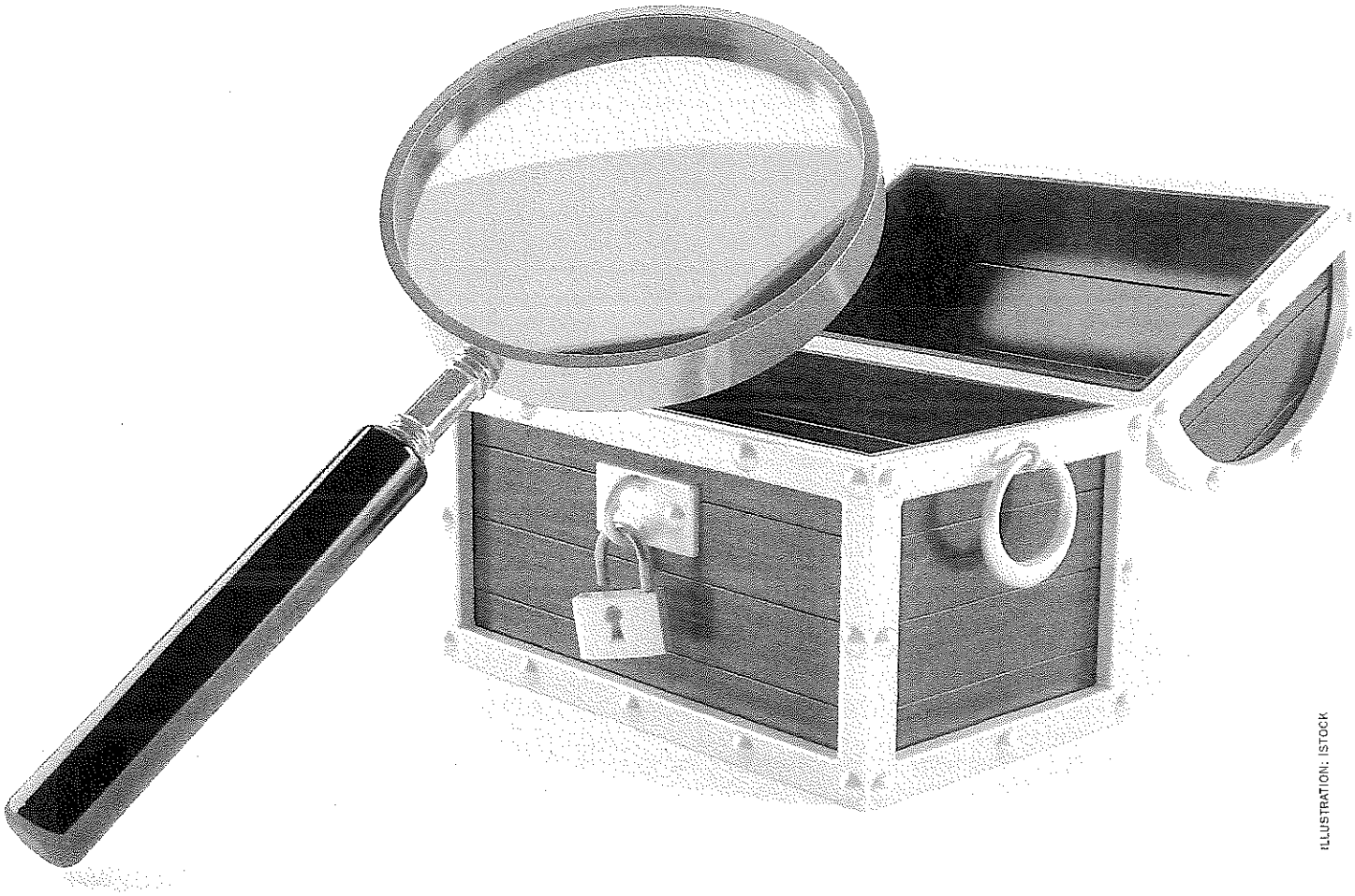
Dreaming the Nearly Impossible Dream

Vacatur of Arbitration Awards in Commercial Arbitration

By Kermit L. Kendrick and Julie W. Pittman



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The arbitration process has one overarching purpose: to provide final and binding resolution of disputes with greater speed, efficiency, and economy than parties would obtain in court. Vacatur of an arbitration award naturally conflicts with this purpose by lengthening the resolution process, adding further litigation costs, and duplicating the efforts of arbitrators. To avoid this conflict, state and federal courts enforce the strongest possible presumption in favor of arbitration decisions, while sharply limiting the grounds for vacatur.

Technically, vacatur is not impossible, but it can certainly seem so. The Federal Arbitration Act (FAA)[1] provides limited statutory grounds for judicial review of an arbitration award, but only where the arbitration process itself has been compromised. The FAA does not allow for vacatur of arbitration decisions based solely on factual or legal errors. Nonstatutory grounds for challenging decisions have been recognized by certain courts, but are not widely accepted and rarely succeed. The entire process is governed by the FAA's heavy presumption in favor of arbitration, which routinely crushes even those petitions that provide compelling statutory grounds for vacatur. As a result, only about 20 percent of petitions for modification and/or vacatur of an arbitration decision ultimately result in some form of relief to the losing party—and even then, the only relief is a return to arbitration for correction of error. Only about 10 percent of petitions filed actually result in vacatur or serious modifications of an arbitration decision.[2]

Given this bleak reality, the process of seeking vacatur should perhaps begin with lowering your client's expectations for success. This is particularly important if the arbitration decision is so riddled with glaring errors of fact and law that your client might naturally expect slam-dunk relief from the court. Be sure your client understands that, in the alternative world of arbitration, the chances of vacatur are essentially slim and none.

Then set out to do the near impossible. Study the statutory grounds for vacatur and find creative ways to fit your case into the FAA's confines. Put the language of your arbitration agreement to work for you, scour the record of the proceeding for procedural issues, and identify points of decision that fall outside the scope of arbitral authority in novel ways. Focus your attack on the process of arbitration, not its result. Strategy, creativity, and luck may combine to form your client's escape from the finality of an arbitrator's wrong decision.

Statutory Grounds for Vacatur: Challenging the Process

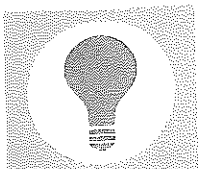
Under the FAA, an arbitration award does not take on the force of law until after it has been confirmed by a court.[3] Confirmation transforms the arbitration award into a judgment that is as binding and enforceable as any other judgment issued by a court.[4] A confirmation proceeding is meant to be little more than a formality; "confirmation can only be denied if an award has been corrected, vacated or modified in accordance with the Federal Arbitration Act."[5] The losing party has an opportunity to seek that correction, vacatur, or modification once the prevailing party commences the confirmation process.[6]

To put it mildly, vacatur of arbitration decisions is strongly disfavored.[7] The FAA grounds for vacatur are "extraordinarily narrow" and stringently applied.[8] Section 10(a) of the FAA provides that vacatur may be granted only:

> (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.[9]

These limited grounds for review are designed *solely* to ensure the integrity of the arbitration itself, and thus allow vacatur only if the decision or award is an affront to the resolution process itself. The FAA provides no grounds on which a party may challenge legal and/or factual errors in the arbitration decision itself. If the decision arguably conforms to the spirit of the arbitration agreement, and fully resolves the issues without blatant arbitral misconduct or fundamental unfairness, the trial court will almost certainly affirm that decision no matter how badly the law and facts have been bungled.

So what does a client do if the arbitrators exercised their powers in good faith, without corruption, and within the scope of the arbitration agreement—yet still issued a decision rife with serious errors of law and/or fact? Unfortunately, in most instances, the client simply loses. This can be hard to accept, particularly if the arbitrators' errors are palpable. However, the U.S. Supreme Court has made it clear that parties must live with the consequences of choosing the "speed and efficiency" of arbitration over the factual and legal rigor of a courtroom. "Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial."[10] Thus, "[w]hen



TIP

The FAA's grounds to vacate make it almost impossible to uphold erroneous arbitration awards. Creative, diligent and early pleadings may, however, provide a winning strategy.

an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, fact finding' does not provide a basis for a reviewing court to refuse to enforce the award."[11] The state and federal courts have repeatedly implemented this rule, enforcing arbitration awards if there is even a "barely colorable justification for the outcome reached."[12] Generally, the strong federal presumption in favor of upholding arbitration awards is all the justification needed to deny the vacatur petition.

It is, therefore, fair to say that any vacatur petition based solely on factual and/or legal errors in the arbitrators' decision will almost certainly be rejected. Your best chances for success lie in framing your vacatur petition within the statutory grounds listed in § 10(a) of the FAA. Focus on the authority of the arbitrators and the procedural requirements of your proceeding, and put your arbitrators' decision through that filter. Is there a way in which the arbitrators exceeded the authority and requirements of the arbitration agreement? Can you identify how the decision might constitute a denial of fundamental fairness in the arbitration process? Did your arbitrators exhibit signs of misconduct or bias? The answers to these questions can help you determine how to make the FAA's grounds fit into the facts of your petition.

Vacatur of decisions that exceed scope of arbitral authority. The most popular and successful basis for vacatur petitions is found under § 10(a)(4), which allows a challenge to an arbitration decision that exceeds the scope of arbitral authority.[13] Excesses of arbitral authority under § 10(a)(4) thus tend to fall into two main categories: (1) failure to comply with an arbitration agreement's clear limitations and requirements, and (2) awarding relief that goes overboard in some gross fashion or condones illegality or unethical behavior by a party. These flaws certainly do not guarantee a vacatur; to the contrary, even where arbitral excesses seem clear, the courts often find contorted ways to affirm the arbitrators' decision in deference to the FAA. These are, however, on average the most successful grounds for vacatur, and thus a good place to start in seeking valid grounds for your petition.

Arbitration agreements often contain clauses that limit the scope of arbitral authority both substantively and procedurally. An arbitration decision or award that exceeds those limits can provide the losing party with a prime basis for vacatur under § 9. For example, courts have vacated arbitration awards under § 10(a)(4) for the following reasons:

- Awarding attorney fees to the prevailing party when the arbitration agreement did not authorize such an award;[14]
- Awarding equitable remedies when the agreement specifically prohibited any relief not available at law;[15]
- Violating two stipulated arbitration rules by refusing to consider a request for deferment of the arbitration hearing because of pending court actions and a possible statute of limitations issue;[16]
- Failing to make a specific determination necessary for the parties to calculate damages under the contract;[17]
- Failing to provide an award in the form required by the parties' agreement;[18]
- Failing to award interest on the amount awarded as required by contract;[19]
- Awarding punitive damages when the agreement clearly prohibited such an award;[20]
- Requiring a company to reinstate an employee in violation of its own employment policies;[21]
- Awarding commissions to a terminated employee when such an award was expressly prohibited under the arbitration agreement;[22]
- Failing to empanel the number of arbitrators required by the agreement;[23]
- Failing to conduct the proceeding in the form required by the agreement;[24]
- Failing to use the arbitration organization specified in the agreement;[25]
- Effectively rewriting the substance of the parties' agreement to impose new duties,[26] or to allow new compensation;[27]
- Failing to make findings of fact and conclusions of law as required by the parties' agreement;[28]
- Failing to dispose of all pending issues;[29]
- Acting so contrary to clear contract provisions that they failed to draw their powers from even the "essence" of the agreement;[30]
- Issuing an award against a

Kermit L. Kendrick *is a litigation partner with Burr & Forman LLP. His practice focuses on transportation, commercial, and insurance litigation. Kendrick has arbitrated many cases on behalf of fortune 500 companies as well as local businesses. He is an active member in TIPS and serves as vice-chair of the Professionals' Officers' and Directors' Liability Committee (PODL) and the Business Litigation Committee. Kendrick also serves on the TIPS Task Force on Leadership-Diversity Initiative.* **Julie W. Pittman** *is a staff attorney with Burr & Forman LLP. Her practice focuses on labor and employment and commercial litigation, including arbitration matters on behalf of national health care corporations. They may be reached, respectively, at kkendrick@burr.com and jpittman@burr.com.*

party not bound by the arbitration agreement;[31] and
- Issuing an opinion when the arbitration panel was not chosen according to the procedure stipulated by the parties.[32]

Unfortunately, for every vacatur granted under § 10(a)(4), there are far more petitions denied under the same ground—even where an arbitrators' decision clearly exceeds their contractual authority. This is true because a petition for vacatur, like all other aspects of arbitration, is to be decided with an extraordinary presumption in favor of promoting, expanding, and protecting the broad authority of arbitrators. To uphold the FAA, courts "must affirm the arbitrator's decision if it is rationally inferable from the letter *or the purpose* of the underlying agreement."[33] When there is conflict between the letter of the agreement and the purpose of arbitration, the courts can, *and will*, look for every way possible to decide in favor of the FAA's purpose.[34] With variation on this basic reasoning, courts are often able to excuse the arbitrators' failure to comply with even the clearest arbitration provisions.

An excess of authority may not always manifest as an obvious violation of a plain limitation in the arbitration agreement. It is generally axiomatic that arbitrators do not have authority to bind unrelated third parties, endanger a person, or order an illegal or unethical act. Accordingly, an arbitration award that extends past the issue at hand to significantly change the way in which a party conducts its business as a whole, or deals with its employees, may exceed the arbitrators' authority. For example, courts have sometimes found that arbitrators have exceeded their authority by directing parties to violate the legal rights of third persons who did not consent to the arbitration.[35] Even more importantly, arbitrators should not be allowed the authority to excuse violations of company policy, professional ethics and rules, and/or requirements under the law.[36] An arbitration award that effectively allows unethical or even illegal actions is a natural fit for vacatur under § 10(a)(4).

Vacatur based on arbitrators' misconduct in administering the proceeding. Section 10(a)(3) permits vacatur where the arbitrators were guilty of misconduct in refusing to postpone the hearing or hear material evidence, or of any other misbehavior that prejudiced the rights of any party. The key to this challenge is to demonstrate how the arbitrators' errors deprived your client of a "fundamentally fair hearing" or resulted in prejudice to your case.

For example, arbitrators' refusal to postpone the proceeding for good cause can be a basis for vacatur where doing so deprives a party of a fair hearing.[37] Refusing to grant a continuance could likewise be a valid ground for vacatur if an otherwise prudent party could not produce an important witness at a hearing because the arbitrators denied a continuance.[38]

Similarly, arbitrators may commit misconduct by refusing to hear pertinent facts or argument. When parties agree to arbitrate, the law presumes they intend that the arbitrators allow them to present material and pertinent evidence supporting their position.[39] Thus, if arbitrators exclude evidence that, if admitted and credited, would have justified a different outcome, a court may grant relief. Again, the touchstone is prejudice: would the outcome have been different had the arbitrators admitted and credited the evidence, or was the challenging party denied a fair hearing because the arbitrators would not hear the proffered evidence? If so, vacatur may be possible based on misconduct.[40]

Vacatur based on arbitral bias or corruption. FAA § 10(a)(1) permits vacatur where there has been actual fraud, corruption, or misconduct on the part of an arbitrator, but only where the evidence of such misconduct is "direct, definite and capable of demonstration rather than remote, uncertain or speculative."[41] To put it in perspective, consider how difficult it can be to achieve the recusal of a judge who shows bias or misconduct, then add to that the strongest possible policy in favor of arbitration.

However, a party who has real evidence of misconduct or bias has perhaps the best chance of achieving vacatur; this level of error strikes at the very integrity of the arbitration process. Thus, an arbitrator who fails to disclose a prior relationship with a party's counsel may be deemed biased, and the decision vacated.[42] Clear-cut evidence of an arbitrator's financial interest in the proceeding is a similarly compelling ground for vacatur.[43]

When conflict exists between the letter of the agreement and the purpose of arbitration, courts can and will look for every way possible to decide in favor of the FAA's purpose.

Digging Into Statutory Grounds to Find Your Issue

Once you understand the limitations of the FAA's grounds for

vacatur, the next step is finding a way to fit your case into those confines. Given the dismal odds of success, you have nothing to lose by making a novel argument. If you see no obvious flaws beyond wrong facts and misapplied law, look again. There may well be "sleeper" issues that don't jump out at you, but could be developed into credible excess-of-authority or fundamental fairness arguments. The following general guidelines may help you look for the errors you need to find your fit within the § 10 vacatur grounds.

Review the arbitration agreement. Your contract is supposed to set the boundaries for your arbitrators, so start there. Read your arbitration agreement, word for word, and consider whether it limits the scope of arbitration, and/or the arbitrator's powers, in any way. Some areas for thought might include the following:

- Did the agreement limit the type of proceeding that could be conducted; e.g., are summary proceedings or equitable proceedings precluded?
- Did the agreement contain any specifications as to the panel itself; i.e., number of arbitrators, their neutrality, etc.?
- What issues were included in the scope of arbitration, and who is bound by the arbitrators' decision? Were nonsignatories such as company employees to be bound or impacted by the ramifications of the decision?
- Did the agreement require the arbitrators to apply the law of a certain state?
- Did the agreement impose any procedural requirements, such as a time limit for bringing claims, discovery limitations, or deadlines for arbitrator decisions?
- Were the arbitrators required to give a written, reasoned opinion and/or make factual findings?
- Was there any limit on the amount or type of kinds of damages that the arbitrators could award; i.e., no summary proceedings, equitable relief, nonmonetary relief, etc.?
- Did the contract reference the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures (AAA Rules) that are applicable to a specific profession? Could those rules imply a duty to render a decision that comports with the professional rules of that profession?
- Did the agreement provide that, in the event of conflict between the AAA Rules and the specific provisions in the agreement, the specific provisions would govern?

Stringently assess the arbitrators' actions. After you have dissected your arbitration agreement, examine the arbitration decision and the transcript to determine where the arbitrators might have exceeded their contractual authority. Review the transcript for any objections that you might have made and consider whether the arbitrators acted against your objection. If you cannot find grounds for your arguments based on prior objections or proceedings, check the decision for surprises that were not telegraphed at the proceeding. Some potential areas of inquiry might include the following:

- Is there any aspect of the proceeding and/or the decision that clearly indicates how your panel might have exceeded its authority?
- Did the panel consider an equitable defense or line of argument when your agreement specifically prohibits equitable relief of any kind?
- Did the panel award damages that are prohibited by contract? For example, even if the award did not specify any amount for punitive damages, could the damages award be construed as such based on the record?
- Was the decision simply a conclusory statement when the contract requires a reasoned opinion that gives specific grounds for the panel's findings?
- Did the arbitrators fail to consider the applicable law required by the contract? Did they allow arguments based on the law of other states and could the decision be tied to such law?
- Did the arbitrators fail to award costs and fees as set forth in the agreement?
- Does the decision rely on a new line of reasoning that was not presented during the proceeding, or conflicts with the applicable law that your contract requires the arbitrators to apply?

Look outside the box for violations of laws and ethics. It is unlikely that your arbitrators would issue a decision that overtly indicates their consideration of the case was touched with illegality or unethical practices. However, if you have any legitimate basis to suspect that an arbitrator might have had a personal or financial conflict of interest, or a demonstrable bias, it is worth some effort to dig for supporting facts. If there is evidence of intentional bias or conflict, you should consider framing the issue as both an excess of arbitral authority and arbitral misconduct under § 10(1)–(3).

However, violations of law and/or ethics need not be intentional, or direct, to be impermissible. At times, arbitrators may focus so narrowly on resolving the case as it is

presented that they do not think their decision all the way through to its natural consequences. Look past the resolution of your client's specific claims and consider whether the ripple effect of the arbitrators' decision falls into shady areas. For example, you might consider the following:

- Will the arbitrators' decision require any significant change in your client's policies and procedures that will negatively impact the company's ability to serve its clients or customers?
- Will the decision require a change in company policies and procedures that will negatively impact the well-being of your employees?
- Will the arbitrators' decision have a ripple effect that could affect your client's industry or profession?
- Does the decision's reasoning, and/or the action it requires, create any "slippery slope" of consequences that the arbitrators did not foresee?
- If your client is bound by professional rules and ethics, does the decision have the effect of requiring—or condoning—an action that conflicts with those rules?
- Does the decision allow a party to "get away with something" that would not be allowed under local, state, or federal law?
- Does the decision directly or indirectly require a party to act in a way that does not comport with your company's policies?
- Does the decision effectively make "two sets of laws" for citizens—one for those who avail themselves of the courts and one for those who submit themselves to arbitrators?

Remember, the arbitration was conducted to resolve the claims between your opponent and you—not reshape your company, impact your industry, negatively impact your employees, or create a new legal system where laws and ethics are negotiable. An arbitration decision that impacts individual and/or corporate nonparties as much as, or even more than, the parties may be inherently in excess of the arbitrators' powers.

TIPS CALENDAR

The following calendar highlights important upcoming dates in TIPS. For additional and updated information, visit the calendar at the TIPS website: www.americanbar.org/groups/tort_trial_insurance_practice/events_cle.html

FEBRUARY

6–9
ABA Midyear Meeting
Chicago, IL
Information: 312-988-5672

10
Members' Monday: Free Teleconference CLE–Cybercrime Claims
Teleconference sponsored by Fidelity & Surety Law Committee
Information: 312-988-5498

20–22
Insurance Coverage Litigation Midyear CLE Meeting
Phoenix, AZ
Information: 312-988-5498

MARCH

13–15
Workers' Compensation & Labor Law Joint CLE Program
Chicago, IL
Information: 312-988-5708

20–22
Rub 'O the Green: Litigation, Ethics, and the Rules of Golf Ethics–CLE Program and Golf Tournament
Tucson, AZ
Information: 312-988-5708

APRIL

2–4
Motor Vehicle Products Liability Litigation National Program
Phoenix, AZ
Information: 312-988-5708

3–5
Toxic Torts and Environmental Law Midyear CLE Meeting
Phoenix, AZ
Information: 312-988-5672

7
Members' Monday: Free Teleconference CLE–Ins and Outs of Interpreting and Applying D&O and E&O Policy Exclusions
Teleconference sponsored by Fidelity & Surety Law Committee
Information: 312-988-5498

11
New York City Bar and TIPS Insurance Regulation Program
New York, NY
Information: 312-988-5498

12–16
TIPS/ABOTA National Trial Academy
Reno, NV
Information: 312-988-5708

24–26
Property Insurance Law Spring CLE Meeting
Carlsbad, CA
Information: 312-988-5498

MAY

7–9
Fidelity & Surety Law Committee Spring Meeting
Louisville, KY
Information: 312-988-5708

14–18
TIPS Section Spring Leadership Meeting
Boca Raton, FL
Information: 312-988-5672

Nonstatutory Grounds for Modification or Vacatur

It bears repeating that the only certain grounds for vacatur of an arbitration award are the statutory grounds set forth in § 10. Prior to 2010, many federal and state courts allowed parties to challenge arbitration decisions on other grounds, primarily to provide parties with a way to challenge decisions that were grossly in error. The main nonstatutory grounds for vacatur were found where arbitrators acted with manifest disregard of the law, arbitrarily and capriciously, and/or in violation of public policy.

As of 2010, however, the U.S. Supreme Court has cast doubt on the ongoing viability of nonstatutory grounds for vacatur, while stopping short of actually prohibiting such grounds. The Supreme Court's signals have created great flux in the lower federal courts and state courts, which vary widely as to whether nonstatutory grounds still exist, what constitutes such grounds, and to what degree such grounds will be applied.

"Manifest disregard of the law" standard. The creation of "manifest disregard" review can be traced to the 1953 Supreme Court opinion in *Wilko v. Swan*.[44] In its discussion, the Court explained that arbitration would undercut the Securities Act's buyer protections and remarked that the "[p]ower to vacate an [arbitration] award is limited" and 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."[45] This small passage led directly to the creation of "manifest disregard" as grounds for vacatur in the federal and state courts.

However, in 2010, the Court's opinion in *Hall Street Associates v. Mattel, Inc.*,[46] revisited the *Wilko* decision to consider again whether the manifest disregard standard was viable only as another way of expressing grounds for vacatur under § 10. The Court stated that "the statutory text gives us no business to expand the statutory grounds [of judicial review under the FAA].[47] However, the Court did not exactly repudiate the manifest disregard standard. Instead, the Court reasoned that nonstatutory grounds for vacatur were hardly necessary when § 10 grounds could be read to encompass many of the same arguments. The Court explained:

> Instead of fighting the text [of the FAA], it makes more sense to see the three provisions, §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process" and bring arbitration theory to grief in post-arbitration process.[48]

Importantly, the Court also recognized that "[t]he FAA is not the only way into court for parties wanting review of arbitration awards," and that sometimes parties "may contemplate enforcement under state statutory or common law."[49] The Court emphasized that its holding was not intended to "exclude more searching review based on authority outside the [FAA]."[50]

It thus seems clear that the *Hall Street* Court did not intend categorically to preclude parties from obtaining expanded judicial review in all forums and under all circumstances. However, the decision has become a lightning rod for lower courts that have struggled to balance the undefined, potentially liberal manifest disregard of the law standard against the stringent federal policy disfavoring vacatur of arbitration decisions. The result has been a wide split among circuits, and confusion in the lower federal and state courts.[51]

In all of this judicial dithering, it is easy to miss important guidance from the *Hall Street* opinion; that is, whether or not it exists as a separate ground for vacatur, "manifest disregard" can be framed to fit into the FAA's statutory grounds for vacatur. For example, a "manifest disregard of the law" argument can morph into an argument that arbitrators acted "in excess of the powers by refusing to apply the law as required by the parties' agreement." By the same token, an argument that arbitrators acted "arbitrarily and capriciously" might be modified to become an "excess of powers" argument or even an "arbitrator misconduct" argument, depending on the circumstances.

Check your federal circuit courts, lower district courts, and state courts—all of which may vary sharply on the issue—to determine the status of nonstatutory grounds as they apply to you. If manifest disregard and other nonstatutory grounds still exist for you, then you should by all means make those arguments for vacatur. However, keep in mind that the statutory grounds under § 10 are a sure thing, and will not give your local court a chance to use the ambiguous status of the manifest disregard standard as an excuse to pass on the merits of your arguments. As the *Hall Street* Court advised, it may be best not to fight against § 10, but to simply use it as the most valid possible frame for your petition. Play it safe: even if your court still recognizes the manifest disregard standard, front-load your petition with statutory grounds for vacatur if at all possible.

Violation of public policy standard. In addition to the manifest disregard standard for review of legal errors, some courts have vacated arbitration decisions that clearly violate an identifiable public policy.[52]

Needless to say, this kind of vacatur is rare, and is granted only in cases where an arbitration decision allows a party to outright violate the law, profit from wrongdoing, or controvert basic public standards.[53] However, this kind of allegation could easily be framed within § 10(a)(4) and presented as a gross example of arbitrators exceeding their powers. Ask yourself whether it is best to risk rejection of your petition based on an amorphous, nonstatutory standard when the same facts can be presented within the FAA's framework. If the facts of your case are compelling enough to fit the strenuous public policy standard, they should be enough to satisfy § 10(a)(4). You can certainly argue it both ways, but lead with the FAA's dictates.

"Arbitrary and capricious" standard. The Eleventh Circuit has created a form of nonstatutory "arbitrary and capricious" standard that is sometimes applied when "a [legal] ground for the arbitrator's decision cannot be inferred from the facts of the case" and the decision represents "a wholesale departure from the law."[54] However, arbitrariness is "a very difficult standard for the party contesting the arbitration award to overcome."[55] No other circuits have outright approved this standard, and most have rejected it at least implicitly.[56] It is difficult enough to attract a court's serious consideration to a petition based on the established statutory grounds of § 10(a); a petition based on an arbitrary and capricious standard would likely be dead on arrival, except perhaps in the Eleventh Circuit. While there may be no harm in including the standard in a secondary argument, there is simply no realistic chance that your petition will succeed on this basis alone.

Planning Ahead for Statutory Vacatur

Attorneys often approach arbitration with little thought of vacatur, particularly if their case is very strong and thus seemingly likely to succeed before the arbitration panel. However, attorneys know only too well that trying a case before a court is risky enough, even with the protections of rules, judicial procedures, legal principles, and appeals. Little or none of these protections exist in arbitration, thus increasing the risk that even a meritorious case can end in a loss, with vacatur as the only escape. Attorneys should therefore anticipate the worst and prepare for vacatur before arbitration begins by: (1) drafting extremely clear contractual limitations; (2) clearly and consistently refining, affirming, and enforcing those limits; and (3) building a record of objections showing when arbitrators exceeded their authority, exhibited misconduct, or simply deprived your client of fundamentally fair proceedings.

The FAA, the courts, and the AAA Rules all provide arbitrators with the widest possible discretion to decide claims and require that every presumption be indulged in favor of arbitration.

In reviewing vacatur petitions, courts start with the premise that, "[u]nless the arbitration agreement provides to the contrary, an arbitrator is not bound by principles of substantive law or by rules of evidence, but 'may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be.'"[57] The FAA, the federal and state courts, and the AAA Rules all provide arbitrators with the widest possible discretion to decide claims, and require that every presumption be indulged in favor of furthering the purposes of arbitration.[58] Even well-drafted limitations on arbitral authority are often trounced by this presumption, making it all the more essential that nothing is left to chance when drafting such limitations in your client's agreement.

Use precise and unequivocal language. Any hint of ambiguity in a limitation on arbitration—even something as subtle as using the word "shall" instead of the stronger word "must"—will be aggressively construed in favor of arbitration. Err on the side of making restrictions or requirements absolutely mandatory. If a provision later proves to be too restrictive as the case unfolds, you can usually waive the provision, asking the arbitrators to disregard it or by simply acting in a way that conflicts with the provision. You can count on the federal and state courts to uphold that constructive waiver.

Provide that the contract will govern conflicts with the AAA Rules. Because arbitration is a creature of contract, it would seem obvious that the parties' carefully crafted arbitration clause will be enforced over the AAA Rules if there is any conflict between the contract and those rules. However, the strong policy in favor of arbitration presumes otherwise. Courts routinely uphold arbitration decisions that are in excess of the parties' specific limitations on arbitral power by finding that such limitation conflicts with the broad granting of arbitral authority under the AAA Rules. If there is any conflict between the rules and the parties' own contract language, the presumption in favor of arbitration will apply and the rules may well trump the contract. However,

a clear and unequivocal provision stating that the parties specifically intend for the contract to govern any conflict with the AAA Rules will often hamper, or even eradicate, a court's ability to enforce the AAA Rules over your agreement.

Draft specific arbitration provisions that build a record. The AAA Rules do not require an arbitration proceeding to be preserved in a record. Consider the scope and potential risks of claims that could foreseeably arise from the parties' transaction. However, obtaining vacatur later may be impossible without a written decision to demonstrate clear error, written findings of fact, and an analysis of the issues. If you lose in arbitration and want to seek judicial relief, how will you prove that the panel erred in its decision? Consider adding provisions to your arbitration agreement to require both a record of the proceedings and a decision that sets forth written findings of fact and an analysis of applicable law or other basis for the award. In your letter of engagement to retain the services of the arbitrators, set out the arbitration provision and emphasize any limitations on issues, arbitral authority, remedies, and award, and/or on procedural issues.

Establish boundaries at the prearbitration conference. Perhaps the single best chance you have to enforce the limitation of arbitral authority is in a substantive prearbitration conference, and the AAA now apparently agrees. Effective October 1, 2013, the AAA has amended its case management rules to require a preliminary scheduling conference that provides an exciting and substantive way for parties to clarify and enforce their desired limitations on arbitral authority. Under new AAA Rule P-1, the parties are to meet in a prearbitration conference in order to address more than 25 different suggested issues, including the scope of issues and relief involved, discovery limitations and costs, and the use of summary proceedings as a dispositive resolution of issues.[59] The parties then reduce their agreements into a multipage preliminary report that will then govern the proceeding.

The new rule is a sea change from prior AAA procedure, which essentially left case management up to the arbitrators' tender mercies.

The FAA's amended case management rules require a preliminary scheduling conference that provides a way for parties to clarify and enforce desired limitations on arbitral authority.

Now, for the first time, the parties have the opportunity, and even the duty, to consider any number of issues that, in the past, might have surfaced only as an afterthought, in an unsuccessful petition for vacatur. The new rule will allow parties to pin down arbitrators and state, in writing, the exact limitations that the parties are imposing on arbitral authority. The parties will then have not only a solid record to reinforce their original arbitration agreement, but a basis upon which to lodge meaningful objections during the proceeding. Arbitrators who might have previously ignored objections to their authority during the proceeding cannot so easily dodge limitations that were discussed and formally reduced to a preliminary report. It will be interesting to watch the first cases that wrestle with scope-of-arbitration issues after the parties have specifically agreed to arbitral limits during the preliminary conference.

Promptly object to any arbitral error. In arbitration, even more than in litigation, the failure to timely object to arbitral error will likely result in a waiver of the issue. If the parties' agreement does not allow arbitrators to award equitable relief, do not allow your opponent to raise equitable defenses or claims, and object on the record if the arbitrators attempt to decide any such issues. If the arbitrators are not authorized to award punitive damages, object to testimony or evidence that is plainly designed to invite such an award. Be alert to arbitrators' questions and comments that indicate they might be straying into issues that are outside the scope of the arbitration, and respectfully remind them—on the record—when they are pursuing a line of argument that is taking them outside their authority.

Firmly object to any arbitrator's action or statement that veers away from the limitations on arbitration that were agreed upon in the arbitration agreement, and in the prearbitration conference. Object even if you don't actually mind the arbitrator's error or consider it to be minor. Your failure to object to one error in excess of arbitral authority might actually be construed by a court as evidence that you intended to waive all such errors. This could happen even if your arbitrators specifically agreed to abide by your agreement's limitations on arbitral power. Don't be obnoxious, but always find a way to object to any arbitrator's attempt to exceed the clear boundaries that you have drawn so precisely.

Conclusion

It is easy to agree to arbitration but extremely difficult to escape from a bad result given the very narrow grounds for vacatur. Thinking ahead to draft clear provisions with desired limitations and requirements, enforcing those provision consistently throughout the arbitration process, and building a strong record of objection can lay the groundwork for vacatur if worse comes to worst. ■

Notes

1. 9 U.S.C. §§ 1–14.

2. *See* Michael H. Leroy, *Irreconcilable Differences? The Troubled Marriage of Judicial Review Standards under the* Steelworkers Trilogy *and the Federal Arbitration Act*, 2010 J. Disp. Resol. 89, 104–08.

3. The FAA requires that a party seeking confirmation of an arbitration award must: (1) provide in the parties' agreement that a court may enter judgment on the award; (2) apply to the court specified in the agreement for the entry of a judgment on the award or, if no court is specified in the agreement, apply to the district court in the district within which the award was made or any district court for which venue is proper; (3) file the request for confirmation within one year after the award is made; and (4) serve the adverse party with notice of the application for confirmation. 9 U.S.C. § 9.

4. *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935 (10th Cir. 2001).

5. Adkins v. Teseo, 180 F. Supp. 2d 15, 18 (D.D.C. 2001).

6. *See* 9 U.S.C. § 10.

7. Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1990) (noting that allowing broad judicial oversight of arbitration decisions would "frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation").

8. Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 471–72 (5th Cir. 2012).

9. 9 U.S.C. § 10(a).

10. Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990).

11. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (per curiam).

12. Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004); *see, e.g.*, Brown

v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1223 (11th Cir. 2000) ("Arbitration awards will not be reversed due to an erroneous interpretation of law by the arbitrator."); InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG, 373 F. Supp. 2d 340, 349 (S.D.N.Y. 2005) ("A mistake of law, a clear error in factfinding, or a failure to understand or apply law appropriately is insufficient to justify disturbing an arbitration award."). As discussed *infra*, a few federal circuits may allow petitioners to raise such errors under a "manifest disregard of the law" standard; however, this standard is outside the FAA and no longer recognized by the majority of federal circuits.

13. *See* Thomas J. Brewer & Lawrence R. Mills, *When Arbitrators Exceed Their Powers: A New Study of Vacated Arbitration Awards*, DISP. RESOL. J., Feb./Apr. 2009 (discussing statistical evidence of success on petitions for vacatur based on procedural and substantive excess of arbitral authority).

14. Hirsch v. Hirsch, 774 N.Y.S.2d 48 (App. Div. 2004).

15. O'Flaherty v. Belgum, 9 Cal. Rptr. 3d 286 (Ct. App. 2004).

16. Utica First Ins. Co. v. Republican Franklin Ins. Co., No. HUC153404, 2004 WL 749701 (N.Y. Dist. Ct. Apr. 2, 2004).

17. Malaklou v. Kashani, No. G031827, 2004 WL 693109 (Cal. Ct. App. Apr. 2, 2004).

18. Cat Charter, LLC v. Schurtenberger, 646 F.3d 836 (11th Cir. 2011).

19. Maxus, Inc. v. Sciacca, 598 So. 2d 1376 (Ala. 1992).

20. Davey v. First Command Fin. Servs., Inc., No. 4:09-CV-711-A, 2010 WL 446081 (N.D. Tex. Feb. 5, 2010).

21. S.D. Warren Co. v. United Paperworkers' Int'l Union, Local 1069, 845 F.2d 3 (1st Cir. 1988).

22. Collins & Aikman Floor Coverings Corp. v. Froehlich, 736 F. Supp. 480 (S.D.N.Y. 1990).

23. Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830 (11th Cir. 1991).

24. *Id.*

25. Citibank v. Wood, 894 N.E.2d 57 (Ohio Ct. App. 2008).

26. Coopertex Inc. v. Rue De Reves Inc., No. 89 CIV. 5748, 1990 WL 6548 (S.D.N.Y. Jan. 22, 1990).

27. First Merit Realty Servs., Inc. v. Amberly Square Apartments, L.P., 869 N.E.2d 394 (Ill. App. Ct. 2007).

28. Schaad v. Susquehanna Capital Grp., No. 03Civ.9902, 2004 WL 1794481 (S.D.N.Y. Aug. 10, 2004).

29. Maxus, Inc. v. Sciacca, 598 So. 2d 1376 (Ala. 1992).

30. McDonald v. Rodriguez, 184 B.R. 514 (S.D. Tex. 1995).

31. Burlington Res. Oil & Gas Co. v. San Juan Basin Royalty Trust, 249 S.W.3d 34 (Tex. App. 2007).

32. Brook v. Peak Int'l, Ltd., 294 F.3d 668 (5th Cir. 2002).

33. Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1320 (5th Cir. 1994) (emphasis added). In most cases where arbitrators have allegedly exceeded their contractual authority, the courts will parrot the following rule of law: "[A]rbitration is a creature of contract. . . . The FAA 'requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 843 (11th Cir. 2011) (quoting Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 478 (1989)). The courts will then usually go on to trounce this guiding principal without a shred of irony, interpreting otherwise plain contract terms in a way that will justify upholding the purpose of arbitration over the letter of the arbitration agreement.

34. *See, e.g.*, Apache Bohai Corp. LDC v. Texaco China BV, 480 F.3d 397, 401–05 (5th Cir. 2007) (refusing to vacate arbitration award where arbitrator invalidated plain exculpatory provision in contract). This is especially easy for courts when the parties' agreement incorporates some form of the commercial AAA Rules, which grant arbitrators unlimited authority to decide cases and do not require that a decision contain written findings of fact or law. Courts have often held that, by generally incorporating the AAA Rules into the arbitration agreement by reference, the parties have conclusively evidenced their intent that the general reference to the rules should override any specific, detailed provision that the parties wrote into the agreement.

35. George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001) (vacating arbitral order requiring parties to violate law by employing unlicensed truck drivers).

36. E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57 (2000); Vestra Res., Inc. v. Thompson, No. C054241, 2008 WL 193252 (Cal. Ct. App. 2008) (vacating default award issued to civil engineering firm for services performed where firm was unlicensed under state law and thus could not enter into enforceable contract for payment). This argument has been made most frequently on nonstatutory grounds, alleging that such decisions are a violation of public policy. However, as discussed *infra*, the viability of nonstatutory grounds for vacatur is in question, and such arguments may not be made most safely on § 10 grounds.

37. Coastal Gen. Constr. Servs. Corp. v. V.I. Hous. Auth., 98 F. App'x 156, 159 (3d Cir. 2004) (vacating award based on arbitrator's refusal to grant continuance after a party committed a document dump of discovery on opposing party on eve of proceeding).

38. Allendale Nursing Home, Inc. v. Local 1115 Joint Bd., 377 F. Supp. 1208 (S.D.N.Y. 1974) (vacating award after arbitrator refused to adjourn proceeding when key witness fell ill and was hospitalized).

39. *See* Burlage v. Superior Court, 100 Cal. Rptr. 3d 531 (Ct. App. 2009).

40. Bernstein v. Mitgang, 661 N.Y.S.2d 253 (App. Div. 1997) (vacating award because arbitrators' refusal to hear pertinent and material evidence resulted in an award of damages not supported by the arbitration agreement).

41. Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1147 (10th Cir. 1982); *see also* Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278, 282 (5th Cir. 2007) (holding that "[t]he draconian remedy of vacatur is

only warranted" as evidence "creates a concrete, not speculative impression of bias" based on a significantly compromising relationship between the arbitrator and the party).

42. Positive Software Solutions, Inc. v. New Century Mortg. Corp., 337 F. Supp. 2d 862, 880 (N.D. Tex. 2004) (vacating decision where arbitrator previously worked with party's counsel in separate litigation).

43. Coty, Inc. v. Anchor Constr., Inc., 776 N.Y.S.2d 795 (App. Div. 2004) (vacating decision where arbitrators involved themselves in parties' dispute over arbitrators' fees prior to hearing).

44. 346 U.S. 427 (1953).

45. *Id.* at 436–37.

46. 552 U.S. 576 (2008).

47. *Id.* at 589.

48. *Id.* at 588 (alteration in original) (citation omitted).

49. *Id.* at 590.

50. *Id.*

51. The Fifth, Seventh, Eighth, and Eleventh Circuits have utilized *Hall Street* as an opportunity to get rid of nonstatutory grounds for vacatur altogether. These courts have construed *Hall Street* even more strictly than the Supreme Court that authored it, finding that there is no basis for vacatur of arbitration awards outside of the FAA. Other circuits, including the Second, Fourth, and Ninth Circuits, have expressly upheld the manifest disregard standard as a valid ground for vacatur. These circuits have, however, suggested that the standard survives primarily because it can be read to fall within the ambit of FAA § 10. Still other circuits remain on the fence, with the First and Sixth Circuits both hinting that the manifest disregard standard is disfavored, if not dead, as a ground for challenging arbitration decisions. The Third and Tenth Circuits have declined to address the issue at all. To add to the confusion, even where circuits have declared their position on the issue, the lower district courts have declined to follow their circuit. Meanwhile, state courts have also split over the meaning of *Hall Street*.

52. N.Y. State Electric & Gas Corp. v. Sys. Council U-7 of Int'l Brotherhood of Elec. Workers, 328 F. Supp. 2d 313, 316 (N.D.N.Y. 2004).

53. Commercial Union Ins. Co. v. Lines, 378 F.3d 204 (2d Cir. 2004) (vacating arbitration award that would allow party to profit from historical fraud); Hirsch v. Hirsch, 774 N.Y.S.2d 48 (App. Div. 2004) (vacating arbitration award that required wife to withdraw criminal complaint against abusive husband).

54. Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 781 (11th Cir. 1993) (alteration in original).

55. Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995).

56. *See* George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2001) (describing confusion over arbitrary and capricious standard). "The Fourth, Seventh, and Tenth Circuits have implicitly rejected the Eleventh Circuit's position by enunciating accepted grounds for vacatur and rejecting all others." Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377, 382 n.6 (5th Cir. 2004) (citing Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001); IDS Life Ins. Co. v. Royal Alliance Assocs., 266 F.3d 645, 650 (7th Cir. 2001); Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998)). "The First, Second, and D.C. Circuits have neither accepted nor rejected arbitrariness and capriciousness but have emphasized that vacatur is available only in very limited circumstances." *Id.* (citing Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 27 (2d Cir. 2000); Morani v. Landenberger, 196 F.3d 9, 11 (1st Cir. 1999); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996)).

57. Azrielant v. Azrielant, 752 N.Y.S.2d 19, 24 (App. Div. 2002).

58. Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1320 (5th Cir. 1994) ("In deciding whether the arbitrator exceeded its authority, [the courts] resolve all doubts in favor of arbitration.").

59. Commercial Arbitration Rules and Mediation Procedures R. P-1 (Am. Arbitration Ass'n, effective Oct. 1, 2013), *available at* www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased.