

**At the Crossroads of Legitimacy
And Arbitral Autonomy**

by

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Introduction

The consensus among like-minded national legal systems regarding standards for the court supervision of arbitral awards excludes the judicial review of the merits of awards. The 1985 UNCITRAL Model Law on International Commercial Arbitration,¹ along with the 1958 New York Arbitration Convention,² both an integral part of the world law of arbitration, codify widely accepted grounds for the recognition and enforcement of international arbitral awards. They implicitly exclude any judicial reassessment of the arbitrators' decision on the merits.³ A

¹ The Uncitral Model Law on International Commercial Arbitration, adopted June 21, 1985, codifies the modern transborder consensus on international commercial arbitration. U.N. Doc. A/40/17/Annex I (1985). It incorporates a liberal approach to the regulation of arbitration, acknowledging the central significance of party autonomy in matters of arbitration. It has served as the basis for statutory enactments on arbitration in a number of U.S. states and in a multitude of foreign countries.

See Article 35 of the Model Law. See First Working Group Report A/CN.9/216 (Mar. 23, 1982); Commission Report A/40/17 (Aug. 21, 1985); Seventh Secretariate Note, A/CN.9/264, Art. 35, para. 3, p. 1040 (Mar. 25, 1986); Fifth Working Group Report A/CN.9/246, at 1032-1033 (Mar. 6, 1984). See also I. DORE, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE* (1993); H. HOLTZMANN & J. NEHHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1989); Aron Broches, *Commentary on the UNCITRAL Model Law*, in P. SANDERS & A. JAN VAN DEN BERG, eds., *INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (1984; supp. Jan. 11, 1990).

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, codified at 9 U.S. C.A. 201-208 (1970) (hereinafter the New York Arbitration Convention). The literature on the Convention is voluminous. See, e.g., H. SMIT & V. PECHOTA, eds., *COMMERCIAL ARBITRATION—AN INTERNATIONAL BIBLIOGRAPHY* 29-39 (3d ed. 2004).

contrary policy would have undermined the independence of arbitration and its viability as a remedy. Both transborder instruments confine judicial oversight to an evaluation of the fairness of the arbitral proceedings.⁴

Arbitrating parties must have had the legal capacity to agree to arbitration. They must have been provided with notice of the proceedings and a reasonable opportunity to make their case. Arbitrators must rule exclusively on matters submitted. Rulings that exceed the arbitrators' jurisdiction can lead to the vacatur of awards or their partial enforcement if the exuberant determinations are excised. Also, the arbitral procedure must comport with party stipulations or with the provisions of the law of the place of arbitration. In such matters, however, legal regulations are secondary to party agreement. Freedom on contract prevails in arbitration. Finally, an award that is not final or has been set aside by a court at the place of arbitration or by a court the national law of which governed the making of the award can be refused recognition and enforcement in other signatory States.⁵

In recent transnational arbitral practice, problems have emerged regarding the application of the setting aside ground. In fact, relevant court determinations have generated a debate. Espousing a result that intends to support arbitration, courts in France and the United States have

³ See generally Barcelo, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANS. L. 1127 – 1129 (2003). See also generally Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANS. L. 1219 – 1221 (2003).

⁴ See generally *id.*

⁵ See generally Carbonneau, *The Exercise of Contract Freedom in Making of Arbitration Agreements*, *supra* note 3, at 1219 – 1221.

enforced awards set aside at the place of rendition,⁶ ruling—in effect—that nullification in one jurisdiction does not impede or even impair enforcement in another. A nullified award can still find a hospitable venue for enforcement. While it gives practical effect to transborder arbitrations, such a practice strains the applicable law and the assumptions that underline it. In effect, it undermines international *res judicata* and the uniform character of the *de facto* transborder legal process created by the New York Arbitration Convention. The contrary view—that annulment in one State invalidates the award in other jurisdictions—avoids the disunifying impact of forum-shopping for enforcement. Giving wider effect to the setting aside action, however, reinforces the authority of national law and makes the enforcement of international arbitral awards less certain. While insularity undermines globalization, disregarding settled transnational procedures (even dubious ones) can create international chaos. Although incidents of protectionism may disrupt transborder arbitration, respecting the application and consequences of the setting aside action is necessary to the continuing viability of the arbitral process.

Arbitral treaty law also provides for a substantive exception to enforcement on the basis of inarbitrability and public policy.⁷ These grounds protect adhering States from fundamental infringements of their political sovereignty. Despite a sound arbitration, a requested State can decline to enforce an international arbitral award if its courts determine that the recourse to

⁶ See, e.g., Gharavi, *Enforcing Set Aside Awards: France's Controversial Steps Beyond the New York Convention*, 6 J. TRANSNAT'L L. & POL'Y 93 (1996); Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin*, 11-9 MEALEY'S INT'L ARB. REP. 22 (1996).

⁷ See notes 1 and 2, *supra*, and accompanying text.

arbitration violates basic jurisdictional boundaries or the award offends the requested State's very concept of justice. The defenses of inarbitrability and public policy are meant to apply only in truly exceptional circumstances. They are intended to express more than mere disagreement with an award or to act as a means for shielding nationals from commercial accountability.⁸

Treaty law, therefore, provides that national judiciaries should take only a modest role in supervising international arbitral awards. Review of the merits, *de novo* or otherwise, is excluded as a matter of essential policy. Arbitrators are the sovereign decision-makers. They, however, can rule only on matters submitted and must give the parties a reasonable opportunity to defend themselves and make their case. The parties also are entitled to notice of the proceedings. The content of the parties' agreement governs. The mission of the courts is to maintain the effectiveness of transborder arbitration and to safeguard its legitimacy by correcting fundamental abuses.

Increased reference and greater sophistication, however, have generated a tension between the evolution of the arbitral process and its founding principles. Two developments have surfaced in U.S. arbitral practice that demonstrate the tension to which creative adaptation has given rise. Both developments can be present in transborder arbitration and, therefore, are likely to have a bearing upon international arbitral law. The tension centers upon the proper role of courts in legal frameworks—domestic and international—that regulate the enforcement of arbitral awards. It raises the question of whether the rule of contract freedom and the perceived necessities of the arbitral process can engender results that actually impair the autonomy of arbitration in relation to courts: First, can contracting parties command in an arbitral clause or submission that courts of enforcement engage in a *de novo* appellate review of arbitrator rulings

⁸ *See id.*

on the law? Second, can the contracting parties provide or a court of enforcement order the rendering arbitral tribunal to clarify an award or parts of it?

In U.S. arbitration law, the development of a right to seek a clarification of an award arose through judicial rulings rather than statute.⁹ For example, Federal Arbitration Act (FAA) §11, the relevant provision in the governing statute, does not authorize such an action and, in fact, implies that it is unavailable and even unlawful.¹⁰ The Revised Uniform Arbitration Act (RUAA) (2000),¹¹ however—the most recent U.S. statutory codification on arbitration—

⁹ See text at notes 149-181 *infra*.

¹⁰ 9 USCA § 11: “In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.”

¹¹ See National Conference of Commissioners on Uniform State Laws, Uniform Arbitration Act, 2000. See generally Andrew Ness, *Revised Uniform Arbitration Act of 2000 Makes Only Incremental Changes*, 21 CONSTR. LAW. (No. 4 Fall 2001). “The Uniform Arbitration Act (UAA), promulgated in 1955, gave courts the power to enforce arbitration agreements and to quickly convert arbitration awards into judgments, often overcoming a long line of state court precedents to the contrary. Establishing that arbitration agreements were valid, binding and readily enforceable paved the way for the enormous increase in arbitration's popularity in construction and many other industries. The National Conference of Commissioners on Uniform State Laws considers the UAA one of its most successful Uniform Acts, with 35 states adopting the UAA intact and 14 more adopting substantially similar legislation. Forty-five years after UAA, a five-year effort to update and revise it culminated in the Revised Uniform Arbitration Act (RUAA), which was given final approval by the National Conference of Commissioners in August

recognizes an action to clarify an award. RUAA Section 20¹² provides that, “On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an

2000. The RUAA seeks to retain the basic principles of the 1955 UAA while updating it to address the issues arising in more complex disputes. As most state legislatures are expected to consider adopting the RUAA over the next few years, construction industry professionals are well-advised to familiarize themselves with its provisions and ponder how they might affect the arbitration of construction disputes.” *See id.* *See also* 11 WORLD ARB. & MED. REP. 326 (2000); Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, [2001] J. DISP. RES. 1; McCabe, *Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act*, 3 PEPP. DISP. RES. L.J. 317 (2003).

¹² *See* National Conference of Commissioners on Uniform State Laws, Uniform Arbitration Act § 20, 2000. (a) On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award: (1) upon a ground stated in Section 24(a)(1) or (3); (2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or (3) to clarify the award. (b) A [motion] under subsection (a) must be made and notice given to all parties within 20 days after the movant receives notice of the award. (c) A party to the arbitration proceeding must give notice of any objection to the [motion] within 10 days after receipt of the notice. (d) If a [motion] to the court is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award: (1) upon a ground stated in Section 24(a)(1) or (3); (2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or (3) to clarify the award. (e) An award modified or corrected pursuant to this section is subject to Sections 19(a), 22, 23, and 24.

Comment: 1. Section 20 provides a mechanism in subsections (a), (b), and (c) for the parties to apply directly to the arbitrators to modify or correct an award and in subsection (d) for a court to submit an award back to the arbitrators for a determination whether to modify or correct an award. The situation in subsection (d) would occur if either party under Section 22, 23, or 24 files a motion with a court within 90 days to confirm, vacate, modify or correct an award and the court decides to remand the matter back to the arbitrators. The revised alternative is based on the

Minnesota version of the UAA. Minn. Stat. Ann. §572.16; *see also* 710 Ill. Comp. Stat. Ann. 5/9; Ky. Rev. Stat. 417.130.

Comment 2. Section 20 serves an important purpose in light of the arbitration doctrine of *functus officio* which is "a general rule in common law arbitration that when arbitrators have executed their awards and declared their decision they are *functus officio* and have no power to proceed further." *Mercury Oil Ref. Co. v. Oil Workers*, 187 F.2d 980, 983 (10th Cir. 1951); *see also International Bhd. of Elec. Workers, Local Union 1547 v. City of Ketchikan, Alaska*, 805 P.2d 340 (Alaska 1991); *Chaco Energy Co. v. Thercol Energy Co.*, 97 N.M. 127, 637 P.2d 558 (1981). Under this doctrine when arbitrators finalize an award and deliver it to the parties, they can no longer act on the matter. *See* 1 Domke on Commercial Arbitration §§22:01, 32:01 (Gabriel M. Wilner, ed. 1996) [hereinafter Domke]. Indeed because of the *functus officio* doctrine there is some question whether, in the absence of an authorizing statute, a court can remand an arbitration decision to the arbitrators who initially heard the matter. 1 Domke §35:03.

Comment 3. The grounds in Section 20(a) and (d) are essentially the same as those in UAA Section 9, which provides the parties with a limited opportunity to request modification or correction of an arbitration award either (1) when there is an error as described in Section 24(a)(1) for miscalculation or mistakes in descriptions or in Section 24(a)(3) for awards imperfect in form or (2) "for the purpose of clarifying the award." *Chaco Energy Co. v. Thercol Energy Co.*, 97 N.M. 127, 637 P.2d 558 (1981) (finding an amended arbitration award for purposes other than those enumerated in statute is void). Section 20(a)(2) and (d)(2) include an additional ground for modification or correction that is based on FAA Section 10(a)(4) where an arbitrator's award is either so imperfectly executed or incomplete that it is questionable whether the arbitrators ruled on a submitted issue. *See, e.g., Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96 (7th Cir. 1996); *Americas Ins. Co. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64 (2nd Cir. 1986).

Comment 4. The benefit of a provision such as Section 20 is evident in a comparison with the FAA, which has no similar provision. Under the FAA, there is no statutory authority for parties to request arbitrators to correct or modify evident errors. Furthermore the FAA has only a limited exception in FAA Section 10(a)(5) for a court to order a rehearing before the arbitrators when an award is vacated and the time within which the agreement required the award to be issued has not expired. This lack of a statutory basis both for arbitrators to clarify a matter and, in

award:...to clarify the award.” According to the *Reporter’s Notes*, “Section 20 enhances the efficiency of the arbitral process.”¹³ The commentary suggests further that the action to clarify an award in Section 20 is distinguishable from an action to modify or correct the award under Section 24.¹⁴ Few states have adopted the RUAA.¹⁵

Its origins in U.S. law notwithstanding, the action to clarify an award has a number of self-evident unresolved problems of application: For example, when and by whom is the action triggered? If because of ambiguity, who defines ambiguity and how much ambiguity is necessary? Must affected arbitrators agree with the court’s determination of ambiguity? Can arbitrators ignore or refuse to comply with the court order? Can they reach an independent determination? When is their correction or clarification of an award sufficient? Are there one, two, or several awards at the end of an action to clarify? Allowing clarification also raises larger

most instances, for a court to remand cases to arbitrators has caused confusing case law under the FAA regarding whether and when a court can remand or arbitrators can clarify matters. *See* III Macneil Treatise §§37.6.4.4; 42.2.4.3; *Legion Ins. Co. v. VCW, Inc.*, 193 F.3d 972 (8th Cir. 1999). The mechanism for correction of errors in RUAA Section 20 enhances the efficiency of the arbitral process.

¹³ *See id.* at comment 4.

¹⁴ *See id.* at comment 1.

¹⁵ *See* Monterey College of Law, Elements of the Revised Uniform Arbitration Act, Alternative Dispute Resolution Newsletter, 2006 (available online at <http://www.montereylaw.edu/newsletter/index.jsp?contentid=3N01XJUcpBFrUNjpoIaWDUNc&aop=60>). *See also* www.ncculs.org.

systemic concerns. It is undeniable that an invitation to contest the meaning of arbitrator rulings on the substance invites a judicial practice of merits review and greater and more sustainable adversarial confrontation among advocates at the enforcement stage of the process. It thereby lessens arbitration's finality and effectiveness.

Article 33(1)(b) of the UNCITRAL Model Law on International Commercial Arbitration¹⁶ preceded the development in U.S. domestic law. It states in its modest language that, "if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award."¹⁷ It then provides that, "[i]f the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award."¹⁸

Article 33(1)(b) has never been considered an important provision of the UNCITRAL Model Law and it had—until now—escaped the affliction of notoriety.¹⁹ Article 35 of the

¹⁶ Article 33 was created from Articles 35 to 37 of the UNCITRAL Rules of Arbitration. *See* First Working Report, A/CN.9/216, para. 98, at 893 (March 23, 1982). *See also* H. HOLTZMANN & J. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, note 1 *supra*.

¹⁷ Article 33(b) of the UNCITRAL Rules of Arbitration.

¹⁸ 9 U.S.C. § 10(a)(4)(2000): "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."

¹⁹ *See* Caron & Reed, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 ARB. INT'L 429 (1995); Dermine, *L'interprétation des sentences arbitrales*, 53 REV. DR. INT'L & DR. COMP. 206 (1976); Garnier, *Interpréter, rectifier et compléter les sentences arbitrales internationales*, [1995] REV. ARB. 565; Williams &

UNCITRAL Rules of Arbitration serves as its model. It, however, differs from the Rules in that the interpretation must relate to “a specific point of the award,” it must be made in thirty (not forty-five) days, and the parties must agree to the interpretation. The arbitral tribunal, however, can reject “unjustified” requests for interpretation.²⁰ The drafters of the law must have intended the provision to act as a practical, common sense device by which to address an unusual situation in which a court or the parties actually did not understand what the arbitrators held in the award.²¹ In fact, one international arbitral tribunal has held that “interpretation” means “clarification.”²²

Such a procedure may have been sensible in a circumscribed process founded upon consensus and trust, but—in contemporary arbitration—enormous sums are in play and sophisticated advocates do battle. Such an action, therefore, is likely to be shaped by and to service adversarial adjudication. For its part, FAA §10 has an answer to “incomprehensible”

Buchanan, *Correction and Interpretation of Awards Under Article 33 of the Model Law*, 4 INT’L ARB. L. REV. 119 (2001).

²⁰ See Summary Record A/CN.9/SR.329, 333 (June 18, 1985). See also H. HOLTZMANN & J. NEUHAUS, note 1 *supra*.

²¹ See Commission Report A/40/17 para. 276, at 906 (Aug. 21, 1985).

²² Paul Donin de Rosiere v. Islamic Republic of Iran, Iran-U.S. Claims Tribunal, Dec. No. 57-498-1, para. 6 (Feb. 10, 1987).

arbitrator rulings: The vacatur of awards that are not “mutual, final, and definite.”²³ Unfortunately, the express content of FAA §10 is not mirrored in arbitral treaty law. Also, U.S. courts have rarely reached determinations to vacate awards on this basis, perhaps considering the statutory rule too draconian in terms of its impact upon the process.²⁴

None of the U.S. courts that recognizes an action to clarify have ventured a reference to transborder practice in their decisional rulings.²⁵ By proclaiming a common law right to request that arbitrators clarify an award, U.S. courts—in all probability—are simply seeking to do better and more effective justice in regard to arbitration. They perceived a potential problem and created a workable pragmatic solution to it—at least, in theory. While the action to clarify may not in the best interests of the arbitral process, it does not necessarily exhibit hostility to arbitration. An unsympathetic judiciary could invoke almost any legal basis to create barriers to arbitration.²⁶ The action to clarify an award, in fact, fits well into the contemporary scheme of judicial supervision. The current law allows courts, on occasion, to assess the merits of arbitral

²³ 9 U.S.C. § 10(a)(4)(2000): “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.”

²⁴See I. MACNEIL, R. SPEIDEL, & T. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT (1994 multi-volume treaties, periodic updates).

²⁵ See text at notes 195-231 *infra*.

²⁶ The point is demonstrated by the extensive debate that took place prior to the U.S. Supreme Court decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001): *Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1998), *op. amended & superceded on denial reh’g*, 177 F.3d 1083 (9th Cir. 1998); *Duffield*, 144 F.3d 1182 (9th Cir. 1998); *Lai*, 42 F.3d 1299 (9th Cir. 1994); *Adams*, 279 F.3d 889 (9th Cir. 2002).

awards.²⁷ Under the common law grounds for vacatur, awards can be supervised for manifest disregard of the law, irrationality, and public policy violations.²⁸ Nonetheless, the FAA and the court construction of the grounds for supervision under the governing statute remain highly supportive of arbitration. Neither the party provision for *de novo* review of arbitrator rulings on the law or a court order to clarify an award, therefore, expands current practices or challenges the efficacy of arbitration.

Despite their arguably “seamless” integration into the present framework for enforcement, the creative additions of practice and the decisional law demand that basic questions be revisited. Friendly or not, the prospect of enhanced judicial supervision of awards has consequences. More aggressive or more complicated policing of awards at least causes delay and increases costs. This makes it difficult for the victors to have their grievances redressed fully and easier for the transgressors to reduce the compensation owed.

What is the proper role of courts and of the law in the evaluation of arbitral proceedings and awards? Which regulatory approach best intermediates between the protection of legal rights and effective adjudication? Should courts become more activist in matters of arbitration and take liberties with existing legal rules and adapt them to the accomplishment of a particular end? What ends should be pursued? Should freedom of contract in arbitration always go

²⁷ See, e.g., *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994); *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57 (2000).

²⁸ See, e.g., Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra* note 3, at 298, 308-321.

unfettered—even when it may lead to dangerous, possibly counterproductive, practices? Deregulation has been triumphant in arbitration—is it always in the best interest of the process?

On the transborder side, does enhanced supervision make a positive and long-lasting contribution to globalization? Does it protect sufficiently the sovereign interests of the national communities that participate in globalization and transborder arbitration? In elaborating a uniform body of arbitral law, does the U.S. judicial endorsement of contract freedom and an action to clarify awards impose them upon other participants in the transborder process? Have these two factors created an imbalance between the public legal order and the practical needs of private adjudication?

Contract freedom emphasizes that party choice makes arbitration a legitimate remedy: Can the exercise of party choice be allowed to undermine the very utility of the arbitral process? Private adjudication—if it is to have any standing at all—must be effective. Having courts police awards on the basis of ambiguity or legal error may not provide any true protection from ill-considered arbitrator rulings. The aggressive pursuit of ambiguity or error could allow adversarial representation to intrude upon, and eventually undermine, the functionality of arbitral adjudication.

This article addresses the questions raised by examining the grounds for the enforcement of arbitral awards under U.S. law. Particular attention is devoted to *de novo* review. Further, the peculiarities of FAA §10 are examined and reform proposals investigated. These considerations are evaluated in terms of their impact upon the policy favoring arbitration. The examination then focuses upon opt-in provisions and the action to clarify. Finally, the influence of the developments in U.S. law upon global treaty standards for the enforcement of arbitral awards is

assessed. Can parties freely dispose and courts order arbitrators to reach “better” rulings in an effective global scheme for regulating private adjudication?

The U.S. Law on Enforcement

The U.S. statutory law on arbitration²⁹ greatly favors the enforcement of both domestic and international arbitral awards.³⁰ As a general matter, the FAA is a modern statement of State

²⁹ The U.S. Arbitration Act, 9 U.S.C. §§1-16, 201-208, and 301-307 (1996). Section 10 of the FAA contains four ground for the vacatur or setting aside of arbitral awards. Under FAA §10, courts can supervise arbitral awards on the basis that the proceedings lacked basic integrity or were not fundamentally fair: An arbitrator took a bribe or was biased; and/or a party was not given reasonable notice of the proceeding or an opportunity to be heard. An award can also be vacated if the arbitrators exceeded their authority. Ordinarily, the latter ground refers narrowly to circumstances in which the arbitrators ruled on a matter not submitted. *See generally* I. MACNEIL, R. SPEIDEL, & T. STIPANOWICH, *FEDERAL ARBITRATION LAW*, note 24 *supra*. *See also* *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991). It can, however, cover a wider array of arbitrator misconduct. *See, e.g., Agrawal v. Agrawal*, 775 F. Supp. 588, 591 (E.D.N.Y. 1991), *aff'd*, 969 f.2d 1041 (2d Cir. 1992). Judicial review on the merits is excluded by implication—and by corroborating court opinions—because the specific statutory enumeration does not refer to it. *See, e.g., Ainsworth v. Skurnick*, 960 F.2d 939, 940 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993). The same deferential and narrow review applies to the judicial supervision of international arbitral awards. *See generally* 9 U.S.C. §§201-208, 301-307. *See also* *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, note 2 *supra*. Moreover, the courts in the United States, especially the federal courts, display a highly deferential attitude towards arbitral proceedings, rulings and awards. “It is well-settled that a court’s power to vacate an arbitration award is extremely limited because an overly expansive judicial review of arbitration awards would undermine the litigation efficiencies which arbitration seeks to achieve....” *Fine v. Bear, Stearns & Col, Inc.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991). Some courts even acknowledge that judicial supervision is a perfunctory exercise. “Thus, in reviewing awards, a district or appellate court is limited to determining ‘whether the arbitrators

practice on arbitration.³¹ Like the arbitral treaty law discussed earlier, it impliedly excludes the judicial review of awards on the merits and, in effect, establishes a strong, nearly irrebuttable presumption of enforceability in regard to awards.³² Vacatur or nullification can only be obtained on the basis of specific grounds that focus upon the procedural aspects of the arbitral proceedings.³³ The bribery of arbitrators or other types of corrupt behavior, for instance, will

did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it.’ ”

³⁰ See, e.g., G. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* ____ (1994); Drahozal, *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, 16-9 MEALEY’S INT’L ARB. REP. 27 (2001); Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA L. REV. 731 (1996).

³¹ 9 U.S.C. §§1-16, 201-208, and 301-307 (1996). Despite its enactment in the early part of the 20th Century, the FAA is very favorable to arbitration. It validates arbitration agreements as an expression of a lawful contractual exercise (§2) and mandates that courts cooperate and assist the arbitral process (§§3, 4). It also recognizes the jurisdictional effect of arbitration agreements (§3), divesting the courts of the authority to rule on covered disputes. Finally, it establishes a hospitable regime for the judicial enforcement of arbitral awards (§10). See T. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 80-120 [hereinafter CARBONNEAU]. See also R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992).

³² FAA §10. The presumption and its strength arise from the restrictiveness and specificity of the express statutory language and the courts’ like-minded and consistent interpretation of the provision and its various parts. Courts generally interpret the statutory grounds in a narrow fashion and usually enforce awards. See note 1, *supra*, and accompany text.

³³ *Id.* It should be noted that the express text of the statute, FAA §10, is supplemented by common law grounds. These grounds were incorporated into FAA §10 by judicial decisions. They provide for the judicial review of the

void an award.³⁴ Moreover, the current arbitral process demands transparency.³⁵ Arbitrators must be impartial;³⁶ they, therefore, must disclose possible conflicts of interest.³⁷ Their duty of

merits of arbitral awards, whereas the statutory text does not. *See* Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra* note 3, at 308-321.

³⁴ *See* FAA §10; note 28, *supra*, and accompany text.

³⁵ *See* National Conference of Commissioners on Uniform State Laws (NCCUSL), *Uniform Arbitration Act* §12—Disclosures By Arbitrator (2000); *Ethics Standards for Neutral Arbitrators in Contractual Arbitration Adopted by the Judicial Council of California 04/19/2002*, DEERING'S CALIFORNIA RULES OF COURT, Appendix, Division VI (Lexis-Nexus 2003); *ABA-AAA Code of Ethics for Commercial Arbitrators* (2004); INTERNATIONAL BAR ASSOCIATION (IBA), GUIDELINES FOR ARBITRATOR CONFLICT OF INTEREST (2004). *See also* Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising and Clarifying Arbitration Law*, [2001] J. DISP. RES. 1; T. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 130-159 (3d rev. ed. 2003) [hereinafter T. CARBONNEAU, *CASES AND MATERIALS*]; Ball, *The Revised Uniform Arbitration Act in the United States: State Law in a Complex Federal System*, 5-2 INT'L ARB. L. REV. 56 (2002); Arkin, *Neutrality of Dispute Resolution in International Commercial Dispute Resolution*, 15-9 WORLD ARB. & MED. REP. 270 (2004); Ball, *Probity Deconstructed—How's Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?* 15-11 WORLD ARB. & MED. REP. 333 (2004); Disco, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113 (1993); Shore, *Disclosure and Impartiality*, 57 DISP. RES. J. 32 (2002); Wangelin, *Buttressing the Pillars of Arbitration*, 19-1 MEALEY'S INT'L ARB. REP. 27 (2004); Rogers, *Fit and Functions in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002); de Witt Wijnen, Voser, & Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT'L 433 (2004);

_____.

³⁶ FAA §10(2).

disclosure is owed to the appointing party, the other arbitrating parties, party representatives, the other arbitrators, and the administering arbitral institution.³⁸ Further, arbitrators must rule pursuant to and within the limits of their mandate.³⁹ Deciding matters not submitted or a failure to abide by the terms of the arbitration agreement can result in a setting aside of the award.⁴⁰

³⁷ See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1968).

³⁸ See, e.g., Sharp, *The Arbitrator's Duty of Good Faith*, 66 ARBITRATION-J. CH. INST. ARB. 228 (2000); Cremades & Cairns, *Corruption, International Public Policy and the Duties of Arbitrators*, 58 DISP. RES. J. 56 (2003-2004); Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective*, 18 GA. ST. U.L. REV. 907 (2002); Carter, *Rights and Obligations of the Arbitrator*, 52 DISP. RES. J. 56 (1997); Shore, *Disclosure and Impartiality*, 57 DISP. RES. J. 32 (2002).

³⁹ FAA §10(3).

⁴⁰ Excess of arbitral authority or an arbitral ruling beyond the arbitrators' mandate is commonplace in arbitral statutes. See generally Antoine, *Judicial Review of Arbitral Awards*, 54 DISP. RES. J. 23 (1999). The failure to follow the provisions in the agreement is less commonplace, although doctrinally it is a clear off-shoot of the notion of freedom of contract. Article V(d) of the New York Arbitration Convention (note 1 *supra*) contains a version of the ground for purposes of the enforcement of international arbitral awards: "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place...." See, e.g., Mulyana, *Attacking Arbitral Awards Under the New York Convention of 1958*, 6 AM. REV. INT'L ARB. 89 (1995); Enkishev, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61 (2004).

Moreover, the arbitral process must satisfy the dictates of basic fairness.⁴¹ Parties are entitled to notice of the demand for arbitration and of the proceedings.⁴² They also must be provided with a reasonable opportunity to present their case.⁴³ Procedures that impinge upon or prejudice the essential procedural rights of an arbitrating party will compromise the integrity of the award and its enforceability.⁴⁴

Additionally, U.S. arbitration law, like its English counterpart,⁴⁵ in complete contradiction to the express language of FAA §§ 10 and 11, allows for the merits review of

⁴¹ FAA §10(3).

⁴² See, e.g., Liebscher, *Fair Trial and Challenge of Awards in International Arbitration*, 6 CROATIAN ARB. Y.B. 83 (1999); Trappe, *The Arbitration Proceedings—Fundamental Principles and Rights of Parties*, 15 J. INT’L ARB. 93 (1998).

⁴³ See, e.g., Kessedjian, *Principe de la contradiction et l’arbitrage*, [1995] REV. ARB. 381. See generally L. NEWMAN & R. HILL, eds., *THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* (2003); L. NEWMAN & G. HANESSIAN, eds., *INTERNATIONAL ARBITRATION CHECKLISTS* (2003).

⁴⁴ FAA §10(3); RUAA §23(3); New York Arbitration Convention, Article V(1)(b).

⁴⁵ UK Arbitration Act 1996 §45. See Chukwumerije, *Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996*, 15 ARB. INT’L 171 (1999); Davidson, *The New Arbitration Act—A Model Law?* J. BUS. L. 101 (1997); Fraser, *Arbitration of International Commercial Disputes Under English Law*, 9 AM. REV. INT’L ARB. 1 (1998). See generally B. HARRIS, R. PLANTEROSE, & J. TECKS, *THE ARBITRATION ACT 1996: A COMMENTARY* (3d ed. 2003). See note 117, *infra*, and accompanying text.

arbitral awards.⁴⁶ Owing to the ill-conceived judicial incorporation of labor arbitration concepts and practices into the federal arbitration statute, courts can vacate any domestic arbitral award on the basis of “manifest disregard of the law,” “irrationality,” and “public policy.”⁴⁷

International arbitral awards governed by the New York Arbitration Convention and rendered pursuant to U.S. law or within U.S. territory can also be set aside under Article V(1)(e) of the Convention on the same common law basis.⁴⁸ The decisional law implant, therefore, alters the stated objective of the statute and could redefine the judicial role in terms of enforcement.⁴⁹ In theory at least, arbitrators no longer are the sovereign decision-makers; courts can review, revise, or repeal arbitral determinations. Even if it does not enhance the likelihood of vacatur,

⁴⁶ See, e.g., Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra* note 3, at 298, 308-321.

⁴⁷ *Id.*

⁴⁸ See *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111, 118 S.Ct. 1042, 140 L.Ed. 2d 107 (1998) (interpreting Article V(1)(e) of the New York Arbitration Convention and concluding that, “We need Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award.” An action under Article V(1)(e) “is controlled by the domestic law of the rendering state.”).

⁴⁹ See Hayford & Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, 51 DISP. RES. J. 22 (1996). See also Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra* note 3, at 308-321.

the common law appendage to FAA §10⁵⁰ makes confirmation and enforcement more complicated, difficult, precarious, and costly.⁵¹

The importation of the labor arbitration doctrines into the FAA⁵² can be most accurately described as a judicial blunder. Not all arbitrations or arbitral awards are alike. Meaningful distinctions can be made between labor and commercial arbitration.⁵³ First, labor arbitration is

⁵⁰ 9 U.S.C. § 10 (2000) the FAA provides for vacatur of an arbitration award in the following narrow instances:

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

⁵¹ See Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, note 30 *supra*; Lucentini, *Taking a Fresh Look at Vacatur of Awards Under the Federal Arbitration Act*, 7 AM. REV. INT’L ARB. 359 (1996); Mungioli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 4 ST. MARY’S L.J. 1079 (2000); Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOKLYN L. REV. 471 (1998); Rubins, *‘Manifest Disregard of Law’ and Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT’L ARB. 363 (2001). See also Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra* note 3, at 308-321.

⁵² See Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra* note 3, at 308-321.

⁵³ See generally *id.*

not governed by the FAA, but rather Section 301 of the Labor-Management Relations Act of 1947.⁵⁴ Because of the particularities of the system established by collective bargaining agreements (CBAs), judicial supervision of the merits of labor arbitration awards is necessary.⁵⁵ Labor arbitrators cannot engage in dispensing “their own brand of industrial justice.”⁵⁶ While they are expected to interpret the CBA in reference to the practices of the affected workplace and their experience,⁵⁷ labor arbitrators cannot lawfully “manifestly” “disregard” the “law” as it is established by the CBA. The CBA is the Constitution or Civil Code of a given workplace. Arbitrators are expected to apply its content to specific cases, not engage in a unilateral reformation or modification of its provisions.⁵⁸ In their awards, arbitrators must stay within the four corners of the CBA.⁵⁹ The decisional phrase that provides that an award must arise from or

⁵⁴ See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

⁵⁵ See *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

⁵⁶ *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); *E. Assoc. Coal Corp. v. United Mine Workers of Am., District 17*, 531 U.S. 57, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000). See generally 2 P. HARDIN, *THE DEVELOPING LABOR LAW* ch. 29, 1698-1706 (3d ed. 1992); P. SLOVAK, M. POSNER, & J. HIGGINS, JR., *THE DEVELOPING LABOR LAW 1995 CUM. SUPP.* ch. 29, 479-486 (3d ed.1995).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

stay within the scope of the contract is an unmistakable allusion to the authority of the CBA and its function in the workplace. It makes no sense in terms of ordinary contractual circumstances.

The second major difference is the prohibition against “irrational,” “arbitrary,” and “capricious” arbitral determinations must have been intended as a failsafe means of safeguarding labor parties from unprofessional arbitrators who became personally involved with the parties and the issues in the arbitration.⁶⁰ Given that the labor arbitration system applies literally to thousands of individual workplace settings,⁶¹ at least a few arbitrators might abandon their necessary distance from the proceedings and base their awards on their personal feelings and beliefs. The volatile character of union-management relations makes episodic unprofessional adjudicatory rulings likely. It is also possible that arbitrators might suffer a physical and emotional incapacity during the proceedings and render rulings in an impaired state. In a word, corrective devices needed to be in place to prevent the adjudicatory sovereignty of the arbitrator from becoming a totalitarian dictatorship. Workplace disputes needed to be resolved pursuant to the rule of law and by means of an “objective” process.

There is no hard evidence that the ban in labor arbitration against irrational awards was a means of protecting grievants against rageful and volatile arbitrators. The suggestion is purely speculative. It, however, might constitute an ingenious way of establishing a meaningful distinction between irrational arbitral decisions and manifest disregard of the law. The FAA case

⁶⁰ See T. CARBONNEAU, *CASES AND MATERIALS*, *supra* note 35, at 610-612.

⁶¹ See note 58, *supra*, and accompany text.

law, however, has been more circumspect on this score.⁶² It contains no mention of “adjudicatory rage” or “arbitrator breakdowns.” In fact, it strains to find a persuasive difference between the two bases for challenging the determinations reached by labor arbitrators.⁶³ In court opinions, both grounds appear to be grounded in the arbitrator’s would-be disregard of or failure to apply the provisions of the CBA. Each serves to prevent arbitrators from dispensing their own “brand of industrial justice.”

Manifest disregard of the law specifically looks at whether there was “willful inattentiveness to the governing law.”⁶⁴ A finding of manifest disregard requires more than mere error or misunderstanding of the law.⁶⁵ The decisional law seems to say that a manifest disregard of the law stems from an irrational determination and that an irrational ruling by an arbitrator is based upon and results in the manifest disregard of the law.⁶⁶ The grounds overlap so substantially that they are duplicative and redundant.

How the overlap came about is difficult to ascertain. There appears to be no self-evident reason of labor relations that might explain the need for and development of these two separate grounds for the vacatur of labor awards. They seem to constitute a surplusage of protection.

⁶² See T. CARBONNEAU, *CASES AND MATERIALS*, *supra* note 35, at 599.

⁶³ See *id.* at 611-612.

⁶⁴ ARW Exploration Corp., 45 F.3d at 1463

⁶⁵ *Id.*

⁶⁶ *Id.*

Nonetheless, it is equally undeniable that the courts have embedded both grounds in the identical rationale of a respect for law, specifically the CBA. Additionally, neither ground serves much of a true policing function; they are equally difficult to establish and rarely have any real impact upon the enforceability of arbitral awards. Courts very infrequently find that arbitrators manifestly disregarded the applicable law or engaged in rendering irrational determinations.⁶⁷ The reason for the infrequency in non-labor circumstances is that there is no CBA to disregard. There, these grounds for vacatur are not only misplaced, but misfits.

Such rules do, however, have a practical impact upon FAA arbitration. They provide disgruntled parties with a means of procedural obfuscation. Parties liable under an award have additional means for challenging the determination. They can delay and possibly discount their liability by invoking these further means of recourse. Concomitantly, the winners seek judicial enforcement at a higher cost. Moreover, the common law grounds mandate that courts engage in an appraisal of the arbitrator's substantive ruling. Disregard of the law and irrationality of determination can only be evaluated by examining the arbitrator's ruling on the merits.⁶⁸ The imported common law grounds give the courts a licence—that otherwise is precluded—to scrutinize the arbitrator's substantive determination despite the lack of a CBA or its equivalent in FAA arbitrations.

⁶⁷ See Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra* note 3, at 314-321. See also *Ainsworth v. Skurnick*, 960 F.2d 939 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993); O'Mullan, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 *FORDHAM L. REV.* 1121 (1995).

⁶⁸ *Id.*

All that has been said about the first two common law grounds also applies to the third—the public policy exception to enforcement.⁶⁹ The *Misco* rule,⁷⁰ as reaffirmed by the U.S. Supreme Court in *Eastern Coal*,⁷¹ is that arbitral awards can be set aside when the arbitrator’s ruling violates an “explicit, dominant, and well-defined” public policy.⁷² The Court, along with lower federal courts,⁷³ have been abundantly clear that the rule is not intended to create a broad-gauged, fluid, and circumstantially variable public policy exception to the enforcement of arbitral awards. The *Misco* rule also arose in the circumstances of labor arbitration and is intended to function in that setting. As with the other two common law grounds, it is meant to contain the substantive discretion of labor arbitrators and to force a basic compliance on their part with the rule of law, *i.e.*, the law of the contract (the CBA) and the workplace. The *Misco* rule, in effect, allows courts to nullify awards in which arbitrators ignore federal legislation on labor law matters. Arbitrators must observe and respect such statutory law when it is relevant to the case.

⁶⁹ See T. CARBONNEAU, CASES AND MATERIALS, *supra* note 35, at 599.

⁷⁰ *United Paper Workers’ Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

⁷¹ See *Eastern Association Coal Corp. v. United Mine Workers of Am.*, District 17, note 56 *supra*. See also 531 US 57 (2000).

⁷² *Misco*, 484 U.S. at 47; *Eastern Assoc. Coal Corp.*, 531 U.S. at 63.

⁷³ See, *e.g.*, *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993).

The public policy exception is not even contemplated in FAA § 10, but is part of Article V of the New York Arbitration Convention and is, therefore, part of FAA Chapter Two.⁷⁴ The case law interpreting the New York Arbitration Convention makes clear that neither public nor foreign policy considerations are likely to hinder the enforceability of international arbitral awards.⁷⁵ Domestic U.S. considerations might become germane through the setting aside procedure when the United States serves as the venue of the arbitration.⁷⁶ Once again, the contrast between *Misco* and the express text of the FAA §10 is striking. It reinforces the view that the integration of the common law grounds is untoward and an exercise that is ultimately counterproductive.

Labor arbitrators, therefore, cannot ignore, denature, or reform the governing law.⁷⁷ Society delegates the responsibility and the authority to “maintain industrial peace”⁷⁸ to labor arbitrators as long as they respect essential legal commands. The public cannot be excluded entirely from the process of CBA arbitration. As noted earlier, arbitrators may be monarchs, but they are not also lawgivers. They supply the link between the CBA and standard practices in the

⁷⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, note 2 *supra*.

⁷⁵ See *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F.Supp. 800 (D.Del. 1990).

⁷⁶ See *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, note 48 *supra*.

⁷⁷ See, e.g., *Eastern Association Coal Corp. v. United Mine Workers of Am., District 17*, note 56 *supra*.

⁷⁸ See, e.g., *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, note 54 *supra*.

workplace and the continuing emergence of workplace disputes.⁷⁹ Labor relations demand that the legal regulation of arbitration permit a limited judicial supervision of the merits of labor awards. Such a requirement is not necessary in FAA arbitration. Non-labor forms of arbitration are generally not governed by statutes or involve essential legislative protections. The FAA makes no provision whatsoever for having courts scrutinize arbitrator determinations for compliance with substantive legal norms. The evolution of FAA arbitration to include statutory and regulatory disputes in the areas of consumer and employment (as well as commercial) disputes may argue for aligning FAA and CBA arbitration on the matter of merits review. The enhanced scope of FAA arbitration, therefore, could entail a substantial alteration of its traditional protocol.

The Impartiality of Arbitrators

The most effective basis in U.S. law upon which to challenge an arbitral award is the ground of “evident partiality” under FAA §10(2). Two factors converged to create this circumstance. First, the U.S. Supreme Court decision in *Commonwealth Coatings*⁸⁰ in 1968, and, second, the arbitration bar’s current preoccupation with arbitrator disclosures⁸¹—which is

⁷⁹ See *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, note 54 *supra*.

⁸⁰ See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1968)

⁸¹ See, e.g., INTERNATIONAL BAR ASSOCIATION, GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, note 44 *supra*; ABA-AAA, *Code of Ethics for Commercial Arbitrators*, note 44 *supra*. See generally

shared by a number of other institutions.⁸² In *Commonwealth Coatings*, the Court emphasized the central significance of the selection of arbitrators. Once appointed, arbitrators have little, if any, constraints upon the exercise of their authority. Judicial rectification of arbitrator actions or dispositions is rarely available. Appeal is very limited and, when brought, is almost never successful.⁸³ In its decision, the Court emphasized that, in light of the arbitrator's nearly unlimited authority as to matters of procedure and substance, the information that serves as the basis of appointment becomes exceedingly important. Arbitrating parties needed to have full and accurate information about prospective arbitrators because, once designated, their authority to rule is nearly unchecked (unless the parties' agreement provides otherwise).⁸⁴ The lack of arbitrator accountability is further enhanced by their immunity from suit.⁸⁵ Disclosures, the Court seemed to say, are instrumental to fundamental consumer protection in arbitration.

Figuroa, *Ethics in International Arbitration*, 18— MEALEY'S INT'L ARB. REP. 41 (2003); Rogers, *Fit and Functions in Legal Ethics: Developing a Code of Conduct for International Arbitration*, note 44 *supra*; de Witt Wijnen, Voser, & Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, note 35 *supra*.

⁸² See, e.g., *An Update on California Arbitrator Ethical Standards*, 16-4 WORLD ARB. & MED. REP. 107 (2005).

⁸³ *Commonwealth Coatings Corp.*, 393 U.S. at 62 – 63. .

⁸⁴ *Id.* at 68 – 69.

⁸⁵ See J. LEW, ed., THE IMMUNITY OF ARBITRATORS (1990); Bristow, *The Gathering Storm of Arbitrators' and Mediators' Liability*, [2000] ARB. & DISP. RES. L.J. 233.

In recent years, a number of organizations have displayed a strong interest in establishing “tribunal-wide” arbitrator neutrality. The organizations include the American Arbitration Association (AAA), the American Bar Association (ABA), the International Bar Association (IBA), and the International Chamber of Commerce (ICC).⁸⁶ The Judicial Council of California and the California state legislature have also been active on this matter.⁸⁷ The AAA-ABA *Code of Ethic for Arbitrators*, for example, establishes a presumption that all arbitrators, including party-designated arbitrators, are neutral.⁸⁸ Prior practice embraced the opposite approach, namely, that party-designated arbitrators were expected to favor the designating party’s position. The third arbitrator, appointed by the two party-appointed arbitrators to be the presiding chair, was the truly neutral arbitrator.⁸⁹ Thereafter, the IBA released its *Guidelines* on arbitrator disclosure and conflicts of interest.⁹⁰ The *Guidelines* attempt to provide a sense of what

⁸⁶ See note 35, *supra*, and accompanying text.

⁸⁷ See note 82, *supra*, and accompanying text.

⁸⁸ *Id.*

⁸⁹ See Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for ‘Nonneutral’s*, 11 AM. REV. INT’L ARB. 295 (2000); Eisemann, *The Partisan Arbitrator*, 4-2 INDIAN COUNCIL ARB. Q. 3 (1969); Rau, *On Integrity in Private Judging*, 14 ARB. INT’L 115 (1998); Yu Hong-lin & Shore, *Independence, Impartiality, and Immunity of Arbitrators*, 52 INT’L & COMP. L. Q. 935 (2003).

⁹⁰ See note 35, *supra*, and accompanying text.

information arbitrators must, should, and should not disclose.⁹¹ They seek to establish workable and realistic provisions on arbitrator disclosure that address the large law firm factor in international commercial arbitration and other professional considerations.⁹²

Judicial practice has yet to endorse the new development. The case law continues to distinguish between neutral and party-appointed arbitrators and to apply different professional standards to each of them.⁹³ Under this approach, absolute impartiality applies only to the neutral arbitrator.⁹⁴ The California Judicial Council, however, has taken the lead in spearheading the arbitrator disclosure reform at the state level within the United States.⁹⁵ The disclosure standards that were eventually enacted in California were so onerous and exacting that securities arbitration organizations refused to conduct arbitrations in which arbitrators were subject to these standards.⁹⁶ Both the NASD and the NYSE believed that the elaborate disclosure requirements

⁹¹ Ball, *Probity Deconstructed*, note 35 *supra*.

⁹² *Id.*

⁹³ See *Austin South 1, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135, 1142 (M.D. Fla. 1992); *Hayne, Miller & Farni, Inc. v. Flume*, 888 F. Supp. 949, 953-954 (E.D. Wis. 1995); *Schmitz v. Zilveti*, 20 F.3d 1043, 1045, 1047-1048 (9th Cir. 1994); *Burlington Northern Railroad Co. v. TUCO, Inc.*, 960 S.W. 2d 629 (Tex. 1997).

⁹⁴ See, e.g., *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994).

⁹⁵ See note 82, *supra*, and accompanying text.

⁹⁶ See *NASDR v. Judicial Council of Ca.*, 232 F. Supp. 2d 1005 (N.D. Cal. 2002).

might undermine the enforceability of awards under FAA §10(2).⁹⁷ A stand-off ensued between the various parties that was crowned by litigation and a concomitant SEC ruling exempting securities arbitrations in California from the state disclosure rules pending the outcome of the lawsuit.⁹⁸

The most curious aspect of the discussion about and activity surrounding the matter of arbitrator neutrality is that it has not been triggered as a result of actual abuse. The focus is upon the potential for abuse. The institutions that have led the charge, as it were, are more concerned with protecting and preserving the legitimacy and reputation of arbitration. They see the use of partisan arbitrators as providing a basis for the external criticism and undermining of the process. There also may be a practical concern that questions regarding arbitrator impartiality could thwart the enforcement of awards. The California state rules on arbitrator disclosure, however, were born of a different set of concerns: They reflect California's skepticism and even antagonism toward arbitration. From the California perspective, mandatory arbitration, especially in consumer and employment matters, deprives weaker parties of their legal rights and symbolizes the oppression of these parties by unprincipled and unbridled corporate interests. In fact, both federal and state courts in California⁹⁹ stand alone in elaborating increasingly

⁹⁷ See, e.g., NASD Proposes Amendments to the Code of Arbitration Procedures, 14-11 WORLD ARB. & MED. REP. 304 (2003).

⁹⁸ See notes ___ & ___, *supra*, and accompanying text.

restrictive case law rules on the validity of arbitration agreements. As to legislation and regulations, California is unique among states in the number of proposed laws and regulations that seek to limit the recourse to arbitration.¹⁰⁰ Such a policy, however, may only deprive California residents of a functional adjudicatory process.

Establishing true parity between parties maybe an elusive and misconceived goal. Making rules for arbitrator disclosure will increase litigious practices in arbitration that seek to disqualify arbitrators adversarially at the head of the process or to vacate awards at the end of the process. Consumer and employee protection will not be enhanced nor will legal rights be more secure. Although the political opposition is strident, it is not based upon a realistic assessment of the operation of the legal system. It reflects a foregone ideological conviction that only public institutions can be trusted to protect the interests of individual citizens and that the marketplace can never achieve truly salutary ends because of a power imbalance. The ideological conviction necessarily distorts both the facts and the issues.

Vacatur as an Abridgment of Arbitral Confidentiality

¹⁰⁰ See, e.g., *Calif. Assembly Again Seeks Limits on Employment Arbitration*, ADRWorld.com, March 7, 2006. A simple search in this area in the California legal databases yields over 1,000 returns. For more information on California's enacted and proposed legislation, see California statutes at <http://www.leginfo.ca.gov/calaw.html> and California proposed legislation at <http://www.leginfo.ca.gov/bilinfo.html>. For more information on California's enacted and proposed regulations, see California's Office of Administrative Law's website at <http://www.oal.ca.gov/>.

A point about the enforcement of arbitral awards under the FAA that has never been made with sufficient conviction is that vacatur proceedings breach the presumed confidentiality of the arbitral process. No matter what ground serves as the basis of the action, vacatur generally entails the development of a full judicial record regarding the underlying arbitration. Any of the statutory or common law grounds for vacatur can justify an extensive adversarial confrontation about whether the necessary elements are constituted under the evidence. Moreover, the parties can engage in a definitional contest about the exact significance of the ground and can further debate the impact of that result upon the specific circumstances of the case. In effect, many vacatur proceedings result in a complete re-enactment of the arbitral proceedings on a public record before a court. Once the court ruling is made available, the arbitration has been completely exposed. An attempt to vacate the award will, therefore, result in destroying the confidentiality of arbitral proceedings.

Disgruntled parties who refuse to comply voluntarily with an award can also use the vacatur procedure to delay the day of reckoning or discount their liability. They can expose the existence and content of the arbitral proceedings and thereby eliminate—*post facto*—a major business benefit of arbitration. Parties might argue that they have a due process right to some form of *de minimus* appeal against awards, that they should be protected against the possible corruption and fundamental unfairness of the process, as well as flagrant arbitrator abuse. Appeal, however, ceases to be *de minimus* once it thwarts a vital benefit and the essential attractiveness of the arbitral process. While absolute confidentiality of the arbitral proceedings cannot be guaranteed, enforcement actions should not allow the losing party to exact the proverbial “pound of flesh” or to inflict damage on the winner by rehashing the entirety of the proceedings. Participants in the arbitral process must recognize that their abuse of right can

deprive society of a workable and fair adjudicatory process. Accordingly, should FAA §10 vacatur actions be altered and, if so, how and by whom?¹⁰¹

The Eleventh Circuit has recently taken that position that parties should be held accountable for “specious” appeals against arbitral awards. In *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, the court entertained a challenge to confirmation based upon manifest disregard of the law. The litigation involved a dispute about the meaning of the contract between commercial parties. The arbitrator ruled in favor of one party and the other party instantly brought an action requesting the arbitrator to clarify the award. Thereafter, an action to vacate was filed before the district court and then appeal to the Eleventh Circuit. From the outset, the court perceived the systemic implications of the case:

The laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. If we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and

¹⁰¹ On the judicial recourse against arbitral awards in general, see Antoine, *Judicial Review of Arbitral Awards*, 54 DISP. RES. J. 23 (1999); Becker, *Appeals from Judicial Orders Under the Federal Arbitration Act*, 4 AM. REV. INT’L ARB. 179 (1993); Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49 (1997); Drahozal, *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, note 30 *supra*; Hayford, *Law in Disarrays: Judicial Standards for Vacatur of Commercial Arbitration Awards*, note 30 *supra*; Hayford & Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, note 49 *supra*; Kaplan, *Appeals from and Reporting of Arbitral Awards*, 59 ARBITRATION 160 (1993); Mungioli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, note 51 *supra*; Park, *Why Courts Review Arbitral Awards*, 16-11 MEALEY’S INT’L ARB. REP. 27 (2001); Vigoriti, *A Common Law of Arbitration: Arbitral Awards and Appeals*, 6 AM. REV. INT’L ARB. 29 (1995).

reaching a final decision will cost more instead of less. This case is a good example of the poor loser problem and it provides us with an opportunity to discuss a potential solution.

The court's assessment of the circumstances of the appeal speaks eloquently for itself:

There is no evidence that the attorney for Hercules urged the arbitrator to disregard the law, and Harbert does not even suggest that happened. There is no evidence that the arbitrator decided the dispute on the basis of anything other than his best judgment—whether right or wrong—of how the law applies to the facts of the case. There is, in short, no evidence that the arbitrator manifestly disregarded the law. The only manifest disregard of the law evident in this case is Harbert's refusal to accept the law of this circuit which narrowly circumscribes judicial review of arbitration awards. By attacking the arbitration award in this case Harbert has shown at best an indifference to the law of our circuit governing the subject. Harbert's refusal to accept that there is no basis in the law for attacking the award has come at a cost to the party with whom Harbert entered into the arbitration agreement and to the judicial system.

In litigating this case without good basis through the district court and now through this Court, Harbert has deprived Hercules and the judicial system itself of the principal benefits of arbitration. Instead of costing less, the resolution of this dispute has cost more than it would have had there been no arbitration agreement. Instead of being decided sooner, it has taken longer than it would have to decide the matter without arbitration. Instead of being resolved outside the courts, this dispute has required the time and effort of the district court and this Court.

When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken. Arbitration's allure is dependent upon the arbitrator being the last decision maker in all but the most unusual cases. The more cases there are, like this one, in which the arbitrator is only the first stop along the way, the less arbitration there will be. If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator's decision will be honored sooner instead of later.

Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions. A realistic threat of sanctions may discourage baseless litigation over arbitration awards and help fulfill the purpose of the pro-arbitration policy contained in the FAA. It is an idea worth considering.

[...]

The Eleventh Circuit ruling echoes the practical concerns expressed by Justice Breyer in *First Options of Chicago, Inc. v. Kaplan* that the litigation relating to arbitration should be held to a minimum in order to preserve the benefits of arbitral adjudication. In an adversarial system, it is unlikely that the parties and their counsel will engage in self-discipline. It is, therefore, the courts' responsibility to discourage post-award litigious representational conduct and to limit the appeal procedure to absolutely fundamental abuse. The law—namely FAA §10—could assist in maintaining the posture of arbitral appeal by recognizing and enforcing a procedure of internal arbitral appeal. In arbitrations between merchant parties, cases that do not involve any significant disparity between party positions, due process concerns must cede to the effectiveness and functionality of the adjudicatory process. The parties must respect the finality of arbitrator determinations that resulted from an essentially fair proceeding. It is simply too easy for talented advocates to foist a laundry list of objections before the courts on behalf of their losing clients. The Eleventh Circuit decision is in keeping with the U.S. Supreme Court's recent decision in *Buckeye*, where the Court affirmed the decisional and procedural sovereignty of the arbitrator. It also points to the need to modernized the provisions of the FAA.

To curb the misuse of vacatur under the FAA, courts might require a threshold evidentiary showing by the party opposing enforcement in an *in camera* proceeding. The latter would be an adversarial action intended to show whether the opposing party has any real prospect of succeeding in its challenge. If the court determines in the summary proceeding that there is a lack of probable success by the party opposing enforcement, it would simply confirm

the award. Such preliminary proceedings would not result in a published opinion. The governing standard could be stated as imposing a burden of rebutting a strong presumption of enforceability on the party opposing the award. Restricting the accessibility of appeal even more than the statute does already will reinvigorate the critics who claim that arbitration amounts to a substantial deprivation of legal rights and abridgement of constitutional guarantees.¹⁰²

Another, albeit partial, solution would be to eliminate the common law grounds as a basis for recourse against arbitral awards under the FAA. The solution appears warranted given what was said previously about the origins of the grounds and their integration into FAA §10. The “head wind” of tradition, however, might become a substantial obstacle to change. Courts have a long history with the common law grounds. They have generated an elaborate case law, absorbed a great deal of judicial energy, and have a long-standing and serious presence in the U.S. law of arbitration. In the vast majority of cases, they provide the judiciary with an anodyne possibility of asserting its role in the law of arbitration through a traditional court function. Although it would rid the law of merits supervision and provide necessary autonomy to arbitration, extricating the common law grounds from FAA §10 would undo a large part of the judicial culture that currently surrounds arbitration.

A more radical solution may be to discontinue vacatur actions altogether and to provide for the automatic enforcement of arbitral awards.¹⁰³ Such a procedure exists in ICSID or World

¹⁰² On the critics, see *Senate Subcommittee Holds Hearings on Bill to Limit Mandatory Employment Arbitration*, 11-6 WORLD ARB. & MED. REP. 153 (2000). *See also* 11-9 WORLD ARB. & MED. REP. 120 (2001); 15-4 WORLD ARB. & MED. REP. 97 (2004).

¹⁰³ Such a procedure applied in Belgium and Swiss law: on Belgium law, see Berger, *The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective*, 12 FORDHAM INT'L L.J.

Bank Arbitration¹⁰⁴ and in the Dutch law of arbitration.¹⁰⁵ It is a practice that is in effect in jurisdictions that highly favor arbitration, like the United States. Courts would automatically

605 (1989); Hanotiau, *International Commercial Arbitration in Belgium*, 1 AM. REV. INT'L ARB. 1 (1990); Matray, *La loi belge du 27 mars 1985 et ses répercussions sur l'arbitrage commercial international*, 64 REV. DR. INT'L & DR. COMP. 243 (1987); Neumann, *Limiting Judicial Review in International Commercial Arbitration: The New Swiss and Belgian Laws Offer Less Than They Promise*, 1 AM. REV. INT'L ARB. 435 (1990); Paulsson, *Arbitration Unbound in Belgium*, 2 ARB. INT'L 68 (1986); van Heutte, *La loi belge du 27 mars 1985 sur l'arbitrage international*, [1986] REV. ARB. 29; on the Swiss law, see Blessing, *The New International Arbitration Law in Switzerland: A Significant Step towards Liberalism*, 5 J. INT'L ARB. 9 (1988); Bond, *The New Swiss Law on International Arbitration and the Arbitral Institutions*, [1989] INT'L BUS. L.J. 785; Budin, *La nouvelle loi suisse sur l'arbitrage international*, [1988] REV. ARB. 51; Gaillard, *A Foreign View of the New Swiss Law on International Arbitration*, 4 ARB. INT'L 25 (1988); Karrer, *Switzerland's New Law is Modern, Liberal and Pragmatic*, 3 INT'L ARB. REP. 21 (1988); Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOKLYN J. INT'L L. 629 (1986); Poudret, *Challenge and Enforcement of Arbitral Awards in Switzerland*, 4 ARB. INT'L 278 (1988).

¹⁰⁴ See Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV.—FOR. INV. L.J. 321 (1991); Buckley, *Now We Have Come to the ICSID Party: Are Its Awards Final and Enforceable?* 14 SYDNEY L. REV. 358 (1992); Craig, *The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk*, 8 ICSID REV.—FOR. INV. L.J. 264 (1993); Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV.—FOR. INV. L.J. 85 (1987); Gaillard, *The Enforcement of ICSID Awards in France: The Decision of the Paris Court of Appeal in the SOABI Case*, 5 ICSID REV.—FOR. INV. L.J. 69 (1990); Giardina, *ICSID: A Self-Contained, Non-National Review System*, in R. LILICH & C. BROWER, eds., INTERNATIONAL ARBITRATION IN THE 21ST CENTURY 199 (1994); Pirwitz, *Annulment of Arbitral Awards under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 23 TEX. INT'L L.J. 73 (1988).

confirm and coercively enforce arbitral awards without any but formalistic supervision (*i.e.*, does an award exist and is it ascertainable in recognized documentary form) as long as appeal to a second arbitral tribunal was available following the rendition of the award. Administrating arbitral institutions or contract provisions could establish an internal appellate procedure. Access to the second tribunal could be made available on grounds similar or identical to those contained in FAA §10 or another statutory or treaty framework (*e.g.*, the UNCITRAL Model law¹⁰⁶ or the 1996 UK Arbitration Act).¹⁰⁷ The arbitral process would yield a single award. A time-limit or

¹⁰⁵ See Sanders, *The Dutch Arbitration Act of 1986*, [1987] J. BUS. L. 321 & 403. See also P. SANDERS & A. VAN DEN BERG, eds., *THE NETHERLANDS ARBITRATION ACT 1986: TEXT AND NOTES, ENGLISH, FRANCAIS, DEUTSCH* (1987); Schultsz, *Les nouvelles dispositions de la législation néelerlandaise en matière d'arbitrage*, [1988] REV. ARB. 209; Vellekoop, *The New Arbitration Law in the Netherlands*, 6 INT'L FIN. L. REV. 16 (1987).

¹⁰⁶ On the Model Law, see note 1 *supra*. See also, P. SANDERS, *THE WORK OF THE UNCITRAL ON ARBITRATION AND CONCILIATION* (2d ed. 2004).

¹⁰⁷ See J.M.H. HUNTER & T. LANDAU, *THE ENGLISH ARBITRATION ACT 1996: TEXT AND NOTES* (1998); R. LORD & S. SALZEDO, *GUIDE TO THE ARBITRATION ACT 1996* (1996); R. MERKIN, *THE ARBITRATION ACT 1996* (2d ed. 2000); Kerr, *The English Arbitration Act 1996 and the Model Law*, in R. BRINER, L.Y. FORTIER, K.P. BERGER, & J. BRADOW, *LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY: LIBER AMICORUM KARL-HEINZ BOCKSTIEGEL* 377 (2001); Landau, *The Effect of the New English Arbitration Act on Institutional Arbitration*, 13 J. INT'L ARB. 113 (1996); Mustill, *La nouvelle loi anglaise sur l'arbitrage de 1996: philosophie, inspiration, aspiration*, [1997] REV. ARB. 29; Redfern, *The Arbitration Act 1996: A Major Opportunity for the International Arbitrator*, [1997] ARB. & DISP. RES. L.J. 172; Saville, *The Arbitration Act 1996*, [1997] LLOYD'S MAR. & COM. L.Q. 502.

other restrictions might be imposed. Such a procedure would protect the confidentiality of the arbitral process and reinforce its self-sufficiency and independence from courts.

Expanding Constricted “Manifest Disregard”

“Manifest disregard” has a rich history and an important place in the U.S. regulation of arbitration.¹⁰⁸ It is frequently invoked by parties and rejected by courts with almost equal frequency.¹⁰⁹ In *Baravati*,¹¹⁰ the Seventh Circuit described it as an empty ornament of

¹⁰⁸ See Mungioli, *The Manifest Disregard of the Law—Standards A Vehicle for Modernization of the Federal Arbitration Act*, note 51 *supra*; Rubins, ‘*Manifest Disregard of Law*’ and Vacatur of Arbitral Awards in the United States, note 51 *supra*. See also Korland, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident-Partiality Under the Federal Arbitration Act*, 53 CASE W. RES. L. REV. 815 (2003); Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, note 51 *supra*; Hayford & Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Reviews of Commercial Arbitration Awards*, note 51 *supra*.

¹⁰⁹ According to the court in *Rodriguez v. Prudential-Bache Securities, Inc.*, 882 F. Supp. 1202, 1209 (D.P.R. 1995), “[i]n order to vacate an arbitration award [on this basis], there must be some showing in the record, other than the result obtained, that the arbitrators know the law and expressly disregarded it...The court [in another case] construed the term ‘disregard’ to imply that the arbitrators appreciated the existence of a governing legal rule but willfully decided not to apply it...As arbitrators need not explain the reasons justifying their award, and did not do so in this case, ‘it is no wonder that [Prudential] is hard pressed to satisfy the exacting criteria for invocation of the doctrine.’ ”

Also, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-934 (2d Cir. 1986), the court stated that, “Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law...The error must have been obvious and capable of being readily and

doctrine,¹¹¹ although many courts continue to debate its significance.¹¹² The number and length of the discussions have not given the notion any greater practical impact upon arbitral awards. Like many of the FAA grounds, it simply invites losing parties to bring perfunctory challenges against awards.¹¹³

instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term ‘disregard’ implies that the arbitrator appreciated the existence of a clearly governing legal principle but decided to ignore or pay no attention to it....To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties....Judicial inquiry...is therefore extremely limited.”

¹¹⁰ *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994).

¹¹¹ According to Chief Judge Posner, “manifest disregard of the law” “originated in the [discredited case of] *Wilko v. Swan*” and was “[c]reated *ex nihilo* to be a nonstatutory ground for setting aside arbitral awards, the *Wilko* formula reflects precisely that mistrust of arbitration for which the Court in its two *Shearson/American [Express]* opinions criticized *Wilko*. We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators ‘exceeded their powers’—it is superfluous and confusing.” 28 F.3d at 706.

¹¹² See, e.g., Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, note 101 *supra*; O’Mullan, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, note 67 *supra*.

¹¹³ See, e.g., *Remmey v. Paine Webber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).

Several years ago, the Second Circuit provided a novel dissertation upon manifest disregard. In *Halligan v. Piper Jaffray, Inc.*,¹¹⁴ the court held that an arbitral award could be vacated because the arbitrators presumptively disregarded the law, the evidence, or both elements of the case.¹¹⁵ The litigation involved claims of age-based discrimination brought by a senior broker who had been forced to resign from Piper Jaffray, Inc. Allegations and counter-allegations were made. The broker died during the proceedings after having undergone several surgeries for oral cancer.¹¹⁶ The arbitral tribunal eventually rejected Halligan's claims, but did not submit any reasons to explain its conclusions. The district court rejected the claim that the tribunal "manifestly disregarded the law" in reaching its determination.¹¹⁷ It held that the tribunal's determination could be supported by the facts and applicable law. Moreover, the tribunal had sovereign discretion in the evaluation of evidence. Finally, the judicial role was not to second-guess the arbitrators' dispositions.¹¹⁸

¹¹⁴ 148 F.3d 197 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999). On *Halligan*, see Poser, *Arbitration: Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, note 51 *supra*; Rees, *Halligan v. Piper Jaffray: The Collision Between Arbitral Autonomy and Judicial Review*, 8 AM. REV. INT'L ARB. 347 (1997).

¹¹⁵ 148 F.3d at 202 - 203.

¹¹⁶ *Id.* at 198.

¹¹⁷ *Id.* at 200.

¹¹⁸ *Id.*

The appellate court expressed skepticism about the wisdom of using arbitration in employment matters that involved civil rights issues. It stated that the arbitration of Title VII claims might require greater judicial supervision of arbitral determinations in order to guarantee the integrity of legal rights.¹¹⁹ Moreover, a tribunal's failure to render an explanatory reasoning with its award made the determination suspect ("the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard.")¹²⁰ The court concluded that the arbitrators had been presented with convincing evidence of age-based discrimination and had been fully and accurately briefed by the parties on the applicable law. The court, therefore, held that the arbitrators "ignored the law or the evidence or both."¹²¹ The opinion illustrate well the gravamen for the prohibition against the judicial review of the merits of arbitral awards. Inviting courts to disagree with the arbitral tribunal's determination could well result in judicial disagreement and vacatur.¹²²

In *Wallace v. Buttar*,¹²³ the Second Circuit reversed its determination in *Halligan*, holding that arbitral awards could not be vacated on the basis that the arbitrators had engaged in

¹¹⁹ *Id.* at 203.

¹²⁰ *Id.* at 204.

¹²¹ *Id.*

¹²² *See, e.g., Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993).

¹²³ *See Wallace v. Buttar*, 378 F.3d 182 (2d Cir. 2004).

the “manifest disregard of the evidence.”¹²⁴ Moreover, the court emphasized the highly exceptional character of manifest disregard of the law, deeming it to be a “doctrine of last resort”¹²⁵ that could be found to exist only when “(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) [confusing its description with the *Misco* rule on public policy¹²⁶] the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.”¹²⁷

Citing the Second Circuit decision in *Halligan*, the district court had vacated the award because the securities arbitral tribunal had “manifestly disregarded the facts” and the “law” by imposing the liability of a “control person” and the theory of *respondeat superior* upon the group of defendants when these concepts clearly did not apply.¹²⁸ In the district court’s view, *Halligan* permitted vacatur when “an arbitral award . . . runs contrary to ‘strong’ evidence favoring the party bringing the motion to vacate.”¹²⁹ The rulings was faithful to the doctrine established by the Second Circuit in *Halligan*.

¹²⁴ *Id.* at 191 - 193.

¹²⁵ *Id.* at 189.

¹²⁶ See *United Paper Workers’ Int’l Union, AFL-CIO v. Misco, Inc.*, note 56 *supra*; *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, District 17, note 56 *supra*.

¹²⁷ 378 F.3d at 189.

¹²⁸ *Id.*

¹²⁹ *Id.* at 193.

Nonetheless, the Second Circuit reversed the district court and, in doing so, in effect repudiated its decision in *Halligan*. The appellate court criticized the lower court for taking “too broad a view” of the FAA grounds for vacatur.¹³⁰ In particular, it held that “manifest disregard of the facts or evidence” was not “an independent ground for vacatur,” asserting that the contrary ruling in *Halligan* was mere “dicta” and somehow never part of the law in the circuit.¹³¹ The Second Circuit embraced a more characteristically deferential judicial posture, stating that a court could examine the record of an arbitration only to determine whether it provided “a colorable basis” for the arbitral tribunal’s ruling.¹³² In such a setting, a finding of manifest disregard of the law was “exceedingly rare” and involved an “egregious impropriety” by the arbitrators in the application of the governing law.¹³³ Moreover, manifest disregard of the law could not be invoked unless the statutory grounds in FAA §10 did not provide relief and manifest disregard was the sole means of rectifying a serious problem or deficiency in the award.¹³⁴ If the arbitrators followed the uncontroverted statement of law presented in the proceedings, manifest disregard was inapplicable even when the error in law or legal reasoning was self-evident.¹³⁵

¹³⁰ *Id.* at 189.

¹³¹ *Id.* at 192.

¹³² *Id.*

¹³³ *Id.* at 189.

¹³⁴ *Id.* at 189 - 190.

¹³⁵ *Id.*

Judicial standards do not control arbitrator application of law; rather, how the average arbitrator would have construed the law is the governing rule.¹³⁶ Many arbitrators are technical specialists with no legal training.

*Wallace v. Buttar*¹³⁷ demonstrates the time-honored role of courts in U.S. arbitration law. Court deference has made for a successful cohabitation between arbitrator sovereignty and judicial authority. The courts' mission in terms of arbitration is to correct only profound abuses or flaws in the process. A more activist stance, illustrated by the creation from whole cloth of the action to clarify awards,¹³⁸ is likely to render arbitral adjudication less functional and may eventually throw it into a dysfunctional state. Increasing rights protection in arbitration for no other reason than its possibility, that it arguably makes sense, and it reflects what is done in court is a very bad idea indeed. It may be true that arbitrators get the vast majority of interesting civil cases and have a more appealing docket; that circumstance, however, cannot justify tinkering with the arbitral process and modifying the core principles of arbitration law. The resourceful use of the judicial imagination can sometimes result in a disease of epidemic proportions. The rights protection rationale is likely to be translated into adversarial advantage and significantly compromise the operation of the arbitral process.

¹³⁶ *Id.* at 193.

¹³⁷ See note 123, *supra*, and accompany text.

¹³⁸ See note ____, *supra*, and accompanying text.

The incorporation of the common law grounds for vacatur was an even worse idea.¹³⁹ It has done very little for arbitration law except to create greater complexity and confusion in matters of enforcement. The rights of the parties are not enhanced; arbitration is not even perceived as more legitimate or fairer. Courts simply got to say very judicial things about the possible vacatur of arbitral awards. They also enhanced the procedural position of recalcitrant and culpable parties. Vacatur allows for loser privilege and abuse, delay, and discounts of liability. Even a modest form of judicial supervision violates the confidentiality of the arbitral process.

Possible Change

Those who argue for the recrafting the FAA¹⁴⁰ are undeniably correct in their view. The statute has had a distinguished history and is still a sensible contemporary statement of how to regulate arbitration. It is, however, badly in need of updating and needs to be written as an arbitration statute, not a procedural guide to the integration of arbitral procedure into the U.S. legal process. FAA §§10 and 11 are excellent illustrations of the need for reform. Vacatur, as it has evolved and been practiced, should probably be abolished. While judicial supervision must be maintained to act as a check on arbitrator power and to correct periodic abuses, it must be

¹³⁹ See, notes _____, *supra*, and accompanying text.

¹⁴⁰ See, e.g., Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75 (2002); Park, *Saving the FAA*, 19-11 MEALEY'S INT'L ARB. REP. 27 (2004); Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241 (2003).

confined to the exceptional case and cannot be made available as the standard procedure in all cases. Some significant threshold showing must be made by the party opposing confirmation before judicial supervision even for procedural matters can be invoked. This strong presumption in favor of enforcement, as it does now, would support avoiding all judicial supervision and essentially result in the automatic judicial confirmation of awards. The statute could encourage parties to provide for the arbitral appeal of awards on whatever grounds and through whatever private procedural process. It should also make clear that subsequent judicial confirmation of the final award is extremely likely.

The grounds for judicial supervision, assuming a rebuttal of the strong presumption of confirmation, would address circumstances in which the award results from a corrupt arbitration. An arbitration becomes corrupted or denatured as an adjudicatory proceeding when it amounts to a denial of justice to one of the parties. Such prejudice can be achieved in circumstances, attitudes, or beliefs that deny a party the opportunity to be heard, to make its case, and to respond to the other party's allegation. Whenever an arbitration becomes an empty formalism and it results a foregone conclusion, the decision that proceeds from it cannot be given compulsory executory legal force. Debilitating elements would include bribery, arbitrator interest in the outcome, preconceived and fixed dispositions in arbitrators, and unrevealed prior, direct, and involved relationships with other people in the arbitration. The Hooter's arbitration process described in *Hooter's of Am., Inc. v. Phillips*¹⁴¹ constitutes a good demonstration of a corrupt or denatured arbitration framework.¹⁴² Beyond these things flagrant, arbitrations would be

¹⁴¹ 173 F.3d 933 (4th Cir. 1999).

¹⁴² See also *Rosenberg, v. Merrill Lynch, Pierce, Fenner & Smith*, 995 F. Supp. 190 (D.Mass. 1998), *aff'd*, 170 F.3d 1 (1st Cir. 1999).

presumptively valid and have that status in fact. This approach should be good for both domestic and international arbitral awards, although the content of Article V of the New York Arbitration Convention would control. But for the occasional guffaw, this system already applies in effect.

Perhaps equally controversial, some thought must be given to incorporating a strain of merits review into any new framework for the confirmation of arbitral awards under the FAA. The relatively recent but now well-settled expansion of the scope of arbitration to include statutory disputes could give new life and function to “manifest disregard of the law.”¹⁴³ Incorporating such a basis for review into the framework for enforcing international arbitral awards would be unrealistic: It would conflict with Article V of the New York Arbitration Convention and would be generally disruptive of international commercial arbitration.¹⁴⁴ The expansion of domestic arbitration into consumer and employment matters and the application of the 1964 and 1991 Civil Rights Act, consumer protection legislation, ERISA, and other social policy statutes, may require that courts supervise with some real rigor arbitrator rulings on statutory matters.

The foregoing proposal can be criticized on a number of grounds. Merits review of any kind and on whatever basis undermines the authority of the arbitrator and the autonomy of the arbitral process. Moreover, the U.S. Supreme Court has been absolutely clear and unyielding on the point that arbitration is just as good as judicial litigation (it is simply different) and, therefore, it does not result in a compromising or abridgement of legal rights. As a procedural mechanism,

¹⁴³ See notes 118-146, *supra*, and accompanying text.

¹⁴⁴ See Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, *supra*, note 3 at

—.

arbitration has no impact upon the content of substantive rights! Arbitrators can decide issues of statutory law just like contract matters. There is no need to second-guess the arbitrator on either score, says the Court.

Given adversarial dispositions, there is every likelihood that a statutory inroad into the merits review of awards will fester into a plague. The implicated rights arise from public law provisions that generally harbor a good deal of disagreement on political and moral grounds. The ideological volatility of the statutory law is, therefore, likely to lead to the nullification of awards, their revision, or their partial (as opposed to full) enforcement. Such a consequence would make both consumer and employment (and perhaps other forms) of arbitration ineffective adjudicatory processes.

The right to supervise arbitrator statutory rulings on the merits could be introduced but contained by court discretion. In keeping with the provisions of the 1996 UK Arbitration Act, courts could have the authority to refuse to exercise their review powers if they deemed it inappropriate or unwarranted in the circumstances. Having a discretionary prerogative to rule, however, could result in making the action so exceptional as to render it perfunctory or could entail so many variations among the different judicial jurisdictions that a uniform rule or set of rules would be precluded.

The two major policy issues of arbitration law are at the core of this discussion. Privileging the protection of legal rights will always diminish the functionality of the arbitral process. Moreover, heightening the presence and role of courts in arbitration will always bring the arbitral process closer to the morass of traditional judicial litigation. The choice of pathways is stark and the dangers of the choice are irreducible. Finally, whichever approach is chosen, there must be a sufficient political will to implement it.

Freedom of Contract Innovation: Opt-In Provisions

Prior to the emergence of opt-in provisions, critics portrayed arbitration as undermining the sovereignty of the State and the regulatory authority of public law. In their view, private adjudication and the exercise of contract freedom diminished the State's legislative and adjudicatory hegemony. Opt-in provisions have eliminated the very foundation of that criticism. In these provisions, the rule of contract freedom no longer shields arbitral adjudication from public law requirements, but rather seeks to incorporate into arbitration standard appellate procedures that are protective of legal rights. The fundamental dynamics of the process have been altered—reversed, in fact. Judicial interference is no longer feared, but desired. The true sovereigns in the process—the parties—can command courts to scrutinize arbitrator determinations if they deem such protection necessary or warranted in their transaction. The invited “second look” or “another bite” safeguards legal rights. Such a result was unthinkable prior to the appearance of opt-in provisions.

Do opt-in provisions reflect a new paradigm in arbitration law? Are they evidence of a new protocol between the courts and the arbitral process? Or, instead, do they indicate basic party confusion and a conflicted and impractical approach to arbitration that is undesirable and should be avoided. If protection from bad decisions by arbitrators is the goal, other, less drastic cures appear to exist.

The federal circuit courts are divided on the enforceability of opt-in provisions.¹⁴⁵ Despite the schism, the objections to the use of contract in this way are legion. There is little, if any, evidence of a new paradigm—not any more here than in January 2000 when financial pundits were heralding a new age of stock investment. Whether by contract or statute, immixing courts into the arbitral process is a bad idea that threatens the core attributes of arbitration. Old anxieties cannot be pacified by the illusion of a new day. As Justice Cardozo remarked in the celebrated *Palsgraf* case, “Life will have to be made over, and human nature transformed, before provision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.”¹⁴⁶ Neither judicializing arbitration nor arbitralized court procedures are likely to emerge as a new form of arbitration. Fundamental definitional and conceptual distinctions prevent it. Only the most opportunistic thinking could endorse such absurdities as a form of adjudication. While both courts and arbitral tribunals engage in

¹⁴⁵ See, e.g., *Gateway Techs, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Cook v. Hughes Training, Inc.*, 254 F.3d 588 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 1196 (2002); *Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 545 (2001); *New Eng. Utils. (NEU) v. Hydro-Québec*, 10 F. Supp. 2d 53 (D. Mass. 1998); *Chi. Typographical Union v. Chi. Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991); *Harris v. Parker College of Chiropractic*, 286 F.3d 790 (5th Cir. 2002); *Jacada Ltd. v. Int’l Mktg. Strategies*, 401 F.3d 701 (6th Cir. 2005).

At last count, the Ninth, Eighth, Seventh, and Tenth Circuits opposed the validity of opt-in provisions for judicial review, while the Sixth, Fifth, Third, and First Circuits favored them. Some of the proponents, like the First Circuit, require express contractual language for judicial review of the merits: *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F.3d 987 (9th Cir. 2003); *Hoelt v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003); *P.R. Tel. Co. v. U.S. Phne Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005).

¹⁴⁶ *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 343 (1928).

adjudication, they do so in different ways and pursuant to distinct missions. Each has its own purpose and function. They respond to different social needs. The episodic judicialization of arbitration is a perilous creation because it not only sullies arbitration's basic character, but it also invites the process' deterioration and eventual elimination.¹⁴⁷

In arbitration, rights protection is always at odds with the functionality of adjudication. The provision of *de novo* review of arbitrator rulings integrates the right of appeal into the arbitral process and renders it much closer, on a fundamental basis, to judicial proceedings. Disgruntled parties, therefore, are given an opportunity to express their opposition to the arbitrators' determinations beyond complaining about would-be procedural irregularities in vacatur. Instructing the court of enforcement to undertake a full review of the substance of the award expresses distrust of the arbitrators and of their ability to interpret and apply the law. It also raises serious questions about the parties' motivation for choosing arbitration. The addition of the opt-in provision alters a material term in the standard and long-standing bargain for arbitration. It is difficult to conceive of contemporary arbitration as a mere fact-finding procedure. Opt-in provision also give judicial proceedings a mythical and unrealistic glow. Finally, they significantly compromise the finality and effectiveness of arbitration.

¹⁴⁷ For a discussion of opt-in provisions for judicial review, see, e.g., Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395 (1998); Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. DISP. RES. 337 (2000); Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 AM. REV. INT'L ARB. 215 (1999); LeRoy & Fenille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review*, 19 OHIO ST. J. DISP. RES. 861 (2004); Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429 (2004); Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS UNIV. L.J. 509 (2002).

Like the misguided common law grounds, the availability of opt-in judicial merits review contradicts the express language of the governing statute. As noted earlier, FAA §10 contains no mention of, and thereby excludes, the judicial supervision of the merits of awards. The FAA is the law, legislatively enacted. It is not a “default” framework, meant to supplement the exercise of freedom of contract. Barebones legal regulation is not insignificant because of its economy. It states basic regulatory principles, important to society and to the law, that are not secondary to party contract discretion—unless the legislation itself so provides. Moreover, if contract can be used to increased judicial supervision, logic demands that it can also be used to lessen or eliminate it. Parties could demand that courts automatically enforce their awards. Such an approach is likely to generate chaos and confusion. Contract negotiations would establish the law of arbitration in a completely *ad hoc* fashion.

The rule of contract freedom provides the strongest support for opt-in provisions. In *Volt Information Sciences*, the U.S. Supreme Court held that the judicial task in regard to arbitration is to enforce arbitration agreements as written by the parties. There, the Court held the parties to the letter of their agreed-upon arbitral clause despite the eventual consequence of inarbitrability. The Court modified its position in a subsequent case. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,¹⁴⁸ the Court held that the exercise of contract choice as to the law applicable must not impede the parties’ reference to arbitration. Opt-in provisions do not defeat the party agreement to arbitrate, but they do lengthen the arbitral process and could impair or destroy the process’ conclusiveness.

¹⁴⁸ 541 U.S. 52 (1995)

A Judicial Addition: The Action to Clarify Awards

The ruling in *Hardy v. Walsh Manning Securities, L.L.C.*,¹⁴⁹ demonstrates the wisdom of the U.S. Supreme Court’s “emphatic federal policy” favoring arbitration. As the Court elaborated the tenets of the policy over the last forty years,¹⁵⁰ the Justices seemed to have understood—before any legislator or commentator—that unequivocal support and intolerance of deviations were necessary to master the ideological rift and cultural clash between arbitral and judicial adjudication. Passivity, understanding, and a practice of consensus-building would have essentially left state and lower federal courts to their own devices. They would quickly have confected an amalgam of rulings that imposed their authority and separate political values upon the arbitral process. U.S. society would have thusly become the beneficiary of an ineffective alternative adjudicatory process, the scattered application of which would not have remedied the inaccessibility of justice. While the legislature is the repository of democratic values, the judiciary’s primary responsibility is to maintain legal civilization and the rule of law by proclaiming juridical standards.

More specifically, *Hardy* illustrates the inter-relationship between vacatur for manifest disregard of the law and the action to clarify an award.¹⁵¹ The *Hardy* court’s reasoning further exhibits how misguided both procedures are and how antagonistic their underlying rationale is to

¹⁴⁹ 341 F.3d 126 (2003).

¹⁵⁰ *Id.* at 129 – 134.

¹⁵¹ *Id.* at 132 – 134.

the autonomy and functionality of arbitration. The *Hardy* circumstances represent nothing more than the majority's disagreement with the arbitrators' application of law.

The majority opinion makes abundantly clear that the court believes that the securities arbitration tribunal misconstrued and thereby misapplied New York state law. It also makes clear that the court invoked its "authority to seek a clarification of...[the tribunal's] intent" in order to avoid vacating the award on the basis of manifest disregard of the law. In reaching its determination, the court's objective appears to have been two-fold: (1) to "afford" the arbitral tribunal "an opportunity" to avoid vacatur on the basis of manifest disregard ("We are reluctant to announce that the Award is void outright as written."); and (2) to avoid imposing a "substantial financial liability...upon an individual without a clear basis in law."¹⁵² Seeking to uphold the federal policy in favor of arbitration and to enforce a would-be legally accurate award, the court seems in the end to have achieved neither objective.

The facts involved an investor who had opened an account with Walsh Manning, a brokerage firm in New York City.¹⁵³ Hardy, the investor, claimed that the firm and its agents misrepresented the value of certain "house stocks" that they encouraged him to buy.¹⁵⁴ The matter was submitted to an NASD arbitration tribunal, which the court described as consisting "of three members, only one of whom [was] an attorney," implying that two-thirds of the panel

¹⁵² *Id.* at 134.

¹⁵³ *Id.* at 127.

¹⁵⁴ *Id.* at 127 – 128.

may not have understood the applicable law.¹⁵⁵ The tribunal decided in favor of the investor, holding in part that, “Respondents Walsh Manning and Skelly [the CEO of the brokerage firm] [were]...jointly and severally liable for and shall pay...compensatory damages...**based upon the principles of respondeat superior.**”¹⁵⁶

It is the tribunal’s reference in the award to respondeat superior that disturbed the majority.¹⁵⁷ In its view, the firm’s CEO and broker were both employees of the firm. Skelly was not an officer of the company.¹⁵⁸ Accordingly, Skelly could not, under applicable New York law, be held liable for the acts of the broker because both of them were employees: “The principle that respondeat superior is a form of secondary liability that cannot be imposed upon the fellow employee of a wrongdoer is certainly well-defined and explicit in New York.”¹⁵⁹ In a word, the majority believed that the arbitral tribunal had misapplied the New York version of respondeat superior (including the “fellow servant” rule) by holding Skelly liable for the broker’s conduct.

The majority then undertook an extensive assessment of the district court opinion. The court below concluded that the award as written should be enforced, although it recognized that

¹⁵⁵ *Id.* at 128.

¹⁵⁶ *Id.* at 128. (Emphasis in the original.)

¹⁵⁷ *Id.* at 130.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

the arbitral tribunal's reference to respondeat superior liability was problematic. It then excused the statement as an imprecise and confusing way to state that the firm and its CEO were "jointly and severally liable" for the broker's conduct. The would-be error arose from bad word choice and grammar. Nonetheless, the award made clear that the firm should pay the investor a sum certain. The essential determination of liability was unmistakable and enforceable.

The dissent, however, provided the most persuasive and accurate interpretation of the facts:

In this case, the disputed portion of the arbitrators' decision simply states: "Walsh Manning and Skelly be and hereby are jointly and severally liable...based upon the principles of respondeat superior." The majority's interpretation, while conceivable, ignores the fact that the critical phrase "based upon the principles of respondeat superior" may simply explain the basis for Walsh Manning's joint and several liability, without referring to the basis for Skelly's primary liability. Indeed, the phrase may indicate Walsh Manning's liability for *Skelly's* actions, not just Cassese's wrongful conduct, based upon the theory of respondeat superior. In other words, the award may specify the form of liability, joint and several, while remaining completely silent as to the underlying claims on which Skelly was actually found liable.

Not only is this a *plausible* interpretation of the decision, but also a completely *probable* one, for Hardy presented substantial evidence during the arbitration hearing that Skelly, who was Cassese's direct supervisor, failed to properly supervise Cassese, that Skelly was personally aware of Cassese's unauthorized trading, and that Skelly violated federal securities laws by engaging in direct market manipulation.¹⁶⁰

It would seem that the judicial policy favoring arbitration would require that courts view the arbitrators' ruling in the light most favorable to the enforcement of the award. Because it is, in fact, quite likely that the reference to respondeat superior only applies to the brokerage firm, the award could not be challenged on the basis of manifest disregard of the law or remanded by the court to the arbitrators for clarification. The firm was liable to its customer because its agents/employees had overreached and violated their fiduciary obligations by failing to properly

¹⁶⁰ *Id.* at 135 – 136.

supervise and by pushing the customer to buy house stocks. It is indeed difficult to accept the majority's conclusion, that "In our case, we have crossed the line from confusion to inexplicability, and we can discern no reading of the Award that resolves its apparent contradiction with the law of respondeat superior."¹⁶¹

According to the majority, "The award indeed contains a fundamental mistake of law."¹⁶² It believed that even "the most liberal reading of the award" could not repair the legally erroneous conclusion that Skelly was liable under respondeat superior.¹⁶³ While it accepted the possibility that the "explicit legal conclusion" may have been "a stray and unnecessary remark," "only the Panel [tribunal] can tell us this..."¹⁶⁴ In continuing its litany of strained contradictions, the majority described the standard for vacatur for manifest disregard of the law (clearly implying that it was satisfied in the instant case) and then concluded in a bout of remorse: "we are reluctant to announce that the Award is void outright as written."¹⁶⁵

In the words of colloquial parlance, 'the arbitrators', says the majority, 'got the law wrong and are imposing a substantial liability upon an individual employee. That conclusion may be true because we have no express statement of its impossibility in the award! The award

¹⁶¹ *Id.* at 132.

¹⁶² *Id.* at 133.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 134.

could be read in a more accommodative manner, but we choose not to because the law was, could, or might have been misapplied by the arbitrators. And, it is a serious matter to impose liability where it should not lie, even though it's likely the arbitrators really didn't do so. We, therefore, find manifest disregard of the law but we really don't. We just want the arbitrators to use better words, our words, and manifestly respect the law on our terms.' To reach an initial conclusion: No thinking other than political punditry has ever been more liberated from the restraints of rationality.

The foregoing "reasoning" stands as the foundation for the court's next lurch of logic consecrating its authority to order a clarification:

Although certainly not the normal course of things, we do have the authority to remand to the Panel for purposes broader than a clarification of the terms of a specific remedy. That is, we have the authority to seek a clarification of whether an arbitration panel's intent in making an award "evidence[s] a manifest disregard of the law."...The Panel should be afforded such an opportunity....

...Judge Lynch's [district court judge] fear that remand here "would in effect require arbitrators to provide explicit and correct legal analyses of their conclusions—something the law does not require" strikes us as overstated....In this case, the Panel chose to make an explicit legal conclusion in the award, a conclusion that may well be wrong. It should be given the opportunity to explain themselves [sic] [itself]. We are emphatically opening no floodgates here. We simply wish for more clarity because we think that substantial financial liability should not be imposed upon an individual without a clear basis in law.¹⁶⁶

Where should the criticism begin? There are an extraordinary number of problems with the court's statements, not the least of which is determining what it is saying and seeking to accomplish. It is no longer clear at this critical stage in the opinion whether the court still believes that the arbitrators' ruling on respondeat superior manifestly disregards the applicable law. The court says only that the tribunal's statement may well be wrong. It is unclear what the

¹⁶⁶ *Id.* at 134.

court means by its reference to the panel's intent and how the court would ascertain it and how it could be a factor in applying the manifest disregard standard. It refers twice to affording the tribunal an "opportunity" to explain itself on the respondeat superior issue. These statements suggest that the court not only is commanding the arbitral tribunal to give reasons for its determination, but also to supply the court with the right reasons in order to avoid vacatur. Judge Lynch is right about the consequences of remand on this basis; it is well-settled law that, unless the arbitration agreement provides otherwise, arbitrators are under no legal obligation to give reasons, let alone the "right" reasons.

The court's adamant denial of systemic consequence is as implausible as its twisted and wrong-headed ruling. The ruling does, in fact, have the potential of generating an entire new sector of vacatur litigation. Every dissatisfied party will now argue that the arbitrators' determination was flawed by ambiguity or a lack of clarity in the application of law. It is beyond cavil that the majority opinion overrides and breaches the levee of arbitrator sovereignty. It is difficult to say when a sufficient lack of clarity exists or how widespread it needs to be. Does it pertain only to law or the facts as well? What if the arbitrators don't agree or see another problem? Is the majority's case for an action to clarify based on a lack of clarity, a legal error, or does it reflect court misconstruction and simple disagreement with the arbitrator?

The court's final statement douses the flames with kerosene. Does the court have the authority and basis in law to require "more clarity"? Is lack of clarity manifest disregard of law? Must the arbitral tribunal rule as the court would in order to avoid vacatur of its determination? Doesn't this constitute an in-depth review of the merits and directions from the court to the arbitrators on how to apply the law? Is it now a rule of arbitration law that arbitrators can only impose substantial financial liability on individuals when there is "a clear basis in law" to do so?

What part of FAA §10 says that? Is this manifest disregard of the law in the second degree? The arbitrators did not manifestly disregard the law, but did not rule as the court would have—‘they did not get it right’—and, therefore, they need to modify their determination accordingly.

The court then gives the arbitral tribunal specific instructions as to the issues presented and how they might be resolved in various ways. The approach is extraordinary and leaves even the most loquacious commentator speechless—nearly. There can be little doubt that the court’s ruling violates the sovereignty of the arbitrators and the autonomy of the arbitral process. It is a confusing mishmash of conflicting tendencies that leads ultimately to a pernicious result: Because the tribunal’s holding could be misunderstood (by someone who misreads it), the court stymies the arbitration until the arbitrators arrive at what the court see as a substantively correct legal result.

The dissent properly evaluates the majority’s distorted reasoning: “By remanding to the arbitration panel for clarification as to the underlying legal basis for liability, the majority...disregards the well-settled precedent establishing our severely limited review of arbitration awards.”¹⁶⁷ Further, “in ‘wishing for more clarity,’ the majority’s decision overlooks our limited role in reviewing arbitration decisions...”¹⁶⁸ It underscores how the majority opinion deviates from well-settled standards: “...[M]ere ambiguity in the award itself is not a basis for denying confirmation, so long as the award can be interpreted as having a colorable factual or legal basis.”¹⁶⁹ Also, “an ambiguous award may be confirmed, so long as any

¹⁶⁷ *Id.* at 134.

¹⁶⁸ *Id.* at 137.

¹⁶⁹ *Id.* at 135.

plausible reading of the award is legally sustainable.”¹⁷⁰ In responding specifically to a point made by the majority, the dissent describes the long-standing judicial practice in terms of arbitration: “Our goal, then, is not to discern the actual subjective intent of the arbitration panel, but only to determine if the award can be sustained under any plausible reading.”¹⁷¹

The dissent also criticizes the majority’s muddled view of the inter-action between the action to clarify awards and manifest disregard of the law. If a court determines that the arbitrators’ ruling constitutes a manifest disregard of the law, the award is unenforceable. The governing legal provisions do not give the arbitral tribunal another chance to get it right. The majority’s position trivializes both the role of the court and the remedial integrity of arbitration. It also fosters protracted litigation about arbitration. It ignores the parties’ expectations as to their bargain for arbitration and substitutes a misguided activism for the deference that has characterized the courts’ relationship with arbitration for so long. The dissent usefully emphasizes that the action to clarify an award does have a place in the legal regulation of arbitration. It is available when the court of enforcement simply does not understand what the arbitrators in fact held. The lack of understanding does not express disagreement with the arbitrators’ legal reasoning, but applies to the holding. A failure to clarify would result in the impossibility of enforcement. According to the precedent, “such a remand is appropriate ‘so that the court will know exactly what it is being asked to enforce.’”¹⁷²

¹⁷⁰ *Id.* at 137.

¹⁷¹ *Id.* at 135.

¹⁷² *Id.* at 137.

In *Brownsville General Hospital*,¹⁷³ the Third Circuit upheld a district court's decision to remand an arbitral award to the arbitrator for clarification. The case involved a unionized employee who had been suspended then terminated because of allegations of sexual harassment¹⁷⁴. Ruling on the employee's grievance, the arbitrator held that the employee should be reinstated after completion of agreed-upon counseling.¹⁷⁵ The designated therapist, however, eventually refused to continue working with the employee.¹⁷⁶ Reinstatement could not take place until the designated therapist certified that the employee had completed counseling.¹⁷⁷ In response to the hospital's attempt to terminate the employee, the union, *inter alia*, requested that the arbitrator be asked to assess the unforeseen change of circumstance in light of his prior ruling.¹⁷⁸ The district court agreed, but cautioned the arbitrator not to "revisit the merits of the

¹⁷³ *Official and Professional Employees International Union, Local 471 v. Brownsville General Hospital*, 186 F.3d 326 (3rd Cir.1999).

¹⁷⁴ *Id.* at 328.

¹⁷⁵ *Id.* at 329.

¹⁷⁶ *Id.* at 330.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

arbitration.”¹⁷⁹ The question presented to the arbitrator was also restricted to assessing the impact of the “therapist’s post-award refusal to continue the counseling relationship.”¹⁸⁰

Brownsville has been applauded as exhibiting “a high degree of common sense” and because it is a practical means of “afford[ing] the parties arbitral justice.” Such praise has been accompanied by the denigration of the *functus officio* doctrine, which is the chief legal and doctrinal barrier to allowing actions for clarification. In order to diminish the doctrine, the commentators refer for support from no less an authority than Judge Richard Posner of the Seventh Circuit. In Chief Judge Posner’s view, a remand to clarify is necessary because arbitrators are no more infallible than judges.¹⁸¹

¹⁷⁹ *Id.* at 333.

¹⁸⁰ *Id.*

¹⁸¹ See Cavendish, *Fortress Arbitration: an Exposition of Functus Officio*, 80 FL. BAR J. (2006). Cavendish writes:

In 1995, Chief Judge Richard A. Posner of the U. S. Court of Appeals for the Seventh Circuit authored a 3-0 opinion in *Glass, Molders, Pottery, Plastics and Allied Workers Int’l Union, AFL-CIO, CLC, Local 182-B v. Excelsior Foundry Co.*, 56 F.3d 844 (7th Cir. 1995). In *Excelsior Foundry*, the Seventh Circuit analyzed *functus officio* and found that the complained of post-award conduct fit within one of two recognized exceptions to the doctrine. See *id.* at 847.

En route to the holding, Judge Posner made five sundry criticisms of *functus officio* — criticisms that have gone largely unanswered for 10 years. See, for example, Daniel C. Tepstein, *Confirming an Amended Labor Arbitration Award in Federal Court: The Problem of Functus Officio*, 8 Am. Rev. Int’l Arb. 65, 70 (1997). Left alone, and considering their provenance, they might persuade an Article III court that this ancient, well-founded, and useful doctrine is best left discarded. See, for example, *Pace Union, Local 4-1 v.*

When compared to *Hardy, Brownsville* is an easy case and, therefore, a bad basis for making law. Hard-headed lawyer practicality—getting the parties a final and adapted result—is an attractive solution and rationale, but it would be destructive in the *Hardy* circumstances. As to Judge Posner, looking at arbitration through the perspective of the judicial process is almost always wrong. The dynamics and objectives of the processes are related but different. Moreover, the authorities cited suggest that the doctrine of *functus officio* arose because of the vulnerability of arbitrators to outside pressure once they had decided the matter. The doctrine allowed them a means of avoiding attempts to be influenced. The rationale, whether valid or not historically, demeans arbitrators and is characteristic of the distrust and petty judicial jealousies that the FAA was meant to eradicate. It is next to impossible to integrate it into the contemporary operation and regulation of arbitration. Rather than portray arbitrators as uncouth and driven by greed and arbitration as an ethically and professionally inferior process of

BP Pipelines, 191 F. Supp. 2d 852, 856, 858 (S.D. Tex. 2002)(declaring the widespread erosion of *functus officio* in the federal appellate courts and relying on *Excelsior Foundry* to question whether the doctrine even exists in labor arbitration today).

Judge Posner's five criticisms are: 1) the doctrine deprives arbitral parties of the opportunity to seek reconsideration of an arbitrator's decision, creating a gap in our system of private arbitral justice; 2) the doctrine cloaks arbitrators with an unfair aura of infallibility, since it assumes that there is no politic need to allow arbitrators to revisit their awards; 3) the doctrine reduces the authority of arbitrators in comparison with judges and, therefore, reduces the utility of arbitration as an alternative to litigation; 4) the availability of exceptions to the doctrine tempts arbitral parties to engage in post-award ex parte contacts attempting to destabilize a final award, creating a behavioral effect that actually undermines the rationale of finality the doctrine serves; and 5) the doctrine is a product of historical judicial hostility to arbitration. *Excelsior Foundry*, 56 F.3d at 846-47.

adjudication, *functus officio* today emphasizes the importance of finality in arbitration and the need to contain the appeal of awards to fundamental procedural irregularities. To philistines, any latinate phrase can only be anchored in pedantry. *Functus officio*, as seen from the perspective of modern arbitration law, is neither obscure or irrelevant; it, in effect, defines and maintains material elements of the parties' bargain for arbitration. It fosters justice, efficiency, and finality.

Conclusions

Given these developments in U.S. arbitration practice, how should the world law on arbitration address the question of the standards for review? The use of party agreement to create an increased form of judicial supervision that involves the court of enforcement's assessment of the merits is easier to dismiss than the action to clarify awards. The integration of such a standard into the legal framework for regulating arbitration would create havoc in the system and lead to scattered results, robbing the process of its uniformity and effectiveness. At the very least, different courts would interpret the same provisions differently and courts would establish different (perhaps contradictory) approaches to answering the same question. The governing law contemplates an entirely different standard that must apply if arbitration is to remain functional. The law reflects a long historical evolution that resulted in legitimating arbitration and liberating it from its status as a "bastardize" remedy. A critical feature of the statutory law was the provision for narrow and very limited judicial review. Arbitration can still be undermined by overly aggressive judicial actions. Supplying an invitation to achieve such an undesirable result through party freedom of contract is completely counterproductive. It

represents the misuse of power and should lead the parties to reconsider their choice of arbitral adjudication.

The action to clarify awards presents a more subtle and challenging problem. Properly circumscribed and applied, it could have enormous practical value and salvage an otherwise sound arbitration from the foible of circumstantial indeterminacy. The Model Law makes it a function of party choice and agreement, whereas the U.S. common law action is directed to courts. Given the adversarial character of adjudication and the practicality of enforcement, it is wiser to embed this decision in the authority of the courts. In fact, it is an action that should only be invoked by the court of enforcement when it literally does not know what the arbitral tribunal has determined and ordered the parties to do.

The action to clarify allows a pragmatic answer to a stark choice: enforcement or vacatur for indefiniteness. It is, of course, impossible to enforce what cannot be known. Vacatur is expensive in terms of time, costs and opportunity. The action, however, must be restricted to clarifying what the court (acting reasonably and in the furtherance of arbitration) does not understand and it cannot lead the arbitrators to reconsider in any respect the merits of the litigation. It would need to be codified in the statutory law as a limited exception to the *functus officio* doctrine. It should be further defined as a highly limited action to which recourse is had only in truly exceptional circumstances.

The recent history of the legal regulation of arbitration is characterized by the shifting between major ideas and purposes. Until the enactment of the FAA in 1925, legislative regulation ceded its authority to courts. Courts perceived arbitration as a competitor adjudicatory process. The conviction among judges was that only trained jurists could render justice in litigation. The recourse to arbitration, therefore, needed to be restricted and discouraged for both

the common and individual good. Public order values and responsibilities predominated and could not be compromised. Lawyers were the servants of the law; they were not beholding to private mandates. Arbitrators were by and large improperly schooled and lacked any allegiance to the social order or the law. They were merely merchants who tried to make peace among their colleagues for a fee.

Thereafter, business interests pushed to change the *status quo*—at least, for themselves. From a commercial perspective, judicial adjudication had always been impractical and counter-productive. Lengthy delays, legalistic considerations, and the depletion of resources and energy made court proceedings undesirable. Choice and self-governance became the watchwords of the resurgence of arbitration. Proponents of the movement persuaded the federal legislature and a few state counterparts to surrender their regulatory authority to private agreements. The law would enforce agreements to arbitrate and the results of the process, but—otherwise—commercial litigation could be shaped by parties' choice and become a basically private matter. Public authority would sustain the process of private adjudication and self-governance at critical stages.

The expansion of the range of arbitrable disputes from commercial to statutory disagreements, as well as employment and consumer matters, altered the relationship between private and public adjudication even more. The functionality and adaptability of arbitration was attractive to most areas of civil litigation. The autonomy of the arbitral process and of arbitrators became a central preoccupation of the governing law. Arbitrators were sovereign decision-makers in terms of the proceeding, the contract, and the dispute. Freedom of contract was heralded by courts as an absolute value in arbitration. In reality, however, the chief concerns of legal doctrine was the ability of arbitrators to conduct arbitrations and to decide without the

interference of courts. Contract freedom was respected as long as it gave effect to the mandate to arbitrate. The use of adhesion contracts in arbitration illustrates this point.

In effect, in order to guarantee access to a functional form of adjudication, public sovereign authority delegated the task of adjudication to the machinery of arbitration. It conferred substantial authority upon arbitrators and upon party counsel to maintain the effectiveness and fairness of the process. The practical social need for a workable process of adjudication trumped the value placed in legal principles and training and in the fairness and legitimacy borne of rigorous due process. The value of legal rights no longer exceeded the workings of the process for their implementation. Hollow, symbolic rights no longer had any currency. The ethic of effectiveness superceded all other considerations in the regulation of arbitration and adjudication.