



Judicial Review of Arbitration Awards

By **Ronald N. Ricketts**

Arbitration is considered to be quicker and less expensive than litigation. But many hesitate to use arbitration because the statutory grounds for the judicial review of an award are extremely narrow. The Federal Arbitration Act (FAA) requires the court to confirm an arbitration award unless the award was procured by “corruption”, “fraud”, “undue means”, or where the arbitrators were “guilty of misconduct” or have “exceeded their powers”. 9 U.S.C. § 10. In the absence of one of these statutory grounds “even serious errors of law or fact will not subject ... [an arbitrator’s] award to vacatur”. *Oxford Health Plans LLC v. Sutter*, 675 F.3d 215, 220 (3rd Cir. 2012). Section 11 of the FAA limits the grounds for modifying or correcting an award to “evident material miscalculation”, “evident material mistake”, and “imperfect[ions] in [a] matter of form not affecting the merits”.

This had raised the question: Can parties who want to arbitrate, but at the same time want to protect themselves against an erroneous award, contractually provide to have the federal court review the award on grounds broader than those provided in the FAA? For example, can they contract for judicial review of plain error of law or fact? Before 2008 the U. S. Courts of Appeals had been split over the exclusiveness of the FAA statutory grounds. Some held the grounds were exclusive, others held the grounds were open to expansion. The U.S. Supreme Court resolved the issue in *Hall Street Associates L.L.C. v. Mattel, Inc.*, 522 U.S. 576 (2008) by ruling that parties cannot contract to have judicial review of an arbitration award on any grounds

broader than those set out in the FAA. The Supreme Court explained in *Hall Street* that limited judicial review “maintain[s] arbitration’s essential virtue of resolving disputes straight away ...” and that “full-bore legal and evidentiary appeals,” would result in arbitration becoming “merely a prelude to a more cumbersome and time consuming judicial review process.” 552 U.S. at 588.

In *Wilko v. Swan*, 346 U.S. 427 (1953) the Supreme Court stated that “the interpretations of the law by arbitrators *in contrast* to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation,” *Wilko*, 346 U.S. at 436-437 (emphasis added). *Wilko* resulted in all of the Circuit Courts of Appeal accepting “manifest disregard of the law” as a valid, judicially created, non-statutory basis for the vacatur of an arbitrators award. The effect of the *Hall Street* decision on manifest disregard as a basis to vacate an award under the FAA is uncertain.

The Supreme Court did not expressly nullify the “manifest disregard of the law” standard in its *Hall Street* opinion. But it questioned whether “manifest disregard” was simply intended to be a shorthand method for referring to the FAA § 10 grounds collectively, rather than creating an additional ground for review. And later in *Stolt-Nielsen S.A. v. Animal Feeds Int’l. Corp.*, 559 US 662 (2010), the Supreme Court stepped back from issue stating: “We do not decide whether “manifest disregard” survives our decision in *Hall Street Associates*, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.” *Stolt-Nielsen SA*, 559 at fn. 3 The question after the *Hall Street* decision is whether, under the FAA, manifest disregard of the law remains valid as a non-statutory ground for vacatur.

Following the *Hall Street* decision the Circuit Courts have been divided over the survival of the “manifest disregard” standard. The First, Fifth and Eleventh Circuits have held it is no longer a valid grounds for vacatur because the FAA’s grounds are exclusive. The Second and

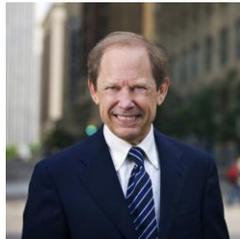
Ninth Circuits have held that “manifest disregard” now exists only as a shorthand or judicial gloss for FAA § 10(a)(3) and (4). The Sixth Circuit has concluded manifest disregard survives since *Hall Street* only prohibited private parties from contracting for greater judicial review. The Fourth Circuit has decided manifest disregard continues to exist either as an independent ground or as judicial gloss, but it stopped short of deciding which of the two.

Even before the uncertainty created by the *Hall Street* decision, the manifest disregard of the law standard set a very high bar for the judicial review of an award under the FAA. The record must reveal the arbitrator’s error to be obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator, and the term “disregard” implies the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it. *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003).

Opportunities do exist to circumvent the limited judicial review under the FAA, and the judicially created manifest disregard standard, if it still exists. The Supreme Court acknowledged in *Hall Street* that “[t]he 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 a different [broader] scope is arguable.” *Hall Street*, 552 U.S. at 590. This recognizes that even in those instances involving interstate commerce where the FAA would normally apply, the parties in the arbitration agreement can expressly provide that the arbitration will be conducted under state law principles rather than the FAA. The state principles will trump the preemptive effect of the FAA so long as those principles do not conflict with the FAA’s prime directive that agreements to arbitrate be enforced. *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989). Only a handful of state

cases have addressed the issue of whether parties can contract for expanded judicial review under the state arbitration statutes. Because of this limited case law, the Uniform Arbitration Act (2000) takes the position that the “parties remain free to agree to contractual review of challenged awards, on whatever grounds and based on whatever standards they deem appropriate until the [state] courts finally determine the propriety of such clauses.” Official Comment B to Uniform Arbitration Act (2000) (U.L.A.) § 23.

A second method to broaden the review of an arbitration award beyond statutory grounds is to contract in the arbitration agreement to have an appellate arbitration panel review the award and provide the grounds for the appellate panels review. That provides a meaningful second-look at an arbitration award even in instances where the FAA applies.



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