

RECONSIDERING ARBITRATION: EVALUATING THE FUTURE OF THE MANIFEST DISREGARD DOCTRINE

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I. INTRODUCTION

Any litigant who seeks to evade the reach of an arbitration agreement quickly discovers that it binds the parties in two ways: the parties must go through the arbitration process, and they must comply with the arbitration award. Unfortunately, parties sometimes face arbitrator misconduct. In particular, reported cases exist in which the arbitrator failed to follow the law, based on a personal belief that the case law was wrong. Until recently, a remedy for this type of arbitrator misconduct existed. A losing party could appeal arbitration awards by establishing “manifest disregard of the law,” a judicially created doctrine that provides a check on situations in which the arbitrator is aware of the applicable law but refuses to follow it.

A recent U.S. Supreme Court has cast doubt on the applicability and scope of the manifest disregard doctrine. In *Hall Street Assocs., LLC v. Mattel, Inc.*,¹ the Court found that parties to an arbitration agreement could not supplement, by contract, the statutory grounds for challenging an arbitration award. The arbitration agreement in *Hall Street* permitted independent judicial review of the arbitrators’ legal reasoning and factual conclusions. The Court’s holding invalidated this contractual provision, finding that the parties could not contract for vacatur grounds more expansive than those permitted by the Federal Arbitration Act. Unfortunately, in referring to the enforcement provisions of the Act as “exclusive,” the Court called into doubt a long line of cases holding that a party could seek to vacate an arbitration decision where the arbitrator exhibited a manifest disregard for the law.

The consequences of the *Hall Street* decision remain unclear. The Supreme Court did not answer whether judicially-created grounds for vacatur of an arbitration award remain valid. Furthermore, although the Court acknowledged the existence of the manifest disregard doctrine, it failed to

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¹ 128 S. Ct. 1396 (2008).

state whether the doctrine would continue to exist. In fact, the Court debated the exact meaning of manifest disregard, but failed to reach a conclusion. Instead, the Court provided several possible definitions for the term. The Court noted that the term “manifest disregard” was perhaps meant to name an independent ground for review. The term might, however, refer to all of the statutory grounds for vacatur collectively. Or, “manifest disregard” may have been shorthand for the Act’s specific subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.”²

Federal courts have roughly split three ways on the question of whether manifest disregard survives *Hall Street*. The Sixth Circuit maintains that the doctrine has been utilized by all circuits, has been put through the test of litigation repeatedly, and that the Supreme Court did not cast aside the standard.³ In the opinion of the Sixth Circuit, no reason exists to abandon the doctrine.⁴ The Second Circuit seems to indicate that there may be some life left in a modified, or perhaps re-conceptualized, doctrine.⁵ Meanwhile, the Fifth Circuit has declared that the manifest disregard doctrine, as anything other than a term of art describing statutory exemptions, is dead.⁶ Because of the split among the Circuit Courts of Appeal, it is only a matter of time before the question reaches the Supreme Court for final resolution.⁷

This article begins with a brief examination of the Federal Arbitration Act and the standards for enforcement of arbitration awards by federal courts. The article then examines the bases for challenging arbitration awards (statutory grounds as well as the common law manifest disregard doctrine), including the past and present usage of the manifest disregard doctrine. The article concludes by examining possible courses of action and my proposed solution.

² *Id.* at 1404.

³ *Coffee Beanery, Ltd. v. WW, LLC.*, 300 F. App’x 415 (6th Cir. 2008).

⁴ *Id.* at 418.

⁵ *Stolt-Nielsen SA v. Animal Feeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008), *rev’d on other grounds*, 130 S. Ct. 1758 (2010).

⁶ *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

⁷ As discussed below, the Supreme Court issued its decision in *Stolt-Nielsen* in April 2010. The appeal was limited to the question of class actions in arbitration matters, and therefore the Court did not reach the issue of manifest disregard.

II. JUDICIAL ENFORCEMENT OF ARBITRATION AWARDS

A. *Historically, Courts Were Hostile to the Arbitration System*

Prior to passage of the Federal Arbitration Act (FAA) in 1925, the judicial system occasionally exhibited resentment toward arbitration.⁸ The idea of a private court system seemed wrong – how could a judicial system work if the parties were able to contract their way out of it?⁹ In an effort to combat judges’ hostility to the arbitration agreement, Congress created a statutory scheme designed to overcome judicial resistance to arbitration,¹⁰ and declared a national policy favoring arbitration of claims that parties contracted to settle in that manner.¹¹

The goal of the FAA was to put arbitration agreements on the same footing as other contracts.¹² To that end, section 2 of the Act states that arbitration agreements in contracts involving commerce are “valid, irrevocable, and enforceable.”¹³ The Act provides that petitions to compel arbitration may be brought before “any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties.”¹⁴

B. *Federal Arbitration Act Required Courts to Enforce Arbitration Awards*

1. Act Provided Very Few Exceptions to the Enforcement of Arbitration Awards

The drafters of the Act were aware that an arbitration award may only be enforced by judicial intervention. Therefore, the Act makes suitable provisions for enforcement of an arbitration award. Section 4 provides that any U.S. district court may enforce arbitration agreements. The Act also provides a method for prevailing parties to file a motion for confirmation of the award by a federal court, and an opportunity for judicial review to confirm, vacate, or modify arbitration awards.

⁸ Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 516 (2009).

⁹ Jonathan A. Marcantel, *The Crumbled Difference Between Legal And Illegal Arbitration Awards: Hall Street Associates And The Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 600 (2009).

¹⁰ *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006).

¹¹ *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (quoting *Southland Corp. v. Keating*, 104 S. Ct. 852 (1984)).

¹² Marcantel, *supra* note 9, at 602.

¹³ 9 U.S.C. § 2.

¹⁴ *Id.*

2. Overview of the Act's Enforcement Provisions

The enforcement provisions of the Act are primarily found in sections 9, 10, and 11. Section 9 restricts the discretion of the court in its consideration of arbitration awards. Under section 9, a court must confirm an award unless it is vacated, modified, or corrected as prescribed in sections 10 and 11.¹⁵ Sections 10 and 11 provide the grounds for vacatur and modification. Section 10 of the Act permits a court to vacate an arbitration award only under certain conditions:

- (a) Where the award was procured by corruption, fraud, or undue means;
- (b) Where there was evident partiality or corruption by the arbitrators;
- (c) 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 another misbehavior by which the rights of any party have been prejudiced or;
- (d) Where the arbitrators exceeded their power or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.¹⁶

Under section 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.”¹⁷

C. Courts Created a Common Law Exception

The Act's enforcement provisions have traditionally been narrowly construed. While an appeals court reviews a confirmation of an arbitration award *de novo*, the review of the underlying arbitration award is “exceedingly deferential.”¹⁸ Historically, a court would upset an arbitration award only under limited circumstances.¹⁹ In fact, even awards based on errors in law or fact were routinely enforced.²⁰

¹⁵ Hall St. Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1403 (2008).

¹⁶ 9 U.S.C. § 10.

¹⁷ 9 U.S.C. § 11.

¹⁸ Apache Bohai v. Texaco China BV, 480 F.3d 397 (2007); *see also* Brabham v. A.G. Edwards & Sons, Inc., 376 F.3d 377, 380 (5th Cir. 2004).

¹⁹ *Id.*

²⁰ *Id.*

The statutory grounds for vacatur require egregious departures from the arbitration as agreed between the parties.²¹ Vacatur is generally proper only with evidence of procedural irregularities.²² To successfully challenge an arbitral award, the party must demonstrate that the error complained of "was made in bad faith or was so gross as to amount to affirmative misconduct."²³ Some commentators suggest that courts have followed such strict rules of construction to preserve the Congressional intent underlying passage of the FAA.²⁴

Faced with strict construction of the statute, courts have struggled to cope with the problem of an arbitrator who refuses to apply the applicable law. Courts responded by crafting an exception. The manifest disregard doctrine was devised to address "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent"²⁵ but which did not fall within the statutory exceptions.

The manifest disregard doctrine most likely derives from an odd statement in *Wilko v. Swan*.²⁶ In that case, the Supreme Court noted in dicta that "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."²⁷ Lower courts seized upon this peculiar phrase to build a new platform to address severe arbitrator misconduct. Despite this somewhat shaky foundation, federal courts leveraged the *Wilko* dicta to develop a new theory of vacatur that existed independently of the statute.

Although widely believed to be judicially created, there is some doubt as to the source of the manifest disregard doctrine. Some commentators argue that the concept of "manifest disregard" springs from the statute itself. As discussed more below, in the wake of *Hall Street*, the Second Circuit seemed to find that the concept of "manifest disregard" existed within the statute.²⁸

Nevertheless, it is much more likely that judges created the manifest disregard doctrine. Some maintain that the common law origins of the

²¹ *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct., 1396, 1405 (2008).

²² *Haw. Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001) ("Our task is, in essence, to review the procedural soundness of the arbitral decision, not its substantive merit.").

²³ *TIG Ins. Co. v. Global Int'l Reinsurance Co.*, 640 F. Supp. 2d 519, 523 (S.D.N.Y. 2009).

²⁴ Jonathan A. Marcantel, *The Crumbled Difference Between Legal And Illegal Arbitration Awards: Hall Street Associates And The Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597 (2009).

²⁵ *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003).
²⁶ 346 U.S. 427, 436-37 (1953).

²⁷ *Wilko*, 346 U.S. at 437 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

²⁸ See *Stolt-Nielsen SA v. Animal Feeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

manifest disregard standard are evident.²⁹ To these commentators, manifest disregard does not comfortably fit within the boundaries of FAA Section 10(a)(3) or 10(a)(4). The majority views holds that the “statutory manifest disregard solution is implausible.”³⁰ According to mainstream analysis, courts consistently “understood manifest disregard to be a creature of case law . . . analytically distinct from any of the FAA vacatur grounds.”³¹

D. Operation of the Manifest Disregard Doctrine

Arbitration awards are subject to extremely limited review. Doing so avoids “undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.”³² Where an arbitrator acted within his authority in making an award, the arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached. “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.”³³

Manifest disregard is often referred to as “a doctrine of last resort” – reserved for use in “those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply.”³⁴ The party seeking to vacate an award on the basis of the arbitrator’s alleged manifest disregard of the law bears a “heavy burden.”³⁵ A good reason exists for the rarity of vacatur: “The parties agreed to submit their dispute to arbitration, more likely than not to enhance efficiency, to reduce costs, or to maintain control over who would settle their disputes and how – or some combination thereof.”³⁶ As the *Hall Street* court noted, permitting expansive review of arbitral awards would fail to “maintain arbitration’s essential virtue of resolving disputes straightaway.”³⁷

Manifest disregard means “more than error or misunderstanding with respect to the law.”³⁸ The manifest disregard analysis consists of two steps.

²⁹ Hiro Arigaki, *The Mess of Manifest Disregard*, 119 Yale L.J. Online 1 (2009).
<http://www.yalelawjournal.org/2009/09/29/aragaki.html>.

³⁰ *Id.*

³¹ *Id.*

³² *Folkways Music Publishers v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993); see *Wedbush Morgan Secs., Inc. v. Robert W. Baird & Co.*, 320 F. Supp. 2d 123 (S.D.N.Y. 2004).

³³ *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 526 (2d Cir. 2005).

³⁴ *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004).

³⁵ *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003).

³⁶ *Stolt-Nielsen SA*, 548 F.3d 85, 92. See also *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 138-39 (2d Cir. 2007).

³⁷ *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008).

³⁸ *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003).

First, an average person qualified to serve as an arbitrator must have been able to easily perceive the error to be obvious.³⁹ 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.⁴⁰ The governing law must be “well-defined, explicit, and clearly applicable.”⁴¹

Second, manifest disregard requires not only that the arbitrator made an error, but that the error was “obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.” The correct governing law must have been “well defined, explicit, and clearly applicable,” and the arbitrator must have exhibited “willful inattentiveness” suggesting that they “appreciate[d] the existence of a clearly governing principle but decide[d] to ignore or pay no attention to it.”⁴²

Manifest disregard may be best illustrated by the case of *New York Telephone Co. v. Communications Workers of America Local 1100*.⁴³ In that case, the arbitrator recognized binding Second Circuit case law but deliberately refused to apply it, concluding, “perhaps it is time for a new court decision.”⁴⁴ Because the arbitrator explicitly rejected controlling precedent, the court found that the arbitral decision was rendered in manifest disregard of the law.⁴⁵

III. UNCERTAIN FUTURE OF THE MANIFEST DISREGARD DOCTRINE

A. Impact of *Hall Street* on the Manifest Disregard Doctrine

In *Hall Street*, a landlord sued its tenant for indemnification and cleanup of a pollutant. The Court confronted the specific issue of whether the statutory grounds for prompt vacatur and modification of an arbitration award could be supplemented by contract.⁴⁶ The parties’ arbitration clause permitted the district court to modify or vacate the arbitration award if substantial evidence did not support the findings of facts or if the arbitrator’s conclusions of law were erroneous. The Court found that the parties could not craft a provision whereby judicial review would include legal error. Rather, the parties’ only remedy lay in the statutory grounds provided by the FAA.⁴⁷ The *Hall Street* Court limited the rights of parties to negotiate a

³⁹ *Apache Bohai v. Texaco China BV*, 480 F.3d 397, 403 (2007).

⁴⁰ *Id.*

⁴¹ *Prestige Ford*, 324 F.3d at 395.

⁴² *Id.*

⁴³ 256 F.3d 89 (2d Cir. 2001) (per curiam).

⁴⁴ *Id.* at 91.

⁴⁵ *Id.* at 93.

⁴⁶ *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

⁴⁷ 9 U.S.C. § 1 et seq.

greater standard of judicial review than that permitted by the FAA. Thus, the decision limited the ability of courts to interfere with arbitration awards.

The *Hall Street* court found that the Act's legislative history indicated that Congress intended the statutory grounds for vacatur and modification to be the exclusive means for setting aside or changing an arbitration award. The Court recalled a brief submitted by one of the primary drafters of the Act, which said, "The grounds for vacating, modifying, or correcting an award are limited. If the award [meets a condition of section 10], then and then only the award may be vacated. . . . If there was [an error under section 11], then and then only it may be modified or corrected."⁴⁸

Accordingly, the Supreme Court found that sections 10 and 11 provide the exclusive means of vacating an arbitration award.⁴⁹ The decision leaves the parties to an arbitration agreement unable to agree privately as to the standard of review for arbitration awards following entry of the decision.

B. *The Circuit Courts of Appeal Have Reacted Differently to the Hall Street Decision*

1. Some Courts Maintain that the Manifest Disregard Doctrine Should Survive

Faced with the uncertain language found in *Hall Street*, federal courts have been forced to decide what to do about manifest disregard. One of the first appellate circuits to face this issue, the Sixth Circuit, held that manifest disregard would survive *Hall Street*. In an unpublished opinion, the Sixth Circuit expressly limited *Hall Street*'s holding about the exclusivity of the statutory grounds of vacatur to contractual expansion. This narrow interpretation of *Hall Street* permits continued use of judicially-created, nonstatutory grounds to challenge arbitration awards.⁵⁰ While acknowledging that a court's ability to vacate an arbitration award is almost exclusively limited to the statutory grounds, the *Coffee Beanery* court reiterated that the Sixth Circuit has long held that an award found to be in manifest disregard of the law may be vacated.⁵¹ The *Coffee Beanery* court noted that although the Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than the statutory grounds, it did not remove completely the ability of federal courts to review

⁴⁸ *Hall Street*, 128 S.Ct. at 1406 n.7.

⁴⁹ *Id.* at 1403.

⁵⁰ *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008).

⁵¹ *Id.* at 418.

awards to determine if the arbitrator had entered the award with a manifest disregard of the law.⁵²

The *Coffee Beanery* court recalled that in *Wilko*, the Supreme Court recognized judicial review based on manifest disregard of the law. Moreover, the Supreme Court did not reach a conclusion “regarding the precise meaning of *Wilko*, holding only that *Wilko* could not be read to allow parties to expand the scope of judicial review by their own agreement.”⁵³ Because the Court did not specifically negate its *Wilko* holding, the Sixth Circuit maintained that the manifest disregard doctrine lives on. The *Coffee Beanery* court found in the Supreme Court’s decision a “hesitation to reject the ‘manifest disregard’ doctrine in all circumstances.”⁵⁴ Because the manifest disregard standard was well established and “universally recognized” the Sixth Circuit concluded they would continue to use the standard.⁵⁵

Recently, in another unpublished opinion, the Sixth Circuit again held that the manifest disregard doctrine remains viable.⁵⁶ In that case, the parties each assumed that the manifest disregard standard remained a valid ground for vacating an arbitration award.⁵⁷ Although the Sixth Circuit acknowledged the possible complications introduced by *Hall Street*, the court ignored those complications. Presumably because the parties did not differ on the question of the continued existence of manifest disregard, the court decided the case without questioning whether the standard applied.

In the Sixth Circuit’s only published decision on the matter of manifest disregard, the court chose not to address the question of the doctrine’s survival. In *Grain v. Trinity Health, Mercy Health Services Inc.*,⁵⁸ the appellant sought modification rather than vacatur of an arbitral award. The court, perhaps wisely, interpreted Sixth Circuit precedent to apply the manifest disregard doctrine only to vacatur, and thus inapplicable to a claim for modification.⁵⁹ The court thus nimbly avoided addressing the manifest disregard directly.

It remains to be seen whether this optimistic construction of the survival of the manifest disregard doctrine will persist. The Sixth Circuit’s decisions appear to conflict with the Supreme Court’s statement in *Hall Street* that the statutory bases of vacatur are “exclusive.” Furthermore, because the Sixth Circuit’s statements on manifest disregard since *Hall Street* have been in

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 419.

⁵⁵ *Id.* at 412.

⁵⁶ *Martin Marietta Materials, Inc. v. Bank of Okla.*, 304 F. App’x 360, 362-63 (6th Cir. 2008).

⁵⁷ *Id.*

⁵⁸ 551 F.3d 374 (6th Cir. 2008).

⁵⁹ *Id.* at 380.

unpublished opinions, the Sixth Circuit's ultimate resolution of the issue is uncertain.

2. Other Courts Have Preserved the Doctrine to a Limited Extent

Other courts have adopted a more creative approach to preserve manifest disregard. Understanding the basis for this interpretation requires a bit of background. In *Wise v. Wachovia Securities, LLC*,⁶⁰ the Seventh Circuit (which has not faced manifest disregard since *Hall Street*) explained that the Act does not actually provide for review of arbitrators' decisions:

It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc. – conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration ... the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause.⁶¹

According to this analysis, the Act concerns only the enforcement of the parties' agreement to arbitrate. When faced with the question of whether to enforce an arbitration award, courts are therefore not bound by the Act. It follows then that when a court vacates an arbitration agreement on the basis of manifest disregard, it does not do so as an alternative to the statutory grounds.

In addressing the question of the continued existence of manifest disregard, the Second Circuit built on the Seventh Circuit's pre-*Hall Street* analysis. In *Stolt-Nielsen SA v. Animal Feeds International Corp.*,⁶² the Second Circuit reasoned that because the parties are presumed "not [to] agree in advance to submit to arbitration that is carried out in manifest disregard of the law," arbitrators who manifestly disregard the law exceed their powers. Accordingly, those decisions may be vacated under section 10(a)(4).

⁶⁰ 450 F.3d 265, 269 (7th Cir. 2006).

⁶¹ *Id.*

⁶² 548 F.3d 85, 95 (2d Cir. 2008).

The *Stolt-Nielsen* court recognized that its holding conflicted with its prior statements regarding manifest disregard. Previously, the Second Circuit followed a strict construction of the Act, but permitted parties to challenge the award based on the independent ground of manifest disregard. The *Stolt-Nielsen* court reconciled this conflict by discounting its previous statements as dicta.⁶³ Instead of concluding that *Hall Street* eliminated manifest disregard as a ground for vacatur under the FAA, the court reasoned that manifest disregard of the law should be “reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA.”⁶⁴ In other words, the court expanded its interpretation of section 10 to include the concept of manifest disregard.

We must therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.⁶⁵

There is logic to the Second Circuit’s analysis. Arbitrators who reach a conclusion in manifest disregard of the law “failed to interpret the contract at all.”⁶⁶ Parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. The arbitrators have thereby “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”⁶⁷ Under this approach, the statutory grounds of vacatur have expanded in a manner roughly proportional to the restriction of nonstatutory grounds under *Hall Street*. The appeal of this line of reasoning is obvious. Using the term manifest disregard in this manner is consistent with at least the *Hall Street* text, if not its intent.⁶⁸

⁶³ *Id.* (“[Hall Street’s] holding is undeniably inconsistent with some dicta by this Court treating the ‘manifest disregard’ standard as a ground for vacatur entirely separate from those enumerated in the FAA.”).

⁶⁴ *Id.* at 93

⁶⁵ *Id.* at 95.

⁶⁶ *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006).

⁶⁷ 9 U.S.C § 10(a)(4).

⁶⁸ It also is consistent with the treatment, in at least some courts, of other judicially-created grounds for vacatur as special cases of arbitrators exceeding their powers. *See, e.g.,* *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 383 n.8 (5th Cir. 2004) (explaining that the superficially nonstatutory requirement “that an arbitration decision must ‘draw its essence’ from the agreement it construes” derives from § 10(a)(4)). Arguably, the Second Circuit’s reliance on the contract comports with the overall message sent by the Supreme Court in reversing *Stolt-Nielsen*. In that case, in ruling that the arbitration panel could not order a class action arbitration, the Court relied on the fact that the arbitration contract was silent as to class actions. According to the Supreme Court, without a basis in the contract, the arbitrators were

The Ninth Circuit agrees. Following a Seventh Circuit-type analysis, the Ninth Circuit treated manifest disregard as shorthand for a ground for vacatur under § 10(a)(4) even before *Hall Street*. In a decision following the Supreme Court's decision in *Hall Street*, the Ninth Circuit concluded that manifest disregard in that circuit will carry on roughly as before.⁶⁹

3. Other Courts Believe the Manifest Disregard Doctrine is Dead

In *Ramos-Santiago v. United Parcel Service*,⁷⁰ the First Circuit interpreted *Hall Street* broadly. In one of the earliest comments on the continued existence of manifest disregard, the First Circuit offered in a footnote that, because of *Hall Street*, “manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award” in cases applying the Act.⁷¹

The most recent federal circuit to enter the debate is the Fifth Circuit. In the case of *Citigroup Global Mkts., Inc. v. Bacon*,⁷² the court stated that manifest disregard of the law “as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected,” that the term manifest disregard “is no longer useful in actions to vacate arbitration awards,” and that “from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in section 10.”⁷³ The *Citigroup* court took the opportunity to review the holdings of other courts on the question of manifest disregard.⁷⁴ The Fifth Circuit rejected the Sixth Circuit's analysis as failing to heed the *Hall Street* Court's description of the statutory grounds as exclusive.⁷⁵

The *Citigroup* court also engaged in a lengthy review of the Second and Ninth Circuit's conception of manifest disregard post-*Hall Street*. The Court failed to address whether the *substance* of manifest disregard, as a broader interpretation of the statutory grounds, would survive. Instead, the *Citigroup* court remanded the case for consideration of statutory grounds of vacatur without explaining whether manifest disregard can be considered as a statutory ground.⁷⁶

acting outside the scope of their powers. *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

⁶⁹ *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

⁷⁰ 524 F.3d 120, 124 n.3 (1st Cir. 2008).

⁷¹ *Id.* This statement seems especially strong, given the Supreme Court's suggestions that manifest disregard might survive in some form.

⁷² 562 F.3d 349 (5th Cir. 2009).

⁷³ *Id.* at 356-58.

⁷⁴ See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

⁷⁵ *Id.*

⁷⁶ *Id.* at 358.

IV. PROPOSED SOLUTION

A. *Hall Street* Decision Provides Three Options

According to the *Hall Street* Court, there were three possible meanings for “manifest disregard.” The terms could refer to (1) a new ground for review, (2) “the § 10 grounds collectively, rather than adding to them,” or (3) acted as “shorthand for § 10(a)(3) or § 10(a)(4).” Some have suggested that the Supreme Court’s suggestions hinted that the court did not intend to abrogate the manifest disregard doctrine at all.⁷⁷ Of special importance, is the first suggestion, which seemed to propose that manifest disregard could stand on its own as a ground for vacatur.⁷⁸

The Court seemingly approved its own previous acceptance of the *Wilko*-inspired manifest disregard language. “We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment.”⁷⁹ The Supreme Court’s position was consistent with previous decisions. For example, in the case of *First Options of Chicago, Inc. v. Kaplan*,⁸⁰ the Court acknowledged manifest disregard as a possible justification for the vacatur of an arbitration award.⁸¹ In fact, the *First Options* court specifically cited manifest disregard as an independent basis for vacatur, separate from the statutory grounds found in section 10.⁸² The Supreme Court’s willingness to cite manifest disregard in *First Options*, coupled with the absence of language in *Hall Street* disowning the previous stance, may indicate a willingness to accept a form of manifest disregard, in line with what the Sixth Circuit has proposed.

Further evidence of the Supreme Court’s amenability to the doctrine may be established by reference to the *Hall Street* opinion itself, where it noted opinions out of the First, Second, Fifth, and Eleventh Circuits – each opinion acknowledging the validity of manifest disregard as a standard permitting the vacatur of an arbitration award.⁸³ Presumably, had the Supreme Court truly intended to abrogate the doctrine, it would have singled out these cases for special comment. It did not do so.

One might also argue that the focus of the *Hall Street* decision was on correcting the fundamental issue in that case: the agreement to expanded judicial review, including the right of the parties to have the district court examine whether the arbitrator committed an error of law. As noted above,

⁷⁷ *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 115 S. Ct. 1920 (1995).

⁸¹ *Id.* at 1923.

⁸² *Id.*

⁸³ *Hall Street*, 128 S.Ct. at 1403.

manifest disregard is a much higher standard than mere mistake of law. An arbitrator who commits a simple mistake of law does not commit manifest disregard.

Nevertheless, one would be hard-pressed to find that the Supreme Court was giving some sort of back-handed blessing of manifest disregard. The language of the decision specifically noted that a court must grant the confirmation of an arbitration award “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11.”⁸⁴ It would be fair to say that use of the word “exclusive” means what it says it means—the Court made it plain that these sections are the exclusive remedy for complaints regarding an arbitration award. It follows that, in the same manner that parties are prevented from expanding the grounds for judicial review, courts may not increase the scope of review.

Similarly, one should not draw too much comfort from the Supreme Court’s language that it was leaving manifest disregard as it found it.⁸⁵ Despite its inconclusive language, the *Hall Street* decision certainly carried the overtone that manifest disregard, as an independent, extra-statutory ground for the vacatur, would not survive much longer.

One may thus be tempted, given the language used in *Hall Street*, as well as the directive issued by the Fifth Circuit, to declare that the phrase “manifest disregard” should no longer be used and may be confidently thrown upon the ash heap of jurisprudential history. Nevertheless, the fact remains that, prior to the *Hall Street* decision, every federal appellate court permitted the vacatur of an award based on an arbitrator’s manifest disregard of the law.⁸⁶ Perhaps then, as the Sixth Circuit noted, it is premature to dispose of the standard at this point. “In light of the Supreme Court’s hesitation to reject the “manifest disregard” doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle.”⁸⁷ What then should courts do?

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See cases cited in *Coffee Beanery, Ltd. v. WW, LLC.*, 300 F. App’x 415, 419 (6th Cir. 2008); *McCarthy v. Citigroup Global Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoefv. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3rd Cir. 2003); *Three S Delaware Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007); *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008); *Manion v. Nagin*, 392 F.3d 294, 298 (8th Cir. 2004); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Dominion Video Satellite, Inc. v. Echostar Satellite LLC*, 430 F.3d 1269, 1275 (10th Cir. 2005); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998).

⁸⁷ *Coffee Beanery, Ltd. v. WW, LLC.*, 300 F. App’x 415, 419 (6th Cir. 2008).

1. Accept that Manifest Disregard, as an Independent Basis for Appeal, is Gone

There are three possible options in regard to manifest disregard. Perhaps the easiest course would be to follow the reasoning of the First and Fifth circuits and accept that manifest disregard, as an independent ground for the vacatur of an arbitration award, is gone. Opting for this path would have comparatively little effect – numerous cases each year are appealed, alleging manifest disregard, but that ground is rarely sufficient to overturn an award. For the most part, doing away with the manifest disregard theory would result in few injustices. And, one could argue, doing away would the standard would provide a positive benefit. The system may see a sizable decrease in the number of arbitration awards that are challenged, as the parties lose an appellate theory. Disgruntled litigants may prove more willing to accept their losses, in the knowledge that the last ditch appeal is gone.

The disadvantage to this option, of course, is that the egregious errors – the types of mistakes for which the doctrine was created – remain uncorrected. A party on the wrong side of arbitrator misconduct would find itself with no recourse and no opportunity for appeal. Moreover, as arbitration agreements find their way into more and more exchanges, where a great disparity of power exists, the chance exists of greater unfairness. While the benefits of arbitration are many, one of those benefits should not include the ability to take advantage of such a situation.

2. Continue to Use the Doctrine as a Reconceptualization of the Statutory Grounds for Vacatur

The second option would be to continue the use of the doctrine, regardless of the *Hall Street* decision. Litigants would continue to cite the doctrine as a basis for their challenge to the award; courts would continue to reject the vast majority of manifest disregard claims. A court could, however, rely on the option for those few situations where an arbitrator was aware of the relevant law, but for whatever reason, failed to apply it. Even easier, the innovative analysis of the Second and Ninth Circuits provides a legitimate basis for continued use of the doctrine.

There is a disadvantage to this approach. The Supreme Court has signaled its opposition to any expansion of the Act. The First and Fifth Circuits have announced that they will no longer accept the use of manifest disregard. While it may be possible to pretend that manifest disregard survived *Hall Street*, and perhaps to read enough tea leaves to determine that from omissions in the opinion, the fact remains that manifest disregard as a doctrine will likely not survive the next time it comes before the court.

3. Create a Statutory Ground for Vacatur

A solution that has been little discussed to date would provide the optimum solution. Congress should add manifest disregard to the statute. Addition of language providing for judicial review would resolve the issue. Addition of the statutory language would not significantly increase litigation – federal courts have been able to address the current amount of litigation, even in a time when every court recognizes the doctrine. There is much to be said for language embracing the public policy underlying manifest disregard. Lower courts would receive the benefit of greater clarity, and a further developed, robust doctrine would no doubt develop.

Adding manifest disregard to the statute is not unprecedented. In 2003, the Georgia Legislature amended its arbitration code to add an additional statutory ground for vacatur of arbitration awards: “manifest disregard of the law.”⁸⁸ In Georgia, the law was changed in response to a Georgia Supreme Court decision reversing a decision that vacated an arbitration award on the basis of manifest disregard of the law.⁸⁹ Though some have criticized this addition to the statute,⁹⁰ there is no evidence to indicate that Georgia courts have been overly burdened with arbitration appeals. The statutory addendum appears to be doing exactly what it meant to do.

This proposed statutory solution is simple, elegant, and unlikely to cause disruption to the system in place. Adding manifest disregard to the Act provides courts with an authoritative, statutory basis for doing what they are already doing – analyzing arbitration awards to determine whether the award was a result of the arbitrator ignoring applicable law. The amended statute would not require extensive interpretation – the meaning of “manifest disregard” is already clear. Courts will not struggle with a new concept.

B. Recognized Standard Should Not be Disposed of Easily

Should the standard be eliminated? Its popularity as a basis for the appeal of an arbitration award cannot be denied. While manifest disregard is often cited, it rarely results in an overturned decision. Its ready availability, combined with its lack of success, seems to point to the needless inflation of litigation, with its higher costs. Maintenance of the manifest disregard

⁸⁸ O.C.G.A. § 9-9-13 (2003).

⁸⁹ *Progressive Data Sys., Inc. v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 474 (Ga. 2002).

⁹⁰ See Note: “*A Manifest Disregard Of Arbitration?*” *An Analysis Of Recent Georgia Legislation Adding “Manifest Disregard Of The Law” To The Georgia Arbitration Code As A Statutory Ground For Vacatur*, 39 GA. L. REV. 259 (2004).

doctrine may encourage the same number, or perhaps an even greater number, of appeals.

Though, to be fair, one might also reason that eliminating manifest disregard will have little effect on the number of lawsuits or the length of litigation. One might also suppose that litigation may actually increase as parties are less willing to enter into arbitration agreements. It is a fair assumption that arbitration awards are challenged as part of an overall strategy to encourage settlement, with little belief that the appeal will pay off. Certainly, any attorney would be aware of the limited chance of success of an appeal based on manifest disregard. So it makes little sense to believe that similar challenges would no longer be filed.

The manifest disregard standard has a long history. Born of a small phrase found in the *Wilko* opinion, the doctrine has provided an important failsafe mechanism. It has been heavily litigated and developed. It fills an important role in the law and therefore should remain a part of the law.

V. CONCLUSION

The manifest disregard doctrine is widely understood yet rarely imposed. It acts as a failsafe, only brought into play when some element of fundamental unfairness exists. It does not weaken the arbitration system; it strengthens the system by encouraging trust and confidence. The existence of the manifest disregard standard permits parties to enter into arbitration agreements, confident that they will be bound by the law and not by the arbitrary whims of an arbitrator.

