

Judicial Review of Arbitration Awards³

“My client just lost an arbitration, so now what are my options?” In recent years, variations of this simple question have been among the most frequent inquiries directed at appellate lawyers. In the wake of a defeat in arbitration, trial lawyers and clients come to their appellate counsel desperate for some method by which to escape the arbitrator’s decision. Most leave their appellate counsel’s office gravely disappointed after having been informed that arbitration awards will be set aside by the courts “only in very unusual circumstances.”⁴ Nonetheless, as arbitration becomes an increasingly large part of the U.S. legal system,⁵ replacing jury trials, appellate lawyers will continue to be confronted with this query. Thus, this paper seeks to enable appellate lawyers to explain to trial counsel and clients what their options are following a defeat in arbitration—although trial counsel and clients will generally not be fond

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⁴ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *cf. Glover v. IBP, Inc.*, 334 F.3d 471, 473-74 (5th Cir. 2003) (discussing the standard of review for arbitration awards and noting deference to arbitrator decision); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 593 n.4 (5th Cir. 2001) (outlining the four limited circumstances under which the FAA permits vacatur of an arbitration award).

⁵ See Benjamin J.C. Wolf, Note, *On-line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT’L & COMP. L. 281, 289 (2006) (noting that, in international commercial contracts, arbitration contracts are almost universal).

of the answer. To do so, this paper will examine judicial review of arbitration awards under the Federal Arbitration Act (FAA)⁶ and then the analogous Texas General Arbitration Act (TGAA),⁷ including attempts to contract for expanded appellate review by courts.

I. The Rise and Reality of Arbitration

The FAA fully endorses arbitration and liberally encourages its use as an alternative to traditional litigation.⁸ This strong federal policy favoring arbitration is designed “to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.”⁹ Congress intended the FAA “to enable *business men* to settle their disputes expeditiously and economically, and [to] reduce the congestion in the Federal and State courts.”¹⁰ Texas courts have similarly recognized that the main purpose of arbitration is to provide a speedy and inexpensive alternative to the normal court system.¹¹

⁶ 9 U.S.C. §§ 1-16 (2000). The FAA is also routinely applied by state courts, including Texas courts, as it governs any contract affecting interstate commerce. *See, e.g., In re L & L Kempwood Assocs., L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 127 (Tex. 1999) (stating that the FAA “extends to any contract affecting commerce”); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (involving a litigant alleging entitlement to arbitration under both the FAA and the Texas Civil Practice and Remedies Code).

⁷ TEX. CIV. PRAC. & REM. CODE § 171 (West 2005). This act governs arbitrations in Texas that do not affect interstate commerce.

⁸ *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating that the FAA creates federal substantive law applicable to arbitration and courts have consistently held that arbitration questions should be addressed in light of the national policy favoring arbitration). The FAA governs all arbitrations that “involve” interstate commerce and the Supreme Court has determined that the FAA applies quite broadly to all transactions “within the flow of interstate commerce.” 9 U.S.C. § 2 (2000); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

⁹ *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) (quoting *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998)); *see also B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 906 (11th Cir. 2006) (declaring that the FAA “liberally endorses and encourages arbitration as an alternative to litigation”). The Eleventh Circuit argues that the goals of the FAA can only be achieved through deferential judicial review. *Id.* at 907. If parties who lose in an arbitration proceeding are free to relitigate their cases in a judicial forum, then arbitration has done little to reduce the cost, delay, and inefficiency of litigation. *Id.*

¹⁰ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125 n.2. (2001) (emphasis in original) (quoting Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923)); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (discussing the FAA’s purpose).

A fierce debate rages in certain legal circles regarding whether arbitration has actually delivered on its promises of speed, efficiency, and cost reduction. One faction passionately maintains that arbitration is a superbly efficient and low-cost alternative to traditional litigation,¹² while an equally passionate opposing faction derides the benefits of arbitration as essentially snake oil, promising much efficiency but offering proceedings that are every bit as cumbersome and expensive as a trial, but without the trial's procedural safeguards, judicial expertise, or access to meaningful appellate review.¹³ This Article is not meant to resolve the great debate on the merits of arbitration, and the authors profess that they are dedicated agnostics on the subject.

According to the Court, the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.* See generally Jonathan H. Peyton, Note, *What Arbitration Clause?: The "Appropriate" Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 757 (2003) (analyzing the use of pre-dispute arbitration agreements by employers as a method of minimizing expenses and resolving disputes quickly).

¹¹ See *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992) (defining arbitration and noting "efficiency and lower costs" as the "main benefits of arbitration"); see also *Porter & Clements, L.L.P. v. Stone*, 935 S.W.2d 217, 221 (Tex. App. - Houston [1st Dist.] 1996, no writ) ("In Texas, 'arbitration' is generally a contractual proceeding by which the parties to a controversy, in order to obtain a speedy and inexpensive final disposition of the disputed matter, select arbitrators or judges of their own choice, and by consent, submit the controversy to these arbitrators for determination." (emphasis omitted)).

¹² See Benjamin J.C. Wolf, Note, *On-Line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 290 (2006) (describing surveys of practicing attorneys that indicate that arbitration provides a speedier and more efficient alternative to litigation).

¹³ See Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 359-60 (2002/2003) (discussing the drawbacks to mandatory arbitration in insurance coverage disputes). The authors note:

There are no arbitration precedents because proceedings and results are confidential; no common understanding of the meaning of repeatedly-used provisions emerges unless they are standard-form provisions whose meaning has been publicly litigated; and parties who consider purchasing insurance policies that require arbitration of coverage disputes have no way to anticipate the interpretations that insurers selling these policies may place on such policy provisions when a loss occurs and a claim is filed.

Id. at 360. In addition, parties who subject themselves to mandatory arbitration provisions lose the benefits of a trial judge and appellate review. *Id.* at 359. See generally John Council, *Headaches and Pains: The Pounding Doesn't Always Stop After an Arbitration Award*, TEX. LAW., May 29, 2006 (noting that, increasingly, parties have become dissatisfied with the arbitration process and are willing to take the risky and expensive steps necessary to seek appellate review of arbitration decisions).

The key point is that many transactional lawyers and clients—in other words, the people who actually draft and enter into contracts containing arbitration clauses—are firmly convinced of arbitration’s merits. For better or worse, arbitration is here to stay—at least until such time as there is a sea change in the preferences of transactional lawyers and clients.¹⁴

Indeed, the number of arbitrations appears to be on a steady rise. In enacting the FAA, Congress predicted that “by avoiding the delay and expense of litigation,” the FAA would appeal “to big business and little business alike, . . . corporate interests [and]...individuals.”¹⁵ Congress was correct. The number of cases filed in federal court and ultimately tried to a jury has been steadily declining—from 11.5 percent in 1962 to 1.8 percent in 2002.¹⁶ While it is impossible to measure with accuracy how many of these cases are being arbitrated,¹⁷ the American Arbitration Association (AAA) has experienced a corresponding growth in the number of arbitration proceedings in its docket.¹⁸ Moreover, many cases filed in federal court are pushed to arbitration

¹⁴ The preference for arbitration could be declining in certain transactions. See Benjamin J.C. Wolf, *On-line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT’L & COMP. L. 281, 290 (2006) (noting that arbitration is less preferential in high-dollar contract disputes);

¹⁵ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (omissions in original) (quoting S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)); see also *Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (discussing the legislative history of the FAA). The Court noted congressional recognition of public frustration related to the cost and delay of litigation and their hopes of eliminating these issues, in part, by enforcing parties’ agreements to arbitrate. *Id.* at 220.

¹⁶ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

¹⁷ Cf. Benjamin J.C. Wolf, Note, *On-line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT’L & COMP. L. 281, 289-90 (2006) (noting that, while there is data to indicate that the use of pre-dispute arbitration agreements appears to be rising, other data indicates that arbitration is becoming less popular in high-dollar disputes).

¹⁸ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515 (2004). The AAA had less than 1,000 cases on its docket in 1960; by 2002, that number had grown to 17,000. *Id.*

or other alternative dispute resolution mechanisms by the courts themselves.¹⁹ Against this backdrop of ever-increasing arbitration,²⁰ the question becomes, “What options are available to the losing party after arbitration?”

II. The Judicial Role Under the FAA: Confirming or Vacating the Award

Consistent with its focus on speed, efficiency, and cost reduction, a critical goal of arbitration is to establish “finality” at the earliest possible point.²¹ Unfortunately, early finality is antithetical to robust appellate review, which postpones finality until after the conclusion of appellate proceedings. Permitting prolonged appellate review would strip arbitration of much of the speed and efficiency it purportedly offers. The FAA, recognizing this tension between the goals of arbitration and the reality of post-award proceedings, sharply limits the grounds for challenging an arbitrator’s award in court.²² Nonetheless, the FAA does provide an “extraordinarily narrow” path for challenging the results of an arbitration proceeding.²³

¹⁹ See *id.* at 514 (noting that 24,000 cases were referred by federal courts to some sort of alternative dispute resolution in the year 2001 alone). Indeed, the Judicial Improvements and Access to Justice Act of 1988 established pre-trial, non-binding arbitration in ten federal districts, one of which was the Western District of Texas. 28 U.S.C.A. §§ 651-658 (West 1994).

²⁰ Though in light of the recent *Hall Street Associates v. Mattel, Inc.* decision, the lack of appellate options may in future make parties—both in contracts and in pending court cases—less likely to go to arbitration in the first place. See *infra* Section II.D.

²¹ See *Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987) (recognizing that, “to effectuate the national policy favoring arbitration,” proceedings require “expeditious and summary hearing, with only restricted inquiry into factual issues” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983))). But cf. Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 362 (2002/2003) (asserting that, because of arbitration’s finality, neither party has effective redress “when a mistake of law is made”).

²² See 9 U.S.C. §§ 10-11 (2000) (listing the situations where an arbitration award can be either vacated or modified).

²³ *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 393 (5th Cir. 2003) (quoting *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995)); cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (noting that those participating in the arbitration process are protected from arbitrator bias in that decisions can be overturned with evidence of partiality or corruption); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (arguing that, although limited, the provisions for vacatur provided for in the FAA are sufficient to ensure arbitrator compliance with the statute).

A. The Confirmation Process

An arbitration award issued under the FAA does not take on the force of law until after it has been “confirmed” by a court.²⁴ The prevailing party files a motion to confirm the arbitration award either with the court specified in the arbitration agreement, or “[i]f no court is specified in the agreement of the parties, then...[with] the United States court in and for the district within which such award was made.”²⁵ “The court must grant such an order unless the award is vacated, modified, or corrected.”²⁶ “Confirmation” transforms the arbitration award into a judgment of the court, binding and enforceable in the same manner as any other judgment issued by the court.²⁷ Under the FAA, a confirmed arbitration award must be recognized and enforced by all federal courts.²⁸

The commencement of the confirmation process opens the “extraordinarily narrow” window for judicial review of arbitration awards. The challenge to the arbitration award is made by opposing the motion to confirm and by filing a motion to vacate.²⁹ The district court then

²⁴ See 9 U.S.C. § 9 (2000) (outlining the procedure for confirmation); see also Stuart M. Widman, *Surveying the Split: More Theories on Confirming Awards Where There Are or Appear to Be More Than One Claim or Issue*, ALTERNATIVES TO HIGH COST LITIG., July/Aug. 2006, at 120 (noting that “arbitration awards do not become judgments unless and until a district court says so”).

²⁵ 9 U.S.C. § 9 (2000). The FAA itself does not confer federal question jurisdiction on a case, and instead requires an “independent jurisdictional basis” to end up in federal court. *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008). So many cases involving the FAA will end up in state court. See *supra* note 6.

²⁶ 9 U.S.C. § 9 (2000).

²⁷ See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (arguing that expansive judicial review after an arbitration award would go against FAA policy). In order achieve the objective of the FAA, courts must enforce agreements to arbitrate as well as the resulting awards. *Id.*

²⁸ *Id.*

²⁹ 9 U.S.C. § 10 (2000).

conducts an “exceedingly deferential” review of the arbitrator's award to determine if there is any legal basis for vacating it.³⁰

The court of appeals, in turn, reviews the district court’s decision to grant or deny the motion to vacate *de novo*, but with the understanding both that the grounds for disrupting the underlying award are extremely limited and that great deference must be shown to the arbitrator’s award.³¹ Indeed, paradoxically, the court of appeals’ *de novo* review of the district court’s action on the motion to vacate makes it *less likely* that the arbitrator’s award will be judicially overturned: “De novo review on the ultimate issue of unfairness enables us to assess whether the district court accorded sufficient deference in the first instance, an assessment that a more restrictive appellate review would cripple.”³² In other words, the appellate review of the district court’s action on vacatur is designed, in substantial part, “to reinforce the strong deference due an arbitral tribunal.”³³

³⁰ Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377, 380 (5th Cir. 2004); *see* Schoch v. INFOUSA, Inc., 341 F.3d 785, 788-89 (8th Cir. 2003) (discussing the standard of review for confirming or vacating arbitrator awards). Even if serious error is committed by the arbitrator, the award will still be confirmed if “the arbitrator is even arguably” adhering to the contractual terms “and acting within the scope of his authority.” *Id.* at 788.

³¹ Brabham v. A.G. Edwards & Sons, Inc. 376 F.3d 377, 380-81 (5th Cir. 2004) (reviewing an order vacating an arbitration award); *see also* Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (reversing a district court that erroneously applied a standard of “harmless error” in reviewing an arbitration proceeding).

³² Forsythe Int’l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1021 (5th Cir. 1990). For examples of party dissatisfaction with this extremely deferential standard, *see* Folger Coffee Co. v. Int’l Union, United Auto., Aerospace, & Agric. Workers of Am.-UAW, Local Union No. 1805, 905 F.2d 108, 111 (5th Cir. 1990) (affirming district court’s enforcement of an arbitration award where it was clear the arbitrator looked beyond the terms of the written agreement: “Arbitrators must only show that the award is ‘rationally inferable’ in ‘some logical way’ to the agreement”), and Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) (holding that the district court did not err in upholding an arbitration award where the evidence was not that the arbitrators exceeded their powers, but that they improperly executed them).

³³ McIlroy v. PaineWebber, Inc., 989 F.2d 817, 820 (5th Cir. 1993); *accord* Brook v. Peak Int’l, Ltd., 294 F.3d 668, 672 (5th Cir. 2002).

B. Statutory Grounds for Vacatur

The district court has the statutory authority under the FAA to vacate an arbitration award in only four situations:

- (1) where the award was procured by *corruption, fraud, or undue means*;
- (2) where there was *evident partiality or corruption* in the arbitrators, or either of them;
- (3) where the arbitrators were *guilty of misconduct* in refusing to postpone the hearing, upon sufficient cause shown, or in *refusing to hear evidence* pertinent and material to the controversy; or of *any other misbehavior* by which the rights of any party have been prejudiced; or
- (4) where the arbitrators *exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³⁴

Each of the above grounds for vacatur deals with the integrity and propriety of the arbitration process itself, not with the legal or factual accuracy of the arbitrator's award. None of the four FAA statutory grounds for vacating an arbitration award is designed to correct a good-faith error of fact or law by the arbitrator, no matter how egregious.³⁵ As such, a petition to vacate an arbitration award on statutory grounds is fundamentally different than a typical appeal of a court's decision. A petition to vacate represents a direct challenge to the fundamental

³⁴ 9 U.S.C. § 10(a) (2000) (emphasis added).

³⁵ See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (declaring that federal courts have no business re-litigating the merits of an underlying claim in reviewing an arbitration decision). The Court reasoned that, because the parties bargained for arbitral resolution of the claim, it is not the place of federal courts to substitute their judgment for that of the arbitrator absent dishonesty. *Id.* at 509-10. In very limited circumstances, however, the FAA allows for modification or correction of an arbitrator's award. See 9 U.S.C. § 11 (2000) (outlining the procedural grounds for the modification or correction of an arbitral award).

fairness of the arbitration proceeding, while a standard appellate brief is directed at errors of fact or law purportedly made by the lower court.³⁶

More pointedly, when an arbitration award is attacked via a petition to vacate based on the FAA's statutory grounds, it is not enough for an arbitrator to have been egregiously wrong or grossly incompetent—instead, the arbitrator must have been corrupt or otherwise fundamentally unfair. “When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator’s ‘improvident, even silly, factfinding’ does not provide a basis for a reviewing court to refuse to enforce the award.”³⁷ This is self-evidently an extremely high bar to clear.

The Fifth Circuit has characterized the FAA's statutory refusal to permit the courts to correct even serious errors of law or fact by an arbitrator as the price that the parties have agreed to pay in return for the speed, cost reduction, and efficiency benefits purportedly offered by arbitration:

Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial; but because the advantages of arbitration are speed and informality, the arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him. Thus, *whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect [arbitration] proceedings without a sound statutory basis for doing so.*³⁸

³⁶ See *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (stating that “[c]ourts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts”).

³⁷ *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (quoting *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 39 (1987)); see, e.g., *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 357-358 (5th Cir. 2004) (emphasizing that courts are not authorized to review an arbitration award on the merits); *Int’l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003) (noting that, when reviewing an arbitration decision involving a collective bargaining agreement, courts cannot overrule an arbitrator who simply misinterpreted a contract).

³⁸ *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 394 (5th Cir. 2003) (emphasis added); cf. *Bridas S.A.P.I.C. v. Gov’t of Turkm.*, 345 F.3d 347, 363 (5th Cir. 2003) (declaring that only a “manifest disregard of the law” warrants vacating an arbitration award in the Fifth Circuit). But see *Butler v. Munsch, Hardt, Kopf, & Harr, P.C.*, 145 F. App’x 475, 477 (5th Cir. 2005) (recognizing two non-statutory grounds for vacating an arbitration

The Supreme Court has expressed a similar concept, holding that the parties to an arbitration agreement contractually sacrifice the protections of the judicial process and risk errors by the arbitrator:

“[P]lenary review...would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . It is the arbitrator's construction which [is] bargained for; and so as far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”³⁹

More bluntly still, the Supreme Court later confirmed that “if an ‘arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,’ the fact that ‘a court is convinced he committed serious error does not suffice to overturn his decision.’”⁴⁰ The bottom line is that the FAA's statutory grounds for vacatur simply do not provide a mechanism for reversing even serious legal or factual errors by the arbitrator.

Nonetheless, as outlined below, successful challenges to arbitration awards based on the four FAA statutory grounds do occur, albeit rarely.

1. Exceeding Defined Powers

The most common—and generally the most promising—of the statutory challenges to an arbitration award is that the arbitrators “exceeded their powers, or so imperfectly executed them

award). *See generally* Bruce E. Meyerson, *How U.S. Courts Have Boosted the Power of Arbitrators*, ALTERNATIVES TO HIGH COST LITIG., Sept. 2004 (delineating the expanding responsibilities that courts are placing in arbitrators' hands).

³⁹ *United Steelworkers of America v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *see also* *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401, 405 (5th Cir. 2003) (stating that ambiguity as to arbitrator decisions must be resolved in favor of the arbitrator unless the decision is outside the scope of the arbitration agreement). Modification of an arbitration award is only appropriate when the arbitrator exceeds his contractual authority, not when interpretations may vary. *Id.* at 405-06.

⁴⁰ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (quoting *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000)); *accord* *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368, 371 (5th Cir. 2004).

that a mutual, final, and definite award upon the subject matter submitted was not made.”⁴¹ The apparent promise of this method is rooted in the fact that it is the only one of the four FAA statutory grounds not to require some sort of affirmative misconduct or corruption by the arbitrator. It is more palatable to most attorneys to attempt to convince the court that the arbitrator has overstepped his powers than it is to argue that the arbitrator is guilty of “corruption, fraud,” or other “misconduct.”⁴²

Proving that the arbitrators exceeded their powers is no easy task. First, “[i]n deciding whether the arbitrator exceeded its authority, [the courts] *resolve all doubts in favor of arbitration*.”⁴³ The extent of the arbitrator’s powers are, of course, defined by the arbitration agreement, and “[t]he power and authority of arbitrators in an arbitration proceeding is dependent on the provisions under which the arbitrators were appointed.”⁴⁴ As such, the courts “must affirm the arbitrator’s decision if it is *rationally inferable from the letter or the purpose* of the underlying agreement.”⁴⁵ In other words, if the arbitration agreement even arguably

⁴¹ 9 U.S.C. § 10(a)(4) (2000).

⁴² 9 U.S.C. § 10(a)(1), (3) (2000).

⁴³ *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994); *accord* *Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Group, Inc.*, 93 F. App’x 1, 5 (5th Cir. 2004) (citing *Executone*). Reasonable and supportable arbitrator findings are sufficient to demonstrate an arbitrator acted within his authority. *Id.*

⁴⁴ *Brook v. Peak Int’l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002) (alteration in original) (quoting *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991). Minor departures from the arbitration agreement will not necessarily preclude enforcement of an arbitration award. *Id.* at 673.

⁴⁵ *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994) (emphasis added); *see also* *Dow Chem. Co. v. Local No. 564, Int’l Union of Operating Eng’rs*, 83 F. App’x 648, 654 (5th Cir. 2003) (holding that, where an arbitration award can be rationally inferred from the contract, it does not matter that the arbitrator failed to provide an explanation for the award). *See generally* Stephen K. Huber, Survey Article, *The Arbitration Jurisprudence of the Fifth Circuit, Round II*, 37 TEX. TECH. L. REV. 531, 546-50 (2005) (discussing post-arbitration judicial proceedings).

authorizes the arbitrator's actions, the courts will not second guess or vacate those actions.⁴⁶ Consistent with this understanding, "[i]f the arbitrator's findings are reasonable and [are supported] by law or custom in the field, then the arbitrator did not exceed his authority."⁴⁷

The critical point is that, despite its promising initial appearance vis-à-vis its three FAA statutory counterparts, attacking an arbitration award on the basis that the arbitrators acted in excess of their power is simply not a promising route to vacatur. So long as the arbitrator did not act in complete disregard of the underlying arbitration agreement, it is likely that the courts will defer to any "rational" understanding of the arbitration agreement put forth by the arbitrator.

2. Corruption, Fraud, Bias, or Misconduct

The FAA statutory vacatur provisions permit a party to challenge and overturn an arbitration award where there has been actual fraud, corruption, or misconduct on the part of an arbitrator.⁴⁸ Instances of such manifest impropriety, however, are exceedingly rare and do not warrant a great deal of discussion. Suffice to say that if there is a bona fide problem with the integrity of an arbitrator or arbitration proceeding, the FAA authorizes the courts to vacate the award produced by the tainted proceeding.⁴⁹ In other words, to the extent that the fundamental

⁴⁶ See *Apache Bohai Corp. v. Texaco China BV*, 480 F.3d 397, 401–05 (5th Cir. 2007) (refusing to vacate an arbitration award where the arbitrator had invalidated the exculpatory clause of the contract). In *Apache Bohai*, the Fifth Circuit found that because the arbitration clause covered "any dispute" arising under the contract, the arbitrator had the power to invalidate the clause at issue despite language in the clause itself that it should apply "[n]otwithstanding any other provision of the Agreement". *Id.* at 402–04. Cf. *Smith v. Transp. Workers Union of Am.*, 374 F.3d 372, 375 (5th Cir. 2004) (vacating the arbitrator's modification of an award when the contract clearly stated that "the parties shall not have a right to seek correction of the award").

⁴⁷ *Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Group Inc.*, 93 F. App'x 1, 5 (5th Cir. 2004). An arbitrator familiar with the legal elements as well as the facts of a particular case is more likely to make a reasonable finding that is not erroneous or outside his authority. *Id.* at 10.

⁴⁸ 9 U.S.C § 10(a) (2000).

⁴⁹ The exotic nature of true arbitrator misconduct is further confirmed by the fact that most commercial arbitrators are selected by reputable, self-regulating organizations such as AAA, which impose and enforce a code of ethics on their arbitrators and seek to punish misconduct by their arbitrators.

fairness and propriety of the proceedings are called into legitimate question, the courts will exercise supervisory authority over the arbitration process, including the vacatur of improperly obtained awards.

However, when attempting to obtain vacatur of an arbitration award via a showing of misconduct or actual bias, “only clear evidence of [bias] . . . justifies the denial of summary confirmation of an arbitration award. . . . For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative.”⁵⁰ Once again, this is a high bar for a party challenging an arbitration award to clear.

3. “Evident Partiality”

Separate and distinct from a showing of actual bias or real partiality is the “evident partiality” standard, wherein a potential arbitrator fails to “disclose to the parties any dealings that might create an impression of possible bias.”⁵¹ A recent *en banc* decision by the Fifth

Even if parties are subject to AAA procedural rules, they do not escape the dilemma of strict judicial review. Under the AAA rules, for example, parties are only entitled to *joint input* in the selection of an arbitrator, not *joint selection*. *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *4 (4th Cir. Aug. 11, 1997). Additionally, the AAA rules recognize *ex parte* arbitrations. *Id.* Thus, if one party fails to participate in the arbitrator selection process and subsequently fails to attend the arbitration hearing, the arbitration will not be set aside absent a showing that the arbitrator was indeed biased and thus the party was prejudiced by the failure to participate in the selection process. *Id.* Simply put, the AAA rules do not give federal courts the ability to vacate arbitration awards on any grounds other than those laid out in the FAA. *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 499 (4th Cir. 1999).

⁵⁰ *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982).

⁵¹ *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 148-49 (1968). The intent of Congress when enacting the FAA was to provide for an impartial arbitration. *Id.* at 147. Just as a civil judgment would be subject to challenge in light of any undisclosed relationship between the judge and another party, so too is an arbitration award. *Id.* at 148. *See Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 427 (9th Cir. 1996) (stating that “[a] reasonable impression of bias sufficiently establishes evident partiality because the integrity of the process by which arbitrators are chosen is at issue in nondisclosure cases”).

Circuit held, however, that failure to disclose a “trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding” did not justify vacatur.⁵²

In that case, *Positive Software Solutions v. New Century Mortgage Corp.*, the arbitrator failed to disclose that he had been co-counsel with one of the party’s counsel for a third-party client some seven years prior to the arbitration.⁵³ The court noted that the arbitrator and party’s counsel were two of thirty-four lawyers in the previous litigation, and had in fact never met or spoken to each other prior to the arbitration.⁵⁴ In light of these facts, this was a “trivial former business relationship” and did not require vacatur.⁵⁵

“The draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship.”⁵⁶ Such a relationship must create a “concrete, not speculative impression of bias.”⁵⁷ Proving “evident partiality” is again a high bar to clear and will only happen in cases where an arbitrator has clearly failed to disclose an important relationship.

⁵² *Positive Software Solutions v. New Century Mortgage Corp.*, 476 F.3d 278, 282 (5th Cir. 2007) (en banc) *cert. denied*, 127 S. Ct. 2943 (2007).

⁵³ *Id.* at 283–84.

⁵⁴ *Id.* at 284.

⁵⁵ *Id.* at 283.

⁵⁶ *Id.* at 286.

⁵⁷ *Id.*

C. Non-Statutory Grounds for Vacatur

“For many years, section 10 of the FAA ‘describe[d] the only grounds on which a reviewing court [could] vacate an arbitration award.’”⁵⁸ Over the last decade, however, the Fifth Circuit has grudgingly expanded the non-statutory grounds of vacatur to include arbitration decisions made in “manifest disregard of the law” or “contrary to public policy.”⁵⁹ These very limited non-statutory grounds for vacatur are in addition to and go beyond the four statutory factors laid out in 9 U.S.C. § 10(a).⁶⁰ While this represents a significant expansion of the extraordinarily narrow grounds of the FAA, review of an arbitrator’s award remains “exceedingly deferential” and vacatur is still permitted “only on very narrow grounds.”⁶¹ An examination of these two relatively new non-statutory grounds for vacatur confirms that obtaining judicial reversal of an arbitration award remains an uphill battle.

1. Manifest Disregard of the Law

⁵⁸ *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) (alterations in original) (quoting *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993) (per curiam)).

⁵⁹ *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004) (“[M]anifest disregard of the law and contrary to public policy are the *only* nonstatutory bases recognized . . . for vacatur of an arbitration award” (emphasis added)); *accord Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216 (5th Cir. 2006).

⁶⁰ *See Kergosien v. Ocean Energy, Inc.*, 390 F.3d 246, 353 (5th Cir. 2004) (noting additional grounds for vacating an arbitration award outside of those statutorily prescribed); *see also* Kristen M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL CIRCUIT REV. 391, 403-04 (2006) (discussing non-statutory grounds for review of arbitration awards).

⁶¹ *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 380 (5th Cir. 2004). The Supreme Court recently stated in its *Hall Street* decision that: “The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.” *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008); *see infra* Section II.D. They alluded to enforcement by state statute or common law as “other possible avenues for judicial enforcement of arbitration awards.” *Id.* The dissenting justices were in accord on this point. *Id.* at 1409 (Stevens, J., dissenting); *Id.* at 1410 (Breyer, J., dissenting). Given the *Hall Street* Court’s conclusion that §10 offers the FAA’s “exclusive grounds for expedited vacatur,” *Id.* at 1403, the Court obviously views its earlier decisions on vacatur outside of §10, such as the ground of “contrary to public policy,” to be one of the common law grounds for vacatur outside of the FAA. The full extent of these common law grounds remains unknown, although it is unlikely that courts will view this limited *Hall Street* dicta as opening the door to a host of new arbitration challenges.

In 1995, the Supreme Court implicitly recognized that parties are bound by an arbitrator's decision not in "manifest disregard" of the law,⁶² and the Fifth Circuit has grudgingly accepted it as a "non-statutory" ground for vacatur of arbitration awards.⁶³ This basis for vacatur is not designed to permit the courts to second-guess the arbitrator's rulings on the law. "[T]he failure of an arbitrator to correctly apply the law is not a basis for setting aside an arbitrator's award."⁶⁴ Instead, as defined by the Fifth Circuit and several of its sister circuits:

[M]anifest disregard for the law "means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it."⁶⁵

The Fifth Circuit requires the party filing a motion to vacate to satisfy a three-part test in order to prove manifest disregard of the law: (1) the arbitrators must have "appreciate[d] the existence of a clearly governing principle but decided to ignore or pay no attention to it"; (2) "the governing

⁶² *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *rev'd on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477 (1989)).

⁶³ *See Williams v. Cigna Fin. Advisors*, 197 F.3d 752, 759 (1999) ("In our opinion, clear approval of the 'manifest disregard' of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court's statement in *First Options* that 'parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law.'" (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995))).

⁶⁴ *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 356 (5th Cir. 2004).

⁶⁵ *Id.* at 355 (quoting *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 395 (5th Cir. 2003)); *see also Sarofim v. Trust Co. of the West*, 440 F.3d 213, 217 (5th Cir. 2006) (emphasizing that the test is *manifest* disregard; mere error or misunderstanding of the law is not sufficient to justify vacatur); *Williams v. Cigna Fin. Advisors, Inc.*, 97 F.3d 742, 762 (5th Cir. 1999) ("[W]here on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld...unless it would result in significant injustice.").

law ignored by the arbitrators must be well defined, explicit, and clearly applicable”; and, separately, that (3) upholding the arbitrator’s award would result in a “significant injustice.”⁶⁶

In light of the foregoing, judicially assaulting an arbitration award on the grounds that it is in manifest disregard of the law is an exceptionally difficult undertaking. Nonetheless, manifest disregard for the law remains the single most frequently used method for seeking vacatur of arbitration awards.⁶⁷

Despite its common use, caution should be exercised before alleging manifest disregard of the law, as this ground for vacatur is chronically misunderstood as a vehicle for allowing the courts to correct ordinary mistakes of law. The courts have little patience for such arguments. Indeed, the Eleventh Circuit recently expressed deep frustrations with “poor loser[s]” whose petition to vacate did “not come within shouting distance” of showing manifest disregard of the law.⁶⁸ The court stated:

If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator’s decision will be honored sooner instead of later. Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions.⁶⁹

⁶⁶ See *Brabham v. A.G. Edwards & Sons Inc.* 376 F.3d 377, 381-82 (5th Cir. 2004) (discussing manifest disregard standard); *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 217 (5th Cir. 2006) (applying manifest disregard standard of review); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 355-56 (5th Cir. 2004) (discussing the three steps involved in a proper manifest disregard analysis).

⁶⁷ See Unif. Arbitration Act § 23, cmt. C.2 (2000) (stating that “manifest disregard of the law is the seminal nonstatutory ground for vacatur of commercial arbitration awards”); Marcus Mungioli, Comment, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY’S L.J. 1079, 1080 (describing the “manifest disregard of the law” standard as “the most recognizable and universally accepted non-statutory standard of review for an arbitration award”).

⁶⁸ *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907, 911 (11th Cir. 2006).

⁶⁹ *Id.* at 913. The Tenth Circuit has cited *Hercules Steel* as offering a “persuasive” view of why “sanctions may be more appropriate in an appeal involving a prior arbitration award.” *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1153 (10th Cir. 2007).

The Eleventh Circuit “is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards” and henceforth is “ready, willing, and able to consider imposing sanction in appropriate cases.”⁷⁰ While the Fifth Circuit has not yet issued a similar warning, the Eleventh Circuit’s decision in *Hercules Steel* should put parties on notice that manifest disregard challenges to arbitration awards should not be brought casually.

In addition to all of these caveats, the Fifth Circuit may change its mind and find that “manifest disregard of the law” is no longer a non-statutory basis for vacatur. This would be a logical result of the Supreme Court’s recent opinion in *Hall Street Associates v. Mattel, Inc.*⁷¹ In *Hall Street*, the Supreme Court took a brief look at the “manifest disregard” language of its previous decisions and called into question whether “manifest disregard” does stand as an independent non-statutory ground for vacatur, without deciding the issue.⁷² The Supreme Court said:

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the §10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for §10(a)(3) or §10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.”⁷³

⁷⁰ *Id.* at 914.

⁷¹ 128 S. Ct. 1396, 1403–04 (2008).

⁷² *Id.*

⁷³ *Id.* at 1404 (citations omitted).

While the Supreme Court does not decide the issue, the Fifth Circuit may find that their previous decisions on “manifest disregard” are “implicitly overruled.”⁷⁴ The *Hall Street* holding, that the statutory grounds of vacatur are “exclusive”, may give additional impetus to this as well.⁷⁵ Given their grudging acceptance in the first place, it is possible that a future panel of the Fifth Circuit may close the door on “manifest disregard” as an independent ground for vacatur.

2. Contrary to Public Policy

The second and final non-statutory ground for vacatur recognized in the Fifth Circuit is that “a court may refuse to enforce an arbitration award that is contrary to public policy.”⁷⁶ Vacating an arbitration award because it is in violation of public policy has been authorized by the Supreme Court:

If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”⁷⁷

The party challenging an arbitration award on policy grounds is not free to simply argue policy in a void and hope for a sympathetic court. Instead, the party filing the petition to vacate must

⁷⁴ *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 n.3 (5th Cir. 2004) (“A prior panel opinion controls until explicitly or implicitly overruled by the Supreme Court or the Fifth Circuit sitting en banc.”).

⁷⁵ *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008). For a fuller discussion of *Hall Street*, see *infra* Section II.D.

⁷⁶ *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 396 (5th Cir. 2003); see also *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 219 (5th Cir. 2006) (applying public policy grounds in vacating an arbitration award).

⁷⁷ *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. U.S.*, 324 U.S. 49, 66 (1945)). The challenge in court cannot be that the contract itself violates public policy—that challenge must be brought before the arbitrator, who is the sole judge of the contract’s validity. *Buckeye Check Cashing, Inc. v. John Cardegna*, 546 U.S. 440, 449 (2006).

direct reference to “laws and legal precedents” that are “explicit, well defined and dominant.”⁷⁸ In no event are invocations of “general considerations of proposed public interests” sufficient to challenge an arbitration award.⁷⁹ In other words, in this context the old law school adage “If you don’t have the law on your side, argue public policy” simply does not work. In order to argue policy successfully, the policy must be linked to law and precedent.⁸⁰ As such, judicial reversals of arbitration awards based solely on public policy arguments are extremely rare.⁸¹

3. Other Potential Non-Statutory Grounds for Vacatur

Although it has formally recognized only manifest disregard of the law and violation of public policy as the non-statutory bases for vacating an arbitration award, the Fifth Circuit has also observed in dictum that:

Most state and federal courts recognize[] one or more nonstatutory grounds warranting vacatur of an arbitral award, including: (1) the arbitrator’s manifest disregard of the law; (2) the award’s conflict with a strong public policy; (3) the award being arbitrary and capricious; (4) the award being completely irrational; or (5) the award’s failure to draw its essence from the underlying contract.⁸²

⁷⁸ *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 396 (5th Cir. 2003) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)); *see also* *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 219 (5th Cir. 2006) (noting that the standard for “contrary to public policy considerations” must rise above mere generalizations). Failure of the complaining party to adequately define the public policy relied upon results in failure of the claim. *Id.* at 219 n.9.

⁷⁹ *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 219 (5th Cir. 2006) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

⁸⁰ *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983).

⁸¹ *See* Donna M. Bates, Note, *A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT’L L.J.* 823, 887 (2005) (recognizing that public policy, non-arbitrability and unconscionability arbitration defenses are rare in the United States); *see also* Kristen Angus, *Arbitration*, 76 *DENV. U. L. REV.* 681, 685 (1999) (noting that the Tenth Circuit’s decision in *Davister Corp. v. United Republic Life Insurance Co.*, 152 F.3d 1277 (10th Cir. 1998), holding that the policy of protecting consumers outweighs national policy favoring arbitration, represented a rare situation in which a federal court chose to overrule applicability of the FAA absent explicit statutory direction).

⁸² *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 757-58 (5th Cir. 1999).

It appears unlikely, however, that the Fifth Circuit will actually adopt any of these additional non-statutory grounds for vacatur in the foreseeable future.

First, characterizing an arbitration award as “completely irrational” appears to be just an alternative way of expressing that the award was made in manifest disregard of the law. It is difficult to conceive of an award that would survive the “manifest disregard of the law” analysis but then be vacated on the basis of “complete irrationality.” To the extent that the award is factually, but not legally, irrational, the anti-corruption and anti-bias statutory provisions of 9 U.S.C. § 10(a) would presumably be implicated. However, if the award were factually irrational and that irrationality was the product of the arbitrator’s incompetence or stupidity rather than bias or corruption, then, as previously discussed, both Supreme Court and Fifth Circuit case law indicate that such an award should not be overturned by the courts.⁸³

Second, the Fifth Circuit has explicitly “reject[ed] arbitrariness and capriciousness as an independent nonstatutory ground for vacatur under the FAA” because it “would simply duplicate existing grounds.”⁸⁴ For example, an award that is issued in manifest disregard of the law could properly be characterized as “arbitrary and capricious.” In rejecting arbitrariness and capriciousness as an independent grounds for vacatur, the Fifth Circuit has noted that “[i]n the interest of establishing clear and deferential standards of review...we must avoid hashing the

⁸³ See *Major League Baseball Ass’n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam) (stating that the tribunal should not substitute its own judgment for that of the arbitrator’s, even in the face of serious error, if the arbitrator acted within his scope of authority); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 394 (5th Cir. 2003) (maintaining that a court must have a sound statutory basis for condemning imperfect arbitration proceedings); see also *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368, 371 (5th Cir. 2004) (recognizing that, if the arbitrator was performing within the scope of his duty, then the award must be affirmed).

⁸⁴ *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 385 (5th Cir. 2004); see also *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216 (5th Cir. 2006) (re-emphasizing that there are only two non-statutory grounds on which to vacate an arbitration award: those that are contrary to public policy and those that are in manifest disregard of the law).

existing grounds for vacatur into analytical bits, only to see those bits take on a life of their own and inexorably overwhelm the deference accorded to arbitration awards.”⁸⁵

Third and finally, the Fifth Circuit has also made quite clear that “the ‘essence test’ . . . is not a separate nonstatutory ground for vacatur but is part and parcel of 9 U.S.C.A § 10(a)(4) of the FAA (the arbitrator exceeded his powers).”⁸⁶ After gently deriding the “essence test” as “rather metaphysical,” the Fifth Circuit in *Kergosien* explained that this test requires the identical analysis as determining whether the arbitrator has exceeded his powers: “Under the essence analysis, ‘[t]he single question is whether the award, however arrived at, is rationally inferable from the contract.’”⁸⁷ In order to draw its essence from the contract, the arbitration award “must, in some logical way, be derived from the wording or purpose of the contract.”⁸⁸ Thus, it is difficult to envision a scenario in which the arbitration award does not derive its “essence from the contract” even as the arbitrator was nonetheless properly acting within the scope of his powers under that same contract. Stated another way, if the arbitrator exceeds his powers, the award he issues does not, by definition, draw its essence from the contract.

D. Contracting For Expanded Review

For over a decade, it was good law in the Fifth Circuit that “federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract.”⁸⁹

Parties were allowed to contractually provide for whatever appellate review they wanted for an

⁸⁵ *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 385-86 (5th Cir. 2004).

⁸⁶ *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004).

⁸⁷ *Id.* at 353-54 (alteration in original) (quoting *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 n.3 (5th Cir. 1990)).

⁸⁸ *Id.* at 353; *see also* *Executone Info. Sys. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994) (defining awards that are outside the arbitrator’s jurisdiction as those that cannot be explained as furthering the goals of the contract).

⁸⁹ *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995).

arbitration award. In *Hall Street Associates v. Mattel, Inc.*, however, the Supreme Court has recently stated unequivocally that §10 “provide[s] the FAA’s exclusive grounds for expedited vacatur.”⁹⁰ In *Hall Street*, the parties had gone to arbitration only after agreeing to expanded appellate review.⁹¹ The Supreme Court held that *parties may not contract for additional expanded review by the courts* under the FAA.⁹² This decision overrules the previous Fifth Circuit case law.

Because of this substantial change to the law, lawyers may need to change the way they look at arbitration agreements. They may need to reevaluate prior arbitration agreements that relied on expanded appellate review. Parties that wish to have an expanded appellate review of any arbitration decision may still do so by contracting for an appellate arbitration panel to review the arbitrator’s decision.⁹³ It is also important to keep the “extraordinarily narrow” review given to arbitration awards in mind before consenting to any court sanctioned arbitration. Indeed, the *Hall Street* decision may encourage more parties to roll the dice on a jury trial with a full-bodied appeal rather than stake everything on a virtually unappealable arbitration. How this affects the number of cases going to arbitration remains to be seen.

⁹⁰ *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403–04 (2008).

⁹¹ *Id.* at 1400–01. The arbitration agreement provided that “The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.” *Id.*

⁹² *Id.* at 1400 (“The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.”). The decision does suggest, however, that there may be other authority beyond that FAA that might allow for expanded judicial review. *See supra* note 61. There may be means under state statutory or common law for the contract to be enforced, even if the contract itself may not alter the limited review provided by the FAA.

⁹³ *See* Kratovil, *supra* note 3, at 497–501.

E. The Long Odds Against Motions to Vacate

When a trial lawyer or client approaches appellate counsel seeking options in the wake of an arbitration defeat, the foregoing list of the grounds for vacatur probably provides them with little comfort. The reality of the matter is that once arbitration has occurred and an award issued, “[t]he party still can ask a court to review the arbitrator’s decision, *but the court will set that decision aside only in very unusual circumstances.*”⁹⁴ Our trial colleagues and clients may not enjoy hearing this evaluation, but at least it has the virtue of truth.

The quest for vacatur of an arbitration award is not always futile—it just takes unusual facts and circumstances to achieve. The Eleventh Circuit’s decision in *Hercules Steel Co.* should, however, give would-be award challengers significant pause. As should be plain “to even the least astute reader” of that decision, the Eleventh Circuit intends to begin imposing sua sponte sanctions on “poor loser[s]” who bring meritless challenges to FAA arbitration awards.⁹⁵ In anticipation of other courts (including potentially the Fifth Circuit) following the Eleventh Circuit’s lead, the losing party in an arbitration should carefully and candidly evaluate the merits of its challenge to an arbitration award before troubling the courts with a motion to vacate.

III. Challenging Arbitration Awards Under Texas Law

Texas law is similar to federal law on challenging arbitration awards, and it is similarly difficult to get the arbitrator’s judgment overturned. “Because arbitration is favored, and

⁹⁴ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (emphasis added); *see Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (opining that an arbitrator’s interpretation of the law is not subject to judicial review for error, as opposed to a manifest disregard of the law); *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (explaining that an arbitration award is enforceable despite a misinterpretation of law or incorrect legal reasoning; the award will only be reversed if the arbitrator states the law correctly, but purposely disregards it).

⁹⁵ *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907, 914 (11th Cir. 2006); *cf. Malice v. Coloplast Corp.*, 629 S.E.2d 95, 98 (Georgia Ct. App. 2006) (stressing that the purpose of arbitration is to avoid litigation).

because the courts do not want to chill the use and trust of the Texas arbitration system, courts ‘review arbitration awards very deferentially; [and] indulge every reasonable presumption in favor of the award and none against it.’”⁹⁶ But under the TGAA, courts do allow many of the same challenges as are found under the FAA. The main substantive difference between Texas and federal law is that Texas maintains a “gross mistake” standard of review while rejecting the “manifest disregard of the law” standard.⁹⁷

A. Reviewing Arbitration Awards under the TGAA

The TGAA provides for vacatur of an arbitration award in the following circumstances:

- (1) the award was obtained by *corruption, fraud, or other undue means*;
- (2) the rights of a party were prejudiced by: (A) *evident partiality* by an arbitrator appointed as a neutral arbitrator; (B) *corruption* in an arbitrator; or (C) *misconduct or willful misbehavior* of an arbitrator;
- (3) the arbitrators: (A) *exceeded their powers*; (B) *refused to postpone the hearing* after a showing of sufficient cause for the postponement; (C) *refused to hear evidence* material to the controversy; or (D) conducted the hearing, contrary to [TGAA’s hearing provisions], in a manner that substantially prejudiced the rights of a party; or
- (4) there was *no agreement to arbitrate*, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.⁹⁸

The challenge to an arbitration award under the TGAA must be brought within 90 days of knowing the grounds for such a challenge.⁹⁹ Most of these grounds are similar to the FAA, and

⁹⁶ Tom Stilwell, *Correcting Errors: Imperfect Awards in Texas Arbitration*, 58 BAYLOR L. REV. 467, 469 (2006) (quoting *Barnes v. Scott*, 126 S.W.3d 232, 241 (Tex. App.—San Antonio 2003, pet. Denied). Stilwell’s article offers a helpful and in-depth look at challenging Texas arbitration awards.

⁹⁷ *Id.* at 514–17.

⁹⁸ TEX. CIV. PRAC. & REM. CODE § 171.088 (West 2005) (emphasis added).

⁹⁹ *Id.*

the same reasoning applies, but it is worth briefly reviewing the grounds as well as the major Texas cases.

The five standards for vacatur in Texas are: (1) corruption, fraud, or undue means; (2) evident partiality, corruption, or misconduct; (3) exceeding their powers; (4) failure to hear evidence or conduct a fair hearing; and (5) no agreement to arbitrate. There is little Texas law on the subject of corruption, fraud, or undue means, but at least one Texas court has found that to qualify for vacatur “an act must so affect the rights of a party as to deprive it of a fair hearing.”¹⁰⁰ Evident partiality of a neutral arbitrator, on the other hand, is more commonly asserted as a reason for vacatur. The Texas Supreme Court has held that “a neutral arbitrator selected by the parties or their representatives exhibits evident partiality under this provision if the arbitrator does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator’s partiality.”¹⁰¹ “[E]vident partiality is established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias.”¹⁰² Arbitrators need not disclose trivial relationships, but should err on the side of disclosure.¹⁰³ A

¹⁰⁰ IPCO-G. & C. Joint Venture v. A.B. Chance Co., 65 S.W.3d 252, 255 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

¹⁰¹ Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629, 630 (Tex. 1997). No disclosure is required of non-neutral arbitrators, as these are considered as partisans for the parties themselves, and are not expected to be neutral. *Id.* at 636–37. As such, the neutral arbitrator’s dealings with a non-neutral arbitrator should also be disclosed or may prove grounds for vacatur. *Id.* at 639.

¹⁰² *Id.* at 636 (emphasis in original).

¹⁰³ *Id.* at 637. The Texas Supreme Court refused to grant vacatur in one case where one of the expert witnesses had previously appeared as an expert opposed to the arbitrator in a legal malpractice action. Mariner Fin. Group, Inc. v. Bossley, 79 S.W.3d 30 (Tex. 2002). It was unclear if the arbitrator even remembered his connection with the witness, and without such evidence, the court refused to vacate the award. *Id.* at 33.

party wishing to overturn an arbitration award under the TGAA may wish to check into the arbitrator's past dealings to ensure that full disclosure was given.¹⁰⁴

Attempting to show that the arbitrators exceeded their powers or failed to conduct a fair hearing is also difficult. “[A]rbitrators have broad authority to decide any issues submitted to them, unless the arbitration agreement expressly limits that authority.”¹⁰⁵ However, “when arbitrators attempt to determine matters not submitted to their determination, as to such matters the award is void.”¹⁰⁶ But provided that the arbitration agreement allows for a broad scope of arbitrator authority, courts will not vacate awards even if the arbitrator uses unusual procedures¹⁰⁷ or fashions types of relief not sought.¹⁰⁸ Courts are more willing to vacate awards if the arbitrators go beyond either the specific terms of the arbitration agreement or the rules of the TGAA.¹⁰⁹ In order to challenge the arbitrator's refusal to postpone a hearing, the party must show that they had “sufficient cause” for a continuance.¹¹⁰ In deciding whether to hear evidence, the arbitrators have “broad discretion in determining whether evidence was relevant and material

¹⁰⁴ The current rule in Texas is that the burden of disclosure is on the arbitrator, but some courts have been more willing to listen to arguments that the parties should perform some due diligence into their neutral arbitrator during the arbitration itself. See Stilwell, *supra* note 96, at 499–501.

¹⁰⁵ *Id.* at 501; See Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co., 164 S.W.3d 438, 443 (Tex.App.—Houston [14th Dist.] 2005, no pet.) (allowing arbitrators to decide on issues not specifically pleaded because of a broad arbitration agreement).

¹⁰⁶ Gulf Oil Corp. v. Guidry, 160 Tex. 139, 327 S.W.2d 406, 408 (1959).

¹⁰⁷ Action Box Co. v. Panel Prints, Inc., 130 S.W.3d 249, 252 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (rejecting an argument that the arbitrator had exceeded his powers by allowing parol evidence to interpret the arbitration agreement).

¹⁰⁸ J.J. Gregory Gourmet Services, Inc. v. Antone's Import Co., 927 S.W.2d 31, 36 (Tex. App.—Houston [1st Dist.] 1995, no writ) (allowing injunctive relief even though neither party had specifically requested this relief).

¹⁰⁹ Barsness v. Scott, 126 S.W.3d 232, 241 (Tex. App.—San Antonio 2003, pet. denied) (finding that the arbitrators had no power to add relief to an award where it had previously been denied).

¹¹⁰ Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 432 (Tex. App.—Dallas 2004, pet. denied); Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C., 63 S.W.3d 807, 809 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

to the dispute and in accepting or rejecting such evidence.”¹¹¹ Unless the arbitration agreement is narrowly drafted or the arbitrators are obviously unfair in denying evidence or refusing postponement, these two grounds for vacatur are very unlikely to succeed.

One way in which the TGAA is different than the FAA is the additional ground of vacatur if there is no valid arbitration agreement. If proven, this would overturn the arbitration completely, but to do so, the party must prove that it is the arbitration clause itself that is invalid, and not simply the whole contract.¹¹² Attacks upon the validity of the contract itself must go before the arbitrator. Overall under the TGAA, it is very difficult to overturn an arbitration award. Only in certain specific cases will the courts overcome the strong presumption in favor of the arbitrator’s judgment and vacate the award.

B. Texas Common Law Challenges

So far, the Texas Supreme Court has not decided whether the TGAA preempts the common law, and has “assume[ed] without deciding” that parties may still rely on common law attacks to arbitration awards.¹¹³ “Texas common law allows a reviewing court to set aside an arbitration award only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment.”¹¹⁴ The only ground separate

¹¹¹ IPCO-G. & C. Joint Venture v. A.B. Chance Co., 65 S.W.3d 252, 260 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

¹¹² *In re Educ. Mgmt. Corp.*, 14 S.W.3d 418, 425 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“Fraud in the inducement of an arbitration provision is a matter for the trial court whereas fraud in the inducement of an entire agreement is a matter for the arbitrator.”); *Women’s Regional Healthcare, P.A. v. FemPartners of North Texas, Inc.*, 175 S.W.3d, 368 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (finding that claims that the underlying contract is void or illegal must be brought before the arbitrator).

¹¹³ *Callahan & Assocs. V. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002).

¹¹⁴ *Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C.*, 183 S.W.3d 741, 752 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (quotation omitted).

from the TGAA is that of “gross mistake.” “Gross mistake results in a decision that is arbitrary or capricious. An honest judgment made after due consideration given to conflicting claims, however erroneous, is not arbitrary or capricious.”¹¹⁵ “The courts will not retry the claim under the guise of determining whether the arbitrators committed a gross mistake.”¹¹⁶ Instead, courts will limit their review to whether the failure to adopt the challenging party’s view of the law “constitutes bad faith or a failure to exercise honest judgment.”¹¹⁷ It is thus very difficult for a party to prove a “gross mistake” has happened. Texas courts have rejected adopting the “manifest disregard of the law” standard,¹¹⁸ though it is likely that any “manifest disregard of the law” would qualify as a “gross mistake.”

The Texas Supreme Court has made clear since 1936 that public policy grounds are a legitimate means for vacatur of arbitration awards, stating that: “a claim arising out of an illegal transaction ... is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in courts of the country.”¹¹⁹ But an “arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy.”¹²⁰ It should be noted that Texas law and the Texas

¹¹⁵ *Id.* (quotation omitted).

¹¹⁶ Stilwell, *supra* note 96, at 515.

¹¹⁷ *Universal Computer Sys.*, 183 S.W.3d at 753.

¹¹⁸ *Action Box Co. v. Panel Prints Inc.*, 130 S.W.3d 249, 252 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

¹¹⁹ *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 237 (Tex. 2002) (quoting *Smith v. Gladney*, 128 Tex. 354, 98 S.W.2d 351, 351 (1936)).

¹²⁰ *Id.* at 239.

Constitution have far more “fundamental policies” than do their federal counterparts, so public policy arguments may go further in Texas courts than they would in federal court.¹²¹

C. The Long Odds against Vacatur in the Lone Star State

The Texas Supreme Court has “long held that an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort. All reasonable resummptions are indulged in favor of the award, and none against it.”¹²² Arbitration is strongly favored in Texas, and Texas courts are loath to overturn awards unless there are exceptional circumstances. With the exception of the replacement of “manifest disregard for the law” with the slightly broader “gross mistake,” Texas law generally is quite close to federal law in how difficult it is to overturn arbitration awards.

D. Waiving the Right to Arbitration in Texas; the *Perry Homes* Decision

In a recent decision by the Texas Supreme Court, *Perry Homes et al v. Cull*, the Court dealt with the issue of a party waiving its contractual right to arbitration.¹²³ In a decision marked by three concurring opinions and two dissents, the Texas Supreme Court held that a “party cannot substantially invoke the litigation process and then switch to arbitration on the eve of trial.”¹²⁴ While the Court recognized the strong presumption against waiver of arbitration, it noted that it is **not** an irrebuttable presumption.¹²⁵

¹²¹ See *id.* (observing the strong Texas public policies to protect homesteads).

¹²² *Id.* at 238 (quotation omitted).

¹²³ *Perry Homes et al v. Cull*, --- S.W.3d ---, 2008 WL 1922978, 51 Tex. Sup. Ct. J. 819 (Tex. 2008).

¹²⁴ *Id.* at *1

¹²⁵ *Id.*

The plaintiffs in *Perry Homes* filed suit and initially opposed arbitration. Indeed, the plaintiffs filed a 79-page response to the defendants' initial motion to compel arbitration.¹²⁶ The plaintiffs asserted that the American Arbitration Association ("AAA") "is incompetent, is biased, and fails to provide fair and appropriate arbitration panels."¹²⁷ Strangely, neither side pressed for a ruling on the defendant's motion to compel arbitration, and the issue remained unresolved as the case progressed.¹²⁸ However, the plaintiffs began seeking extensive discovery.

With most of the discovery completed and with the case set for trial, the plaintiffs changed their minds and, in a sudden about-face, moved the trial court to compel arbitration.¹²⁹ While the trial court expressed reservations about the context of the plaintiffs' request (the plaintiffs had, after all, waited fourteen months and conducted extensive discovery before requesting arbitration), the court ordered arbitration because the defendants failed to show that they would suffer prejudice as the result of the late shift from litigation to arbitration.¹³⁰

The parties spent a year in arbitration, and the plaintiffs ultimately were awarded \$800,000.¹³¹ The defendants moved to vacate the award based at least partially on the grounds that the "case should never have been sent to arbitration after so much activity in court."¹³² The court of appeals later affirmed the trial court's decision.¹³³

¹²⁶ *Id.*

¹²⁷ *Id.* at *7.

¹²⁸ *Id.* at *1.

¹²⁹ *Id.* at *1.

¹³⁰ *Id.* at *8.

¹³¹ *Id.* at *2.

¹³² *Id.*

¹³³ *Id.*

The Texas Supreme Court granted the defendant's petition for review and applied a "totality of the circumstances" analysis, finding that the plaintiffs had substantially invoked the judicial process and had, thereby, prejudiced the other party.¹³⁴ The Court, while recognizing the "difficulty of uniformly applying a test based on nothing more than the totality of the circumstances," found no better test for "substantial invocation."¹³⁵

The Supreme Court found that, based on the totality of the circumstances, the plaintiffs had waived arbitration based on the following actions: (1) the plaintiffs' initial objection to arbitration; (2) the defendants' responses to requests for disclosure; (3) the plaintiffs' five motions to compel, including 76 requests for production; (4) the defendants' two motions for protective orders, including requests for 67 categories of documents; (5) the plaintiffs' notices of depositions, including requests for 24 categories of documents; and (6) the fact that plaintiffs moved for arbitration fourteen months after filing suit and shortly before the trial setting.¹³⁶ The Supreme Court found that the plaintiffs took advantage of extensive discovery available through the trial process and then belatedly invoked arbitration in a purposeful effort to limit the appellate process available to the defendants.¹³⁷

Ultimately, the Court concluded that "a party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party."¹³⁸ The Court's analysis and holding suggest that while

¹³⁴ *Id.* at *5.

¹³⁵ *Id.*

¹³⁶ *Id.* at *7.

¹³⁷ *Id.* at *8.

¹³⁸ *Id.*

waiver of arbitration is disfavored, under the right, albeit rare circumstances, such waiver is possible, and the Texas courts should not be so quick to kick a case out of its courtroom in favor of arbitration. In sum, *Perry Homes* provides a narrow new basis for appellate lawyers to pursue vacatur of an arbitration award, but only under unusual factual circumstances where the party seeking arbitration belatedly did so in a purposeful effort to inflict prejudice..

IV. Conclusion

One long-term solution to the problem of the profoundly limited appealability of arbitration awards would be to move towards the English arbitration system, under which judicial review for legal error committed by the arbitrator is always permitted: “Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.”¹³⁹ Such a change to the FAA would require action by Congress and—unhappily for appellate lawyers—no such change appears to be in the works. We are left then with our current system of appellate review.

Under the current system, there are only “extraordinarily narrow” grounds for vacatur of an arbitration award under either the FAA or TGAA. Trial lawyers should be very cautious in invoking arbitration, knowing that if the arbitrator makes mistakes of law or fact, there will be no appellate judge able to review the case. One solution is to simply change the way that arbitration agreements are written. Even in the wake of the U.S. Supreme Court’s decision in *Hall Street*, transactional attorneys and clients have the opportunity, in crafting the arbitration agreement, to

¹³⁹ Arbitration Act, 1996, ch. 23, § 69(1) (Eng.). Thus, the English and American systems of arbitration are fundamentally different. While the English system allows for judicial review unless the parties specifically contract otherwise, the FAA provides for limited review, and parties may not expand this review.

provide for an appellate arbitration panel. Absent an increase in the use of such appellate provisions in arbitration agreements, however, we appellate lawyers will remain the bearers of bad news when trial attorneys and clients come to us in the wake of an arbitration defeat.