CORE
Metadata, citation and similar papers at core.ac.uk
Provided by KU ScholarWorks

# Authorities Split After the Supreme Court's *Hall Street* Decision: What Is Left of the Manifest Disregard Doctrine?

*By Stephen J. Ware* & Marisa C. Maleck***

Arbitration is a private-sector court.[1] Rather than litigating in a government court (in which a judge or jury resolves the dispute), many parties form contracts obligating themselves to have their disputes resolved by an arbitrator. The arbitrator's decision in such a case, typically called an arbitration "award," can be enforced in court. To do this, the party that won in arbitration can get a court order "confirming" the arbitration award.[2] "A confirmed award in favor of the plaintiff (or 'claimant') is enforced in the same manner as other court judgments,"[3] and an arbitration award in favor of the defendant precludes the plaintiff from reasserting in court the claim the plaintiff lost in arbitration.[4] So arbitration awards are generally final and binding.

A court's main alternative to confirming an arbitration award is to vacate it, but courts do not vacate arbitration awards very often.[5] This is largely because the Federal Arbitration Act (FAA),[6] which governs nearly all arbitration in the United States,[7] contains narrow grounds for vacatur. Section 10(a) of the FAA says a court may vacate an award:

> (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 submitted was not made.[8]

Importantly, the FAA's grounds for vacating arbitration awards do not include "error of law" by the arbitrator. Courts generally do not review whether the arbitrator's decision correctly applied the law, and "courts have directly acknowledged that '[a]rbitrators are not bound by rules of law.'"[9] However, courts may be uncomfortable confirming arbitration awards that misapply the law. Perhaps for this reason, courts have gone beyond the FAA's statutory grounds for vacatur to create two additional grounds for vacatur. Under these two judicially-created grounds, "an arbitration award may be vacated if (1) the arbitrator 'manifestly disregarded' applicable law, or (2) enforcement of the arbitration award would violate 'public policy.'"[10]

In addition, some courts have enforced contractually-created grounds for vacating arbitration awards. For example, a panel of the Ninth Circuit enforced an arbitration agreement providing that "[t]he Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous."[11] Such clauses are apparently motivated by parties' fear of a "knucklehead" arbitration award being confirmed under the FAA's narrow grounds of vacatur.[12] This fear leads some parties to try to add (by contract) additional grounds for vacatur to enable courts to better police the legal accuracy of arbitrator's rulings.

The Supreme Court, however, rejected such contractually-created grounds for vacatur in the 2008 case of *Hall Street Associates v. Mattel*.[13] In *Hall Street*, the Supreme Court stated that the FAA's four grounds for vacatur are "exclusive."[14] The Court viewed the FAA's provisions on confirmation and vacatur of arbitration awards

> 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 render 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.[15]

This rationale, along with *Hall Street*'s statement that the FAA's four grounds for vacatur are "exclusive," has led some courts and commentators to conclude that *Hall Street* does away with not only contractually-created grounds for vacatur, but also a judicially-created one, the "manifest disregard of law" doctrine.[16] By contrast, other courts continue to use the manifest disregard doctrine to vacate awards, even after *Hall Street*.[17]

The manifest disregard doctrine is traced to the Supreme Court's decision in *Wilko v. Swan*,[18] which stated (in dicta) that "interpretations of the law by arbitrators in contrast to manifest disregard are not subject . . . to judicial review for error in interpretation."[19] This statement might be read to say that, although courts should not overrule arbitrators who try to apply the law but make an error in doing so, courts should overrule arbitrators who refuse even to try to apply the law. And lower courts applying *Wilko*'s manifest disregard doctrine often summarize it as permitting vacatur if "the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it."[20]

*Wilko* and the manifest disregard doctrine were relied upon by the petitioner in *Hall Street*. As the Supreme Court explained:

** Stephen J. Ware is a Professor of Law at the University of Kansas and faculty advisor to the KU chapter of the Federalist Society.*

*** Marisa C. Maleck is a second year student at the University of Chicago Law School and a student liaison to the Federalism/Separation of Powers and Litigation Practice Groups' Executive Committees of the Federalist Society.*

> Hall Street [the petitioner] reads [*Wilko*] as recognizing "manifest disregard of the law" as a further ground for vacatur on top of those listed in § 10, and some Circuits have read it the same way. Hall Street sees this supposed addition to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties.
>
> But this is too much for *Wilko* to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of *Wilko*'s phrasing. 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." We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.[21]

This passage has left uncertainty in its wake.

Courts and commentators have split three ways on *Hall Street*'s implications for the manifest disregard doctrine. One approach is that the manifest disregard doctrine is dead, killed by *Hall Street*,[22] so courts must now confirm arbitration awards that manifestly disregard the law. At the other extreme, some courts treat the manifest disregard doctrine as though it was unaffected by *Hall Street*; in these courts, "manifest disregard of the law" remains a judicially-created ground for vacatur in addition to the four statutory grounds found for vacatur found in the text of the FAA.[23] A third group of courts takes an intermediate position. In these courts, the manifest disregard doctrine survives, but not as an independent, judicially-created ground for vacatur. Rather, the manifest disregard doctrine is folded into FAA Section 10(a)(4), so arbitrators who manifestly disregard the law are held to have "exceeded their powers"; thus the statutory ground for vacatur is triggered.[24]

This three-way split of authority may not last. As more appellate courts have a chance to address *Hall Street*'s impact on the manifest disregard doctrine, they may converge on a single view. If not, the law may remain unsettled enough for the Supreme Court to take another arbitration case in order to clarify the status of the manifest disregard doctrine. Of course, Congress could amend the FAA to provide this clarification,[25] and one of us has proposed statutory language to do so.[26] But until the law is clarified, litigants seeking to vacate arbitration awards increase their chances by casting their manifest disregard arguments as arguments under FAA §10(a)(4), rather than as arguments relying on a judicially-created ground for vacatur.[27] Of course, litigants defending arbitration awards against manifest disregard arguments can argue that the arbitrator did not manifestly disregard the law and, even if she did, arbitrators have every right to manifestly disregard the law. In sum, we still do not know whether arbitrators must try to apply the law or else have their awards vacated. A strikingly important gap in arbitration law remains.

**Endnotes**

1 Stephen J. Ware, Principles of Alternative Dispute Resolution § 2.1 (2d ed. 2007).

2 9 U.S.C. § 9 (2000).

3 Ware, *supra* note 1, § 2.40.

4 *Id.* § 2.41 (discussing claim-preclusive—or res judicata—effect of arbitration awards).

5 *Id.* § 2.43.

6 9 U.S.C. §§ 1 - 16 (2000).

7 Ware, *supra* note 1, § 2.4(c).

8 9 U.S.C. § 10(a) (2000).

9 Ware, *supra* note 1, § 2.45(a)(1) (quoting Aimcee Wholesale DCorp. v. Tomar Prods., Inc., 237 N.E.2d 223, 225 (N.Y. 1968)).

10 Ware, *supra* note 1, § 2.45.

11 Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 990-91 (9th Cir. 2003). For discussion of the split of authority on this issue, *see* Ware, *supra* note 1, § 2.45(c).

12 *See, e.g.*, Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp. Disp. Resol. L.J. 419, 426-27 (2003); Carroll E. Neesemann, *Contracting for Judicial Review: Party-Chosen Arbitral Review Standards Can Inspire Confidence in the Process, and Is Good for Arbitration*, Disp. Resol. Mag., Fall 1998, at 18.

13 128 S.Ct. 1396 (2008).

14 *Id* at 1403.

15 *Id* at 1405 (internal quotation omitted).

16 *See, e.g.,* The Householder Group v. Caughran, 576 F. Supp. 2d 796, 800 (E.D. Tex. 2008) ("The Fifth Circuit previously recognized the following two common law grounds for vacating an arbitration award: (1) manifest disregard of the law; and (2) contrary to public policy. But '[t]he Supreme Court has recently held that the provisions of the FAA are the exclusive grounds for expedited vacatur and modification of an arbitration award, which calls into doubt the non-statutory grounds which have been recognized by [the Fifth Circuit].' In light of the Supreme Court's holding in *Hall Street*, the court will limit its analysis to the statutory grounds enumerated in the FAA." (internal citations omitted)); *see also* Prime Therapeutics LLC v. Omnicare Inc., 555 F. Supp. 2d 993, 999 (D. Minn. 2008) ("[D]oes this suggest that courts can no longer vacate an arbitration award based on judicially-created grounds such as 'manifest disregard of the law'? After *Hall Street*, this Court believes the answer to that question is yes."); Robert Lewis Rosen Assocs., Ltd. v. Webb, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008) ("As the Second Circuit's traditional understanding of *Wilko* and §10—that *Wilko* endorsed manifest disregard and that §10's grounds are not exclusive—is inconsistent with the basis for the holding in *Hall Street,* the Court finds that the manifest disregard of the law standard is no longer good law."); Hereford v. D.R. Horton, Inc., No. 1070396, 2008 WL 4097594, *5, 2008 Ala. LEXIS 186, *12-*13 (Ala. Sept. 5, 2008) (""In light of the fact that the Federal Arbitration Act is federal law, and in light of the Supremacy Clause of the Constitution of the United States, Art. VI, we hereby overrule our earlier statement in *Birmingham News* that manifest disregard of the law is a ground for vacating, modifying, or correcting an arbitrator's award under the Federal Arbitration Act, and we also overrule any such language in our other cases construing federal arbitration law.").

Two other cases suggesting that *Hall Street* ended the manifest disregard doctrine include *Ramos-Santiago v. United Parcel Service,* 524 F.3d 120, 123 n.3 (1st Cir. 2008), and *ALS & Assocs. Inc. v. AGM Marine Constructors Inc.,* 557 F. Supp. 2d 180, 185 (D. Mass. 2008); however, these cases conflict with a First Circuit decision vacating an award under the manifest disregard doctrine. Kashner Davidson Sec. Corp. v. Mscisz, 531 F.3d 68 (1st Cir. 2008). *Kashner Davidson*, however, did not acknowledge *Hall Street*'s existence.

Commentators supporting the view that *Hall Street* ended the manifest disregard doctrine or at least seriously calling into question the doctrine's continuing vitality include Albert G. Besser, *Arbitration Vacatur: The Supreme Court Bars One Route and Muddles the Other—Manifest Disregard is Dead!*, 34 Fall Vt. Bar J. 67, 68 (2008), and Mauricio Gomm-Santos & Quinn Smith, *On Dangerous Footing: The Non-Statutory Standards for Reviewing An Arbitral Award*, 18 Am. Rev. Int'l Arb. 353, 367 (2007).

17 *See*, *e.g.*, Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1283 (9th Cir. 2009), *cert. denied,* 130 S.Ct. 145 (2009) (vacating an award on manifest disregard grounds post-*Hall Street*); Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415, 419 (6th Cir. 2008) (same).

18 346 U.S. 426 (1983), *overruled on other grounds*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

19 346 U.S. at 436-437. For a strong argument "that the 'manifest disregard' doctrine as it stands is legally baseless and should be abandoned," see Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 Duke L.J. 547, 585-86 (2005) ("[T]he authorities on which the *Wilko* majority relied for its 'manifest disregard' dicta do not support the doctrine in its current form—that is, as a check on an arbitrator's intentional departure from established law. On the contrary, courts and commentators contemplated judicial intervention as a means to give effect to the arbitrator's intent. Courts following this rationale would vacate an award when the arbitrator manifested an intention to adhere to the law but erred in executing this intention, not when the arbitrator consciously disregarded legal rules, as the modern 'manifest disregard' standard allows.").

20 *See* Jill Gross, *Hall Street Blues: The Uncertain Future of Manifest Disregard*, Securities Regulation Law Journal, VOL. 37: 3 , 232, 236 (2009) (citing Cytec Corp. v. Deka Prods. Ltd. P'ship, 439 F.3d 27, 35 (1st Cir. 2006)).

21 128 S.Ct. 1396, 1403-04 (2008). For a strong criticism of this passage, see Alan Scott Rau, *Fear of Freedom*, 17 Am. Rev. Int'l Arb. 469, 497-98 (2008).

22 *See supra* note 16.

23 Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415, 2008 U.S. App. LEXIS 23645, *10-11 (6th Cir. 2009) (*Hall Street* "significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10, but it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law."); *see also* Qorvis Comms., LLC v. Wilson, 549 F.3d 303 (4th Cir. 2008) (noting *Hall Street* and considering a manifest disregard challenge to an arbitration award but rejecting that challenge); Hiro N. Aragaki, *The Mess of Manifest Disregard,* 119 Yale L.J. Online 1, 5 (2009) (*Hall Street* "leaves manifest disregard and other common-law vacatur standards fully intact.").

24 *See* Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1290 (2009) ("[T]he manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically 9 U.S.C. §10(a)(4), which states that the court may vacate 'where the arbitrators exceeded their powers.'"); Stolt-Nielsen SA, v AnimalFeeds Intern Corp., 548 F.3d 85, 93-96 (2d Cir. 2008) (finding *Hall Street* inconsistent with statements "treating the 'manifest disregard' standard as a ground for vacatur entirely separate from those enumerated in the FAA," but agreeing with those who "think that 'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards."); *see also* Mastec N. Am., Inc. v. MSE Power Sys., Inc., No. 1:08-cv-168, 2008 WL 2704912, at *3, 2008 U.S. Dist. LEXIS 52205, at **8-9 (N.D.N.Y. July 8, 2008) ("The Supreme Court's holding in Hall Street limits the application of 'manifest disregard of the law' to the Section 10 bases."); Chase Bank USA, N.A. v. Hale, 19 Misc.3d 975, 859 N.Y.S.2d 342, 349 (2008) ("Although the Court in *Hall Street* did not settle on its own definition of the term, it rejected the notion that 'manifest disregard' embodies a separate, nonstatutory ground for judicial review under the FAA. Nonetheless . . . the *Hall Street* Court appears to have done nothing to jettison the 'manifest disregard' standard of *Wilko*. Accordingly, this court will view 'manifest disregard of law' as judicial interpretation of the section 10 requirement, rather than as a separate standard of review."). Probably also in this category is *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."). The Fifth Circuit criticized the Sixth Circuit's *Coffee Beanery* decision, *supra* note 23, but not *Stolt-Nielson* and *Comedy Club*. The Fifth Circuit concluded its opinion in *Citigroup*, noting: "To the extent that our previous precedent holds that non-statutory grounds may support the vacatur of an arbitration award, it is hereby overruled." *Id.* at 358. This narrow holding suggests that the Fifth Circuit may be open to arbitration award challenges based on the manifest disregard doctrine, but recast as §10(a)(4) challenges.

For criticism of this view, see, e.g., Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 Nev. L. J. 234, 238 (2007) ("[A]ttempts to derive the manifest disregard standard from the statutory grounds have not proven persuasive."); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 Penn St. L. Rev. 1103, 1144 (2009) ("[M]anifest disregard review should not be viewed as synonymous with exceeding-powers review.").

25 *Compare, e.g.,* Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 Nev. L.J. 234 (2007) ("argu[ing] in favor of codifying manifest disregard of the law as a ground for vacating arbitration awards"), *with* Kevin Patrick Murphy's note, *Alive But Not Well: Manifest Disregard After Hall Street*, 44 Ga. L. Rev. 285, 314 (2009) ("Congress should step in and abrogate manifest disregard itself."); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 Penn St. L. Rev. 1103, 1147 (2009) ("Manifest disregard has no place in the modern structure of arbitration for general submissions to arbitration—that is, submissions to arbitration that do not call for the arbitrator to apply the law. As noted above, manifest disregard is a paternalistic remnant of the era of judicial distrust of arbitration that undermines party autonomy, relies on an unsupported rationale, and ultimately is nonsensical.").

26 Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, *in* Brunet et al., Arbitration Law in America: A Critical Assessment 109-121 & App. A at 348-49 (2006) (rejecting manifest disregard in favor of vacating "[w]here the award was based on the arbitrators' error of law and, at the time of their most recent agreement submitting the controversy to arbitration, the parties could not have formed an enforceable contract to avoid such law.").

27 It is rare for a reviewing court to vacate an arbitration award on manifest disregard grounds, even prior to *Hall Street*. One study of 336 federal and state employment arbitration awards between 1975 and 2006 found that manifest disregard challenges were only successful in 7.1 percent of the cases. *See* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 189 (2008).