

THE OTHER AVENUES OF *HALL STREET* AND PROSPECTS FOR  
JUDICIAL REVIEW OF ARBITRAL AWARDS

by  
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*In Hall Street Associates, L.L.C. v. Mattel, Inc., the U.S. Supreme Court held that the Federal Arbitration Act (FAA) provided the exclusive grounds for judicial vacatur and modification of arbitral awards covered under the Act. In so ruling, the Court rejected the contention that the FAA's requirement to enforce arbitration contracts as written includes private contracts that seek to expand the scope of judicial review beyond the grounds enumerated in the FAA. Despite holding that parties cannot expand a court's power to review an arbitration award under the FAA, the Court alluded to the possibility of "other possible avenues" for judicial review of arbitration awards. This decision arguably raised more questions than it answered. For example, did Hall Street limit a court's power to review an arbitral award for a judicially recognized standard of manifest disregard of the law or violation of public policy? Can parties achieve essentially the same result through creative drafting, such as provisions that limit the scope of an arbitrator's powers to render only factually or legally correct decisions? Are state courts bound by the FAA's narrow modification and review standards, and Hall Street's interpretation thereof? This Article analyzes these questions and considers Hall Street's impact on arbitration practice and judicial willingness and ability to review arbitral awards.*

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## I. INTRODUCTION

United States Supreme Court arbitration jurisprudence of the past 30 years is regarded as decidedly pro-arbitration and as establishing the Federal Arbitration Act’s (FAA) call to enforce private agreements to arbitrate “according to their terms,” an instruction to uphold parties’ contractual freedom to resolve disputes in arbitration.<sup>1</sup> By definition, arbitration is a matter of private contract.<sup>2</sup> Rather than submit disputes to a judicial forum, with the attendant procedural rules and rights to appeal, arbitration offers parties the flexibility to define their own

<sup>1</sup> FAA, 9 U.S.C. §§ 1–16 (2006). *See, e.g., id.* § 2 (declaring that an arbitration agreement shall be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (“[T]he overriding goal of the [FAA] was to promote . . . the enforcement . . . of privately negotiated arbitration agreements.”); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (describing a basic purpose of the FAA to be to ensuring that “commercial arbitration agreements . . . are enforced according to their terms” (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989))).

<sup>2</sup> STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 4 (2d ed. 2006) (“The core of arbitration is not simplicity, though most who choose that forum escape from the convolutions of the courtroom. Nor is reduced expense the essence of arbitration, though few would quarrel with trimming counsel fees. The central element of arbitration is the intention of the parties as expressed in the arbitration agreement. The agreement determines the process.” (quoting Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49, 51 (1997))).

process, applicable rules, and scope for the arbitration.<sup>3</sup> By private contract, the parties may also determine the scope of the arbitrator's powers. In arbitration, parties agree to submit an existing or future dispute for final and binding determination to a non-judicial arbitral forum. Thus, another hallmark of arbitration is its finality. The privacy and finality of the arbitral forum, however, have experienced considerable detours through the public judicial system, as questions about the freedom and process of contractual arbitration continue to percolate.

In its 2008–2009 term, the Supreme Court issued five important decisions specifically involving arbitration and the application and scope of the FAA.<sup>4</sup> The first among these cases included questions regarding a union's ability to waive a member's right to a judicial forum through a clear provision in a collective bargaining contract.<sup>5</sup> In two cases which raised separate jurisdictional questions under the FAA, the Court ruled that non-signatories to an arbitration agreement may have standing to seek interlocutory review of a district court's denial to stay litigation of a matter referable to arbitration,<sup>6</sup> and, secondly, that a federal district court lacked jurisdiction to compel arbitration of a state law debt collection lawsuit involving a federal substantive law counterclaim.<sup>7</sup> The Court also determined that the FAA preempted the California Talent Agencies Act (TAA)<sup>8</sup> and thus mandated enforcement of a contract requiring arbitration in a dispute between a television artist and his attorney, who allegedly acted as an unlicensed talent agent, although the

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<sup>3</sup> THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 11 (2d ed. 2009) (“By entering into an arbitration contract, the parties voluntarily abandon their right to judicial relief and, in effect, create a private system of adjudication that presumably is better adapted to their transactional needs.”).

<sup>4</sup> 9 U.S.C. §§ 1–16 (2006).

<sup>5</sup> 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009) (holding that “a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.”). *But cf.*, Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998) (holding that any waiver of an employee's statutory rights for federal claims of employment discrimination resulting from a collective bargaining agreement must be “explicitly stated” and “clear and unmistakable”); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51–52 (1974) (holding that “there can be no prospective waiver of an employee's rights under Title VII” and that a Title VII claim is not lost if previously submitted to arbitration).

<sup>6</sup> Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1903 (2009) (holding that FAA authorizes interlocutory review from a denial of a motion to stay litigation pending arbitration and that non-parties may have standing to request a stay if permitted under state law).

<sup>7</sup> Vaden v. Discover Bank, 129 S. Ct. 1262 (2009) (holding that federal court jurisdiction to compel arbitration under section 4 of the FAA requires an underlying basis of federal court subject matter jurisdiction; applying the “well-pleaded complaint” rule and affirming that counterclaims based on federal law do not provide an independent basis for federal court jurisdiction).

<sup>8</sup> CAL. LAB. CODE ANN. §§ 1700–1700.47 (West 2003).

TAA lodged exclusive jurisdiction of such disputes in a state labor agency.<sup>9</sup>

But the single case from this term that has generated the most controversy, commentary, and lingering questions is *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>10</sup> In *Hall Street*, the Court confronted the question of whether private parties can contractually agree to expand the scope of judicial review of an arbitral award beyond those grounds enumerated in the FAA.<sup>11</sup> In addition to providing for the enforcement of arbitration agreements, the FAA provides for judicial confirmation, vacatur, and modification of arbitral awards in sections 9, 10, and 11, respectively.<sup>12</sup> In *Hall Street*, the Court answered this question in the negative, holding that the FAA's grounds for prompt vacatur and modification of arbitral awards are the exclusive grounds for parties seeking expedited review under the FAA.<sup>13</sup>

The *Hall Street* ruling seemed to contravene the principles of party autonomy and contractual freedom to decide the process and standards for resolving private disputes that hallmark arbitration.<sup>14</sup> In so ruling, the Court rejected the contention that the FAA's requirement to enforce arbitration contracts as written includes private contracts that seek judicial review beyond the grounds stated in the FAA.

In the aftermath of *Hall Street*, parties and courts continue to grapple with its implication for arbitration contracts and judicial review of arbitral awards in state and federal courts. The decision arguably raised more questions than it answered. For example, did *Hall Street* limit a court's power to review an arbitral award for a judicially recognized standard of manifest disregard of the law or violation of public policy? Can parties achieve essentially the same result through creative drafting, by including provisions that limit an arbitrator's powers to render factually or legally correct decisions? Are state courts bound by the FAA's narrow modification and review standards and *Hall Street's* interpretation thereof? In short, what are the "other possible avenues" for judicial review of arbitration awards?<sup>15</sup>

This Article reflects upon *Hall Street*, in particular, analyzing how and whether the ruling has changed or affected arbitration practice and

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<sup>9</sup> *Preston v. Ferrer*, 128 S. Ct. 978, 981–82, 987 (2008) (holding that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative").

<sup>10</sup> 128 S. Ct. 1396 (2008).

<sup>11</sup> *Id.* at 1400.

<sup>12</sup> *Id.* at 1402.

<sup>13</sup> *Id.* at 1403.

<sup>14</sup> See, e.g., Matthew M. Mitzner, *Snatching Arbitral Freedom from Hall Street's Clenched Fist*, 29 REV. LITIG. 179, 180 (2009) (asserting that *Hall Street* had the effect of taking the free-market based system of contractual arbitration to "a take-it-or-leave-it bargain").

<sup>15</sup> *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1406.

examining its impact upon judicial willingness or ability to review arbitral awards and upon arbitral practices.

## II. THE FAA AND CONTRACTUAL PROVISIONS FOR LEGAL ERROR REVIEW

### A. *The Federal Arbitration Act*

Arbitration is a widely used method for resolving disputes in business, employment, consumer, and international transactions. Increasingly, arbitrators are called upon to resolve high-dollar business disputes that involve complex factual and legal issues. While desiring the potential benefits of arbitration's informality, speed, and finality, many business clients are also concerned about arbitral awards that are based upon erroneous interpretations or applications of the facts or law, or that are just outright egregious. As a safeguard against arbitral error, some parties to arbitration contracts have included provisions that purport to limit the arbitrator's powers to rule in accordance with the law or that provide for judicial review for an arbitrator's legal error.<sup>16</sup>

In these scenarios, the freedom of contract in arbitration collides with the presumption of arbitration finality. The FAA is the primary federal statute which governs the enforceability of arbitration agreements involving interstate commerce and awards. Section 2 of the FAA provides for the enforcement of agreements to arbitrate and establishes a strong national policy in favor of arbitration.<sup>17</sup> The FAA's remaining provisions set forth a procedural framework for the enforcement of arbitration agreements and awards. The FAA authorizes federal district courts to stay litigation pending arbitration,<sup>18</sup> to compel arbitration,<sup>19</sup> and to confirm, vacate, or modify an arbitral award.<sup>20</sup> Section 10 of the FAA sets forth an enumerated category of grounds upon which a court may vacate an arbitral award, such as for fraud, arbitrator misconduct, or arbitrator abuse of authority.<sup>21</sup> These grounds are narrower than the standards for

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<sup>16</sup> See Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429 (2004) (noting arbitration user concerns about "maverick arbitrators" or egregious awards that are clearly legally and factually wrong).

<sup>17</sup> 9 U.S.C. § 2 (2006) (stating that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

<sup>18</sup> *Id.* § 3 (providing for a stay of a lawsuit brought "in any of the courts of the United States" where any issue therein can be referred to arbitration).

<sup>19</sup> *Id.* § 4.

<sup>20</sup> *Id.* §§ 9–11.

<sup>21</sup> In its entirety, section 10 states as grounds for vacation of arbitral awards:  
(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;

appellate review in a judicial case where a court reviews a lower court's legal rulings de novo and factual findings for clear error.<sup>22</sup> However, many courts have vacated arbitral awards on grounds not provided in the FAA, such as where the award was made in manifest disregard of the law or in violation of public policy.

The FAA seems consistent in promoting arbitration finality, by ensuring the enforcement of agreements to arbitrate and by limiting the grounds upon which a court may review or vacate an arbitral award. But the question raised in *Hall Street* tested whether the grounds for judicial review of arbitration awards under the FAA may be varied by private contract or by courts themselves.

B. *Hall Street Associates, L.L.C. v. Mattel, Inc.*

1. *Lower Courts' Review of the Contract's Legal Error Standard*

The underlying facts in *Hall Street* involved a lease dispute over Mattel's right as a tenant to terminate a lease and Mattel's obligation to indemnify Hall Street, the landlord, for any costs incurred as a result of failure to follow environmental laws.<sup>23</sup> Hall Street sued Mattel initially in state court; however, Mattel removed to federal district court in Oregon on diversity of citizenship jurisdictional grounds.<sup>24</sup> The district court ruled in favor of Mattel on the issue of Mattel's right to terminate the lease but ordered the parties to mediate the indemnification issue.<sup>25</sup> Although the parties did not resolve Hall Street's indemnification claim

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(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;

(b)If 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 580 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 572 of title 5.

*Id.* § 10.

<sup>22</sup> See, e.g., *Hicks v. Cadle Co.*, No. 08-1306, 2009 WL 4547803, at \*7 (10th Cir. Dec. 7, 2009).

<sup>23</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

<sup>24</sup> *Id.* at 1400, 1408. Although the FAA is a federal law, it does not provide an independent basis for federal subject matter jurisdiction. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271-73 (1995); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

<sup>25</sup> See *Hall St. Assocs., L.L.C.*, 128 S.Ct. at 1400.

in mediation, they agreed to arbitrate the claim pursuant to an arbitration agreement that required the court to “vacate, modify or correct any award [if the] arbitrator’s findings of fact [were] not supported by substantial evidence, or [if the] arbitrator’s conclusions of law [were] erroneous.”<sup>26</sup> When the arbitrator likewise ruled in favor of Mattel, Hall Street requested the court vacate the award, claiming that the arbitrator’s ruling involved legal error.<sup>27</sup> Based on the parties’ contractual standard for review of the arbitral award for legal error, the district court vacated the award and remanded the case to arbitration for further consideration, citing as authority *LaPine Technology Corp. v. Kyocera Corp.*<sup>28</sup>

After the second arbitration decision instead favored Hall Street, both parties sought review by the district court. Again the district court applied the parties’ designated standard of review; it modified the arbitrator’s calculation of interest but otherwise upheld the award.<sup>29</sup> The parties then appealed to the Ninth Circuit, where Mattel, having lost in the second arbitration, contended that the Ninth Circuit’s subsequent decision in *Kyocera* (overruling *LaPine*) effectively made unenforceable the arbitration agreement’s provision for judicial review of legal error.<sup>30</sup> The Ninth Circuit agreed, stating that “[u]nder *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.”<sup>31</sup> The Ninth Circuit directed the district court to confirm the original arbitration award in favor of Mattel, unless it should be vacated under grounds set forth in the FAA.<sup>32</sup> After a brief return to the district court, the U.S. Supreme Court granted Hall Street’s petition for certiorari.<sup>33</sup>

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<sup>26</sup> *Id.* at 1400–01. In subsequent discussion reviewing arbitrators’ awards, erroneous conclusions of law or legal errors is called “manifest disregard of the law.” *See id.* at 1403–04.

<sup>27</sup> *Id.* at 1401. Hall Street filed a District Court Motion for Order Vacating, Modifying and/or Correcting the arbitration decision. *Id.*

<sup>28</sup> *Id.* (citing *LaPine Tech. Corp. v. Kyocera Corp.* 130 F.3d 884 (9th Cir. 1997)). Petitioner summarized the district court’s characterization of *LaPine* to be that the FAA leaves parties “free . . . to draft a contract that sets rules for arbitration and dictates an alternative standard of review.” *Id.* (omission in original). *LaPine* is distinct from and was overruled by *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.* 341 F.3d 987, 994, 996 (9th Cir. 2003). *See infra* Part III.A.

<sup>29</sup> *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1401.

<sup>30</sup> *Id.*

<sup>31</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 113 F. App’x. 272, 272–73 (9th Cir. 2004).

<sup>32</sup> *Id.* at 273.

<sup>33</sup> *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1401. On remand, the district court again held for Hall Street, against the orders of the Ninth Circuit, and the Ninth Circuit reversed the decision in favor of Mattel. *Id.*

## 2. *The U.S. Supreme Court Rejects a Contractual Review Standard*

The precise issue before the Court was “whether statutory grounds for prompt vacatur and modification may be supplemented by contract.”<sup>34</sup> The Court held that the grounds for modification and vacatur of arbitral awards set forth in sections 10 and 11 of the FAA are exclusive.

The Court acknowledged that the FAA does not provide federal subject matter jurisdiction for disputes covered by the FAA.<sup>35</sup> Yet the Court noted that the FAA’s enforcement command applies in both state and federal court.<sup>36</sup> It went on to cite the FAA’s provisions for enforcing arbitral awards under sections 9 and 10, although not clarifying that such provisions, which reference federal district courts, would likewise apply in state courts.<sup>37</sup>

The Court resolved the split among the circuits on whether parties may contract for expanded judicial review, ruling by a 5-3 vote that the FAA provides the exclusive grounds for vacatur and modification of arbitral awards.<sup>38</sup> The Court disregarded the argument that its 1953 decision in *Wilko v. Swan*, often cited as precedent for the proposition that an arbitrator’s “manifest disregard of the law” authorizes judicial review, permits review either in the form of judicially created or party-created standards.<sup>39</sup> The Court characterized manifest disregard as an example or potential subset of the grounds within section 10, representing arbitrator misconduct or excessive powers.<sup>40</sup>

Responding to the contractual freedom argument that arbitration is a matter of contract and that the FAA reflects a congressional desire to enforce such contracts, the Court rejected that parties may, by private contract, expand the categories beyond what Congress provided in the

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<sup>34</sup> *Id.* at 1400.

<sup>35</sup> *Id.* at 1402. (“As for jurisdiction over controversies touching arbitration, the [FAA] does nothing, being ‘something of an anomaly in the field of federal-court jurisdiction’ in bestowing no federal jurisdiction but rather requiring an independent basis.” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) and citing 9 U.S.C. § 4 (2006) (providing for action by a federal district court “which, save for such [arbitration] agreement would have jurisdiction under title 28”))).

<sup>36</sup> *Id.* (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984)).

<sup>37</sup> *Id.* See *infra* Part III.B.

<sup>38</sup> *Id.* at 1399. At the time, the Ninth and Tenth Circuits had rejected contractual expansion for judicial review, while the First, Third, Fifth, and Sixth Circuits accepted the proposition. *Id.* at 1403 n.5.

<sup>39</sup> 346 U.S. 427 (1953). See Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 234 (2007).

<sup>40</sup> *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1404 (“Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to § 10 grounds collectively, rather than adding to them. 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 arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’” (citations omitted)).

FAA.<sup>41</sup> Determining that the limited categories for vacatur in the FAA address egregious arbitral conduct, the Court reasoned that “expanding the detailed categories [to include legal error] would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility.”<sup>42</sup> As the Court remarked, “[f]raud’ and a mistake of law are not cut from the same cloth.”<sup>43</sup>

Justices Kennedy, Stevens, and Breyer dissented, largely relying on the contractual freedom principles associated with the FAA. Justice Stevens emphasized that the limited grounds for vacatur were intended “as a shield meant to protect parties” from courts hostile to arbitration, rather than a sword “to cut down parties’ ‘valid, irrevocable and enforceable’ agreements to arbitrate their disputes subject to judicial review for errors of law.”<sup>44</sup>

### 3. *An Opening?*

Despite holding that parties cannot expand a court’s power to review an arbitration award under the FAA, the Court emphasized that it “decid[es] nothing about other possible avenues for judicial enforcement of awards.”<sup>45</sup> The Court suggested there are other ways to obtain judicial review of arbitration awards besides through the FAA, such as through state statutory or common laws providing a different scope of review.<sup>46</sup> Regardless of other options, however, the Court stated that *Hall Street* was never “anything but an FAA case.”<sup>47</sup> As such, the Court affirmed the

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<sup>41</sup> *Id.* In *Wilko*, the Court stated 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.” 346 U.S. 427, 436–37 (1953). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) (“Arbitration awards are only reviewable for manifest disregard of the law, 9.U.S.C. §[] 10 . . .”).

<sup>42</sup> *Hall St. Assocs., L.L.C.*, 128 S. Ct. at 1405. The Court stated that section 9 of the FAA states that if “parties have agreed to judicial enforcement, the court ‘must grant’ confirmation unless grounds for vacatur or modification exist under § 10 or § 11.” *Id.* at 1405 n.6.

<sup>43</sup> *Id.* at 1405.

<sup>44</sup> *Id.* at 1409 (quoting 9 U.S.C § 2 (2006)).

<sup>45</sup> *Id.* at 1406. The Court did not rule on the question of whether the arbitration agreement, which was entered into in the course of the federal court litigation to resolve the indemnification claim, was reviewable by the district court under its inherent authority to manage litigation. *Id.* at 1407–08. The case was originally filed in state court and removed to federal court based on diversity of citizenship. *Id.* at 1408. The dissent questioned why the FAA should apply to an arbitration agreement that arose from district court litigation. *Id.* (Stevens, J., dissenting).

<sup>46</sup> *Id.* at 1406 (“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.”).

<sup>47</sup> *Id.* at 1407. The proposition is not necessarily obvious because the arbitration in *Hall Street* arose out of a properly filed federal district court action and resulted from a settlement by the parties to agree to arbitrate the indemnification issue, provided the presiding court maintains authority to review for legal error.

Ninth Circuit's decision that the "FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11."<sup>48</sup>

### III. *HALL STREET'S* AFTERMATH: JUDICIAL AND PARTY RESPONSES

In holding section 10 of the FAA to be the exclusive grounds for vacatur of an arbitral award, *Hall Street* precludes private parties from contracting to expand the scope of judicial review for arbitration awards covered under the FAA and restricts their ability to seek review based on an arbitrator's legal error. While seemingly resolving the question for arbitration contracts covered by the FAA in federal court, *Hall Street* has raised new questions regarding its impact on arbitration practice and judicial review in other fora. The following Section examines, post-*Hall Street*, key issues raised in federal and state court cases interpreting *Hall Street's* application: the status of "manifest disregard of the law" as an independent, judicially recognized standard of review or as part of "excessive authority" under the FAA; the availability of state law for expanded judicial review; and whether state courts are bound to apply the restrictive interpretations of sections 9 and 10 of the FAA.

#### A. *Perspectives on Manifest Disregard of the Law Post-Hall Street*

Since *Hall Street*, the status of manifest disregard of the law, as an independent ground for vacating arbitral awards covered by the FAA, is in doubt. Although the Court discussed manifest disregard as a subset or descriptive of the vacatur grounds of the FAA, the standard has distinct elements. Whereas the grounds for vacating an award under section 10 of the FAA, including fraud, arbitrator misconduct, and exceeding authority, address procedural defects in the underlying arbitration, the manifest disregard of the law standard considers the merits of the underlying award.<sup>49</sup> The import of the standard is that the arbitrator blatantly ignored clear law and that the award has no legal justification.<sup>50</sup> Manifest disregard is commonly comprised of three constituent elements.<sup>51</sup> First, the law "allegedly ignored [is] clear, and in fact

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<sup>48</sup> *Id.* at 1408.

<sup>49</sup> *See id.* at 1404–05 (noting that the FAA's grounds, such as corruption, fraud and evident material mistake, represent "egregious departures" from arbitration, as opposed to plain "legal error").

<sup>50</sup> *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) ("[A]wards are vacated on grounds of manifest disregard only in 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrator[] is apparent,' . . . [and] 'the award should be enforced . . . if there is a barely colorable justification for the outcome reached.'" (quoting *Stolt-Nielsen SA v. Animal Feeds Int'l Corp.*, 548 F.3d 85, 91–92 (2d Cir.2008), *rev'd*, 2010 WL 1655826, (U.S. Apr. 27, 2010)) (emphasis and citations omitted)).

<sup>51</sup> *Id.*

explicitly applicable to the matter before the arbitrator[.]”<sup>52</sup> This element is not met when the law “is unclear or not clearly applicable” or when there is a “misapplication of an ambiguous law.”<sup>53</sup> The second element considers whether the law was misapplied and if an erroneous outcome came about as a result.<sup>54</sup> Even with misapplication, if the outcome can be justified, then the award should be confirmed, as no explanation or rationalization is generally required on the part of the arbitrator.<sup>55</sup> Finally, a court will consider the actual knowledge of the arbitrator in question.<sup>56</sup> For an arbitrator to “intentionally disregard the law, [he] must have known of its existence, and its applicability to the problem before him.”<sup>57</sup> These elements combine to create the test for whether manifest disregard can provide the basis for vacating an arbitrator’s award.<sup>58</sup>

Despite *Hall Street*’s statement that section 10 of the FAA provides the exclusive grounds for vacatur and judicial review of arbitration awards, courts are still divided on the status of manifest disregard of the law as an independent ground.<sup>59</sup> Some courts strictly read *Hall Street* to abolish any grounds of review other than those specifically listed in the statute. Other courts treat manifest disregard of the law as inherent in the grounds listed in the FAA, describing manifest disregard as a “gloss” on the section 10 categories. Other courts view *Hall Street* as restricting private parties, but not courts, in expanding review of arbitration awards and thus continue to recognize judicially created standards for vacatur, such as manifest disregard of the law. A similar debate surrounds the status of public policy violation as an independent basis for vacatur. A related question in this context is whether expanded judicial review is available

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* Arbitrators are not required to explain their reasoning in an award. *Bosack v. Soward*, 573 F.3d 891, 899 (9th Cir. 2009).

<sup>56</sup> *T.Co Metals, LLC*, 592 F.3d at 339.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* See *Drahozal*, *supra* note 39, at 235 (noting the varied tests for manifest disregard, but summarizing a common test for vacatur of an award based on manifest disregard of the law as where “the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it” (citing *Cytec Corp. v. Deka Prods. Ltd. P’ship*, 439 F.3d 27, 35 (1st Cir. 2006)). The Drafting Committee of the RUAA declined to set forth a test for the “manifest disregard” or “public policy” standards to section 23 for judicial review of arbitral awards. UNIF. ARBITRATION ACT § 23 cmt. C (2000), (2009).

<sup>59</sup> Courts have also recognized violations of public policy as an independent justification for vacating an arbitration award. *See, e.g.*, *Legacy Trading Co., Ltd. v. Hoffman*, Nos. 09-6007, 09-6018, 2010 WL 325893, at \*3 (10th Cir. Jan. 29, 2010) (judicially created public policy exception provides grounds for vacatur); *Williams v. NFL*, 582 F.3d 863, 884 (8th Cir. 2009) (policy must be explicit and well-defined). *Cf.* *DCR Constr., Inc. v. Delta-T Corp.*, No. 8.09-CV-741-T-27AEP, 2009 WL 5173520, at \*6 (M.D. Fla. Dec. 30, 2009) (following *Hall Street*, public policy is no longer a viable ground for FAA vacatur).

when the arbitration at issue is governed by state arbitration law, as opposed to the FAA.<sup>60</sup> While *Hall Street* resolved one circuit split, it paved the way in creating another.

1. *Judicially Created Manifest Disregard under the FAA is Dead*

Courts have adopted varied approaches to questions relating to *Hall Street's* impact or application. The Tenth Circuit in *Hicks v. Cadle Co.* identified the circuit splits on the status of the judicially created standard of manifest disregard of the law after *Hall Street*.<sup>61</sup> *Hicks* noted that the First, Fifth, Eleventh, and Eighth Circuits have concluded that *Hall Street* eliminated manifest disregard as an independent ground for vacatur.<sup>62</sup> In dicta in *Ramos-Santiago v. United Parcel Service*, the First Circuit concluded that “manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA].”<sup>63</sup> Similarly, the Fifth Circuit in *Citigroup Global Markets, Inc. v. Bacon* determined that *Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA.<sup>64</sup> In *Crawford Group, Inc. v. Holekamp*, the Eighth Circuit cited *Hall Street's* proposition that “[a]n arbitral award may be vacated only for the reasons enumerated in the FAA.”<sup>65</sup> Finally, the Eleventh Circuit in *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.* concluded that *Hall Street* “confirmed [that

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<sup>60</sup> Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509 (2009).

Cf. Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451 (2000) (examining judicial review under international arbitration agreements).

<sup>61</sup> *Hicks v. Cadle Co.*, No. 08-1306, 2009 WL 4547803 (10th Cir. Dec. 7, 2009). *Hicks* involved a promissory note issued by Bank of America to Hicks, containing an arbitration clause covered by the FAA. Although Bank of America agreed that Hicks was not liable on the note after he paid off the portion for which he was responsible, the company to whom the note was sold pursued Hicks for the remaining amount on the note, finally coming before an arbitrator. Hicks countersued, claiming defamation and intentional infliction of emotional distress. The arbiter awarded Hicks compensatory and punitive damages, as well as pre-judgment interest. The district court confirmed the award but vacated the award of interest on the grounds of manifest disregard of state law. On appeal to the Tenth Circuit, defendants argued the district court erred in confirming the award, claiming a manifest disregard of the law. The Tenth Circuit acknowledged that prior to *Hall Street*, it had held “an arbitrator’s manifest disregard for the law or for a violation of public policy” to be grounds under FAA, 9 U.S.C. § 10, for vacatur of an arbitration award. *Id.* at \*7.

<sup>62</sup> *Id.* at \*8 (noting that after *Hall Street*, “[s]ome courts have decided that manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA”).

<sup>63</sup> 524 F.3d 120, 124 n.3 (1st Cir. 2008).

<sup>64</sup> 562 F.3d 349, 355 (5th Cir. 2009) (“Our case law defines manifest disregard of the law as a *nonstatutory* ground for vacatur. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.” (citations omitted)).

<sup>65</sup> 543 F.3d 971, 976 (8th Cir. 2008).

sections] 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award under the statute.”<sup>66</sup>

The Sixth Circuit in *Grain v. Trinity Health, Mercy Health Services Inc.* declined to decide officially what position it would take after *Hall Street*, but acknowledged that:

[i]t is true that we have said that ‘manifest disregard of the law’ may supply a basis for *vacating* an award, at times suggesting that such review is a ‘judicially created’ supplement to the enumerated forms of FAA relief. *Hall Street’s* reference to the ‘exclusive’ statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory. But, either way, we have used the ‘manifest disregard’ standard only to vacate arbitration awards, not to modify them.<sup>67</sup>

Despite its survey of circuit court treatment, the Tenth Circuit in *Hicks* likewise declined to take a position on the continued viability of judicially recognized standards such as manifest disregard because it concluded that the facts presented in the underlying case neither demonstrated manifest disregard of the law nor a violation of public policy.<sup>68</sup> The Fourth Circuit has yet to consider *Hall Street’s* effect on non-statutory grounds for vacating arbitration awards.<sup>69</sup>

## 2. *Manifest Disregard as a “Gloss” on the FAA or Part of Section 10*

The Second and Ninth Circuits have continued to allow manifest disregard as a means for vacating an arbitration award.<sup>70</sup> The Second Circuit interpreted *Hall Street* as conceptualizing manifest disregard “as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, [and therefore] remains a valid ground for vacating arbitration awards.”<sup>71</sup> The Ninth Circuit has similarly regarded manifest

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<sup>66</sup> 579 F.3d 1268, 1271 (11th Cir. 2009).

<sup>67</sup> 551 F.3d 374, 380 (6th Cir. 2008) (citations omitted). The Sixth Circuit re-examines this question again in *Coffee Beanery, Ltd. v. WW, LLC*, 300 F. App’x 415 (6th Cir. 2008), *cert. denied* 130 S. Ct. 81 (2009). See *infra* notes 76–84 and accompanying text.

<sup>68</sup> *Hicks v. Cadel Co.*, No. 08-1306, 2009 WL 4547803, at \*9 (10th Cir. Dec. 7, 2009) (affirming the district court’s judgment but remanding the portion involving the award of interest).

<sup>69</sup> See *Raymond James Fin. Servs., Inc. v. Bishop*, No. 09-1038, 2010 WL 610614, at \*9 & n.13 (4th Cir. Feb. 22, 2010) (upholding vacatur of award on the basis the arbitrator “‘exceeded [its] powers’ under 9 U.S.C. § 10(a)(4)”).

<sup>70</sup> *Hicks*, 2009 WL 4547803, at \*8–9.

<sup>71</sup> *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94–95 (2d Cir. 2008), *rev’d*, 2010 WL 1655826, (U.S. Apr. 27, 2010) (“[*Hall Street*] did not . . . abrogate the ‘manifest disregard’ doctrine altogether.”), *cert. granted*, 129 S. Ct. 2793 (2009) (on the issue of whether an arbitrator has authority to order class-wide arbitration). The Second Circuit conceded that *Hall Street* changes previous case law which treated manifest disregard as an independent means to vacate an arbitration award. *Id.* at 95. See also *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010) (stating that “manifest disregard ‘remains a valid ground for vacating arbitration awards’” (quoting *Stolt-Nielsen SA*, 548 F.3d at 94)).

disregard as implicit within FAA statutory grounds and thus a continued viable ground for vacatur.<sup>72</sup> In *Comedy Club, Inc. v. Improv West Associates*, the Ninth Circuit concluded that *Hall Street's* recognition of manifest disregard as a possible element of the FAA statutory grounds left intact Ninth Circuit precedent which held manifest disregard to be “shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4), which states that the court may vacate ‘where arbitrators exceeded their powers.’”<sup>73</sup> Applying a standard for manifest disregard of the law that required that it be “clear from the record that the arbitrator[] recognized the applicable law and then ignored it,”<sup>74</sup> the court ruled that the arbitral award enforced an overly broad covenant not to compete and was in manifest disregard of the law. The court therefore vacated.<sup>75</sup>

### 3. *Manifest Disregard as an Independent, Judicially Created Standard*

The Sixth Circuit revisited the manifest disregard doctrine in *Coffee Beanery, Ltd. v. WW, LLC*, where it reversed a district court’s confirmation of an arbitration award and vacated the award on grounds of the arbitrator’s manifest disregard of the law.<sup>76</sup> Although the court was previously non-committal about the continued viability of the manifest disregard doctrine in *Grain*,<sup>77</sup> the court declared in *Coffee Beanery* that *Hall Street* forecloses private parties from establishing new standards but

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<sup>72</sup> *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009), cert. denied 130 S. Ct. 145 (2009). The U.S. Supreme Court had remanded *Comedy Club, Inc.* to the Ninth Circuit to be decided in accordance with *Hall Street*. 129 S. Ct. 45 (2008).

<sup>73</sup> *Comedy Club, Inc.*, 553 F.3d at 1290. (noting that “[t]he Supreme Court did not reach the question of whether the manifest disregard of the law doctrine fits within §§ 10 or 11 of the FAA [and] [i]nstead it listed several possible readings of the doctrine, including [that in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)].” (citations omitted)).

<sup>74</sup> *Id.* at 1290 (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995)). See also *Bosack v. Soward*, 573 F.3d 891, 899 (9th Cir. 2009) (recognizing that arbitrators exceed their powers under section 10(a)(4) of the FAA when they act in “manifest disregard of [the] law” or when their award is “completely irrational”).

<sup>75</sup> *Comedy Club, Inc.*, 553 F.3d at 1294. *Comedy Club, Inc.* (“CCI”) and Improv West had executed a Trademark Agreement that provided CCI with the exclusive nationwide license to use Improv West’s marks when opening new comedy clubs and stipulated that CCI should open four clubs per year between 2001 and 2003. *Id.* at 1281. The Trademark Agreement also required arbitration of disputes arising under the Agreement. *Id.* at 1281–82. When CCI failed to open the required number of clubs by 2002, and Improv West cancelled CCI’s right to use the trademark and open clubs under the still valid Trademark Agreement, CCI filed for a declaratory judgment and Improv West filed for arbitration. *Id.* at 1282. The district court ordered the parties to arbitration. The arbitrator ruled in favor of Improv West, and the district court confirmed. *Id.* at 1282–83. The Ninth Circuit affirmed, but ruled that the arbitrator’s order regarding enforcement of the non-compete clause was in a manifest disregard of the law. *Id.* at 1293–94.

<sup>76</sup> 300 F. App’x 415, 415–16 (6th Cir. 2008), cert. denied 130 S. Ct. 81 (2009).

<sup>77</sup> See *supra* note 67 and accompanying text.

does not disturb judicially invoked manifest disregard as an independent basis for vacatur.<sup>78</sup>

*Coffee Beanery* involved a dispute between the Coffee Beanery Corporation and franchisees who purchased a license to open a Coffee Beanery in Maryland. An 11-day arbitration hearing ensued, involving claims that franchisor misrepresentations and non-disclosures led to failed franchise operation.<sup>79</sup> The district court twice confirmed the arbitration award favoring Coffee Beanery, and the franchisees appealed to the Sixth Circuit, claiming *inter alia* that the arbitrator had manifestly disregarded state franchise law by failing to apply the statutory requirement that a franchisor disclose prior felony convictions.<sup>80</sup>

Taking a *de novo* review of the district court's confirmation ruling and determining that *Hall Street* "did not foreclose federal courts' review for an arbitrator's manifest disregard of the law,"<sup>81</sup> the Sixth Circuit applied its test of manifest disregard<sup>82</sup> and vacated the award on the grounds that the arbitrator refused to apply state franchise law which plainly required franchisor disclosures.<sup>83</sup> In October 2009, the U.S. Supreme Court denied Coffee Beanery's petition for certiorari on the precise question of: "Is manifest disregard of the law a valid common-law or statutory ground for vacating an arbitration award under the [FAA]?"<sup>84</sup>

#### B. *The Availability of State Law or State Courts for Expanded Judicial Review*

Despite the questionable status of courts' ability to create standards for judicial review independent of the FAA, *Hall Street* addressed arbitration contracts covered by the FAA, suggesting that parties could

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<sup>78</sup> *Coffee Beanery, Ltd.*, 300 F. App'x at 418–19. The Court interpreted *Hall Street* as only prohibiting private parties from contracting to alter or add to the FAA's statutory grounds for vacating an arbitration award and "not foreclos[ing] federal courts' review for an arbitrator's manifest disregard of the law." *Id.* at 418.

<sup>79</sup> *Id.* at 416–17.

<sup>80</sup> *Id.* at 418–19.

<sup>81</sup> *Id.* at 418. Appellate courts review a district court's decision to confirm or vacate an arbitration award *de novo*. *See id.* ("When reviewing a district court's decision to confirm an arbitration award, we review questions of law *de novo* and review findings of fact for clear error.").

<sup>82</sup> *Id.* (noting "mere error in interpretation or application of the law" to be insufficient to establish manifest disregard, but stating the test is whether "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir.1995))).

<sup>83</sup> *Id.* at 421.

<sup>84</sup> *Coffee Beanery, Ltd. v. WW, LLC*, 130 S. Ct. 81 (2009); Petition for Writ of Certiorari, *d.* (No. 08-1396). The issue remains unresolved. In April 2010, the Supreme Court declined to resolve the fate of manifest disregard of the law. *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198, 2010 WL 1655826, at \*7 n.3 (U.S. Apr. 27, 2010) ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street* . . . as an independent ground for judicial review or as a judicial gloss on the enumerated ground for vacatur in 9 U.S.C. § 10.").

contract for expanded judicial review under state arbitration rules. Thus, among the “other avenues” for expanded review are the use of state arbitration law or judicial review in state courts.

1. *Expanded Judicial Review by Contracting for State Arbitration Law*

In *Cable Connection, Inc. v. DirecTV, Inc.*,<sup>85</sup> the California Supreme Court considered *Hall Street's* application to an arbitration agreement under a state statutory scheme, specifically the California Arbitration Act (CAA).<sup>86</sup> The CAA is similar to the FAA in its provisions for enforcement and enumerated grounds for judicial review,<sup>87</sup> although the CAA contains additional grounds for vacatur, such as for an arbitrator's failure to disclose grounds for disqualification.<sup>88</sup> The California Supreme Court had previously held in *Moncharsh v. Heily & Blase* that courts applying the CAA could not adopt common-law standards for vacating arbitral awards or review arbitral awards for legal error.<sup>89</sup> The California Supreme Court stated that “in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.”<sup>90</sup> The arbitration contract in *Cable Connection, Inc.* did state such a limitation, prompting the California Supreme Court to consider whether under the CAA courts may provide expanded review, such as for an arbitrator's legal error, where private parties so designate by contract.

The underlying facts in *Cable Connection, Inc.* involved a nationwide class action filed by a group of cable dealers against DirecTV. DirecTV moved to compel arbitration pursuant to the arbitration clauses of the business contracts with the cable dealers.<sup>91</sup> The arbitral panel held that class arbitration was available under the agreement that was otherwise silent on the matter.<sup>92</sup> Applying the contractual review standard, the trial

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<sup>85</sup> 190 P.3d 586 (Cal. 2008).

<sup>86</sup> CAL. CIV. PROC. CODE §§ 1280–1290 (West 2007).

<sup>87</sup> See *Cable Connection, Inc.*, 190 P.3d at 592 (noting the grounds for vacatur and modification under the FAA and CAA are similar).

<sup>88</sup> *Id.* at 592 n.4; CAA § 1286.2(6). In 2002, the California legislature adopted an additional grounds for vacatur based on arbitrator non-disclosure of conflicts of interest. See Jaimie Kent, *The Debate in California Over and Implications of New Ethical Standards for Arbitrator Disclosure: Are the Changes Valid or Appropriate?*, 17 GEO. J. LEGAL ETHICS 903, 912–13 (2004).

<sup>89</sup> 832 P.2d 899, 914 (Cal. 1992). The U.S. Supreme Court has similarly admonished lower courts from reviewing the merits of an arbitrator's ruling, despite claims of serious error. See *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 504 (2001).

<sup>90</sup> *Moncharsh*, 832 P.2d. at 912 (emphasis omitted) (quoting *Crofoot v. Blair Holdings Corp.*, 260 P.2d 156, 172 (Cal. App. 1953)); *Cable Connection, Inc.*, 190 P.3d at 589.

<sup>91</sup> *Cable Connection, Inc.*, 190 P.3d at 590.

<sup>92</sup> *Id.* at 591 (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)). For additional information on rules regarding class arbitration, see American Arbitration Association, *Supplementary Rules for Class Arbitrations*, “AAA Class Rules” at 4, 5, 6 and 8, <http://www.adr.org/sp.asp?id=21936>. Note that this ruling was made prior to

court vacated the arbitral ruling.<sup>93</sup> The court of appeal reversed on the grounds that the parties may not contract for expanded judicial review and directed the trial court to reaffirm the arbitral award because the trial court had employed an inappropriate judicial review.<sup>94</sup>

In determining whether *Hall Street's* restrictive scope of judicial review bound state courts, the California Supreme Court held that “the FAA provisions governing judicial review are specific to federal courts.”<sup>95</sup> The California Supreme Court determined the FAA was not controlling because “the United States Supreme Court does not read the FAA’s procedural provisions to apply to state court proceedings” and also because “the provisions for judicial review of arbitration awards in sections 10 and 11 of the FAA are directed to the ‘United States court in and for the district where the award was made.’”<sup>96</sup> Accordingly, the California Supreme Court determined the FAA’s procedural provisions, and thus the U.S. Supreme Court’s holding in *Hall Street*, did not apply.<sup>97</sup>

The California Supreme Court determined that the FAA did not preempt or conflict with the CAA over the ability of parties to create their own contract provisions for judicial review, stating that “[a] reading of the CAA that permits the enforcement of agreements for merits review is fully consistent with the FAA ‘policy guaranteeing the enforcement of private contractual arrangements.’”<sup>98</sup> The California Supreme Court acknowledged that, under California law, “arbitration awards are ordinarily final and subject to a restricted scope of review, but that parties may limit the arbitrators’ authority by providing for review of the merits in the arbitration agreement.”<sup>99</sup> The California Supreme Court concluded that judicial review of an arbitration award was permissible

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the ruling in *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, No. 08-1198, 2010 WL 1655826 (U.S. Apr. 27, 2010) in which the Court ruled that class arbitration may not be imposed on parties under a contract that is silent and absent evidence of an agreement to proceed under class arbitration.

<sup>93</sup> *Cable Connection, Inc.*, 190 P.3d at 591.

<sup>94</sup> *Id.* The California Court of Appeal ruled that the parties’ contract providing for judicial review on the merits of an arbitral decision was void and that the FAA provided the exclusive grounds to vacate. *Cable Connection, Inc. v. DirecTV, Inc.*, 49 Cal. Rptr. 3d 187, 198–99 (Cal. Ct. App. 2006) (applying *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003)).

<sup>95</sup> *Cable Connection, Inc.*, 190 P.3d at 597 n.12 (stating also that the cable dealers waived their right to claim that the contract is governed by the FAA by not raising the claim in the previous courts).

<sup>96</sup> *Id.* at 597 (quoting *Cronus Invs., Inc. v. Concierge Servs.*, 107 P.3d 217, 226 (Cal. 2005); quoting 9 U.S.C. §§ 10(a), 11(a)). The California Supreme Court also stated that the California Courts of Appeal have rejected the proposition that the CAA’s grounds for reviewing arbitration awards are preempted by the FAA. *Id.*

<sup>97</sup> *Id.* at 598.

<sup>98</sup> *Id.* at 599 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)) (noting *Hall Street* did not preempt because it was governed by federal law and it “unanimously left open other avenues for judicial review, including those provided by state statutory or common law”).

<sup>99</sup> *Id.* at 606 (citing *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992)).

when expressly provided for by private contract.<sup>100</sup> The California Supreme Court held: “[F]ailure to provide for [judicial] review *by statute* does not mean the parties themselves may not do so *by contract*.”<sup>101</sup> According to the court, “[i]f the parties constrain the arbitrators’ authority by requiring a dispute to be decided according to the rule of law, *and* make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties’ agreement.”<sup>102</sup>

In *Cable Connection, Inc.*, the California Supreme Court concluded that under the state arbitration statute, an award could be vacated or corrected due to errors of law where the parties specifically limited the arbitrator’s power to make such errors. The agreement between the parties in *Cable Connection, Inc.* explicitly stated that arbitrators did not have “the power to commit errors of law or legal reasoning” and that “the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”<sup>103</sup> The California Supreme Court ultimately concluded that policies favoring efficiency in arbitration and objections to expanded judicial review were “outweighed by the freedom of contract that is fundamental to arbitration.”<sup>104</sup>

The federal system and each state have its own set of rules that govern arbitration.<sup>105</sup> While the FAA applies to all arbitration contracts involving interstate commerce as a default, parties can opt by contract to have state arbitration law govern.<sup>106</sup> Thus, an option for expanded judicial review may lie in specifically opting for state arbitration laws, but not all states’ arbitration statutes will necessarily be interpreted as broader than the FAA.

## 2. Seeking Expanded Review in State Courts—Does FAA Section 10 Apply?

The *Cable Connection, Inc.* court did not consider itself bound by *Hall Street* where legal error review was sought in California state court under an explicit contractual provision. But given that state courts are also called upon to enforce arbitral awards governed by the FAA, are state courts bound to apply *Hall Street* and the FAA’s provisions that speak to U.S. district courts?<sup>107</sup> The FAA is an anomalous statute in that it is

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 601–02.

<sup>102</sup> *Id.* at 600.

<sup>103</sup> *Id.* at 590 n.3.

<sup>104</sup> *Id.* at 604.

<sup>105</sup> See generally Huber, *supra* note 60. See also UNIF. ARBITRATION ACT, Prefatory Note (2000), 7 U.L.A. 2 (2009).

<sup>106</sup> Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477–78 (1989).

<sup>107</sup> FAA, 9 U.S.C. §§ 3–4, 9–11 (2006). The anomaly raised by *Southland’s* interpretation has been criticized by many commentators as well as members of the Court themselves. See *Southland Corp. v. Keating*, 465 U.S. 1, 21–36 (1984) (O’Connor, J. dissenting) (arguing that Congress under the FAA cannot regulate

considered substantive law with preemptive effects<sup>108</sup> and applicable in state as well as federal courts. However, the FAA does not provide a basis for federal subject matter jurisdiction. Parties seeking FAA action by federal district courts must satisfy an independent basis of federal jurisdiction, such as where the underlying dispute involves federal law or parties of diverse citizenship.<sup>109</sup> As a practical matter, most arbitration contracts are governed by the FAA yet enforced and confirmed by state courts because of the restrictive federal court jurisdictional requirements.<sup>110</sup> A line of U.S. Supreme Court cases, such as *Southland Corp. v. Keating*, hold that the FAA's enforcement provisions apply in both state and federal courts, although other provisions, including section 10, speak specifically to federal district courts.<sup>111</sup> California state courts have concluded that even for contracts governed by the FAA, the statute's post-arbitration provisions for vacatur, confirmation, and modification do not apply to state courts.<sup>112</sup>

Under *Hall Street* and *Cable Connection, Inc.*, state arbitration law becomes more relevant. Professor Stephen Huber posits the "vast potential scope for expanding the regulation of arbitrators and arbitration awards under state law."<sup>113</sup> State arbitration law may govern post-arbitration challenges through an explicit choice of law provision or

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procedures in state courts under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 285–89 (1995) (Thomas, J., dissenting) (joined by Justice Scalia and arguing that the FAA was never intended to apply in state courts).

<sup>108</sup> See, e.g., *Southland Corp.*, 465 U.S. at 10. (holding that the FAA's enforcement provisions apply in state and federal court); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempted Montana's state law requiring conspicuous notice of arbitration which was deemed to conflict with the FAA's pro-arbitration policy).

<sup>109</sup> 28 U.S.C. §§ 1331, 1332; *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271 (2009).

<sup>110</sup> Huber, *supra* note 60, at 513. The FAA covers arbitration contracts involving interstate commerce. 9 U.S.C. § 2. See also *Allied-Bruce Terminix Cos.*, 513 U.S. at 276 (holding that the commerce provision under the FAA should be broadly construed).

<sup>111</sup> See, e.g., *Southland Corp.*, 465 U.S. at 10 (holding that the FAA is a substantive federal statute that governs in federal and state courts); *Allied-Bruce Terminix Cos.*, 513 U.S. at 265 (same); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (same). This proposition remains controversial. At least three Justices have stated that they never believed Congress intended the FAA to apply in state courts. See *Allied-Bruce Terminix Cos.*, 513 U.S. at 284 (Scalia, J., dissenting) ("For the reasons set forth in Justice Thomas' opinion, which I join, I agree with the respondents (and belatedly with Justice O'Connor) that *Southland* clearly misconstrued the [FAA]."); *Southland Corp.*, 465 U.S. at 21–36 (O'Connor, J., dissenting) (asserting that the FAA was not intended to apply in state courts and that Congress cannot regulate procedures in state courts under *Erie R.R. Co.*, 304 U.S. 64 and the Rules of Decision Act, 28 U.S.C. § 1652).

<sup>112</sup> See *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586 (Cal. 2008).

<sup>113</sup> Huber, *supra* note 60, at 513. Huber also importantly notes that "[m]ost cases that are subject to the [FAA] are heard in state, rather than federal, courts." *Id.*

through procedural rules applicable in state courts.<sup>114</sup> State arbitration statutes have traditionally mirrored the FAA.<sup>115</sup> The drafting committee for the Revised Uniform Arbitration Act (RUAA) considered, but decided against, adding a provision in the RUAA to permit parties to “opt-in” to judicial review of arbitration awards for errors of law or fact or any other grounds not prohibited by applicable law.<sup>116</sup> Does *Hall Street* invite forum shopping for state arbitration statutes where expanded review is allowed?

If state courts were to adopt *Cable Connection, Inc.*'s interpretation that the FAA's post-hearing provisions do not apply to them, *Hall Street* would have limited impact, and the uniformity of review for arbitration awards could be disjointed depending upon applicable state arbitration law. But is *Cable Connection, Inc.* right? Do the FAA enforcement and review provisions, and thus restrictive judicial interpretations, also bind state courts reviewing FAA arbitral awards? Although the California court determined that its state courts reviewing FAA awards are not bound to apply the FAA's post-award provisions, few other state courts have followed *Cable Connection, Inc.*'s bifurcated application of the FAA. More generally, courts interpret the rule that the FAA applies as substantive law in state and federal courts, as requiring wholesale application of the statute in state courts, including post-award provisions. Thus, state courts reviewing arbitral awards governed by the FAA consider *Hall Street* as controlling the standard for judicial review of arbitral awards by state courts as well.<sup>117</sup> Other state courts similarly apply the FAA vacatur provisions, despite the statutory language directed to U.S. district courts.<sup>118</sup> The debate on viability of manifest disregard also occurs among the state courts, many of whom interpret *Hall Street* to require the elimination of manifest disregard doctrine in state court review of

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<sup>114</sup> *Id.* at 513–14. *See also* Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

<sup>115</sup> For example, the Uniform Arbitration Act, adopted in 1955 as the state model arbitration law, closely mirrored the FAA. *See* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 102–04 (2006) (explaining that the parallel provisions of FAA and UAA were to address arbitration proceedings for federal, and state courts, respectively); Huber, *supra* note 58, at 520–21 (noting the FAA provisions for reviewing arbitration awards are directed to federal district courts, while the UAA is addressed at state district courts).

<sup>116</sup> *See* UNIF. ARBITRATION ACT § 23 cmt. B (2000), 7 U.L.A. 79–83 (2009).

<sup>117</sup> *See* Chase Bank USA, N.A. v. Hale, 859 N.Y.S.2d 342, 350 n.8 (N.Y. Sup. Ct. 2008) (applying section 10 of the FAA, although noting that as Delaware's arbitration statute was closely modeled on the FAA, Delaware courts look to federal decisional law for interpretation of arbitral awards); Royce Homes, L.P. v. Bates, 2010 WL 184216, at \* 9 (Tex. Ct. App. 2010) (stating that the Texas Arbitration Act is superseded by the FAA when there are inconsistencies).

<sup>118</sup> *See* Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's, 888 N.Y.S.2d 458, 497 (N.Y. App. Div. 2009) (applying FAA vacatur standards and stating that New York policy similarly favors limited review of arbitration awards).

arbitral awards.<sup>119</sup> Professor Huber, in accord with *Cable Connection, Inc.*, posits that state courts properly apply state court procedures, including review of arbitral awards under state law, “even where the arbitration agreement specifies the FAA provides the applicable law.”<sup>120</sup> Although it may be confusing to apply only a portion of a statute, the approach used by *Cable Connection, Inc.* comports with the “plain reading” of the FAA and gives meaning to state arbitration law.<sup>121</sup>

#### IV. PRESCRIPTIONS AND OPTIONS FOR ACHIEVING EXPANDED REVIEW

##### A. *Accepting Arbitral Finality?*

The tension between the policies favoring arbitration’s finality, reflected in *Hall Street*, and regard for party contractual freedom, considered paramount by the California court in *Cable Connections, Inc.*, undergird the debate about contracts seeking expanded judicial review of arbitration awards. By opting for arbitration, parties avail themselves of the benefits of arbitration, including process flexibility, privacy, and the ability to select the decision makers. Most importantly, generally, arbitration provides the parties a final and binding determination of the dispute. The very essence of arbitration is the expectation of finality.<sup>122</sup> As a practical matter, should parties be able to have a “second bite” at the merits and selectively use the public judicial system when dissatisfied with the selected arbitral forum? Does the restrictive reading in *Hall Street* represent a potential backlash from the courts, which “are not likely to view with favor parties exercising the freedom of contract to gut the

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<sup>119</sup> See, e.g., *Chase Bank USA*, 859 N.Y.S.2d at 349 (applying the FAA but concluding that manifest disregard is actually a judicial interpretation of section 10 of the FAA); *Wachovia Sec., Inc. v. Bonebrake*, No. 455, 2009 WL 1916059 (Neb. Dist. Ct. June 19, 2009) (holding that *Hall Street* has eliminated the extra statutory ground for vacating an arbitration award for manifest disregard of the law); *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 827 (Tex. App. 2009) (stating the *Hall Street* rules on manifest disregard for vacatur).

<sup>120</sup> Huber, *supra* note 58, at 534.

<sup>121</sup> *Id.* at 530–31 (rejecting commentary that the FAA grounds for vacatur preempt state standards and stating “[t]he FAA plainly states that its judicial review provisions are addressed only to the federal courts”). See also *Dawsey v. Raymond James Financial Svcs., Inc.*, 17 So.3d 639 (Ala. 2009) (holding that state court lacks jurisdiction to confirm award under section 9 of the FAA and that party must proceed under state arbitration rule); *Jaylene, Inc. v. Steuer ex. rel. Paradise*, 22 So.3d 711 (Fla. App. 2009) (distinguishing Florida’s vacatur standards from federal courts interpretations under the FAA); *Sennett v. National Healthcare Corp.*, 272 S.W.3d 237, 240 (Mo. Ct. App. 2008) (recognizing that FAA substantive, but not procedural, provisions apply in state courts). Cf., Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L. J. 169, 174–77 (2007) (characterizing state arbitration law as “irrelevant.”).

<sup>122</sup> See *Gravillis v. Coldwell Banker Residential Brokerage Co.*, No. B216373, 2010 WL 670133, at \*6 (Cal. Ct. App. Feb. 26, 2010).

finality of the arbitration process and throw disputes back into the courts for decision”?<sup>123</sup>

After *Hall Street*, will parties accept arbitration’s benefits, risks, and finality? A likely answer in many high-stakes cases is probably not. Aside from considering the application of California arbitration law after *Cable Connections, Inc.*, parties may attempt other methods for keeping open the security door for a more expanded judicial review of arbitral awards.<sup>124</sup>

*B. Defining “Excessive Powers” by Limiting Arbitral Powers to Bar Legal Error*

Can parties effectively achieve the result of expanded review for legal error by contractually limiting the arbitrator’s powers to require correct legal and factual rulings?<sup>125</sup> The California Supreme Court in *Cable Connections, Inc.* so much as advised interested parties that they could similarly get judicial review where the arbitration agreement “explicitly and unambiguously” limited the powers of the arbitrator.<sup>126</sup> Although the California Supreme Court’s decision in *Moncharsh v. Heily & Blase* establishes that courts will not review arbitral legal error, an exception applies where an arbitration agreement limits the powers of the arbitrator.<sup>127</sup>

Even courts that apply FAA standards, whether in state or federal courts, and consider review only for the exclusive grounds set forth in the FAA, must address the practice where parties seek expanded judicial review through contractual provisions that limit an arbitrator’s scope of authority. Courts addressing requests for legal error review as constituting “excessive powers” under the FAA have responded differently. Some courts recognize a contractual limitation on an arbitrator’s power, as opposed to contractual provisions that purport to expand a court’s review standard provided by statute.<sup>128</sup> Thus, a number of courts have accepted review based on party contracts that limit arbitrators from making legal errors; while other courts see this practice as a subterfuge around *Hall Street* and the exclusive statutory grounds.

<sup>123</sup> UNIF. ARBITRATION ACT § 23 cmt. B (2000), 7 U.L.A. 79–83 (2009).

<sup>124</sup> Another possible ground is the “inherent authority” of a court in a court-connected arbitration, as argued but not decided, in *Hall Street*. See *supra* note 43.

<sup>125</sup> See Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 225 (2007).

<sup>126</sup> *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586, 604 (Cal. 2008).

<sup>127</sup> 832 P.2d 899, 912 (Cal. 1992). See, e.g., *Gueyffier v. Ann Summers, Ltd.*, 50 Cal. Rptr. 3d 294, 311–12 (Cal. Ct. App. 2006), *rev’d* on the merits 184 P.3d 739 (2008) (reviewing arbitral legal error for excess power where the parties’ contract limited the arbitrator’s powers and was ultimately reversed by the California Supreme Court on the grounds that the lower court had erred in holding that the arbitrator had exceeded his powers).

<sup>128</sup> *Gueyffier*, 50 Cal. Rptr. 3d at 311–12 (although recognizing a “beyond the scope of authority” argument is a circuitous way of reviewing the merits, the court deferred to the parties’ contract and reviewed the underlying award).

*Wood v. PennTex Resources, LP* determined that “[t]his reading would impermissibly circumvent *Hall Street*.”<sup>129</sup> The practice of contractually limiting the scope of an arbitrator’s authority to legally correct rulings, thus availing legal error review under the “exceeding powers” provision of the FAA, may soon be the next test on the U.S. Supreme Court’s patience.<sup>130</sup>

C. *The How-to Opt Out of the FAA: Be Specific and Beware*

One way parties can exercise greater control over their arbitration agreement is by using choice of law clauses to apply state arbitration law to the dispute.<sup>131</sup> The U.S. Supreme Court in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* recognized that “[e]ven if §§ 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent the application of [state law] to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with [state] law.”<sup>132</sup> Thus, parties may opt to have a state arbitration statute with a different standard of review for arbitration governing their arbitration.

Choice of law clauses restrict which laws may apply to a dispute and therefore provide greater predictability and control in the arbitration process. The choice of state law encompasses all laws of that state, including state arbitration law. Given the possibility to use state law that permits parties to contract for expanded judicial review, courts have required specificity in opting-out of the FAA’s section 10 exclusive ground for review. The arbitration contract must explicitly and unambiguously provide for expanded judicial review under state law.<sup>133</sup>

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<sup>129</sup> No. H-06-2198, 2008 WL 2609319, at \*8 (S.D. Tx. June 27, 2008). *See also* Feeney v. Dell, Inc., No. 031158, 2008 WL 1799954, at \*1–2 (Mass. Super. Ct. Apr. 4, 2008) (rejecting argument that National Arbitration Forum rules, which require arbitrators to follow the law, make review of legal rulings in awards reviewable de novo).

<sup>130</sup> Under the FAA, a court may vacate an award “where the arbitrators exceeded their powers.” 9 U.S.C. 10(a)(4). *See also* Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 432–33 (2003) (noting “restricted submissions” requiring arbitrators to follow the law).

<sup>131</sup> Other options include providing for arbitral appeal, *see* Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (discussing the option for parties to contractually provide for an “appellate arbitration panel”) or inherent authority under Federal Rule of Civil Procedure 16 for arbitration agreed upon during course of judicial proceedings.

<sup>132</sup> *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

<sup>133</sup> *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586, 604 (Cal. 2008); *Gravillis v. Coldwell Banker Residential Brokerage Co.*, No. B216373, 2010 WL 670133, at \*8 (Cal. Ct. App. Feb. 26, 2010). *See* *Oberwager v. McKechnie Ltd.*, No. 08-1117, 2009 WL 3358469, at \* 1 (3d Cir. Oct. 20, 2009) (parties may contract out of

Parties can use choice of law clauses to expand the role of state arbitration law beyond that defined by the U.S. Supreme Court.

## V. CONCLUSION

The judicial deference to arbitration over the last three decades has served to promote contractual freedom for parties, particularly the drafting parties, to determine the scope and process of resolving disputes in a private arbitral forum. But where the contract seeks to provide recourse to the public judicial system beyond the parameters set forth by Congress in 1926 in the FAA, the U.S. Supreme Court holds that Congress trumps and private parties may not attempt to expand federal court judicial review.

*Hall Street* leaves open to interpretation whether courts are similarly bound and precluded from interposing judicially created exceptions to enforce or vacate arbitral awards that are based on an arbitrator's manifest disregard of the law or that violate public policy. The seemingly exclusive grounds of the FAA remain elusive where the Court suggests that non-statutory standards, such as manifest disregard, are only potential "gloss" on statutory grounds. The Court provides parties options to potentially achieve the same goal of judicial review on the merits via *other avenues*, such as state arbitration law, although whether state statutes, other than California, would provide similar results is unclear. The alternative course through drafting limits on arbitral powers to require legally correct rulings remains a course to be travelled. Undoubtedly, we're due for a test drive.

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the FAA, but a general choice of law clause is insufficient to opt-out of the FAA's default regime).