Significant Questions, Little Guidance

Arbitration after *Hall Street*

By Aaron S. Bayer and Joseph M. Gillis

The scope of the Supreme Court's decision and its long-term impact on arbitration are far from clear.

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), the United States Supreme Court held, in a 6–3 decision, that parties seeking to enforce an arbitration award under the Federal Arbitration Act ("FAA") cannot contractually expand the scope of a court's review of the award beyond the limited standards of review provided in the FAA. The Court's ruling resolved a longstanding split among the circuits on this issue, but the scope of its decision and its long-term impact on arbitration are far from clear. The Court expressly left open the possibility that parties seeking to enforce an arbitral award outside the FAA could contract for expanded judicial review, but provided little guidance to litigants and lower courts. The Court's ruling also called into question the continued viability of the "manifest disregard" standard for vacating arbitral awards, even though all of the federal circuits and most states had adopted this standard, and raised doubts about the validity of other commonly used standards of review as well.

The Decision in *Hall Street*

Section 10 of the FAA provides that an arbitration award may be vacated only on the following grounds:

> (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; (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

9 U.S.C §10. The Supreme Court granted certiorari in *Hall Street* to determine whether parties could contractually provide for expanded judicial review beyond these narrow grounds. The parties in *Hall Street* had done just that, requiring *de novo* judicial review of the arbitrator's legal rulings and substantial evidence review of the arbitrator's factual findings. In an opinion by Justice Souter, the Court held that section 10 provides the "FAA's exclusive

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grounds for expedited vacatur" of an arbitration award. 128 S. Ct. at 1403.

The issue in *Hall Street* represented the intersection of two foundational principles of arbitration law. On the one hand, arbitration is a creature of contract; the FAA was enacted to overcome judicial hostility to arbitration and ensure that agreements to arbitrate are enforced according to their terms. On the other hand, limited judicial review and deference to arbitrators' decisions are also cornerstones of arbitration law, ensuring that arbitration remains an efficient alternative to litigation; if parties can contract around this principle, the efficiencies of arbitration may be lost.

The circuit split leading up to *Hall Street* reflected this philosophical tension. *Compare Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 292–93 (3d Cir. 2001) (parties can agree to have arbitration conducted pursuant to varying state law standards because the FAA "requires that the court enforce the terms of the agreement") *with Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (parties cannot agree to expand judicial review, noting that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process").

Prior to *Hall Street*, the Supreme Court had focused heavily on the contractual nature of arbitration. As the Court explained in *Volt Info. Sci. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), the idea that "the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself… would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."

Hall Street relied on this principle, but the Court concluded that expanding judicial review was simply precluded by the text of the FAA. The language of §9—if the parties agreed that a judgment shall be entered pursuant to the arbitration award, the "court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11"—does not read as a default provision, as Hall Street had asserted, but rather "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Hall Street*, 128 S. Ct. at 1405. "Instead of fighting the text," the Court wrote, it made more sense to read the FAA to honor arbitration's promise of efficiency—any other conclusion would render arbitration "merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.* If the parties choose to take advantage of the FAA's "expedited" procedures for enforcing an arbitral award, then they must accept the exclusive and limited judicial review that goes with this statutory "shortcut." *Id.* at 1403.

The Court went on to say, however, that its holding did not preclude parties from seeking broader judicial review of arbitration awards outside the FAA. In *Hall Street*, there was no pre-dispute arbitration agreement. In the course of the litigation, the parties, with the district court's approval, agreed to arbitrate certain issues, and their agreement provided that the court could review the arbitrator's decision for legal error and substantial evidence. The Supreme Court requested additional briefing on whether the parties intended to enforce their arbitration agreement outside the FAA, presumably pursuant to the district court's broad case management authority under Fed. R. Civ. P. 16. In the end, the Court remanded to the Ninth Circuit to decide this issue. *Id.* at 1408.

Review Outside the FAA

The Court was clear that its holding that section 10 provides the exclusive standards for judicial review of arbitration awards under the FAA did not "exclude more searching review based on authority outside the statute." *Id.* at 1406. That is consistent with prior Court decisions holding that only the substantive provisions of the FAA, in particular §2's requirement that courts enforce agreements to arbitrate, apply to every arbitration contract that is subject to the FAA. The FAA's "proarbitration policy does not operate without regard to the wishes of the contracting parties," and the Court may honor the parties' contractual intent to displace certain of the FAA's provisions with state or common law. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 59 (1995); *see Volt*, 489 U.S. at 477. As the Seventh Circuit recently stated, "parties can opt out of the federal act, provided the state arbitration statute does not contain provisions that would undermine the federal act's aim of facilitating the resolution of disputes… by arbitration." *Edstrom Indus., Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 549 (7th Cir. 2008). Parties wishing to opt out of the FAA, however, are well advised to include explicit language to that effect in their arbitration agreements and to provide that state or common law governs.

It is unclear whether a state statute that allows parties to contract for expanded judicial review would undermine these core goals and policies of the FAA.

The Court in *Hall Street* suggested that more expansive review may be permissible where parties seek "enforcement under state statutory or common law… where judicial review of different scope is arguable," 128 S. Ct. at 1406, or where an arbitration is conducted in the course of litigation pursuant to a district court's Rule 16 authority. *Id.* at 1407. But the Court did little to illuminate these alternatives, each of which raises its own questions and may be of limited use to parties seeking to have a court conduct a more searching review of an arbitral award.

Arbitrations "Carved Out" of Existing Litigation

Hall Street recognized that district courts have broad case management discretion under Rule 16 that might permit an agreement to carve out and arbitrate certain claims in the course of litigation, with

the court to conduct a broader review of the resulting award than the FAA would permit. While it seems clear that such an agreement would be enforceable, the utility of this alternative is likely to be very limited. It has no bearing on pre-dispute arbitration agreements, and parties do not often enter into agreements to arbitrate a dispute only after litigation has commenced. Moreover, district courts are more likely to use special masters rather than arbitration to resolve specific claims in litigation. The Court in *Hall Street* also referenced the Alternative Dispute Resolution Act of 1998, which allows district courts to refer any civil action to arbitration. 28 U.S.C. §654(a). But that Act also allows any party to demand a trial *de novo* after the arbitration award has been issued, requiring the court to try the matter without any reference to the arbitration or the award, 28 U.S.C. §657(c), and largely eviscerating the utility and efficiency of arbitrating.

California Moves Beyond *Hall Street*

The California Supreme Court recently ruled that *Hall Street* does not preclude expanded judicial review outside the FAA. Acknowledging that *Hall Street* had "left the door ajar for alternate routes to an expanded scope of review," the California court walked through that door in *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal.4th 1334, 190 P.3d 586 (Cal. 2008), holding that a contract provision providing for expanded judicial review was enforceable under the state arbitration statute. 44 Cal.4th at 1339–40.

Citing *Volt* and other U.S. Supreme Court case law, the California court expressly rejected an argument that its interpretation of the California statute, which paralleled the FAA's judicial review provisions, was preempted by the FAA. It reasoned that the FAA's primary purpose was not "expediency in the dispute resolution process," but rather the "enforcement of private contractual arrangements." *Id.* at 1353–54. While *Hall Street* had "brushed aside" these policy considerations, the California court concluded that the *Hall Street* majority had not "intended to declare a policy with preemptive effect in all cases involving interstate commerce"—if the Court had favored such a policy, it would not have left open other avenues for expanded review. *Id.*

The California Supreme Court emphasized that the parties must "expressly" and "clearly" agree "to take themselves out of the general rule that the merits of the aware are not subject to judicial review." *Id.* at 1361. It held that the contract language—that the arbitrators "shall not have the power to commit errors of law or legal reasoning" and that "the award may be vacated… for any such error"—was sufficient to provide for judicial review for legal error. *Id.* at 1361 & n.20.

Judicial Review under State Arbitration Statutes and Preemption Issues

The Court suggested that parties may turn to state statutory law to obtain expanded judicial review that would be precluded under the FAA. Most states, however, have adopted either the Uniform Arbitration Act or the Revised Uniform Arbitration Act, both of which provide for limited judicial review similar to that in Section 10 of the FAA. A state court could interpret its statute as allowing the parties contractually to expand the scope of judicial review, though it would be difficult to square that result with *Hall Street*'s reading of the FAA's parallel provision.

A state legislature could amend its arbitration statute to allow for broader judicial review than that allowed by the FAA. New Jersey did just that in 2003, providing that parties may "expand[ ] the scope of judicial review of an award by expressly providing for such expansion. N.J. Stat. Ann. §2A:23B-4(c); *see also Hogoboom v. Hogoboom*, 924 A.2d 602, 606 (N.J. Super. A.D. 2007) (approving parties' contractual expansion of scope of review per §2A:23B-4(c)).

However, a state statute like New Jersey's might be preempted by the FAA. The "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. The FAA does have preemptive effect where state law renders arbitration provisions invalid or treats arbitration agreements more harshly than other types of contracts, *see Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), but that principle would not apply to a provision allowing expanded judicial review. In other contexts, the principal inquiry is whether the state law at issue "would undermine the goals and policies of the FAA," *see Volt*, 489 U.S. at 477–78, or undermine the Act's goal of "facilitating the resolution of disputes… by arbitration." *Edstrom*, 516 F.3d at 549. It is unclear whether a state statute that allows parties to contract for expanded judicial review would undermine these core goals and policies of the FAA.

In earlier cases, the Supreme Court made it clear that the "principal purpose" of the FAA was to ensure that "private arbitration agreements are enforced according to their terms," and that parties therefore could agree to arbitrate under a state law that set forth different rules from those provided in the FAA. *Volt*, 489 U.S. at 478–79. Under this line of precedent, a state law that honored the parties' agreement to set different standards for reviewing an arbitral award would be consistent with, not contrary to, the core purpose of the FAA. *Hall Street* did not repudiate this principal, and courts may view *Hall Street*'s narrow holding, and its express mention of the possibility of obtaining expanded review outside the FAA, as an acknowledgment that such efforts would not be preempted by the FAA.

On the other hand, *Hall Street* seems to back away from the Court's earlier emphatic statements that enforcing the parties' agreement is the FAA's primary purpose, focusing instead on a narrow reading of the Act's terms and on the importance of preserving the efficiency of arbitration. Notably, Hall Street had relied heavily on *Volt* in its briefs and at oral argument to support its contention that the parties' agreement should be honored according to its terms, but the Court gave this argument short shrift. If the Court views preserving the efficiency of arbitration as a core purpose of the FAA, it might view state statutes allowing for broader judicial review as undermining that purpose.

In any event, parties that seek to pursue arbitration under provisions of state law should make this explicit in their arbitration agreement. Relying on a choice of law

provision in the agreement may be insufficient. *Compare Volt*, 489 U.S. at 470 (choice of law provision intended to incorporate California law staying arbitration pending resolution of related third-party litigation) *with Mastrobuono*, 514 U.S. at 63–64 (choice of law provision did not incorporate New York law precluding arbitrators from awarding punitive damages, in light of parties' adoption of NASD rules that did not limit the relief arbitrators may award).

Enforcement under State Common Law

When it mentioned the possibility of enforcing arbitral awards under state common law, 128 S. Ct. at 1406, the Court in *Hall Street* presumably was referring to enforcing an arbitration award through a breach of contract action. *See id.* at 1402 (noting that the FAA's streamlined treatment for confirming an award obviated the "separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court"). Chief Justice Roberts suggested this alternative during oral argument. The parties could agree that an award would be enforceable in a breach of contract action and could specify a more rigorous standard of review than the FAA applies.

It is difficult to envision how this approach would work as a practical matter. First, despite the contractual provision, the prevailing party might still seek to enforce the award under the FAA and encourage the court to disregard the contractually specified standard of review as contrary to *Hall Street*. Second, there is at least some public policy question about the extent to which parties can dictate the standard of judicial review that a court must follow in a common law action. Finally, the disadvantages of pursuing a breach of contract action to enforce an arbitral award are significant and obvious. While it may enable the parties to get more searching judicial review, they will be forced to litigate an additional lawsuit on the heels of a potentially lengthy and costly arbitration, largely eliminating the efficiencies the parties sought in selecting arbitration in the first place. This option may only be attractive in unusual circumstances, when, for example, the parties chose arbitration for reasons other than efficiency (*e.g.*, to be able to select the decision-maker) or when the likelihood of the losing party not complying with an award is very low.

Other Avenues for Expanded Review

Parties may have other options to secure broader review of an arbitrator's decision. For instance, parties could contract for an arbitral appellate review process. Under such a process, the parties would provide in their arbitration agreement for a second arbitrator or panel of arbitrators to review the initial arbitration award, and would establish the standard of review to be used, including review for legal error or lack of substantial evidence. While a reviewing court under the FAA would ultimately be limited to the section 10 bases for vacatur, a preliminary appeal to a panel of arbitrators would provide an opportunity for a second decision-maker to review and alter an award that is legally wrong. This process, of course, adds a layer of review and the additional time and expense associated with it.

Parties may also decide to forgo arbitration altogether and choose another method of binding alternative dispute resolution that is not subject to the FAA. One example is private judging, by which parties select from a pool of retired judges to adjudicate their dispute. Several states have statutory provisions allowing such a procedure, and the judge's award is subject to the same judicial review as a judgment by a court. *See*, *e.g.*, Cal. Code Civ. Proc. §638; Burns Ind. Code Ann. §33-13-15-1; ORC Ann. 2701.10; R.I. Gen. Laws §9-15-1; Tex. Civ. Prac. & Rem. Code §151.001.

These alternatives to expanded judicial review remain permissible under the FAA after *Hall Street*, and parties wanting more certainty may prefer to opt for one of these procedures instead of attempting to craft an agreement for expanded judicial review, which may or may not be enforceable.

Hall Street's Impact on Non-Statutory Grounds for Vacatur

Manifest Disregard

The principal non-statutory basis for reviewing and vacating arbitral awards is "manifest disregard of the law." Although the precise formulations of this standard vary, manifest-disregard review is extremely narrow. Typically, courts hold that the governing law must be clearly established and that the arbitrators must be made aware of the law and nonetheless choose to disregard it. *E.g.*, *Peebles v. Merrill Lynch Pierce Fenner & Smith*, 431 F.3d 1320, 1326–27 (11th Cir. 2005); *Westerbeke Corp. v. Daihatsu Motor Co. Ltd.*, 304 F.3d 200, 209 (2d Cir. 2002). This stringent standard, which does not permit vacatur merely for errors of law, reflects the fact that arbitrators need not be lawyers or versed in the law.

The manifest disregard standard derived from dicta in *Wilko v. Swan*, 346 U.S. 427 (1953) (*overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989)), which the Supreme Court endorsed in *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law"). Based on these Supreme Court statements, the federal circuits and most states adopted manifest disregard of the law as a ground for vacating arbitral awards.

In *Hall Street*, the petitioner argued that the Court's recognition of the manifest disregard standard, which is not one of the grounds for vacatur enumerated in section 10 of the FAA, demonstrated that the FAA does not provide the exclusive standards for reviewing arbitral awards. Therefore, it argued, parties should be free to adopt more stringent standards of review. In rejecting this argument, the Court suggested that its statement in *Wilko* could not be accorded "the significance that Hall Street urges." 128 S. Ct. at 1404. The Court found its own statements in *Wilko* ambiguous, saying "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." *Id.* The Court suggested that the term may simply have been "shorthand" for the Section 10 grounds for vacating where arbitrators engaged in misconduct or "exceeded their powers." *Id.*

While appearing to speak tentatively, the Court effectively swept aside the reading of *Wilko* adopted by most courts across the country. It is awfully difficult to square the Court's holding that the FAA provides the "exclusive" grounds for vacatur with

the view that manifest disregard of the law is an additional, independent ground for review. Indeed, some courts have already concluded that *Hall Street* eliminated manifest disregard as a basis for vacatur. *E.g.*, *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008); *see Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008) (declining to address manifest disregard argument in wake of *Hall Street*); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, ___ F. Supp. 2d ___, 2008 WL 2662015 (S.D.N.Y. July 7, 2008) (holding that "manifest disregard of the law standard is no longer good law"); *Hereford v. D.R. Horton, Inc.*, ___ So. 2d ___ 2008 WL 4097594 at *5 (Ala. Sept. 5, 2008) (holding that under *Hall Street*, "manifest disregard of the law is no longer a ground for vacating, modifying or correcting an arbitrator's award"); *but see MasTec N.A., Inc. v. MSE Power Sys., Inc.*, 2008 WL 2704912 at *3 (N.D.N.Y. July 8, 2008) (concluding that manifest disregard review remains, not as separate standard of review, but as "judicial interpretation of the Section 10 requirements"); *Fitzgerald v. H & R Block Fin. Advisors, Inc.*, 2008 WL 2397636 at *4 (E.D. Mich. June 11, 2008) (conducting manifest disregard review without discussing effect of *Hall Street*).

Parties may also decide to forgo arbitration altogether and choose another method of binding alternative dispute resolution that is not subject to the FAA.

A few courts had presaged the Supreme Court's new direction. Long before *Hall Street*, the Seventh Circuit had "defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of [Section 10's] fourth statutory ground—'where the arbitrators exceeded their powers.'" *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 268 (7th Cir. 2006). A few state courts had similarly found that the manifest disregard standard derives from the statutory "exceeding powers" ground for vacatur, *e.g.*, *Economos v. Liljedahl Bros., Inc.*, 901 A.2d 1198, 1203 n.7 (Conn. 2006), or had declined to recognize manifest disregard at all, *e.g.*, *BBF, Inc. v. Alstom Power, Inc.*, 645 S.E.2d 467, 469–70 (Va. 2007).

Thus, even before *Hall Street*, the line between manifest disregard and arbitrators exceeding their powers was a fine one, and courts sometimes blurred the distinctions between the doctrines. *See*, *e.g.*, *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 847 (6th Cir. 2003) (damages award to nonparties both exceeded arbitrators' authority and manifestly disregarded the law); *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003) (noting overlap of manifest disregard and exceeding powers standards). For this reason, and because courts only very rarely used this basis to overturn arbitral awards in any event, *see Dawahare v. Spencer*, 210 F.3d 666, 669–70 (6th Cir. 2000) (noting that "only two federal courts of appeals have used [manifest disregard] to vacate arbitration decisions"), redefining manifest disregard to mean that an arbitrator exceeded his or her authority is therefore not as dramatic a change as it might appear to be.

As a practical matter, however, practitioners should now endeavor to frame possible manifest disregard claims as challenges based on arbitrators having exceeded their powers under the contract. Parties can facilitate that approach by including in their agreement a provision explicitly requiring the arbitrator to follow the law of a particular jurisdiction or identifying a specific, substantive provision of law that is to be applied—so that the failure to apply the law may be challenged as exceeding the arbitrator's authority. *See Edstrom*, 516 F.3d at 552–53 (vacating arbitral award on "exceeded powers" ground where the contract required the arbitrator to "strictly apply" Wisconsin law and the arbitrator clearly was not "even trying to interpret" the applicable Wisconsin statute); *but see Wood v. Penntex Res. LP.*, 2008 WL 2609319 at *6–8 (S.D. Tex. June 27, 2008) (rejecting a similar argument). While this approach may not differ substantially from manifest disregard review—both require disregard of applicable law, and do not permit review of the award simply for legal error—it is the safer approach in light of manifest disregard's uncertain future after *Hall Street*.

Public Policy Review

Courts have long permitted an arbitral award to be challenged on the ground that enforcing it would violate public policy. The Supreme Court has recognized this as a "specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers Int'l v. Misco, Inc.*, 484 U.S. 29, 42 (1987). Under this doctrine, an award may be vacated only if it violates an "explicit public policy that is well defined and dominant." *Id.* at 43.

Hall Street's ruling that the FAA provides the exclusive grounds for vacating an award is unlikely to eliminate public policy as an independent basis for vacatur, for several reasons. First, unlike manifest disregard, public policy is not a basis for reviewing the merits of the arbitrator's decision or reasoning. Indeed, the Supreme Court has made it clear that, in determining whether an arbitral award violates public policy, courts must defer to the arbitrator's factual determinations and inferences drawn from the facts. *Misco*, 484 U.S. at 44–45. Second, unlike manifest disregard, which was essentially created out of whole cloth after *Wilko*, public policy review has a stronger foundation in the law. Courts have long refrained from enforcing, and thereby putting the State's imprimatur on, contracts that violate important public policies. Finally, interpreting the FAA to require state courts to enforce awards that violate important state public policies would raise federalism concerns that can otherwise be avoided.

Other Nonstatutory Grounds for Vacatur

Some federal courts have used other standards for vacatur that are not found in the FAA, allowing an award to be set aside, for example, if it is "completely irrational" or "fails to draw its essence from the agreement," *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461–62 (8th Cir. 2001), is "arbitrary and capricious," *Peebles v. Merrill Lynch,*

Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1326 (11th Cir. 2005), "exhibits a wholesale departure from the law," *Brown v. Rauxcher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993) or where the parties were not given a "fundamentally fair hearing." *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1012–13 (10th Cir. 1994).

These standards are likely to survive *Hall Street* only to the extent they are deemed to mirror the FAA standards. A decision that "fails to draw its essence" from the parties' agreement, for example, comes close to the statutory requirement that arbitrators not exceed the powers given to them by agreement. Similarly, an award that flows from a process that is so "fundamentally unfair" that the parties never truly got the chance to present their case to the arbitrator, arguably might exceed the arbitrator's powers, as the parties did not get the process they bargained for in agreeing to arbitrate. These standards might survive as alternative ways of expressing the standards found in Section 10 of the FAA. By contrast, to the extent that these non-statutory standards entail a review of the merits of the arbitrator's decision—such as review to determine whether an award is a "wholesale departure from the law"—they are unlikely to survive.

Some states have also embraced standards for vacatur that entail a review of the merits of the arbitrator's decision or the evidence on which the award is based. Nevada, for example, makes clear that its "arbitrary and capricious" standard is intended to "ensure that the arbitrator does not disregard the facts" and that "the arbitrator's findings are supported by substantial evidence in the record." *Clark County Educ. Ass'n v. Clark County School Dist.*, 131 P.3d 5, 9–10 (Nev. 2006). Whether such state standards survive will turn on whether they are viewed as a legitimate procedural variation under state law or as standards that require such extensive judicial scrutiny of arbitral decisions that they undermine the FAA's core purpose of facilitating arbitration as an alternative to litigation.

Conclusion

Hall Street made it clear that parties seeking to enforce an arbitral award under the streamlined provisions of the FAA cannot contractually expand the narrow standards for judicial review enumerated in Section 10 of the Act. Beyond that, the Supreme Court's decision raised significant questions, but provided little clear guidance. Alternative standards of review, including review for "manifest disregard of the law," probably cannot be used as a basis for vacatur under the FAA unless they are re-cast as providing the same basis for vacatur as Section 10's "exceeding powers" standard. The Court left open the possibility that parties could seek expanded judicial review outside of the FAA, under state statutory or common law, but it is uncertain whether these options offer a practical alternative to enforcement under the FAA and whether more stringent standards of review would be preempted as undermining the FAA's purposes. Parties seeking more expansive judicial review under state law should make it clear in their agreement that they are proceeding under state law and not the FAA. They should also specify in the agreement that the arbitrator must strictly follow the relevant provisions of applicable law, to facilitate judicial review to determine whether the arbitrator exceeded his or her powers under the agreement. Parties wary of the uncertainties involved in obtaining expanded *judicial* review, but who still desire expanded review of their arbitral award, may wish to consider an additional layer of review within the arbitration process itself.