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ARBRRATION AFTER \textit{HALL STREET} v. \textit{MATTEL}: WHAT HAPPENS NEXT?

\textit{Stanley A. Leasure}\textsuperscript{*}

I. INTRODUCTION

Sparking a policy debate in the business and legal communities, on March 25, 2008, the United States Supreme Court ruled that the Federal Arbitration Act’s grounds for vacatur and modification of arbitral awards are exclusive and declared arbitration agreements calling for expanded judicial review unenforceable.\textsuperscript{1} Writing for the majority in this 6-3 decision, Justice Souter noted as follows:

When all these arguments based on prior legal authority are done with, Hall Street and Mattel remain at odds over what happens next. Hall Street and its \textit{amici} say parties will flee from arbitration if expanded review is not open to them. One of Mattel’s \textit{amici} foresees flight from the courts if it is. We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of the arbitrators or to that of the courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.\textsuperscript{2}

Even though Hall Street and Mattel “remain[ed] at odds as to what happens next” and Justice Souter could not foretell who was right,\textsuperscript{3} that question—What happens next?—is vitally important to those whose business dispute resolution strategies incorporate arbitration.

Since the passage of the Federal Arbitration Act (FAA) in 1925, American business has used arbitration with increasing frequency. Businesses today identify a number of advantages to arbitration over the primary alternative, civil litigation, including: control, confidentiality, cost and time savings, and finality.

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\textsuperscript{1} Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) (hereinafter \textit{“Hall Street”}).

\textsuperscript{2} \textit{Id.} at 1406 (citations and footnote omitted).

\textsuperscript{3} \textit{Id.}
Central to the calculus surrounding the selection of arbitration is that business does not like litigation's unpredictability. Arbitration is seen as a way to better manage risk through a process that allows the selection of decision makers with expertise and mature judgment in the subject area. Some participants see the finality of arbitration as a two-edged sword in high-stakes disputes; arbitration is good insofar as a quick and cost effective resolution is concerned, yet it is potentially disastrous in the event of an irrational award. These participants want to ameliorate that risk by agreeing to the possibility of expanded judicial review and relief in some circumstances, such as legal error or lack of substantial evidence—grounds not available under the FAA. For those desiring to arbitrate under the auspices of the FAA, the option of expanded review has now been eliminated by the Supreme Court in a decision eschewing any significant consideration of the extant policy issues, hewing instead to strict rules of statutory construction.

This dispute's roots can be traced to 1925 when Congress passed the FAA to "reduc[e] [the] technicality, delay and expense to a minimum and at the same time safeguard[] the rights of the parties" as a result of "agitation against the costliness and delays of litigation." The FAA's legislative history reflects that Congress sought to achieve two goals: reduction of formality, expense, and delay in the resolution of disputes and safeguarding the rights of the parties. In Hall Street the United States Supreme Court, under the rubric of statutory construction, struck a balance between these goals in favor of the reduction in formality, delay, and expense, concluding that the statutory grounds for vacatur and modification of arbitration awards contained in the FAA are exclusive and agreements to supplement those grounds are unenforceable. In his dissent, Justice Stevens decried the decision as in conflict with Congress's "core purpose" in passing the FAA: the "abrogat[ion] [of] the general common-law rule against specific enforcement of arbitration agreements."6

The right of parties to arbitration to agree to expand the scope of judicial review beyond that provided in the FAA and compel its enforcement is in accord with the principal purpose of the FAA. Proponents also say public policy demands that disputants should not be forced to make a choice between litigation and arbitration with no way to ensure the legal correctness of the award. The concern is that, requiring parties to make such a choice will cause many business managers to lose their appetite for arbitra-

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5. Id.
6. Id. at 1408 (Stevens, Kennedy, JJ., dissenting) (citation omitted).
8. See id. at 38–39.
tion by requiring them to "bet the company" on a process with no prospect of meaningful review.9

The concept of judicial review limited to the bases provided by the FAA is grounded in the Act's other primary purposes—finality and savings of time and money.10 The thesis here is that unlimited review of arbitration awards, structured at the parties' whim, would relegate arbitration to nothing more than a prelude to litigation and transform it into something never foreseen by the drafters.11 Proponents also contend that the statutory text of the FAA allows no other conclusion and that Congress has defined the boundaries of judicial review under federal arbitration law.12

Policy considerations notwithstanding, the Court felt constrained by the statutory text.13 It candidly acknowledged that it could not predict the practical effect of its ruling on the continued viability of arbitration without the possibility for meaningful judicial review for legal error or substantial evidence.14 The development of the law of arbitration, however, has been steeped in considerations of public policy as divined by the judiciary from the legislative history of the statute. The judiciary has been sensitive to arbitration's jurisprudential development in light of the policy goals declared by the drafters.15 But, in Hall Street, over the objection of the dissent, the majority declined to consider those issues in any substantial way.16 Nevertheless, major public policy questions are impacted by this holding. Some of these bear on the continued efficacy of arbitration as a leading mechanism for the resolution of disputes in the United States. As a result of the Court's decision to resolve the issues in the virtual vacuum of statutory construction, the political branches will be required to have the final say. Its task will be to weigh the issues surrounding the question of whether, under the federal arbitration statute, expanded judicial review should be available to those who want it (and the effect on the utilization of arbitration of not having it)

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9. See id. at 40.
11. See id. at 48.
13. Hall Street, 128 S. Ct. at 1406.
14. See id.
16. See id.
and then further consider appropriate statutory amendments to effectuate that judgment.

This Article first provides an overview of the federal law of vacatur and modification, which provided the statutory framework within which the Hall Street decision was rendered. Next, this Article provides the common law context within which the United States Supreme Court confronted the issues in Hall Street and then further discusses the major cases giving rise to the split among the circuit courts of appeal on the question of the authority of parties to agree to grounds for vacatur not contained in the FAA. The majority and dissenting opinions of Hall Street, as well as the FAA’s legislative history, are then considered in detail. The final part of the Article presents observations and recommendations regarding the effect of the decision on the law and practice of arbitration, as well as how to address the unresolved policy issues.

II. THE STATUTORY UNDERPINNINGS OF HALL STREET V. MATTEL

The Hall Street majority focused on sections 9, 10, and 11 of the FAA in reaching its decision. An understanding of the interplay between these statutory provisions is essential to an appreciation of the issues involved in that litigation and, ultimately, the decision of the United States Supreme Court.

A. Confirmation Under Section 9

The provisions of section 9 provide the “shortcut” referred to in Justice Souter’s quotation set out at the beginning of this Article. This section gives the winner at arbitration an expeditious way to obtain a court ordered confirmation of the arbitration award with, of course, some conditions. It provides in pertinent part as follows:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration... then... any party to the arbitration may apply to the court... for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title.

17. See infra Part II.
18. See infra Part III.
19. See infra Part IV.
20. See infra Part V.
Hall Street and Mattel had agreed to the entry of a judgment on the arbitral award and, in addition, empowered the court to “vacate, modify or correct any award: (i) where the arbitrator’s findings of fact are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.” 22 This litigation began as the parties alternately attempted to obtain or resist confirmation of the arbitral award under section 9. 23 The Court granted certiorari to decide whether the bases for vacatur and modification established by the FAA are exclusive. 24 Central to that task was the determination of whether the language in section 9, “the court must grant such order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title,” when read in conjunction with sections 10 and 11, provided the exclusive grounds for vacatur and modification, not susceptible to expansion by agreement of the parties. 25

B. Vacatur Under Section 10

Requests for vacatur of arbitration awards under the FAA are governed by 9 U.S.C. §10, which provides for very limited review and offers only four bases upon which the court may vacate an arbitral award:

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party may have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 26

The issue of vacatur of arbitral awards (in general) and the interpretation of §10 (in particular), has generated a great deal of litigation, resulting in a considerable body of federal common law. It is important to recognize just how difficult, as a practical matter, it is to overturn an arbitral award as a result of the courts’ narrow interpretation of the statutory grounds for vacatur and the considerable deference afforded arbitration awards. 27 As discussed below, cases addressing the grounds for vacatur under the FAA teach many things, but the unmistakable and overriding lessons are that such

23. *Id.* at 1401.
24. *Id.* at 1400.
25. *Id.* at 1405.
27. O.R. Sec., Inc. v. Prof’l. Planning Assocs., 857 F.2d 742, 746 (11th Cir. 1988).
grounds: (1) are construed in the narrowest of fashions, (2) must be proven by clear and convincing evidence, (3) must be shown to affect the decision of the arbitrator, and (4) must amount to more than factual or legal errors.28

Arbitral awards "procured by corruption, fraud, or undue means" are subject to vacatur under the FAA.29 Subsection 10(a) focuses on the conduct of a party and not the arbitrator. Facts establishing corruption, fraud, or undue means must be supported by clear and convincing evidence30 and must have been undiscoverable, using due diligence, before the arbitration.31 Before the courts will ascribe the labels "corruption," "fraud," and "undue means" to conduct, it must be intentional, extreme, and involve serious culpability amounting to immoral, or perhaps even illegal, activity.32 The extreme nature of the requisite conduct has been characterized as more than the presentation of legally objectionable evidence at the arbitration or "sloppy or overzealous lawyering."33 For example, "undue means must be limited to an action by a party that is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence."34 Lastly, the existence of facts, giving rise to one of the statutory grounds, in the abstract is not enough; a material connection to the entry of the arbitral award must be proven.35

1. **Arbitrator Misconduct**

Two of the most common grounds utilized by those seeking vacatur are evident partiality or corruption on the part of the arbitrator.36 A mens rea requirement for "evident partiality" has been imposed, calling for proof of

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28. See infra Part III.A.
31. Lafarge Conseils Et Etudes, 791 F.2d at 1339; see also Dogherra, 679 F.2d at 1297 and Karppinen v. Karl Kiefer Machine Co., 187 F.2d 32, 35 (2d Cir. 1951) (discussing fraud).
35. See Harre v. A.H. Robins Co., 750 F.2d 1501, 1504–05 (11th Cir. 1985) (vacated on other grounds), 866 F.2d 1301 (11th Cir. 1989); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968).
the arbitrator’s improper motive. An appearance of bias is insufficient. A number of courts have adopted an objective standard with respect to a showing of partiality, requiring evidence that “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.” The difficulty of proving evident partiality is compounded by the fact that the courts decline to base such a finding on evidence that is “remote, uncertain or speculative,” requiring instead evidence of bias that is “direct, definite and capable of demonstration.”

As pointed out, however, by Justice White:

This does not mean the judiciary must overlook outright chicanery in giving effect to their [arbitrators] awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.


38. Peoples Sec. Life Ins. Co., 991 F.2d at 146; Health Servs. Mgmt. Corp., 975 F.2d at 1264; Apperson, 879 F.2d at 1358; Morelite Constr. Corp., 748 F.2d at 83–84.


41. Commonwealth Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 150 (1968) (White, J., concurring). A variety of circumstances have been found by the courts to be insufficient to establish partiality of sufficient magnitude to warrant vacatur. See, e.g., Lucent Techs., Inc. v. Tatung Co., 379 F.3d 24, 28–30 (2d Cir. 2004) (arbitrator had previously served as expert witness for party); Montez v. Prudential Sec., Inc., 260 F.3d 980, 983–84 (8th Cir. 2001) (previous relationship between advocate’s law firm and arbitrator); Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1009–10 (11th Cir. 1998) (individuals held liable for debit balances of corporate entity whose corporate veil was pierced and arbitrators were in debit balance collection business); Lifecare Int’l, Inc. v. CD Med., Inc., 68 F.3d 429, 433–35 (11th Cir. 1995, modified, 85 F.3d 519 (11th Cir. 1996)) (arbitrator failed to disclose scheduling dispute with law firm of advocate in arbitration proceeding). Alternatively, arbitration awards have been set aside on the basis of evident partiality in a number of cases. See, e.g., Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 158–60 (8th Cir. 1995) (investment firm served as underwriter for company of which arbitrator was officer); Schmitz v. Zilveti, 20 F.3d 1043, 1049 (9th Cir. 1994) (undisclosed previous representation of party by arbitrator’s law firm); Morelite Constr. Corp., 748 F.2d at 84 (2d Cir. 1984) (Union was party to arbitration and arbitrator’s son was officer of that Union); Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1201–02 (11th Cir. 1982) (arbitral party had undisclosed dispute with family company of arbitrator).
The FAA also provides for vacatur "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent in material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." This provision has also been interpreted quite restrictively. The Court characterized as "very rare" procedural irregularities of sufficient magnitude to constitute grounds for vacatur. In fact, the misconduct must be so egregious as to destroy "the fundamental fairness of the arbitration proceedings." "Fundamental fairness," however, not procedural perfection, is the standard. "In handling evidence an arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing." Errors on the part of an arbitrator in rejecting evidence are insufficient unless they were "in bad faith or so gross as to amount to affirmative misconduct." Establishment of vacatur under this subsection requires clear and convincing evidence of misconduct that was outcome determinative.

2. Arbitrator Misuse of Powers

A final statutory basis for relief from arbitration awards encompasses circumstances in which the arbitrators exceed their powers or so imperfectly execute them that a mutual, final, and definite award was not made. Language from the holding of the United States Supreme Court in United Pa-

42. 9 U.S.C. § 10(a)(3).
45. Bell Aerospace Co., Div. of Textron, Inc. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974). See also Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997).
48. See PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 994 (8th Cir. 1999), cert. denied, 529 U.S. 1020 (2000); A.G. Edwards & Sons, Inc. v. McColough, 967 F.2d 1401, 1401 (9th Cir. 1992); M & A Elec. Power Coop. v. Local Union No. 702, 977 F.2d 1235, 1238 (8th Cir. 1992); Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990). The physical and mental condition of the arbitrator has been held to be beyond examination under the grounds of vacatur provided by the FAA. In Gearhardt v. Cadillac Plastics Group, Inc., a question was raised as to the mental fitness of the arbitrator. The court concluded that this would not suffice as grounds for vacatur under 9 U.S.C. § 10(c), even if true. 140 F.R.D. 349, 352 (S.D. Ohio 1992).
perworkers–International Union, AFL-CIO v. Misco, Inc.\textsuperscript{50} illustrates just how difficult it is to set aside an arbitral award on this basis: "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."\textsuperscript{51} The courts' interpretation of this basis for vacatur under the FAA is founded upon the maxim that parties cannot be compelled to arbitrate when they have not agreed to arbitrate.\textsuperscript{52} Only when the arbitrator manages to alter the parties' contract or fails to meet contractually assigned obligations, however, can it be said that he has exceeded his powers.\textsuperscript{53} This basis for vacatur has also been examined under a rubric asking whether the arbitrator has exceeded the arbitration agreement's "essence."\textsuperscript{54} The courts have made it clear that legal error,\textsuperscript{55} failure to specify decisional grounds,\textsuperscript{56} or failure to state conclusions of law\textsuperscript{57} are not within the ambit of 9 U.S.C. § 10(a)(4).

C. Modification Under Section 11

The FAA provides the following provision for modification of arbitral awards:

(a) [w]here there was an evident material miscalculation of figures or an evident material mistake of the description of any person, thing, or property referred to in the award. (b) [w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. [or] (c) [w]here the

\textsuperscript{50} 484 U.S. 29 (1987).
\textsuperscript{51} Id. at 38.
\textsuperscript{56} United Steelworkers of Am., 363 U.S. at 598 (1960).
\textsuperscript{57} See Kurt Orban Co. v. Angeles Metal Sys., 573 F.2d 739, 740 (2d Cir. 1978).
award is imperfect in matter of form not affecting the merits of the controversy. 58

In addition, the court is empowered to enter an order on a fine or correcting an award “to effect the intent thereof and promote justice between the parties.” 59

It is axiomatic that mistakes of fact are not sufficient to justify the modification of an award, 60 and the courts have construed subsection 11(a) almost literally by limiting modification to situations in which there is a mathematical error apparent on the face of the award. 61 The phrase “evident material mistake” has been similarly limited:

The plain language of the statute embraces only an “evident material mistake” that appears in a description “in the award.” Because the arbitration panel crafts the award, only the panel can make a mistake in the award. To make a “mistake” is to “understand wrongly” or to “recognize or identify incorrectly.” 62

In AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc., 63 the court concluded that this subsection did not apply because it was not that the arbitration panel did not understand, but rather, the arbitration panel was without knowledge due to a failure of proof on the part of one of the parties. 64 The court declared this to be beyond the statutory language of §11(a). 65

Likewise, an award is subject to modification if it includes a matter not submitted. 66 In making this determination, the court must consider whether the arbitrator has stayed “within the areas marked out for his consideration.” 67 This, in turn, requires the court to ascertain whether the arbitrator

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60. See Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960).
63. 508 F.3d at 999 (11th Cir. 2007).
64. Id. at 999–1000.
65. Id. at 1000. The Eleventh Circuit rejected the contrary holding of the Fourth Circuit in Transnitro, Inc. v. M/V. Wade, 943 F2d 471 (4th Cir. 1991), which held § 11(a) to include situations in which mistakes of the parties were not brought to the attention of the arbitrator. Id. at 474.
has made an award with respect to a matter not "specifically or necessarily included in the subject matter submitted to arbitration." The decision of courts with respect to this issue, however, is—like many issues under the Federal Arbitration Act—colored by its policy of encouraging arbitration, with the courts upholding awards "whenever they justly may."

III. THE EXCLUSIVITY OF STATUTORY GROUNDS FOR VACATUR IN DISARRAY

By the time Hall Street reached the doorstep of the Supreme Court, two distinct and irreconcilable views had hardened within the circuits as to the enforceability of agreements for expanded judicial review of arbitral awards. One faction, consisting of the Ninth and Tenth Circuits, was undergirded by its perception that the sanctity of the judicial process precluded such private interference with the administration of the judicial process and its conclusion that the principal purpose of the FAA is to insure finality of awards in the interest of saving time and money. On the other side, the First, Third, Fourth, Fifth, and Sixth Circuits endorsed contractually expanded review, firmly wedded to the conclusion that compelling the judicial enforcement of the terms of private arbitration contracts lies at the heart of the FAA.

A. The Ninth and Tenth Circuits Reject Contractually Expanded Review

In Bowen v. Amoco Pipeline Co., the Tenth Circuit Court of Appeals became the first circuit to limit judicial review of arbitral decisions to the grounds set out in the Federal Arbitration Act. The Bowens filed suit against Amoco for damages to their real property resulting from leakage of oil from a pipeline across their property. At Amoco's request, the trial court stayed the proceedings and ordered arbitration pursuant to a provision in the right-of-way agreement under which the subject pipeline had been installed. The Bowens and Amoco agreed that either party would have the right to appeal the arbitral award on the grounds that it was "not supported by the evidence" and that the decision of the district court in that regard


70. 254 F.3d 925 (10th Cir. 2001) (hereinafter "Bowen").

71. Id. at 934.

72. Id. at 928.

73. Id.
would be final.\textsuperscript{74} The arbitrators awarded the landowners substantial damages, and they sought to confirm the award in district court.\textsuperscript{75} Amoco filed a motion to vacate the award and a notice of appeal to the district court, contending that the award was unsupported by the evidence.\textsuperscript{76} The district court refused to apply the parties' expanded scope of judicial review and limited its review to those grounds set forth in the FAA, and confirmed the award on that basis.\textsuperscript{77} Amoco appealed, seeking vacatur of the award and either remand for a new arbitration or to require the district court to conduct its review under the expanded standard set out in the parties' agreement.\textsuperscript{78}

Conceding the question to be a difficult one, the court held that the FAA and "principles announced in various Supreme [Court] decisions" fail to support the right of parties to arbitration agreements "to alter the judicial process by private contract."\textsuperscript{79} It distinguished this case from the circumstances at issue in\textit{ Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.},\textsuperscript{80} in which the United States Supreme Court endorsed the right of parties to arbitration agreements to "specify by contract the rules under which . . . arbitration will be conducted."\textsuperscript{81} The court pointed out that \textit{Volt} held only that the parties may structure the procedural aspects of arbitration as they see fit, but did not sanction the freedom "to interfere with the judicial process."\textsuperscript{82} Acknowledging that Congress mandated enforcement of arbitration agreements established specific standards for judicial review and recognized that common law principles require the courts to resolve doubts as to arbitrability in favor of arbitration, the Tenth Circuit rejected the conclusion that parties are at liberty to dictate standards of review at variance with those set out in the FAA.\textsuperscript{83}

In the court's view, such expanded review would undermine the FAA's policy of limited judicial review, which "ensures judicial respect for the arbitration process and prevents courts from enforcing parties' agreements to arbitrate only to refuse to respect the results of the arbitration."\textsuperscript{84} The

\begin{itemize}
\item \textsuperscript{74} Id. at 930.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Bowen, 254 F.3d at 930.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id. at 933. In so doing, the Tenth Circuit rejected contrary holdings of the Ninth and Fifth Circuits. \textit{Id.} at 933–34. See LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887–90 (9th Cir. 1997) (hereinafter "LaPine I"), vacated in part, 341 F.3d 987 (9th Cir 2003); Gateway Technologies, Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 996–997 (5th Cir. 1995), \textit{abrogated} by Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008).
\item \textsuperscript{80} 489 U.S. 468 (1989) (hereinafter "Volt").
\item \textsuperscript{81} Id. at 479.
\item \textsuperscript{82} Bowen, 254 F.3d at 934.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id. at 935.
\end{itemize}
court opined that enforcement of contractually created standards of review would undermine the aim of finality of arbitral awards. The court also quoted with approval the Eighth Circuit's description of the difference between litigation and arbitration:

We have served notice that where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.

The Ninth Circuit followed suit two years later in Kyocera Corp. v. Prudential-Bache Trade Services, Inc. Kyocera Corporation (Kyocera), Prudential-Bache Trade Corporation (Prudential), and LaPine Technology Corporation (LaPine) began a business enterprise in 1984. By 1986 LaPine encountered financial problems and the three companies, in connection with the reorganization of their business relationship, drafted a Definitive Agreement and an Amended Trading Agreement. Kyocera refused to execute the Amended Trading Agreement and LaPine subsequently filed suit in federal district court. The Definitive Agreement contained an arbitration provision, and the district court granted Kyocera's request to compel arbitration. The arbitrators determined that Kyocera had, in fact, entered into an agreement with LaPine and Prudential under the terms of the Amended Trading Agreement and that this agreement was breached by Kyocera to both Prudential and LaPine's damage in an amount in excess of $243 mil-

85. Id. (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)).
86. Id. at 936 (quoting UHC Mgmt. Co. v. Computer Sciences Corp., 148 F.3d 992, 998 (8th Cir. 1998)).
88. Id.
89. Id. at 989–90.
90. Id. at 990.
91. Id. The parties' arbitral agreement contained the following provisions:
   The decisions and awards of the Tribunal may be enforced by the judgment of the Court or may be vacated, modified, or corrected by the court (a) based upon any grounds referred to in the Act, or (b) where the Tribunal’s findings of fact are not supported by substantial evidence, or (c) where the Tribunal’s conclusions of law are erroneous.
   Id. at 990, n.4.
   The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous.
   Id. at 990–91.
Arguing for the standard of review set out in the arbitration clause, Kyocera urged the district court to set aside the arbitral award based, in part, on Kyocera's contentions that the arbitrators made errors of law and their findings of fact were unsupported by substantial evidence. Concluding that the FAA's limited grounds for vacatur could not be expanded by private contract and finding no statutory grounds to sustain vacatur, modification, or correction; the district court denied Kyocera's request to set aside the award. On appeal to the Ninth Circuit, Kyocera urged that the lower court erred in refusing to apply the contractual standard of judicial review.

In *LaPine Tech. Corp. v. Kyocera Corp.* (hereinafter *LaPine I*) a divided panel concluded that the district court should have used the expanded scope of review agreed to by the parties. The *LaPine I* court affirmed the finding of the district court that statutory grounds for vacatur under the FAA were not shown, but remanded the case for consideration of the vacatur issue under the standard of review set out in the parties' agreement. On remand, the district court confirmed most of the arbitrators' award, but returned the case to the arbitral panel (as a result of the district court's vacatur of one of the panel's findings of fact) to consider whether the vacatur of this finding would affect the arbitral award. The panel responded in the negative, and the court entered judgment in favor of Prudential and LaPine. Again Kyocera appealed, but again the district court was affirmed.

Subsequently, the Ninth Circuit granted Kyocera's request for rehearing en banc ("*LaPine II*"). In *LaPine II*, the court affirmed the district court's confirmation of the arbitral award and also took the opportunity to "correct the law regarding the proper standard for review of arbitral decisions under the FAA." But, in reversing its *LaPine I* decision, the court in *LaPine III* noted as follows:

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92. Id. at 990.
93. *Kyocera*, 341 F.3d at 991.
94. Id.
95. Id. In addition, Kyocera contended, at least summarily, that it was entitled to vacatur pursuant to the provisions of 9 U.S.C. § 10(a)(4) (arbitrator exceeded their power) and 9 U.S.C. § 10(a)(1) (award procured by fraud or undue means). Id. at 991.
96. 130 F.3d 884 (9th Cir. 1997).
97. *Kyocera Corp.*, 341 F.3d at 991.
98. Id. at 992.
99. Id.
100. Id. at 993.
101. Id.
102. Id. at 994.
We conclude that Congress has explicitly prescribed a much narrower role for federal courts reviewing arbitral decisions. The Federal Arbitration Act . . . enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard. Because the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator’s decision, we hold that private parties may not contractually impose their own standard on the courts.104

The court’s explanation for this reversal included an explication de texte of the FAA.105 The court observed that, at the request of a party, “the court must grant such an order [confirming an arbitration award,] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”106 The court emphasized that vacatur is permitted only on those grounds set out in the FAA.107 The court also pointed out that the modification or correction of an award pursuant to § 11 of the FAA is merited only in circumstances in which the award contains an evident miscalculation, where the award was determined with respect to matters not submitted to the arbitrators, or where the award was imperfect in form.108 Explaining that while these limited grounds of judicial review are among the narrowest in the law, the court emphasized that they preserve due process and at the same time limit unnecessary interference with the private arbitral process.109 The court found the logic underlying such restrictive review to be in accord with arbitration’s widely proclaimed benefits of speed, economy, simplicity, and

104. Kyocera, 341 F.3d at 994 (emphasis added). To support vacatur under the “manifest disregard” standard, the proponent has the difficult task of establishing that the arbitrator knew the law and explicitly disregarded it. See Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991); Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985); Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc. WOR Div., 546 F.2d 1107, 1113 (2d Cir. 1977); San Martine Compania de Navegacion, S.A., v. Sagunay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961).
105. See Kyocera, 341 F.3d at 994.
106. Id. at 997.
107. Id. Those grounds are: corruption, fraud, or undue means; partiality or corruption; refusing to postpone, or to hear evidence, or other misbehavior; and exceeded powers. Id. (citing French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986), the court explained that it had previously ruled that arbitrators “exceed their powers” only when the award is “completely irrational” and not merely when the arbitrators fail to correctly interpret or apply the law). Id.
108. Id.
109. Kyocera, 341 F.3d at 998.
finality.\textsuperscript{110} Seeing the issue as one of deference to the legislative branch, the court declared as follows:

Congress's decision to permit sophisticated parties to trade the greater certainty of correct legal decisions by federal courts for the speed and flexibility of arbitration determinations is a reasonable legislative judgment that we have no authority to reject.\textsuperscript{111}

In sum, the Ninth Circuit Court of Appeals concluded that by the time an arbitration case reaches federal court, the arbitration process is complete.\textsuperscript{112} The standards specified by Congress for the confirmation of that award must be followed, and no room remains for expansion by agreement of private parties who are without the power to dictate the manner in which federal courts conduct their business.\textsuperscript{113}

B. The First, Third, Fourth, Fifth and Sixth Circuits Endorse Contractually Expanded Review

In \textit{Gateway Technologies, Inc. v. MCI Telecommunications Corp.},\textsuperscript{114} the Fifth Circuit Court of Appeals ruled that agreements for expanded judicial review are enforceable.\textsuperscript{115} In 1990, MCI Telecommunications Corp. and Gateway Technologies, Inc. entered into a subcontract agreement concerning the design of a telephone system for the Virginia Department of Corrections.\textsuperscript{116} The subcontract included a provision requiring the parties, in the event of a dispute, to negotiate in good faith, and if that proved unsuccessful, to submit to binding arbitration.\textsuperscript{117} The arbitration clause provided that "errors of law shall be subject to appeal."\textsuperscript{118} A dispute arose between MCI and Gateway,\textsuperscript{119} MCI terminated the contract, and the matter proceeded to arbitration.\textsuperscript{120} The arbitrator awarded Gateway compensatory and punitive damages based on his finding that MCI had failed—in violation of the con-

\begin{itemize}
  \item \textsuperscript{111} \textit{Kyocera}, 341 F.3d at 998.
  \item \textsuperscript{112} Id. at 1000.
  \item \textsuperscript{113} Id. (citing \textit{Worth v. Tyer}, 276 F.3d 249, 262, n.4 (7th Cir. 2001); \textit{K & T Enters., Inc. v. Zurich Ins. Co.}, 97 F.3d 171, 175 (6th Cir. 1996); \textit{United States v. Vosteen}, 950 F.2d 1086, 1091 (5th Cir. 1992)).
  \item \textsuperscript{114} 64 F.3d 993, 997 (5th Cir. 1995) (hereinafter "\textit{Gateway}").
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id. at 995.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} \textit{Gateway}, 64 F.3d at 996.
\end{itemize}
tract—to negotiate in good faith.\textsuperscript{121} MCI asked the United States District Court for the Northern District of Texas to vacate the award, and Gateway sought confirmation of the award.\textsuperscript{122} The court purported to review the award using the expanded review provided in the agreement but, in fact, used its own harmless error standard to review alleged errors of law based on its notion of the policy favoring arbitration.\textsuperscript{123} It was on this basis that the award in favor of Gateway was confirmed.\textsuperscript{124} MCI appealed.\textsuperscript{125}

In line with what it called established principles of appellate review, the Fifth Circuit determined that it would use a \textit{de novo} standard in its examination of the district court’s confirmation order.\textsuperscript{126} The court emphasized that in the typical case, the scope of appellate review is quite limited under the terms of the FAA.\textsuperscript{127} It also made clear that the FAA precludes vacatur except in specified circumstances.\textsuperscript{128} The court, however, acknowledged the significance of an agreement calling for a broader review than that permitted or required by the FAA, explaining that the contractual provision that “errors of law shall be subject to appeal” is consistent with the FAA’s pro-arbitration policy because arbitration, at its core, remains a “creature of contract.”\textsuperscript{129} The \textit{Gateway} court found support for this conclusion in the language of the United States Supreme Court:

\begin{quote}
"[I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. \textit{Indeed, such a result would be quite inimical to the FAA’s purpose of ensuring that private agreements to arbitrate are enforced according to their terms.} Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which
\end{quote}

\begin{itemize}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Gateway}, 64 F.3d at 996 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1320 (5th Cir. 1994); McIlroy v. PaineWebber, Inc., 989 F.2d 817, 819–20 (5th Cir. 1993); Forsythe Int’l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020–21 (5th Cir. 1990)).
\item \textsuperscript{127} \textit{Gateway}, 64 F.3d at 996 (citing Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990)).
\item \textsuperscript{128} \textit{Gateway}, 64 F.3d at 996 (citing 9 U.S.C. § 10 (a)(1)–(4) (Supp. 1995) as the statutory circumstances for vacatur. See Forsythe Int’l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990)).
\item \textsuperscript{129} \textit{Id.}
\end{itemize}
they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted."  

The court construed this language to include the right to dictate the scope of review.  

The court emphasized that the underlying purpose of the FAA is to compel the enforcement of arbitration contracts according to their terms. In particular, the court demonstrated significant reliance on language from Volt, which construed the FAA as encompassing the right of the parties to establish their own scope of review. The court stated that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." The court held that the district court should have reviewed the arbitrator’s decision for errors of law under a de novo standard rather than its own “harmless error standard.” The court explained that because the parties had expressly provided for the review of errors of law by the district court, review should have been undertaken without regard to its wisdom because federal policy compels review in accordance with the terms of the agreement of the parties.  

Therefore, rather than remand the case, the Fifth Circuit undertook its own de novo review of the arbitral award searching for “errors of law.” That review led to the court’s decision to affirm the award with the exception of the award for punitive damages, which was vacated based on the court’s conclusion that “as a matter of law, the facts do not sustain a claim for breach of fiduciary duty.”  

In an unpublished opinion, the Fourth Circuit, in Syncor International Corp. v. McLeland, declared an arbitral provision calling for expanded review enforceable. This case arose as a result of a former employee’s

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131. Gateway, 64 F.3d at 997.  
133. Gateway, 64 F.3d at 997  
134. Id. n.3 (quoting Volt, 489 U.S. at 469).  
135. Gateway, 64 F.3d at 997.  
136. Id. (citing Volt, 489 U.S. at 469).  
137. Gateway, 64 F.3d at 997.  
138. Id. at 1000.  
140. Id. at *1.
alleged violation of a non-competition agreement. In 1995, claiming that former employee McLeland violated his employment agreement, Syncor demanded arbitration pursuant to the terms of that agreement. Syncor filed suit in federal court to compel arbitration after McLeland refused to participate in the arbitration because he considered the dispute beyond the scope of the arbitration agreement.

With the matter pending in federal court, the arbitration continued without McLeland, resulting in an award in favor of Syncor. The district court, reviewing the arbitral award for evidence of the arbitrator’s "manifest disregard of the law," granted Syncor’s request to enforce the award and McLeland appealed. The arbitration agreement in question provided that "[t]he arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error." McLeland claimed that this language required a de novo review of the arbitration award by the district court. The Fourth Circuit, following the Fifth Circuit’s holding in Gateway, concluded that the arbitrator’s legal findings should have been reviewed de novo. The court undertook its own de novo review and found no legal or factual error.

In Roadway Package System, Inc. v. Kayser, the Third Circuit held that enforcement of private arbitration agreements, including nonstatutory vacatur provisions, was in accord with the FAA’s underlying premise. Roadway Package System, Inc. engaged defendant Kayser to ship packages pursuant to a Linehaul Contractor Operating Agreement (LCOA). The LCOA included an arbitration clause with respect to its involuntary termina-

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141. Id.
142. Id. at *2.
143. Id.
144. Id. at *3.
145. McLeland, 1997 WL 452245 at *3. The arbitrator used a standard of review set forth in Upshur Coals Corp. v. United Mine Workers of America Dist. 31, 933 F.2d 225 (4th Cir. 1991) (which provides that: an arbitrator’s . . . interpretation of the law is accorded deference as well. A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable “even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion,” and may only be reversed “when arbitrators understanding correctly state the law, but proceed to disregard the same.” Id. at *6 (citations omitted).
146. Id. at *6.
147. Id.
148. Id. at *7.
149. Id. at *6.
150. Id. at 288.
151. Id. at 288–89.
tion provisions.\textsuperscript{153} The LCOA also provided that it was to be governed by the laws of the commonwealth of Pennsylvania.\textsuperscript{154} Upon Roadway's termination of the LCOA, Kayser demanded arbitration, which resulted in a damages award in Kayser's favor of more than $174,000.\textsuperscript{155} Roadway appealed to the United States District Court, seeking vacatur or modification.\textsuperscript{156} The district court vacated the award on the grounds that the FAA, and not Pennsylvania law, supplied the appropriate standard of judicial review, and also that the arbitrator exceeded his authority.\textsuperscript{157} Kayser appealed to the Third Circuit.\textsuperscript{158}

The appellate court initially addressed the question of whether the vacatur provisions of the FAA (as urged by Kayser) or the Pennsylvania Uniform Arbitration Act (PUAA) applied.\textsuperscript{159} The court concluded that the arbitral agreement involved interstate commerce and therefore found the FAA applicable.\textsuperscript{160} The court acknowledged the four circumstances under which a court may grant vacatur under the FAA, and provided three additional cir-

\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 289. (The arbitration clause provided in pertinent part:
\begin{quote}
"[i]n the event that RPS acts to terminate this Agreement . . . and [Kayser] disagrees with such termination . . . then each such disagreement . . . shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . .
\end{quote}

The arbitrator shall have the authority only to conclude whether the termination of [Kayser] was within the terms of this Agreement, to determine damages if required to do so under this subparagraph, and to provide for the division of the expenses of the arbitration between the parties . . . . If the arbitrator concludes that the termination was not within the terms of this Agreement, then, at the option of RPS . . . (2) [Kayser] shall nevertheless be terminated and . . . shall be entitled to damages equal to the arbitrator's determination of what [Kayser's] net earnings . . . would have been during the period between the date of termination to the last day of the term of this Agreement, (without any renewals). [Kayser] shall have no claim for damages in any other amount, and the arbitrator shall have no power to award punitive or any other damages

\begin{itemize}
\item The arbitrator shall have no authority to alter, amend or modify any of the terms and conditions of this Agreement (including by application of estoppel, waiver, or ratification), and further, the arbitrator may not enter any award which alters, amends or modifies the terms or conditions of this Agreement in any form or manner (including by application of estoppel, waiver, or ratification.).
\end{itemize}

\item \textsuperscript{154} \textit{Id.} at 290.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Roadway}, 257 F.3d at 291.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.} at 291.
\item \textsuperscript{159} \textit{Id.} at 292.
\item \textsuperscript{160} \textit{Id.} (citing Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 268 (1995)).
\end{itemize}

Title 9, section 2 of the United States Code provides that the FAA applies to any "written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract or transaction."
cumstances under which a court may correct or modify an award. The court also considered the effect of the Pennsylvania arbitration law, which it described as being divided into two categories: "statutory and common law." Under Pennsylvania's "statutory arbitration" the vacatur and modification provisions are substantially similar to those found in the FAA. Under "common law arbitration," the power of the courts to vacate arbitral awards is limited to cases in which a party has been "denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award." Under the PUAA, all arbitrations are presumed to be common law arbitrations unless the written agreement expressly provides for statutory arbitration. The court reasoned that if the provisions of the PUAA were applicable, the LCOA would require common law arbitration.

The court next set out to determine whether the parties had agreed to arbitrate pursuant to the provisions of state law, rather than federal law. The court noted as follows:

When a court enforces the terms of an arbitration agreement that incorporates state law rules, it does so not because the parties have chosen to be governed by state rather than federal law. Rather, it does so because federal law requires that the court enforce the terms of the agreement.

161. Id. at 292. Under 9 U.S.C. § 10(a), awards are subject to vacatur on the following bases: corruption, fraud or undue means; partiality or corruption on the part of the arbitrator; where the arbitrator unjustifiably refused to postpone the hearing or consider pertinent evidence or engaged in other misbehavior to the prejudice of a party; and, where the arbitrator exceeded the arbitrator's powers or imperfectly executed them to the extent that a mutual, final and definite award was not made. In addition, the court identified two common law grounds for vacatur recognized by the Third Circuit: "manifest disregard of the law" (citing Tanoma Mining Co. v. Local Union No. 1269, 896 F.2d 745, 749 (3rd Cir. 1990)) and "irrationality" (citing Swift Indus., Inc. v. Botony Indus., Inc., 466 F.2d 1125, 1134 (3rd Cir. 1972)). Roadway, 257 F.3d at 292. The court also described the circumstances under which an award may be corrected or modified by the court pursuant to 9 U.S.C. § 11: a material miscalculation, a mistake in description, or where the arbitrators have issued an award on a matter not submitted to them. Id. at 292 n.2.


163. Id. (citing 42 PA. CONS. STAT. § 7314 (a) (vacatur) and 42 PA. CONS. STAT. § 7315 (a) (modification and correction)).

164. Roadway, 257 F.3d at 292 n.2 (quoting 42 PA. CONS. STAT. § 7341).

165. Roadway, 257 F.3d at 292 n.2 (citing PA. CONS. STAT. § 7302(a)).

166. Id.


The court found that parties to an arbitration agreement have the power to agree to a scope of judicial review under a standard “borrowed from state law” as opposed to those contained in the default provisions of the FAA.\textsuperscript{69} The court interpreted \textit{Volt} and \textit{Mastrobuono} as clarifying \textit{Southland Corp. v. Keating}\textsuperscript{70} to mean that courts must enforce the terms of arbitration agreements selected by the parties, including terms by which the parties “opt out of the FAA’s off-the-rack vacatur standards” and fashion their own standards, including reference to state law.\textsuperscript{71}

Jacada (Europe), Ltd. (a British corporation) and International Marketing Strategies (IMS) (a Michigan corporation) entered into a Distribution Agreement\textsuperscript{72}. The Distribution Agreement contained: a choice of law provision (Michigan), an arbitration clause requiring arbitration by the American Arbitration Association in accordance with its commercial arbitration rules, and a limited liability clause under which the maximum damages recoverable by IMS from all causes (other than breach of warranty) were limited to amounts “actually paid by IMS to [Jacada] under the Distribution Agreement.”\textsuperscript{73} Jacada and IMS became embroiled in a compensation dispute and IMS sought arbitration.\textsuperscript{74} The arbitrators awarded IMS damages of more than $400,000, together with a portion of future payments due from Jacada’s customer over which the dispute arose.\textsuperscript{75} The arbitrators declined to abide by the liability limitation in the Distribution Agreement, finding it to be “unreasonable and unconscionable” and “that it fails of its essential purpose.”\textsuperscript{76}

Jacada filed an action in Michigan state court to vacate the arbitration award, and soon thereafter, IMS moved to enforce it in the United States District Court for the Western District of Michigan.\textsuperscript{77} The district court stayed its action in favor of the state court proceedings that were filed first.\textsuperscript{78} IMS removed the state action to federal court as falling within the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{79} The two federal cases were consolidated, and the court held that

\begin{itemize}
  \item 169. \textit{Id.} at 292–93.
  \item 170. 465 U.S. 1, 16 (1984).
  \item 171. 257 F.3d at 293 n.3 (citing La Pine Tech Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997)).
  \item 173. \textit{Id.} The choice of law provision stated that “[t]he agreement will be governed by the laws of the State of Michigan.” \textit{Id.}
  \item 174. \textit{Id.} at 703–04.
  \item 175. \textit{Id.} at 704.
  \item 176. \textit{Id.}
  \item 177. \textit{Id.}
  \item 179. \textit{Id.}
\end{itemize}
the arbitration proceeding fell within the Convention and was subject to review under FAA standards. On this basis, the district court upheld the arbitral award and Jacada appealed. The Sixth Circuit concluded that the Convention did not apply and that the dispute at issue qualified as a non-domestic dispute pursuant to the provisions of section 2 of the FAA. Next, the court held that the FAA applied, inasmuch as the Distribution Agreement is a “contract evidencing a transaction involving commerce” within the ambit of 9 U.S.C.A. § 2. The court then addressed the issue of the applicable standard of review: the limited scope found under the FAA or the broader one under Michigan law. The court read Mastrobuono and Volt as declaring the primary purpose of the FAA to be to compel the enforcement of private arbitral agreements according to their terms.

The most recent case in which a circuit court of appeals took the opportunity to examine the enforceability of expanded scopes of review established by contract was Puerto Rico Telephone Co., Inc. (PRTC) v. U.S. Phone Manufacturing Corp. (USP). There, USP agreed to supply telephones to PRTC under a requirements contract which provided that it was to be governed by the laws of the Commonwealth of Puerto Rico. The contract contained an arbitration clause, which provided in pertinent part:

[disputes shall be finally settled under the Rules of Conciliation and Arbitration of the American Arbitration Association . . . . The panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico . . . . The arbitral award shall be substantiated in writing and the findings shall be final and binding for both parties.

Disputes arose between PRTC and USP resulting in a contract termination by PRTC and the subsequent commencement of arbitration by USP. An arbitral panel awarded USP more than $2,500,000. PRTC moved to vacate the arbitration award in the United States District Court, contending that, under the contract, the court’s review of the arbitral award was not limited to the scope of review set out in the FAA, but was rather subject to review for errors of law. The district court, applying the scope of review

180. Id.
181. Id.
182. Id. at 708–09.
183. Id. at 709.
185. Id. at 710.
186. 427 F.3d 21 (1st Cir. 2005).
187. Id. at 23.
188. Id.
189. Id. at 24.
190. Id.
191. Id.
set out in the FAA, denied PRTC's motion to vacate, finding that the facts did "not rise to anywhere near the level required under the Federal Arbitration Act in order to allow court review . . . [and] that PRTC's objections to the arbitration are essentially disagreements with the arbitrators' conclusion." 192

On appeal by PRTC, the First Circuit noted that the parties were in agreement that the contract was governed by the FAA under which review is quite limited. 193 The court pointed out that section 10 of the FAA "carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways . . . [and] contains no express grounds upon which an award can be overturned because it rests on garden-variety factual or legal [errors]." 194 Nevertheless, PRTC urged that by designating the applicability of Puerto Rican law, the parties had contracted for a scope of review broader than provided by the FAA. 195 The court found the circumstances at hand to be similar to those in Mastrobuono, in which the court held that the choice of law provision in that case could not be interpreted as intent to "substitute state for federal law." 196

In Mastrobuono, the arbitral clause provided for the applicability of National Association of Securities Dealers rules, which allowed awards of punitive damages. 197 The same contract, however, provided that it was to be governed by the law of New York, which did not permit an award of punitive damages by arbitrators. 198 In Mastrobuono, the court held that a choice of law provision alone will not suffice to restrict the arbitrators' authority by application of state law in light of the fact that such choice of law provision conflicted with the arbitral provision. 199 The court held that a generic choice of law provision would not suffice to supplant the strong federal policy established by the FAA of limited judicial review of arbitral awards. 200 The court made clear that the contract language in question was insufficient to establish a scope of review broader than that provided in the FAA, but clarified that parties by contract can expand the FAA's standard of review. 201

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193. Id. at 25.
194. Id. (quoting Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990)). See Wonderland Greyhound Park, Inc. v. Autotote Sys., Inc., 274 F.3d 34, 35-36 (1st Cir. 2001) (holding that awards may be vacated for legal error under the FAA only in manifest disregard of the law).
195. Id. at 26.
196. Id. at 27 (citing Mastrobuono, 514 U.S. at 58-61).
197. Id. at 27-28 (citing Mastrobuono, 514 U.S. at 60-61).
199. Id. at 28 (citing Mastrobuono, 514 U.S. at 63-64).
200. Id. at 29 (citing PaineWebber Inc. v. Elahi, 87 F.3d 589, 593 (1st Cir. 1996)).
201. Id. at 31 (citing Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 711 (6th Cir. 2005)).
The First Circuit emphasized its rejection of the Ninth Circuit's position that a contractual agreement to a standard of review different than that set out by the FAA somehow violates the rule precluding parties from creating federal jurisdiction by private agreement. The court considered this position "misplaced" because federal jurisdiction, in cases to compel arbitration or to enforce or vacate arbitral awards, requires diversity or another grant of jurisdiction.

The First Circuit also rejected the conclusions of the Ninth and Fifth Circuits in Kyocera (LaPine III) and Bowen that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." Instead, the court favored its interpretation of the United States Supreme Court's proclamation that Congress's "preeminent concern in passing the Act . . . [was] to enforce private agreements," and the recognition in Moses H. Cone Memorial Hospital v. Mercury Construction Corp. that sometimes agreements of the parties might "require [] piecemeal resolution when necessary to give effect to an arbitration agreement."

IV. RESOLUTION OF THE SPLIT: HALL STREET ASSOCIATES, L.L.C. v. MATTEL, INC.

A. The Background

The genesis of this litigation was a real estate lease entered into between lessor Hall Street Associates, L.L.C. (Hall Street) and lessee Mattel, Inc. (Mattel). Hall Street sued Mattel claiming a right of indemnity from Mattel with respect to claims resulting from water pollution on the leased premises. Mattel removed the case to the United States District Court for the District of Oregon under diversity jurisdiction.

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202. Id. at 30 (citing Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 994 (9th Cir. 2003) (en banc)).
203. Id. at 30-31. The court recognized the FAA as creating federal substantive law but not creating independent federal jurisdiction. Id. at 31 n.7 (citations omitted).
205. Id. (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).
209. Id. at 1400.
ducted a bench trial, limited to the issue of Mattel’s lease termination, which ended in favor of Mattel. With court approval, the parties agreed to arbitrate the remaining issues under an agreement, which provided that:

[the United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of fact are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.

Based on an exception to the indemnity obligation contained in the lease, the arbitrator ruled that Mattel was not required to indemnify Hall Street. The arbitrator concluded that Mattel had not violated a provision in the lease requiring it to comply with environmental law, which the arbitrator determined did not include the Oregon Drinking Water Quality Act (the “Oregon Act”). Pursuant to the terms of the arbitration agreement approved by the district court, Hall Street sought review of the arbitrator’s legal conclusion that Mattel’s violation of the Oregon Act did not constitute a violation of “applicable environmental law” within the terms of the lease. The district court rejected the arbitrator’s conclusion in this regard and remanded the matter to the arbitrator for additional consideration.

The arbitrator entered an amended award in favor of Hall Street based upon the legal conclusion that the Oregon Act was an “applicable environmental law” pursuant to the terms of the parties’ agreement. Both parties sought modification of the award, and applying the agreed standard of review for legal error, the district court corrected the arbitrator’s interest calculation but otherwise upheld the amended award in favor of Hall Street.

On appeal to the Ninth Circuit, Mattel “switched horses” and argued (wisely, as it turned out) that the district court erred in reviewing de novo the arbitrator’s conclusions of law in light of that court’s November 2004 decision in Kyocera v. Prudential-Bache Trade Services, Inc., in which the court declared an arbitral provision providing for review beyond that set

211. Hall Street, 128 S.Ct. at 1400.
212. Id. at 1400–01.
213. Id. at 1401.
215. Id. (providing review for legal error in accordance with the parties’ agreement, the district court relied on the holding of the Ninth Circuit in LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997)).
216. Id. at 1401.
217. Id.
218. Id.
219. 341 F.3d 987, 1000 (9th Cir.2003).
out in the FAA to be unenforceable.\textsuperscript{220} The court of appeals in \textit{Hall Street} reversed the vacatur and remanded the case with instructions that the district court should confirm the \textit{original} award in favor of Mattel unless it determined that the award should be vacated or modified on one of the grounds permitted by the FAA.\textsuperscript{221} Dauntless, the district court again held for Hall Street, this time finding grounds for vacatur under 9 U.S.C. § 10 based on its conclusion that the arbitrator exceeded his powers by implausibly interpreting the lease.\textsuperscript{222} That decision was reversed by the Ninth Circuit, which concluded that neither § 10 nor § 11 include "implausibility" as one of the grounds for vacatur or modification of an arbitral award.\textsuperscript{223} The United States Supreme Court granted certiorari to decide whether the bases for vacatur and modification established by the FAA are exclusive.\textsuperscript{224}

\section*{B. The Majority Opinion}

Justice Souter, writing for the majority, found the FAA's grounds for vacatur and modification of arbitral awards exclusive and not subject to expansion by private agreement.\textsuperscript{225} Chief Justice Roberts and Justices Thomas, Ginsburg, and Alito joined the majority opinion.\textsuperscript{226} Justice Scalia also joined the majority opinion, with the exception of footnote seven.\textsuperscript{227} At the outset, the Court acknowledged the split between the circuits as to whether the statutory grounds for vacatur and modification established by the FAA are subject to contractual expansion and noted that the majority of the circuits that have addressed the issue have answered in the affirmative.\textsuperscript{228}

\begin{thebibliography}{9}
\bibitem{Id} \textit{Id.}
\bibitem{Id} \textit{Id.}
\bibitem{Id} \textit{Id.}
\bibitem{Id} \textit{Id. at 1400.}
\bibitem{Id} \textit{Id. at 1400.} In order to limit the issue to the scope of judicial review permissible under the FAA (rather than the creation of federal jurisdiction by private contract) Justice Souter pointed out that the FAA creates no federal jurisdiction but its application requires an independent jurisdictional basis. \textit{Id. at 1402} (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).
\bibitem{Id} \textit{Id. at n.7.} (setting out the legislative history of the FAA).
\bibitem{Id} \textit{Id. at 1403.} The Court noted that the Ninth and Tenth Circuits have established that the FAA's grounds for review are exclusive and not subject to expansion by contract (citing Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001)). The Court further noted that the First, Third, Fifth, and Sixth Circuits have held to the contrary (citing Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005)); Jacada (Europe), Ltd. v. Int'l Mkts. Strategies, Inc., 401 F.3d 701, 710 (6th Cir. 2005); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 288 (3d Cir. 2001); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 60 F.3d 993, 997 (5th Cir. 1995)). \textit{Id. n.5.}
The majority opinion focused on the explication of statutory text in reaching its decision. In particular, the Court focused on the language of section 9 of the FAA to buttress the conclusion that an arbitral award must be confirmed unless vacated, modified, or corrected pursuant to the provisions of sections 10 and 11. For the majority, the principal point was the mandatory language of section 9 that the Court "must grant" the order of confirmation "unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title." The majority considered this language inflexible, requiring mandatory confirmation in every situation unless one of the delineated exceptions was found applicable and teaching that such mandatory language could not withstand the transformation into a mere default provision for use only in the event the parties fail to provide otherwise. By way of illustration, the Court cited §5 as an example of the manner in which Congress could, and did, create a default provision:

If in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed: but if no method be provided therein, or if a method be provided and if any party thereunto shall fail to avail himself of such method . . . then upon the application of either party to controversy the court shall designate and appoint an arbitrator . . . .

The majority stressed that the bases for modification and vacatur set out in sections 10 and 11 of the FAA are of the same class: extreme departures from the parties' agreement making the doctrine of ejusdem generis applicable. Here, the FAA lists a specific basis for vacatur or modification followed by no language of expansion and as such, that language cannot be considered authorization sufficient to permit contracts for judicial reviews of "any legal error." Justice Souter, departing slightly from the task of statutory construction, dismissed the assertion that the FAA's primary aim is to enforce private arbitral agreements, and identified the principal question as whether the text of the FAA is contrary to the notion of enforcing a private agreement for expanded judicial review of arbitral awards. He said it makes sense to

229. Id.
230. Id. at 1405.
231. Id.
233. Id. at 1404-05. Under the ejusdem generis rule of construction, where an enumeration is followed by general words, the general words are to be held as applying only to the same class as those specifically enumerated, rather than broadly construed. BLACK'S LAW DICTIONARY 608 (Revised 4th ed. 1968).
234. Hall Street, 128 S. Ct. at 1405. (J. Souter) (noting that "'[f]raud' and a mistake of law are not cut from the same cloth.'").
235. Id. at 1404 (see Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985)).
view sections 9 through 11 as the embodiment of a national policy favoring arbitration and having as one part of that favored treatment, the provision for limited review in order to maintain arbitration’s “essential virtue of resolving disputes straightaway,” as opposed to the reading urged by Hall Street, which would put arbitration in the posture of a mere prelude to the judicial process.236

Hall Street relied on comments in Wilco v. Swan237 (in reference to section 10 of the FAA) that “[p]ower to vacate an [arbitration] award is limited” and that “the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation.”238 Hall Street argued that this language recognizes “manifest disregard of the law” as a ground for vacatur in addition to those specifically listed in section 10 of the FAA.239 This reading by Hall Street is in accord with several circuits240 but was rejected by the Supreme Court.241

The Court also rejected Hall Street’s contention that Wilco supported the conclusion that the FAA’s grounds for vacatur or modification are not exclusive, finding Wilco was limited to the determination that section 14 of the Securities Act of 1933 voided agreements to arbitrate violations of that Act.242 In the Court’s view, the Wilco statements reject the general review of arbitral legal errors and the vagueness of Wilco’s phrasing leads to several possible interpretations (other than that of adding a ground for vacatur) including a mere reference to the section 10 grounds collectively.243 Alternatively, Justice Souter pointed out that perhaps the “manifest disregard” language in Wilco could have been a “shorthand” reference to the grounds for vacatur set out in section 10(a)(3) (misconduct) or section 10(a)(4) (powers exceeded).244

236. Id. at 1405 (citing Kyocera, 341 F.3d, at 998; cf. Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985)).


239. Id.

240. See e.g., McCarthy v. Citigroup Global Markets., Inc., 463 F.3d 87, 91 (1st Cir. 2006); Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003); Prestige Ford v. Computer Servs., Inc., 324 F.3d 391, 395-396 (5th Cir. 2003); Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1017 (11th Cir. 1998).

241. Hall Street, 128 S. Ct. at 1404.

242. Id. at 1403.

243. Id. (see e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 656 (1985) (Stevens, J. dissenting)).

The majority also rejected Hall Street’s reliance on the language in *Dean Witter Reynolds, Inc. v. Byrd*245 “reject[ing] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims.”246 The majority characterized this as only an attempt to explain that problems associated with simultaneously conducting arbitration and federal court litigation are an insufficient reason to defer arbitration.247

In passing, the Court acknowledged the juxtaposition of the policy arguments of Hall Street and its amici curiae, which stated that parties will shun arbitration absent the availability of expanded review,248 with the contention of Mattel’s amicus curiae that parties will flee the courts if expanded review is available.249 Nevertheless, Justice Souter stressed that, given the text of the FAA, the Court had “no business to expand the statutory grounds.”250 Near the end of the majority opinion, Justice Souter pointed out the following:

In holding that [sections] 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside of the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under [sections] 9, 10 and 11 deciding nothing about other possible aspects for judicial enforcement of arbitration awards.251

With that, the Court pronounced that the FAA limits judicial review to the grounds listed in sections 10 and 11, vacated the judgment, and remanded for proceedings consistent with the opinion.252

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248. *Id.* at 1406 (citing Brief for Petitioner at 39; Brief for New England Legal Foundation, et al. as amici curiae at 15).
249. *Id.* (citing Brief for U.S. Counsel for Int’l Bus. as amicus curiae at 29-30).
251. *Id.*
252. *Id.*, 128 S. Ct. at 1408. The Court declined to consider the issues in any context other than that of the FAA on the grounds that no other basis was argued; the parties had the FAA in mind at the outset; the district court thought it was applying the FAA by alluding to it in its quotation of *LaPine I*; and the Ninth Circuit apparently thought that the district court review of the arbitral award depended on the FAA; and, in the petition and primary briefs, the parties acted on the same premise. *Id.* at 1406–07. In addition, at the conclusion of the majority opinion, the Court noted that since the arbitral agreement was entered into during the litigation process and submitted to the trial court for approval, the case could be analyzed as an
C. The Dissenting Opinions

Justice Stevens authored a dissenting opinion in which Justice Kennedy joined. In his dissent, Justice Stevens chastised the majority for forbidding the enforcement of "perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court," in direct conflict with Congress's aim of reversing long-standing reluctance to enforce arbitration agreements. Justice Stevens, after reviewing the judiciary's historical enmity toward the enforcement of arbitration agreements, noted that, prior to the enactment of the FAA, the courts rarely deigned to enforce them. He declared this purpose "stronger today than before the FAA was enacted" and noted that it provided more reason than ever to give judicial effect to agreements that allow judicial review beyond that provided by the FAA. Justice Stevens characterized the bases for the majority decision as follows: (1) expedited federal enforcement of arbitration awards is conditioned upon the FAA's limitations on judicial review, and (2) Congress intended to qualify the list of the grounds for vacatur and modification set out in 9 U.S.C. § 10 and § 11 with the phrase "and no other." To him, these positions were untenable: "An unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute." With respect to the first, he argued that the FAA is premised on Congress's assumption that arbitration is quicker and cheaper than litigation, and as such, the FAA should be construed to encourage the use of arbitration. In the view of Justices Steven's and Kennedy's dissent, the FAA's primary purpose is defeated upon the judiciary's refusal to enforce an entire class of

exercise of the trial court's authority to manage cases under Rule 16 of the Federal Rules of Civil Procedure. Id. at 1407-08. The Court, however, declined to address that issue, other than to leave it open for pursuit by Hall Street on remand: "If the Court of Appeals finds they are open, the court may consider whether the District Court's authority to manage litigation independently warranted that court's order on the mode of resolving the indemnification issues remaining in this case." Id. at 1407-08.

253. Id. at 1408.
254. Id. at 1410.
257. Hall Street, 128 S. Ct. at 1408.
258. Id. at 1409.
259. Id.
260. Id.
"perfectly reasonable" agreements.\footnote{261} In addition, the goal of encouraging the use of arbitration "provides a sufficient response to the Court's reliance on statutory text."\footnote{262} This dissent denigrated the approach taken by the majority as "a wooden application" of the rule of ejusdem generis and that the specifically enumerated grounds for vacatur and modification amount only to a floor—those "that must always be available."\footnote{263}

Justice Stevens also found it important that prior to the FAA's passage in 1925, judicial review of arbitration awards was thorough, broad, and, in fact, hostile.\footnote{264} This historical context, viewed in light of the purposes of the FAA, led the dissent to the conclusion that the vacatur and modification provisions of the FAA set out in sections 10 and 11 are intended "as a shield meant to protect parties from hostile courts, not a sword with which to cut

\footnote{261}{Hall St. Assocs. L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1408 (2008).} \footnote{262}{Id. at 1409.} \footnote{263}{Id. at 1409. 9 U.S.C. § 9 (2006) provides in pertinent part: If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . then at any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title.} \footnote{264}{Hall Street, 128 S. Ct. at 1408 n.1 (see Klein v. Catara, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814) and 1409 n.3 (see also Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 VA. L. REV. 265, 270–71 (1926); Tom Cullinan, Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements, 51 VAND. L. REV. 395, 409 (1998)).}
down parties' ‘valid, irrevocable and enforceable’ agreements to arbitrate their disputes subject to judicial review for errors of law.”265 The penultimate paragraph of the dissent focused on extant policy issues and found them compelling:

Even if I thought the narrow issue presented in this case were as debatable as the conflict among the courts of appeals suggests, I would rely on a presumption of overriding importance to resolve the debate and rule in favor of petitioner’s position that the FAA permits the statutory grounds for vacatur and modification of an award to be supplemented by contract. A decision “not to regulate” the terms of an agreement that does not even arguably offend any public policy whatsoever, “is adequately justified by a presumption in favor of freedom.”266

In his dissent, Justice Breyer characterized the issue as whether the FAA precludes federal courts from enforcing agreements that give the court the authority to set aside an arbitration award on account of a mistake of law.267 Justice Breyer agreed that the provisions of the FAA do not preclude judicial enforcement of such agreements.268 The purpose of the dissent was to point out his conclusion that the case should be remanded with instructions that the Ninth Circuit should affirm the judgment of the district court enforcing the arbitrator’s final award.269

D. The Role of Legislative History: Footnote 7

In footnote 7 of the majority opinion, Justice Souter laid out the legislative history of the FAA, finding it consistent with the majority’s conclusion that the statutory text “gives us no business to expand the statutory grounds.”270 It was first noted that the FAA is textually based on the New York arbitration statute.271 Justice Souter went on to explain that New York’s arbitration statute incorporated the New York Code of Civil Proce-

265. Id. at 1408 (citing 9 U.S.C. § 2 (2006)).
268. Id. at 1410 (quoting, with approval, from the opinion of the Court that the FAA “is not the only way into court for parties wanting review of arbitration awards” and Justice Stevens’s dissent that the FAA is a “shield meant to protect parties from hostile courts, not a sword with which to cut down parties’ ‘valid, irrevocable, and enforceable’ agreements to arbitrate their disputes subject to judicial review for errors of law.”). Id. at 1409 & n. 3.
269. Id.
270. Id. at 1406. Interestingly, this is the only portion of the majority opinion with which Justice Scalia did not join, and one would assume it was placed in a footnote for his convenience in that regard.
271. Id. n.7. (see S. Rep. No. 68-536, at 3 (1924)).
dure, which mandated that the court grant an application for confirmation "unless the award is vacated, modified, or corrected, as prescribed in the next two sections," which were noted to be "virtually identical" to sections 10 and 11 of the FAA. The majority also found significant a portion of the brief submitted by Julius Henry Cohen, a primary drafter of the 1920 New York Act and the FAA. Cohen wrote, "[t]he grounds for vacating, modifying or correcting an award are limited. If the award [meets a condition of § 10], then and then only the award may be vacated .... If there was [an error under § 11], then and then only it may be modified or corrected ...." In addition, the House Report provided that an "award may . . . be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form." Justice Souter emphasized that this provision of the FAA, based upon the New York arbitration law, was distinct from that of the Illinois Arbitration and Awards Act of 1917 requiring, upon request of either party, the submission of legal questions during the arbitration to judicial determination.

V. WHAT HAPPENS NEXT?

With little more than passing reference to the policy issues and the effect on the continued efficacy of arbitration, the United States Supreme Court chose to rely on canons of statutory construction in concluding that the FAA provides the sole grounds for vacatur and modification. Rejecting what it called this "wooden application of the old rule of ejusdem generis" as contrary to the FAA's core purpose of enforcing arbitration contracts as written, the dissent characterized the Court's decision as "forbid[ing] enforcement of perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties" and, in so doing, disregarding the historical context in which Congress passed the FAA in 1925.

Nevertheless, the course of arbitration after this decision is of significant concern to those who use arbitration. Hall Street and its amici urged that allowing the statutory grounds for vacatur and modification set forth in the FAA to be supplemented by contract—in addition to being permitted textually—constitutes good public policy for several reasons. First, the sig-

272. Id. (see 1920 N.Y. Laws page no. 806 and 2 N.Y. REP. ANN. CODE CIV. PROC. §§ 2374–75 (Stover 6th ed. 1902)).
274. Id. (quoting H.R. REP. No. 68–96, at 2 (1924)).
275. Id. (citing Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 97–98 (1924); 1917 Ill. Laws page no. 203)).
276. Id. at 1408.
nificance of the issues and the amount of money involved may make some
disputants reluctant to trade reliable decision making and legal certainty for
simplicity, speed, and economy; good policy would not require that such
parties be limited to only two choices—litigation or arbitration without the
possibility of judicial review—to ensure legal correctness.\textsuperscript{277} Second, effi-
ciency favors review for legal error requiring fewer resources than full adju-
dication, thereby reducing the burden on the judiciary, while at the same
time increasing the number of parties who would be amenable to arbitration,
given the option for meaningful judicial review.\textsuperscript{278} In Hall Street’s view, the
policy considerations favor the enforcement of arbitral agreements provid-
ing for enhanced judicial review because these agreements effectuate the
parties’ contractual rights and expectations, encourage arbitration by afford-
ing flexibility and protection against legally erroneous awards, reduce the
burden on the judicial system, and augment the overarching policy of the
FAA.\textsuperscript{279}

Mattel claimed the public policy high ground just as vigorously, ar-

guing that expanded review would result in chaos, destroy the arbitration
process as we know it, and wreck havoc for both arbitrators and the
courts.\textsuperscript{280} The potential for review of arbitrators’ legal and factual errors
would, according to Mattel, require the transformation of the arbitration
process into something indistinguishable from litigation, resulting in bur-
dens that would undermine the time and cost savings so central to that alter-
native.\textsuperscript{281} Even worse, if expansive judicial review was allowed and the arbi-
tral process remained unchanged, the resulting review for legal and factual
error—with few rules and no detailed decision making—would inevitably
lead to wasteful remands to the arbitrator for more detailed explanations and
findings, again in contravention with the FAA’s primary goal of finality.\textsuperscript{282}
All of this, according to Mattel, would make arbitration a mere prelude to
litigation of no particular benefit to the ultimate judicial decision maker.\textsuperscript{283}

\textsuperscript{277}. Brief for the Petitioner at 38–39, \textit{Hall Street}, 128 S. Ct. 1396 (No. 06-989).
\textsuperscript{278}. Brief for the Petitioner at 40, Hall St. Assocs. L.L.C. v. Mattel, Inc., 128 S. Ct. 1396
\textsuperscript{279}. Id.
\textsuperscript{280}. Brief for Respondent at 44, \textit{Hall Street}, 128 S. Ct. 1396 (No. 06-989).
\textsuperscript{281}. Id.
\textsuperscript{282}. Id. at 45.
\textsuperscript{283}. Id. at 47. Many of the parties’ policy arguments were bolstered by amici. The Amer-
ican Arbitration Association (AAA) and the United States Council for International Business,
filed amicus briefs in support of Mattel. The Wireless Association, New England Legal
Foundation, et al. and the Pacific Legal Foundation filed amicus briefs on behalf of Hall
Street. The AAA made several points in support of Mattel, as follows: (1) Congressional
intent in establishing the FAA’s system of arbitration with its emphasis on finality would be
frustrated by contractually expanded judicial review (Brief of Amicus Curiae for the Ameri-
can Arbitration Association in Support of Affirmance, \textit{supra} note 12, at 8); (2), allowing
In addition to Hall Street's admittedly unknown potential secondary effects on the practice of arbitration, there are two other significant questions left unanswered by the decision: (1) the status of the common law grounds for vacatur and (2) whether arbitral parties can require arbitrators to adhere to substantive legal norms, backed up by judicial enforcement. The statutory grounds for vacatur under the FAA have been supplemented by judicially crafted grounds established, to a greater or lesser extent, in each of the circuits, including provision for the vacatur of awards found to be in manifest disregard of the law, contrary to public policy, irrational, or arbitrary and capricious. The continued viability of these common law grounds that do not fit within the FAA's statutory framework has been called into question.

expanded review threatens to turn to a purely advisory process, denying the promise of a timely, less expensive, and final determination of disputes (Brief of amicus Curiae American Arbitration Association in Support of Affirmance, supra note 12, at 21-23); (3) arbitral parties are free to incorporate an appellate review process within the arbitration system (Brief of Amicus Curiae American Arbitration Association in Support of Affirmance, supra note 12, at 22-23), and (4) expanded judicial review would be contrary to the understanding and practice of arbitration by most of the international community (Brief of Amicus Curiae American Arbitration Association in Support of Affirmance, supra note 12, at 24-27.


Another unanswered question is whether parties can, by agreement, require their arbitrator to adhere to substantive legal norms or by *Hall Street*.285 To support vacatur under the manifest disregard standard, the proponent has the difficult task of establishing that the arbitrator knew the law and explicitly disregarded it. *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991); Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985); Local 771, I.A.T.S.E., AFL-CIO v. RKO Gen., Inc. WOR Div., 546 F.2d 1107, 1113 (2d Cir. 1977); San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961). See also Stanley A. Leasure, *Vacatur of Arbitration Awards: The Poor Loser Problem or Loser Pays?* 29 U. ARK. LITTLE ROCK L. REV. 512 (2007). While manifest disregard is a judicially created ground for vacatur, a number of cases have considered it as one example of a circumstance in which an arbitrator can be considered to have exceeded the arbitrator's powers, thereby falling within the scope of section 10 (a)(4) of the FAA. *Upshur Coals Corp.*, 933 F.2d at 229. Accordingly, it would appear that conduct constituting manifest disregard of the law could be incorporated under the *Hall Street* decision, as within the ambit of the FAA as a statutory basis for vacatur.

Subsequent to the *Hall Street* decision, the United States District Court for the Southern District of Texas, Houston Division in *Halliburton Energy Services, Inc. v. NL Industries, 553 F. Supp.2d 733, 753 (2008)*, following this logic, ruled that:

*Because the Supreme Court did not expressly decide whether the 'manifest disregard' standard remains a separate basis for federal court review of arbitration decisions in at least some circumstances; because the Fifth Circuit has often approved of reviewing arbitration awards for 'manifest disregard,'; and because Halliburton sought vacatur on the basis of the Fifth Circuit's 'manifest disregard' standard, out of an abundance of caution this court analyzes the parties' arguments using 'manifest disregard' as both a summary of some of the statutory grounds and as an additional ground for vacatur."

*Id.* at 752 (citation omitted).

See also *Chase Bank USA, NA v. Hale, 859 N.Y.S.2d 342 (N.Y.Sup. Ct. 2008)* in which the court noted:

*The Supreme Court has now announced, however, that section 10 of the FAA provides the exclusive route for expedited judicial vacatur of an arbitral award under the federal statutory scheme. (citation omitted). The Court examined the "manifest disregard" standard of the *Wilco* Court for the first time, and found the concept ambiguous . . . .

*Although the Court in *Hall Street* did not settle on its own definition of the term, it rejected the notion that "manifest disregard" embodies a separate, non-statutory ground for judicial review under the FAA. Nonetheless, by favorably citing the above-quoted language from its earlier decision in *Kaplan, supra*, the *Hall Street* Court appears to have done nothing to jettison the "manifest disregard" standard of *Wilco*. Accordingly, this court will view "manifest disregard of law" as judicial interpretation of the section 10 requirement, rather than as a separate standard of review. It seems appropriate, however, since the standard has apparently not been overruled by the Court, to resort to existing case law to determine its contours. (citations omitted). On the other hand, the First Circuit, in dicta, has indicated that *Hall Street* vitiates manifest disregard of the law as a valid ground for vacatur or modification under the FAA. *Ramos-Santiago v. UPS, 524 F.3d 120, 124 (1st Cir. 2008).* The other common law grounds for vacatur—violation of public policy, irrationality, and arbi-
have the decision judicially set aside as beyond the scope of the arbitrator's powers. In an opinion issued before the *Hall Street* decision, the Seventh Circuit indicated that, regardless of the holding in *Hall Street*, the answer to this question may be in the affirmative.\(^{286}\)

The potential reach of *Hall Street*'s holding is another open issue. Some may attempt to marginalize the decision in *Hall Street* as of limited effect, given the language in the opinion that statutory or common law bases for expanded judicial review outside the FAA may be "arguable"\(^ {287}\) and that the holding is strictly limited to circumstances in which expedited relief under sections 10 and 11 of the FAA is sought. While this is true from a technical standpoint, the problem is that there is uncertainty as to what, if any, other statutory or common law bases are extant and the means available to access them. In this case much was made of the inherent authority of the district court to mange its docket and that trial court orders approving arbitration and establishing expanded review within the context of the underlying federal case could be such a means to this end.\(^ {288}\) This mechanism, however, would, by definition, be available only with respect to arbitral agreements arising in the course of the federal litigation and not with regard to pre-dispute agreements.

Another potential source mentioned is state arbitration law. Unfortunately, this would raise a number of unresolved issues as well, including selection of applicable law, given that the Uniform Arbitration Act and Revised Uniform Arbitration Act—the models for many state arbitration statutes—have no provision for expanded judicial review. Further, the issues of preemption by the FAA would likely arise in this context. In any event, those intrepid enough to take Justice Souter's invitation to try to develop a means for expanded review outside the FAA can hardly do so with any confidence that whatever alternative they select will be sufficiently developed

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\(^{286}\) The Seventh Circuit, in Edstrom Industries, Inc. v. Companion Life Insurance Co., 516 F.3d 546, 550 (7th Cir. 2008), noted:

> The question in our case is different. It is whether the arbitrator can be directed to apply specific substantive norms and held to the application. The Supreme Court held in the *Volt* case, that parties to a contract may include in the contract's arbitration clause a choice of law provision defining, by reference to a state's arbitration law (provided it does not undermine the federal arbitration law), 'the rules under which that arbitration will be conducted.' We cannot think of any reason why the choice of law provision could not designate the governing substantive norms. The alternative would leave every arbitrator free to make up his own law of contracts.

(citations omitted).


\(^{288}\) *Id.* at 1407-08.
to avoid protracted post-arbitration litigation substantially similar to that experienced by Hall Street and Mattel. The potential for other avenues suggested by the majority may turn out to be nothing more than whimsical dead ends as opposed to significant limitations on the practical reach of Hall Street.

The Hall Street majority felt the text of the statute left little, if any, room for consideration of such policy issues or the effect of its decision on the continued willingness of commercial enterprises to contract for dispute resolution arbitration without the option for meaningful judicial review. In fact, the majority conceded that it could not predict the practical effect of its ruling. This is, however, not the first time the United States Supreme Court has been required to construe the text of the FAA, and on many such prior occasions, the Court did not find itself so constrained to hew solely to the maxims of statutory construction, without consideration of the broader issues of policy or legislative intent. In fact, in his book, Active Liberty: Interpreting Our Democratic Constitution, Justice Breyer, one of the Hall Street dissenters, described the method of contextual statutory construction to determine legislative intent as a “purposive” approach. In his view, it behooves the Court to identify legislative intent by the best means available rather than relying in excess on the statutory text, which “can lead courts astray, divorcing law from life[...] [although] a purposive approach is more consistent with the framework for a ‘delegated democracy’ that the Constitution creates.” Using, for demonstrative purposes, a case under the FAA, Justice Breyer explained the potentially outcome-determinative effect of the choice between the purposive and textual approaches. His illustration centered on the issue of the exception from the scope of the FAA all of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” and whether “any other class of workers” encompasses all other employees or only those connected with maritime or railroad employment. Justice Breyer noted that the Court majority, using a textual interpretive approach and applying the

290. Hall Street, 128 S. Ct. at 1406.
291. Id.
293. BREYER, supra note 292, at 99.
294. BREYER, supra note 292, at 81.
doctrine of ejusdem generis, found that the statutory language in question included only those connected with maritime or railroad employment. To make his point, Justice Breyer noted that the dissent, utilizing a purposive approach, examined the legislative history of the FAA to determine why the Congress had excluded any employees from the coverage of the FAA and found that the genesis of this exclusion was opposition from the seamen’s union, which opposed the FAA’s enactment on the grounds that employment arbitration would disadvantage workers. An officer of the American Bar Association (ABA), a major proponent of the FAA, testified before a congressional committee that the ABA was only interested in arbitration of commercial disputes, not those involving employment and that to assuage the concerns of the seamen’s union, language should be added excluding “seamen or any class of workers in interstate and foreign commerce.”

According to Justice Breyer, the purposive approach utilized by the dissent led to the inescapable conclusion that Congress would have wanted the exclusion applicable to all workers, contrary to the conclusion reached by the majority of the Court in the case using a textual approach. The lesson learned from this example, at least according to Justice Breyer, is that a purely textual approach (such as that used by the majority in Hall Street) can lead to a result contrary to that envisioned by the legislative branch.

While not necessarily identifying the methodology as “purposive,” the Supreme Court has frequently relied on the strong national policy favoring arbitration and the manner in which Congress advanced that policy by mandating the enforcement of arbitral agreements. Public policy was identified as one of the primary bases for the Court’s conclusion that Congress, in passing the FAA, exercised its power under the Commerce Clause to withdraw from the states the ability to require parties to litigate claims they had contracted to arbitrate. When faced with a particularly knotty problem of statutory construction under the FAA—the scope of the applicability of the FAA vis-à-vis the states—the Court emphasized the significance of the FAA’s underlying policy concerns:

We therefore proceed to the basic interpretive questions aware that we are interpreting an Act that seeks broadly to overcome judicial hostility to arbitration agreements and that applies in both federal and state courts.

297. Breyer, supra note 292, at 89.
298. Breyer, supra note 292, at 89.
300. Breyer, supra note 292, at 94.
We must decide in this case whether that Act used language about interstate commerce that nonetheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law or policy.\(^{303}\)

\textit{Volt} was a seminal case in which the court's determination of federal arbitration policy was paramount in connection with state/federal choice of law rules.\(^{304}\) There, the Supreme Court concluded that the federal policy favoring arbitration is "to ensure the enforceability, according to their terms, of private agreements to arbitrate."\(^{305}\) As can be seen, historically the United States Supreme Court has been more than sensitive to the policies underlying the enactment of the FAA in its interpretation of this statute. This is probably because of the Court's awareness that the ultimate purpose of Congress in enacting the FAA was to rein in the hostile attitude of the judicial branch toward this species of contract that the Congress determined worthy of such protection.

As a result of the Supreme Court's election to resolve the issues in the vacuum of the canons of statutory construction, the political branch will probably be required to address the still unresolved policy questions through consideration of amendments to the FAA in regard to the right of parties to agree to expanded judicial review of arbitration decisions. The task of Congress will be to weigh the myriad policy issues surrounding the question of whether, under the federal arbitration statute, expanded judicial review will be available to those who want it and the effect on the use of arbitration as a result of not having it, after which a reasoned decision hopefully can be reached on the merits. These issues remain after the United States Supreme Court's \textit{Hall Street} decision. They deserve to be addressed, particularly in light of the potentially deleterious effect on the future of arbitration in the United States of the current inability of sophisticated and willing parties to provide for the possibility of meaningful judicial review of arbitration awards for legal error or substantial evidence.

\begin{itemize}
\item \(^{304}\) Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. at 470.
\item \(^{305}\) \textit{Id.} at 476.
\end{itemize}