is the logical approach. In suits to vacate an arbitration award, the party suing wants to avoid paying the amount of arbitration, so the amount of arbitration is the amount in controversy. In suits to confirm an arbitration award, the party suing wants to confirm that the amount of the arbitration award is correct, so the amount of the award is necessarily the amount in controversy. This rationale has likely led several district courts across the United States to follow the award approach.[50] However, the FAA provides that a court can do more than simply confirm or vacate an arbitration award.[51] Parties can sue to modify an arbitration award or reopen arbitration.[52] These types of scenarios led to the development of the other approaches.[53]

B. Development of the Demand Approach

While the award approach remains the most prominent approach taken by courts, the demand approach continues to grow in popularity.[54] Under the demand approach, a federal court looks to the amount sought in the underlying arbitration to determine the amount in controversy.[55] The amount of the award is irrelevant. Proponents of the demand approach argue that because the amount sought in arbitration is the basis of the underlying dispute, the amount demanded is the appropriate measure of the amount in controversy.[56]

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[50] *See, e.g.*, Evergreen Forest Prods. of Ga., LLC v. Bank of Am., N.A., 262 F. Supp. 2d 1297, 1308 (M.D. Ala. 2003) ("In the end, the Plaintiff requests that this court vacate an arbitration award that exceeds $75,000.00, therefore the amount-in-controversy requirement is met in this case."); Mannesmann Dematic Corp. v. Phillips, Getschow, Co., No. 3:00-CV-2324-G, 2001 U.S. Dist. LEXIS 2885, at *6 (N.D. Tex. Mar. 16, 2001) ("Under the authority of these cases, Mannesmann's motion to confirm the arbitration award must be dismissed because the amount in controversy—the actual net attorneys' fees award of $64,035—is less than $75,000.").

[51] 9 U.S.C. §§ 10(b), 11.

[52] *Id.*

[53] *See* Karsner v. Lothian, 532 F.3d 876, 882 (D.C. Cir. 2008) (suggesting that courts that apply the award approach would apply a different approach if the parties were seeking to reopen arbitration).

[54] *See id.* at 884; Theis Research, Inc. v. Brown & Bain, 400 F.3d 659, 662 (9th Cir. 2005); Pershing LLC v. Kiebach, 101 F. Supp. 3d 568, 574 (E.D. La. 2015), *aff'd*, 819 F.3d 179 (5th Cir. 2016).

[55] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 171 F. App'x 545, 546 (9th Cir. 2006).

[56] *See Pershing LLC*, 101 F. Supp. 3d at 573 (holding that a suit to confirm or vacate an award is just an extension of the original dispute).

The Ninth Circuit adopted the demand approach in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*.[57] In *Merrill Lynch*, the arbitration panel awarded Merrill Lynch exactly $75,000.[58] Moore appealed the case to the Ninth Circuit contending that the district court did not have jurisdiction to confirm the arbitration award awarded to Merrill Lynch.[59] However, because Moore made counterclaims during arbitration for $2 million, the court held that the amount in controversy requirement was satisfied.[60] The court reasoned that the amount in controversy is the amount of the underlying litigation.[61] Because the underlying litigation included claims for amounts that were greater than $75,000, the amount in controversy was satisfied for diversity jurisdiction purposes.[62]

While the Ninth Circuit currently follows the demand approach, the Circuit historically struggled to apply the approach.[63] In 1934, the Ninth Circuit ruled that a district court had jurisdiction when it vacated a zero-dollar arbitration award in *American Guaranty Co. v. Caldwell*.[64] Notably, *American Guaranty Co.* involved arbitration that initially resulted in an arbitration award of $32,500.[65] The district court, which clearly had jurisdiction in the original proceeding,[66] vacated the arbitration award and required that the arbitration be reopened.[67]

[57] 171 F. App'x at 546 ("[T]he amount at stake in the underlying litigation, not the amount of the arbitration award, is the amount in controversy for the purposes of diversity jurisdiction." (quoting *Theis Research, Inc.*, 400 F.3d at 662)).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Joshua W. Christie, Comment, *Where Can I Go from Here? Determining the Amount in Controversy for Diversity Jurisdiction in Post-Award Cases Under the Federal Arbitration Act*, 13 LOY. J. PUB. INT. L. 189, 206 (2011).

[64] *See* 72 F.2d 209, 211 (9th Cir. 1934) ("It is the amount in controversy which determines jurisdiction, not the amount of the award.").

[65] *Id.*

[66] *See* Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (1911) (current version at 28 U.S.C. § 1332 (2012)) ("[W]here the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars . . . .").

[67] *American Guaranty Co.*, 72 F.2d at 210.

In 2004, the Ninth Circuit ruled almost directly contrary to *American Guaranty Co.* in *Luong v. Circuit City Stores, Inc*.[68] The court distinguished *Luong* from *American Guaranty Co.* by noting that the district court in *American Guaranty Co.* had jurisdiction during the original proceeding.[69] In *Luong*, the original proceeding involved a zero-dollar arbitration award, and thus jurisdiction never existed according to the court.[70] While the *Luong* opinion was withdrawn,[71] the substituted opinion did not address the amount in controversy issue.[72] Coming full circle, the Ninth Circuit reverted back to the demand approach in 2005 in *Theis Research, Inc. v. Brown & Bain*.[73] The Ninth Circuit held that jurisdiction existed in a case involving a zero-dollar arbitration award because the damages sought were over $200 million.[74]

Along with the fluctuating Ninth Circuit, the demand approach has also been adopted by the DC Circuit[75] and the First Circuit.[76] The DC Circuit rejected the award approach as inconsistent.[77] The court found the demand approach to be the most sensible approach because it permits the district court to have jurisdiction had the case been originally litigated rather than arbitrated.[78] Similarly, the First Circuit reasoned that following the award approach could lead to a result where jurisdiction would be proper if the

[68] 356 F.3d 1188 (*Luong I*), 1194 (9th Cir.) ("Therefore, we conclude that the better rule is that the matter in controversy on a petition to vacate an arbitration award should be measured by the amount of the award."), *substituted opinion on other grounds*, 368 F.3d 1109 (9th Cir. 2004).

[69] *Id.* at 1192.

[70] *See id.* at 1194.

[71] Luong v. Circuit City Stores, Inc. (*Luong II*), 368 F.3d 1113, 1113 (9th Cir. 2004).

[72] *See generally* Luong v. Circuit City Stores, Inc. (*Luong III*), 368 F.3d 1109 (9th Cir. 2004).

[73] 386 F.3d 1180, 1184 (9th Cir. 2004) ("We are satisfied that the amount in controversy is the amount Theis sought to recover by its complaint.").

[74] *Id.*

[75] Karsner v. Lothian, 532 F.3d 876, 884 (D.C. Cir. 2008).

[76] Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000) ("[W]e think the better rule is to measure the amount in controversy by the amount at stake in the entire arbitration.").

[77] *See Karsner*, 532 F.3d at 883 ("The award approach would apply two different jurisdictional tests depending on the action the petitioner seeks, resulting in jurisdiction over a petition to compel arbitration of a claim but not necessarily over a petition to confirm/vacate an arbitration award arising from the same claim.").

[78] *Id.* at 884. (The district court would have had jurisdiction over a $100,000 claim by the plaintiffs if the claim would have been litigated. Because jurisdiction would have existed if the claim was litigated, the court reasoned that jurisdiction should exist even if the arbitration resulted in an award for less than the jurisdictional requirement.).

case was litigated, while a district court would not have jurisdiction over the same dispute in the post-award context if the award was for less than the jurisdictional requirement.[79]

Most recently, the Fifth Circuit adopted the demand approach in *Pershing, L.L.C. v. Kiebach*.[80] Notably, the court in *Pershing* only considered the award approach and the demand approach.[81] Despite a $10,000 arbitration award, the court held that the amount in controversy was the $80,000,000 initially demanded.[82] The court reasoned that while only $10,000 was at stake in the proceeding, the confirmation of the arbitration award is just the last stage of one dispute which began with the $80,000,000 demand.[83] In other words, the court was inclined to adopt the demand approach because the court would have had jurisdiction over the $80,000,000 claim if that claim was litigated rather than arbitrated to begin with.

Based on the development of the demand approach, two primary rationales emerge as to why a court should follow the demand approach. First, the demand approach allows for consistency in terms of a district court's ability to compel arbitration and a district court's ability to enforce arbitration. A district court would have jurisdiction to compel arbitration in a case where the plaintiff was seeking over $75,000. However, under the award approach, the district court would not have jurisdiction to enforce the arbitration award in the same dispute if the award was for less than $75,000. Second, the demand approach allows jurisdiction to exist if jurisdiction would have existed if the case was litigated rather than arbitrated.

C. Development of the Remand Approach

Viewed as somewhat of a hybrid between the first two approaches, the remand approach acts as a middle ground for determining the amount in controversy. Under the remand approach, the district court looks at the amount sought in the underlying arbitration, but only when the request to vacate includes a request for remand.[84] In other words, when the plaintiff

[79] *Bull HN Info. Sys.*, 229 F.3d at 329.

[80] 819 F.3d 179, 181 (5th Cir. 2016), *aff'g* 101 F. Supp. 3d 568 (E.D. La. 2015).

[81] *Id.* at 182.

[82] *Id.*

[83] *Id.*

[84] Sirotzky v. N.Y. Stock Exch., 347 F.3d 985, 989 (7th Cir. 2003), *overruled on other grounds by* Martin v. Franklin Capital Corp., 546 U.S. 132 (2005).

wants to reopen arbitration, the court looks to the amount sought in the underlying arbitration. If the plaintiff does not want to reopen arbitration but rather wants to confirm or vacate an arbitration award, then the amount of the arbitration award is used for jurisdiction purposes.[85]

One of the primary proponents of the remand approach is the Seventh Circuit.[86] In *Sirotzky v. N.Y. Stock Exchange*, the Seventh Circuit provided the rationale for using the remand approach.[87] If the plaintiff wanted to reopen arbitration, the amount in controversy of the new arbitration would be the same amount that the plaintiff sought in the original arbitration.[88] This rationale is similar to the rationale used by courts that have adopted the demand approach. Rather than considering the arbitration award, the court looks to the amount of the underlying dispute. By looking to the amount of the underlying dispute, the parties are not divested of jurisdiction because they chose to enter into arbitration.

While the Sixth Circuit adopted the award approach in *Ford*, language from the case indicates that the court may have been attempting to adopt the remand approach.[89] In providing the rationale for only looking at the arbitration award for determining if the amount in controversy requirement was satisfied, the court stated that Ford never asked the district court to reopen the arbitration.[90] While the court did not state that the amount sought in the arbitration would have been the appropriate measure for determining the amount in controversy if Ford was seeking to reopen litigation, the court at least hinted that the issue would have changed depending on the relief sought by the plaintiff.[91]

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[85] *See* Choice Hotels Int'l, Inc. v. Felizardo, 278 F. Supp. 2d 590, 593 (D. Md. 2003) (noting that while some courts normally look to the amount of the award, they will look to the amount sought if a remand is sought in addition to vacating the award).

[86] *See Sirotzky*, 347 F.3d at 989.

[87] *Id.* at 988–89.

[88] *Id.* at 988. (In support of the remand approach, the court stated that the arbitrators did not rule in the original proceeding that "her damages would not exceed the $75,000 minimum amount in controversy required in a diversity case." Thus, "the amount in controversy . . . would be the $242,000 that Sirotzky had sought originally.")

[89] Ford v. Hamilton Invs., Inc., 29 F.3d 255, 260 (6th Cir. 1994) ("[H]e never asked the district court to order that the arbitrators reopen his claim against Hamilton Investments; all he sought from the district court was the vacation of an award that fell short of the jurisdictional amount by almost $20,000.").

[90] *Id.*

[91] *See id.*

More recently, the Sixth Circuit has actually applied the remand approach to a case in which the plaintiff was seeking to reopen arbitration.[92] The court very plainly stated that when the plaintiff is seeking to reopen arbitration, the amount in controversy is measured by the amount at stake in the arbitration.[93] Thus, while the Sixth Circuit has formally adopted the award approach, it has applied the remand approach.

Similarly, even though the Eleventh Circuit adopted the award approach, an Eleventh Circuit court later applied the remand approach.[94] In *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, the court held that because Peebles was seeking to reopen arbitration, the appropriate amount in controversy was his demand for damages.[95] Thus, while the court did not expressly reject the award approach in favor of the remand approach, the court set forth a rule that is identical to the remand approach: when a plaintiff seeks to reopen arbitration, the original demand, rather than the arbitration award, is the amount in controversy.

While the remand approach has not been formally adopted by multiple circuits, courts are applying the remand approach even if they do not acknowledge it. As a hybrid between the two approaches, the remand approach fills in certain gaps of the award approach by looking to the amount sought in the underlying arbitration in certain cases.

IV. THE CASE FOR THE REMAND APPROACH

Regardless of which approach the Supreme Court chooses to follow, the various lower courts need to be given guidelines to follow. Currently, the circuits lack any consistency.[96] Confusion even exists within individual circuits.[97] For example, some circuits have adopted one approach but have applied a different.[98] In a unified court system such as the federal court system, there is a need for unified rules on how a party can get into court.

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[92] Mitchell v. Ainbinder, 214 F. App'x 565, 566 (6th Cir. 2007).

[93] *Id.*

[94] Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1325 (11th Cir. 2005).

[95] *Id.*

[96] U-Save Auto Rental of Am., Inc. v. Furlo, 608 F. Supp. 2d 718, 720–21 (S.D. Miss. 2009).

[97] *See, e.g.*, *Mitchell*, 214 F. App'x at 566; *Peebles*, 431 F.3d at 1325; *see also supra* text accompanying notes 92–95.

[98] *See, e.g.*, *Mitchell*, 214 F. App'x at 566; *Peebles*, 431 F.3d at 1325; *see also supra* text accompanying notes 92–95.

Moreover, courts in unresolved circuits will have trouble following the rationale set forth by other courts of appeals. Circuits applying either the award or demand approach have struggled with their weaknesses in certain situations.[99] Thus, rather than trying to apply a one size fits all approach, the Supreme Court should adopt the most sensible approach—the remand approach.

This section highlights the major flaws of the two dominant approaches. Because the approaches do not allow for flexibility in determining the amount in controversy, situations inevitably arise in which a bright-line rule leads to an unfair or illogical result. This section concludes by illustrating how the remand approach cures the defects of the other two approaches, while also providing enough of a rule that can be understood and followed by courts applying it.

A. Flaws with the Award Approach

The award approach is a common sense approach at a very basic level. In a suit to confirm or vacate an arbitration award, the fundamental inquiry is whether the amount of the arbitration award is correct.[100] Thus, it logically follows that a court should base the amount in controversy of the suit on what is actually at controversy in the suit—the arbitration award. However, due to the simple nature of the approach, several flaws emerge in its application.

First, the award approach has the potential to lead to unnecessary litigation.[101] Once a court compels arbitration, the court retains jurisdiction to resolve any disputes that stem from that order, including the enforcement of the award.[102] It is well established that in a motion to compel arbitration, the amount in controversy is the amount at stake in the underlying

[99] *See supra* text accompanying notes 57–74 (the fluctuating Ninth Circuit provides an example of a circuit struggling to consistently apply either the demand or award approach).

[100] *See* Ford v. Hamilton Invs., Inc., 29 F.3d 255, 260 (6th Cir. 1994) (holding that the amount in controversy in a suit to vacate an arbitration award is the amount of the award because the parties were disputing whether the amount of the award was correct); *see also* Curbelo v. Hita, EP-09-CV-133-PRM, 2009 U.S. Dist. LEXIS 63496, at *12 (W.D. Tex. July 22, 2009) (reasoning that in a case to confirm an arbitration award, the disputed amount is the award sought to be confirmed).

[101] Pershing LLC v. Kiebach, 101 F. Supp. 3d 568, 574 (E.D. La. 2015), *aff'd*, 819 F.3d 179 (5th Cir. 2016).

[102] U-Save Auto Rental of Am. Inc. v. Furlo, 368 F. App'x 601, 602 (5th Cir. 2010) (per curiam).

arbitration.[103] Thus, a party may unnecessarily bring litigation to compel arbitration in order to latch on to jurisdiction in the event that the party later wants to sue to confirm or vacate the award. If the amount sought in the arbitration is greater than the amount in controversy requirement, the court will have jurisdiction to compel arbitration.[104] Consequently, if the federal court compels arbitration, the court will have jurisdiction to enforce the arbitration award regardless of the amount of the award.[105]

Similarly, a court could have jurisdiction to compel arbitration but could lack jurisdiction to enforce the arbitration award under the award approach.[106] If a party seeks an award of $100,000 from arbitration, a federal court would have jurisdiction to compel arbitration as long as there was diversity of citizenship.[107] However, if the party did not go to federal court to compel the arbitration and the arbitration resulted in an award of $50,000, a federal court would not have jurisdiction to enforce the award under the award approach. Because the two scenarios involve the same dispute, advocates of the demand approach argue that a federal court should have jurisdiction in both instances.[108]

Perhaps the most obvious flaw of the award approach is that the amount of the arbitration award is not necessarily the amount at stake in every circumstance. Following an arbitration award, suits can be brought to vacate the arbitration award and reopen arbitration.[109] In these instances, the amount at stake can no longer simply be viewed as the amount of the arbitration award since the plaintiff is seeking to reopen arbitration. This scenario is more similar to when a party is seeking to compel arbitration. The suit initiates an arbitration proceeding, albeit a subsequent one to the initial arbitration. Likewise, in a suit to compel arbitration, the party suing is seeking to initiate an arbitration proceeding. The amount in controversy when seeking to reopen arbitration should therefore be the amount at stake

[103] *E.g.*, Webb v. Investacorp, Inc., 89 F.3d 252, 256 (5th Cir. 1996); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995).

[104] 28 U.S.C. § 1332(a) (2012) (assuming the diversity requirements are met, the amount in controversy requirement is the only other requirement for diversity jurisdiction).

[105] *See U-Save Auto Rental of Am. Inc.*, 368 F. App'x at 602 (holding that the district court had jurisdiction over a zero-dollar award because the district court had jurisdiction when it ordered the arbitration).

[106] Karsner v. Lothian, 532 F.3d 876, 883 (D.C. Cir. 2008).

[107] 28 U.S.C. § 1332(a).

[108] *Karsner*, 532 F.3d at 883–84.

[109] 9 U.S.C. § 10(a)–(b).

in the arbitration, which is the amount demanded by the party bringing suit.[110]

This flaw is evident even in the courts which have adopted the award approach. In both the Eleventh and Sixth Circuits, the courts have recognized an exception to the award approach when the plaintiff is seeking to vacate the arbitration award and reopen arbitration.[111] These circuits recognized the gap left by the award approach and filled the gap by applying the remand approach, even if the circuits did not specifically state as much. While the award approach provides a common sense approach in most scenarios, the approach has flaws and leaves a gap when the party suing wants more than to simply confirm or vacate an arbitration award.

B. Flaws with the Demand Approach

Several courts decided to adopt the demand approach in order to avoid the flaws associated with the award approach. By adopting the demand approach, courts no longer face the struggle of having jurisdiction in cases to compel arbitration, but lacking jurisdiction in cases to enforce it. Rather, the same test applies in both instances. In order to compel arbitration, courts look to the amount sought in the arbitration to determine if the amount in controversy is met.[112] In order to enforce an arbitration award, courts still look to the amount sought in the arbitration.[113] While curing some of the defects of the award approach, the demand approach creates its own host of issues that must be grappled with.

The first major flaw of the demand approach is its lack of efficiency, at least as compared to the award and remand approaches. The Supreme Court has recognized that one of the purposes of arbitration is the efficient resolution of claims.[114] If the goal of arbitration is efficiency, then the appropriate approach adopted by the Supreme Court should be aimed at

[110] Sirotzky v. N.Y. Stock Exch., 347 F.3d 985, 989 (7th Cir. 2003), *overruled on other grounds by* Martin v. Franklin Capital Corp., 546 U.S. 132 (2005).

[111] *See, e.g.*, Mitchell v. Ainbinder, 214 F. App'x. 565, 566 (6th Cir. 2007); Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1325 (11th Cir. 2005); *see also* discussion *supra* Part III.c. (the circuits did not expressly recognize an exception; rather, the circuits applied the remand approach after previously adopting the award approach).

[112] Webb v. Investacorp, Inc., 89 F.3d 252, 256 (5th Cir. 1996).

[113] *Karsner*, 532 F.3d at 883–84.

[114] Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974).

efficiency. It is well settled that the award approach is the most efficient approach to resolve these disputes.[115]

The demand approach requires the court to look beyond the documents before the court. The court must determine the amount actually demanded as well as determine the relevant time at which the demand should be considered.[116] This may not seem like an incredibly arduous task, but the demand approach still requires more work than the other two approaches, and is thus less efficient. If efficiency was not a concern, the court system could handle all disputes through litigation. However, courts have established efficiency as a legitimate concern when resolving disputes.[117] Thus, the demand approach should be given less weight than the other approaches. When the Supreme Court has stated that efficient resolution of disputes is a purpose of arbitration, the Supreme Court should adopt an approach that yields efficiency.

The demand approach could also cause courts to resolve controversies regarding the adequacy of demands. If a party resisting jurisdiction challenges the amount in controversy, the court will apply a good faith test to determine the amount in controversy.[118] The test requires a legal certainty that the claim is actually for less than the jurisdictional amount to justify dismissal.[119] In resolving the dispute, the court will necessarily engage in burdensome litigation to prove whether the demand sought was in good faith or not. The award approach presents no such risk. The award is objectively verifiable, and thus no inquiry of good faith is needed.

If the goal of arbitration is efficiency, the demand approach is directly at odds with the FAA's purpose. Moreover, if courts move to the demand approach to avoid unnecessary litigation caused by the award approach, the demand approach makes no progress. Rather, federal courts will begin to be polluted with litigation about the good faith demands made prior to entering into arbitration.

C. Curing the Defects Through the Remand Approach

As illustrated above, the two dominant approaches both suffer from flaws which make them undesirable or unconducive to the goals of

[115] Frost, *supra* note 29, 256.

[116] *See id.*

[117] *Scherk*, 417 U.S. at 510–11.

[118] St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

[119] *Id.* at 289.

arbitration. On its face, the remand approach may appear to suffer from the same deficiencies as the other approaches. However, closer examination illustrates that these deficiencies are not prevalent under the remand approach.

The remand approach provides an efficient means of resolving disputes. As noted above, the award approach is a more efficient means of resolving disputes than the demand approach.[120] The remand approach is thus necessarily more efficient than the demand approach because it simply uses the amount of the award unless the plaintiff is seeking to reopen arbitration.[121] In many cases, the remand approach is just as efficient as the award approach.

It is only in the circumstance where a plaintiff seeks to reopen arbitration that the remand approach is less efficient than the award approach. However, in these circumstances, fairness outweighs efficiency. Just as the Supreme Court stated that efficiency is one of the primary purposes of arbitration,[122] arbitration proceedings should also be fair.[123] The remand approach balances efficiency and fairness. When the plaintiff is seeking to reopen arbitration, it is more fair to the plaintiff to allow the federal court to have jurisdiction. The plaintiff is not simply asking the court to reject or confirm an established arbitration award. Rather, the plaintiff is asking the court to allow arbitration to reopen so that the plaintiff can pursue the amount they originally demanded. The remand approach achieves efficiency in most instances, but allows fairness to play a role when arbitration is to be reopened.

Many of the arguments against the award approach also apply to the remand approach because the remand approach acts as an extension of the award approach. However, these arguments are without merit. One of the primary arguments against the award approach is that a court could have jurisdiction to compel arbitration, but not have jurisdiction to enforce an

[120] Frost, *supra* note 29, 256.

[121] Sirotzky v. N.Y. Stock Exch., 347 F.3d 985, 989 (7th Cir. 2003), *overruled on other grounds by* Martin v. Franklin Capital Corp., 546 U.S. 132 (2005).

[122] *Scherk*, 417 U.S. at 510–11.

[123] *See, e.g.*, Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) (holding that a question to be asked following an arbitration award is whether the arbitration proceedings were fundamentally unfair); *see also* Bell Aerospace Co. Div. of Textron v. Local 516, UAW, 500 F.2d 921, 923 (2d Cir. 1974) (stating that parties must be granted a fundamentally fair hearing in arbitration proceedings).

arbitration award.[124] This argument fails against the remand approach for several reasons.

Because courts could have jurisdiction to compel arbitration but do not have jurisdiction to enforce an arbitration award, courts have feared that the award approach would lead to unnecessary litigation.[125] This argument could also apply to the remand approach in situations where the plaintiff was not seeking to reopen arbitration. However, this argument is not persuasive. The alternative to using the arbitration award as the amount in controversy is to use the amount at stake in the arbitration. However, as explained previously, this also leads to litigation and pollutes the federal court system.[126] Rather than preemptively bringing suit to compel arbitration to latch on to federal jurisdiction, parties under the demand approach are more likely to litigate over whether the amount in controversy is actually met.[127] Also, the litigation that ensues under the award/remand approach is more efficient than the litigation under the demand approach.[128] Thus, if the concern of unnecessary litigation is efficiency, the remand approach still applies a more efficient resolution of disputes than the demand approach.

Using the demand approach also creates a legal fiction. In order to justify the demand approach, a court has to assume that the amount in controversy is the amount sought in the underlying arbitration.[129] This is not always the case. In a case to confirm an arbitration award, the amount in dispute is the arbitration award.[130] The court is deciding whether the arbitration award is appropriate.[131] Suggesting that the amount sought in the underlying arbitration is the amount in controversy in a suit to confirm the arbitration award is creating a legal fiction. While the demand approach allows suits to compel arbitration and suits to confirm/vacate an arbitration

[124] Karsner v. Lothian, 532 F.3d 876, 883 (D.C. Cir. 2008).

[125] Pershing LLC v. Kiebach, 101 F. Supp. 3d 568, 574 (E.D. La. 2015), *aff'd*, 819 F.3d 179 (5th Cir. 2016).

[126] *See supra* Part IV.b.

[127] *See supra* Part IV.b.

[128] Frost, *supra* note 29, 256.

[129] *Karsner*, 532 F.3d at 882.

[130] *See* Ford v. Hamilton Invs., Inc., 29 F.3d 255, 260 (6th Cir. 1994) (holding that the amount in controversy was not satisfied because the award was the disputed amount and was less than the jurisdictional requirement).

[131] *Id.*

award to be granted jurisdiction under the same test,[132] courts are forced to make assumptions about the amount in controversy that are not true.

Further, proponents of the demand approach make an assumption that something is fundamentally wrong with the possibility that courts could have jurisdiction to compel arbitration, but could not have jurisdiction to confirm/vacate an arbitration award.[133] This assumption is largely unwarranted. If suit is brought to compel arbitration, district courts will retain jurisdiction to enforce any subsequent arbitration awards.[134] Thus, the only situation in which this concern would be relevant is if a party did not bring suit to compel arbitration, but later wanted to bring suit to confirm/ vacate an arbitration award. In this situation, different tests should apply.

Congress established long ago that in every suit in which a federal court seeks to establish diversity jurisdiction, an amount in controversy must be met.[135] In a suit to compel arbitration, the amount in controversy is unquestionably the amount sought in the arbitration.[136] However, when a party wants to confirm or vacate an arbitration award, the amount sought in the underlying arbitration is no longer the amount disputed.[137] The amount in controversy is what the party is seeking to confirm or vacate, which is the arbitration award.[138] While this may lead to situations where federal courts could have had jurisdiction to compel arbitration, but do not have jurisdiction to confirm/vacate the arbitration award, this is the correct result based on the amount in controversy requirement established by Congress.

Finally, the remand approach does not operate under the pretense that the amount in controversy can be established in the same manner in every case. Rather, the remand approach takes the novel approach of actually looking at what the amount in controversy is in each case, and applying that amount accordingly. When the plaintiff is seeking to confirm or vacate an

[132] *Karsner*, 532 F.3d at 883–84.

[133] *See id.* at 883.

[134] U-Save Auto Rental of Am. Inc. v. Furlo, 368 F. App'x 601, 602 (5th Cir. 2010) (per curiam).

[135] Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1789) (current version at 28 U.S.C. § 1332 (2012)).

[136] Webb v. Investacorp, Inc., 89 F.3d 252, 256 (5th Cir. 1996).

[137] *See* Pershing LLC v. Kiebach, 101 F. Supp. 3d 568, 574 (E.D. La. 2015), *aff'd*, 819 F.3d 179 (5th Cir. 2016).

[138] *Id.*

arbitration award, the disputed is the amount of the award.[139] When the plaintiff is seeking to vacate an arbitration award and reopen arbitration, the disputed amount is the amount the plaintiff is seeking from the arbitration.

The remand approach is the most sensible approach for the Supreme Court to follow. The remand approach adheres to the principles of efficiency and fairness that arbitration aims to achieve.[140] Moreover, the amount in controversy is logically based on the amount actually in controversy in each individual proceeding. While the rule is not one size fits all for determining the amount in controversy, it is straightforward and easy to apply.

V. CONCLUSION

A split currently exists in federal court jurisprudence regarding how the amount in controversy should be decided in a suit to confirm or vacate an award under the FAA. This gap has led to inconsistency among the courts of appeals. Some courts have established that jurisdiction exists when other courts would have decided that they did not have jurisdiction to hear a particular case. This gap needs to be filled so that litigators and courts can be confident of the existence of subject matter jurisdiction in each case.

The Supreme Court should adopt the remand approach. The remand approach is consistent with the well-established principles governing arbitration under the FAA. Individuals need to know if they will be welcomed into federal court when they knock on the court's doors. The Supreme Court needs to follow an approach consistent with its established policies and procedures. The remand approach addresses both needs by providing a fair and efficient means of resolving these disputes.

[139] *See id.* (a court that has adopted the demand approach recognized that at least on some level, the amount at stake in a suit to confirm or vacate an arbitration award is the amount of the award).

[140] *See* Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 412 (5th Cir. 1990) (establishing efficiency as a fundamental purpose of arbitration); *see also* Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) (establishing fairness as a consideration that arbitration is meant to achieve).