JUDICIAL REVIEW OF ARBITRATION RULINGS: PROBLEMS AND POSSIBLE ALTERNATIVES

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Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
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State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
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- Practice Before the Supreme Court of Texas Course (2002 - 2005 & 2007)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
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- 1991 Advanced Evidence and Discovery, Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
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---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)

---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)

---*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)

---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)

---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)

---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)

---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE ARTICLES AND SPEECHES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008)

SBOT's **Marriage Dissolution Course**: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997-1998); Making and Meeting Objections (1998 & 1999); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000 & 2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007)

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JUDICIAL REVIEW OF ARBITRATION RULINGS: PROBLEMS AND POSSIBLE ALTERNATIVES

by

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I. INTRODUCTION. The world of arbitration appeals was jolted by the U.S. Supreme Court's decision on March 25, 2008 in *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008) (copy attached) ("*Hall Street Assocs.*"). The holding of the case itself is narrow, but the language of the Majority Opinion has potentially far-reaching effect. Early reaction of lower court judges to the decision is "all over the map." It will take some time for judges and practitioners to sort through the ramifications of the decision. This Article examines the law of judicial review of arbitration awards, both before and after *Hall Street Assocs.* The Article also discusses the viability of alternatives that might be used by parties and lawyers wanting to create an arbitration environment where the arbitrators must make decisions based on correctly applying the law to the proven facts. This article does not discuss the procedural aspects of referring a case to arbitration, or procedures for contesting or confirming an arbitration award. The article also does not analyze judicial review of foreign or international arbitration awards.

II. OVERVIEW OF THE SITUATION. Arbitration as a practical solution to immediate problems dates back to before the rise of organized court systems. Commercial arbitration existed throughout the ages, where commercial disputes were typically resolved by arbitrators familiar with prevailing commercial practices, who reached a business solution more than a legal solution. In British courts, however, there was hostility toward arbitration as an alternative to the court system, and this hostility continued in much of America until the U.S. Congress adopted the Federal Arbitration Act ("FAA") in 1925. After that, arbitration became prevalent in labor disputes and certain industries. On the commercial side, since arbitration can only exist by agreement, arbitration arose mostly out of contractual disputes between businesses. One key feature shared by these users of arbitration was the intention of the parties to have a continuing relationship after the dispute was resolved. This made the less formal, quicker, and cheaper arbitration process more attractive than litigation. *See* Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1 (2006).

In today's legal environment, arbitration is not so much a quick and informal route to a practical solution. Now arbitration is a contractually-based parallel litigation environment, existing apart from the court system but borrowing its procedures and evidence rules, where the parties ultimately have to "report back" to the court system for the government to give the arbitration award the force of law. One of the signature features of arbitration is that judicial review of the arbitrators' decision is very limited. Decisions overturning arbitration awards are rare, and occur only when the arbitrators' award is so clearly wrong as to be indefensible. Over the years, different courts have developed different common law grounds to overturn the most egregious arbitration awards. Cautious lawyers have also written into their arbitration agreements certain limitations on the arbitrators' powers, or have included agreed-upon grounds for judicial review of arbitration awards. In *Hall Street Assocs.*, the Supreme Court declared contractually-expanded judicial review of arbitration awards to be invalid for agreements covered by the FAA. The language used in the Majority Opinion to explain the ruling can also be read to negate common law grounds for vacating arbitration awards. And yet the Majority Opinion cryptically suggests that, where recognition of the arbitration award is sought under law other than the FAA, the principles of the Opinion may not apply. Determining when and how these other laws might interface with the FAA is for future determination. Courts and practitioners are left to grapple with the interaction of the U.S. Constitution's Commerce Clause, partial preemption, state contract law, conflict of law rules, choice of law clauses, federal common law of arbitration, state arbitration statutes, state common law of arbitration, and arbitration rules of

private organizations that provide the contractually-based infrastructure for all this private litigation. Pronouncements on all these issues will be forthcoming not only from the twelve Federal Courts of Appeals, which have heretofore exhibited little uniformity on arbitration issues, but also the welter of state appellate courts who must blend federal and state arbitration laws with state contract law to resolve the arbitration cases that land in state court.

Arbitration practice, which grew up largely independent of legal oversight, has matured and expanded to the point that the legal system must now pay serious attention to defining the relationship that will exist between these two worlds–that is, defining the cross-over points between arbitration's world of private litigation, based on a contractual framework constructed (sometimes incompletely) by the parties, and the court system's world of public litigation, based on constitutions, statutes, common law, and some form of public selection of judges and juries. The differences between the two systems are profound, not only procedurally but most especially because judges and juries are accountable for their decisions to some higher authority, whereas arbitrators operate in a private world of few constraints, with little accountability to a higher authority.

The recent U.S. Supreme Court decision in *Hall Street Assocs.* reflects an effort by the Supreme Court (many would say an unsuccessful one) to build a new bridge between these two worlds of private and public litigation, replacing the highways and bi-ways that lower courts have developed over time. One would think that, in a contract-based world of private litigation (i.e., arbitration), the parties would be free to agree on what type of judicial review there will be at the end of the arbitration process. Five U.S. courts of appeals thought so. But a majority of the U.S. Supreme Court thought not. Justice Souter's majority Opinion in *Hall Street Assocs.* reveals a view that the FAA, conceived in the business world of 1925, maintains for us in the inter-linked international economy 80+ years later a quick and simple dispute resolution process that must remain largely unmonitored by the court system except to guarantee a minimum of procedural fairness. The *Hall Street Assocs.* majority reads the FAA as saying that, in this world of private, contract-based litigation, the parties can agree on almost anything they want to in terms of the arbitration process, but they do not have the freedom to contract what type of judicial review they will receive at the end of the arbitration process. Thus, the U.S. Supreme Court decided to protect the freedom to contract by restricting it. In addition to rejecting contractually-expanded judicial review of arbitration awards, the Supreme Court's language says that, where the FAA applies, only the express statutory grounds for vacatur or modification of arbitration awards are available, thus seeming to overrule a long-established and well-developed body of case law around America recognizing common law grounds for judicial review of arbitration awards governed by the FAA.

In the five months since *Hall Street Assocs.* was announced, lower courts have started struggling with this decision. Some courts seem to have given up on any form of expanded judicial review and accepted the narrow, explicit grounds listed in the FAA as the sole basis for judicial review of arbitration awards. Other courts have continued to recognize "common law" standards of judicial review, which developed unevenly over 50 years of inconsistent jurisprudence, or have grafted them onto the FAA, and continue to review arbitration awards the way they did before *Hall Street Assocs.* was decided.

Our Supreme Court has handed down a ruling that frustrates the intent of many and, if clients want to couple the flexibility of arbitration with normal appellate review, it will require extra effort and ingenuity on the part of contract-drafting lawyers, trial lawyers and appellate lawyers, and tolerance on the part of judges to achieve those goals.

III. JUDICIAL REVIEW OF ARBITRATION AWARDS (BEFORE HALL STREET ASSOCS.).

A. THE FORUM FOR JUDICIAL REVIEW. The FAA does not establish jurisdiction in federal courts. *Hall Street Assocs.*, 128 S.Ct. at 1402. Parties must independently meet federal question or diversity jurisdiction in order to seek confirmation, vacatur, or modification of an arbitration award in federal court. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983). But even when federal court jurisdiction does not exist, and an arbitration award is brought into a state court for approval, the FAA may govern judicial review of arbitration awards issued under arbitration agreements that come within the reach of the FAA. Thus, there are both federal court decisions and state court decisions on the scope of judicial review of arbitration agreements under the FAA.

B. TRIAL COURT REVIEW VS. APPELLATE COURT REVIEW. It is necessary to distinguish the standard of review when the trial court is reviewing an arbitration award from the standard of review used by the appellate court in reviewing the trial court's decision on confirming, vacating, or modifying an arbitration award.

In order to require arbitration, there must be a (1) valid arbitration agreement, and (2) the contested claims must fall within the scope of that agreement. *In re MJI Partnership, Ltd.*, 2008 WL 2262157 (Tex. App.--Houston [14th Dist.] 2008, no pet.) (memorandum opinion) (applying the FAA), citing *In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006). Although there is a strong presumption favoring arbitration, that presumption does not apply to the question of whether a valid arbitration agreement exists. *Provision Interactive Technologies, Inc. v. Betacorp Management, Inc.* 2008 WL 536688, *2 (Tex. App.–Austin 2008, no pet.) (memorandum opinion), citing *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 23, 227 (Tex. 2003). The U.S. Supreme Court held that "[when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 115 S.Ct. 1920, 1924 (1995). *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60, 115 S.Ct. 1212, 1217 (1995) (Supreme Court gives deference to state court's interpretation of contract under state law, but applied de novo review to federal court interpreting contract). The standard of appellate review, in Texas courts, of the trial court's ruling on the existence of an arbitration agreement is abuse of discretion according to *In re Hartigan*, 107 S.W.3d 684, 688 (Tex. App.–San Antonio 2003) (orig. proceeding), or alternatively a question of law reviewed on appeal de novo, according to *Bennett v. Leas*, 2008 WL 2525403, *3 (Tex. App.–Corpus Christi June 26, 2008, pet. pending). Determining whether the claim falls within the scope of an arbitration agreement is reviewed on appeal de novo. *Id. Accord, McReynolds v. Elston*, 222 S.W.3d 731, 740 (Tex.App.--Houston [14th Dist.] 2007, no pet.) ("Determining whether a claim falls within the scope of an arbitration agreement involves the trial court's legal interpretation of the agreement, and we review such interpretations de novo").

The standard of trial court review of an arbitration award is different from an appellate court's review of the trial court's decision. It is universally recognized that the trial court must give deference to the arbitration award. *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 380 (5th Cir. 2004). However, the trial court's decision on vacatur or modification is reviewed on appeal in the federal courts by ordinary standards, to-wit: "accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995).

Both the trial court and the appellate court, when deciding whether to confirm or vacate or modify an arbitration award, must indulge every reasonable presumption to uphold the arbitration award. *Massey v. Galvan*, 822 S.W.2d 309, 316 (Tex. App.--Houston [14th Dist.] 1992, writ denied). "Arbitration awards are entitled to great deference by the courts 'lest disappointed litigants seek to overturn every unfavorable arbitration award in court.'" *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.--Dallas 2004, pet. denied). "Judicial review of arbitration awards 'adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes.'" *Id.* at 429. "In Texas, review of arbitration awards is extraordinarily narrow." *GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257, 263 (Tex. App.--San Antonio 2003, pet. denied).

C. WHEN DOES THE FAA APPLY? Since many states have arbitration statutes and common law that vary from the FAA, in order to determine the scope of judicial review of an arbitration award, you must first determine whether the arbitration agreement in question is governed by the federal arbitration statute, or a state arbitration statute, or the common law, or sometimes even rules of private organizations that have been incorporated into the arbitration agreement, or some combination of these. Once you know which body of rules apply, you can better determine the standards for judicial review of arbitration awards.

The applicability of the FAA often depends on whether the underlying contract evidences a transaction involving commerce, which may in some cases be a question of fact and in others a question of law. Ordinary standards of appellate review would apply to that question.

1. Scope of Statute. Since federal law is supreme, when the FAA and state law conflict, state law must

yield. The scope of the Federal Arbitration Act, 9 U.S.C.A. §§ 1-16 ("FAA") is set out in Section 2:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a *transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (Emphasis added.)

In *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), the U.S. Supreme Court held:

> This case concerns the reach of § 2 of the Federal Arbitration Act. That section makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (emphasis added). Should we read this phrase broadly, extending the Act's reach to the limits of Congress' Commerce Clause power? Or, do the two italicized words – "involving" and "evidencing" – significantly restrict the Act's application? We conclude that the broader reading of the Act is the correct one . . . .

Id. at 268, 836. The Texas Supreme Court acknowledged:

> The Federal Act thus applies to all suits in state and federal court when the dispute concerns a "contract evidencing a transaction involving commerce." *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520, 2525, 96 L.Ed.2d 426 (1987); *Southland Corp.*, 465 U.S. at 14-16, 104 S.Ct. at 860-61; 9 U.S.C. § 1 ("commerce" means commerce "among the several States ..."). Nor is its application limited solely to interstate shipment of goods.

Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269-70 (Tex. 1992). As Commerce Clause power has waxed and waned, so has the applicability of the FAA.

2. "A Transaction Involving Commerce." The types of situations that constitute "a transaction involving commerce" sufficient to trigger the FAA are too varied to discuss here. Courts of different states sometimes disagree on similar facts, *compare In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005), *with Bruner v. Timberlane Manor Ltd. Partnership*, 155 P.3d 16, 29 (Okla. 2006) (the Texas Supreme Court held that the fact that Medicare payments crossed state line triggered the FAA, while the Oklahoma Supreme Court held it did not). Nor are the courts from one state always consistent. *Compare In re Akin Gump Strauss Hauer & Feld, LLP*, 252 S.W.3d 480, 489 (Tex. App.--Houston [14th Dist.] Feb. 21, 2008, no pet.) (law firm's contingent fee contract involved interstate commerce), with *In re Godt*, 28 S.W.3d 732, 736 (Tex. App.–Corpus Christi 2000, no pet.) (attorney's contingent fee contract did not involve interstate commerce). Cases from federal and state courts deciding whether the transaction involved interstate commerce such that the FAA applied are gathered in *When Does Contract Evidence Transaction Involving Commerce Within Meaning of Federal Arbitration Act (FAA)–Legal Issues and Principles*, 10 A.L.R. Fed.2d 489 (2006); *When Does Contract Evidence Transaction Involving Interstate Commerce Within Meaning of Federal Arbitration Act (FAA)–Service Contracts*, 11 A.L.R. Fed.2d 233 (2006). The Texas Supreme Court said:

> As defined in the FAA, . . . , "interstate commerce" is not limited to the interstate shipment of goods, but includes all contracts "relating to" interstate commerce.FN12 In fact, the United States Supreme Court has construed the FAA to extend as far as the Commerce Clause of the United States Constitution will reach.

In re FirstMerit Bank, N.A., 52 S.W.3d 749, 754 (Tex. 2001). *See In re L & L Kempwood Associates, L.P.*, 9 S.W.3d 125, 127 (Tex. 1999) ("The parties to the contract . . . reside in different states--Georgia and Texas--and the renovation work on Houston apartments was to be done by a Texas business for Georgia owners. The contract here thus involves interstate commerce.").

3. Choice-of-Law. The U.S. Supreme Court has said:

> Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the

> issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.

Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 479 (1989). Subsequent cases have required that the election of non-FAA law must be explicit.

The Fifth Circuit said that, in an interstate case, the narrower FAA standards of vacatur should apply instead of broader state law standards "absent clear and unambiguous contractual language to the contrary." *Action Industries, Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 341 (5th Cir. 2004). The Austin Court of Appeals said:

> In drafting an arbitration provision, parties are free to specify which statute shall apply to arbitration proceedings. . . . However, if the parties do not explicitly state which statute applies, the courts must look to the contract between the parties, applying the FAA if the contract involves interstate commerce.

Provision Interactive Techs., Inc. v. Betacorp Mgmt., Inc., 2008 WL 536688, at *3 (Tex. App.--Austin Feb. 28, 2008, no pet.). *See Roadway Package Sys. v. Kayser*, 257 F.3d 287, 293-300 (3d Cir.) ("we need to establish a default rule, and the one we adopt is that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards"), *cert. denied*, 534 U.S. 1020 (2001); *Jacada (Europe), Ltd. f/k/a Client/Server Technology (Europe), Ltd. v. Int'l Marketing Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005) ("a generic choice-of-law provision does not displace the federal standard for vacating an arbitration award"), *abrogated on other grounds by Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

In *Saturn Telecommunications Services, Inc. v. Covad Communications Co.*, 2008 WL 2403199 (S.D. Fla. June 9, 2008), a clause saying that "[t]his Agreement shall be deemed to have been made in, and shall be construed pursuant to the laws of the State of California and the United States without regard to conflicts of laws provisions thereof," determined what law to apply to disputes arising out of the contractual relationship, but did not invoke the California Arbitration Act in preference to the FAA.

In *In re Godt*, 28 S.W.3d 732, 736 (Tex. App.--Corpus Christi 2000, no pet.), the contract said that Texas law would apply, and invoked both the Texas General Arbitration Act ("TGAA") and the FAA. The Corpus Christi Court of Appeals held that, notwithstanding the explicit invoking of the FAA, the FAA did not apply to an attorney-client malpractice claim because the contract did not involve intestate commerce.

4. Preemption of State Law by FAA. The U.S. Supreme Court has said:

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. . . But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law-that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Citation omitted].

Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 477 (1989).

In the past, most issues of preemption of state arbitration law by the FAA have involved the availability of the arbitration procedure, since some states have laws that ban or limit arbitration in certain circumstances. If the FAA preempts, then arbitration would be available under the FAA even if not permitted under state law.

In light of the *Hall Street Assocs.* decision, however, we may expect to see preemption argued more on the issue of judicial review of arbitration awards. If a state's statute or common law permit broader judicial review than what is allowed by *Hall Street Assocs.*, the winner in arbitration will argue that state standards of judicial review are preempted by the FAA. For a while we will have to use preemption case law developed mainly on the issue of when arbitration is available, to determine when and how much the FAA preempts state law on judicial review of arbitration awards.

"The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sci., Inc. v. Board of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477,

109 S.Ct. 1248, 1254, 103 L.Ed.2d 488 (1989). The Court went on to say:

> [W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement . . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *See Prima Paint*, supra, at 404, n. 12, 87 S.Ct., at 1806 n. 12 (the Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so"). [Some citations omitted]

Id. at 478, 1255.

In *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005), the Texas Supreme Court held that the TGAA was preempted by the FAA in that instance, because the TGAA interfered with enforcement of an arbitration agreement "by adding an additional requirement–the signature of a party's counsel–to arbitration agreements in personal injury cases." *Id.* at 69.

The Austin Court of Appeals, in *Provision Interactive Technologies, Inc. v. Betacorp Management, Inc.*, 2008 WL 536688, *2 (Tex. App.–Austin 2008, no pet.) (memorandum opinion) said:

> The FAA preempts only those state laws that undermine the goals and policies of the FAA. *Volt*, 489 U.S. at 477-78. The FAA was initially designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). "The primary purpose of the Federal Act is to require the courts to compel arbitration when the parties have so provided in their contract, despite any state legislative attempts to limit the enforceability of arbitration agreements." *Anglin*, 842 S.W.2d at 271. In light of this purpose, the FAA preempts only those state laws that prevent the enforcement of arbitration agreements, without affecting state laws that foster the federal policy favoring arbitration.

The Opinion in *Hall Street Assocs.* specifically recognizes that there may be other grounds to vacate or modify under other statutes or laws. 128 S.Ct. at 1406. It is safe to assume that these other grounds will apply when the contract does not involve interstate commerce, and there is no preemption risk. What if the contract involves interstate commerce but the contract says the FAA will not apply, or says that a state arbitration statute or state common law on arbitration will apply instead? Are these conscious choices to use other regimes effective in a transaction involving interstate commerce? Existing case law suggests "yes," but we may expect the proposition to come increasingly under attack now that contractually-expanded judicial review under the FAA has been nullified and parties losing in arbitration will begin to seek expanded review by invoking state law.

D. GROUNDS FOR JUDICIAL REVIEW UNDER FEDERAL LAW.

1. Statutory Grounds in the FAA. The FAA has grounds for vacating an arbitration award (Section 10), and grounds for amending an arbitration award (Section 11):

> Section 10. Same; vacation; grounds; rehearing
>
> a. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> 1. Where the award was procured by corruption, fraud, or undue means.
>
> 2. Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> 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.
>
> b. Where an award is vacated and the time within which the agreement required the

award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

c. The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

Section 11. Same; modification or correction; grounds; order

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.

2. Arbitrators Exceeded Their Powers. Note that FAA Section 10.a.4 permits vacatur "[w]here the arbitrators exceeded their powers." "An arbitrator has the authority to decide only the issues that have been submitted for arbitration by the parties." *Brennan v. CIGNA Corp.*, 2008 WL 2441049 (3rd Cir. 2008). The U.S. Supreme Court has noted that "it is the language of the contract that defines the scope of disputes subject to arbitration." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S.Ct. 754, 762 (2002). In determining when an arbitrator has exceeded his authority, the agreement is broadly construed and all doubts must be resolved in favor of the arbitrator's authority. *See United Food & Commercial Workers, Local No. 88 v. Shop 'N Save Warehouse Foods, Inc.*, 113 F.3d 893, 897 (8th Cir. 1997). However, "once the parties have gone beyond their promise to arbitrate and have actually submitted an issue to an arbiter, we must look both to their contract and to the submission of the issue to the arbitrator to determine his authority." *Piggly Wiggly Operators' Warehouse v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980). Courts have rejected a claim that the arbitrators exceeded their powers, when the argument is used as a vehicle for reviewing the merits of an arbitration award.

> It is well settled that "[a]n arbitrator does not exceed his powers merely because he assigns an erroneous reason for his decision."

Hacienda Hotel v. Culinary Workers Union, 175 Cal.App.3d 1127, 1133 (Cal. 1985).

However, the Third Circuit Court of Appeals, in *Sherrock Bros., Inc. v. DaimlerChrysler Motors Co., LLC*, 260 Fed. Appx. 497 (3rd Cir. 2008), said:

> [A] court may vacate an arbitration award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). When determining whether an arbitrator exceeded his authority, this Court examines the form of relief awarded and the terms of that relief. . . . We must be able to derive rationally the form of the award either from the parties' agreement or from their submissions to the arbitrators, and the terms of the award must not be completely irrational.

In *Comedy Club, Inc. v. Improv West Associates*, 502 F.3d 1100, 1110 (9th Cir. 2007), the Ninth Circuit Court of Appeals vacated part of an arbitration award that granted an injunction against non-party affiliates of a company, where those affiliates were not signatories of the agreement being enforced.

In *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1133 (3rd Cir. 1971), an arbitrator's award of a cash bond to protect a party from possible future tax liability was set aside as beyond the arbitrator's power when the contract provided only for cash remedies for losses, liabilities, and expenses "incurred or suffered."

In *Southco, Inc. v. Reell Precision Manuf. Corp.*, 556 F. Supp.2d 505 (E.D. Pa. May 27, 2008), a party complained that arbitrators exceeded the scope of their authority by awarding lost profits that were not allowed by the arbitration agreement which was governed by the FAA. The court recounted the Third Circuit Court of Appeals' standard of review of this complaint, but interpreted the challenge as an attack on the arbitrators' factual and legal determinations, and so rejected it. A similar complaint was made in *Saturn Telecommunications Services, Inc. v. Covad Communications Co.*, 2008 WL 2403199 (S.D. Fla. June 9, 2008), where the agreement containing the arbitration clause specifically negated claims for lost profits. *Id.* at *4. The district court distinguished several cases holding that arbitrators exceeded their powers when they ignored specific limitations contained in the arbitration agreement, because the arbitration agreement in the instant case contained a broad arbitration clause saying that "disputes between the parties" would be resolved by arbitration. This permitted the arbitrator to determine the enforceability of the "no lost profits" clause, and the arbitrator could have held the restriction unenforceable under California law. *Id.* at *7.

In *California Faculty Ass'n v. Superior Court of Santa Clara County*, 63 Cal.App.4th 935, 952-53, 75 Cal. Rptr.2d 1 (6th Dist. 1998), an arbitrator's award was set aside as exceeding his authority when the arbitrator disregarded the contractually-agreed upon standard of review of the decision-making process used by the University president in denying tenure, and instead substituted his own judgment on the merits of whether tenure should be granted. The court distinguished the arbitration agreement from those in other cases where "all disputes" were submitted to the arbitrator for resolution. *Id.* at 945.

The lesson from these cases is that a clause restricting the arbitrators' powers may permit an attack on an award as exceeding the scope of their authority, but a clause submitting "all disputes" to the arbitrators subjects the restriction itself to arbitration. The "all disputes" clause should be replaced by a clause specifying what the arbitrators may and may not arbitrate. This should enhance an argument that the arbitrators exceeded their powers when they ignore restrictions in the arbitration agreement or the underlying contract.

3. "Manifest Disregard of the Law." A widely-recognized standard of judicial review of arbitration awards under the FAA is "manifest disregard of the law." The U.S. Supreme Court mentioned that parties are bound by arbitration awards that are not in "manifest disregard" of the law in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), the Supreme Court listed "manifest disregard of the law" as one of the very unusual circumstances where the court will set the award aside. The Fifth Circuit Court of Appeals took this statement in *Kaplan* as "clear approval of the 'manifest disregard' of the law standard in the review of arbitration awards under the FAA." *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 759 (5th Cir. 1999).

The Second Circuit Court of Appeals said, in *Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC*, 497 F.3d 133, 139 (2nd Cir. 2007):

> [A] court may vacate an award if it exhibits a "manifest disregard of the law". . . . Our review under the doctrine of manifest disregard of the law is highly deferential and such relief is appropriately rare. . . . An arbitral award may be vacated for manifest disregard only where a petitioner can demonstrate "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case." (Citations omitted).

In *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 209 (2nd Cir. 2002), the Second Circuit articulated a–

> two-prong test for ascertaining whether an arbitrator has manifestly disregarded the law has both an objective and a subjective component. We first consider whether the "governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable". . . . We then look to the knowledge actually possessed by the arbitrator. The arbitrator must "appreciate[ ] the existence of a clearly governing legal principle but decide[ ] to ignore or pay no attention to it." . . . Both of these prongs must be met before a court may find that there has been a manifest disregard of law. (Citations omitted.)

The Third Circuit court of appeals, in *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1133 (3rd Cir. 1971), set aside an arbitrator's award of a cash bond to

protect a party from possible future tax liability as manifest disregard *of the contract* where the contract provided only for cash remedies for liabilities actually incurred.

The Fourth Circuit Court of Appeals recently said, in *Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 351-52 (4th Cir. 2008):

> In order to overturn an arbitration award on the basis of the arbitrator's manifest disregard of the law, the party pursuing that effort must sustain a heavy burden, and is obliged to show that the arbitrator knowingly ignored applicable law when rendering his decision.

According to the Fifth Circuit Court of Appeals, in *Prestige Ford v. Ford Dealer Computer Services, Inc.*, 324 F.3d 391, 395 (5th Cir. 2003):

> "Manifest disregard of the law" by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-88, 98 L.Ed. 168 (1953). It is not to be found in the federal arbitration law. 9 U.S.C. § 10. 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 instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing principle but decides 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 under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.

The Sixth Circuit Court of Appeals said, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995):

> A mere error in interpretation or application of the law is insufficient. . . . Rather, the decision must fly in the face of clearly established legal precedent. When faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.) (Citation omitted).

In *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001), the Tenth Circuit Court of Appeals suggested that the "manifest disregard" standard is an application of FAA § 10(a)(4).

"Manifest disregard" was recognized by a Texas court reviewing an award governed by the FAA, in *Banc of America Investment Services, Inc. v. Lancaster*, 2007 WL 2460277 (Tex. App.–Fort Worth 2007, no pet.) (memorandum opinion).

4. "Essence of the Agreement." In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960), the Supreme Court said:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it *draws its essence from the* collective bargaining *agreement*. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [Emphasis added.]

Id. at 1361, 597. Justice Posner put it this way: "The arbitrator is not free to think or to say 'The contract says X, but my view of sound public policy lead me to decree Y.'" *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.3d 1501, 1505 (7th Cir. 1991). The Third Circuit court of appeals, in *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1133 (3rd Cir. 1971), set aside an arbitrator's award of a cash bond to protect a party from possible future tax liability, as not drawing its essence from the contract, when the contract provided only for cash remedies for liabilities actually incurred. The Fourth Circuit Court of Appeals, in *Choice Hotels Intern., Inc. v. SM Property Management, LLC*, 519 F.3d 200, 207 (4th Cir. 2008), said:

> We have held that an arbitration award fails to draw its essence from the agreement at issue "when an arbitrator has disregarded or modified

> unambiguous contract provisions or based an award upon his own personal notions of right and wrong.”. . . However, an arbitration award “does not fail to draw its essence from the agreement merely because a court concluded that an arbitrator has misread the contract.” . . . In this regard, “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” (Citations omitted)

The Sixth Circuit Court of Appeals said, in *Dallas & Mavis Forwarding Co. v. General Drivers, Local Union No. 89*, 972 F.2d 129, 134 (6th Cir. 1992):

> An award fails to derive its essence from the agreement when (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on “general considerations of fairness and equity” instead of the exact terms of the agreement.

In *Boise Cascade Corp. v. Paper Allied-Indus., Chemical and Energy Workers*, 309 F.3d 1075, 1080 (8th Cir. 2002), the Court said:

> In addition to those grounds for vacation of an award set forth in the Federal Arbitration Act, 9 U.S.C. § 10 (2000) (listing such reasons as the arbitrator's corruption, fraud, evident partiality, misconduct, or ultra vires acts), courts have vacated arbitral awards that are “completely irrational” or that “evidence[ ] a manifest disregard for the law.” . . . An award is “irrational where it fails to draw its essence from the agreement”; it “manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.”. . . “An arbitrator's award draws its essence from the [parties' agreement] as long as it is derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention.”

In *Missouri River Serv., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir. 2001), the court set aside an arbitration award as being “irrational” and failing to draw its essence from the agreement, where the arbitrator directed that the award would be satisfied by profits from the tribe's Iowa casino when the agreement specifically limited satisfaction of the claim to property and profits from the tribe's Nebraska casino.

5. Other Legal Grounds. Various courts have recognized the ability to set aside an arbitration award on grounds other than the FAA:

- **public policy**: *Acands, Inc. v. Travelers Cas. and Sur. Co.*, 435 F.3d 252, 258 (3rd Cir. 2006) (“A long-standing exception to this general rule provides that courts may refuse to enforce arbitration awards that violate well-defined public policy as embodied by federal law”); *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216 (5th Cir. 2006) (“In this Circuit, an arbitration award may be vacated on two nonstatutory grounds: if the award displays manifest disregard of the law or is contrary to public policy”); *Hollern v. Wachovia Secs., Inc.*, 458 F.3d 1169, 1172 (10th Cir. 2006); *B.L. Harbert Intern., LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (“In addition to those four statutory grounds for vacatur, we have said that there are three non-statutory grounds. An award may be vacated if it is arbitrary and capricious, . . . if enforcement of the award is contrary to public policy, . . . or if the award was made in manifest disregard for the law”) (citations omitted); *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001) (“In addition to the limited statutory grounds on which an arbitration award may be vacated, arbitration awards can be vacated . . . if they are contrary to some explicit public policy that is well defined and dominant and ascertained by reference to the laws or legal precedents”) (internal quotation marks omitted); *Galvan v. Centex Home Equity Co., LLC*, 2008 WL441773, *3 (Tex. App.–San Antonio Feb. 20, 2008, no pet.) (memorandum opinion) (recognizing four statutory grounds for vacatur under the FAA, plus two common law grounds–manifest disregard of the law and contrary to public policy);

- **arbitrary and capricious**: *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (quoted above);

- **irrational**: *Acands, Inc. v. Travelers Cas. and Sur. Co.*, 435 F.3d 252, 258 (3rd Cir. 2006) (“An arbitration award will be enforced if its form can be rationally derived from either the agreement between the parties or the parties' submissions to

> the arbitrators and the terms of the arbitral award are not completely irrational"); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1133 (3rd Cir. 1971) (arbitration award set aside for "complete lack of rationality"); *Boise Cascade Corp. v. Paper Allied-Indus., Chemical and Energy Workers*, 309 F.3d 1075, 1080 (8th Cir. 2002) ("courts have vacated arbitral awards that are 'completely irrational'").

In one case the Fifth Circuit Court of Appeals announced that it would not consider any non-FAA grounds for vacatur. *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 n. 2 (5th Cir. 1993). However, a review of Fifth Circuit cases over the years reflects that this was an overstatement.

6. Contractually-Expanded Judicial Review. Prior to *Hall Street Assocs*., five federal courts of appeals had ruled that the parties can agree to standards of judicial review of arbitration awards that vary from the FAA, and that those standards should be applied to the task: *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3rd Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262, 1997 WL 452245, *6 (4th Cir. 1997) (unpublished); *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995); and *Jacada (Europa) Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005). Two federal courts of appeals rejected agreed-upon grounds for review, *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003); and *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001); and two federal circuit courts expressed disagreement or skepticism about agreed grounds of review, *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract."); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 789 (8th Cir. 2003) ("we again express skepticism as to whether parties can contract for heightened judicial review of arbitration awards, which would seemingly amend the FAA, crown arbitrators mini-district courts, force federal trial courts to sit as appellate courts, and completely transform the nature of arbitration and judicial review"). The agreement in *Hall Street Assocs.* provided that the arbitration award would be set aside if the arbitrator's findings were not supported by substantial evidence or the arbitrator's conclusions of law were erroneous. *Hall Street Assocs.*, 128 S. Ct. 1400-01. A majority of the Supreme Court said that this was not permissible.

Apart from the ability of the parties to specify standards of judicial review, there is the question of whether the language of the arbitration agreement actually alters the standards for review. In *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244 (Tex. App.--Houston [14 Dist.] 2003, pet. denied), an FAA case, the court considered a clause saying that the parties agreed to "submit their disputes to arbitration 'under the rules of the American Arbitration Association then in place and applicable legal and equitable principles.' The fee agreement further includes a choice of law provision stating the 'agreement shall be construed in accordance with the laws of the State of Texas.'" The court concluded that the provision in question was not like the clear and express language altering the standard of review found in other cases, and that the parties did not agree to alter the standard of review under the FAA. *Id.* at 251. In *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 294 (3d Cir.), *cert. denied*, 534 U.S. 1020, 122 S.Ct. 545, 151 L.Ed.2d 423 (2001), the court rejected the argument that a choice of law clause, saying that the arbitration agreement "shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania," was evidence of a clear intent to incorporate Pennsylvania's standards for judicial review of arbitration awards.

E. GROUNDS FOR JUDICIAL REVIEW UNDER TEXAS LAW. The Texas Supreme Court said, in *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348 (Tex. 1977):

> Historically, the settlement of disputes by arbitration has been favored in Texas law. Early cases recognized arbitration as an approved and effective mode of trial, and statutes have provided for arbitration since 1846. Thus, a dual system of arbitration has existed in Texas, and the statutory method has been viewed as cumulative of the common law. [Footnotes omitted]

Id. at 351. Thus, in *Lacy* the Supreme Court upheld an arbitration award that was not covered by the TGAA, based on the common law. In *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126, 134 n. 5 (Tex. App.--Austin 2003, no pet.), the court said:

> Two coexisting schemes govern arbitration in Texas: common-law arbitration and the Texas Arbitration Act . . . However, the legislature did not intend for the act to supplant common-law arbitration; indeed, if an arbitration award is not within the requirements of the act, the award may still be valid if it complies with common-law arbitration requirements . . . Under the common law, the procedures are more restrictive. The common law provides for three instances in which an arbitration award can be overturned: evidence of (1) fraud, (2) mistake, or (3) misconduct. [Citations omitted]

1. Express Grounds in the TGAA.

a. The Statutory Terms. Section 171.088(a) of the Texas Civil Practice and Remedies Code provides statutory grounds for vacating an arbitration award:

> Section 171.088(a)
>
> (a) On application of a party, the court shall vacate an award if:
>
> (1) the award was obtained by corruption, fraud, or other undue means;
> (2) the rights of a party were prejudiced by:
> (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
> (B) corruption in an arbitrator; or
> (C) misconduct or wilful misbehavior of an arbitrator;
> (3) the arbitrators:
> (A) exceeded their powers;
> (B) refused to postpone the hearing after a showing of sufficient cause for the postponement;
> (C) refused to hear evidence material to the controversy; or
> (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or
> (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.

Section 171.091 of the Texas Civil Practice and Remedies Code provides statutory grounds for modifying an arbitration award:

> § 171.091. Modifying or Correcting Award
>
> (a) On application, the court shall modify or correct an award if:
>
> (1) the award contains:
> (A) an evident miscalculation of numbers; or
> (B) an evident mistake in the description of a person, thing, or property referred to in the award;
> (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or
>
> (3) the form of the award is imperfect in a manner not affecting the merits of the controversy.
>
> (b) . . . . .
>
> (c) If the application is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as modified or corrected. If the application is not granted, the court shall confirm the award.
>
> (d) . . . . .

b. Not Mistake of Fact or Law. Texas courts are quick to say that a mere mistake of fact or law is insufficient to set aside the arbitration award. *J.J. Gregory Gourmet Servs., Inc. v. Antone's Import Co.*, 927 S.W.2d 31, 33 (Tex. App.--Houston [1st Dist.] 1995, no writ); *Riha v. Smulcer*, 843 S.W.2d 289, 292 (Tex. App.--Houston [14th Dist.] 1992, writ denied). Yet experience shows that sometimes courts will use recognized grounds for judicial review to conduct what sometimes approximates review of mistakes of fact or law.

In *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126, 135 (Tex. App.--Austin 2003, no pet.), the court said:

> Absent a statutory ground to vacate or modify an arbitration award, a reviewing court lacks

> jurisdiction to review other complaints about the arbitration, including the sufficiency of the evidence supporting the award.

However, in *Pheng Investments, Inc. v. Rodriguez*, 196 S.W.3d 322, 333-34 (Tex. App.–Fort Worth 2006, no pet.), the appellate court reversed and rendered an arbitration award of attorneys' fees where the attorney's bills were admitted into evidence but there was no testimony of reasonableness and necessity.

c. "Exceeded Their Powers." The Texas Supreme Court has said that the "authority of arbitrators is derived from the arbitration agreement and is limited to a decision of the matters submitted therein either expressly or by necessary implication." *Gulf Oil Corp. v. Guidry*, 160 Tex. 139, 327 S.W.2d 406, 408 (1959). Arbitrators therefore exceed their authority when they decide matters not properly before them. *Barsness v. Scott*, 126 S.W.3d 232, 241 (Tex. App.--San Antonio 2003, pet. denied). "A mistake of fact or law in the application of substantive law is insufficient to vacate an arbitration award." *Banc of America Investment Services, Inc. v. Lancaster*, 2007 WL 2460277 (Tex. App. – Fort Worth 2007, no pet.) (memorandum opinion).

The parties have the freedom to limit, in their arbitration agreement, the power of the arbitrators. Clever draftsmen have attempted to engraft judicial review of the merits of an arbitration award by limiting the powers of the arbitrators by requiring them to make decisions that are legally correct. In *Quinn v. NAFTA Traders, Inc.*, 2008 WL 2426665 (Tex. App.–Dallas 2008, no pet.), the arbitration agreement said:

> The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."

Note that the draftsman stated the restraint on the arbitrator as a limit of his/her authority (no doubt to trigger review under Section 171.088(a)(3)(A)), and not a contractually-agreed standard of judicial review, but to no avail. The court of appeals dismissed it as an impermissible effort to establish a non-statutory standard for judicial review.

In *Lee v. Daniels & Daniels*, 2008 WL 2037309, *6 (Tex. App.--San Antonio May 14, 2008), the arbitrator assessed 100% of his fees against one party when the arbitration agreement required that they be paid 50-50. The appellate court held that the award should be vacated in that respect under Tex. Civ. Prac. & Rem. Code § 171.088(a)(3), providing that the court shall vacate an award if arbitrator exceeded his powers.

In *Whiteside v. Carr, Hunt & Joy, L.L.P.*, 2007 WL 172028 (Tex. App.--Amarillo 2007, pet. denied), *cert. denied*, 128 S.Ct. 1652 (2008), the court considered an arbitration agreement that provided that the only evidence the arbitrator could consider was the partnership agreement. The court commented that if the arbitrator had violated this restriction by considering other evidence, the award would have been subject to vacatur because the arbitrator exceeded his powers. *Id.* at *3 n. 4.

Imposing vague requirements that arbitrators cannot commit reversible error will not set up an attack that the arbitrators exceeded their powers by making a mistake. However, explicitly limiting the scope of issues to be arbitrated, or specifically excluding certain remedies from arbitration, may work to set up judicial review for "exceeding their powers."

2. Contractually-Expanded Judicial Review. Texas appellate opinions discussing contractually-expanded judicial review of arbitration awards were dealing with what was allowed under the FAA, rather than what Texas arbitration law allowed. *See Mariner Fin. Group. v. Bossley*, 79 S.W.3d 30, 43-45 (Tex. 2002) (Owen, J., concurring); *Galvan v. Centex Home Equity Co., L.L.C.*, 2008 WL 441773 (Tex. App.--San Antonio 2008, no pet.) (memorandum opinion); *Bison Bldg. Materials, Ltd. v. Aldridge*, 2006 WL 2641280, at *4, *7 (Tex. App.--Houston [1st Dist] 2006, no pet.) ("the Arbitration Agreement in this case provides that the trial court may review the arbitrator's decision using an appellate court standard of review – a standard that is 'the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.' This sort of clause presents interesting issues of jurisdiction and policy, which the parties do not raise or brief here."); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld*, 105 S.W.3d 244, 251-52 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). Whether the TGAA permits parties to agree on expanded judicial review of arbitration awards is an open question.

3. Manifest Disregard. Texas courts have not recognized "manifest disregard of the law" as a basis to vacate an arbitration award that is governed by Texas law *under Texas law*. *Action Box Co., Inc. v. Panel*

Prints, Inc., 130 S.W.3d 249, 252 (Tex. App.–Houston [14th Dist.] 2004, no pet.). It is interesting to note that, effective September 1, 2003, the Legislature enacted that standard of judicial review for agreements to arbitrate residential construction agreements, in Texas Property Code § 438.001:

> § 438.001. Grounds for Vacating Award
>
> In addition to grounds for vacating an arbitration award under Section 171.088, Civil Practice and Remedies Code, on application of a party, a court shall vacate an award in a residential construction arbitration upon a showing of manifest disregard for Texas law.

This statutory standard was applied in *Home Owners Management Enterprises, Inc. v. Dean*, 230 S.W.3d 766, 768-69 (Tex. App.--Dallas 2007, no pet.), where the court of appeals said:

> Manifest disregard of the law is more than a "mere error or misunderstanding with respect to the law.". . . Rather, the record must show the arbitrator clearly recognized the applicable law but chose to ignore it. . . . Our review for "manifest disregard of the law does not open the door to extensive judicial review" and is therefore extremely limited. . . . The party seeking to vacate an arbitration award bears the burden of demonstrating the arbitrator acted in manifest disregard of the law and has the burden of bringing forth a complete record of the arbitration proceeding to support its claims. (Citations omitted.)

4. Common Law Grounds. Texas courts have recognized common law grounds for judicial review of arbitration awards under Texas law, but have described those grounds in different ways.

In *Powell v. Gulf Coast Carriers, Inc.*, 872 S.W.2d 22, 23-34 (Tex. App.–Houston [14th Dist.] 1994, no writ), the court said that "under the common law of this state, the test for determining whether or not an arbitration award must be vacated is whether the award is 'tainted with fraud, misconduct, or such gross mistakes as would imply bad faith and failure to exercise honest judgment.'"

In *Callahan & Associates v. Orangefield Independent School Dist.*, 92 S.W.3d 841, 844 (Tex. 2002), the Supreme Court said that "[g]ross mistake, as a common law ground for setting aside an arbitration award, is a mistake that implies bad faith or failure to exercise honest judgment." As noted below, in that case the Supreme Court did not hold that that basis for vacatur was still available, but did describe the standard in those terms.

In *Gumble v. Grand Homes 2000, L.P.*, 2007 WL 1866883, *2 (Tex. App.--Dallas 2007, no pet.), the court said: "At common law, a court may overturn an award if it is 'unconstitutional or otherwise violates public policy.'"

In *Chambers v. O'Quinn*, 2006 WL 2974318, *2 (Tex. App.--Houston [1 Dist.] 2006), *rev'd on other grounds*, 242 S.W.3d 30 (Tex. 2007), the court said:

> Texas common law allows a reviewing court to set aside an arbitration award "only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment.". . . "Gross mistake results in a decision that is arbitrary or capricious. An honest judgment made after due consideration given to conflicting claims, however erroneous, is not arbitrary or capricious.". . . The party seeking to vacate an arbitration award has the burden of demonstrating how the arbitrators made a gross mistake. (Citations omitted)

In *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. 2002), where the Court assumed rather than decided that common law grounds for vacatur exist, the Court said: "We agree that an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy." Readers should take note, however, that the Supreme Court commented in passing that it had not addressed the continuing vitality of common law grounds for vacatur in many years:

> In 1936, we held in Smith v. Gladney, that "a claim arising out of an illegal transaction ... is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in courts of the country." The claim there was for a debt that was incurred trading in futures on the Chicago Board of Trade, what we called "a gambling transaction". We have not had occasion to revisit the subject of when judicial enforcement of arbitration awards must be withheld for reasons of legal or public policy, but two courts of appeals

> have weighed in. One court refused to uphold an arbitration award upholding the termination of an employee for filing criminal assault charges against a supervisor in violation of a collective bargaining agreement that required exhaustion of grievance procedures before bringing "suit or other action", concluding that the arbitration award was "repugnant to both federal and state public policy to the extent that it forces employees using the grievance procedure to delay the filing of criminal charges growing out of the subject matter of the grievance until the grievance procedure has been exhausted." The other court refused to confirm an arbitration award of damages for unused sick leave in violation of article III, section 53 of the Texas Constitution, which prohibits a grant of extra compensation after service had been rendered. Neither of these courts of appeals was called upon to consider whether common law grounds for refusing to confirm arbitration awards have been preempted by statutes governing arbitration, nor have the parties raised that issue here. Accordingly, we assume the law is as we stated it in *Smith*. (Footnotes omitted.)

Id. at 237-38. The comment that the Court would not address preemption of common law grounds by the TGAA, because it was not raised, is an invitation to raise that issue. The Supreme Court in *Callahan & Associates v. Orangefield Independent School Dist.*, 92 S.W.3d 841, 844 (Tex. 2002), reversed a court of appeals that had overturned an arbitration award for gross mistake. The Supreme Court said, "assuming without deciding that OISD may rely on the gross mistake standard under the common law to attack the arbitrator's award, an arbitrator does not violate the common law simply by failing to award damages." The Supreme Court again signaled to practitioners that the Court might be prepared to hand down some law on non-statutory review of arbitration awards, if the parties would just raise the issue in an appeal.

IV. JUDICIAL REVIEW OF ARBITRATION AWARDS (SINCE *HALL STREET ASSOC.*). In *Hall Street Assocs.*, the Supreme Court was asked to decide whether the FAA's "statutory grounds for prompt vacatur and modification may be supplemented by contract." *Hall Street Assocs.*, 128 S. Ct. 1400. In approaching the problem, the Court posed a different and broader question: whether the statutory grounds for vacatur or modification of arbitration awards are exclusive. *Id.* The Court said that, "when parties take the FAA shortcut to confirm, vacate, or modify an award," they cannot by contract expand the grounds for vacatur or modification. *Id.* at 1403-06. But the Court went further. The Court expressly negated *Wilko v. Swan*, 346 U.S. 427 (1953), as precedent for a common law "manifest disregard of the law" standard of review of arbitration awards. *Hall Street Assocs.*, 128 S. Ct. 1403. The Court then held that FAA Section 10 and 11 "provide exclusive regimes for the review provided by the statute." *Id.* at 1406. But then the Court went on to state, in the next sentence:

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

Id. at 1406. After this mystifying comment, the Court remanded the case to the court of appeals to consider whether Federal Rule of Civil Procedure 6 or the Federal Alternate Dispute Resolution statute give the trial court different powers of review when the agreement to arbitrate occurs after the lawsuit is commenced, not before. *Id.* at 1407-08.

Although it was not specifically discussed, the analysis in *Hall Street Assocs*. implies that parties cannot contract to *waive* or *narrow* judicial review to less than what the FAA provides.

Where does that leave us? We know that when parties "take the FAA shortcut to confirm, vacate, or modify an award," the FAA grounds for vacatur are exclusive. What if the parties contract not to take the shortcut? What if the contract doesn't specify which arbitration act applies, and one party files in state court to set aside an arbitration award under state law and the other party invokes the FAA? What if the defending party removes the dispute to Federal court based on diversity of citizenship? Is the law different in a state forum than in a federal forum? Does the FAA, with its exclusive standards for vacatur and modification, apply in all cases involving interstate commerce, or just the ones

where the parties did not expressly opt out of the FAA? These are difficult questions that only time–perhaps much time–will tell.

A few courts have addressed the question of enforcement of arbitration awards since *Hall Street Assocs.* came down. They are presented in reverse chronological order.

- In *Reeves v. Chase Bank USA, NA*, 2008 WL 2783231 (E.D. Mo. July 15, 2008), the federal district judge cited to *Hall Street Assocs.* but nonetheless said that "courts may also vacate arbitral awards which are 'completely irrational' or 'evidence[ ] a manifest disregard for the law.'" *Id.* at *3.

- In *Mastec North America v. MSE Power Systems, Inc.*, 2008 WL 2704912 (N.D. N.Y. July 8, 2008), the federal court said that the Supreme Court's holding in *Hall Street Assocs.* "limits the application of 'manifest disregard of the law' to the Section 10 bases" of the FAA. The court thus considered "manifest disregard" to be a judicial interpretation of Section 10 and "resort[ed] to existing case law to determine its contours." *Id.* at *3. The analysis used by the court looked very much like pre-*Hall Street Assocs.* analysis.

- In *Wood v. Penntex Resources LP*, 2008 WL 2609319 (S.D. Tex. June 27, 1008), Federal District Judge Lee Rosenthal considered an agreement that said the arbitration award would not be eligible for confirmation if it is based on clearly erroneous findings of fact, or manifestly disregards the law, or exceeds the powers of the arbitrator. *Id.* at *7. Judge Rosenthall noted that the provision did not restrict the arbitrators' power, but rather limited when the award could be enforced by the courts. She rejected these constraints as a contract for a different basis for judicial review of an arbitration award, beyond the standards in the FAA. Citing *Hall Street Assocs.*, she refused to apply these standards to review of the arbitrators' award. Judge Rosenthall also said that *Hall Street Assocs.* overruled "manifest disregard of the law" as an independent basis for vacatur. *Id.* at *8. She appears to have recognized the "essence of the contract" complaint as sounding under FAA Section 10(a)(4). *Id.* at *9.

- In *Quinn v. NAFTA Traders, Inc.*, 2008 WL 2426665, *1 (Tex. App.–Dallas June 17, 2008, no pet.), the parties agreed that the arbitrator could not render a decision which contained reversible error or apply a cause of action or remedy not available under federal or state law. The Dallas Court of Appeals said that the language in the TGAA is close enough to the language in the FAA so that the principles reflected in *Hall Street Assocs.* apply to the TGAA. The Court therefore rejected a complaint that the arbitrator violated the provisions of the agreement. The court also rejected a complaint that the arbitrator exceeded his authority.

- In *Fitzgerald v. H&R Clock Financial Advisors, Inc.*, 2008 WL 2397636 (E.D. Mich. June 11, 2008), the district court cited *Hall Street Assocs.* and then proceeded to apply the non-statutory ground of "manifest disregard of the law" to review an arbitration award governed by the FAA.

- The Fifth Circuit Court of Appeals is undecided whether the holding in *Hall Street Assocs.* has eliminated all non-statutory grounds for vacating or modifying an arbitration award. In *Rogers v. KBR Technical Services Inc.*, 2008 WL 2337184, *2 (5th Cir. June 9, 2008), the Court said:

  > The Supreme Court has recently held that the provisions of the FAA are the exclusive grounds for expedited vacatur and modification of an arbitration award, which calls into doubt the non-statutory grounds which have been recognized by this Circuit. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1403 & n. 5 (2008). However, because we affirm the district court and hold that the arbitration award is confirmed, there is no need in the instant case to determine whether those non-statutory grounds for vacatur of an arbitration award remain good law after Mattel.

- In *ALS & Assocs., Inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp.2d 180 (D. Mass. June 2, 2008), in reviewing an attack on an arbitration award governed by the FAA, the district court rejected "manifest disregard of the law" as a ground for vacating or modifying an arbitration award, citing the First Circuit Court of Appeals' decision in *Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008). The district

court did, however, indicate that "manifest disregard of the law" might be a collective label for all grounds for vacatur in FAA Section 10, or as shorthand for Section 10(a)(3) or 10(a)(4). *Id.* at 181 n. 1.

- In *Southco, Inc. v. Reell Precision Mfg. Corp.*, 2008 WL 2221891 (E.D. Pa. May 27, 2008), a federal district judge cited *Hall Street Assocs.* for another point, then applied traditional Third Circuit analysis to the question of whether the award was "completely irrational." Using this standard, the court declined to overturn the arbitration award.

- In *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp.2d 993 (D. Minn. May 21, 2008), the federal district judge viewed *Hall Street Assocs.* as having eliminated not only contractually-expanded judicial review but also judge-made standards outside of the FAA. The Judge held that "manifest disregard of the law" was no longer available to attack arbitration awards governed by the FAA.

- In *UMass Memorial Medical Center, Inc. v. United Food And Commercial* , 527 F.3d 1, *4 (1st Cir. May 15, 2008), without mentioning *Hall Street Assocs.*, the First Circuit Court of Appeals confirmed the trial judge's standard of review of an arbitration award in these terms:

  > In order to overturn the award, the district court noted that the movant (the Hospital) must show that the award was "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."

- In *Ascension Orthopedics, Inc. v. Curasan, AG*, 2008 WL 2074058 (S.D. Texas May 14, 2008), Federal District Judge Gray Miller considered an arbitration agreement providing for appellate review "for errors of law but not for findings of fact." Judge Miller originally vacated the award for errors of law. Learning that the U.S. Supreme Court had handed down *Hall Street Assocs.* the previous day, Judge Miller rescinded his ruling and called for briefing on the effect of the Supreme Court's decision. The arbitration agreement did not select either the FAA, the TGAA, or common law to be applied. However, the motion to vacate the arbitration award was originally filed by *Ascension* in a Texas state court, and was removed to federal district court based on diversity jurisdiction. *Ascension* argued that it sought vacatur under the TGAA, which allowed contractually expanded scope of review, or alternatively under Texas common law, which allowed vacatur for "gross mistake." *Id.* at *2. Judge Miller denied vacatur under the FAA, since none of the statutory grounds for vacatur were met. *Id.* Judge Miller then held that the TGAA did not permit contractually expanded vacatur, citing *Callaghan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002). Finally, Judge Miller held that "gross mistake" had not been established. Judge Miller therefore upheld the arbitration award that he had originally set aside.

- In *Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n. 3 (1st Cir. April 24, 2008), the court of appeals commented that *Hall Street Assocs.* eliminated "manifest disregard of the law" as a ground for vacatur under an arbitration agreement governed by the FAA. *Id.* at 124. In this case, because neither party invoked the FAA the court applied Puerto Rican law to the arbitration agreement, without reaching the question of whether *Hall Street Assocs.* precludes that ground under state law. *Id.* The First Circuit did continue to recognize the power to vacate an award if "the decision fails to 'draw[ ] its essence from the collective bargaining agreement.'" *Id.* at 123-24.

- In *Jimmy John's Franchise, LLC v. Kelsey*, 549 F.Supp.2d 1034, 1037 (C.D. Ill., April 10, 2008), a federal district judge in Illinois cited *Hall Street Assocs.* and then said that courts can set aside arbitration awards that are in "manifest disregard of the law." The court applied that standard as articulated by the Seventh Circuit Court of Appeals in pre-*Hall Street Assocs.* decisions.

- In *Chase Bank USA v. Hale*, 859 N.Y.S.2d 342, 349 (Supreme Court, New York County March 31, 2008), a New York judge held that *Hall Street Assocs.* eliminated "manifest disregard" as an independent non-statutory ground for judicial review. However, the trial court did view "manifest disregard" "as judicial interpretation of

the section 10 requirements, as opposed to a separate standard of review." *Id.* at 349.

- In *Halliburton Energy Services, Inc. v. NL Industries*, 553 F.Supp.2d 733, 752 (S.D. Tex. March 31, 2008), Federal District Judge Lee H. Rosenthal said this about the "manifest disregard" ground for vacatur, after *Hall Street Assocs.*:

> The Supreme Court's decision in Hall Street Associates calls into question whether the manifest disregard standard is a ground for vacatur separate from the statutory grounds for vacatur under the FAA, as the Fifth Circuit has previously stated, or a way of summarizing two or more of those statutory grounds.

V. ENFORCEABILITY OF AGREEMENTS PARTIALLY NULLIFIED BY HALL STREET ASSOCS. The question arises regarding existing arbitration agreements that either restricted or expanded the bases of judicial review of an arbitration award governed by the FAA, and if state courts follows suit, under state statutes. Can a party avoid arbitration on the ground that it would not have entered into the arbitration agreement absent the altered grounds for judicial review? To some extent that is a question of intent, and to some extent it is a question of policy. The nearest analogue is arbitration agreements which have had certain offending clauses that the court declares unenforceable. After the removal of the offending provision, will arbitration still be ordered under the revised agreement? Some of the courts who have addressed this question have turned to general contract law for an answer, while others have considered policies special to arbitration.

The RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) provides that:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

The Eighth Circuit Court of Appeals, in *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001), held a portion of an arbitration agreement to be unenforceable, but upheld the remainder of the arbitration agreement. The Court said:

> [I]f we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract. Such an outcome would represent the antithesis of the "liberal federal policy favoring arbitration agreements."

Id. at 682. In *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999), the court found that the employer's "rules when taken as a whole . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding," and so declared the entire arbitration agreement unenforceable.

California has a statute for situations where part of an arbitration agreement is declared unconcsionable and unenforceable. Cal. Civil Code § 1670.5, subdivision (a). The California Supreme Court said: "[T]he statute appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement. But it also appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability." *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 695 (Cal. 2000). The Court recognized two policies favoring enforcing the revised arbitration agreement:

> The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement - particularly when there has been full or partial performance of the contract. . . . Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. (Citations omitted.)

Id. at 696. In *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 (Cal. 2003), the California negated a clause in an arbitration agreement because it allowed an arbitral appeal only for a judgment in excess of $50,000, which was seen as an unconscionable asymmetrical advantage to the defendant. Still, the remainder of the arbitration agreement was upheld. *Id.* at 986. *Accord, Fittante v. Palm Springs Motors, Inc.*, 129 Cal. Rptr.2d 659, 674

(2003) ("The appeal clause affects only a post-award proceeding, not the general conduct of the arbitration itself. The appeal clause is thus severable from the remainder of the arbitration agreement."). In *Ontiveros v. DHL Exp. (USA), Inc.*, 79 Cal. Rptr.3d 471, 489 (Cal. App. 2008), the trial and appellate courts found three provisions in an arbitration agreement to be unlawful, and voided the arbitration provision altogether as it was "permeated with unconscionability . . . ."

In *Wigginton v. Dell, Inc.*, 2008 WL 2267173 (Ill. App. June 2, 2008), the court of appeals found a provision barring class actions in arbitration to be unenforceable, but found it to be severable from the arbitration agreement. The Court said: "An unenforceable provision is severable unless it is 'so closely connected' with the remainder of the contract that to enforce the valid provisions of the contract without it 'would be tantamount to rewriting the [a]greement.'" *Id.* at *7. The court also considered it relevant that the agreement had no severability clause, but the lack of such a clause was not dispositive. *Id.* In *Parker v. American Family Ins. Co.*, 734 N.E.2d 83, 86 (Ill. App. 2000), the court said: "in order to preserve the parties' agreement to the greatest extent possible and because arbitration is an encouraged form of dispute resolution in Illinois, we hold that only the trial de novo clause is unenforceable and that the trial court properly entered a judgment confirming the arbitration panel's decision."

In *Booker v. Robert Half Int'l, Inc.*, 315 F.Supp.2d 94, 106 (D.C. 2004), after the court declared unenforceable a bar in an arbitration agreement against punitive damages, the court left the balance of the arbitration agreement in place, based on language in the agreement saying that "[t]he provisions of this Agreement are severable. If any provision is found by any court of competent jurisdiction to be unreasonable and invalid, that determination shall not affect the enforceability of the other provisions." The court of appeals affirmed, saying:

> C. Booker next argues that enforcing the remainder of the arbitration clause contravenes the federal policy interest in ensuring the effective vindication of statutory rights. He contends that responding to illegal provisions in arbitration agreements by judicially pruning them out leaves employers with every incentive to "overreach" when drafting such agreements. If judges merely sever illegal provisions and compel arbitration, employers would be no worse off for trying to include illegal provisions than if they had followed the law in drafting their agreements in the first place. On the other hand, because not every claimant will challenge the illegal provisions, some employees will go to the arbitral table without all their statutory rights.
>
> We have never addressed this issue, but Booker's argument- bolstered by support from the EEOC-has helped persuade some circuits to strike arbitration clauses in their entirety, rather than simply sever offending provisions. *See Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir.2001); *Shankle v. B-G Maint. Mgmt. of Colo.*, 163 F.3d 1230, 1235 & n. 6 (10th Cir.1999); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir.1994). Other circuits, however, have invoked the federal policy in favor of enforcing agreements to arbitrate to reject policy arguments like Booker's and uphold severance of illegal provisions. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir.2003); *Gannon*, 262 F.3d at 682-83; see also *Hadnot*, 344 F.3d at 478 (severing bar on punitive damages in arbitration clause without citing federal policy).

Booker v. Robert Half Intern., Inc., 413 F.3d 77, 84 (D.C. Cir. 2005). The Court of Appeals attributed the different outcomes of the decisions to the presence or absence of a severability clause, or "agreements that did not contain merely one readily severable illegal provision, but were instead pervasively infected with illegality. . . ." *Id.* at 84. The Court also said:

> A critical consideration in assessing severability is giving effect to the intent of the contracting parties. . . . That was also the "preeminent concern of Congress in passing the [FAA]"--"to enforce private agreements into which parties had entered." . . . If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.

Id. at 84-85.

In *Anderson v. Comcast Corp.*, 500 F.3d 66, 77 (1st Cir. 2007), the First Circuit Court of Appeals invalidated a term of an arbitration agreement setting a limitations period shorter than the period provided by statute. Because the agreement contained a provision saying

that, "[i]f any portion of ... this dispute resolution section[ ] is determined to be illegal or unenforceable, then that provision may be deleted or modified and the remainder of ... this dispute resolution section[ ] shall be given full force and effect," the court found the balance of the arbitration agreement to be enforceable.

Years ago the Rhode Island Supreme Court addressed the question of whether the failure of an arbitration clause, with the result that the dispute must be litigated, would negate the underlying contract. The court stated "the general rule that an invalid clause relating to arbitration does not render the contract unenforceable since it pertains to the remedy only and is not a substantial part of the general contract." *Donahue v. Associated Indem. Corp.*, 227 A.2d 187, 191 (R.I. 1967). *Accord*, *Plaskett v. Bechtel Intern., Inc.*, 243 F.Supp.2d 334, 345 (D. Virgin Islands 2003) (finding enough objectionable terms in the arbitration agreement sufficient to vitiate the arbitration agreement, but finding the entire arbitration provision severable from the underlying contract, leaving it in force).

The Texas Supreme Court announced a rule on severability, in *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978), in upholding a premarital agreement after invalidating a significant portion of the agreement. The Court said:

> We are of the opinion that the agreement here is controlled instead by the rule that where the consideration for the agreement is valid, an agreement containing more than one promise is not necessarily rendered invalid by the illegality of one of the promises. In such a case, the invalid provisions may be severed and the valid portions of the agreement upheld provided the invalid provision does not constitute the main or essential purpose of the agreement.

In the case of *In re Kassachau*, 11 S.W.3d 305, 313 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding), the court said that "[s]everability is determined by the intent of the parties as evidenced by the language of the contract . . . . The issue is whether the parties would have entered into the agreement absent the illegal parts." In *City of Beaumont v. International Ass'n of Firefighters, Local Union No. 399*, 241 S.W.3d 208 (Tex. App.--Beaumont 2007, no pet.), the court found that an arbitration agreement failed in its entirety because one clause was invalidated, despite the presence of a severability clause. The court said: "a severability clause does not transmute an otherwise dependent promise into one that is independent and divisible." *Id.* at 216. In *Security Service Federal Credit Union v. Sanders*, 2008 WL 2038826 (Tex. App.--San Antonio May 14, 2008, n.p.h.), the court negated anti-attorney's fee clauses in two separate arbitration agreements, as violating the Texas Deceptive Trade Practices Act. In considering whether that invalidated the arbitration agreement, the court ruled differently on each contract. The court said that "a court is generally authorized to sever an illegal or an unenforceable provision from a contract and enforce the remainder of the contract," and that '[s]everability is determined by the intent of the parties as evidenced by the language of the contract." One agreement expressly prohibited "the severance of any provision deemed unenforceable," while the other agreement said that "[i]f any provision of this arbitration clause should be determined to be unenforceable, all other provisions of this arbitration clause shall remain in full force and effect." The trial court was correct to invalidate the first arbitration agreement and uphold the second. *Id.* at *4.

The lesson from these cases is that, if your consent to the arbitration agreement is dependent on contractually-expanded review or common law grounds for vacatur, you had better say so explicitly or you may be stuck with an arbitration award that is subject to vacatur only on FAA or TGAA grounds.

VI. POSSIBLE WORKAROUNDS.

A. OPT OUT OF FAA AND INTO ANOTHER REGIME. *Hall Street Assocs.* limits its holding to instances where the parties "take the FAA shortcut." There are choices when electing which arbitration law to apply to a transaction. The parties can expressly elect the FAA, or the TGAA, or Texas common law, or the law of another state, or the rules of a private organization. *Verlander Family Ltd. Partnership v. Verlander*, 2003 WL 304098, at *2 (Tex. App.--El Paso February 13, 2003, no pet.) (memorandum opinion) ("Where the parties designate in the arbitration agreement which arbitration statute they wish to have control, the court should apply their choice"). *See Volt Info. Sciences v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), where the Supreme Court said:

> Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see

> fit. Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . . [Citation omitted]

Id. at 479.

"When the parties' contract provides that another state's substantive law applies, there is no legal or contractual basis to invoke the TGAA." *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 407 (Tex. App.--Dallas 2007, no pet.). The cases make it clear that a general choice of law clause will not be interpreted as a conscious invocation of a particular arbitration law. So a choice of a specific law for arbitration will have to be spelled out. An interesting option is to agree to apply the law of some state in the Union that permits more liberal judicial review of arbitration awards, but there may be a limit on how far a court will go in applying the law of a sister state if there are not sufficient ties to that jurisdiction to meet the significant relationship test used in deciding conflict of law disputes.

B. NARROW THE ARBITRATION CLAUSE. Up to now, contracts have routinely provided that the parties would arbitrate "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract"–or words to that effect. This broad recital can have a destructive effect on attempts to limit the discretion of arbitrators. Instead of a broad arbitration clause, draw up an exclusive listing of the disputes that are subject to arbitration, and rule out all others. Perhaps set out specific exclusions, like "The parties do not agree to arbitrate class action claims, or claims for exemplary damages, nor may the interpretation or enforceability of this clause be arbitrated."

Broad recitals that the arbitrators are empowered only to make correct decisions based on applicable law do not work, at least in connection with the FAA. One possible way to confine the arbitrator to a decision based on the correct law would be to specify in the arbitration agreement the substantive legal principles that the arbitrators must apply. This is more specific than saying that the arbitrator "must follow the law" or "not commit reversible error." If the arbitrators disregarded a rule of law that the parties stipulated s/he must follow, it might be easier to establish manifest disregard of the law or ignoring the essence of the contract, in a court that continues to recognize those grounds for review. *See Edstrom Industries, Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 549, 552 (7th Cir. Feb. 11, 2008) (Posner, J.) (arbitration award overturned where the contract said to apply Wisconsin law "strictly" and arbitrator did not).

C. EXPLICIT RESTRICTIONS ON AVAILABLE REMEDIES. The TGAA provides that "the fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award." Tex. Civ. Prac. & Rem. Code § 171.090. If the arbitrator grants relief that the contract in question does not allow, the question becomes not whether an arbitrator can do what the law does not allow, but rather whether an arbitrator can do what the parties did not allow. There are a few cases that suggest that courts can set aside an arbitrator's award on the ground that the arbitrator exceeded his authority by ignoring an express limitation of remedies available under an arbitration agreement or under the underlying contract: *Missouri River Serv., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir. 2001); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1127-28 (3rd Cir. 1971); discussed previously in this Article. There are other cases which say that a broad arbitration clause involving "all disputes" or words to that effect permit the arbitrators to rule on the enforceability of the limiting provisions of the contract. *See Saturn Telecommunications Services, Inc. v. Covad Communications Co.*, 2008 WL 2403199 (S.D. Fla. June 9, 2008), and cases cited therein. Judicial review of an arbitration award that ignored an explicit limitation of remedies contained in the contract may be available under FAA Section 10 and TGAA Section 171.088b ("exceeded their powers"). The argument that a restriction of remedies in the underlying contract is binding on the arbitrators can be bolstered by providing in the arbitration clause or agreement that the arbitrator is not empowered to decide the enforceability of the restrictive terms of the contract, and is empowered to grant only the remedies set out in the contract.

D. CONTRACTUALLY-EXPANDED JUDICIAL REVIEW UNDER THE TAA OR COMMON LAW. The U.S. Supreme Court has ruled out contractually-expanded judicial review of arbitration awards under the FAA. The ruling is not binding as to the TGAA or arbitration under Texas common law. In *Ascension Orthopedics, Inc. v. Curasan, AG*, 2008 WL 2074058 (S.D. Texas May 14, 2008), Federal District Judge

Gray Miller considered an arbitration agreement providing for appellate review "for errors of law but not for findings of fact." Judge Miller rejected the expanded review under the FAA, based on *Hall Street Assocs.*, then concluded the result was the same under the TGAA. Judge Miller cited *Callaghan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002), as having already rejected contractually-expanded vacatur under the TGAA. *Callaghan* did not really involve contractually-expanded judicial review. In *Callaghan*, the Texas Supreme Court did indeed say that "[t]he statutory grounds allowing a court to vacate, modify, or correct an award are limited to those the Act expressly identifies." *Id.* at 843. Thus, it rejected the court of appeals' conclusion that the arbitration award should be set aside for "evident mistake," when the statute only permitted modification for an "evident miscalculation of figures" or an "evident mistake in the description of a person, thing, or property referred to in the award." *Id.* at 844. The Supreme Court next considered the claim that the Texas common law standard of "gross mistake" warranted vacatur of the arbitration award. The Supreme Court "assum[ed] without deciding" that the contesting party "may rely on the gross mistake standard under the common law to attack the arbitrator's award," but held that the arbitrator did not violate the common law simply by failing to award damages. *Id.* at 844. Next the Supreme Court considered the contention that the arbitrator "exceeded her authority" by awarding a recovery that violated the Texas Constitution, a claim also presented to lower the courts as a violation of "public policy." *Id.* at 844. The Supreme Court held that the argument had been waived by failure to present it during arbitration and during the confirmation hearing in the trial court. So the Supreme Court did not address whether violation of public policy was a valid basis for vacatur. *Id.* at 844.

The Supreme Court, several years ago, discussed the courts' ability to set aside an arbitration award that violated public policy, in *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. 2002), where the Court said:

> We agree that an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy. The Delgados argue, and the court of appeals determined, that the policy at stake in the present case is protection of the homestead. The homestead is given special protections in the Texas Constitution FN25 and in the Property Code provisions dealing with mechanic's liens.FN26 An arbitration award made in direct contravention of those protections would violate public policy. Thus, had the arbitrator wholly disregarded the constitutional and statutory requirements for perfecting a mechanic's lien on a homestead and held that a lien should be valid without regard to such requirements, the award would contravene public policy.

In making this comment, the Supreme Court did not pass judgment on the argument that the TGAA had eliminated common law grounds for vacatur, because that argument had not been raised. *Id.* at 237-38. In both *Delgado* and *Callahan*, the Supreme Court as much as invited practitioners to raise the issue of whether the TGAA preempts common law grounds for vacatur. Notwithstanding Judge Miller's comment to the contrary, the issue of contractually-modified grounds for vacatur of arbitration awards under Texas law still appears to be an open question. For those who are now drafting arbitration agreements, it may be wise to contractually elect to be governed by both the TGAA and Texas common law, or exclusively Texas common law, as to vacatur.

E. ADR STATUTES. Arbitration can arise under an alternate dispute resolution ("ADR") statute, rather than the TGAA. The Texas Family Code contains two such provisions, in Sec. 6.601 and Sec. 153.0071. An ADR statute for referral of ordinary civil litigation to an arbitrator is set out in Tex. Civ. Prac. & Rem. Code, § 154.027, which provides:

> § 154.027. Arbitration
>
> (a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award.
>
> (b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

Note that under the Texas general civil ADR statute, the arbitration award is to be treated as a contractual obligation, not tantamount to a judgment. This is a large variance from the TGAA and the FAA. Additionally, the implication is that judicial enforcement is achieved

by a suit for specific enforcement of a contract, not the expedited process for confirmation of an arbitration award under the TGAA or FAA. *See Padilla v. La France*, 907 S.W.2d 454 (Tex. 1995).

The decision of the Supreme Court in *Hall Street Assocs.* specifically leaves open the question of whether arbitration that results from a post-filing agreement to arbitrate a pending suit may be subject to court control independent of the FAA. *Hall Street Assocs.*, 128 S.Ct. 1408 (remanding the case to the court of appeals to determine whether Fed. R. Civ. P. 16 or the Federal Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., give the trial court an independent basis for judicial review of a dispute sent to arbitration as result of an agreement by the parties made after litigation started). Applying those principles to a pre-dispute agreement to use court annexed arbitration is plausible.

F. ARBITRATING FACTS: LITIGATING LAW. If the primary desire is to avoid litigation of disputed facts, the parties could agree to arbitrate only the factual disputes and agree that, when the arbitration award is confirmed, then the trial court must decide how the law applies to the arbitrated facts. Obviously clear and copious expressions of this intent would be advisable.

G. ARBITRAL APPELLATE REVIEW. In *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991), the court said that "[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award." Arbitral appellate review was used but not challenged in *Chase Bank USA v. Hale*, 859 N.Y.S.2d 342, 344 (Supreme Court, New York County March 31, 2008).

In *Redish v. Yellow Transp., Inc.*, 2008 WL 2572658 (N.D. Tex. June 24, 2008), the district court considered an arbitration agreement containing the following clause:

> At either party's written request within fourteen (14) days after issuance of the award, the award shall be subject to affirmation, reversal or modification, following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review of a civil judgment following court trial in the sate in which the arbitration was held.

Id. at *4. The district court held that the provision, which allowed a second arbitrator to review an arbitration award using standards of review applicable to appeals in civil cases, was valid and did not violate the *Hall Street Assocs.'* prohibition against expanding judicial review of arbitration awards. *Id.*

The California Supreme Court considered a clause for appellate arbitration, in *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 (Cal. 2003):

> [T]he arbitration agreement provided that "[a]wards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial."

The California Supreme Court held that the clause was unconscionably one-sided and thus unenforceable, because it was asymmetrically "geared toward giving the arbitral defendant a substantial opportunity to overturn a sizable arbitration award." *Id.* at 984-85.

Since all case law, even *Hall Street Assocs.*, permit parties broad latitude to agree on the arbitration process (as distinguished from judicial review of the arbitration process), an arbitral appellate process would seem to be a sure bet, provided that judicial confirmation occurs after the appellate arbitration is concluded.

JAMS offers an optional arbitration appeal procedure.<http://www.jamsadr.com/rules/optional.asp>.

H. CUSTOM-TAILORING THE LITIGATION PROCESS. A largely-untested, but potentially viable approach to the problem of limited judicial review of arbitration awards is to abandon arbitration and turn to custom-tailoring of the litigation process. There are a number of potential tools that are available. None are a perfect fit, but in combination they might couple some of the flexibility of arbitration with normal appellate review. For an overview of possibilities, *see* Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's*

Image, 30 HARV. J.L. & PUB. POL'Y 579 (2007); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181 (2006).

1. Special Judge. Texas Civil Practice & Remedies Code § 151.001-ff. permits the court, upon agreement of the parties, to refer a case for disposition by a special judge. The parties must file a motion that: (1) requests the referral; (2) waives the party's right to trial by jury; (3) states the issues to be referred; (4) states the time and place agreed on by the parties for the trial; and (5) states the name of the special judge, the fact that the special judge has agreed to hear the case, and the fee the judge is to receive as agreed on by the parties. Tex. Civ. Prac. & Rem. Code § 151.002. The special judge must be a retired or former district, statutory county court, or appellate judge who: "(1) has served as a judge for at least four years in a district, statutory county court, or appellate court; (2) has developed substantial experience in his area of specialty; (3) has not been removed from office or resigned while under investigation for discipline or removal; and (4) annually demonstrates that he has completed in the past calendar year at least five days of continuing legal education in courses approved by the state bar or the supreme court." *Id.* § 151.003. The same rules of procedure and evidence that apply in the referring court apply to proceedings before the special judge. *Id.* § 151.005. A special judge must conduct the trial in the same manner as a court trying an issue without a jury, and has the powers of the referring judge except that the special judge may not hold a person in contempt of court unless the person is a witness before the special judge. *Id.* § 151.006. A court reporter is required. *Id.* § 151.008. The special judge must render a verdict within sixty days after trial adjourns. The verdict must comply with the requirements for a verdict by the court. The verdict stands as a verdict of the referring judge's court. *Id.* §151.011. Section 151.013 provides:

> The right to appeal is preserved. An appeal is from the order of the referring judge's court as provided by the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure.

The provision for referral to a special judge says: "[o]n agreement of the parties, in civil of family law matters pending in a district court . . . ." Tex. Civ. Pac. & Rem. Code § 151.001. The question arises whether a pre-suit agreement to appointment of a special judge is enforceable if one party changes his/her mind and refuses to file a motion requesting the referral.

2. Master in Chancery. TEX. R. CIV. P. 171 permits the court, "in exceptional cases for good cause," to appoint a master in chancery "who shall perform all of the duties required of him by the court." Rule 171 provides that the master in chancery has the powers assigned by the court, and provides a list of default powers that are quite broad. A sample order of referral to a master in chancery is attached to this article.

The standard for judicial review of the master's report is stated in Rule 171:

> The Court may confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as the court may deem proper and necessary in the particular circumstances of the case.

Upon timely objection to a master's report, the master's report is "without force" and the court must conduct a de novo hearing. *Hyundai Motor America v. O'Neill*, 839 S.W.2d 474, 480 (Tex. App.–Dallas 1992, orig. proceeding) (mandamus). Thus, judicial review of the master's report is the opposite end of the spectrum from judicial review of arbitration awards, since judicial review of the master's report is an automatic new trial. This is too much review for almost every purpose. However, the parties can waive the right to object to a master's report and the right to have a hearing de novo in front of the judge. *Flukinger v. Straughan*, 795 S.W.2d 779, 788 (Tex. App.–Houston [14th Dist.] 1990, writ denied). In *Flukinger*, where the right to object was waived, the appellate court reviewed the sufficiency of the evidence to support the master's rulings, just like it would have reviewed the decision had it been made by a trial judge based on evidence presented in court. It is uncertain whether a pre-suit waiver of the right to object to a master's report will have binding effect. If it does, then a proceeding before a special master has many of the features of arbitration coupled with full appellate review.

There is no authority as to whether a *pre-suit* agreement to the appointment of a master in chancery (i) meets the exceptional case/good cause threshold for appointment of a master, and (ii) is binding on the court so that refusal to appoint a master in chancery would be an abuse of discretion subject to mandamus. *Simpson v. Canales*, 806 S.W.2d 802, 811 (Tex. 1991), says that where the parties agree in a post-suit agreement to appointment of a master, the exceptional case/good cause requirement does not apply.

There is no authority to suggest that the parties can by agreement control the court's decision as to the identity of the person to be appointed a master in chancery, or even the minimum qualifications of someone to be selected by the court. Rule 171 requires only that the master be a citizen of Texas, and not an attorney for either party to the action. This might be too much uncertainty for parties who can pick their "judge" in arbitration. The pre-suit agreement could contain an escape clause saying that if the court will not appoint an agreed-upon master that the case will flip to arbitration. In the author's personal experience, judges have been happy to appoint a master agreed upon and paid for by the parties, which allowed the judges to move the case off of their docket.

3. Jury Waiver. If the motivating factor for selecting arbitration is to avoid a jury trial, an alternative to arbitration is a contractual pre-dispute jury waiver. The Texas Supreme Court held that such an agreement is enforceable in Texas, in *In re Prudential Ins. Co.*, 148 S.W.3d 124, 133 (Tex. 2004). In a later case, the Supreme Court held that the following jury waiver language constituted prima facie proof of waiver and shifted the burden to the opposing party to rebut it.

> THE MAKER HEREBY UNCONDITIONALLY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF, DIRECTLY OR INDIRECTLY, THIS NOTE,.... IN THE EVENT OF LITIGATION, THIS NOTE MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.

In re General Elec. Capital Corp., 203 S.W.3d 314, 316 (Tex. 2006).

4. Court-Appointed Auditor. Under TEX. R. CIV. P. 172, the court can appoint an auditor(s) to "state accounts between the parties and to make a report thereof" when "an investigation of accounts or examination of vouchers" "appears necessary for the purpose of justice." Texas Rule of Civil Procedure 706 provides that verified reports of auditors, prepared pursuant to Tex. R. Civ. P. 172, shall be admitted into evidence "whether or not the facts or data in the reports are otherwise admissible and whether or not the reports embrace the ultimate issues to be decided by the trier of fact." A party who files exceptions to the report can present controverting evidence.

5. Agreements Regarding Admissibility of Evidence. Texas Rule of Evidence 802 provides that "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay." A pre-suit agreement could take advantage of this rule by containing specific and clearly-worded terms that the parties waive a hearsay objection to affidavits from all or from selected witnesses. To protect the right of cross-examination, the pre-suit agreement could provide for a presentation-and-response mechanism akin to Texas Civil Practice and Remedies Code Sections 18.001 and 18.002 (affidavit concerning cost and necessity of services) or Texas Rule of Evidence 1009 (translation of foreign language documents).

The U.S. Supreme Court has ruled that Federal Rules of Evidence can be waived even where waiver is not mentioned in the rule. *U.S. v. Mezzanatto*, 513 U.S. 196 (1995). The court even recognized a "presumption of waivability" of evidentiary rules. *Id.* at 202.

6. Limits on Discovery Processes. Texas Rule of Civil Procedure 191.1 provides that "[e]xcept where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties." The agreement must comply with Rule 11. Rule 11 requires that the agreement be "in writing, signed and filed with the papers as part of the record." Neither Rule 191.1 nor Rule 11 say that the agreement can be signed only after suit is filed. A pre-suit agreement, filed with the court clerk once suit is filed, may be allowed. *Padilla v. La France*, 907 S.W.2d 454, 461 (Tex. 1995), says that the filing requirement in Rule 11 "is satisfied so long as the agreement is filed before it is sought to be enforced."

7. Agreed Case. Texas Rule of Civil Procedure 263 permits parties to file an agreed statement of facts, to serve as the basis for a judgment. This agreed statement of facts is the record on appeal. This procedure could be coupled with arbitration limited to the factual disputes, by agreeing that the arbitrator's award will be treated as the agreed statement of facts, based upon which the trial court will apply the relevant law. The application of the law to the "agreed facts" would thus be appealable. As stated in *State Farm Lloyds v. Kessler*, 932 S.W.2d 732, 735 (Tex. App.–Fort Worth 1996, writ denied), "the only issue on appeal is whether the trial court properly applied the law to the agreed facts." This hybrid approach would

allow arbitration of factual disputes while preserving full appellate review of the legal issues.

8. Altering Presumptions. While case law does not exist saying that parties can contract to alter presumptions and burdens of proof, the Texas Family Law Practice Manual ("TFLPM") premarital agreement form (Form 48-3) contains several clauses which alter presumptions and prescribe what constitutes proof of separate and community property. Paragraph 18.3 says that property held in a spouse's individual name is presumed to be that spouse's separate property–which is a reversal of the statutory presumption of community property in Tex. Fam. Code § 3.003. Paragraph 3.4 negates any presumptive ownership resulting from commingling of separate and community property. Paragraph 3.9 lists facts that cannot be considered evidence of intent to create community. Paragraph 7.1 says that jointly-held property "may not be deemed to be community property," and that absent records of each party's contribution (that is, oral testimony has no probative weight), ownership is conclusively presumed to be 50-50. Paragraph 12.1 provides terms on how you can and cannot prove a gift. A scholarly article, Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006), said this about contractually altering burdens of proof:

> [C]ontracts scholars focus principally on the substantive terms and not on the ability of the parties to regulate the procedural course of their future enforcement. This is a rich avenue for future research, and we take a preliminary step in this Part by examining the ways in which the parties can vary one important feature of judicial factfinding: the allocation of burdens of proof and standards of proof. [FN127] A threshold question is whether burdens and standards of proof are regarded as mandatory background rules or as defaults subject to alteration by individual parties. While we have not found direct authority, we believe that courts would enforce reasonable contractual burden of proof provisions. [FN128] And, we have found ample evidence that many contracts in fact contain such provisions.

Id. at 857-58.

9. Pre-Suit Agreement to ADR Procedures. Chapter 154 of the Texas Civil Practice and Remedies Code, "Alternative Dispute Resolution Procedures," does not say that the parties can agree is a pre-dispute contract to bind themselves to alternate dispute resolution ("ADR") procedures. In family law, courts routinely enforce the requirement contained in the State Bar form agreement incident to divorce that the parties mediate before they litigate. This is usually done by an abatement and order requiring the parties to attend mediation. Section 154.027 provides:

> § 154.027. Arbitration
>
> (a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award.
>
> (b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

If the parties can, in a contract, bind themselves to binding arbitration under this Section of the Texas Civil Practice and Remedies Code, then the vacatur and modification procedures of the TGAA should not apply, and the parties *may* be free to enter into contractually-expanded judicial review of the arbitration award. Note that an award under the statute is enforceable like any contract (i.e., by specific performance), and not through the expedited approval procedure under the TGAA. The majority opinion in *Hall Street Assocs.* said:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.

Hall Street Assocs., 128 S.Ct. at 1406. The majority recognized that Federal Rule of Civil Procedure 16 (Pretrial Conferences; Scheduling; Management) and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., might serve as an independent basis for arbitration, with different standards of judicial review. *Hall Street Assocs.*, 128 S.Ct. at 1407. For example, the Federal ADR statute for court-annexed arbitration permits any party who is dissatisfied with the arbitrator's award to demand a trial de novo. 28

U.S.C. § 657(c). If de novo trial is not requested, the award must be implemented by the court and is not subject to appeal. 28 U.S.C. § 657(a). Waiver of de novo retrial would not permit appellate review of the arbitrator's award because the statute provides that the award, when incorporated into the court's judgment, "shall not be subject to review in any other court by appeal or otherwise." *Id.* § 657(a). The Texas ADR statute is not encumbered in this way, so that an agreement to arbitrate under the Texas ADR statute may circumvent the restrictions imposed by *Hall Street Assocs.* so that the parties could agree on a standard of review, or at least be assured that common law standards of judicial review of arbitration awards will be available.

10. Not Pre-Suit Confession of Judgment. Texas Rule of Civil Procedure 314 permits a party to confess judgment, but only after suit is filed. Pre-suit confession of judgment is also precluded under Texas Civil Practice and Remedies Code Section 30.001.

11. Can Shorten Limitations Period to No Less Than Two Years. Texas Civil Practice and Remedies Code Section 16.070 provides that "[a] stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state." One can infer that a four year statute of limitations (such as for fraud or breach of contract) can be shortened to two years. The prohibition does not apply to the sale or purchase of a business entity for an "aggregate value of not less than $500,000." TEX. CIV. PRAC. & REM. CODE § 16.070(b).

12. Notice as Condition for Suit. Under Texas Civil Practice Code Section 16.071 "[a] contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void."

[SAMPLE]

AGREED ORDER APPOINTING MASTER IN CHANCERY

The parties have requested that the Court appoint Solomon Wise as a Tex. R. Civ. P. 171 Master In Chancery to preside over the pre-trial and trial of this case. The parties have stipulated that good cause exists for the appointment. Solomon Wise is a citizen of Texas, and is a licensed attorney but is not the attorney for any party to this case.

Based on the foregoing, the Court finds that appointment of Solomon Wise as Master In Chancery is warranted, and IT IS ORDERED that Solomon Wise is hereby appointed as Master In Chancery to preside over the pre-trial and trial of this case. IT IS ORDERED that this appointment shall extend to all pre-trial, trial, and post-trial matters relating to the disposition of this case, including without limitation: (a) dilatory pleas, motions and exceptions; (b) issues regarding the amendment or supplementation of pleadings; (c) establishing and amending a discovery schedule and ruling on discovery-related disputes; (d) requiring written statements of the parties' contentions; (e) ruling on full or partial motions for summary judgment and making other pretrial rulings to determine the contested issues of fact; (f) the possibility of obtaining stipulations of fact; (g) the identification of legal matters to be ruled on or decided by the court; (h) the exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness; (i) the exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness; (j) the necessity and sufficiency of expert reports; (k) agreed applicable propositions of law and contested issues of law; (l) the marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial; (m) written trial objections to the opposite party's exhibits, stating the basis for each objection; (n) settlement of the case, and to aid such consideration, encouraging settlement either through court-ordered mediation or otherwise; (o) making all rulings regarding the scheduling of trial, and all rulings on disputes that arise during trial, whether procedural issues, or issues regarding the admissibility of evidence, or on motions for judgment; (p) rulings on the merits of the dispute; (q) ruling on motions for new trial, motions to modify judgment, and any other post-trial or post-judgment motions or requests; (r) issuing or ruling on requested or proposed findings of fact and conclusions of law; (s) ruling on the amount of supersedeas bond or deposit; (t) ruling on temporary orders pending appeal. IT IS ORDERED that Solomon Wise, as

Master In Chancery, shall have the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order. IT IS ORDERED that Solomon Wise, as Master In Chancery, shall have all the rights and powers specified in Tex. R. Civ. P. 171. Upon request, a court reporter shall make a record of all proceedings involving the Master In Chancery, including proceedings in hearings and trial, as well as telephone conferences, bench conferences, and the like.

All proceedings shall be conducted by the Master In Chancery in accordance with the Texas Constitution, the Texas Rules of Civil Procedure and Texas Rules of Evidence, and shall be decided under Texas law, the same as if the case were being heard by an elected judge sitting without a jury. The parties hereby waive trial by jury.

Except as noted below, the parties have explicitly waived, and do hereby explicitly waive, the right to de novo hearing before this Court, and to review by this Court, of the Master In Chancery's findings and rulings, be they pretrial, trial, or post-trial. As a consequence, the case shall be handled by the Master In Chancery as if the case were a bench trial. All findings and rulings of the Master In Chancery shall be considered to be findings and rulings of this Court, and appeal or mandamus review may be sought in the Court of Appeals or Supreme Court to the same extent as if this Court had made the finding or ruling in question.

All documents, including pleadings, which would ordinarily be filed with the District Clerk shall be filed with the District Clerk in this matter, with a copy forwarded to the Master In Chancery on the date the document is filed with the District Clerk.

IT IS ORDERED that the parties shall initially equally split the costs associated with the Master In Chancery, including but not limited to time spent by the Master In Chancery, court reporter fees, the cost of a person to act as bailiff, if needed, and rental charges for room usage, if needed. The parties shall make deposits or pre-payments as ordered by the Master In Chancery for costs associated with this process, the same to be deposited within 5 working days of receipt of the order or request issued by the Master In Chancery.

IT IS ORDERED that the cost of the Master In Chancery is to be determined by billings reflecting the Master In Chancery's time spent and actions performed, at an hourly rate of $500.00. IT IS AGREED AND THEREFORE ORDERED that, to the extent these costs exceed the amount on deposit, each party shall deposit any further amounts indicated by the Master in Chancery or, if so indicated by the Master in Chancery, shall pay one-half of the Master In Chancery's bills upon receipt.

IT IS AGREED AND THEREFORE ORDERED that each party shall pay one-half of the charges for the court reporter, the same to be paid upon receipt by the party of the court reporter's bill. Costs of transcripts ordered by either party shall be paid by the party ordering the transcript. Costs of transcripts ordered by the Master in Chancery shall be shared equally by PARTY 1 and PARTY 2. The court reporter's notes shall, for purposes of appeal, be treated under the law as if they are the notes of the official court reporter of this Court.

IT IS AGREED AND THEREFORE ORDERED that the Master In Chancery is further authorized to hire a private security guard to stand in the place of the Court's bailiff, and each party shall pay one-half of any deposit required by the Master in Chancery and one-half of the security guard's bills, upon receipt by the party.

IT IS FURTHER ORDERED that the Master In Chancery shall have the power, in the ultimate ruling, to assess the costs associated with the Master In Chancery, including but not limited to, costs for the Master In Chancery, court reporter, security guard, or room rental.

IT IS ORDERED that the Master In Chancery is hereby authorized to conduct proceedings on any motions for contempt of court that may be filed, or any direct contempt of court that may occur in the presence of the Master In Chancery. The Master In Chancery will receive all evidence and will issue findings of fact on all material and pertinent issues of contested fact relating to the alleged contempt. The Master In Chancery will also issue conclusions of law applicable to the dispute, together with a recommendation on whether a contemnor should be held in contempt and, if so, what the terms of coercive contempt should be and what the punishment should be for criminal contempt of court. The Court shall retain the ultimate authority and whether to hold a person in contempt of court, and if so, then what fine to impose and whether to order confinement in jail, and for how long and any conditions of probation. IT IS ORDERED that a reporter's record shall be made of all contempt proceedings and shall be forwarded to the Court together with the recommendations of the Master In Chancery.

Regarding the merits of the case, the parties may, within thirty (30) days of the close of evidence, submit proposed judgments to the Master In Chancery. The Master In Chancery shall issue to the parties a proposed written judgment no later than sixty (60) days after the evidence is closed. The parties may object to or move to amend or set aside the proposed judgment issued by the Master In Chancery within thirty (30) days after it is issued by the Master In Chancery. The decision of whether or not to amend or set aside the proposed judgment shall be made by the Master In Chancery. At the time that the Master In Chancery issues a proposed judgment, the Master In Chancery will also issue findings of

fact on all material and significant disputed fact issues, and conclusions of law on all material and significant legal issues. Such findings are not limited to only ultimate issues of fact. The parties may make proposed findings of fact and conclusions of law at any time prior to issuance of the Master In Chancery's proposed judgment, and may object to the Master In Chancery's findings or conclusions or move for the Master In Chancery to amend his/her findings or conclusions within thirty (30) days after they are issued by the Master In Chancery. Findings and conclusions made by the Master In Chancery prior to this Court's signing the Judgment will not constitute findings and conclusions under Tex. R. Civ. P. 296, but the Master In Chancery may use such findings and conclusions as a basis for post-judgment Rule 296 findings and conclusions, if they are timely requested.

Between thirty (30) and sixty (60) days after the Master In Chancery issues his/her proposed judgment, the Master In Chancery shall issue his/her "final" proposed judgment, findings and conclusions, which shall be signed by the Master In Chancery and which the Master In Chancery shall file with the clerk of the court. With one exception, the parties have expressly waived de novo review by this Court of the findings and rulings of the Master In Chancery. The sole exception is that the Court may vacate or overrule the proposed "final" judgment of the Master In Chancery only where the proposed "final" judgment was obtained by corruption, fraud, or other undue means.

Upon motion of any party, or upon this Court's own Motion, this Court shall sign the Master In Chancery's proposed "final" judgment, thus making it the official final judgment of this Court. Any complaints of errors regarding mistakes of fact, law, procedure, evidence, or otherwise, can and must be addressed through resort to the Court of Appeals and Supreme Court, either by original proceeding or appeal.

Once a judgment is signed by the Court, the parties may utilize any post-judgment procedures, including without limitation motions for new trial or to modify judgment, and requests for findings of fact and conclusions of law. The Master In Chancery will decide such motions, issue such Rule 296 findings and conclusions, and otherwise resolve post-judgment disputes the same as could this Court. The Court will adopt the rulings of the Master In Chancery on these issues, by signing the Master In Chancery's proposed order on motion for new trial or motion to modify judgment, and the Master In Chancery's proposed Rule 296 findings and conclusions.

Signed the _____ day of August, 2008.

_____
JUDGE PRESIDING

AGREED AND APPROVED:

By: _____
PARTY 1

By: _____
Attorney for PARTY 1

By: _____
PARTY 2

By: _____
Attorney for PARTY 2

Hall Street Associates, L.L.C. v. Mattel, Inc.
U.S.,2008.

Supreme Court of the United States
HALL STREET ASSOCIATES, L.L.C., Petitioner,
v.
MATTEL, INC.
No. 06-989.

Argued Nov. 7, 2007.
Decided March 25, 2008.

Background: Lessor brought action against lessee and its predecessors, seeking order that lessee was required to meet its contractual lease obligations. The United States District Court for the District of Oregon, Robert E. Jones, J., 145 F.Supp.2d 1211, refused to enforce arbitration award. On appeal, the Ninth Circuit Court of Appeals, 113 Fed.Appx. 272, affirmed in part, reversed in part, and remanded. On remand, District Court again refused to enforce arbitration award, and plaintiff appealed. The Court of Appeals, 196 Fed.Appx. 476, reversed and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Souter, held that:
(1) grounds stated in the Federal Arbitration Act (FAA) either for vacating, or for modifying or correcting, arbitration award constitute the exclusive grounds for expedited vacatur and modification of arbitration award pursuant to provisions of the FAA; but
(2) case had to be remanded for consideration of whether arbitration agreement, having been entered into by parties in course of district court litigation, having been submitted to district court as request to deviate from the standard sequence of trial procedure, and having been adopted by district court as order, should be treated as exercise of district court's authority to manage its cases.

Vacated and remanded.

Justice Stevens filed a dissenting opinion, in which Justice Kennedy joined.

Justice Breyer filed a dissenting opinion.

West Headnotes

[1] Alternative Dispute Resolution 25T 114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases
Congress enacted the Federal Arbitration Act (FAA) to replace judicial indisposition to arbitration with a national policy favoring it, and to place arbitration agreements on equal footing with all other contracts. 9 U.S.C.A. § 1 et seq.

[2] Federal Courts 170B 198

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(C) Cases Arising Under Laws of the United States
170Bk198 k. Arbitration. Most Cited Cases
Federal Arbitration Act (FAA) does not bestow federal jurisdiction over controversies touching arbitration, but rather requires an independent jurisdictional basis. 9 U.S.C.A. § 1 et seq.

[3] Alternative Dispute Resolution 25T 362(2)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk360 Impeachment or Vacation
25Tk362 Grounds for Impeachment or Vacation
25Tk362(2) k. Limitation to Statutory Grounds. Most Cited Cases

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Grounds stated in the Federal Arbitration Act (FAA) either for vacating, or for modifying or correcting, arbitration award constitute the exclusive grounds for expedited vacatur and modification of arbitration award pursuant to provisions of the FAA; parties cannot, by contract, expand upon these grounds. 9 U.S.C.A. §§ 10, 11.

[4] Alternative Dispute Resolution 25T 119

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk118 Matters Which May Be Subject to Arbitration Under Law
25Tk119 k. In General. Most Cited Cases

Federal Arbitration Act (FAA) lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, and which issues are arbitrable, along with procedure and choice of substantive law. 9 U.S.C.A. § 1 et seq.

[5] Alternative Dispute Resolution 25T 362(2)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk360 Impeachment or Vacation
25Tk362 Grounds for Impeachment or Vacation
25Tk362(2) k. Limitation to Statutory Grounds. Most Cited Cases

Grounds stated in the Federal Arbitration Act (FAA) either for vacating, or for modifying or correcting, arbitration award address egregious departures from parties' agreed-upon arbitration. 9 U.S.C.A. §§ 10, 11.

[6] Statutes 361 194

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k194 k. General and Specific Words and Provisions. Most Cited Cases

Under rule of ejusdem generis, when statute sets out a series of specific items ending with general term, that general term is confined to covering subjects comparable to the specifics it follows.

[7] Alternative Dispute Resolution 25T 362(2)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk360 Impeachment or Vacation
25Tk362 Grounds for Impeachment or Vacation
25Tk362(2) k. Limitation to Statutory Grounds. Most Cited Cases

While the grounds stated in the Federal Arbitration Act (FAA) either for vacating, or for modifying or correcting, arbitration award provide the exclusive regimes for the review provided by statute, this is not to say that they exclude more searching review based on authority outside the statute as well. 9 U.S.C.A. §§ 10, 11.

[8] Alternative Dispute Resolution 25T 367

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk367 k. In General. Most Cited Cases

Federal Arbitration Act (FAA) is not the only way into court for parties wanting review of arbitration awards. 9 U.S.C.A. § 1 et seq.

[9] Alternative Dispute Resolution 25T 375

25T Alternative Dispute Resolution

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25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk375 k. Hearing and Determination in General. Most Cited Cases

Federal Courts 170B ⚷461

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk460 Review on Certiorari
170Bk461 k. Questions Not Presented Below or in Petition for Certiorari. Most Cited Cases

Federal Courts 170B ⚷462

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk462 k. Determination and Disposition of Cause. Most Cited Cases
While the Court of Appeals, in reversing district court order vacating arbitration award, properly found that grounds stated in the Federal Arbitration Act (FAA) either for vacating, or for modifying or correcting, arbitration award comprised the exclusive grounds for expedited vacatur and modification of arbitration award pursuant to provisions of the FAA, case had to be remanded for consideration of whether arbitration agreement, having been entered into by parties in course of district court litigation, having been submitted to district court as request to deviate from the standard sequence of trial procedure, and having been adopted by district court as order, should be treated as exercise of district court's authority to manage its cases, such that relief from arbitration award might be sought upon more than just the limited grounds permitted for expedited vacatur and modification under the FAA; issue could not be addressed for first time by the Supreme Court on certiorari. 9 U.S.C.A. §§ 10, 11; Fed.Rules Civ.Proc.Rule 16, 28 U.S.C.A.

***1398** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 9-11, provides expedited judicial review to confirm, vacate, or modify arbitration awards. Under § 9, a court "must" confirm an award "unless" it is vacated, modified, or corrected "as prescribed" in §§ 10 and 11. Section 10 lists grounds for vacating an award, including where the award was procured by "corruption," "fraud," or "undue means," and where the arbitrators were "guilty of misconduct," or "exceeded their powers." Under § 11, the grounds for modifying or correcting an award include "evident material miscalculation," "evident material mistake," and "imperfect[ions] in [a] matter of form not affecting the merits."

After a bench trial sustained respondent tenant's (Mattel) right to terminate its lease with petitioner landlord (Hall Street), the parties proposed to arbitrate Hall Street's claim for indemnification of the costs of cleaning up the lease site. The District Court approved, and entered as an order, the parties' arbitration agreement, which, *inter alia,* required the court to vacate, modify, or correct any award if the arbitrator's conclusions of law were erroneous. The arbitrator decided for Mattel, but the District Court vacated the award for legal error, expressly invoking the agreement's legal-error review standard and citing the Ninth Circuit's *LaPine* decision for the proposition that the FAA allows parties to draft a contract dictating an alternative review standard. On remand, the arbitrator ruled for Hall Street, and the District Court largely upheld the award, again applying the parties' stipulated review standard. The Ninth Circuit reversed, holding the

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case controlled by its *Kyocera* decision, which had overruled *LaPine* on the ground that arbitration-agreement terms fixing the mode of judicial review are unenforceable, given the exclusive grounds for vacatur and modification provided by FAA §§ 10 and 11.

Held:

1. The FAA's grounds for prompt vacatur and modification of awards are exclusive for parties seeking expedited review under the FAA. The Court rejects Hall Street's two arguments to the contrary. First, Hall Street submits that expandable judicial review has been accepted as the law since *Wilko v. Swan,* 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168. Although a *Wilko* statement-"the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation,"*id.,* at 436-437, 74 S.Ct. 182 (emphasis added)-arguably favors Hall Street's position, arguable is as far as it goes. Quite apart from the leap from a supposed judicial expansion by interpretation***1399** to a private expansion by contract, Hall Street overlooks the fact that the *Wilko* statement expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Moreover, *Wilko*'s phrasing is too vague to support Hall Street's interpretation, since "manifest disregard" can be read as merely referring to the § 10 grounds collectively, rather than adding to them, see, *e.g.,Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 656, 105 S.Ct. 3346, 87 L.Ed.2d 444, or as shorthand for the § 10 subsections authorizing vacatur when arbitrators were "guilty of misconduct" or "exceeded their powers." Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is motivated by a congressional desire to enforce such agreements. *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 220, 105 S.Ct. 1238, 84 L.Ed.2d 158. This argument comes up short because, although there may be a general policy favoring arbitration, the FAA has textual features at odds with enforcing a contract to expand judicial review once the arbitration is over. Even assuming §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand their uniformly narrow stated grounds to the point of legal review generally. But § 9 makes evident that expanding § 10's and § 11's detailed categories at all would rub too much against the grain: § 9 carries no hint of flexibility in unequivocally telling courts that they "must" confirm an arbitral award, "unless" it is vacated or modified "as prescribed" by §§ 10 and 11. Instead of fighting the text, it makes more sense to see §§ 9-11 as the substance of a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. *Dean Witter, supra,* at 217, 219, 105 S.Ct. 1238, distinguished. Pp. 1403 - 1406.

2. In holding the § 10 and § 11 grounds exclusive with regard to enforcement under the FAA's expedited judicial review mechanisms, this Court decides nothing about other possible avenues for judicial enforcement of awards. Accordingly, this case must be remanded for consideration of independent issues. Because the arbitration agreement was entered into during litigation, was submitted to the District Court as a request to deviate from the standard sequence of litigation procedure, and was adopted by the court as an order, there is some question whether it should be treated as an exercise of the District Court's authority to manage its cases under Federal Rule of Civil Procedure 16. This Court ordered supplemental briefing on the issue, but the parties' supplemental arguments implicate issues that have not been considered previously in this litigation and could not be well addressed for the first time here. Thus, the Court expresses no opinion on these matters beyond leaving them open for Hall Street to press on remand. Pp. 1406 - 1408.

196 Fed.Appx. 476, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and THOMAS, GINS-

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BURG, and ALITO, JJ., joined, and in which SCALIA, J., joined as to all but footnote 7. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined. BREYER, J., filed a dissenting opinion.

Carter G. Phillips, Virginia A. Seitz Sidley Austin LLP, Washington, D.C., ***1400**Michael T. Garone, Counsel of Record, Michael A. Cohen, Jay T. Waldron, Sara Kobak Schwabe, Williamson & Wyatt, P.C., Portland, OR, for Petitioner.
Shirley M. Hufstedler, Peter Hsiao, Morrison & Foerster LLP, Los Angeles, CA, Drew S. Days, III, Beth S. Brinkmann, Counsel of Record, Seth M. Galanter, Ketanji Brown Jackson Morrison & Foerster LLP, Washington, DC, for Respondent.
Michael T. Garone, Counsel of Record, Michael A. Cohen, Jay T. Waldron, Sara Kobak Schwabe, Williamson & Wyatt, P.C., Portland, OR, for Petitioner.For U.S. Supreme Court Briefs, see:2007 WL 2197585 (Pet.Brief)2007 WL 2731409 (Resp.Brief)2007 WL 3068189 (Reply.Brief)2007 WL 4244684 (Pet.Supp.Brief)2007 WL 4254420 (Pet.Supp.Brief)2007 WL 4244685 (Resp.Supp.Brief)2007 WL 4254419 (Resp.Supp.Brief)

Justice SOUTER delivered the opinion of the Court.[FN*]

FN* Justice SCALIA joins all but footnote 7 of this opinion.

The Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.*, provides for expedited judicial review to confirm, vacate, or modify arbitration awards. §§ 9-11 (2000 ed. and Supp. V). The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.

I

This case began as a lease dispute between landlord, petitioner Hall Street Associates, L.L.C., and tenant, respondent Mattel, Inc. The property was used for many years as a manufacturing site, and the leases provided that the tenant would indemnify the landlord for any costs resulting from the failure of the tenant or its predecessor lessees to follow environmental laws while using the premises. App. 88-89.

Tests of the property's well water in 1998 showed high levels of trichloroethylene (TCE), the apparent residue of manufacturing discharges by Mattel's predecessors between 1951 and 1980. After the Oregon Department of Environmental Quality (DEQ) discovered even more pollutants, Mattel stopped drawing from the well and, along with one of its predecessors, signed a consent order with the DEQ providing for cleanup of the site.

After Mattel gave notice of intent to terminate the lease in 2001, Hall Street filed this suit, contesting Mattel's right to vacate on the date it gave, and claiming that the lease obliged Mattel to indemnify Hall Street for costs of cleaning up the TCE, among other things. Following a bench trial before the United States District Court for the District of Oregon, Mattel won on the termination issue, and after an unsuccessful try at mediating the indemnification claim, the parties proposed to submit to arbitration. The District Court was amenable, and the parties drew up an arbitration agreement, which the court approved and entered as an order. One paragraph of the agreement provided that

> "[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the ***1401** arbitrator's conclusions of law are erroneous." App. to Pet. for Cert. 16a.

Arbitration took place, and the arbitrator decided for Mattel. In particular, he held that no indemnification was due, because the lease obligation to follow all applicable federal, state, and local environ-

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mental laws did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act (Oregon Act); that Act the arbitrator characterized as dealing with human health as distinct from environmental contamination.

Hall Street then filed a District Court Motion for Order Vacating, Modifying And/Or Correcting the arbitration decision, App. 4, on the ground that failing to treat the Oregon Act as an applicable environmental law under the terms of the lease was legal error. The District Court agreed, vacated the award, and remanded for further consideration by the arbitrator. The court expressly invoked the standard of review chosen by the parties in the arbitration agreement, which included review for legal error, and cited *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (C.A.9 1997), for the proposition that the FAA leaves the parties "free ... to draft a contract that sets rules for arbitration and dictates an alternative standard of review." App. to Pet. for Cert. 46a.

On remand, the arbitrator followed the District Court's ruling that the Oregon Act was an applicable environmental law and amended the decision to favor Hall Street. This time, each party sought modification, and again the District Court applied the parties' stipulated standard of review for legal error, correcting the arbitrator's calculation of interest but otherwise upholding the award. Each party then appealed to the Court of Appeals for the Ninth Circuit, where Mattel switched horses and contended that the Ninth Circuit's recent en banc action overruling *LaPine* in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (2003), left the arbitration agreement's provision for judicial review of legal error unenforceable. Hall Street countered that *Kyocera* (the later one) was distinguishable, and that the agreement's judicial review provision was not severable from the submission to arbitration.

The Ninth Circuit reversed in favor of Mattel in holding that, "[u]nder *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable." 113 Fed.Appx. 272, 272-273 (2004). The Circuit instructed the District Court on remand to

> "return to the application to confirm the original arbitration award (not the subsequent award revised after reversal), and ... confirm that award, unless ... the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." *Id.*, at 273.

After the District Court again held for Hall Street and the Ninth Circuit again reversed,[FN1] we granted certiorari to decide whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive. 550 U.S. ----, 127 S.Ct. 2875, 167 L.Ed.2d 1151 (2007). We agree with the Ninth Circuit that they are, but vacate and remand for consideration of independent issues.

> FN1. On remand, the District Court vacated the arbitration award, because it supposedly rested on an implausible interpretation of the lease and thus exceeded the arbitrator's powers, in violation of 9 U.S.C. § 10. Mattel appealed, and the Ninth Circuit reversed, holding that implausibility is not a valid ground for vacating or correcting an award under § 10 or § 11. 196 Fed.Appx. 476, 477-478 (2006).

***1402** II

[1][2] Congress enacted the FAA to replace judicial indisposition to arbitration with a "national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). As for jurisdiction over controversies touching arbitration, the Act does nothing, being "something of an anomaly in the field of federal-court jurisdiction" in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*,

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460 U.S. 1, 25, n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); see, *e.g.*,9 U.S.C. § 4 (providing for action by a federal district court "which, save for such [arbitration] agreement, would have jurisdiction under title 28").[FN2] But in cases falling within a court's jurisdiction, the Act makes contracts to arbitrate "valid, irrevocable, and enforceable," so long as their subject involves "commerce." § 2. And this is so whether an agreement has a broad reach or goes just to one dispute, and whether enforcement be sought in state court or federal. See *ibid.; Southland Corp. v. Keating,* 465 U.S. 1, 15-16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

FN2. Because the FAA is not jurisdictional, there is no merit in the argument that enforcing the arbitration agreement's judicial review provision would create federal jurisdiction by private contract. The issue is entirely about the scope of judicial review permissible under the FAA.

The Act also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. §§ 9-11. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court.[FN3] § 6. Under the terms of § 9, a court "must" confirm an arbitration award "unless" it is vacated, modified, or corrected "as prescribed" in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.[FN4]

FN3. Unlike Justice STEVENS, see *post,* at 1408 - 1409 (dissenting opinion), we understand this expedited review to be what each of the parties understood it was seeking from time to time; neither party's pleadings were amended to raise an independent state-law contract claim or defense specific to the arbitration agreement.

FN4. Title 9 U.S.C. § 10(a) (2000 ed., Supp. V) provides:

"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

"(1) where the award was procured by corruption, fraud, or undue means;

"(2) where there was evident partiality or corruption in the arbitrators, or either of them;

"(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

"(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Title 9 U.S.C. § 11 (2000 ed.) provides:

"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, un-

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less 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."

***1403** [3] The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement.[FN5] As mentioned already, when this litigation started, the Ninth Circuit was on the threshold side of the split, see *LaPine*, 130 F.3d, at 889, from which it later departed en banc in favor of the exclusivity view, see *Kyocera*, 341 F.3d, at 1000, which it followed in this case, see 113 Fed.Appx., at 273. We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification.

FN5. The Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (C.A.9 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (C.A.10 2001). The First, Third, Fifth, and Sixth Circuits, meanwhile, have held that parties may so contract. See *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (C.A.1 2005); *Jacada (Europe), Ltd. v. International Marketing Strategies, Inc.*, 401 F.3d 701, 710 (C.A.6 2005); *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 288 (C.A.3 2001); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997 (C.A.5 1995). The Fourth Circuit has taken the latter side of the split in an unpublished opinion, see *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (1997), while the Eighth Circuit has expressed agreement with the former side in dicta, see *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-998 (1998).

III

Hall Street makes two main efforts to show that the grounds set out for vacating or modifying an award are not exclusive, taking the position, first, that expandable judicial review authority has been accepted as the law since *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). This, however, was not what *Wilko* decided, which was that § 14 of the Securities Act of 1933 voided any agreement to arbitrate claims of violations of that Act, see *id.*, at 437-438, 74 S.Ct. 182, a holding since overruled by*Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Although it is true that the Court's discussion includes some language arguably favoring Hall Street's position, arguable is as far as it goes.

The *Wilko* Court was explaining that arbitration would undercut the Securities Act's buyer protections when it remarked (citing FAA § 10) that "[p]ower to vacate an [arbitration] award is limited,"346 U.S., at 436, 74 S.Ct. 182, and went on to say that "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation,"*id.*, at 436-437, 74 S.Ct. 182. Hall Street reads this statement as recognizing "manifest disregard of the law" as a further ground for vacatur on top of those listed in § 10, and some Circuits have read it the same way. See, *e.g.*,*McCarthy v. Citigroup Global Markets, Inc.*, 463 F.3d 87, 91 (C.A.1 2006); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (C.A.2 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-396 (C.A.5 2003); *Scott v. Pruden-*

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tial Securities, Inc., 141 F.3d 1007, 1017 (C.A.11 1998). Hall Street sees this supposed addition to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties.

***1404** But this is too much for *Wilko* to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. See, *e.g.*,*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (STEVENS, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207"); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 431 (C.A.2 1974). Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." See, *e.g.*,*Kyocera, supra*, at 997. We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

[4] Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). But, again, we think the argument comes up short. Hall Street is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

[5][6] To that particular question we think the answer is yes, that the text compels a reading of the §§ 10 and 11 categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] ... powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted;" the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just ***1405** any legal error. "Fraud" and a mistake of law are not cut from the same cloth.

That aside, expanding the detailed categories would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order con-

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firming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.[FN6]

FN6. Hall Street claims that § 9 supports its position, because it allows a court to confirm an award only "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." Hall Street argues that this language "expresses Congress's intent that a court must enforce the agreement of the parties as to whether, and under what circumstances, a judgment shall be entered." Reply Brief for Petitioner 5; see also Brief for Petitioner 22-24. It is a peculiar argument, converting agreement as a necessary condition for judicial enforcement into a sufficient condition for a court to bar enforcement. And the text is otherwise problematical for Hall Street: § 9 says that if the parties have agreed to judicial enforcement, the court "must grant" confirmation unless grounds for vacatur or modification exist under § 10 or § 11. The sentence nowhere predicates the court's judicial action on the parties' having agreed to specific standards; if anything, it suggests that, so long as the parties contemplated judicial enforcement, the court must undertake such enforcement under the statutory criteria. In any case, the arbitration agreement here did not specifically predicate entry of judgment on adherence to its judicial-review standard. See App. to Pet. for Cert. 15a. To the extent Hall Street argues otherwise, it contests not the meaning of the FAA but the Ninth Circuit's severability analysis, upon which it did not seek certiorari.

In fact, anyone who thinks Congress might have understood § 9 as a default provision should turn back to § 5 for an example of what Congress thought a default provision would look like:

> "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator ... such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, ... then upon the application of either party to the controversy the court shall designate and appoint an arbitrator....."

"[I]f no method be provided" is a far cry from "must grant ... unless" in § 9.

Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,"*Kyocera*, 341 F.3d, at 998; cf. *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 184 (C.A.7 1985), and bring arbitration theory to grief in post-arbitration process.

Nor is *Dean Witter*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158, to the contrary, as Hall Street claims it to be. *Dean Witter* held that state-law claims subject to an agreement to arbitrate could not be remitted to a district court considering a related, nonarbitrable federal claim; the state-law claims were to go to arbitration immediately. *Id.*, at 217, 105 S.Ct. 1238. Despite the opinion's language "reject[ing] the suggestion that the overriding goal of the [FAA] was to promote the expeditious ***1406** resolution of claims,"*id.*, at 219, 105

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S.Ct. 1238, the holding mandated immediate enforcement of an arbitration agreement; the Court was merely trying to explain that the inefficiency and difficulty of conducting simultaneous arbitration and federal-court litigation was not a good enough reason to defer the arbitration, see *id.*, at 217, 105 S.Ct. 1238.

When all these arguments based on prior legal authority are done with, Hall Street and Mattel remain at odds over what happens next. Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them. See, *e.g.*, Brief for Petitioner 39; Brief for New England Legal Foundation et al. as *Amici Curiae* 15. One of Mattel's *amici* foresees flight from the courts if it is. See Brief for U.S. Council for Int'l Business as *Amicus Curiae* 29-30. We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.[FN7]

FN7. The history of the FAA is consistent with our conclusion. The text of the FAA was based upon that of New York's arbitration statute. See S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) ("The bill ... follows the lines of the New York arbitration law enacted in 1920 ..."). The New York Arbitration Law incorporated pre-existing provisions of the New York Code of Civil Procedure. See 1920 N.Y. Laws p. 806. Section 2373 of the code said that, upon application by a party for a confirmation order, "the court must grant such an order, unless the award is vacated, modified, or corrected, as prescribed by the next two sections." 2 N.Y. Ann.Code Civ. Proc. (Stover 6th ed.1902) (hereinafter Stover). The subsequent sections gave grounds for vacatur and modification or correction virtually identical to the 9 U.S.C. §§ 10 and 11 grounds. See 2 Stover §§ 2374, 2375.

In a brief submitted to the House and Senate Subcommittees of the Committees on the Judiciary, Julius Henry Cohen, one of the primary drafters of both the 1920 New York Act and the proposed FAA, said, "The grounds for vacating, modifying, or correcting an award are limited. If the award [meets a condition of § 10], then and then only the award may be vacated. ... If there was [an error under § 11], then and then only it may be modified or corrected ...." Arbitration of Interstate Commercial Disputes, Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess., 34 (1924). The House Report similarly recognized that an "award may ... be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form." H.R.Rep. No. 96, 68th Cong., 1st Sess., 2 (1924).

In a contemporaneous campaign for the promulgation of a uniform state arbitration law, Cohen contrasted the New York Act with the Illinois Arbitration and Awards Act of 1917, which required an arbitrator, at the request of either party, to submit any question of law arising during arbitration to judicial determination. See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 97-98 (1924); 1917 Ill. Laws p. 203.

IV

[7][8][9] In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the

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statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

Although one such avenue is now claimed to be revealed in the procedural ***1407** history of this case, no claim to it was presented when the case arrived on our doorstep, and no reason then appeared to us for treating this as anything but an FAA case. There was never any question about meeting the FAA § 2 requirement that the leases from which the dispute arose be contracts "involving commerce." 9 U.S.C. § 2; see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (§ 2"exercise[s] Congress' commerce power to the full"). Nor is there any doubt now that the parties at least had the FAA in mind at the outset; the arbitration agreement even incorporates FAA § 7, empowering arbitrators to compel attendance of witnesses. App. to Pet. for Cert. 13a.

While it is true that the agreement does not expressly invoke FAA § 9, § 10, or § 11, and none of the various motions to vacate or modify the award expressly said that the parties were relying on the FAA, the District Court apparently thought it was applying the FAA when it alluded to the Act in quoting *LaPine*, 130 F.3d, at 889, for the then-unexceptional proposition that " '[f]ederal courts can expand their review of an arbitration award beyond the FAA's grounds, when ... the parties have so agreed.' " App. to Pet. for Cert. 46a. And the Ninth Circuit, for its part, seemed to take it as a given that the District Court's direct and prompt examination of the award depended on the FAA; it found the expanded-review provision unenforceable under *Kyocera* and remanded for confirmation of the original award "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." 113 Fed.Appx., at 273. In the petition for certiorari and the principal briefing before us, the parties acted on the same premise. See, *e.g.*, Pet. for Cert. 27 ("This Court should accept review to resolve this important issue of statutory construction under the FAA"); Brief for Petitioner 16 ("Because arbitration provisions providing for judicial review of arbitration awards for legal error are consistent with the goals and policies of the FAA and employ a standard of review which district courts regularly apply in a variety of contexts, those provisions are entitled to enforcement under the FAA").

One unusual feature, however, prompted some of us to question whether the case should be approached another way. The arbitration agreement was entered into in the course of district-court litigation, was submitted to the District Court as a request to deviate from the standard sequence of trial procedure, and was adopted by the District Court as an order. See App. 46-47; App. to Pet. for Cert. 4a-8a. Hence a question raised by this Court at oral argument: should the agreement be treated as an exercise of the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16? See, *e.g.*, Tr. of Oral Arg. 11-12. Supplemental briefing at the Court's behest joined issue on the question, and it appears that Hall Street suggested something along these lines in the Court of Appeals, which did not address the suggestion.

We are, however, in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA. The parties' supplemental arguments on the subject in this Court implicate issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 *et seq.*, none of which has been considered previously in this litigation, or could be well addressed for the first time here. We express no opinion on these matters beyond leaving them

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open for Hall Street to press on remand. If the Court of Appeals finds ***1408** they are open, the court may consider whether the District Court's authority to manage litigation independently warranted that court's order on the mode of resolving the indemnification issues remaining in this case.

* * *

Although we agree with the Ninth Circuit that the FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11, we vacate the judgment and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice KENNEDY joins, dissenting.

May parties to an ongoing lawsuit agree to submit their dispute to arbitration subject to the caveat that the trial judge should refuse to enforce an award that rests on an erroneous conclusion of law? Prior to Congress' enactment of the Federal Arbitration Act (FAA or Act) in 1925, the answer to that question would surely have been "Yes." [FN1]Today, however, the Court holds that the FAA does not merely authorize the vacation or enforcement of awards on specified grounds, but also forbids enforcement of perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court. Because this result conflicts with the primary purpose of the FAA and ignores the historical context in which the Act was passed, I respectfully dissent.

FN1. See *Klein v. Catara,* 14 F. Cas. 732, 735 (C.C.D.Mass.1814) ("If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please") (Story, J.).

Prior to the passage of the FAA, American courts were generally hostile to arbitration. They refused, with rare exceptions, to order specific enforcement of executory agreements to arbitrate.[FN2] Section 2 of the FAA responded to this hostility by making written arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. § 2. This section, which is the centerpiece of the FAA, reflects Congress' main goal in passing the legislation: "to abrogate the general common-law rule against specific enforcement of arbitration agreements,"*Southland Corp. v. Keating,* 465 U.S. 1, 18, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (STEVENS, J., concurring in part and dissenting in part), and to "ensur[e] that private arbitration agreements are enforced according to their terms,"*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Given this settled understanding of the core purpose of the FAA, the interests favoring enforceability of parties' arbitration agreements are stronger today than before the FAA was enacted. As such, there is more-and certainly not less-reason to give effect to parties' fairly negotiated decisions to provide for judicial review of arbitration awards for errors of law.

FN2. See *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 120-122, 44 S.Ct. 274, 68 L.Ed. 582 (1924); *The Atlanten,* 252 U.S. 313, 315-316, 40 S.Ct. 332, 64 L.Ed. 586 (1920). Although agreements to arbitrate were not specifically enforceable, courts did award nominal damages for the breach of such contracts.

Petitioner filed this rather complex action in an Oregon state court. Based on the diverse citizenship of the parties, respondent removed the case to federal court. More than three years later, and after some issues had been resolved, the parties sought and obtained the District ***1409** Court's approval of their agreement to arbitrate the remaining issues subject to *de novo* judicial review. They neither requested, nor suggested that the FAA authorized, any "expedited" disposition of their case. Because

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the arbitrator made a rather glaring error of law, the judge refused to affirm his award until after that error was corrected. The Ninth Circuit reversed.

This Court now agrees with the Ninth Circuit's (most recent) interpretation of the FAA as setting forth the exclusive grounds for modification or vacation of an arbitration award under the statute. As I read the Court's opinion, it identifies two possible reasons for reaching this result: (1) a supposed *quid pro quo* bargain between Congress and litigants that conditions expedited federal enforcement of arbitration awards on acceptance of a statutory limit on the scope of judicial review of such awards; and (2) an assumption that Congress intended to include the words "and no other" in the grounds specified in §§ 10 and 11 for the vacatur and modification of awards. Neither reason is persuasive.

While § 9 of the FAA imposes a 1-year limit on the time in which any party to an arbitration may apply for confirmation of an award, the statute does not require that the application be given expedited treatment. Of course, the premise of the entire statute is an assumption that the arbitration process may be more expeditious and less costly than ordinary litigation, but that is a reason for interpreting the statute liberally to favor the parties' use of arbitration. An unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute.

That purpose also provides a sufficient response to the Court's reliance on statutory text. It is true that a wooden application of "the old rule of *ejusdem generis*,"*ante*, at 1404, might support an inference that the categories listed in §§ 10 and 11 are exclusive, but the literal text does not compel that reading-a reading that is flatly inconsistent with the overriding interest in effectuating the clearly expressed intent of the contracting parties. A listing of grounds that must always be available to contracting parties simply does not speak to the question whether they may agree to additional grounds for judicial review.

Moreover, in light of the historical context and the broader purpose of the FAA, §§ 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' "valid, irrevocable and enforceable" agreements to arbitrate their disputes subject to judicial review for errors of law.[FN3] § 2.

FN3. In the years before the passage of the FAA, arbitration awards were subject to thorough and broad judicial review. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L.Rev. 265, 270-271 (1926); Cullinan, Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements, 51 Vand. L.Rev. 395, 409 (1998). In §§ 10 and 11 of the FAA, Congress significantly limited the grounds for judicial vacatur or modification of such awards in order to protect arbitration awards from hostile and meddlesome courts.

Even if I thought the narrow issue presented in this case were as debatable as the conflict among the courts of appeals suggests, I would rely on a presumption of overriding importance to resolve the debate and rule in favor of petitioner's position that the FAA permits the statutory grounds for vacatur and modification of an award to be supplemented by contract. A decision "*not to regulate*" the terms of an agreement that does not even arguably offend any public policy whatsoever, "is ***1410** adequately justified by a presumption in favor of freedom." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 320, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (STEVENS, J., concurring in judgment).

Accordingly, while I agree that the judgment of the Court of Appeals must be set aside, and that there may be additional avenues available for judicial enforcement of parties' fairly negotiated review provisions, see, *ante*, at 1406 - 1408, I respectfully dissent from the Court's interpretation of the FAA, and would direct the Court of Appeals to affirm the judgment of the District Court enforcing the arbitrator's final award.

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Justice BREYER, dissenting.

The question presented in this case is whether "the Federal Arbitration Act ...*precludes* a federal court from enforcing" an arbitration agreement that gives the court the power to set aside an arbitration award that embodies an arbitrator's mistake about the law. Pet. for Cert. i. Like the majority and Justice STEVENS, and primarily for the reasons they set forth, I believe that the Act does not *preclude* enforcement of such an agreement. See *ante*, at 1406 - 1407 (opinion of the Court) (The Act "is not the only way into court for parties wanting review of arbitration awards"); *ante*, at 1409 - 1410 (STEVENS, J., dissenting) (The Act is a "shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law").

At the same time, I see no need to send the case back for further judicial decisionmaking. The agreement here was entered into with the consent of the parties and the approval of the District Court. Aside from the Federal Arbitration Act itself, 9 U.S.C. § 1 *et seq.*, respondent below pointed to no statute, rule, or other relevant public policy that the agreement might violate. The Court has now rejected its argument that the agreement violates the Act, and I would simply remand the case with instructions that the Court of Appeals affirm the District Court's judgment enforcing the arbitrator's final award.

U.S.,2008.
Hall Street Associates, L.L.C. v. Mattel, Inc.
128 S.Ct. 1396, 2008 A.M.C. 1058, 170 L.Ed.2d 254, 76 USLW 4168, 08 Cal. Daily Op. Serv. 3313, 2008 Daily Journal D.A.R. 3997, 21 Fla. L. Weekly Fed. S 121

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