University of Arkansas at Little Rock Law Review

Volume 29 | Issue 3 Article 2

2007

Vacatur of Arbitration Awards: The Poor Loser Problem or Loser Pays?

Stanley A. Leasure

VACATUR OF ARBITRATION AWARDS: THE POOR LOSER PROBLEM OR LOSER PAYS?

Stanley A. Leasure[*]

I. INTRODUCTION

> The laudatory goals of the [Federal Arbitration Act] will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. If we permit parties who lose in arbitration to freely re-litigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less. This case is a good example of the poor loser problem and it provides us with an opportunity to discuss a potential solution.[1]

In *B. L. Harbert International, LLC v. Hercules Steel Co.*,[2] decided in February 2006, the Eleventh Circuit Court of Appeals took the opportunity to express its "exasperation" with the growing tendency of losing parties in arbitration disputes to take a "never-say-die attitude" in the pursuit of vacatur of arbitral decisions "without any real legal basis for doing so" and its concern for the concomitant threat to the underlying purposes of the Federal Arbitration Act (FAA).[3] Going further, the court gave a stern notice and warning:

> The notice [this opinion] provides, hopefully to even the least astute reader, is that this Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards. The warning this opinion provides is that in order to further the purposes of the FAA and to protect arbitration as a remedy, we are ready, willing, and able to consider imposing sanctions in appropriate cases. While Harbert and its counsel did not have the

---

* Stanley A. Leasure, J.D. is an assistant professor of Business Law at Missouri State University. His twenty-five years of law practice in Fort Smith, Arkansas with the law firm of Daily & Woods, P.L.L.C. included service as a mediator and arbitrator in litigated cases. He is a certified civil mediator in Arkansas and is a member of the bars of Arkansas and Oklahoma.

1. B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 907 (11th Cir. 2006).
2. 441 F.3d 905 (11th Cir. 2006).
3. *Id.* at 913, 914; 9 U.S.C. §1.

> benefit of this notice and warning, those who pursue similar litigation positions in the future will.[4]

Harbert has attracted national attention in the alternative dispute resolution literature and in cases currently being litigated in state and federal courts around the country.[5]

Applying the *Harbert* "any real legal basis" requirement raises several concerns that can be assuaged only by courts' commitment to focus on balancing two competing public policy goals: the need to protect the purposes and benefits of arbitration under the FAA and the need to protect parties' right to test the boundaries of the general rule that arbitration awards are final. In Part II, this article examines the *Harbert* decision in detail, both with respect to the underlying facts of the case and from the standpoint of its legal underpinnings. Part III briefly examines the history of sanctions imposed in connection with attempts to vacate arbitration decisions pursuant to Rule 11 of the Federal Rules of Civil Procedure, Rule 38 of the Federal Rules of Appellate Procedure, and 28 U.S.C. § 1927. Inasmuch as the analysis of the efficacy of the sanctions proposed by the *Harbert* court hinges on the "legal basis" for challenging arbitral decisions, the historical perspec-

---

4. 441 F.3d at 914.

5. *See* Rueter v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 440 F. Supp. 2d 1256, 1262 (N.D. Ala. 2006); SII Investments, Inc. v. Jenks, No. 8:05-CV-2148-T-23 MAP, 2006 WL 2092639, at *3–5 (M.D. Fla. Jul. 27, 2006); Sheetmetal Workers' Int'l v. Law Fabrication, 459 F. Supp. 2d 1236, 1241, 1244 (M.D. Fla. 2006); Polote Construction Co. v. Ziadeh, No. 1:00-CV-263-GET, 2006 WL 2583292, at *1 (M.D. Ga. Sept. 6, 2006); Goeben v. Morgan Stanley DW, Inc., No. 06-C-319, 2006 WL 2711802, at *2 (E.D. Wis. Sept. 21, 2006); Puljic v. E.M. Rose Builders, Inc., No. NNHCV054016795, 2006 WL 2002384, at *1 (Conn. Super. June 28, 2006); Malice v. Coloplast Corp., 629 S.E.2d. 95, 98 (Ga. Ct. App. 2006); Lewis v. Cir. City Stores, Inc., No. 05-3383, 2006 WL 2701182, at *26–28, 35 n.19 (10th Cir. Aug. 2, 2006); Sheeler v. O'Carrs Mgmt. Corp., No. 06-13137-GG, 2006 WL 2630042, at *1, 16 (11th Cir. July 17, 2006); Campos v. City of Naples, No. 06-12713-13, 2006 WL 2629912, at *37 (11th Cir. June 30, 2006); FTN Financial Capital Mkts. v. Miller Johnson, No. CV051770 PHX EHC, 2006 WL 1182744, at *1 (D. Ariz. Mar. 10, 2006); PRM Energy Sys., Inc. v. Primenergy, LLC, No. 04-6157, 2006 WL 1497745 (W.D. Ark. Apr. 7, 2006); Strum v. Citigroup, Inc., No. 06-CV-290-PSF (MJW), 2006 WL 1407255 (D. Colo. Apr. 13, 2006); Clear Channel Outdoor, Inc. v. Int'l Union of Painters & Allied Trades, No. 06-10635 WGY, 2006 WL 1746316 (D. Mass. May 2, 2006); Meyer v. Edward Jones & Co., No. 06-C-0491, 2006 WL 1830935 (E.D. Wis. May 8, 2006); Jenelle Mims Marsh & Charles W. Gamble, Alabama Law of Damages § 7:15 (5th ed. 2006); Construction Law Digest, § 29:20 (2006); Geri L. Dreiling, *No Pity for "Poor Losers" 11th Circuit Threatens Sanctions for Some Appeals of Arbitration Rulings*, 5 No. 11 A.B.A. J.E-REPORT 2, (2006); David Seidman, *Sanctions for Frivolous Appeals*, 61-Jul DISP. RESOL. J. 93, 93 (2006); Don Zupanec, *Arbitration "Poor Losers" Face Sanctions*, 21 FED. LITIGATOR 10, 10 (2006); Eric D. Dunlap, *Setting Aside Arbitration Awards and the Manifest Disregard of the Law Standard*, 80-Aug Fla. B.J. 51, (2006); *Arbitration Sanctions for "Frivolous" Appeals of Arbitration Awards*, Nov. 2, 2006 N.Y.L.J. 3, col. 1, 3, Col. 1 (2006); *Arbitration Developments and Trends*, SL081 Al-ABA 1643, 1648 (2006).

tives underlying the purposes of the FAA, together with federal statutory and common law limitations on vacatur of arbitral decisions are examined in Part IV. Part V reviews Arkansas statutory and case law related to the vacation of arbitration awards. Finally, Part VI contains concluding thoughts and recommendations regarding the appropriate use of sanctions in connection with arbitration vacatur.

II. *B.L. HARBERT INTERNATIONAL, LLC V. HERCULES STEEL COMPANY*

This case came to the Eleventh Circuit Court of Appeals on appeal from the United States District Court for the Northern District of Alabama.[6] It involved a construction dispute between Harbert and Hercules Steel, parties to a contract under which Hercules was to supply steel to Harbert for the construction of an office building for the Corps of Engineers.[7] The arbitrator, a former federal judge, entered an award with which Harbert was dissatisfied.[8] Harbert filed a motion to vacate the award in the United States District Court for the Northern District of Alabama.[9] The district court denied Harbert's motion to vacate the award and granted Hercules' motion to confirm it.[10] Unwilling to quit, Harbert filed an appeal of the district court's denial of its motion to vacate the arbitration award with the Eleventh Circuit persisting in its contention that the arbitrator had manifestly disregarded the law.[11]

In 2000, the Army Corps of Engineers awarded Harbert a contract to construct an office complex at Fort Bragg, North Carolina.[12] Subsequently, Harbert awarded Hercules a subcontract to supply steel fabrication and erection services in connection with the construction of the office complex.[13] The subcontract contained a binding arbitration clause, and the parties later executed a separate arbitration agreement that recognized the FAA as controlling.[14]

Under the subcontract, Harbert was to issue a progress schedule, with a copy to each subcontractor, and the work was to be done according to the progress schedule.[15] Subcontractors were liable for damages caused by fail-

6. *Harbert*, 441 F.3d at 909.
7. *Id.* at 907.
8. *Id.* at 908 n.1.
9. *Id.* at 909.
10. *Id.*
11. *Id.*
12. *Harbert*, 441 F.3d at 907.
13. *Id.*
14. *Id.*
15. *Id.*

ure to complete the work on time under the project schedule.[16] Neither the progress schedule nor the project schedule was defined.[17]

As it developed, Harbert created two schedules known as the 2000 schedule and the 3000 schedule; the 3000 schedule was designed to update the Corps of Engineers, and the 2000 schedule was to manage the subcontractors.[18] Neither of these schedules mentioned the subcontract.[19]

A dispute arose between Harbert and Hercules over Hercules's completion of the work.[20] The 2000 schedule called for earlier completion dates than those listed in the 3000 schedule,[21] and Hercules did not meet these earlier deadlines.[22] Hercules's beginning and ending dates were, however, within the deadlines in the 3000 schedule.[23] Consequently, Harbert stopped payments to Hercules and demanded delay damages that exceeded the amount due to Hercules under the subcontract.[24] Hercules subsequently filed a demand for arbitration with the American Arbitration Association seeking the balance due under its subcontract and other damages.[25] Harbert contended that it was entitled to delay and other damages in its counterclaim in the arbitration proceeding.[26]

The main disagreement in the arbitration proceeding involved whether the 2000 or the 3000 schedule applied to Hercules. Hercules contended that the 3000 schedule applied and that it met these deadlines. Its principal points were (1) that the subcontract was ambiguous because it referred to progress schedule and project schedule without any definition of either; (2) that the subcontract should be interpreted in light of the implied element of reasonableness in the contract; (3) that Harbert had abandoned the 2000 schedule thereby authorizing the 3000 schedule; and (4) that Harbert was not given notice of the 2000 schedule when the work began.[27] "Harbert, on the other hand, contended that the subcontract language unambiguously gave it complete authority to set the schedule meaning that Hercules was bound by the

16. *Id.*
17. *Id.*
18. *Harbert*, 441 F.3d at 907.
19. *Id.*
20. *Id.* at 907–08.
21. *Id.*
22. *Id.*
23. *Id.* at 908.
24. *Harbert*, 441 F.3d at 908.
25. *Id.* The arbitration hearing occurred before the Honorable Frank H. McFadden, who had formerly served as Chief Judge for the United States District Court for the Northern District of Alabama. *Id.* at 908 n.1. The arbitration took a total of seven days, and the proceedings were not recorded by a court reporter. *Id.* at 908.
26. *Id.* at 908.
27. *Id.*

2000 schedule."[28] Further, Harbert argued that the "2000 schedule was the 'progress schedule' referred to in the subcontract because it was the only schedule . . . issued to all subcontractors."[29]

On September 8, 2004, the arbitrator awarded Hercules $369,775, the unpaid balance on its subcontract, plus interest.[30] The arbitrator denied Harbert damages for delay.[31] The arbitrator also denied Harbert's counterclaim and denied both parties' claims for attorney's fees.[32] After the arbitrator issued this award, Hercules contended that the $369,775 was a scrivener's error and requested that the arbitrator fix the amount to $469,775.[33] Harbert moved for clarification and modification of the award on the grounds that the award did not contain the specificity that the parties agreed they needed.[34] Further, Harbert requested that the arbitrator modify the award to provide "enough discussion" to enable the parties to understand the result and the arbitrator's reasons for granting or denying any item of damage.[35]

As a result, on October 18, 2004, the arbitrator issued a new order modifying the $369,775 award to Hercules to $469,775.[36] The arbitrator also issued findings on six issues, including a finding that Hercules was bound to the more generous 3000 schedule rather than the 2000 schedule and that Harbert was entitled to no damages because its claim was based on the inapplicable 2000 project schedule.[37] Harbert then filed a motion to vacate the award in the United States District Court for the Northern District of Alabama, claiming "that the arbitrator's rationale reflected a manifest disregard of the applicable law."[38] Hercules opposed that motion and moved that the court confirm the award, pursuant to the provisions of 9 U.S.C. § 9.[39]

The district court denied Harbert's motion and granted the relief requested by Hercules.[40] The district court interpreted the arbitrator's award as concluding that the reason Hercules did not breach the subcontract was because it was bound by the 3000 schedule and not the 2000 schedule.[41] The district court found no evidence of manifest disregard for the law, distin-

28. *Id.*
29. *Id.*
30. *Harbert*, 441 F.3d at 908.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 908–09.
36. *Harbert*, 441 F.3d at 909.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

guishing the instant case from *Montes v. Shearson Lehman Bros., Inc.*[42] Accordingly, the district court entered judgment enforcing the arbitration award.[43] Harbert was dissatisfied with the decision of the district court as it had been with the arbitrator's decision, so it continued the battle by filing a notice of appeal to the Eleventh Circuit Court of Appeals.[44]

The court of appeals issued its opinion February 28, 2006.[45] At the outset, the court staked out the parameters of its review and the presumptions under which that review would be conducted.[46] The court noted that under the FAA, the standard of review is strictly limited, and the FAA presumes that an arbitration award will be confirmed.[47] Furthermore, deference is to be given to the arbitrator's decision whenever possible.[48]

Before proceeding with a discussion of the common law grounds for setting aside an arbitration award, including manifest disregard for the law, the court identified the four narrow bases for vacating an award under the FAA, holding that none "are even remotely applicable in this case."[49] After dismissing the statutory grounds set out in the FAA as inapplicable, the court pointed out that the Eleventh Circuit recognizes three non-statutory grounds for vacating an arbitration award: (1) if it is arbitrary and capricious; (2) if enforcement of the award is contrary to public policy; and (3) if the award was made in manifest disregard for the law.[50]

The linchpin of Harbert's challenge was its claim that the arbitrator had acted in manifest disregard for the law; therefore, the court analyzed this basis for the vacatur of an arbitration award.[51] The court began its discussion

---

42. *Harbert*, 441 F.3d at 909 (citing Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1461 (11th Cir. 1997)).

43. *Id.*

44. *Id.*

45. *Id.* at 906.

46. *Id.*

47. *Id.* at 909 (citing Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190 (11th Cir. 1995); Lifecare v. CD Med., Inc., 68 F.3d 429, 433 (11th Cir. 1995)).

48. *Harbert*, 441 F.3d at 909 (citing Robbins v. Day, 954 F.2d 679, 682 (11th Cir. 1992)).

49. *Id.* at 909–10 n.2 (citing the statutory grounds for the vacation of an award set out at 9 U.S.C. § 10(a): (1) The award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or 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) 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).

50. *Id.* at 910 (citing Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) (arbitrary and capricious); Delta Air Lines, Inc. v. Air Line Pilots Ass'n. Int'l, 861 F.2d 665, 671 (11th Cir. 1988) (contrary to public policy); Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1464 (11th Cir. 1997) (manifest disregard for the law)).

51. *Id.* at 910.

with a declaration founded on its previous decision in *Montes v. Shearson Lehamn Bros.*[52]: "[t]his ground for vacating an arbitration award requires clear evidence that the arbitrator was 'conscious of the law and deliberately ignore[d] it.'"[53] The court made it clear that the mere misinterpretation, misstatement, or misapplication of the law is not enough.[54]

The *Harbert* court traced manifest disregard for the law as a basis for overturning an arbitration decision back to the *Montes* case, noting that *Montes* was the only case in which the Eleventh Circuit had ever found the exceptional circumstances sufficient to satisfy the exacting requirements for setting aside an arbitration award based on manifest disregard for the law grounds.[55] The fact situation that arose in *Montes* and that the Eleventh Circuit found supported appellant's claim that the arbitrator had manifestly disregarded the law was unique to say the least.[56] That case arose out of an employment dispute about overtime pay controlled by the Fair Labor Standards Act (FLSA).[57] The FLSA was clearly contrary to the position taken by the employer; nevertheless, the attorney for the employer repeatedly urged the arbitrator to disregard the FLSA and rule in favor of the employer based on equitable considerations.[58] On behalf of his client, the employer's attorney argued "in this case this law is not right" and that "the law says one thing. What equity demands and requires and is saying is another."[59] The employer's counsel asked the arbitrator, in no uncertain terms, not to follow the law.[60] In *Montes*, the arbitrator found in favor of the employer, and in the award the arbitrator repeated the plea of the employer's attorney.[61] Nothing in the transcript of the proceedings or the award indicated that the arbitrator had not responded to the urgings of the employer's attorney, but neither the evidence nor the law supported the award.[62]

---

52. 128 F.3d 1456 (11th Cir. 1997).

53. *Id.*

54. *Id.* (citing *Montes*, 128 F.3d at 1461–62).

55. *Harbert*, 441 F.3d at 910. Furthermore, the court took the opportunity to mention numerous Eleventh Circuit cases in which manifest disregard for the law was not found, including *University Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000); and *Scott v. Prudential Sececurites, Inc.*, 141 F.3d 1007, 1017 n.21 (11th Cir. 1998). *Id.*

56. *Montes*, 128 F.3d at 1458, 1462.

57. *Id.* at 1458.

58. *Id.* at 1459.

59. *Harbert*, 441 F.3d at 911.

60. *Id.* at 910–11.

61. *Id.* at 911.

62. *Montes*, 128 F.3d at 1461–62.

In *Montes*, the Eleventh Circuit found that the arbitrator had acted in manifest disregard of the law, emphasizing the rare nature of the circumstances in that case.[63] The court in *Harbert* noted the following:

> Four facts came together in *Montes* and will seldom recur: Those facts are that: 1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; 2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel's award; 3) neither in the award itself nor anywhere else in the record is there any indication that the panel disapproved or rejected the suggestion that it rule contrary to the law; and 4) the evidence to support the award is at best marginal.[64]

The *Harbert* court identified *Montes* as the exception rather than the rule, noting that in every other case decided in the Eleventh Circuit on the manifest disregard of the law issue, the arbitration loser was the loser in the Eleventh Circuit.[65]

The court then directed its attention to the arguments made by Harbert in support of its contention that the arbitration award should be set aside as in manifest disregard for the law.[66] The court began with a rather scathing attack on Harbert's position with the statement that "the facts of this case do not come within shouting distance of the *Montes* exception."[67] Going further, the court proclaimed the following:

> There are arguments to be made on both sides of the contractual interpretation issue, and they were made to the arbitrator before being made to the district court and then to us. Even if we were convinced that we would have decided this contractual dispute differently, that would not be nearly enough to set aside the award.[68]

Finally, the court repeated the axiom so often used in connection with arbitration appeals that a showing of manifest disregard of the law requires something more than misinterpretation, misstatement, or misapplication of the law.[69] Accordingly, the *Harbert* court quoted with approval the following language from *Montes*: "An arbitration board that incorrectly interprets

---

63. *Id.*

64. *Harbert*, 441 F.3d at 911 (citation omitted).

65. *Id.* (citing Peebles v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F.3d 1320, 1327 (11th Cir. 2005); Univ. Commons-Urbana, Ltd. v. Universal Constructors, Inc., 304 F.3d 1331, 1338 (11th Cir. 2002); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1223 (11th Cir. 2000); Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1017 n.21 (11th Cir. 1998)).

66. *Id.*

67. *Id.*

68. *Id.* (citations omitted).

69. *Id.*

the law has not manifestly disregarded it. It has simply made a legal mistake."[70] The court characterized Harbert's argument as an argument that the arbitrator clearly erred and noted that even a showing of clear error is insufficient.[71] Finding no evidence that the arbitrator had made a conscious and deliberate decision to ignore the applicable law, the court concluded that it could not find that the arbitrator acted in manifest disregard for the law.[72]

Harbert made two main arguments in support of its position.[73] In support of one of its legal arguments, Harbert urged that "the contract is part of the law the arbitrator must apply, so that any misapplication of the contract is a misapplication of the law."[74] The court rejected this argument out of hand on two bases: (1) "[t]he contract is not part of the applicable law" but is the agreement to which the law is applied and (2) "errors of law are not enough to justify setting aside an arbitration award."[75]

Another argument Harbert made was based on dicta from the Eleventh Circuit decision in *University Commons-Urbana, Ltd. v. Universal Constructors, Inc.*[76] There, the arbitral dispute involved an alleged failure to meet contractual deadlines.[77] The arbitrators found in favor of the developer and awarded lost rent for a period during which the project had been completed.[78] The construction company contended the arbitrators had acted, in this regard, in manifest disregard for the law.[79] The district court confirmed the arbitration award, and on appeal the Eleventh Circuit concluded that there had been no showing of manifest disregard for the law, reiterating its rule that such a conclusion was predicated on the consciousness of the law and the deliberate ignoring of it.[80] However, Harbert seized on one sentence of dicta in the *University Commons* decision: "Theoretically, we suppose, the arbitrators' approach to the award of damages could be in disregard of the law altogether, if it differed from the provisions of the contract."[81] Harbert argued that this dicta stood for the proposition that misinterpretation of a contract could constitute a manifest disregard for the law.[82] The *Harbert* court rejected this contention:

---

70. *Harbert*, 441 F.3d at 911 (citation omitted).
71. *Id.* at 911–12.
72. *Id.* at 912.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Harbert*, 441 F.3d at 912 (citing 304 F.3d 1331 (11th Cir. 2002)).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 913.
82. *See Harbert*, 441 F.3d at 913.

> This one sentence of speculative dicta in one footnote of one opinion cannot plausibly be construed as setting out a rule of law—that misinterpretation of a contract may constitute a manifest disregard of the law. That is especially true since such a rule would be contrary not only to the holding and express rationale of *University Commons*, but also to the settled Eleventh Circuit precedent which governed that decision. Under the well-established law of this circuit, which we have already discussed, if we believe that the arbitrator's approach differed from the provisions of the contract, at most that only establishes the arbitrator erred, which is not enough to conclude there was a manifest disregard of the law.[83]

Finally, the *Harbert* court concluded that there was "no evidence that the arbitrator decided the dispute on the basis of anything other than his best judgment—whether right or wrong—of how the law applie[d] to the facts of the case."[84]

After so concluding, the court turned its attention to Harbert's conduct in appealing the arbitration award, first to the district court and then to the circuit court.[85] Beginning what could be described as a diatribe, the court stated the goals and rationale behind the FAA, noting that the FAA "endorses and encourages arbitration as an alternative to litigation."[86] Relieving court congestion and encouraging a method of speedier and less costly dispute resolution are the foundations for the pro-arbitration policy of the FAA.[87] The court summarized these goals and purposes and applied them to the facts in this case as follows:

> The laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. If we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less. This case is a good example of the poor loser problem and it provides us with an opportunity to discuss a potential solution.[88]

---

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 906 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005); Hill v. Rent-A-Center, Inc., 398 F.3d 1286, 1288 (11th Cir. 2005)).

87. *Id.* (citing *Caley*, 428 F.3d at 1367 (quoting Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1440 (11th Cir. 1998); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 125 n.2 (2001))).

88. *Harbert*, 441 F.3d at 907.

And discuss a potential solution, the court did.[89] In the concluding paragraphs of the opinion, the court characterized Harbert's actions as depriving Hercules and the judicial system of the benefits of arbitration, increasing cost and causing delay, and wasting judicial effort at the district court and court of appeals levels.[90] According to the court of appeals, by refusing to quit in the face of certain defeat, Harbert had destroyed the promise of arbitration as a meaningful alternative to litigation.[91] Recognizing the fact that it could not prevent losers in arbitration proceedings from filing appeals "without any real legal basis for doing so," the court noted that it could discourage such baseless litigation and promote the policies of the FAA through the threat of sanctions.[92]

The court, however, allowed Harbert to escape sanctions under the circumstances of this case for three reasons listed by the court in reverse order of importance: (1) the speculative dicta in *University Commons*; (2) Hercules's failure to move for sanctions (although the court noted that it could apply these *sua sponte*); and (3) lack of opportunity for Harbert to have the benefit of this warning.[93] The Eleventh Circuit wanted a notice and a warning to emanate from its opinion.[94] That notice and warning were expressed in no uncertain terms:

> The notice . . . hopefully to even the least astute reader, is that this Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law . . . . The warning . . . is that in order to further the purposes of the FAA and to protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases. While Harbert and its counsel did not have the benefit of this notice and warning, those who pursue similar litigation positions in the future will.[95]

The *Harbert* court did not cite any authority for its proclamation that future litigants would face sanctions should they seek to overturn an arbitration award through the appellate process without a sound basis. However, this is not the first case in which the issue has arisen and in which sanctions have been meted out.[96] In the following section of this article, the history and basis of sanctions in arbitration litigation are discussed.

---

89. *Id.* at 913.
90. *Id.*
91. *Id.*
92. *Id.* at 913–14.
93. *Id.* at 914.
94. *Harbert*, 441 F.3d at 914.
95. *Id.*
96. *See infra* Part III; CUNA Mut. Ins. Soc. v. Office and Prof'l Employees Int'l Union, Local 39, 443 F.3d 556 (7th Cir. 2006); Dominion Video Satellite v. Echostar Satellite L.L.C., 430 F.3d 1269 (10th Cir. 2005); Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machin-

III. A BRIEF HISTORY OF SANCTIONS IN ARBITRATION VACATUR ACTIONS

As previously stated, *Harbert* is not the first case in which a court has sanctioned, or has considered sanctioning, those who unsuccessfully seek to vacate an arbitration award.[97] Sanctions have been imposed in such cases pursuant to Rule 11 of the Federal Rules of Civil Procedure, Rule 38 of the Federal Rules of Appellate Procedure, and 28 U.S.C. § 1927. This section of the article explores a brief history of sanctions in the context of efforts to vacate arbitration awards.

A. *CUNA Mutual Insurance Social v. Office & Professional Employees International Union*

The Seventh Circuit dealt with the issue of sanctions in an arbitration appeal in *CUNA Mutual Insurance Society v. Office & Professional Employees International Union, Local 39*,[98] a case decided less than a month after *Harbert*.[99] That case arose as a result of a dispute between CUNA and a labor union representing a number of its employees in Madison, Wisconsin.[100] The underlying facts are relatively straightforward. CUNA decided to outsource a number of its employees' positions over the objection of the union.[101] The union filed a grievance, contending there was a violation of the collective bargaining agreement (CBA).[102] CUNA proceeded with the layoff notices, and the union appealed the grievance to arbitration.[103] CUNA contended that the union's grievance was insufficient because it referred to provisions of the collective bargaining agreement dealing with layoffs, which "did not prohibit outsourcing and was not concerned with the underlying causes of layoffs."[104] CUNA further contended that the CBA did not address the question of outsourcing.[105] Accordingly, it was CUNA's position that the arbitrator was without jurisdiction to address the challenge.[106] Although CUNA participated in the arbitration hearing, it did not waive its argument that the arbitrator lacked authority to rule on whether its outsourcing was

---

ists & Aerospace Workers, District No. 8, 802 F.2d 247 (7th Cir. 1986); Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local Union No. 6 v. Thermo-Guard, 814 F.2d 1192 (D. Mass. 1987).

97. *See supra* Part II.
98. 443 F.3d 556 (7th Cir. 2006).
99. *Id.*
100. *Id.* at 558.
101. *Id.* at 558–59.
102. *Id.* at 559.
103. *Id.*
104. *CUNA*, 443 F.3d at 559.
105. *Id.*
106. *Id.*

violative of provisions not cited in the written grievance.[107] The arbitrator found that the issue was properly before him and that CUNA, through outsourcing, had violated several provisions of the CBA.[108] The grievance was sustained, and the arbitrator ordered "that the work be restored to the bargaining unit."[109]

CUNA filed an action in the United States District Court for the Western District of Wisconsin to vacate, *inter alia*, that portion of the arbitration award holding that its outsourcing violated provisions of the contract.[110] The union sought to uphold the arbitrator's decision and, in addition, Rule 11 sanctions. [111] The parties stipulated that the district court could decide the matter on cross motions for summary judgment.[112] The district court entered its order finding in favor of the union on the merits and affirmed the Rule 11 sanctions against CUNA, awarding attorneys' fees of over $9000.[113] CUNA appealed the imposition of the Rule 11 sanctions only.[114]

The appellate court reviewed the sanctions issue under an abuse of discretion standard.[115] Using an objective standard to determine whether CUNA or its counsel should have known that CUNA's position was groundless, the court concluded that the district court could impose sanctions if a suit "is not warranted by existing law or a good faith argument for [an] extension, modification, or reversal of existing law" or if it is not well

---

107. *Id.*

108. *Id.* at 559–60.

109. *Id.* at 560.

110. *CUNA*, 443 F.3d at 560.

111. *Id.* Rule 11 of the Federal Rules of Civil Procedure provides that an attorney presenting a pleading to the court certifies to the best of the attorney's

> knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Violations of these strictures may result in sanctions against the offending party. Fed. R. Civ. P. 11(b).

112. *CUNA*, 443 F.3d at 560.

113. *Id.*

114. *Id.*

115. *Id.* (citing Cooter & Gell v. Hartmarz Corp., 496 U.S. 384, 405 (1990); Corley v. Rosewood Care Ctr., Inc. of Peoria, 388 F.3d 990, 1013–14 (7th Cir. 2004); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989) (en banc)).

grounded in fact.[116] The court took into consideration "the long line of Seventh Circuit cases that have discouraged parties from challenging arbitration awards and have upheld Rule 11 sanctions in cases where the challenge to the award was substantially without merit."[117] The court quoted with approval from *Dreis & Krump Manufacturing Co. v. International Ass'n of Machinists & Aerospace Workers*[118]:

> A company dissatisfied with the decisions of labor arbitrators need not include an arbitration clause in its collective bargaining contracts, but having agreed to include such a clause it will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscionably through the filing of meritless suits and appeals. For such conduct the law authorizes sanctions that this court will not hesitate to impose. Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts . . . . Lawyers practicing in the Seventh Circuit, take heed![119]

The court then discussed CUNA's claim of lack of arbitrability, concluding that there was no true question of arbitrability, but rather CUNA was "dress[ing] up its arguments about the scope of the arbitrator's authority in arbitrability clothing."[120] The court concluded that "[c]ase law could not be more clear: courts should not overrule an arbitrator's interpretation of an arbitration agreement unless 'there is no possible interpretive route to the [arbitrator's] award, so a non-contractual basis can be inferred.'"[121]

---

116. *Id.* at 560 (citing Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957, 963 (7th Cir. 1993)). In another argument rejected by the lower court, CUNA claimed that the arbitrator erred by retaining jurisdiction to address damage issues, a claim that was one of the reasons Rule 11 sanctions were imposed by the district court. The court concluded that the case law was likewise clear on this issue and that CUNA's lawyers should have known their position was groundless. *Id.* at 565 (citing Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957, 963 (7th Cir. 1993)).

117. *Id.* at 561 (citing Bailey v. Bicknell Minerals, Inc., 819 F.2d 690, 691 (7th Cir. 1987); Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192 (7th Cir. 1987); Machinists & Aerospace Workers v. Clearing, 807 F.2d 618 (7th Cir. 1986); Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, District No. 8, 802 F.2d 247, 255–56 (7th Cir. 1986)).

118. 802 F.2d 247 (7th Cir. 1986).

119. *CUNA*, 443 F.3d at 561 (quoting *Dreis & Krump Mfg. Co.*, 802 F.2d at 255–56).

120. *Id.* at 563.

121. *Id.* at 564 (citing Arch of Illinois v. District 12, United Mine Workers of Am., 85 F.3d 1289, 1293–94 (7th Cir. 1996)) (quoting Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1506 (7th Cir. 1991)).

B. *Dominion Video Satellite v. Echostar Satellite L.L.C.*

The issue of sanctions was also addressed in a Tenth Circuit Court of Appeals case involving a dispute over a lease agreement, which was submitted to arbitration.[122] Echostar lost at the arbitration hearing and was ordered to pay Dominion almost $2.5 million in damages.[123] Dominion asked the district court to confirm the award pursuant to 9 U.S.C. §§ 9 and 13, and Echostar objected to the arbitral decision and the motion to confirm it in the district court.[124] The district court confirmed the arbitration award and, pursuant to 28 U.S.C. § 1927, sanctioned counsel for Echostar for "unreasonably and vexatiously extend[ing] the arbitration hearings and court proceedings."[125] Echostar was ordered to pay Dominion's costs, expenses, and attorney's fees occasioned by the necessity to respond to Echostar's frivolous motions.[126] Echostar appealed the confirmation of the arbitrator's damage award in favor of Dominion, and Echostar's attorneys appealed the award of attorneys' fees, costs, and expenses.[127] The Tenth Circuit Court of Appeals affirmed the decision of the district court on all counts.[128]

On appeal, Echostar contended that the arbitral award against it should be set aside on several grounds: federal preemption; violation of first amendment freedom of expression; claim preclusion; doctrine of impossibility; lack of justiceability; and failure of the agreement to provide for damages.[129] The court noted that none of Echostar's contentions fit within the ru-

122. Dominion Video Satellite v. Echostar Satellite L.L.C., 430 F.3d 1269 (10th Cir. 2005).

123. *Id.* at 1272.

124. *Id.*

125. *Id.* Section 1927 of Title 28 of the United States Code provides in pertinent part: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (2006).

126. *Dominion*, 430 F.3d at 1272.

127. *Id.*

128. *Id.* The appellate court began by declaring the standard of review of an arbitration decision to be "among the narrowest known to law." *Id.* (quoting Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001)). It also set out the statutory basis for vacation of an arbitration award under the FAA and under the common law basis of manifest disregard. *Id.*; 9 U.S.C. §10(a)(4) (providing statutory grounds for vacation "in certain instances of fraud or corruption, arbitrator misconduct, or 'where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, definite award upon the subject matter was not made'") (quoting *Bowen*, 254 F.3d at 932). Manifest disregard exists in cases of "willful inattentiveness to the governing law" and where "arbitrators knew the law and explicitly disregarded it." *Dominion*, 480 F.3d at 1272 (quoting ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995)); *Bowen*, 254 F.3d at 932.

129. *Id.* at 1275. Echostar also requested that the arbitral decision be remanded for clarification as to how the panel reached the damages figure. *Id.* at 1278. The appellate court concluded that the cases Echostar relied on did not support the proposition that an arbitral panel

bric of the FAA and, accordingly, must fall within the manifest disregard of the law basis.[130] The court also pointed out that virtually all of these arguments had been raised in and rejected by (1) the district court prior to arbitration when Dominion requested a preliminary injunction; (2) the arbitration panel; and (3) the district court at the hearing on confirmation of the arbitration award.[131] In almost summary fashion, the court dispatched with each of Echostar's contentions because "Echostar cite[d] no controlling precedent and it fail[ed] to identify any evidence . . . indicat[ing] . . . 'manifest disregard.'"[132] The Tenth Circuit concluded that Echostar's appeal of the confirmation of the award was frivolous and invited Dominion to file a motion for sanctions under Rule 38 of the Federal Rules of Appellate Procedure to recoup its attorneys' fees and costs.[133]

The court then turned its attention to the contention by Echostar's attorneys that the 28 U.S.C. § 1927 sanctions rendered against them in the district court were baseless and violated their due process rights.[134] It pointed out that attorneys have been called to answer for their conduct under § 1927 in a number of situations, such as where they have acted "recklessly or with indifference to the law;"[135] "when an attorney is cavalier or bent on misleading the court; intentionally acts without a plausible basis; [or] when the entire course of the proceedings are unwarranted."[136] Applying these standards, the court rejected the attorneys' argument that they filed the vari-

---

must set forth its calculation of damages when the record provides adequate support for the award. *Id.* at 1287.

130. *Id.*

131. *Id.* at 1275–76.

132. *Dominion*, 430 F.3d at 1276. As to Echostar's First Amendment argument, the court stated that "Echostar failed to provide relevant authority . . . failed to allege or point to any evidence that the panel willfully ignored relevant First Amendment doctrine. . . ." *Id.* As to claim preclusion, the court stated that "[e]ven though the prior arbitration panel referenced a provision of the Agreement at issue in this case, it did not decide any issues related to that exception, nor was the reference invited by the parties or necessary to the resolution of the prior dispute." *Id.* As to impossibility, the court stated that "Echostar's bare allegations, which are not supported by the record, do not establish evidence in support of this contention . . . ." *Id.* at 1277. As to justiciablity, the court determined that "the concept of justiciability is derived from Article III of the Constitution and limits the jurisdiction of federal courts. This Court has found no controlling authority that mandates application of those limits in arbitration." *Id.* Finally, regarding damages the court concluded that "Echostar fail[ed] to provide this Court with any evidence that in reaching [the] conclusion [that damages are recoverable under the agreement] the panel disregarded the law or exceeded its power . . . ." *Id.*

133. *Id.* at 1278. Rule 38 of the Federal Rules of Appellate Procedure provides as follows: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

134. *Dominion*, 430 F.3d at 1278.

135. *Id.* (citing Braley v. Campbell, 832 F.2d 1504, 1511 (10th Cir. 1987)).

136. *Id.* (citing Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1342 (10th Cir. 1998)).

ous motions and briefs below only to preserve issues for appeal.[137] The court found that the attorneys' conduct was both "unreasonable and vexatious" and that the district court had not abused its discretion in finding their conduct sanctionable.[138] The court likewise dispatched with the attorneys' due process argument and affirmed in full the sanctions issued against Echostar's attorneys.[139]

As discussed above, the *Harbert* court threatened and other courts have imposed, sanctions against parties who have lost arbitral decisions and have elected to attempt to set aside those decisions through litigation in the courts.[140] The Eleventh Circuit has, in *Harbert*, expressed its intention to attempt to stop this practice, at least insofar as it involves efforts to vacate arbitration awards without a "real legal basis for doing so."[141] The following two sections examine what constitutes a "real legal basis" for asking that an arbitral award be set aside.

IV. VACATUR: FEDERAL STATUTORY AND COMMON LAW

A. Statutory Grounds for Vacatur Under the Federal Arbitration Act

The Federal Arbitration Act (FAA) was passed by Congress in 1925 to reverse the long-standing enmity of American courts toward the enforcement of arbitration agreements.[142] The FAA evinces a strong national policy favoring arbitration as a mechanism to relieve congestion in the courts and to provide a method of dispute resolution that is simpler, more expeditious and less expensive than litigation.[143] Process efficiency has been historically viewed as one of the chief attributes of the arbitral alternative established

137. *Id.* at 1279.
138. *Id.*
139. *Id.* at 1280.
140. *See supra* Part II.
141. *See supra* Part II.
142. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001).
143. B. L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 906 (11th Cir. 2006). *See* Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 280 (1995); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–511 (1974); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005); Hoffman v. Cargill Inc., 236 F.3d 458, 461 (8th Cir. 2001); Dobbins v. Hawk's Enters., 198 F.3d 715, 717 (8th Cir. 1999); *see also S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67 Cong., 4th Sess. 2 (1923). Despite the long standing weariness with which the courts viewed arbitration, the FAA was passed by Congress due to the "agitation against the costliness and delays of litigation." H.R. Rep. No. 68–96 at 1–2 (1924). It was designed to "reduc[e] technicality, delay and expense to a minimum and at the same time safeguard [] the rights of the parties." *Id.*

under the FAA.[144] In furtherance of this goal, the FAA provides for very restricted judicial review of arbitration awards, with only four statutory grounds for the vacatur of an arbitration decision: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or 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) 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.[145] While the FAA does provide statutory grounds for vacatur of arbitration awards, it "does not obliterate the hesitation with which courts should view efforts to re-examine awards."[146] In this section of the article, the statutory grounds for vacatur under the FAA will be examined in light of the numerous cases in the federal courts construing these provisions.

The FAA provides that in cases in which the award was "procured by corruption, fraud, or undue means," it may be vacated by the district court upon application of any party.[147] The federal courts have taken a narrow view in interpreting "undue means." This basis for vacatur connotes behavior that is immoral, if not illegal.[148] In *Conoco, Inc. v. Oil, Chemical & Atomic Workers International Union*,[149] the court noted that the facts giving rise to the undue means must not have been discoverable by due diligence prior to the arbitration and must be materially related to an issue in the arbitration as established by clear and convincing evidence.[150] Vacation of an arbitration award on this basis is appropriate only if the undue means relied upon were outcome determinative.[151] Furthermore, some courts have said that inasmuch as the term undue means is combined with "fraud" and "corruption" in this ground for vacatur, there must be evidence of intentional

144. Steven L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 499–500 (1998); Warren Burger, *Isn't There a Better Way?*, A.B.A.J., Mar. 1982, at 274, 276–277.

145. 9 U.S.C. § 10(a)(1)–(4) (2000 & Supp. 2001–2003).

146. Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 598 (3d Cir. 1968).

147. 9 U.S.C. § 10(a)(1) (2000 & Supp. 2001–2003).

148. A.G. Edwards & Sons, Inc. v. McCullough, 967 F.2d 1401, 1403 (9th Cir. 1992).

149. 26 F. Supp. 2d 1310 (N.D. Okla. 1998).

150. *Id.* at 1320 (citing Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995)); *see also* Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988).

151. *A.G. Edwards & Sons, Inc.*, 967 F.2d at 1403; Forsythe Int'l S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990).

misconduct to constitute the requisite undue means.[152] The District of Columbia Court of Appeals has held that "undue means . . . include measures equal in gravity to bribery, corruption, or physical threat to an arbitrator; no court has ever suggested that the term 'undue means' should be interpreted to apply to submission of evidence that is merely legally objectionable."[153]

Similarly, most courts have been reluctant to vacate an arbitration award on the statutory basis of fraud.[154] More than a mere showing of fraud is necessary. It must be demonstrated that there was a connection between the fraud and the arbitration decision.[155] The predicate to vacation of an arbitral award on grounds of fraud has been explained as follows: (1) the fraud must be materially related to an issue in the arbitration; (2) the fraud must not have been discoverable with due diligence prior or during the arbitration; and (3) the fraud must be established by clear and convincing evidence.[156] Fraudulent conduct brought to the attention of the arbitrator prior to his decision does not constitute fraud sufficient to justify overturning the award.[157] Also, the requisite fraud has been found absent where a party consented to arbitration only after one of the witnesses gave perjured testimony, if the witness's testimony was not considered by the arbitrators.[158]

One seeking to set aside an arbitration award on the basis of evident partiality has the heavy burden of establishing facts that indicate an improper motive on the part of the arbitrator.[159] The standard for a finding of evident partiality adopted by the Second Circuit in *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*,[160] that the evidence must clearly show that an arbitrator was partial to one of the parties,

---

152. PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 991 (8th Cir. 1999).

153. Am. Postal Workers Union, AFL-CIO v. United States Postal Serv., 52 F.3d 359, 362 (D.C. Cir. 1995).

154. Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir. 1982), *cert. denied*, 459 U.S. 990 (1982); *Conoco*, 26 F. Supp. 2d at 1319.

155. *Forsythe*, 915 F.2d at 1022.

156. Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004); MidAmerican Energy Co. v. Int'l Bhd. Of Elec. Workers Local 499, 345 F.3d 616, 622 (8th Cir. 2003); O.R. Sec., Inc. v. Prof'l Planning Assocs. Inc., 857 F.2d 742, 748 (11th Cir. 1988); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988).

157. ABC Int'l Trades, Inc. v. Fun 4 All Corp., 79 F. App'x 346, 348 (9th Cir. 2003) (quoting A.G. Edward & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992)) ("[W]here fraud . . . is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will not be given a second bite at the apple.").

158. Terk Techs. Corp. v. Dockery, 86 F. Supp. 2d 706, 709–10 (E.D. Mich. Div. 2000).

159. Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993).

160. 748 F.2d 79 (2d Cir. 1984).

has been widely adopted.[161] In determining partiality, an objective standard is used. It must be shown that a reasonable person would have to conclude that the arbitrator was partial to one of the parties.[162] The hurdle facing one who seeks to set aside an arbitration award on the basis of evident partiality has also been described as follows: "[T]he interest or bias . . . must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative."[163] It must be so great as to evidence bias and prejudice sufficient to "destroy fundamental fairness" of the arbitration proceeding.[164] Therefore, partiality must be more than a mere appearance of bias.[165]

Federal courts have declined to find partiality sufficient to set aside an arbitration award in the following circumstances: prior business relationship between arbitrator and party's law firm;[166] arbitrators were in the business of collecting debit balances from customers and arbitration award pierced corporate veil of entities to hold individual liable for debit balances;[167] attorney-arbitrator's undisclosed scheduling dispute with law firm representing one of the parties to arbitration proceeding;[168] and arbitrator's prior service as an expert witness for a party to the arbitration.[169] Evident partiality sufficient to set aside an arbitration award was, however, found where the arbitrator's son was an officer of a union, which was a party to the arbitration.[170] The Eighth Circuit, in *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[171] held that the arbitrator's position as a high ranking officer of a company for which Merrill Lynch had served as underwriter of numerous bond issues

161. *Id.* at 84; *see also* Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 645 (6th Cir. 2005); JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003); ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999); Montes v. Prudential Sec., Inc., 260 F.3d 980, 983 (8th Cir. 2001); Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998).

162. Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989).

163. Tamari v. Bache Halsey Stuart Inc., 619 F.2d 1196, 1200 (7th Cir. 1980); *see also* United States Wrestling Fed'n v. Wrestling Div. of AAU, Inc., 605 F.2d 313, 318 (7th Cir. 1979).

164. Catz Am. Co. v. Pearl Grange Fruit Exch., Inc., 292 F. Supp. 549, 551–52 (S.D.N.Y. 1968); *see also* Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 600 (3d Cir. 1968); Ballentine Books, Inc. v. Capital Distrib. Co., 302 F.2d 17, 21 (2d Cir. 1962).

165. Florasynth, Inc. v. Pickholz, 750 F.2d 171, 173 (2d Cir. 1984).

166. Montez v. Prudential Sec., Inc., 260 F.3d 980, 982 (8th Cir. 2001).

167. Scott v. Prudential Securities, Inc., 141 F.3d 1007, 1017–18 (11th Cir. 1998).

168. Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 434–35 (11th Cir. 1995), *opinion modified and supplemented*, 85 F.3d 519 (1996).

169. Lucent Techs., Inc. v. Tatung Co., 379 F.3d 24 (2d Cir. 2004).

170. Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

171. 51 F.3d 157 (8th Cir. 1995).

(which relationship was non-disclosed) was likewise sufficient to establish evident partiality requiring the vacation of an arbitration award.[172]

An arbitration award may also be vacated under the FAA "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."[173] These grounds for the vacatur have been construed to require a showing that the misconduct was serious and "amount[ed] to a denial of the fundamental fairness of the arbitration proceedings."[174] Furthermore, it must be demonstrated by clear and convincing evidence that the aggrieved party was not able to fully present its case,[175] and bad faith or gross error typically must be shown to establish the requisite misconduct.[176]

The exclusion of evidence by the arbitrator will be sufficient to sustain the grant of a request to vacate an arbitration decision only if it "so affects the rights of a party that it may be said that he was deprived of a fair hearing."[177] This requires a showing of more than an error of law.[178] Given the fact that arbitrators have considerable procedural discretion in the administration of an arbitration hearing and in refusing to allow evidence, it must be demonstrated by clear and convincing evidence that a party was prejudiced by not being able to fully present its case.[179] The court in *Storey v. Searle Blatt Ltd.*[180] identified the reason behind the rule of limited review of a determination of whether the arbitrators were guilty of misconduct in denying a request for adjournment, noting that the expeditious resolution of a dispute is one of the principal benefits of arbitration.[181] "'[I]nstances when an arbi-

172. *Id.* at 160. For other cases in which courts have found "evident partiality," see also *Schmitz v. Zilveti,* 20 F.3d 1043, 1049 (9th Cir. 1994) (failure to disclose prior representation by arbitrator's law firm on numerous occasions); Middlesex Mutual Insurance Co. v. Levine, 675 F.2d 1197, 1201–02 (11th Cir. 1982) (undisclosed dispute between arbitrator's family company and party to the arbitration).

173. 9 U.S.C. § 10(a)(3) (2000 & Supp. 2001–2003).

174. Transit Casualty Co. v. Trenwick Reinsurance Co., Ltd., 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987); *see also* Bell Aerospace Co. Div. of Textron, Inc. v. Local 516 Int'l Union, 500 F.2d 921, 923 (2d Cir. 1974).

175. Roe v. Cargille Inc., 333 F. Supp. 2d 808, 815 (W.D. Ark. 2004).

176. Bisnoff v. King, 154 F. Supp. 2d 630, 637 (S.D.N.Y. 2001) (citing Agarwal v. Agarwal, 775 F. Supp. 588, 589 (S.D.N.Y., 1991); United Paperworkers Int'l. v. Misco, Inc., 484 U.S. 29, 40 (1987)).

177. Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968).

178. *Id.*

179. Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 822 (8th Cir. 2001); s*ee also* Roe v. Cargill, Inc., 333 F. Supp. 2d 808 (W.D. Ark. 2004).

180. 685 F. Supp. 80 (S.D.N.Y. 1988).

181. *Id.* at 82.

trator's procedural aberrations rise to the level of affirmative misconduct' are 'very rare.'"[182] Additionally, as the court in *Marshall & Co. v. Duke*[183] held, "[t]his statutory basis for vacatur does not, however, invite hindsight evaluations of the correctness of the judgment of an arbitration panel in managing the presentation of evidence during an arbitration."[184]

Interestingly, concerns regarding the mental capacity of an arbitrator cannot rise to the level of misconduct and, therefore, are beyond examination. In *Gearhardt v. Cadillac Plastics Group, Inc.*,[185] the losing party in an arbitration proceeding resisted an action to confirm the arbitration award and, also, sought to obtain post-award discovery related to the physical and mental condition of the arbitrator.[186] The party that came out on the short end of the arbitration claimed it had reasonable cause to believe the arbitrator was suffering from a mental disability during the arbitration hearing such as senile dementia or another neurological or brain disorder.[187] The court refused to permit discovery into the arbitrator's mental health, concluding that even if he were suffering from a mental disease or defect, that would not be misconduct cognizable under 9 U.S.C. §10(c).[188]

Another statutory basis for vacatur arises when the arbitrator exceeds his powers or so imperfectly executes them that a mutual, final, and definite award upon the subject matters was not made.[189] As with the preceding grounds for vacatur, this basis is difficult to establish under federal case law. The United States Supreme Court held in *United Paperworkers International Union v. Misco, Inc.*[190] that "as 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 error does not suffice to overturn his decision."[191] The issue regarding an arbitrator exceeding his or her powers in such a way as to support the vacation of an arbitration award has typically been found only in situations where the arbitrator modifies or changes the parties' contractual obligations.[192] Similar to the approach taken by many courts in connection with the common law "irrationality" basis for setting aside an arbitral award discussed below, many

182. Holmes v. Nat'l Football League, 939 F. Supp. 517, 524 (N.D. Tex. 1996) (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968)).

183. 941 F. Supp. 1207 (N.D. Ga. 1995).

184. *Id.* at 1211.

185. 140 F.R.D. 349 (S.D. Ohio 1992).

186. *Id.* at 350.

187. *Id.*

188. *Id.* at 352.

189. 9 U.S.C. § 10(a)(4) (2000).

190. 484 U.S. 29 (1987).

191. *Id.* at 38.

192. Western Employers Ins. Co. v. Jefferies & Co., 958 F.2d 258, 261 (9th Cir. 1992); *see* Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir. 1982).

courts have interpreted this statutory ground to include situations in which the arbitrator has gone beyond the "essence" of the arbitration agreement.[193] This provision of the FAA has also been applied in circumstances where the arbitrator fails to meet his obligations as specified in the contract of the parties.[194] However, only in situations in which it is clear that the arbitrator went beyond the scope of the submission to arbitration will the award be set aside.[195] For instance, an award of relief against someone not a party to the arbitration agreement would constitute an act in excess of an arbitrator's powers, such as to justify judicial action to rectify the award.[196] In addition, if the arbitrator decides issues not presented by the parties, the award must be vacated.[197] As noted in *Shahmion Industries, Inc. v. United Steelworkers of America, AFL-CIO*:[198]

> It is, of course, elementary that an arbitrator may not decide matters outside of the issues submitted for arbitration. But it is only when the arbitrator clearly goes beyond the scope of the submission that the courts will interfere. Every presumption is in favor of the award's validity, and the person challenging an award has the burden of showing that the arbitrator exceeded his authority.[199]

Legal or interpretive errors, however, do not equate to the arbitrator exceeding the powers granted him in the arbitration agreement.[200] The courts have been very clear that this ground for vacatur does not include situations

193. *See, e.g.*, Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377, 384 n.8 (5th Cir. 2004); Jacada (Europe), Ltd. v. Int'l Marketing Strategies, Inc., 401 F.3d 701, 712 (6th Cir. 2005); Yasuda Fire & Marine Ins. Co. of Eur. v. Cont'l Cas. Co., 37 F.3d 345, 349 (7th Cir. 1994); Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1024 n.2 (9th Cir. 1991); Kelley v. Michaels, 59 F.3d 1050, 1053 (10th Cir. 1995); Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1179–81 (D.C. Cir. 1991); Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1130 n.11 (3d Cir. 1972).

194. *Id.* at 261; *see* Western Can. S.S. Co. v. Cia. De Nav. San Leonardo, 105 F. Supp. 452 (S.D.N.Y. 1952).

195. FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1312–13 (8th Cir. 1994); Textile Workers of Am., AFL-CIO, Local Union No. 1386 v. Am. Thread Co., 291 F.2d 894, 896 (4th Cir. 1961); *see also* Fireman's Fund Ins. Co. v. Flint Hosiery Mills, 74 F.2d 533, 536 (4th Cir. 1935); Mut. Benefit Health & Accident Ass'n v. United Cas. Co., 142 F.2d 390 (1st Cir. 1944).

196. Lefkovitz v. Wagner, 395 F.3d 773, 778 (7th Cir. 2005) (citing BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 548, 554–55 (7th Cir. 2002); Lindland v. United States Wrestling Ass'n, Inc., 227 F.3d 1000, 1003 (7th Cir. 2000); Katz v. Feinberg, 290 F.3d 95, 97–98 (2d Cir. 2002); Coady v. Ashcraft & Gerel, 223 F.3d 1, 9 (1st Cir. 2000)).

197. Dighello v. Busconi, 673 F. Supp. 85, 87 (D. Conn. 1987) (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)).

198. Shahmoon Indus., Inc. v. United Steelworkers of Am., AFL-CIO, 263 F. Supp. 10 (D.N.J. 1966).

199. *Id.* at 14 (citation omitted).

200. Long John Silver's Rests., Inc. v. Cole, 409 F. Supp. 2d 682, 688 n.3 (D.S.C. 2006).

in which the arbitrator fails to correctly interpret the law, misinterprets the underlying contract, fails to specify reasons for the decision, or fails to state conclusions of law.[201]

As can be seen from the preceding discussion, the judicial interpretations of the grounds enumerated in the FAA for vacating an arbitration award demonstrate the great deference provided to such awards.[202] The court in *Brown v. Rauscher Pierce Refsnes, Inc.* noted that in the consideration of the vacatur of an arbitration award, the courts should proceed along the "slender and carefully defined path" set out in the FAA in its narrow statutory provisions and only upon a finding of no arbitral misconduct as described by the FAA may the court begin its determination as to whether one of the few common law grounds for arbitration vacatur exists.[203] In the next section of this article, those judge-made exceptions to the finality of arbitral decisions are discussed.

B. Judicially Crafted Grounds for Vacatur

In addition to the statutorily created grounds for vacatur of an arbitration award, the courts have crafted a limited number of common law grounds that, when satisfied, will justify vacatur of arbitral awards.[204] Most jurisdictions recognize "manifest disregard of the law," and some have adopted "contrary to public policy," "irrational," and "arbitrary and capricious" as grounds for vacatur.[205]

1. *Manifest Disregard for the Law*

Manifest disregard of the law has been frequently used in attempts to set aside arbitration awards.[206] Reviewed under a clearly erroneous standard,

---

201. Maidman v. O'Brien, 473 F. Supp. 25, 27–28 (S.D.N.Y. 1979); *In re* Arbitration Between Andros Compania Maritima & Marc Rich & Co., 579 F.2d 691, 704 (2d Cir. 1978); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960); Kurt Orban Co. v. Angeles Metal Sys., 573 F.2d 739, 740 (2d Cir. 1978).

202. Brown v. Rauscher Pierce Refsnes, Inc., 796 F. Supp. 496, 499–500 (M.D. Fla. 1992) (citing O.R. Sec., Inc. v. Prof'l Planning Assoc., 857 F.2d 742, 746 (11th Cir. 1988)).

203. *Id.* at 503.

204. *See infra* text accompanying notes 194 (manifest disregard of the law); 213–17 (irrational); 219–26 (contrary to public policy); 227–32 (arbitrary and capricious).

205. Lawrence R. Mills, J. Lani Bader, Thomas J. Brewer & Peggy J. Williams, *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23.

206. Petitioners' Reply Brief at 8 n.4, John Hancock Life Ins. Co. v. Patten, 127 S. Ct. 434 (2006) (No. 0649) sets forth the following: "Westlaw searches show that, since 2000 alone, there have been at least 400 decisions in the District Courts addressing 'manifest disregard,' as a ground for vacating arbitration awards. Of the 197 cases ruling on the issue in the courts of appeals, more than seventy percent were decided in the last decade. At least four more published appellate decisions . . . have issued since the petition was filed." *Id.* The

this basis for vacatur requires a showing that the arbitrator knew the law and explicitly disregarded it.[207] Importantly, the "manifest disregard" standard does not apply to the factual findings of the arbitrator, which are not reviewable.[208]

The Second Circuit has developed a two-pronged test to determine whether an arbitrator is guilty of manifestly disregarding the law with both objective and subjective components.[209] Under this test, the court first determines whether the governing law is "well defined, explicit, and clearly applicable."[210] Then, the court attempts to determine whether the arbitrator recognized the clearly governing principle and chose to ignore it.[211] Only if both elements of the test are met has there been a manifest disregard of the law.[212] Often in connection with claims that an arbitrator manifestly disregarded the law, it is pointed out that judicial review of arbitral decisions is significantly limited:

> Review of an arbitrator's award is severely circumscribed. Indeed, the scope of review of an arbitrator's valuation decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.[213]

Respondents Brief in Opposition at 8 n.1, John Hancock Life Ins. Co. v. Patten, 127 S. Ct. 434 (2006) (No. 06-49), identifies the following federal cases from each of the circuits recognizing manifest disregard as a common law basis for vacatur of an arbitration award: Cytyc Corp. v. DEKA Prods. Ltd. P'ship, 439 F.3d 27, 35 (1st Cir. 2006); Hofet v. MVL Group, Inc., 343 F.3d 57, 69 (2d Cir. 2003); Dluhos v. Strasberg, 321 F.3d 365, 370 (3d Cir. 2003); Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998); Sarofim v. Trust Co. of the West, 440 F.3d 213, 216–17 (5th Cir. 2006); Solvay Pharms., Inc. v. Duramed Pharms., 442 F.3d 471, 475 n.3 (6th Cir. 2006); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253 (7th Cir. 1992); McGrann v. First Albany Corp., 424 F.3d 743, 749 (8th Cir. 2005); Carter v. Health Net of Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004); Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C., 430 F.3d 1269, 1274 (10th Cir. 2005); Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1326 (11th Cir. 2005); Kurke v. Oscar Gruss & Son, Inc., 454 F.3d 350, 354 (D.C. Cir. 2006); Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1365–66 (Fed. Cir. 2001).

207. Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985).

208. Kennecott Utah Copper Corp. v. Becker, 195 F.3d 1201, 1204 (10th Cir. 1999).

209. Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 209 (2d Cir. 2002).

210. *Id.*

211. *Id.*; *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 934 (2d Cir. 1986).

212. Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d Cir. 1998); DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997); Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 112 (2d Cir. 1993).

213. Apex Plumbing Supply, Inc. v. United States Supply Co., 142 F.3d 188, 193 (4th Cir. 1998) (citation omitted).

Similarly, the Fourth Circuit recognizes that one claiming manifest disregard shoulders the "heavy burden" of demonstrating that the arbitrator was aware of the law, understood it, found it applicable, and chose to ignore it in making the arbitral decision.[214] The Eighth Circuit has concluded that the standard for vacatur of an arbitration award based on manifest disregard is "narrow" and limited to situations in which the arbitrator clearly identifies the governing law and then ignores it.[215] In *St. John's Mercy Medical Center v. Delfino*,[216] the court characterized the doctrine of manifest disregard of the law as "a doctrine of last resort reserved for those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply."[217]

In an Age Discrimination in Employment Act case decided in July 2006, the United States District Court for the District of Colorado was faced with a claim that the arbitrator had manifestly disregarded the law set out in a prior federal court case.[218] There, the court noted the following: "Unfortunately *May* is of little persuasive guidance, as it rejects the theory out of hand without analysis, observing only that 'Plaintiffs have absolutely no legal support for this assertion.'"[219] Accordingly, the one case cited by the movant seeking vacatur of the arbitral decision did not amount to manifest disregard of the law.[220]

The Seventh Circuit has limited the application of the principle to cases in which the arbitration award requires the parties to violate the law or fails to "adhere to the legal principles specified by contract."[221] However, the manifest disregard of the law standard has been consistently distinguished from misinterpretation, misstatement, or misapplication of the law.[222]

The First Circuit, in a case decided September 19, 2006, found manifest disregard of the law when an arbitral panel used the word "irrelevant" in determining the inapplicability of New Hampshire wage law to a compensa-

214. Remmey v. PaineWebber, Inc., 32 F.3d 143, 149 (4th Cir. 1994); Upshur Coals Corp. v. United Mine Workers of Am. Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991); San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961).

215. Hoffman v. Cargill, Inc., 236 F.3d 458, 461 (8th Cir. 2001); Roe v. Cargill, Inc., 333 F. Supp. 2d. 808, 814 (W.D. Ark. 2004).

216. 401 F.3d 882 (8th Cir. 2005).

217. *Id.* at 884 (citing Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004)).

218. Morrill v. G.A. Wright Marketing, Inc., No. 04-CV-01744-MSK-BNB, 2006 WL 2038419 (D. Colo. July 18, 2006).

219. *Id.* at *2.

220. *Id.* at *2–3.

221. George Watts & Son, Inc. v. Tiffany & Co., 248 F. 3d 577, 580 (7th Cir. 2001) (citing Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000)).

222. Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1461–62 (11th Cir. 1997).

tion plan dispute.[223] The court held that the use of "irrelevant" by the panel evidenced an intent to "set aside the governing law in favor of its perception of an equitable result and industry practices" in concluding that an employee was not protected by the wage laws because he had participated in a company stock plan and had voluntarily agreed to its terms.[224]

2. *Contrary to Public Policy, Irrational, and Arbitrary and Capricious*

Another sometimes-recognized basis for vacatur is that the award is "completely irrational."[225] In analyzing the rationality test, some courts have focused on whether the award "draws its essence" from the agreement.[226] An award is considered drawn from the essence of the agreement if it is, in fact, derived from the agreement in light of its language, context, and other indicia of the parties' intention.[227] Additionally, irrationality has been found in cases in which there is no evidence to support the arbitrator's award,[228] and failure to decide the arbitration proceeding in accordance with the relevant provisions of the law has also been construed as "fundamentally irrational."[229] The courts are quick to point out that a mere error of the law or failure of the arbitrator to understand and apply the law is not sufficient.[230]

Some courts have determined that the vacation of an arbitration award is appropriate if it is contrary to public policy, but the requisite "public policy" must be "well defined and dominant" as determined "by reference to the

---

223. McCarthy v. Citigroup Global Mkts., Inc., 463 F.3d 87, 89–90 (1st Cir. 2006).

224. *Id.* at 90. Interestingly, however, in reviewing the district court's actions with respect to a second decision by the same arbitral panel, the First Circuit ruled that the district court had erred in finding that the arbitral panel likewise evidenced manifest disregard for the law in that award since the district court conducted its own legal analysis into the second arbitral award rather than limiting its examination to the record for manifest disregard of the law. *Id.*

225. Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3d Cir. 1972).

226. Roe v. Cargill, Inc., 333 F. Supp. 2d 808, 814 (W.D. Ark. 2004); Cytyc Corp. v. DEKA Products Ltd. P'ship, 439 F.3d 27, 32–33 (1st Cir. 2006); McGrann v. First Albany Corp., 424 F.3d 743, 749 (8th Cir. 2005).

227. Boise Cascade Corp. v. Paper-Allied Indus., Chemical & Energy Workers (PACE), Local 7-0159, 309 F.3d 1075, 1080 (8th Cir. 2002).

228. NF&M Corp. v. United Steelworkers of Am., 524 F.2d 756, 760 (3d Cir. 1975); H.K. Porter Co. v. United Saw, File & Steel Products Workers of Am., 333 F.2d 596 (3d Cir. 1964).

229. San Martine Compania De Navegacion, S.A. v. Saguenay Terminals, Ltd., 293 F.2d 796, 801 n.4 (9th Cir. 1961).

230. Cytyc Corp. v. DEKA Products Ltd. P'ship, 439 F.3d 27, 32 (1st Cir. 2006); McGrann v. First Albany Corp., 424 F.3d 743, 748 (8th Cir. 2005); Roe v. Cargill, Inc., 333 F. Supp. 2d 808, 813 (W.D. Ark. 2004); Boise Cascade Corp. v. Paper-Allied Indus., Chemical & Energy Workers (PACE), Local 7-0159, 309 F.3d 1075, 1080 (8th Cir. 2002); NF&M Corp. v. United Steelworkers of Am., 524 F.2d 756, 759 (3d Cir. 1975).

laws and legal precedents."[231] It must be shown that the enforcement of the arbitration award would violate such a public policy.[232] The Tenth Circuit expressed the public policy grounds as follows:

> [T]he public policy exception provides an additional basis for reversing an arbitration award where the terms of the arbitration contract, either expressly or as interpreted by the arbitrators, violate public policy or where the award requires parties undertake some action in violation of public policy. The decision to reverse an award must be based on "explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.'"[233]

This exception to the general rule that decisions of the arbitrator are final traces its roots to the maxim that the courts are not bound to enforce illegal contracts.[234] However, this basis for vacatur is also very limited:

> This exception is narrow. The mere fact that "general considerations of supposed public interests" might be offended by an arbitral award is not enough to make the exception available. . . . Rather, the award must violate an "explicit . . . well defined and dominant" public policy, as ascertained "by reference to . . . laws and legal precedents."[235]

As with all of the common law exceptions, the courts have not exercised this power broadly.[236] In *Exxon Corp. v. Esso Workers' Union, Inc.*,[237] the First Circuit was instructive in the methodology to be used to determine whether an arbitral award contravenes public policy:

---

231. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987); *see also* LaPrade v. Kidder, Peabody & Co., 246 F.3d 702, 706 (D.C. Cir. 2001); Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255 (2d Cir. 2003); Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A., 334 F.3d 721, 724 n.2 (8th Cir. 2003).

232. United Food & Commercial Workers' Union Local No. 655 v. St. John's Mercy Health Sys., 448 F.3d 1030, 1033 (8th Cir. 2006) (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987)).

233. Bowles Fin. Group, Inc. v. Stifles, Nicolaus & Co., 22 F.3d 1010, 1012 n.1 (10th Cir. 1994) (citing United Paper Workers Int'l Union v. Misco, Inc., 484 U.S. 29, 42–44 (1987); Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023 (10th Cir. 1993)); *see also* Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 983 (1980); Delta Air Lines, Inc. v. Air Line Pilots Ass'n of the Int'l Bhd. of Elect. Workers, 861 F.2d 665, 671 (11th Cir. 1988); Iowa Elec. Light & Power Co. v. Local Union 204, 384 F.2d 1424 (8th Cir. 1987).

234. Mercy Hosp., Inc. v. Massachusetts Nurses Ass'n, 429 F.3d 338, 343 (1st Cir. 2005) (citing W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983)).

235. *Id.* at 343 (quoting W.R. Grace & Co. v. Local Union 795, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757, 766 (1983)).

236. *See* Tennessee Valley Auth. v. Tennessee Valley Trades & Labor Council, 184 F.3d 510, 520 (6th Cir. 1999) (per curiam).

237. 118 F.3d 841, 846 (1st Cir. 1997).

> To determine whether a particular case fits within the confines of this class, courts must employ a two-tiered analytic approach. First, since a generalized sense of public policy provides an insufficient basis upon which to annul an arbitral award, an inquiring court must review existing statutes, regulations, and judicial decisions to ascertain whether they establish a well defined and dominant public policy. If positive law does not give rise to such a policy, then the inquiry is at an end. If, however, the court finds that such a policy exists, it must proceed to the second step of the pavane and determine whether the arbitral award clearly violates the discerned public policy.[238]

Another common law exception applies to arbitrary and capricious awards.[239] In the Eleventh Circuit, arbitration awards are considered arbitrary and capricious if the "award exhibits a wholesale departure from the law"[240] or if a legal "ground for the arbitrator's decision cannot be inferred from the facts."[241] An attack on an arbitration award on the grounds that it is arbitrary and capricious is a high hurdle indeed inasmuch as the award is presumed to be correct and will be set aside only under circumstances in which there is no ground whatsoever to support it.[242] This judicially created basis for the setting aside of an arbitral award is founded on the presumption that arbitration agreements "do not grant arbitrators carte blanche, so federal courts have the power to vacate awards that are arbitrary or capricious. . . . His award must have 'foundation in reason or fact.'"[243]

Several things are readily apparent from the foregoing discussion of the statutory grounds for vacatur and those judicially created. They are viewed narrowly, with great reluctance shown in implementing them. They must be established by clear and convincing evidence, and there must be a nexus between the establishment of one of these statutory grounds and the arbitration decision. Errors of law or fact are never enough. The difficulty in establishing one of these statutory grounds for vacatur is surmounted only by that necessary to establish one of the common law bases, and the scope of review is characterized as "among the narrowest known at law" in light of the public policy favoring arbitration as a means of quick and cheap dispute

238. *Id.* at 846 (citation omitted).

239. *See infra* text accompanying notes 230–34.

240. Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 781 (11th Cir. 1993).

241. Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990).

242. Sullivan, Long & Hagarty, Inc. v. Local 559 Laborers' Int'l Union of N. Am., 980 F.2d 1424, 1427 (11th Cir. 1993); Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 781 (11th Cir. 1993).

243. Teamsters, Chauffeurs, Warehousemen, Helpers & Food Processors, Local Union 657 v. Stanley Structures, Inc., 735 F.2d 903, 905 (5th Cir. 1984) (citing Int'l Ass'n of Machinists and Aerospace Workers, District No. 145 v. Modern Air Transport, Inc., 495 F.2d 1241, 1244 (5th Cir. 1974)).

resolution.[244] These grounds are accepted only as a last resort for truly unique and rare circumstances. With the foregoing overview of the federal statutory and case law regarding vacatur of arbitral decisions, the next section of this article examines the same issues from the standpoint of Arkansas statutory and case law.

V. VACATUR IN ARKANSAS

The Arkansas Uniform Arbitration Act (AUAA) was passed by the Arkansas General Assembly in 1969.[245] The statutory grounds for vacatur of an arbitration award under the AUAA differ slightly from those of the FAA. The Arkansas act contains five grounds on which the vacation of an arbitration award is appropriate:

> (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 16-108-205, as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in the proceedings under § 16-108-202 and the parties did not participate in the arbitration hearing without raising the objection.[246]

The AUAA also specifically provides that no grounds exist for the vacation of an arbitration award on the basis that the relief granted could not or would not be awarded by a court.[247]

The arbitral process is, without question, favored in Arkansas.[248] In construing both the FAA and the AUAA, the Arkansas courts have recog-

---

244. Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C., 430 F.3d 1269, 1275 (11th Cir. 2005).

245. ARK. CODE ANN. §§ 16-108-201 to -224 (LEXIS Repl. 2006). "When the underlying dispute involves interstate commerce, the FAA, instead of the AUAA, applies." Lehman Properties, Ltd. P'ship v. BB&B Const. Co., 81 Ark. App. 104, 108, 98 S.W.3d 470, 473 (Ark. App. 2003); *see also* Pest Mgmt., Inc. v. Langer, No. 06-748, 2007 WL 538178 (Ark. Feb. 22, 2007); PRM Energy Sys., Inc. v. Primenergy, L.L.C., No. 04-6157, 05-6061, 2005 WL 3783414, at *4 (W.D. Ark. Nov. 15, 2005); Walton v. Lewis, 337 Ark. 45, 49, 987 S.W.2d 262, 265 (Ark. 1999); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 281 (1995).

246. ARK. CODE ANN. § 16-108-212(a) (LEXIS Repl. 2006). Arkansas Code Annotated section 16-108-212 is based upon section 12 of the Uniform Arbitration Act (1955). *See* UNIFORM LAWS ANNOTATED, MASTER EDITION Volume 7, Pt. I.

247. ARK. CODE ANN. § 16-108-212(a)(5)(B) (LEXIS Repl. 2006).

nized the strong public policy in favor of arbitration as a means of dispute resolution that is faster and cheaper than the litigation process, with the added benefit of reducing congestion in the courts.[249] The scope of judicial review in arbitration cases has been determined, to be "very narrow"[250] because under Arkansas law, the courts are to construe an arbitration award, when possible, to uphold its validity.[251] As the Arkansas Supreme Court has noted, "[I]n the interest of avoiding time-consuming and costly litigation, arbitration is not a perfect system. Our scope of review is very narrow, limited to vacating an award only upon statutory grounds or a finding that the award violates a strong public policy."[252]

The court's task with respect to "undue means" does not include evaluating whether the evidence at the arbitral hearing was inappropriate or inadequate, but rather focuses on the fairness, or lack thereof, of the decision or decision-making process and whether that process went beyond what was contemplated by the AUAA.[253] Furthermore, procedural irregularities in the proceedings can be waived and a party may be estopped from raising them if that party contributes to the irregularities.[254]

In *Arkansas Department of Parks & Tourism v. Resort Managers, Inc.*,[255] the Arkansas Supreme Court had the opportunity to construe "undue means" in a case in which the Arkansas Department of Parks and Tourism had declined to renew the lease of DeGray State Park Lodge to Resort Managers.[256] The decision not to renew the lease gave rise to several disagreements between the parties, which they agreed to submit to binding arbitra-

248. Slusser v. Farm Serv., Inc., 359 Ark. 392, 401, 198 S.W.3d 106, 112 (2004); Lehman Props., L.P. v. BB&B Const. Co., 81 Ark. App. 104, 110, 98 S.W.3d 470, 474 (2003).

249. Pest Mgmt., Inc. v. Langer, No. 06-748, 2007 WL 538178 (Ark. Feb. 22, 2007); Lancaster v. West, 319 Ark. 293, 299, 891 S.W.2d 357, 361 (1995); Hart v. McChristian, 344 Ark. 656, 662, 42 S.W.3d 552, 556 (2001); May Const. Co. v. Thompson, 341 Ark. 879, 888, 20 S.W.3d 345, 351 (2000); Showmethemoney Check Cashers v. Williams, 342 Ark. 112, 119 27 S.W.3d 361, 365 (2000); Cash in a Flash Check Advance of Ark., L.L.C. v. Spencer, 348 Ark. 459, 466, 74 S.W.3d 600, 604 (2002).

250. ESI Group, Inc. v. Brown, 90 Ark. App. 6, 10, 203 S.W.3d 664, 667 (2005) (citing Hart v. McChristian, 344 Ark. 656, 42 S.W.3d 552 (2001)).

251. 200 Garrison Assocs. Ltd. P'ship v. Crawford Constr. Co., 53 Ark. App. 7, 9, 918 S.W.2d 195, 196 (1996); Chrobak v. Edward D. Jones & Co., 46 Ark. App. 105, 109, 878 S.W.2d 760, 762 (1994) (citing Ark. Dep't of Parks & Tourism v. Resort Managers, Inc., 294 Ark. 255, 260, 743 S.W.2d 389 (1988)).

252. Hart v. McChristian, 344 Ark. 656, 666–67, 42 S.W.3d 552, 559 (2001).

253. Ark. Dep't of Parks & Tourism v. Resort Managers, Inc., 294 Ark. 255, 260, 743 S.W.2d 389, 391 (quoting Seither & Cherry Co. v. Illinois Bank Bldg. Corp., 95 Ill. App. 3d 191, 419 N.E.2d 940 (1981)); *Chrobak*, 46 Ark. App. at 110, 878 S.W.2d at 763.

254. *Chrobak*, 46 Ark. App. at 111, 878 S.W.2d at 763 (citing Gibbons v. United Transp. Union, 462 F. Supp. 838, 842 (E.D. Ill. 1978); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1359 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990)).

255. 294 Ark. 255, 743 S.W.2d 389 (1988).

256. *Id.* at 256, 743 S.W.2d at 389.

tion.[257] The arbitrators ruled in favor of the Department, awarding it substantial damages against Resort Managers.[258] Taking a laissez faire attitude toward the arbitration, Resort Managers declined to present any evidence at the arbitration hearing and failed to challenge the Department's evidence and damage calculations.[259] After the adverse ruling at the arbitration, Resort Managers filed suit in chancery court seeking to modify the arbitration award.[260] The Chancellor vacated the award, finding that the Department had used undue means to obtain the award by misrepresenting monies spent for recarpeting, cleaning, and painting.[261] The Department appealed the vacation of the award to the Arkansas Supreme Court.[262] The reviewing court determined that, although some mistakes in fact had occurred, there was no evidence of fraud, corruption or undue means, or other basis to set aside the award and accordingly reversed the decision of the trial court.[263] In so doing, it noted that Arkansas public policy strong favors arbitration as a mechanism for resolving disputes.[264]

In *Hart v. McChristian*,[265] the Arkansas Supreme Court reviewed much of the law on arbitral appeals.[266] In that case, the basis of the dispute was a Limited Liability Partnership Agreement (LLPA) entered into between the parties, particularly, the removal of general partners under a mechanism created by the LLPA.[267] The Harts were the general partners, and McChristian was a limited partner.[268] McChristian sought to remove the Harts as general partners pursuant to the provisions of the LLPA based on allegations of their improper conduct. McChristian filed suit in Washington County Chancery Court seeking, *inter alia*, an order requiring the parties to submit to arbitration should the Harts object to their removal as general partners.[269] The Harts contended that because McChristian held only eighteen percent of the partnership the arbitration was precluded, but the trial court ordered the parties to submit to arbitration.[270] The arbitrators found in favor of McChristian and ordered the removal of the Harts as general partners.[271] The arbitral

257. *Id.*
258. *Id.*
259. *Id.* at 257, 743 S.W.2d at 390.
260. *Id.* at 256, 743 S.W.2d at 389–90.
261. *Ark. Dep't of Parks & Tourism*, 294 Ark. at 256, 743 S.W.2d at 390.
262. *Id.* at 256, 743 S.W.2d at 390.
263. *Id.* at 259, 743 S.W.2d at 389.
264. *Id.*, 743 S.W.2d at 391.
265. 344 Ark. 656, 425 S.W.3d 552 (2001).
266. *Id.*, 42 S.W.3d at 552.
267. *Id.*, 42 S.W.3d at 552.
268. *Id.* at 660, 42 S.W.3d at 555.
269. *Id.* at 661, 42 S.W.3d at 555.
270. *Id.*, 42 S.W.3d at 555.
271. *Hart*, 344 Ark. at 661, 42 S.W.3d at 556.

award was confirmed by the chancery court, and the Harts filed motions to amend or vacate the award and the Chancellor's order confirming it.[272] In connection with these motions, the Harts reiterated their standing and procedural arguments, but the chancery court entered judgment confirming the award pursuant to Arkansas Code Annotated section 16-108-214, and the Harts appealed.[273]

In their first point for appeal, the Harts contended that the trial court erred in compelling arbitration under the LLPA.[274] In rejecting this argument, the court determined that such agreements addressed the strong Arkansas public policy favoring arbitration and determining, in light thereof, that such agreements are not to be construed strictly, but rather read to include arbitration topics within the spirit of the agreement resolving doubts in favor of arbitration.[275]

McChristian further contended that there were procedural defects in the arbitration, including the arbitrator's failure to keep a record and follow the rules of evidence.[276] These, he contended, constituted grounds for vacating the award.[277] The Arkansas Supreme Court rejected these procedural arguments, ruling that recordation of the proceeding is not required and the failure to follow evidentiary rules is, likewise, not grounds for vacatur of an arbitration award.[278] The court noted, "Our review is limited to vacating an award only upon the enumerated statutory grounds, unless the award is violative of a strong public policy."[279]

In *Anthony v. Kaplan*,[280] a dispute arose between KPMG and a former partner regarding his termination.[281] An arbitration hearing was held, and the arbitrators found that KPMG had complied with the partnership agreement in terminating Anthony. Anthony moved to vacate the arbitral decision in federal court, which was denied.[282] The genesis of this lawsuit was Anthony's claim that his attorney in the arbitration proceeding had committed malpractice.[283] In determining whether the attorney committed malpractice, the Arkansas Supreme Court was required to determine whether the award

272. *Id.*, 42 S.W.3d at 556.
273. *Id.*, 42 S.W.3d at 556.
274. *Id.*, 42 S.W.3d at 556.
275. *Id.*, 42 S.W.3d at 556.
276. *Id.* at 669, 42 S.W.3d at 560.
277. *Hart*, 344 Ark. at 669, 42 S.W.3d at 560.
278. *Id.*, 42 S.W.3d at 560 (citing Dean Witter Reynolds, Inc. v. Deislinger, 289 Ark. 248, 711 S.W.2d 771 (1986)).
279. *Id.* at 668, 42 S.W.3d at 560.
280. 324 Ark. 52, 918 S.W.2d 174 (1996).
281. *Id.* at 55, 918 S.W.2d at 175.
282. *Id.*, 918 S.W.2d at 176.
283. *Id.*, 918 S.W.2d at 176.

should be vacated on statutory grounds or as violative of public policy.[284] The court determined that the award was not subject to vacatur and, in doing so, quoted with approval *McElroy v. Waller*,[285] which it characterized as setting out general principles.

> The fact that parties agree to submit their disputes to arbitration implies an agreement to be bound by the arbitration board's decision, and every reasonable intendment and presumption is in favor of the award; it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or misfeasance or malfeasance. Unless the illegality of the decision appears on the face of the award, courts will not interfere merely because the arbitrators have mistaken the law, or decided contrary to the rule of established practice as observed by courts of law and equity.[286]

In *Dean Witter Reynolds, Inc. v. Deslinger*,[287] a party dissatisfied with an arbitral decision appealed, contending that the arbitrators excluded certain evidence that would have been admitted in court.[288] The Arkansas Supreme Court determined that this did not rise to the level of the statutory ground of partiality: "[I]t is well established that the interest, partiality, or bias which will overturn an arbitration award must be certain and direct, and not remote, uncertain or speculative."[289] And in *Lancaster v. West*,[290] the Arkansas Supreme Court held that bare allegations of partiality on the part of arbitrators are insufficient, rejecting the appellant's claim of partiality of the arbitral board on "her belief that certain arbitration panel members were not impartial" without more.[291]

In *ESI Group, Inc. v. Brown*,[292] the Arkansas Court of Appeals was faced with a claim by the loser at an arbitration hearing that the arbitrator had exceeded the scope of the arbitration agreement.[293] ESI had purchased stock in a corporation from the Browns, and a controversy arose as to whether the Browns had misrepresented the earnings of the corporation in

---

284. *Id.* at 56–58, 918 S.W.2d at 176–77 (citing Stifle Nicholaus & Co. v. Francis, 872 S.W.2d 484 (1994); Maross Const. Inc. v. Cent. N.Y. Reg'l Transp. Auth., 488 N.E.2d 67; Lieberman v. Lieberman, 149 Misc. 2d 983, 566 N.Y.S.2d 490 (Supp. 1991)).

285. 1 Ark. App. 292, 731 S.W.2d 789 (1987).

286. Anthony v. Kaplan, 342 Ark. 52, 59, 918 S.W.2d 174, 178 (1996) (quoting McLeroy v. Walker, 21 Ark. App. 292, 295, 731 S.W.2d 789, 791 (1987)); *see also* Chrobak v. Edward D. Jones & Co., 46 Ark. App. 105, 878 S.W.2d 760 (1994) (citing Alexander v. Fletcher, 206 Ark. 906, 175 S.W.2d 196 (1943); Kirten v. Spears, 44 Ark. 166 (1884)).

287. 289 Ark. 245, 711 S.W.2d 771 (1986).

288. *Id.* at 250, 711 S.W.2d at 771.

289. *Id.* at 251, 711 S.W.2d at 772 (quoting 56 A.L.R.3d 697 (1973)).

290. 319 Ark. 293, 891 S.W.2d 357 (1995).

291. *Id.* at 300, 891 S.W.2d at 361.

292. 90 Ark. App. 6, 203 S.W.3d 664 (2005).

293. *Id.* at 6, 203 S.W.3d at 666.

question.[294] ESI contended that they had and argued that the purchase price for the stock should be adjusted accordingly.[295] The parties settled their dispute and executed a settlement agreement, which called for the preparation of audited financial statements to be used, pursuant to a formula, to calculate a price adjustment, subject to a floor and ceiling amount.[296] The settlement agreement contained an arbitration clause by which disputes "concerning" the settlement agreement would be resolved by binding arbitration.[297] The Browns, dissatisfied with the preparation of the audited financial statements and the resultant price adjustment, filed suit contending, *inter alia*, breach of contract.[298] At ESI's request, the court referred the claim to arbitration at which ESI contended that the arbitrator's power was limited to a determination of the breach of contract claim in the Brown's lawsuit.[299] The Browns, on the other hand, contended that the arbitration covered any issue related to the settlement agreement.[300] The arbitrator agreed with the Browns, concluding that any dispute concerning the settlement agreement was subject to arbitration; therefore, the arbitrator decided issues in the dispute in addition to the breach of contract claim brought by the Browns against ESI.[301] ESI moved for reconsideration by the arbitrator and persisted in its contention that the arbitrator erred in resolving any matter other than the breach of contract claim in the original circuit court complaint brought by the Browns.[302] The arbitrator denied the motion for reconsideration, and ESI filed a motion in circuit court to vacate the arbitration award, claiming it exceeded the scope of the arbitration.[303] The trial court denied that motion, and ESI appealed to the Arkansas Court of Appeals.[304]

The Arkansas Court of Appeals began its analysis by pointing out that the scope of appellate review is very narrow and that an arbitral award may be vacated only upon statutory grounds or a finding of a violation of strong public policy.[305] The court identified its task as being to construe the arbitration award, if possible, to uphold its validity and to uphold the award absent a clear showing that it was made without authority or as a result of fraud, mistake, misfeasance, or malfeasance.[306] The court felt bound to give effect

294. *Id.* at 8, 203 S.W.3d at 665.
295. *Id.*, 203 S.W.3d at 665.
296. *Id.*, 203 S.W.3d at 665.
297. *Id.* at 9, 203 S.W.3d at 665.
298. *ESI Group*, 90 Ark. App. at 9, 203 S.W.3d at 665.
299. *Id.*, 203 S.W.3d at 666.
300. *Id.*, 203 S.W.3d at 666.
301. *Id.*, 203 S.W.3d at 666.
302. *Id.* at 10, 203 S.W.3d at 666.
303. *Id.*, 203 S.W.3d at 666.
304. *ESI Group*, 90 Ark. App. at 10, 203 S.W.3d at 667.
305. *Id.*, 203 S.W.3d at 667.
306. *Id.* at 11, 203 S.W.3d at 667.

to the parties' contract.[307] However, it held that the arbitration agreement would not be strictly construed, but rather it would be construed to include subjects within the spirit of the agreement, resolving ambiguities regarding intent or scope in favor of arbitration.[308] With those guideposts, the court concluded that even if part of the arbitral award dealt with compensation due under a non-competition agreement rather than solely the settlement agreement, that the award "concerned the settlement agreement" and was therefore the proper subject of arbitration as within the spirit of the arbitration agreement.[309] Accordingly, the court affirmed the trial court's refusal to vacate the arbitral award.[310]

With the foregoing discussion of the historical perspectives underlying the purposes of the FAA and the statutory and common law limitations on vacatur of arbitral decisions established in the federal courts as well as those in Arkansas, and the analysis of the *Harbert* decision and other federal cases in which sanctions have been applied, the question remains, where do we go from here? The *Harbert* court has unmistakably thrown down the gauntlet insofar as the Eleventh Circuit is concerned, and based on the multitude of articles and cases citing and discussing this case, it is apparent that numerous other courts have been, and will continue to be, urged to adopt the stance taken in *Harbert*. In the next, and concluding, section of this article, the future ramifications of *Harbert* will be discussed as well as the wisdom, or lack thereof, of harsh sanctions to those who deign to challenge arbitration awards and lose.

VI. CONCLUDING COMMENTS AND RECOMMENDATIONS

In *Harbert*, the Eleventh Circuit Court of Appeals did four things: (1) it identified what it called the "poor loser problem," defined by that court as arising when the losing party in arbitration refuses to quit and seeks relief from the arbitration award without a good basis for doing so;[311] (2) it characterized the poor loser problem as a threat to the underlying goals of the Federal Arbitration Act to reduce congestion and provide a quicker and cheaper alternative to the litigation system;[312] (3) it expressed its exasperation with this problem;[313] and (4) it identified a potential solution, the threat of sanc-

307. *Id.*, 203 S.W.3d at 667.
308. *Id.* at 11–12, 203 S.W.3d at 667.
309. *Id.* at 12, 203 S.W.3d at 668.
310. *ESI Group*, 90 Ark. App. at 12, 203 S.W.3d at 668.
311. B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 907, 913 (11th Cir. 2006).
312. *Id.* at 907.
313. *Id.* at 914.

tions, to attempt to discourage this practice.[314] What the court failed to do was identify exactly how the practitioner representing a losing party at arbitration is to make the determination, prior to launching the vacatur process, whether there is, in fact, "any real legal basis for doing so."[315] In reaching its conclusion that Harbert had pursued vacatur without an appropriate legal basis, the court relied on a number of arbitration bromides: judicial review of arbitration awards is narrowly limited;[316] deference is to be given to the arbitration award;[317] and manifest disregard of the law must be shown by clear evidence.[318]

In assessing the wisdom of pursuing vacatur of an arbitration decision, one must, no doubt, consider the standards of the law of arbitration vacatur discussed above. There is, without a doubt, a strong policy both nationally and in Arkansas favoring arbitration as a mechanism to relieve congestion and expedite the resolution of disputes in an economical fashion.[319] Additionally, judicial review of arbitration awards is quite narrow[320] in that the court will not substitute its view of the evidence for that of the arbitrator, and mere errors of law or fact are insufficient to set aside an arbitration award.[321] Most of the statutory and common law bases for setting aside an arbitration award must be shown by clear and convincing evidence,[322] and grounds that are uncertain or speculative are insufficient.[323] With respect to the frequently asserted grounds of undue means or fraud, the courts have set rigorous standards requiring a showing of intent or culpability and a demonstration that the conduct was outcome determinative.[324] Procedural irregularities, standing alone, are seldom enough.[325] Also, claims that the arbitrator exceeded his power or imperfectly executed it are rarely successful.[326] Accordingly, based on the foregoing, it is clear that in Arkansas and elsewhere a bleak picture has been painted for one considering an attempt to vacate an adverse arbitration decision.

This pessimism is supported by a study presented in April 2005 at the American Bar Association Section of Dispute Resolution's Seventh Annual Conference, which was the subject of a recent article entitled *Vacating Arbi-*

314. *Id.* at 913–14.
315. *Id.* at 913.
316. *Id.* at 909.
317. *Harbert*, 441 F.3d at 909.
318. *Id.* at 910.
319. *See supra* text accompanying notes 104, 194, 195, 209, 222.
320. *See supra* text accompanying notes 106, 109, 185, 196, 197, 198, 224, 228, 247.
321. *See supra* text accompanying notes 137, 154, 155, 179, 199, 230.
322. *See supra* text accompanying notes 116, 121, 134, 150, 230.
323. *See supra* text accompanying notes 123, 125, 188.
324. *See supra* text accompanying notes 111, 112, 113, 114, 115.
325. *See supra* text accompanying notes 50, 74, 140.
326. *See supra* text accompanying notes 71, 81, 147, 148, 149, 154.

tration Awards.[327] Mills, et al., analyzed 182 reported state and federal cases decided in 2004 in which vacatur of an arbitration award had been requested.[328] In these 182 cases, the parties seeking vacatur of the arbitration award raised 277 grounds for vacatur.[329] Of these 277 grounds, only fourteen percent were successful.[330] The following is a breakdown from the Mills study showing the success rates of the various grounds of vacatur asserted in the subject cases:

Ground	Attempted	Vacated	% Successful
Corruption/Fraud	13	1	7.7
Refused postponement	12	2	16.7
Manifest disregard	52	2	3.8
Refused evidence	24	3	12.5
Evident partiality	33	4	12.1
Misbehavior	42	7	16.7
Exceeded powers	101	21	20.8
Total	277	40	14.4[331]

The aforementioned results are not particularly surprising given the numerous and substantial hurdles the Federal Arbitration Act, its state counterparts, and the common law have placed on vacatur of arbitration awards. Mills, et al. concluded, "In general, our sample confirmed once again how very difficult it is in the real world for parties to obtain vacatur of an award."[332] It is not overstatement to characterize these hurdles as nearly insurmountable. However, with the *Harbert* decision, the cost of challenging an arbitral award has gone up, and assuming the logic of *Harbert* is accepted in other federal and state courts, the risk of being wrong is significant. With *Harbert's* logic, "poor losers" may be accurate in more than one sense of the term as a result of the imposition of monetary sanctions. How will counsel for these losers advise their clients, and how will those clients, both sophisticated and unsophisticated, make these decisions?

The aforementioned cases from the federal courts and Arkansas, when combined with the results of the Mills study, lead inescapably to the conclu-

327. Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005.

328. *Id.* at 24.

329. *Id.* at 23.

330. *Id.* at 24.

331. *Id.* at 26.

332. *Id.*

sion that in the vast majority of cases, an attempt to vacate an arbitration award will be unsuccessful. In light of that, how can it be said, absent the most extreme and unusual circumstances, that such an attempt has any "real legal basis"? The *Harbert* decision may thwart all but the most intrepid. The question almost boils down to whether, in this context, the courts want to adopt a "loser pays" rule, when, in fact, the party seeking the vacatur of an arbitration award is almost always the loser.

The lessons to be learned from *Harbert* are simple and at least facially appealing. The *Harbert* court, and other courts that ultimately adopt the same logic, are concerned about degradation of the arbitration process by the usually unsuccessful, but multitudinous, attempts to have arbitration awards judicially vacated. They see the harm, not from the ultimate success of the challenges because as can be seen, most are unsuccessful, but from the challenges themselves. Under this view, the parties and the legal system are denied the significant benefits of arbitration if attacks on arbitration awards, except in the most compelling circumstances, are permitted to go unchecked. It is hoped that the threat of significant sanctions will thwart vacatur actions that do not have an objectively identifiable and substantial legal basis. The *Harbert* court struck the balance between reducing the number of vacatur actions and discouraging meritorious vacatur contests in favor of the former.

However, the *Harbert* logic raises some concerns. Much of the case law in the vacatur area is very fact intensive. The courts in these cases tend to spend a great deal of effort analyzing the specific fact situation. From the practitioner's standpoint, such fact-based decisions are sometimes difficult to apply to the case at hand. Another problem arises in states such as Arkansas thath do not have a large body of law dedicated to the vacatur issue. While the Arkansas courts do have a number of cases dealing with this issue, none have been located addressing the imposition of sanctions in connection with unsuccessful attempts to vacate arbitration awards. Furthermore, most of the Arkansas cases rely on general principles of arbitration law and presumptions in connection with the review of arbitration decisions rather than on the specifics of the statutory grounds for vacating arbitration awards. Several have never been addressed at all.

In addition, the case law related to judicially crafted exceptions to the general rule that arbitration awards are final is not well developed in Arkansas. Therefore, the task put to one considering an attempt to vacate an arbitration award in Arkansas or other states with limited arbitration jurisprudence, under the standard set out in *Harbert* ("real legal basis"), may not be so simple. It is true that the Arkansas Supreme Court and other state courts have stated that when faced with issues previously undecided in this area, they will rely upon decisions from other jurisdictions, but which jurisdiction? As discussed above, there is variance in the law related to the standards for vacating arbitration awards.

As has been pointed out, parties to arbitration agreements are there by choice and, if they do not desire to accept the finality of arbitration decisions, they are free to refrain from entering into these agreements.[333] Certainly that is true, but as a favored means of dispute resolution, it would follow that the national policy favoring arbitration includes the notion that the more parties willing to participate in this process, the better. In that vein, it is appropriate to consider the effect of the *Harbert* ruling, if widely adopted, on the willingness of "high volume" participants in the arbitration process to continue to participate in that process.

Given the fact that the vast majority of such motions for vacatur will be unsuccessful, the author anticipates that in Arkansas, and elsewhere, requests for sanctions under the *Harbert* rule will accompany virtually every response to a motion to vacate an arbitral award. The task of courts presented with such motions will be to balance two competing, and important, public policy goals: the need to protect the underlying purposes and benefits of arbitration against the rights of parties to test the limits of the general rule that arbitration awards are final. The deftness with which the courts are able to strike this balance will soon become apparent.

333. *See, e.g.*, CUNA Mut. Ins. Soc. v. Office & Prof'l Employees Int'l Union, Local 39, 443 F.3d 556, 561 (7th Cir. 2006).