ARBITRATION—JUDICIAL REVIEW OF ARBITRATION AWARDS—COURTS MAY REVIEW AND VACATE AN ARBITRATION AWARD WHERE AN ARBITRATOR COMMITS GROSS, UNMISTAKABLE, OR NOT REASONABLY DEBATABLE ERRORS OF LAW OR WHERE THE ARBITRATOR MANIFESTLY DISREGARDS THE LAW AND THE RESULT IS UNJUST—*Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 610 A.2d 364 (1992).

Arbitration[1] is one of several fora available to parties for the resolution of their disputes.[2] As an expeditious, inexpensive, and

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[1] In *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, the New Jersey Supreme Court defined arbitration as a system in which the parties agree to submit their dispute to an arbitrator of their own choosing while also agreeing to be bound by the award rendered. Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 490, 610 A.2d 364, 369 (1992) (citation omitted). The *Perini* court also noted that arbitration was "a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law" and "[a]n arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." *Id.* (citation omitted); *see also* BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (defining arbitration as "[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard"). For a more detailed definition of arbitration, see 2 RULING CASE LAW, *Arbitration* § 2 (1929) (defining arbitration and distinguishing it from appraisement, a method of preventing future disputes through contractual stipulations) (footnotes omitted); Sylvan Gotshal, *The Art of Arbitration*, 48 A.B.A. J. 533, 553 (1962) (noting that arbitration is "a simple, uncomplicated system, created through need by trial and error, whereby mankind has settled and does settle disputes of every kind or nature through the acceptance of the judgment of one or more reasonable and competent honorable men as the final settlement of the dispute"). For a general discussion of the contractual nature of arbitration, see MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 1.01, at 1-4 (rev. ed. 1984).

[2] Thomas J. Stipanowich, *Punitive Damages in Arbitration* Garrity v. Lyle Stuart, Inc. *Reconsidered*, 66 B.U. L. Rev. 953, 953 (1986). Other forms of alternative dispute resolution include mediation, summary jury trials, expert fact-finding, mini-trials and early neutral evaluation. Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1 J. DISP. RESOL. 1, 1 (1993). Commercial arbitration has many advantages, including reduction of court congestion, expedition of proceedings, minimization of costs, and preservation of business relationships. Christa Arcos, Comment, 24 SUFFOLK U. L. REV. 189, 193 (1990). *But see* Richard S. Bayer & Harlan S. Abrahams, *The Trouble with Arbitration*, LITIG. J., Winter 1985, at 30, 31-32 (discussing some of the disadvantages involved in choosing arbitration over litigation, among them, forced informality and difficulties involved in overturning a bad award). For a presentation of articles that explore different aspects of arbitration, see generally Symposium, *Achieving Justice in Arbitration*, 65 TUL. L. REV. 1303 (1991). *See also* AMERICAN ARBITRATION ASSOCIATION, PIONEERS IN DISPUTE RESOLUTION A HISTORY OF THE AMERICAN ARBITRATION ASSOCIATION ON ITS 65TH ANNIVERSARY (1926-1991) 4-6 (1991) (describing the history of arbitration in America, including the development of the American Arbitration Association).

informal disposition of claims,[3] arbitration has become a favored

[3] *See Perini*, 129 N.J. at 490, 610 A.2d at 369 (stating that arbitration is known for its speedy, cost-efficient, informal method of resolution, as well as its finality) (quoting Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 187, 430 A.2d 214, 217-18 (1981) (further quotation omitted)). Over the years, New Jersey courts have recognized the same advantages of arbitration for the disputing parties. *In re* Arbitration Between Grover, 80 N.J. 221, 234, 403 A.2d 448, 454-55 (1979) (Pashman, J., dissenting) (citations omitted); Carpenter v. Bloomer, 54 N.J. Super. 157, 162, 148 A.2d 497, 500 (App. Div. 1959) (citations omitted); Harsen v. Board of Educ., 132 N.J. Super. 365, 370, 333 A.2d 580, 583 (Law Div. 1975); Hoboken Mfrs. R.R. v. Hoboken R.R. Warehouse & Steamship Connecting, 132 N.J. Eq. 111, 118, 27 A.2d 150, 154 (Ch. 1942), *aff'd*, 133 N.J. Eq. 270, 31 A.2d 801 (1943); Eastern Eng'g Co. v. Ocean City, 11 N.J. Misc. 508, 510-11, 167 A. 522, 523 (1933); Leslie v. Leslie, 50 N.J. Eq. 103, 108, 24 A. 319, 321 (Ch. 1892); *see also* Hazen v. Addis, 14 N.J.L. 333, 337 (1834) (noting that the principal object of arbitration is to avoid future litigation).

In *Local No. 153, Office and Professional Employees International Union v. Trust Co.*, the New Jersey Supreme Court mentioned that arbitration was a way of privately resolving disputes between parties in a flexible manner. Local No. 153, Office of Professional Employees Int'l Union v. Trust Co., 105 N.J. 442, 448, 522 A.2d 992, 994-95 (1987) (citation omitted). New Jersey courts have also recognized arbitration's value in allowing parties to avoid the courts. Faherty v. Faherty, 97 N.J. 99, 105, 477 A.2d 1257, 1261 (1984); Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 16-17, 389 A.2d 439, 446 (1978); *see also* Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227, 230 A.2d 521, 525 (App. Div. 1967) (noting specifically that the purpose of labor law arbitration was to minimize industrial strife) (citation omitted).

Other courts have pronounced various reasons for resorting to arbitration. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 439-40 (1953) (observing that the considerations of speed, flexibility, informality, and finality led to the enactment of the Federal Arbitration Act) (Frankfurter, J., dissenting), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); Diapulse Corp. of Am. v. Carba, 626 F.2d 1108, 1110 (2d Cir. 1980) (stating that arbitration avoids expensive and prolonged court proceedings) (citation omitted); Exxon Shipping Co. v. Exxon Seamen's Union, 788 F. Supp. 829, 834 (D.N.J. 1992) (recognizing the same benefits as those found in *Wilko*) (quoting Penntech Papers, Inc. v. United Paperworkers Int'l Union, 896 F.2d 51, 53 (3d Cir. 1990)), *aff'd*, 993 F.2d 357 (3d Cir. 1993); Arkansas Dep't of Parks & Tourism v. Resort Managers, 743 S.W.2d 389, 391 (Ark. 1988) (acknowledging that avoiding litigation was the "main" purpose of arbitration); Gaer Bros. v. Mott, 130 A.2d 804, 806 (Conn. 1957) (noting that utilization of arbitration avoids litigation and ensures prompt settlement of disputes); Utah Constr. Co. v. Western Pacific R.R., 162 P. 631, 632-33 (Cal. 1917) (recognizing that the policy of arbitration was to avoid delays in civil litigation). *But see* Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 427 (Mich. 1982) (observing that the aspects of expeditiousness, inexpensiveness, and nonreviewability of arbitration proceedings were *not* the sole or even primary goals of statutory arbitration). For a general discussion of the many purposes of arbitration, see Note, *Judicial Review of Arbitration on the Merits*, 63 HARV. L. REV. 681, 681 (1950) [hereinafter *Judicial Review of Arbitration*]; 5 AM. JUR. 2D *Arbitration and Award* § 1 (1962). *See also* Bettyann Babjak, Note, 17 SETON HALL L. REV. 307, 312-14 (1987) (discussing the benefits of arbitration, specifically in labor contexts).

From the judiciary's perspective, one important advantage of arbitration is that the arbitration process eases congested court calendars. Cargill v. Northwestern Nat'l Ins. Co., 462 A.2d 833, 834 (Pa. Super. Ct. 1983) (citation omitted); *see also* Junius L. Allison, *Problems in the Delivery of Legal Services*, 63 A.B.A. J. 518, 519 (1977) (stating that arbitration provides the means to resolve a dispute at a more cost-efficient rate than

alternative to litigation.[4] Despite an initial reluctance to recognize the validity of arbitration,[5] courts have come to appreciate arbitra-

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does the court system); Judge Stanley Sporkin, *Foreword to* RALPH C. FERRERA AND DANNY ERTEL, BEYOND ARBITRATION DESIGNING ALTERNATIVES TO SECURITIES LITIGATION at xvii (1991) (noting the importance of the country's focus on the litigation explosion, and pointing out the necessity of providing an arena to resolve disputes on a virtually cost-free and timely basis). Judge Sporkin later explained that one of the advantages of arbitration over litigation was arbitration's ability to process a dispute much more quickly than the courts. *Id.* Although no New Jersey courts have focused on this aspect of arbitration, New Jersey is certainly not immune from the problem of court congestion. *See* Arthur J. Simpson, Jr., *Whither Judicial Arbitration in New Jersey* 2-3 (Mar. 9, 1982) (unpublished manuscript, on file with the New Jersey State Library and the *Seton Hall Law Review*) (providing statistics on the backlog of court cases on the New Jersey docket through 1977). For a discussion on the need for alleviating court calendar-loads by arbitration and other means, see *id.* at 5, n.8 (citing Chief Justice Warren E. Burger, Annual Address Year-end Report on the Judiciary (1980), *reprinted in Year-End Report on the Judiciary*, 107 N.J. L.J. 49 (Jan. 22, 1981); Robert Coulson, President, American Arbitration Association, Address at Arbitration Day 1980, *reprinted in Arbitration Developments: National and International Activities*, 107 N.J. L.J. 60 (Jan. 22, 1981) (further citations omitted)).

[4] James Hadden, *The Authority of Arbitrators to Award Punitive Damages:* Raytheon Co. v. Automated Business Systems, 7 OHIO ST. J. DISP. RES. 337, 337 (1992). For example, in 1984, almost 40,000 accident, commercial, and labor cases were filed with the American Arbitration Association (AAA). Stipanowich, *supra* note 2, at 953 n.2 (citation omitted); *see also* BERTHOLD H. HOENIGER, COMMERCIAL ARBITRATION HANDBOOK § 1.01, at 1-1 (1st ed. 1990) (noting the progressive increase in arbitration cases filed with the AAA from 6,140 in 1980 to 12,350 in 1989); *Caseload Up, Processing Time Down*, ARB. J., June 1992, at 10 (reflecting the statistic that 62,327 cases were filed with the AAA in 1991).

The reaction in the federal courts has been particularly positive in favoring arbitration. *See, e.g.*, Mandich v. Watters, 970 F.2d 462, 466 (8th Cir. 1992) (endorsing arbitration under Minnesota law); Echostar Satellite Corp. v. General Elec. Co., 797 F. Supp. 855, 857 (D. Colo. 1992) (recognizing that federal policy favors arbitration) (citation omitted); Victor v. State Farm Fire and Casualty Co., 795 F. Supp. 300, 302 (D. Alaska 1992) (endorsing arbitration under Alaska law) (citations omitted). For a general discussion of federal arbitration law, see DOMKE, *supra* note 1, at § 4.03, at 31-46.

Many courts have also recognized the value of using arbitration for resolving labor conflicts. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965) (approving contract grievance procedures for settling labor disputes); *see also* LaCourse v. Firemen's Ins. Co., 756 F.2d 10, 12 (3d Cir. 1985) (stating that despite Pennsylvania's policy of favoring arbitration for commercial disputes, federal policy favoring arbitration of labor disputes was stronger) (citations omitted), *aff'd*, 822 F.2d 53 (1987); Ludwig V. Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969) (recognizing arbitration as one method of enforcing the strong public policy of encouraging peaceful settlement of industrial disputes); Independent Lift Truck Builders Union v. Hyster Co., 803 F. Supp. 1374, 1375 (C.D. Ill. 1992) (reiterating the value of arbitration in labor disputes) (citation omitted); *cf.* Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 10 (1st Cir. 1989) (noting that the differences between labor and commercial arbitration are such that their procedures are not necessarily interchangeable).

[5] *Perini*, 129 N.J. at 489, 610 A.2d at 369 (observing a past hostility to arbitration in the courts). For a general discussion of the hostility historically exhibited by Ameri-

tion's overall importance.[6] In recognition of arbitration's significant role, courts have adopted a policy of great deference to arbitration and as a result have limited the judiciary's review of these awards.[7]

Different jurisdictions have applied varying standards of review in vacating arbitration awards for an arbitrator's mistake of law.[8] For example, certain courts have held that an award may be

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can courts and academia to common law arbitration, see DOMKE, *supra* note 1, at §§ 2.04-.06, 3.01, at 16-20, 21-23.

[6] *Perini*, 129 N.J. at 489, 610 A.2d at 369 (citing James B. Boskey, *A History of Commercial Arbitration in New Jersey Part I*, 8 RUT.-CAM. L.J. 1, 2-3, 7 (1976) (observing New Jersey courts' early acceptance of arbitration)); *see also* Standard Oil Dev. Co. Employees Union v. Esso Research & Eng'g Co., 38 N.J. Super. 106, 115, 118 A.2d 70, 75 (App. Div. 1955) (noting that the courts' initial hesitation to embrace arbitration has been replaced with the recognition of and respect for the indispensability of arbitration in current economic life); *Hoboken Mfrs. R.R. Co.*, 132 N.J. Eq. at 117, 27 A.2d at 154 (explaining the initial hostility towards arbitration as motivated by judicial jealousy of private dispute resolution but excepting New Jersey courts from such behavior) (citation omitted); HOENIGER, *supra* note 4, § 1.03, at 1-3 (noting recent judicial and legislative encouragement of arbitration by increasing the scope of arbitrability).

[7] A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 970 (1993); Polk Bros. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union, 973 F.2d 593, 596 (7th Cir. 1992) (citations omitted); Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 333 (3d Cir. 1991) (citation omitted); Siegel v. Titan Indus. Corp., 779 F.2d 891, 892 (2d Cir. 1985) (citation omitted); Connecticut Light & Power Co. v. Local 420, IBEW, 718 F.2d 14, 19 (2d Cir. 1983) (remarking that great judicial deference should be given to an arbitration award in recognition of the arbitrator's increased experience and expertise as compared to that of a judge) (citation omitted); Revere Copper & Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir.) (citation omitted), *cert. denied*, 446 U.S. 983 (1980); Engis Corp. v. Engis Ltd., 800 F. Supp. 627, 628 (N.D. Ill. 1992) (citation omitted); Pompano-Windy City Partners Ltd. v. Bear Stearns & Co., 794 F. Supp. 1265, 1272 (S.D.N.Y. 1992) (citations omitted).

Furthermore, courts have regularly cautioned against unchecked review. *See* Mobil Oil Corp. v. Indep. Oil Workers Union, 677 F.2d 299, 302 (3d Cir. 1982); *see also* General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Co., 372 U.S. 517, 519 (1963) (holding that current Supreme Court decisions reflect a strong labor policy encouraging private settlement of disputes, and limiting judicial review of such decisions to exceptional cases). *But see* Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 435 & n.11 (Mich. 1982) (acknowledging Michigan's more expansive review over arbitration awards than that of other jurisdictions) (citations omitted).

For a discussion of judicial attitudes on the limited review of arbitral awards see generally Editorial Note, *Labor Arbitration in New Jersey*, 14 RUT. L. REV. 143, 159, n.92 (1959) [hereinafter Editorial Note] (discussing generally the importance of having a limited standard of judicial review); *Judicial Review of Arbitration*, *supra* note 3, at 681 (surveying briefly the contemporary standards of various jurisdictions on judicial review over arbitration awards); Stipanowich, *supra* note 2, at 982-88 (discussing the limitations on judicial review).

[8] *See* ROBERT M. RODMAN, COMMERCIAL ARBITRATION WITH FORMS, § 25.15, at 568-73 (West's Handbook Series 1984) (surveying arbitral standards of review in many jurisdictions); *see also* Babjak, *supra* note 3, at 317-19 (discussing New Jersey's legisla-

vacated for "gross" legal error.[9] Conversely, many jurisdictions have vacated awards in which the arbitrator acted in manifest disregard of the law.[10] Still yet, other courts have upheld awards even

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tive and judicial grounds for review of an award); Alan H. Katz, Note, 52 TUL. L. REV. 862, 867-68 (1978) (outlining briefly the scope of judicial review for arbitral error in Louisiana); Anthony J. Basincki, Comment, *Commercial Arbitration Under the Federal Act: Expanding the Scope of Judicial Review*, 35 U. PITT. L. REV. 799, 805-09 (1974) (discussing particularly judicial review in the federal context).

9 *See, e.g.*, Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1476-77 (11th Cir. 1987) (stating that grounds for vacation include an arbitrator's "egregious" error); Celtech, Inc. v. Broumand, 584 A.2d 1257, 1258 (D.C. 1991) (allowing judicial interference for corruption or "gross mistake"); State v. Public Safety Employees Ass'n, 798 P.2d 1281, 1285 (Alaska. 1990) (vacating for "gross" errors that are "obvious and significant") (citation omitted); Board of Educ. v. Prince George's Co. Educators' Ass'n, 522 A.2d 931, 941 (Md. 1987) (reviewing arbitration awards under Maryland's common law "palpable legal or factual error apparent on the face of the award" standard or the "mistake so gross as to work a manifest injustice" standard); *Perini*, 129 N.J. at 488, 610 A.2d at 368 (citing the New Jersey Superior Court Appellate Division's refusal to vacate the award where the arbitrators were not "clearly" mistaken, and also pointing out the New Jersey Superior Court Chancery Division's refusal to overturn the award absent a "gross mistake" or "clear disregard of applicable law"); Pacific Gas & Elec. Co. v. Superior Ct., 277 Cal. App. 3d. 694, 701 (Ct. App.) (vacating an award for "egregious" error, though defining the term as an "arbitrary remaking of the contract"), *review granted and opinion superseded*, 810 P.2d 997 (Cal. 1991), *review denied*, 19 Cal. Rptr. 2d 295 (Ct. App. 1993); NuVision, Inc. v. Dunscombe, 415 N.W.2d 234, 238 (Mich. Ct. App. 1987) (stating that the error "must be so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise") (citation omitted); *see also* Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699, 701 (Ky. 1991) (adopting the "common dictionary definition of 'gross' [as] something immediately obvious or glaringly noticeable" and proposing to vacate the award for the arbitrator's ignorance of the law). *But see* Rauh v. Rockford Prods. Corp., 574 N.E.2d 636, 644 (Ill. 1991) (refusing to vacate an award for gross legal errors unless the mistake appeared on the face of the award) (citation omitted). Offering an internal contradiction, the *Carrs* court later adopted a slightly different standard by refusing to enforce the award for its failure "to provide equity so as to produce palpable error." *Carrs*, 809 S.W. 2d at 703.

10 *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436-37 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). Many federal courts today continue to adhere to the *Wilko* rule. Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992); A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992); Eichleay Corp. v. International Ass'n of Bridge Workers, 944 F.2d 1047, 1056 (3d Cir. 1991) (citation omitted), *cert. dismissed*, 112 S. Ct. 1285 (1992); Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 516 (2d Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 380 (1991) *and* 112 S. Ct. 1241 (1992); Jih v. Long & Foster Real Estate, Inc., 800 F. Supp. 312, 317 (D. Md. 1992); Fairchild & Co. v. Richmond, Fredericksburg, & Potomac R.R., 516 F. Supp. 1305, 1315 (D.D.C. 1981) (citation omitted); *see also* West Jersey R.R. v. Thomas, 23 N.J. Eq. 431, 440 (Ch. 1873) (vacating in the state court an award where the arbitrator disregarded certain legal requirements).

In concurrence, Chief Justice Wilentz noted in *Perini* that there are at least two federal circuits, the Eighth and the Eleventh Circuits, that have refused to adopt this stringent "manifest disregard" standard. *Perini*, 129 N.J. at 526, 610 A.2d at 388 (Wilentz, C.J., concurring) (citations omitted). Some of the Eleventh Circuit decisions

where the arbitrator erroneously applied the law.[11] Finally, a limited number of courts have held that an award may not be disturbed for any legal error, regardless of the error's magnitude.[12]

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that have not adopted this standard are Robbins v. Day, 954 F.2d 679, 684 (11th Cir.), *cert. denied sub nom.* Robbins v. PaineWebber, Inc., 113 S. Ct. 201 (1992); Raiford v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990); O.R. Sec., Inc. v. Professional Planning Assocs., Inc., 857 F.2d 742, 747 (11th Cir. 1988). Some of the Eighth Circuit decisions that also either refused to adopt this standard or found the standard satisfied include Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991); Stroh Container Co. v. Delphi Indus. Inc., 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986).

What constitutes a "manifest disregard" of the law, however, will differ from court to court. *See, e.g.*, Svoboda v. Negey Assocs., 655 F. Supp. 1329, 1332-33 (S.D.N.Y. 1987) (explaining that the term "disregard" means that the arbitrator ignored or did not attend to the law despite an awareness of the legal principles) (footnote omitted); Bechtel Constructors Corp. v. Detroit Carpenters Dist. Council, 610 F. Supp. 1550, 1555 (E.D. Mich. 1985) (equating the manifest disregard standard with a "manifest error" standard) (citation omitted); Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 108 (N.D. Ill. 1980) (pointing out that the award would not be vacated for manifest disregard unless there was a failure to decide in accordance with the relevant provisions of the law, and not mere error in the interpretation of the law) (citations omitted), *aff'd*, 653 F.2d 310 (7th Cir. 1981); Reynolds Sec., Inc. v. Macquown, 459 F. Supp. 943, 945 (W.D. Pa. 1978) (adding that for manifest disregard to apply the arbitrator must have had not only an awareness of the law but also an understanding and correct statement of the law); Bell Aerospace Co. Div. of Textron v. Local 516, UAW, 356 F. Supp. 354, 356 (W.D.N.Y. 1973) (same) (citing Fukaya Trading Co., S.A. v. Eastern Marine Corp., 322 F. Supp. 278, 282 (E.D. La. 1971)), *aff'd in part and rev'd in part*, 500 F.2d 921 (2d Cir. 1974).

[11] *See, e.g.*, News Am. Publications, Inc. v. Newark Typographical Union, Local 103, 918 F.2d 21, 24 (3d Cir. 1990) (ruling that Third Circuit courts may not review an award to determine whether the arbitrator correctly applied principles of law) (citation omitted); *In re* Arbitration Between Marcy Lee Mfg. Co. & Cortley Fabrics Co., 354 F.2d 42, 43 (2d Cir. 1965) (refusing to set aside an award for an erroneous determination or application of the law) (citation omitted); Textile Workers Union of Am. v. American Thread Co., Local 1386, 291 F.2d 894, 896 (4th Cir. 1961) (remarking that awards were upheld despite an arbitrator's erroneous interpretation even when courts did not favor arbitration); *cf.* Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-37 (2d Cir. 1986) (proposing that a simple misinterpretation of a contract would not be grounds to vacate an award unless the error was "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator"); Celtech, Inc. v. Broumand, 584 A.2d 1257, 1258 (D.C. 1991) (Mansfield, J., dissenting) (noting that courts will not disturb an award even if the award is based on an erroneous interpretation of a contract) (citing I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 432 (2d Cir. 1974)).

[12] Tanoma Mining Co. v. Local Union No. 1269, UMWA, 896 F.2d 745, 749 (3d Cir. 1990) (citation omitted); Padgett v. Dapelo, 791 F. Supp. 438, 441 (S.D.N.Y. 1992) (citation omitted), *aff'd*, 992 F.2d 320 (2d Cir. 1993); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (refusing to vacate even for "serious" error); Local 1199, Drug, Hosp. & Health Care Employees Union v. Brooks Drug Co., 956 F.2d 22, 25 (2d Cir. 1992)) (same); Las Vegas Joint Executive Bd. v. Riverboat Casino, 817 F.2d 524, 528 (9th Cir. 1987) (stating that an award containing a factual or legal error is not to be vacated even where the arbitrator's view of the law is seriously questionable) (citations omitted); Washington-Baltimore News-

Other courts have denied enforcement where the error was apparent on the face of the arbitration award.[13] A few courts, how-

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paper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971) (preferring not to vacate an award for legal or factual error unless it "compels the violation of law or conduct contrary to accepted public policy") (footnote omitted).

Similarly, state courts have been reluctant to vacate for legal or factual error. Arkansas Dep't of Parks & Tourism v. Resort Managers, 743 S.W.2d 389, 392 (Ark. 1988); Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1329 (Fla. 1989) (citation omitted); Fischer v. Guaranteed Concrete Co., 151 N.W.2d 266, 270 (Minn. 1967); P G Metals Co. v. Hofkin, 218 A.2d 238, 240 (Pa. 1966); Foust v. Aetna Casualty & Ins. Co., 786 P.2d 450, 451 (Colo. Ct. App. 1989) (citation omitted); Cady v. Allstate Ins. Co., 747 P.2d 76, 80 (Idaho Ct. App. 1987) (footnote and citation omitted); School Comm. of Norton v. Norton Teachers' Assoc., 505 N.E.2d 531, 532 (Mass. App. Ct. 1987) (citation omitted). *But see* Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699, 703 (Ky. 1991) (Combs, J., concurring) (denouncing Kentucky's arbitration statute for its potential to "close the courthouse doors as to mistakes of law and fact, to persons who have elected to be bound by arbitration[,]" and stating that "under our constitution, neither the parties nor the arbitrators can tie the hands of the court on questions of law").

[13] Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co., 794 F. Supp. 1265, 1272 (S.D.N.Y. 1992) (noting that the error must be "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator") (quoting Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)); Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 434 (Mich. 1982) (limiting judicial review to those errors appearing on the face of the award) (citation omitted). New Jersey courts have also adopted this prerequisite. Daly v. Komline-Sanderson Eng'g Corp., 40 N.J. 175, 178, 191 A.2d 37, 38 (1963) (citations omitted); Carhal Factors, Inc. v. Salkind, 5 N.J. 485, 491, 76 A.2d 252, 254 (1950) (citations omitted); Melvin P. Windsor, Inc. v. Mayflower Sav. & Loan, Ass'n, 115 N.J. Super. 219, 220-21, 278 A.2d 547, 547-48 (App. Div. 1971) (citations omitted); Carpenter v. Bloomer, 54 N.J. Super. 157, 168, 148 A.2d 497, 503 (App. Div. 1959).

At least one court abroad also adheres to the requirement that the error be apparent on the face of the award. *See* Martin Hunter, Note, *Error on the Face of the Award*, 105 L. Q. REV. 539, 540 (1989) (discussing New Zealand's standard for vacating an arbitration award for errors of law apparent on the face of the award). Hunter additionally noted that no public policy exists in New Zealand to prevent the parties from agreeing that the courts cannot review the award. *Id.* at 540-41 (citations omitted). In fact, the commentator quoted one justice's observation that public policy encourages the courts not to interfere where the parties desire finality. *Id.* (quotation omitted). Hunter then cited a decision of the Supreme Court of Victoria, the highest court of the New Zealand province of Victoria, in which the court qualified the error on the face of the award principle by noting that the error must be one affecting the case's outcome. *Id.* at 542 (citation omitted). Upon finding no "fundamental" legal error, Hunter explained, the court dismissed the application to overturn the award. *Id.* at 543. The author concluded by speculating as to the outcome of the battle between judicial supervision over arbitration and the parties' ability to displace that jurisdiction contractually. *Id.* at 544.

For a Canadian critique of the error on the face of the award standard, see generally W.H. Hurlburt, *Setting Aside Private Non-Labour Arbitration Awards for Errors of Law—Some Recent Decisions*, 26 ALBERTA L. REV. 345 (1988). In this article on Canadian law, Hurlburt recited the standard in which legal error on the face of the award would evidence that the arbitrator "misconducted himself," and as such, would constitute grounds for vacating the award. *Id.* at 345-46. The author then addressed recent

ever, have refused to consider vacating an award unless there was "no proper basis" for the award.[14] Yet other courts have upheld awards whenever the arbitrator rendered a fair and honest decision.[15] Finally, several jurisdictions have limited review to instances

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cases implementing a new rule elevating the standard of an arbitrator's misconduct to an error that was "patently unreasonable." *Id.* at 346. In discussing the merits of the old and new standard, Hurlburt suggested that the older rule limited judicial review and accordingly left arbitration "as much to itself as possible." *Id.* at 353-54. Hurlburt also explained that the newer standard was a much broader one because the standard grants judges the discretion to decide which awards to vacate. *Id.* at 354.

Similarly, Australian commentators have experienced conceptual difficulty with the error on the face of the award standard. John Goldring, 54 AUSTRALIAN L. J. 232, 232 (1980). Goldring stated that despite some criticism of setting aside an award for an error on its face, these grounds remained the law of each of the Australian States and Territories. *Id.* The commentator further explained that upon discovery of an error, the court is obligated to review the award. *Id.* (citations omitted). Goldring justified such review by noting the importance that there be "throughout the land, a single system of law interpreted by a single system . . . ." *Id.* at 233.

[14] Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992), *cert. denied sub nom.* Robbins v. PaineWebber, Inc., 113 S. Ct. 201 (1992); *see also* Brown v. Rauscher Pierce Refsnes, Inc., 796 F. Supp. 496, 504 (M.D. Fla. 1992) (refusing to identify the "no proper basis" standard as a "correct basis" for the award standard, and instead identifying the standard as one of a "justifiable basis"), *aff'd*, 994 F.2d 775 (11th Cir. 1993). The *Brown* court also cautioned, however, that the justifiable basis standard should be limited to instances in which the arbitrators committed egregious error, overstepped their authority, or otherwise misconducted themselves. *Id.*

[15] *See* Independent Lift Truck Builders Union v. Hyster Co., 803 F. Supp. 1374, 1376 (C.D. Ill. 1992) (holding that the award would not be set aside if the arbitrators provided the parties with a full and fair hearing, and the award subsequently contained an honest decision) (citation omitted); Bechtel Constructors Corp. v. Detroit Carpenters Dist. Council, 610 F. Supp. 1550, 1555 (E.D. Mich. 1985) (adopting the same standard as that found in *Independent*) (citing Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir. 1982)); Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. Ct. App. 1987) (vacating an award only where there was a "gross mistake," but defining "gross" in terms of failure to exercise honest judgment) (citation omitted); David A. Brooks Enters., Inc. v. First Sys. Agencies, 370 N.W.2d 434, 436 (Minn. Ct. App. 1985) (adopting a "bad faith or failure to exercise and honest judgment" approach) (citation omitted).

For a review of decisions that have adopted the "fair" standard, see National Post Office Mailhandlers v. United States Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985) (stating that review of arbitration awards should be limited to determining whether a fundamentally fair hearing was denied) (citing Grahams Serv., Inc. v. Teamsters Local 975, 700 F.2d 420, 422 (8th Cir. 1982)); Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979) (same) (citation omitted); Bell Aerospace Co. Div. of Textron v. Local 516, UAW, 500 F.2d 921, 923 (2d Cir. 1974) (same); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 600 (3d Cir.) (articulating that Third Circuit law demands more than a mere error of law; it must be one that deprives a party of a fair hearing), *cert. denied*, 393 U.S. 954 (1968); Jackson Trak Group, Inc. v. Mid-States Port Auth., 751 P.2d 122, 127 (Kan. 1988) (noting that most errors would generally not constitute grounds for vacating an award fairly made); Sonotone Corp. v. Hayes, 2 N.J. Super. 407, 411, 64 A.2d 249, 250 (Ch. Div.) (reaffirming the notion that equity and good conscience were valid grounds for upholding an award), *rev'd*, 4 N.J. Super. 326, 67 A.2d 184 (App.

of fraud, corruption, or some other similar wrongdoing specifically enunciated in the applicable arbitration statute.[16]

Thus, the New Jersey Supreme Court had many alternative theories to choose from when the court examined the standards of review to apply in *Perini v. Greate Bay Hotel & Casino, Inc.*[17] Ultimately, however, the court fashioned its own standard for review of arbitration awards by combining selected aspects of standards articulated in other jurisdictions.[18] Specifically, the *Perini* court held that an arbitration award would be vacated where an arbitrator committed gross, unmistakable, or not reasonably debatable errors

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Div. 1949); Ruckman v. Ransom, 23 N.J. Eq. 118, 120 (Ch. 1872) (holding that the arbitrators need not base their award on "mere dry principles of law," but may render a decision founded on principles of "equity and good conscience"); *see also* Aetna Casualty & Sur. Co. v. Deitrich, 803 F. Supp. 1032, 1038 (M.D. Pa. 1992) (refusing to vacate an award absent a "clear" showing that a hearing was denied or that fraud, corruption, or similar wrongdoing rendered the award unjust, inequitable, or unconscionable) (citations omitted); Silverman v. Benmor Coats, Inc., 461 N.E.2d 1261, 1266 (N.Y. 1984) (holding that the arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement").

16 Katz, *supra* note 8, at 864. Limiting review to these circumstances has been particularly applicable in the New Jersey courts. County College of Morris Staff v. County College of Morristown, 100 N.J. 383, 391, 495 A.2d 865, 869 (1985); Johowern Corp. v. Affiliated Interior Designers, Inc., 187 N.J. Super. 195, 199, 453 A.2d 1370, 1372 (App. Div. 1982) (citing Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 187-88, 430 A.2d 214, 218 (1991)); Selected Risks Ins. Co. v. Allstate Ins. Co., 179 N.J. Super. 444, 451, 432 A.2d 544, 548 (App. Div. 1981) (citing Kearny PBA Local No. 21 v. Kearny, 81 N.J. 208, 221, 405 A.2d 393, 399 (1979)), *certif. denied*, 88 N.J. 489, 443 A.2d 705 (1981); Brooks v. Pennsylvania Mfrs. Ass'n Ins., 121 N.J. Super. 51, 54, 296 A.2d 72, 74 (App. Div. 1972), *modified*, 62 N.J. 583, 303 A.2d 884 (1973); Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227, 230 A.2d 521, 525 (App. Div. 1967); Anco Prods. Corp. v. TV Prods. Corp., 23 N.J. Super. 116, 123, 92 A.2d 625, 628 (App. Div. 1952); Harsen v. Board of Educ. of W. Milford, 132 N.J. Super. 365, 371, 333 A.2d 580, 584 (Law Div. 1975); International Assoc. of Machinists v. Bergen Ave. Business Owners' Assoc., 3 N.J. Super. 558, 565, 67 A.2d 362, 366 (Law Div. 1949); Caparaso v. Durante, 132 N.J.L. 16, 17, 38 A.2d 133, 134 (1944), *aff'd*, 132 N.J.L. 419, 40 A.2d 649 (1945); Deakman v. Odd Fellows Hall Ass'n of Jersey City, 110 N.J.L. 304, 305-06, 164 A. 256, 257 (1933); *see also* Lozano v. Maryland Casualty Co., 850 F.2d 1470, 1472 (11th Cir. 1988) (citing Florida law in support of the proposition that only the presence of the enumerated statutory grounds would subject an award to review and vacation, and that legal error did not fall into this category) (citations omitted); Kirk v. Board of Educ. of Bremen Community High Sch. Dist., 811 F.2d 347, 354 (7th Cir. 1987) (holding that evidence of fraud, corruption, or partiality was only one of five grounds for vacating an award) (citation omitted); Moncharsh v. Hiely & Blase, 832 P.2d 899, 915 (Cal. 1992) (surveying other jurisdictions' adoption of this standard) (citations omitted); *cf. In re* Arbitration Between Grover, 80 N.J. 235, 237, 403 A.2d 448, 456 (1979) (Pashman, J., dissenting) (bemoaning the court's departure from this strict standard of review, and predicting that such action would create "unbounded" judicial review of arbitration proceedings) (citation omitted).

17 129 N.J. 479, 610 A.2d 364 (1992).

18 *See id.* at 494-97, 610 A.2d at 371-73.

of law or where the arbitrator manifestly disregarded the law, and the result of the arbitration was unjust.[19]

Greate Bay Hotel & Casino, Inc., trading as Sands Hotel & Casino (Sands), entered into an agreement with Perini Corporation (Perini) in July 1983 to renovate the Sands hotel and casino for a $600,000 management fee.[20] Although the contract had explicitly proscribed terminating the contract after substantial completion, Sands later attempted to do so on grounds that Perini had not timely completed the work.[21]

In response to what Perini perceived as Sands's breach of contract, Perini filed suit in the Superior Court, Chancery Division, which referred the termination issue and other disputed matters to arbitration.[22] A panel of arbitrators awarded Sands lost profit damages of $14.5 million[23] and set the contractual balance due Perini at $300,000 plus interest.[24]

Dissatisfied with this award, Perini appealed to the chancery division.[25] Finding that the arbitrators had based the damage award on sufficient evidence, the court denied Perini's motion to

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19 *Id.* at 496, 610 A.2d at 372-73. To determine whether the arbitrator had committed gross, unmistakable, or not reasonably debatable errors of law, the court also addressed several contractual issues, such as whether the contract between the parties had been substantially completed and whether lost profits should have been awarded. *Id.* at 497-517, 610 A.2d at 373-83. This Note, however, focuses only on the arbitration aspects of the *Perini* court's decision.

20 *Id.* at 484-85, 610 A.2d at 366-67. Perini's responsibilities were those of a general contractor hired to manage the casino renovation project. *Id.* at 485, 610 A.2d at 367. Sands had argued that Perini was to receive 4% of the contract price if the price exceeded $20 million, and that the actual fee was thus $771,000. *Id.* at 511 n.3, 610 A.2d at 380 n.3. The appellate division rejected this argument, however, and concluded that Perini's fee was $600,000. *Id.*

21 *Id.* at 487, 610 A.2d at 368. Perini contended that the attempted termination took place on December 21, 1984, three months after the entire project would be substantially completed, September 14, 1984. *Id.*

22 *Id.*

23 The decision was split two-to-one, with the attorney-arbitrator dissenting. *Id.* at 487, 610 A.2d at 368.

24 *Id.* This amount came to $300,000 plus interest. *Id.* The panel, however, did not explicitly decide whether Sands had wrongfully terminated the contract after Perini's substantial completion. *Id.*

25 *Id.* Perini protested that, in comparison to its $600,000 management fee, the award of over $14 million dollars, representing *2400%* of Perini's fee, was grossly disproportionate. *Id.* at 511, 610 A.2d at 300. Had it realized that it would be held liable for over $14 million dollars in damages for its $600,000 fee, Perini argued that it would have never entered into the original contract. *Id.* Further, Perini asserted that allowing the lost profit award to stand violated the "well-established rule" which limited damages after substantial completion. *Id.* at 500, 610 A.2d at 374.

vacate the award.[26] The court further declared that the arbitrators had not made a "gross mistake" or clearly disregarded the applicable law in awarding Sands lost profits, of which either was necessary to overturn the award.[27]

The appellate division affirmed, holding that an award should not be vacated absent a clear mistake of law.[28] The court also held that the award was not unjust because it was not disproportionate to the contract price.[29] Additionally, the court concluded that in light of the evidence submitted to the arbitrators, lost profits were reasonably foreseeable upon breach of the contract, and that these lost profit damages were not speculative.[30]

Subsequently, the New Jersey Supreme Court granted certification[31] to address three issues: (1) what standard of review should be adopted for an alleged mistake of law; (2) whether the definition of "undue means," a phrase of statutory origin,[32] encompassed a mistake of law; and (3) whether the possible excessiveness of the award to Sands was sufficient grounds for its vacation.[33] The court held that New Jersey's standard of review permitted vacation of an arbitration award where the arbitrator's error was gross, unmistakable, undebatable, or in manifest disregard of applicable law and led to an unjust result.[34] The supreme court also explained that the phrase "undue means" encompassed a mistake of law in which the arbitrator intended to follow the law, but clearly mistook the law and, thus, committed a mistake apparent on the face of the

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26 *Id.* at 487-88, 610 A.2d at 368. The court instead granted Sands's motion to confirm the award. *Id.*

27 *Id.* at 488, 610 A.2d at 368. Noting the chancery judge's comment that the contract was substantially completed on September 15, 1984, the *Perini* court observed that the chancery judge was "greatly troubled" with the arbitrators' award of lost profits after that date. *Id.* at 506, 610 A.2d at 378.

28 *Id.* With regard to the substantial completion issue, the appellate division concluded that Perini did not complete the contractually mandated work in a timely manner. *Id.*

29 *Id.* In weighing the award of $14.5 million in lost profits against the $24 million actual contract price, the court found the award reasonable. *Id.*

30 *Id.*

31 Perini Corp. v. Greate Bay Hotel & Casino, Inc., 127 N.J. 533, 606 A.2d 353 (1991).

32 N.J. STAT. ANN. § 2A:24-8 (West 1952) (outlining the grounds for vacating an arbitration award). Section 2A:24-8(a), the undue means provision, reads in pertinent part: "The court shall vacate the award in any of the following cases: . . . [w]here the award was procured by corruption, fraud or undue means; . . ." *Id.* For a general discussion of modern arbitration statutes, see DOMKE, *supra* note 1, §§ 4.01 & 4.02, at 27-31. For a list of each state's arbitration statute, see *id.*, app. IX at 1-3.

33 *Perini*, 129 N.J. at 488-89, 610 A.2d at 368-69.

34 *Id.* at 496-97, 610 A.2d at 372-73.

award.[35] Lastly, the court determined that mere excessiveness of an arbitration award was not enough to warrant its vacation.[36] Based upon these principles of law, the supreme court affirmed the appellate division's decision.[37]

In *Wilko v. Swan*,[38] the federal standard for review, different from that later adopted by New Jersey courts, was articulated when the United States Supreme Court addressed whether section 14 of the Securities and Exchange Act (Securities Act) of 1933[39] voided a compulsory arbitration agreement.[40] The Supreme Court stated

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35 *Id.* at 494, 610 A.2d at 371.

36 *Id.* at 510, 610 A.2d at 379-80.

37 *Id.* at 489, 610 A.2d at 369.

38 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). For a general discussion of *Wilko* and its progeny, see Edgar H. Brenner, *The Enforcement of Arbitration Awards, in* COMMERCIAL ARBITRATION FOR THE 1990s, at 97-100 (Richard J. Medalie ed., 1991); Stephen H. Kupperman & George C. Freeman, III, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1549-53 (1991); Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29, 54-62 (1988); Jay R. Sever, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1670-80 (1991) [hereinafter *Relaxation*]; F. Chet Taylor, Note, *The Arbitrability of Federal Securities Claims:* Wilko's *Swan Song*, 42 U. MIAMI. L. REV. 203 (1987).

Although *Rodriguez de Quijas v. Shearson/American Express* overruled the *Wilko* holding by voiding the agreement to arbitrate under § 14 of the Securities Act, the *Rodriguez* Court did not address the manifest disregard dicta. *Rodriguez*, 490 U.S. at 484-85. For a brief survey of *Rodriguez*, see J.R. Sever, Rodriguez de Quijas v. Shearson/American Express, Inc.: *A Green Light To Arbitration, A Yellow Light To Investors*, 64 TUL. L. REV. 1312, 1312-20 (1990) [hereinafter *Green Light*].

39 Section 14 of the Securities and Exchange Act of 1933 (Securities Act), provides in pertinent part: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and Regulations of the Commission shall be void." Securities Act of 1933, ch. 38, § 14, 48 Stat. 74, 84 (1933) (codified at 15 U.S.C. § 77n (1988)).

40 *Wilko*, 346 U.S. at 430. In *Wilko*, the petitioners alleged that the respondents, partners in a securities brokerage firm, induced them to purchase 1600 shares of a corporation through fraudulent misrepresentations and omissions. *Id.* at 428-29. The parties' contract contained an arbitration clause stating that in the event of a dispute, the parties would submit their claims to an arbitrator. *Id.* at 429-30. Moving to stay the trial under § 3 of the United States Arbitration Act, the respondents claimed that the petitioners were bound to the arbitration clause in their contract. *Id.* at 429. Section 3 of the United States Arbitration Act provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the

that arbitrators had a duty to follow the law even where the parties' agreement did not so specify.[41] After carefully weighing the advantages of arbitration against the possible economic hazards posed to investors by enforcement of an arbitration clause, the Court found the parties' compulsory arbitration agreement invalid.[42] Rejecting the holding of the Second Circuit, the Supreme Court held that because arbitrators were not legally trained,[43] their failure to follow the law could not alone constitute grounds for vacating an award.[44] The Court instead required evidence on the face of the award that the arbitrators failed to follow the law in order for the award to be vacated.[45]

In oft-quoted dicta, the *Wilko* Court next articulated its "manifest disregard" standard,[46] explaining that judicial review was proper where an arbitrator manifestly disregarded the law.[47] The Court clarified that judicial review was improper, however, where the arbitrator erred only in the interpretation of the law.[48] For these reasons, the majority concluded that enforcement of the

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applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1988). The petitioner argued that the clause directly conflicted with the Securities Act because the clause waived "compliance with" another provision that set jurisdiction over these matters in the district courts. *Id.* at 432-33 (citation omitted).

41 *Wilko*, 346 U.S. at 433-34.

42 *Id.* at 438. For a discussion of the application of the *Wilko* balancing test, see IAN R. MACNEIL, AMERICAN ARBITRATION LAW REFORMATION-NATIONALIZATION-INTERNATIONALIZATION 63-64 (1992). In 1987, the United States Supreme Court reconsidered the enforceability of an arbitration clause in the context of an alleged Securities Act violation in *Shearson/American Express, Inc. v. McMahon.* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 222 (1987). Justice O'Connor, writing for the majority, resolved the conflict among the federal courts and held, *inter alia*, that the arbitrability of certain claims under the Securities Act should be enforced. *Id.* at 238. In so doing, the Court reflected upon its former distrust of arbitration and noted that this outlook had since become outmoded and inappropriate. *Id.* at 233.

43 *Wilko*, 346 U.S. at 436. The Court noted that arbitrators did not have the benefit of judicial instruction on the law. *Id.*

44 *Id.* The Court implicitly limited this holding, however, to those awards governed by § 10 of the United States Arbitration Act. *Id.*

45 *Id.*

46 *Id.* at 436-37. The Court stated that "[i]n unrestricted submissions[ ] [to arbitration,] . . . the interpretation of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* (citations omitted).

47 *Id.* at 436. Although, dissenting, Justice Frankfurter affirmed the notion that arbitrators "may not disregard the law." *Id.* at 440 (Frankfurter, J., dissenting). Looking to the record for grounds on which to vacate the award, the Justice, however, found no violation of the law. *Id.* For this reason, Justice Frankfurter argued that the Court should have affirmed the Second Circuit Court of Appeals's decision. *Id.*

48 *Id.* at 436-37 (citations omitted); *see also Judicial Review of Arbitration, supra* note 3, at 685-87 (discussing awards based on an erroneous ruling).

compulsory arbitration agreement was inappropriate in the present case.[49]

The United States Supreme Court again addressed the reviewability of arbitration awards in *United Paperworkers v. Misco*.[50] Specifically, the *Misco* Court considered the enforceability of an arbitration award rendered pursuant to a collective bargaining agreement.[51] Justice White, writing for a unanimous Court, affirmed the notion that courts could not review the merits of an arbitrator's decision and, therefore, could not vacate an award based upon a misinterpretation of a contract.[52] The Court asserted that the fact that parties chose to have their disputes settled by an arbitrator, rather than a judge, insulated an award based on legal error from judicial review.[53] The Court further concluded that even where an arbitrator committed "serious error" the award could not be overturned.[54] Relying on the foregoing analysis, the Court reversed the judgment of the Fifth Circuit Court of Appeals and affirmed the award rendered pursuant to the collective bargaining agreement.[55]

The New Jersey courts first addressed the reviewability of arbitration awards containing legal error in *Held v. Comfort Bus Line, Inc.*[56] In *Held*, the plaintiffs, litigants in a tort action for negligence, asserted that an inadequate arbitral award constituted legal error.[57] The New Jersey Supreme Court concluded that an arbitra-

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49 *Wilko*, 346 U.S. at 438.

50 484 U.S. 29 (1987).

51 *Id.* at 31. For a discussion of the precursors to *Misco*, an analysis of *Misco*, and reflections on decisions following *Misco*, see Eileen Nowikowski, *Public Policy Exception to the Enforcement of Labor Arbitration Awards*, 68 MICH. B.J. 626, 626-31 (1989); *see also* Amanda J. Berlowe, Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving* Grace *in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767, 791-98 (1988) (criticizing the impact of *Misco*'s public policy exception grounds for vacating an arbitration award).

52 *Misco*, 484 U.S. at 36; *see* Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759, 762 (explaining *Misco*'s affirmance of an arbitration award that arose out of the essence of the contract).

53 *Misco*, 484 U.S. at 37-38.

54 *Id.* at 38.

55 *Id.* at 45. Justice Blackmun, addressing a different issue than the review of an arbitration award, wrote a separate concurrence in which Justice Brennan joined. *Id.* at 46 (Blackmun, J., concurring).

56 136 N.J.L. 640, 57 A.2d 20 (1948). The court was deciding this issue in response to a party's request to defer confirmation of the award until application was made to the arbitrators for reconsideration. *Id.* at 641, 57 A.2d at 21.

57 *Id.* at 641, 643, 57 A.2d at 21, 22. The dispute in *Held* arose when 21 tort suits for negligence were filed as a result of a bus accident on a bridge crossing the Passaic River between Passaic and Wallington, New Jersey. *Id.* at 640-41, 57 A.2d at 21. Pursu-

tion award secured by "undue means" was impeachable.[58] The court indirectly acknowledged that a mere mistake of law was insufficient grounds for vacating an arbitration award.[59] The court noted, however, that a mistake of law was "fatal" where the magnitude of the error suggested that there was either fraud, or misconduct, or a failure of intent.[60] In conclusion, the court held that a party's discontent with the inadequacy of an award was insufficient grounds for remittal to an arbitrator.[61]

In *Brooks v. Pennsylvania Manufacturers Ass'n Insurance Co.*,[62] the appellate division reiterated the principle articulated in *Held* that an arbitration award secured by "undue means" could be reviewed and vacated.[63] Without citing any authority, however, the *Brooks* court revised the *Held* standard by establishing a presumption that, absent any indication on the record to the contrary, an arbitrator intended to follow the law.[64] As a consequence of this presump-

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ant to an arbitration agreement, the matters were referred to two arbitrators. *Id.* at 641, 57 A.2d at 21.

58 *Id.*, 57 A.2d at 22 (citation omitted). The court explained the phrase "undue means" as a situation where the arbitrator intended to follow the law, but clearly mistook the law, and the arbitrator either stated this mistake or the mistake appeared on the face of the award. *Id.* at 642, 57 A.2d at 22 (citing Leslie v. Leslie, 50 N.J. Eq. 103, 107-08, 24 A. 319, 320 (Ch. 1892); Taylor v. Sayre, 4 N.J.L. 647, 650 (1855); Bell v. Price, 23 N.J. Eq. 578, 590 (Ch. 1849)). While the *Bell* and *Leslie* courts had articulated the principle of impeaching an award where the foregoing conditions were met, neither court had made a specific reference equating these conditions with the phrase "undue means." *See Bell*, 23 N.J. Eq. at 590; *Leslie*, 50 N.J. Eq. at 107-08, 24 A. at 320. Thus, the court's later attempt to define the phrase "undue means" in *Perez v. American Bankers Insurance Co. of Florida* may be traced back to *Held*'s extension of the holdings in cases preceding it. *See* Perez v. American Bankers Ins. Co., 81 N.J. 415, 420, 409 A.2d 269, 271 (1979). For a general discussion of the *Perez* case, see *infra* notes 69-73 and accompanying text.

59 *Held*, 136 N.J.L. at 642, 57 A.2d at 22.

60 *Id.* at 642, 57 A.2d at 22. This standard was slightly different than the one enunciated in *Bell v. Price* and *Leslie v. Leslie*. *Bell*, 22 N.J.L. at 590 (holding that the arbitrators must have mistaken the rule in "some palpable and material point"); *Leslie*, 50 N.J. Eq. at 108, 24 A. at 320 (holding that the arbitrators must have mistaken the law in a "material respect").

61 *Held*, 136 N.J.L. at 643, 57 A.2d at 22.

62 121 N.J. Super. 51, 296 A.2d 72 (App. Div. 1972), *modified on other grounds*, 62 N.J. 583, 303 A.2d 884 (1973).

63 *Id.* at 54, 296 A.2d at 74. In *Brooks*, the appellate division decided whether to affirm the trial court's decision to modify certain portions of an arbitration award and confirm the remainder of the award. *Id.* The plaintiff in *Brooks* was injured in an accident with an uninsured motorist. *Brooks*, 62 N.J. at 585, 303 A.2d at 885. The plaintiff filed a claim pursuant to an uninsured motorist clause in an insurance liability policy. *Id.* The matter was then submitted to an arbitrator in accordance with the insurance policy. *Id.* The arbitrator awarded the plaintiff a credit for money received under a pending workmen's compensation claim. *Id.* The trial court subsequently invalidated the credit provision of the arbitral award. *Id.*

64 *Brooks*, 121 N.J. Super. at 55, 296 A.2d at 74. In a concurring opinion in *Perini*,

tion, the appellate panel suggested that a court could vacate an award for any legal error where the record was deficient of any reasoning to support an arbitrator's award.[65] Although the court recognized that an arbitration award based only on an arbitrator's personal sense of equity and justice, rather than on the law, was permissible,[66] the court did not adopt this standard.[67] Instead, relying upon a presumption that the arbitrator had intended to follow the law and erred in the decision, the court affirmed the lower court's decision to vacate the disputed portion of the award.[68]

The New Jersey Supreme Court continued this trend towards expansion of judicial review in *Perez v. American Bankers Insurance Co.*,[69] by extending the meaning of the phrase "undue means."[70] Writing for a unanimous court, Justice Sullivan concluded that the requirement that the arbitrators must have intended to follow the

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Chief Justice Wilentz viewed this presumption as an unfortunate departing point for the liberal approach that other courts had been adopting in vacating awards. Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 522, 610 A.2d 364, 386 (Wilentz, C.J., concurring); *see infra* note 129 and accompanying text (clarifying Chief Justice Wilentz's critical analysis of *Brooks*). *See also* Shearson/American Express v. McMahon, 482 U.S. 220, 232 (1987) (affirming the importance of limited judicial review, and observing that a presumption that the arbitrators would not follow the law was unwarranted) (citation omitted). Not long after *Brooks*, the court in *Ukrainian National Urban Renewal Corp. v. Muscarelle, Inc.* adopted this philosophy, stating that unless the award clearly indicated the contrary, it was accepted that the arbitrator intended to apply the law. Ukrainian Nat'l Urban Renewal Corp. v. Muscarelle, Inc., 151 N.J. Super. 386, 400, 376 A.2d 1299, 1306 (App. Div.) (citation omitted), *certif. denied*, 75 N.J. 529, 384 A.2d 509 (1977); *see also In re* Arbitration Between Grover, 151 N.J. Super. 403, 417, 376 A.2d 1308, 1315 (App. Div. 1977) (Larner, J., dissenting) (noting that since *Brooks*, a court should presume that an arbitrator intended to follow the law, unless the record demonstrates otherwise), *rev'd*, 80 N.J. 221, 403 A.2d 448 (1979); *cf.* Communications Workers, Local 1087 v. Monmouth County Bd. of Social Servs., 96 N.J. 442, 450, 476 A.2d 777, 781 (1984) (noting the slightly different presumption that the parties intended to have their dispute settled according to legal principles unless their agreement stipulated otherwise) (citation omitted). Interestingly, the court in *Taylor v. Sayre* suggested that where an arbitrator intended to follow the law but misapplied it, "the court will correct the error, for it will assume that it is not his award, in other words, is not the award he intended to make." *Taylor v. Sayre*, 4 N.J. 647, 650 (1855) (citations omitted).

65 *Brooks*, 121 N.J. Super. at 55, 296 A.2d at 74.

66 *Brooks*, 121 N.J. Super. at 55, 296 A.2d at 74 (citing Collingswood Hosiery Mills v. American Fed'n of Hosiery Workers, 31 N.J. Super. 466, 471, 107 A.2d 43, 45 (App. Div. 1954)).

67 *Id.*

68 *Id.* at 55, 60-61, 296 A.2d at 74, 77-78.

69 81 N.J. 415, 409 A.2d 269 (1979). *Perez* concerned a claim protesting the validity of a certain arbitration provision in an insurance policy. *Id.* at 416, 403 A.2d at 269.

70 *Id.* at 420, 409 A.2d at 271 (citations omitted). An arbitrator's contradictory findings, the court ruled, would similarly constitute "undue means." *Id.* (citations omitted).

law and then erred was generally no longer applicable.[71] Instead, the court stated that a mistake of law was generally sufficient to overturn the award.[72] Finding that the arbitrator in *Perez* may have made such a mistake, the court reversed the appellate division's holding and reinstated the trial court's ruling vacating the award.[73]

Finally, one week before the *Perini* decision, the Supreme Court of California in *Moncharsh v. Hiely & Blase*[74] ruled on the issue of whether to reverse an arbitrator's award that was erroneous.[75] Chief Justice Lucas, writing for the majority, stated that a mistake of law was generally not grounds for reversal except in the rarest of instances.[76] Although the trial court had held that an error appearing on the face of an award would subject it to vacation, the supreme court disagreed.[77]

Chief Justice Lucas provided two separate justifications for employing limited review in the face of possible legal error.[78] First, the court observed that when parties choose arbitration as the forum for resolving their dispute, they must assume the risk that a legal error may be committed.[79] Next, the chief justice noted that

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71 *Id.*

72 *Id.*

73 *Id.* at 420-21, 409 A.2d at 271-72.

74 832 P.2d 899 (Cal. 1992). In *Moncharsh*, an employment dispute between an attorney and his former law firm was submitted to an arbitrator under an arbitration clause of the parties' employment contract. *Id.* at 900-01. The dispute concerned the enforceability of a provision in the parties' employment agreement that proscribed the attorney from encouraging clients to leave the firm should the attorney terminate his employment with the firm. *Id.* The arbitrator determined that the attorney was bound to the provision and granted the firm an award. *Id.* at 901. Both the California Superior Court and Court of Appeals affirmed the arbitrator's decision, concluding that the alleged error was not apparent on the face of the award. *Id.* at 902. For a brief survey of *Moncharsh*, see Michael J. Smith, Note, *Efficient Injustice: The Demise of the "Substantial Injustice" Exception to Arbitral Finality*, 1993 J. DISP. RESOL. 209, 209-12; *see also* Blue Cross v. Jones, 23 Cal. Rptr. 2d 359, 362 (Ct. App. 1993) (discussing Moncharsh's standard of judicial review, and clarifying the "excess of power" provisions).

75 *Moncharsh*, 832 P.2d at 900. The *Moncharsh* decision came only one year after the California Court of Appeals, Third District, passed judgment on *Pacific Gas & Elec. Co. v. Superior Court*. *Id.* at 899; Pacific Gas & Elec. Co. v. Superior Court, 277 Cal. Rptr. 694, 694 (Ct. App. 1991), *review granted and opinion superseded*, 810 P.2d 997 (Cal. 1991), *review denied*, 19 Cal. Rptr. 2d 295 (Ct. App. 1993). In *Pacific Gas & Electric*, the court held that no review was available for "mere" legal or factual error. *Pacific Gas & Elec.*, 277 Cal. Rptr. at 700. The award may be vacated, however, the court cautioned, on grounds that the arbitrators exceeded their power by arbitrarily remaking the contract. *Id.*

76 *Moncharsh*, 832 P.2d at 904.

77 *Id.* at 902, 915-16.

78 *Id.* at 904.

79 *Id.* *But see* Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 429 (Mich.

the legislature had already minimized the risk of error by providing for vacation of the award where there were problems with the arbitration or where there were inherent deficiencies in the award.[80] The court then weighed each of the risks involved and ruled in favor of upholding the arbitral process regardless of any error resulting in "substantial injustice."[81]

Additionally, the court spurned the idea that a misuse of power existed where an arbitrator erred according to the law.[82] Instead, the court reasoned, an arbitrator's powers included resolving the merits of the controversy submitted by the parties.[83] As the "merits" necessarily encompass all questions of law, the court concluded that an error of law is simply not grounds for denying enforcement of the award.[84]

These conflicting views on judicial review of arbitration awards presented the New Jersey Supreme Court in *Perini Corp. v. Greate*

1982) (arguing that in statutory arbitrations, parties do not assume the risk of the arbitrator's legal error).

80 *Moncharsh*, 832 P.2d at 905 (citation omitted).

81 *Id.* at 915-16. Justice Kennard, however, completely disagreed with the court's refusal to reverse where an injustice occurred. *Id.* at 920 (Kennard, J., concurring in part, dissenting in part). The justice explained that the terms "gross error" and error on a "palpable and material point," grounds used by earlier courts to vacate an award, were inherently suggestive of the concept of "substantial injustice." *Id.* at 921 (Kennard, J., concurring in part, dissenting in part). Moreover, the justice insisted that the majority was wrong in concluding from the absence of such an express provision that the legislature's intent was to exclude this provision. *Id.* at 922-24 (Kennard, J., concurring in part, dissenting in part). Instead, the justice pointed to other courts that had equated the "excess of power" provision with substantial injustice. *Id.* at 924 (Kennard, J., concurring in part, dissenting in part) (citations omitted). The justice further noted that the term "fraud" was also indicative of the legislature's intent to encompass the notion of "substantial injustice." *Id.* (citation omitted). Justice Kennard concluded that for the foregoing reasons and in light of the judiciary's unique role in ensuring that justice is served, the majority's holding was deficient. *Id.* Using a "substantial injustice" test, the justice found none present and therefore concurred in the result only. *Id.*

For support of Justice Kennard's view in another jurisdiction, see Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 272 (7th Cir. 1988) (refusing to vacate an award where the arbitrators may have made a mistake of law but no injustice resulted); Bailey & Williams v. Westfall 727 S.W.2d 86, 90 (Tex. Ct. App. 1987) (upholding vacation of awards, in part, for errors resulting in some "great and manifest wrong and injustice") (citation omitted). *See also* Patricia Shuler Schimbor, Address at the American Bar Association Annual Meeting (Aug. 11, 1993) (expressing concern with such a standard in remarks as panelist for the program entitled *East Coast or West Coast and Everywhere in Between: Should Arbitration Awards be Reviewed to Correct Errors of Law that Lead to an "Unjust" Result?*) (notes on file with *Seton Hall Law Review*).

82 *Moncharsh*, 832 P.2d at 916 (citations omitted).

83 *Id.* (citation omitted).

84 *Id.*

Bay Hotel & Casino, Inc.[85] with no easy task in formulating its own standard of review.[86] Writing for the plurality, Justice O'Hern prefaced his analysis of *Perini* with a short discussion of the changing judicial attitudes towards arbitration in general, and particularly in New Jersey.[87]

The supreme court explained that the parties in the case had opted to use the procedures of arbitration set out by the American Arbitration Association (AAA).[88] The justice next quoted passages from New Jersey's Arbitration Act (Arbitration Act)[89] relating to confirmation of and reasons for vacating an arbitration award.[90]

The court conceded that the Arbitration Act did not explicitly state a mistake of law or insufficiency of the evidence as reasons for vacating an award.[91] Nonetheless, the court affirmed the invalidity of an arbitration award unsupported by the evidence.[92]

Next, the court acknowledged the inconsistent case law dealing with judicial review of arbitrators' mistakes of law.[93] The court

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85 129 N.J. 479, 610 A.2d 364 (1992).

86 *See supra* notes 8-16 and accompanying text (discussing the many standards of review from which the New Jersey Supreme Court could choose).

87 *Perini*, 129 N.J. at 489, 610 A.2d at 369. For a brief overview of the New Jersey courts' stance on arbitration, see Editorial Note, *supra* note 7, at 159 & n.92.

88 *Perini*, 129 N.J. at 490, 610 A.2d at 369. The justice pointed out that parties have the option of agreeing to procedures set out by the American Arbitration Association (AAA) or any other procedure. *Id.* In the present case, the justice stated that the parties chose "to follow the Construction Industry Arbitration rules of the AAA." *Id.* The justice then quoted: "[t]he arbitrator may grant any remedy or relief which is just and equitable within the terms of the agreement of the parties." *Id.* at 490-91, 610 A.2d at 369.

89 N.J. STAT. ANN. § 2A:24-1 to -11 (West 1952).

90 *Perini*, 129 N.J. at 491, 610 A.2d at 369-70 (citing N.J. STAT. ANN. § 2A:24-7 (West 1952) and quoting N.J. STAT. ANN. § 2A:24-8 (West 1952)). Section 2A:24-8(d), the "exceeded their powers" provision, requires a court to vacate an award "[w]here the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." N.J. STAT. ANN. § 2A: 24-8(d) (West 1952). Section 24A:24-7, the provision governing confirmation of arbitral awards, provides: "A party to the arbitration may, within 3 months after the award is delivered to him, unless the parties shall extend the time in writing, commence a summary action in the court aforesaid for the confirmation of the award or for its vacation, modification or correction." N.J. STAT. ANN. § 2A:24-7 (West 1952).

91 *Perini*, 129 N.J. at 491, 610 A.2d at 370.

92 *Id.* (citing McHugh Inc. v. Soldo Constr. Co., 238 N.J. Super. 141, 147, 569 A.2d 293, 295 (App. Div. 1990)). The standard set forth in *Perini* was later used in *In re Tretina Printing, Inc. In re* Tretina Printing, Inc. v. Fitzpatrick & Assocs., 262 N.J. Super. 45, 51, 619 A.2d 1037, 1040 (App. Div. 1993) (citation omitted). *See also* NF&M Corp. v. United Steelworkers of Am., 524 F.2d 756, 760 (3d Cir. 1975) (holding that an award may be vacated where it is bereft of any support for the arbitrator's determinations) (citation omitted).

93 *Perini*, 129 N.J. at 491, 610 A.2d at 370; *see also* Ukrainian Nat'l Urban Renewal Corp. v. Muscarelle, Inc., 151 N.J. Super. 386, 400, 376 A.2d 1299, 1306 (App. Div.)

first discussed various ways in which "undue means" would occur and, therefore, justify vacation.[94] Justice O'Hern then referred to differing case law in which some courts categorized a mistake of law under the "undue means" provision in the Arbitration Act.[95] The justice also pointed to courts that had categorized mistakes of

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(further noting that various courts have interpreted the phrase "undue means" differently over time) (citation omitted), *certif. denied*, 75 N.J. 529, 384 A.2d 509 (1977); Bell v. Price, 23 N.J. Eq. 578, 584 (Ch. 1849) (noting that American courts treat an arbitrator's power to decide questions of law and/or fact inconsistently depending on the unique customs or practices of that particular jurisdiction).

94 *Perini*, 129 N.J. at 491-93, 610 A.2d at 370-71.

95 *Id.* (citations omitted). Specifically, Justice O'Hern cited *Perez v. American Bankers Insurance Co.* as the only New Jersey Supreme Court case to equate a mistake of law with undue means. *Id.* at 492, 610 A.2d at 370 (citing Perez v. American Bankers Ins. Co., 81 N.J. 415, 420, 409 A.2d 269, 271 (1979)). *But see* Atlantic City v. Laezza, 80 N.J. 255, 269, 403 A.2d 465, 472 (1979) (stating that an arbitrator's failure to consider the town's law in rendering an award would constitute a violation of the "undue means" provision).

Several lower courts adopted the *Perez* interpretation of undue means both prior to and subsequent to the *Perez* decision. *See, e.g.*, *In re* Arbitration Between Grover, 80 N.J. 221, 230-31, 403 A.2d 448, 453 (1979) (stating that where the parties set forth certain terms and conditions to be satisfied and the arbitrator disregarded those terms, the award was procured by a mistake of law or "undue means"); Jersey City Educ. Ass'n v. Board of Educ., 218 N.J. Super. 177, 188, 527 A.2d 84, 90 (App. Div. 1987) (arguing that an arbitrator's actions may constitute "undue means" by failing to follow the law) (citation omitted); Selected Risks Ins. Co. v. Allstate Ins. Co., 179 N.J. Super. 444, 451, 432 A.2d 544, 548 (App. Div. 1981) (arguing that a mistake of law constitutes undue means in the private sector context) (citation omitted), *certif. denied*, 88 N.J. 489, 443 A.2d 705 (1981); Local Union 560, I.B.T. v. Eazor Express Inc., 95 N.J. Super. 219, 227-28, 230 A.2d 521, 525 (App. Div. 1967) (proposing that only a clearly mistaken view of fact or law would constitute "undue means") (citation omitted); Held v. Comfort Bus Line, Inc., 136 N.J.L. 640, 642, 57 A.2d 20, 22 (1948) (ruling that "undue means" contemplates an arbitrator's mistake of law or fact that results in failure of intent).

Certain jurisdictions, however, have chosen to equate the phrase "undue means" with terms equivalent to fraud and corruption. *See, e.g.*, Drayer v. Krasner, 572 F.2d 348, 352 (2d Cir. 1978) (qualifying undue means as being partial or misbehaving) (citing San Martine Compania De Navegacion v. Saguenay Terminals Ltd., 293 F.2d 796), *cert. denied*, 436 U.S. 948 (1978)); Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 108 (N.D. Ill. 1980) (defining "undue means" under § 10A of the Arbitration Act as requiring the award to have been rendered by "some type of bad faith") (citations omitted), *aff'd*, 653 F.2d 310 (7th Cir. 1981); Arkansas Dep't of Parks & Tourism v. Resort Managers, Inc., 743 S.W.2d 389, 391 (Ark. 1988) (defining the phrase "undue means," as found in the Arkansas arbitration statute, as exceeding a mere inappropriateness or inadequacy of the evidence, but confining applicability of the standard to unfairness in the arbitration proceeding or conduct specifically outlined in the arbitration act) (citation omitted).

Other courts, however, have defined the phrase "undue means" differently. *See, e.g.*, A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992), (defining the term "undue" as "behavior that is immoral if not illegal") (quoting BLACK'S LAW DICTIONARY 1697 (4th ed. 1951)), *cert. denied*, 113 S. Ct. 970 (1993); *see also San Martine*, 293 F.2d at 801 (applying a "manifest infidelity" standard to the "undue means" phrase in a federal arbitration statute); Editorial Note, *supra* note 7, at

law under the Arbitration Act's "exceeded their powers" provision.[96] The New Jersey Supreme Court disagreed, however, with

180-81 & nn.233-41 (describing undue means as a palpable mistake appearing on the face of the award, which if shown to the arbitrator would be admitted as a mistake).

[96] *Perini*, 129 N.J. at 492-93, 610 A.2d at 370 (revealing that both the "undue means" and the "exceeds their powers" provisions were used as grounds to vacate an award because the arbitrator had failed to follow the law) (citation omitted); *see also* Faherty v. Faherty, 97 N.J. 99, 112-13, 477 A.2d 1257, 1264 (1984) (holding that where the parties agreed that the arbitrator would decide legal issues in accordance with New Jersey law, the part of the award that violated the law was vacated because the arbitrator exceeded his power under the statute); Smith v. Motorland Ins. Co., 352 N.W.2d 335, 337 (Mich. Ct. App. 1984) (explaining that the "excess power" provision included the situation where the arbitrator acted "in contravention" of the law) (citation omitted). *But see* Farkas v. Receivable Fin. Corp., 806 F. Supp. 84, 87 (E.D. Va. 1992) (refusing to vacate an award under the "excess of power" provision for a misinterpretation of a contract or a legal error) (citations omitted); Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1329 (Fla. 1989) (declining to interpret the "excess of power" provision as encompassing a legal error but instead defining the standard as the arbitrator's "go[ing] beyond the authority granted by the parties or the operative documents and decid[ing] an issue not pertinent to the resolution of the issue submitted to arbitration") (citation omitted); Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 436 (Mich. 1982) (Levin, J., concurring) (stating that the interpretation of the "excess of power" provision had not previously incorporated an arbitrator's decision contrary to a judicial decision that a court would make) (footnote omitted); Turner v. Nicholson Properties, Inc., 341 S.E.2d 42, 45 (N.C. Ct. App. 1986) (declining to place a legal error under the "excess of power" provision for fear that the general rule of refusing to vacate an award for legal error would then be easily circumvented) (citations omitted); Batten v. Howell, 389 S.E.2d 170, 172 (S.C. Ct. App. 1990) (stating that a legal error was not considered an "excess of power").

Various courts have defined the "exceeds their powers" provision in somewhat different terms. *See, e.g.*, Pennsylvania Power Co. v. Local Union No. 272, IBEW, 886 F.2d 46, 48 (3d Cir. 1989) (defining an excess of arbitral authority as an arbitrator's disregard of the parties' agreement, substituting instead the arbitrator's own "notions of industrial justice") (citing United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)); Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 165, 168 (D.C. Cir. 1981) (vacating an award under the "exceeding powers" provision when arbitrators granted relief not contemplated by the arbitration clause); National R.R. Passenger v. Chesapeake & Ohio Ry., 551 F.2d 136, 142 (7th Cir. 1977) (agreeing with other courts that an arbitrator's misconstruction of a contract does not constitute an excess of power); County College of Morris Staff v. County College of Morris, 100 N.J. 383, 391, 495 A.2d 865, 869 (1985) (holding that an excess of power occurred when the arbitrator ignored the authority mandated by the terms of the contract); *Selected Risks*, 179 N.J. Super. at 451, 432 A.2d at 548 (App. Div.) (discussing actions that satisfy the excess power provision); *Ukrainian Nat'l Urban Renewal*, 151 N.J. Super. at 398, 376 A.2d at 1305 (applying the "exceeds-their-powers" test of N.J. STAT. ANN. § 2A:24-8(d) to situations in which the arbitrability of a dispute was in question by looking to the contractual language for resolution) (quoting Standard Oil, Dev. Co. Employees Union v. Esso Research Eng'g Co., 38 N.J. Super. 106, 119, 118 A.2d 70, 77 (App. Div. 1955)), *certif. denied*, 75 N.J. 529, 384 A.2d 509 (1977).

Other jurisdictions have cautioned against concluding too quickly that an arbitrator acted in excess of power. *See, e.g.*, Western Iowa Pork Co. v. National Bhd. Packaginghouse Workers, Local 52, 366 F.2d 275, 277 (8th Cir. 1966) (noting that in instances of a possible excess of authority, an arbitrator, who derived his powers from the terms of the agreement, was awarded the benefit of the doubt) (citations omit-

those courts' placement of the mistake of law only within the two classifications.[97] Rather, the court declared that because an arbitrator's authority is derived solely from the parties' intent, an arbitrator is required to resolve the matter in accordance with the parties' instructions.[98] Justice O'Hern qualified this statement by remarking that arbitrators are not considered judges,[99] and that

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ted); Textile Workers Union of Am., Local 1386 v. American Thread Co., 291 F.2d 894, 906 (4th Cir. 1961) (Sobeloff, J., dissenting) (stating that in reviewing arbitration awards, courts delegate the burden of proving an excess of an arbitrator's power on the party attacking the award) (footnote omitted); Rauh v. Rockford Prods. Corp., 574 N.E.2d 636, 641 (Ill. 1991) (affording arbitrators a presumption that there was no excess of authority where an award is challenged under an Illinois statute containing an excess of power provision) (citation omitted). *But see* Brotherhood of R.R. Trainmen for St. Louis Southwestern Ry. v. St. Louis Southwestern Ry., 220 F. Supp. 319, 325 (E.D. Tx. 1963) (refusing to reverse an arbitrator's award even though an inference could have been drawn that the arbitrator exceeded authority), *cert. denied*, 396 U.S. 1008 (1970).

97 *Perini*, 129 N.J. at 493, 610 A.2d at 371.

98 *Id.* (citing Kearny PBA Local 21 v. Kearny, 81 N.J. 208, 217, 405 A.2d 393, 398 (1979)).

99 *Id.* This statement, however, stands in sharp contrast to earlier judicial observations that arbitrators were the parties' private or chosen judges of both law and fact. Levine v. Wiss & Co., 97 N.J. 242, 250, 478 A.2d 397, 401 (1984) (citation omitted); *Ukrainian Nat'l Urban Renewal*, 151 N.J. Super. at 396, 376 A.2d at 1304 (citations omitted); Melvin P. Windsor, Inc. v. Mayflower Sav. & Loan, Ass'n, 115 N.J. Super. 219, 220, 278 A.2d 547, 547-48 (App. Div. 1971) (citation omitted); Harsen v. Board of Educ., 132 N.J. Super. 365, 371, 333 A.2d 580, 583 (Law Div. 1975); Daly v. Komline-Sanderson Eng'g Corp., 40 N.J. 175, 178, 191 A.2d 37, 38 (1963); Sonotone Corp. v. Hayes, 2 N.J. Super. 407, 411, 64 A.2d 249, 250 (Ch. Div.) (citations omitted), *rev'd on other grounds*, 4 N.J. Super. 326, 67 A.2d 184 (App. Div. 1949); Ruckman v. Ransom, 23 N.J. Eq. 118, 120 (Ch. 1872); Moore v. Ewing & Bowen, Ex'rs, 1 N.J.L. 167, 173 (1792); *see also In re* Arbitration Between Grover, 80 N.J. 221, 234, 403 A.2d 448, 455 (1979) (Pashman, J., dissenting) (stating that an arbitrator becomes an absolute judge over all submitted matters and, as such, "may do what no other judge has a right to do; he may intentionally decide contrary to law and still have his judgment stand") (citation omitted). *But see id.* at 224, 230-31, 403 A.2d at 450, 453 (setting aside an award upon discovery that the arbitrator made a mistake of law in interpreting an insurance policy).

Similarly, the court in *Fred J. Brotherton, Inc. v. Kreielsheimer* noted that "[a]n arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him." Fred J. Brotherton, Inc. v. Kreielsheimer, 8 N.J. 66, 70, 83 A.2d 707, 709 (1951); *cf. Levine*, 97 N.J. at 248-50, 478 A.2d at 400-01 (holding that because arbitration can be considered a quasi-judicial proceeding, a decision rendered under it should be treated the equivalent of a verdict). *But see* Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 598 (3d Cir. 1968) (observing that the United States Arbitration Act changed the common law notion that arbitrators act as the sole judges of both fact and law) (citation omitted), *cert. denied*, 393 U.S. 954 (1968).

Other jurisdictions have agreed with the *Brotherton* court as to the finality of an arbitrator's decision. Mandich v. Watters, 970 F.2d 462, 466 (8th Cir. 1992) (citation omitted); San Martine Compania De Navegacion v. Saguenay Terminals Ltd., 293 F.2d 796, 800 (9th Cir. 1961); The Hartbridge v. Munson S.S. Line, 62 F.2d 72, 73 (2d

their decisions, therefore, are not subject to the same degree of supervision as those of a judge.[100]

The main issue, Justice O'Hern explained, was the scope of judicial review over an arbitrator's decision.[101] Reciting the "reasonably debatable" standard used in the public sector,[102] the court encouraged the adoption of this standard for the private sector.[103] The justice further opined that the courts must go beyond a search for "mere mistakes of law."[104] In so doing, the court recalled the *Held* standard,[105] which confirmed an arbitration award where the arbitrators clearly intended to follow the law, but mistook the law,

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Cir. 1932), *cert. denied sub nom.* Munson S.S. Line v. Harbridge, 288 U.S. 601 (1933); Aetna Casualty & Sur. Co. v. Deitrich, 803 F. Supp. 1032, 1038 (M.D. Pa. 1992).

100 *Perini*, 129 N.J. at 493, 610 A.2d at 371. *But see* Hoagland v. Veghte, 3 N.J.L. 92, 94 (1851) (stating that because the parties choose their arbitrators, the parties may not appeal the arbitrators' judgment) (citation omitted).

101 *Perini*, 129 N.J. at 493, 610 A.2d at 371.

102 *Id.* (citing Kearny PBA Local No. 21 v. Kearny, 81 N.J. 208, 221, 405 A.2d 393, 399-400 (1979)); *see* Division 540, Amalgamated Transit Union, v. Mercer County Improvement Auth., 76 N.J. 245, 252, 386 A.2d 1290, 1294 (1978) (describing the expansive use of arbitration in the public sector); *see also* United States Postal Serv. v. National Ass'n of Letter Carriers, 839 F.2d 146, 150 (3d Cir. 1988) (holding that with regard to judicial review of arbitration conducted under collective bargaining agreements, there was no distinction between the postal service and the private sector despite the fact that the postal service was a public employer).

103 *Perini*, 129 N.J. at 493, 610 A.2d at 371. Other New Jersey courts have similarly employed the "reasonably debatable" standard. County College of Morris Staff v. County College of Morris, 100 N.J. 383, 390-91, 495 A.2d 865, 869 (1985) (citation omitted); D'Arrigo v. State Bd. of Mediation, 228 N.J. Super. 189, 196, 549 A.2d 451, 454 (App. Div. 1988) (citation omitted), *rev'd*, 119 N.J. 74, 574 A.2d 44 (1990); Selected Risks Ins. Co. v. Allstate Ins. Co., 179 N.J. Super. 444, 451, 432 A.2d 544, 548 (App. Div.) (citation omitted), *certif. denied*, 88 N.J. 489, 443 A.2d 705 (1981). The court in *Ukrainian National Urban Renewal Corp. v. Muscarelle, Inc.* additionally stated that "where the agreement provides for arbitration of disputes over contractual language, and a debatable question exists, the reviewing court is bound by the arbitrators' decision." *Ukrainian Nat'l Urban Renewal*, 151 N.J. Super. at 398, 376 A.2d at 1305 (citations omitted).

Federal courts have also discussed either the "reasonably debatable" standard or an equivalent standard. *See* Exxon Shipping Co. v. Exxon Seamen's Union, 788 F. Supp. 829, 834 (D.N.J. 1992) (enforcing an arbitration award containing a serious error so long as the contract was "arguably" construed) (citation omitted), *aff'd*, 993 F.2d 357 (3d Cir. 1993); *cf.* Ierna v. Arthur Murray Int'l., Inc., 833 F.2d 1472, 1476-77 (11th Cir. 1987) (upholding an award that was merely reasonable).

104 *Perini*, 129 N.J. at 494, 610 A.2d at 371; *see also* Held v. Comfort Bus Line, Inc., 136 N.J.L. 640, 642, 57 A.2d 20, 22 (1948) (ruling that "[o]rdinarily, a mistake or error of law or fact is not fatal"); West Jersey R.R. v. Thomas, 21 N.J. Eq. 431, 433 (Ch. 1873) (refusing to set aside an award for legal error). *But see D'Arrigo*, 228 N.J. Super. at 196, 549 A.2d at 454 (vacating for legal error) (citations omitted); *Selected Risks*, 179 N.J. Super. at 451, 432 A.2d at 548.

105 For a discussion of the *Held* standard, see *supra* notes 58-61 and accompanying text.

and where the mistake was apparent on the face of the award.[106] The court later noted that an arbitrator's award should similarly not be vacated even for a gross error of law[107] unless the award suggested fraud or misconduct.[108]

Justice O'Hern then discussed the grounds upon which other jurisdictions relied in refusing to vacate an award.[109] The justice observed other courts' holdings that the award would be vacated only if the arbitrator misapplied the law.[110] Justice O'Hern noted, however, several other exceptions to this rule, which included vacating an award due to irrationality,[111] contrariness to public pol-

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106 *Perini*, 129 N.J. at 371, 610 A.2d at 494 (citation omitted). The *Held* case was the landmark decision for reversing an award where the arbitrators intended to follow the law, but failed, and made the mistake apparent on the face of the award. *Held*, 136 N.J.L. at 640, 57 A.2d at 20. Since *Held*, many New Jersey courts have either implicitly or explicitly adopted the *Held* standard. *See* Local No. 153 Office & Professional Employees Int'l Union v. Trust Co., 105 N.J. 442, 450 n.1, 522 A.2d 992, 996 n.1 (1987); Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227-28, 230 A.2d 521, 525 (App. Div. 1967); Anco Prods. Corp. v. T V Prods. Corp., 23 N.J. Super. 116, 124, 92 A.2d 625, 629 (App. Div. 1952); William J. Burns Int'l Detective Agency, Inc. v. New Jersey Guards Union, Inc., 64 N.J. Super. 301, 312, 165 A.2d 844, 849 (App. Div. 1960) (citations omitted), *certif. denied*, 34 N.J. 464, 169 A.2d 742 (1961); Carpenter v. Bloomer, 54 N.J. Super. 157, 168, 148 A.2d 497, 503 (App. Div. 1959); Harsen v. Board of Educ., 132 N.J. Super. 365, 371-72, 333 A.2d 580, 584 (Law Div. 1975) (citation omitted); Tave Constr. Co. v. Wiesenfeld, 82 N.J. Super. 562, 567, 198 A.2d 486, 488-89 (Ch. Div. 1964) (citation omitted), *aff'd*, 90 N.J. Super. 244, 217 A.2d 140 (App. Div.), *certif. denied*, 47 N.J. 84, 219 A.2d 419 (1966); International Ass'n of Machinists, Lodge 1292 v. Bergen Ave. Business Owners Ass'n, 3 N.J. Super. 558, 566, 67 A.2d 362, 367 (Law Div. 1949) (citation omitted).

Courts before *Held* had expressed a similar principle but were not credited for the proposition. *See* Caparaso v. Durante, 132 N.J.L. 16, 16-17, 38 A.2d 133, 134 (1944), *aff'd*, 132 N.J.L. 419, 40 A.2d 649 (1945); Deakman v. Odd Fellows Hall Ass'n of Jersey City, Inc., 110 N.J.L. 304, 306, 164 A. 256, 257 (1933); Hoboken Mfrs. R.R. v. Hoboken R.R. Warehouse & Steamship Connecting Co., 132 N.J. Eq. 111, 118-19, 27 A.2d 150, 154 (Ch. 1942), *aff'd*, 133 N.J. Eq. 270, 31 A.2d 801 (1943); Leslie v. Leslie, 50 N.J. Eq. 103, 107-08, 24 A. 319, 320 (Ch. 1892).

107 *Perini*, 129 N.J. at 494, 610 A.2d at 371. At least one court had adopted this "gross" error standard prior to *Perini*. *See* Ruckman v. Ransom, 23 N.J. Eq. 118, 120 (Ch. 1872) (refusing to disturb an arbitrator's judgment "except upon very cogent reasons"). Other New Jersey courts, however, have vacated an award for even a palpable or material mistake of law. *See* Brooks v. Pennsylvania Mfrs. Ass'n Ins., 121 N.J. Super. 51, 55, 296 A.2d 72, 74 (App. Div. 1972) (citation omitted), *modified on other grounds*, 62 N.J. 583, 303 A.2d 884 (1973); Collingswood Hosiery Mills, Inc. v. American Fed'n of Hosiery Workers, 31 N.J. Super. 466, 471, 107 A.2d 43, 45 (App. Div. 1954); *Hoboken Mfrs. R.R.*, 132 N.J. Eq. at 118, 27 A.2d at 154 (citations omitted); Eastern Eng'g Co. v. City of Ocean City, 11 N.J. Misc. 508, 512, 167 A. 522, 523 (Sup. Ct. 1933).

108 *Perini*, 129 N.J. at 494, 610 A.2d at 371.

109 *Id.* at 494-96, 610 A.2d at 371-73 (citations omitted).

110 *Id.* at 494, 610 A.2d at 371 (citation omitted).

111 *Id.*; *see* Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1476-77 (11th Cir. 1987); French v. Merrill, Lynch, Pierce, Fenner & Smith, 784 F.2d 902, 906 (9th Cir.

icy,[112] and abuse of the arbitrator's power.[113] Further, the court distinguished the federal standard that allowed for vacation of an award only where an arbitrator displayed a "manifest disregard" of the law.[114] Recognizing the limited nature of judicial review,[115] the

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1986); National Post Office Mailhandlers Union v. United States Postal Serv., 751 F.2d 834, 840 (6th Cir. 1985); Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752, 757-58 (3d Cir. 1982); Detroit Coil Co. v. International Ass'n of Machinists Workers, Lodge 82, 594 F.2d 575, 579 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979); *In re* Arbitration Between Marcy Lee Mfg. Co. v. Cortley Fabrics Co., 354 F.2d 42, 43 (2d Cir. 1965); *In re* Harris, 140 N.J. Super. 10, 15, 354 A.2d 704, 707 (App. Div. 1976); Lentine v. Fundaro, 278 N.E.2d 633, 634 (N.Y. 1972).

The Supreme Court of Kansas has advanced a similar doctrine relating to the revision rather than the vacation of an award. Jackson Trak Group, Inc. v. Mid States Port Auth., 751 P.2d 122, 127 (Kan. 1988) (refusing to revise the award unless the award was "tainted" or the contract was irrationally interpreted) (citations omitted).

112 *Perini*, 129 N.J. at 494, 610 A.2d at 371; *see, e.g.*, Iowa Elec. Light & Power Co. v. Local 204, IBEW, 834 F.2d 1424, 1427 (8th Cir. 1987) (refusing to enforce an award violative of public policy) (citation omitted); Exxon Shipping Co. v. Exxon Seamen's Union, 788 F. Supp. 829, 837 (D.N.J. 1992) (refusing to enforce an award violative of public policy) (citation omitted), *aff'd*, 993 F.2d 357 (3d Cir. 1993); Union Pacific R.R. v. United Transp. Union, 794 F. Supp. 891, 894 (D. Neb. 1992) (observing that "a court need not, in fact, cannot enforce an award that violates public policy") (citation omitted).

For a general discussion of arbitrability and public policy in other jurisdictions such as Argentina, England, France, and Belgium, see *Relaxation*, *supra* note 38, at 1680-87.

113 *Perini*, 129 N.J. at 494, 610 A.2d at 371 (citation omitted); *see* Belardinelli v. Werner Continental, Inc., 128 N.J. Super. 1, 7, 318 A.2d 777, 780 (App. Div. 1974) (noting that where an arbitrator's award has no basis in fact or reason, the arbitrator has exceeded his/her power) (quoting Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 403, 411-12 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970)).

114 *Perini*, 129 N.J. at 495-96, 610 A.2d at 372 (citations omitted). *See* Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 108 (N.D. Ill. 1980), *aff'd*, 653 F.2d 310 (7th Cir. 1981) (equating "manifest disregard of the law" with "fundamentally irrational" and defining both as the arbitrator's failure to decide according to legal principles and not a mistaken legal interpretation); San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 n.4 (9th Cir. 1961) (defining manifest disregard of the law as "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law"). For a discussion of actions that do not constitute "manifest disregard" of the law, see Local Joint Executive Bd. of Las Vegas v. Riverboat Casino, Inc., 817 F.2d 524, 528 (9th Cir. 1987) (holding that the arbitrators did not manifestly disregard the law by applying different common law principles). For other cases that use the "manifest disregard" language in reference to the parties' agreement, rather than the law as a basis for disturbing an award, see News America Publications, Inc. v. Newark Typographical Union, Local 103, 918 F.2d 21, 24 (3d Cir. 1990) ("News America Publications I") (quotation omitted); General Tel. Co. v. Communications Workers of America, 648 F.2d 452, 457 (6th Cir. 1981) (citation omitted); *In re* Arbitration Between Silverman and Benmor Coats, 461 N.E.2d 1261, 1266 (N.Y. 1984) (citations omitted); *In re* Arbitration Between Grover, 80 N.J. 221, 230, 403 A.2d 448, 453 (1979). Similarly, the court in *Amicizia Societa Navegacione v. Chilean Nitrate & Iodine Sales Corp.* held that a misapplication of a contract did not constitute manifest disregard of the law. Amicizia Societa Navegacione v. Chilean Nitrate & Iodine Sales Corp.,

justice insisted that the court's function was to protect only against an interpretive error that could be characterized as unmistakable, gross, undebatable, or in a manifest disregard of the applicable law leading to an unjust result.[116]

The court concluded its discussion of the arbitration issues by challenging Chief Justice Wilentz's concurring view that the plurality was maintaining an "anti-arbitration bias."[117] According to the court, the chief justice's assertion of a limited amount of judicial review of arbitrators' awards would not weaken the arbitration system.[118] Rather, the court declared that the public would lose faith in the arbitration system if an award expressly violating New Jersey law and policy was upheld.[119] Thus, the court affirmed the appellate division's holding by refusing to vacate the arbitration award absent any gross or undebatable error, or manifest disregard of the law.[120]

Chief Justice Wilentz presented a forceful, yet eloquent concurrence,[121] which explored the possible ramifications that the plu-

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274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960). Furthermore, Judge Oakes, writing for the Second Circuit in *I/S Stavborg v. National Metal Converters, Inc.*, explained that the Supreme Court in *Bernhardt v. Polygraphic Co. of America* "negated the possibility of applying a nonstatutory, 'manifest disregard' standard to a case" when the Court stated that "[w]hether the arbitrators misconstrued a contract is not open to judicial review." I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974) (citing Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 n.4 (1956)) (further citation omitted).

115 *Perini*, 129 N.J. at 496, 610 A.2d at 372 (citation omitted). This articulation was consistent with the New Jersey courts' practice of limiting judicial review of arbitration awards. Levine v. Wiss & Co., 97 N.J. 242, 250, 478 A.2d 397, 401 (1984) (quoting Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 187, 430 A.2d 214, 218 (1981)); Elberon Bathing Co. v. Ambassador Ins. Co., 77 N.J. 1, 17, 389 A.2d 439, 446 (1978) (citations omitted); McHugh Inc. v. Soldo Constr. Co., 238 N.J. Super. 141, 144, 569 A.2d 293, 294 (App. Div. 1990). Narrow review has also been extended to labor arbitration cases. Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227, 230 A.2d 521, 525 (App. Div. 1967) (citation omitted).

116 *Perini*, 129 N.J. at 496, 610 A.2d at 372-73.

117 *Id.* at 496-97, 610 A.2d at 373.

118 *Id.* at 497, 610 A.2d at 373.

119 *Id. But see Barcon Assocs.*, 86 N.J. at 210, 430 A.2d at 230 (Clifford, J., dissenting) (stating that the public policy of encouraging arbitration as a viable, alternative method of dispute resolution outweighs any consideration of maintaining public confidence in the process) (citations omitted).

120 *Perini*, 129 N.J. at 493, 610 A.2d at 371.

121 *See* Edgar H. Brenner, Speech at the American Bar Association Annual Meeting in a seminar presented by the ABA Arbitration Committee, entitled *East Coast or West Coast and Everywhere in Between: Should Arbitration Awards be Reviewed to Correct Errors of Law That Lead to an "Unjust" Result?* (Aug. 11, 1993) (excerpts available from the *Seton Hall Law Review*) (praising the Chief Justice's comprehensive analysis of the plurality's opinion). Chief Justice Wilentz has, over the years, been found on both sides of decisions involving confirmation of arbitration awards. *See, e.g.*, Local 153, Office & Pro-

rality's decision would have on the interplay between arbitration and the court system.[122] Initially, the concurrence forewarned that the plurality's holding would result in arbitration becoming a first step to lengthy litigation.[123] The chief justice argued for the overhaul of prior precedents that allowed for judicial review in the case of arbitral error.[124] The chief justice proposed that the standard for review should simply be whether the arbitrator was honest,[125]

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fessional Employees Int'l Union v. Trust Co., 105 N.J. 442, 453, 522 A.2d 992, 997 (1987) (joining the court in upholding the award); County College of Morris Staff v. County College of Morris, 100 N.J. 383, 399-407, 495 A.2d 865, 873-78 (1985) (Wilentz, C.J., dissenting) (dissenting from the majority's decision to reverse an arbitrators' award); Faherty v. Faherty, 97 N.J. 99, 112-13, 477 A.2d 1257, 1264-65 (1984) (agreeing to vacate part of an award under the excess of power provision because the parties intended, but the arbitrator failed, to follow the law); Communications Workers of Am., Local 1087 v. Monmouth County Bd. of Social Servs., 96 N.J. 442, 452, 453, 456, 476 A.2d 777, 781, 782, 783-84 (1984) (joining a unanimous decision to vacate a public sector award where the arbitrator did not follow the law); New Jersey, Dep't of Law & Pub. Safety v. State Fraternal Ass'n of New Jersey, Inc., 91 N.J. 464, 471-72, 475, 453 A.2d 176, 180, 182 (1982) (joining with the majority in reversing an award partly because the arbitrator's interpretation was not "reasonably debatable"); *Barcon Assocs.*, 86 N.J. at 200, 206, 216, 430 A.2d at 224, 228, 233 (Clifford, J., dissenting) (joining dissenting Justices Clifford and Schreiber in reversing the appellate division's decision to vacate on grounds of partiality); Perez v. American Bankers Ins. Co., 81 N.J. 415, 420, 421, 409 A.2d 269, 271, 272 (1979) (participating in this decision in which the court unanimously identified a mistake of law as grounds for vacating an award under the "undue means" provision) (citation omitted). In *County College of Morris Staff*, Chief Justice Wilentz remarked:

> The Court has . . . forgotten the rule that requires us to give great deference to arbitration, a deference that necessarily includes a sympathetic rather than a hostile reading of the arbitrator's opinion. Today's decision is an unfortunate exception to this Court's recognition of the desirability of arbitration in labor relations and of the superior wisdom and experience of arbitrators in determining disputes in that field.

County College of Morris Staff, 100 N.J. at 406-07, 495 A.2d at 878.

122 *Perini*, 129 N.J. at 519, 610 A.2d at 384 (Wilentz, C.J., concurring).

123 *Id.* at 518-19, 610 A.2d at 384 (Wilentz, C.J., concurring). Other courts have articulated this fear when arbitrators' awards were freely vacated. *See, e.g.*, Burchell v. Marsh, 17 U.S. (1 How.) 344, 349 (1854) (explaining that where a court vacated an award that was made after a fair hearing, the vacation would become the beginning, rather than the end of litigation); *see also In re* Arbitration Between Grover, 80 N.J. 221, 235, 403 A.2d 448, 455 (1979) (Pashman, J., dissenting) (expressing the need for limited judicial review to avert the potential for prolonged litigation) (citations omitted); Richard H. Steen, *Steps to Avoid Construction Contract Problems*, 135 N.J. L.J. 742, 760 (Oct. 18, 1993) (noting that many attorneys agree with the possibility that the plurality's decision in *Perini* may increase post-arbitration litigation).

124 *Perini*, 129 N.J. at 519, 610 A.2d at 384 (Wilentz, C.J., concurring).

125 *Id.* at 519, 529, 610 A.2d at 384, 389 (Wilentz, C.J., concurring). For other New Jersey cases supporting an "honesty" standard, see Brooks v. Pennsylvania Mfrs. Ass'n Ins., 121 N.J. Super. 51, 55, 296 A.2d 72, 74 (App. Div. 1972), *modified on other grounds*, 62 N.J. 583, 303 A.2d 884 (1973) (per curiam) (refusing to vacate an award where the arbitrator decided a case according to a personal notion of what was right and just, rather than the law) (citation omitted); William J. Burns Int'l Detective Agency v. New

and whether his or her decision remained restricted to the terms of the agreement.[126]

Next, the chief justice faulted the *Held* decision[127] for its hostility to precedents that had generally refused to vacate an arbitration award.[128] Chief Justice Wilentz then criticized *Brooks* for improperly expanding judicial review of arbitration awards where the arbitrator had intended to follow the law but made a mistake.[129]

The concurrence surveyed the law of other jurisdictions and found that New Jersey had adopted the minority position as to the standard of judicial review of arbitration awards.[130] The chief justice then launched into a lengthy discussion of the plurality's rule, classifying the rule as both "unworkable" and "unjustifiable."[131] Chief Justice Wilentz disagreed with the plurality's standard because the rule wrongly focused on the arbitrator's intent and the arbitrator's expressions of that intent.[132] Instead, the chief justice insisted that the focus should be on the *parties'* intent in having the arbitrators resolve the dispute and on what standard the litigants wished to be considered during judicial review of the arbitrator's decision.[133]

Chief Justice Wilentz also strongly denounced the plurality's decision to vacate an award that contained a "gross error" because

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Jersey Guards Union, 64 N.J. Super. 301, 312-13, 165 A.2d 844, 849 (App. Div. 1960) (citation omitted) (recognizing that by submitting their dispute to arbitration, the parties had implicitly agreed to allow the arbitrator to balance the equities in achieving a fair outcome), *certif. denied*, 34 N.J. 464, 169 A.2d 742 (1961); Eastern Eng'g Co. v. Ocean City, 11 N.J. Misc. 508, 511, 167 A. 522, 523 (Sup. Ct. 1933) (categorizing an award rendered by an upright and impartial arbitrator who did not exceed his authority as "unimpeachable" and "irreversible"); Leslie v. Leslie, 50 N.J. Eq. 103, 107, 24 A. 319, 320 (Ch. 1892) (upholding an award fairly rendered); Ruckman v. Ransom, 23 N.J. Eq. 118, 120 (Ch. 1872) (stating that an arbitrator could render an award based on a personal sense of good conscience and was not bound to base a decision solely on legal grounds).

126 *Perini*, 129 N.J. at 519, 610 A.2d at 384 (Wilentz, C.J., concurring).

127 *See supra* notes 56-61 and accompanying text (discussing the *Held* case).

128 *Perini*, 129 N.J. at 520-21, 610 A.2d at 385 (Wilentz, C.J., concurring).

129 *Id.* at 522, 610 A.2d at 386 (Wilentz, C.J., concurring) (citing Brooks v. Pennsylvania Mfrs. Ass'n Ins., 121 N.J. Super. 51, 296 A.2d 72 (App. Div. 1972), *modified on other grounds*, 62 N.J. 583, 303 A.2d 884 (1973)).

130 *Perini*, 129 N.J. at 524-27, 610 A.2d at 387-89 (Wilentz, C.J., concurring) (citations omitted). As the chief justice noted, most jurisdictions had refused to vacate an award for reasons other than irrationality, fraud, corruption, or some similar wrongdoing. *Id.* at 527, 610 A.2d at 389 (Wilentz, C.J., concurring). The plurality's rule, which would vacate an award for other reasons, including that of a "gross" legal error, thus fell within a minority position. *Id.* at 527-28, 610 A.2d at 388-89 (Wilentz, C.J., concurring).

131 *Id.* at 527-36, 610 A.2d at 389-93 (Wilentz, C.J., concurring).

132 *Id.* at 527-29, 610 A.2d at 389 (Wilentz, C.J., concurring).

133 *Id.* at 529-30, 610 A.2d 389-90 (Wilentz, C.J., concurring) (citation omitted).

the plurality had failed to define adequately what constituted a gross error of law.[134] The chief justice envisioned the difficulties that judges would experience in attempting to distinguish between a "gross" legal error and any other error.[135] The concurrence also noted that judges would encounter additional problems in determining whether any legal error had taken place in the arbitration proceedings if no record, or only a limited record, of the arbitrator's reasoning was available.[136]

Next, the chief justice discussed the potentially negative implications of the rule's implementation.[137] The concurrence warned that the plurality's rule would not only deprive the parties of the recognized benefits of arbitration,[138] but also deprive them of the arbitrator's award altogether.[139] Observing both the problem of congestion in the courts and the viability of arbitration as a means to remedy that problem, the chief justice suggested that the rule, by interfering with the arbitration process, actually hindered the effectiveness of arbitration as an alternative method of dispute resolution.[140] Furthermore, the chief justice noted that by defining the phrase "undue means" to encompass a mistake of law, the plu-

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134 *Id.* at 530, 610 A.2d at 390 (Wilentz, C.J., concurring) (citing *id*, 129 N.J. at 515-16, 610 A.2d at 382-83). A Texas Court of Appeals attempted to define a gross error of law in *Bailey & Williams v. Westfall.* Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. Ct. App. 1987). In *Bailey & Williams*, the court held that a gross error of law implied "bad faith or failure to exercise honest judgment." *Id.* (citation omitted). The court further noted that a gross mistake resulted where the decision was arbitrary or capricious. *Id.* (citation omitted). The court simultaneously insisted, however, that where due consideration was given and an honest judgment was rendered, the award, no matter how erroneous, was not arbitrary or capricious. *Id.* (citation omitted).

135 *Perini*, 129 N.J. at 530-31, 610 A.2d at 390 (Wilentz, C.J., concurring). This difficulty was foreseen in *Collingswood Hosiery Mills v. American Federation of Hosiery Workers*, where the appellate division declared that it was questionable whether the distinction between a "clear" and an "unclear" error of law could be made practically. Collingswood Hosiery Mills v. American Fed'n of Hosiery Workers, 31 N.J. Super. 466, 471, 107 A.2d 43, 45 (App. Div. 1954).

136 *Perini*, 129 N.J. at 533-35, 610 A.2d at 391-93 (Wilentz, C.J., concurring); *see also* O.R. Sec., Inc. v. Professional Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988) (recognizing that in those instances where the arbitrators have chosen not to explain their reasoning for the award, a showing of manifest disregard is "extremely difficult"). Among the disadvantages of providing a fully reasoned award is that the arbitrator may render an award that is outmoded or unsuitable to the particular situation so as not to deviate from the governing law. HOENIGER, *supra* note 4, § 6.22, at 6-51. For a general discussion of the advantages and disadvantages of providing reasons for the award, see *id.*, § 6.22, at 6-50 to -53.

137 *Perini*, 129 N.J. at 536-38, 610 A.2d 393-94 (Wilentz, C.J., concurring).

138 *Id.* at 537-38, 610 A.2d at 393-94 (Wilentz, C.J., concurring). *See supra* note 3 (discussing the benefits of arbitration).

139 *Perini*, 129 N.J. at 537-38, 610 A.2d at 394 (Wilentz, C.J., concurring).

140 *Id.* at 539, 610 A.2d at 394-95 (Wilentz, C.J., concurring).

rality had misinterpreted the phrase in a way that directly contradicted the legislature's intent.[141] Chief Justice Wilentz explained that, taken in context, the phrase referred only to a defect that affected the integrity of the whole dispute resolution process.[142]

Additionally, the concurrence pointed out that parties do not always want their disputes resolved according to the law, but will often rely on the arbitrator's expertise[143] and sense of fairness to fashion an appropriate award.[144] If the parties desire a different standard, the chief justice offered, they may simply provide for one in their agreement.[145] Otherwise, the chief justice asserted, the presumption, absent a contrary expression in the agreement, should be that the parties expect the arbitrators to use any standard that results in a just and equitable outcome.[146]

Chief Justice Wilentz next commented on the difficulty in ascertaining both the precise bounds and the application of the plurality's rule.[147] The chief justice derived from the plurality's rule that the arbitrator's award would be subject to review similar to that of an appellate court.[148] As a result, the chief justice warned that the standard for reversal would become one of mere error of law.[149] The concurrence thus maintained that the court should

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141 *Id.* at 540-41, 610 A.2d at 395 (Wilentz, C.J., concurring) (citing N.J. STAT. ANN. §§ 2A:24-8 to -9 (West 1952)).

142 *Id.*

143 *See* Local No. 153, Office & Professional Employees Int'l Union v. Trust Co., 105 N.J. 442, 448, 522 A.2d 992, 995 (1987) (noting that one of the benefits of arbitration is that arbitration provides for a decisionmaker who has experience in the particular industry and knowledge of customs and practices of the work site) (citation omitted).

144 *Perini*, 129 N.J. at 543, 610 A.2d at 397 (Wilentz, C.J., concurring); *see also* Motomura, *supra* note 38, at 39-40 (articulating the expectation that both labor and commercial arbitrators resolve their respective disputes according to usual business practices with which they are familiar and not necessarily according to strict legal principles).

145 *Perini*, 129 N.J. at 544, 610 A.2d at 397 (Wilentz, C.J., concurring).

146 *Id.* at 543, 610 A.2d at 396-97 (Wilentz, C.J., concurring). The chief justice based this observation on the same passage of the construction industry arbitration rules that the plurality cited, namely that the arbitrator "may grant any remedy or relief which is just and equitable." *Id.* at 490-91, 610 A.2d at 369; *see* CONSTRUCTION INDUSTRY ARBITRATION R. 43 (as amended Jan. 1, 1986), *reprinted in* Appendix 9, DOMKE, *supra* note 1, app. IX, at 65.

147 *Perini*, 129 N.J. at 544-48, 610 A.2d at 397-99 (citations omitted) (Wilentz, C.J., concurring). The chief justice cited four separate formulations furnished by the plurality: first, the presumption that parties intended the arbitrators to be bound by New Jersey law; second, a gross legal error constituted grounds for vacating an award; third, that no disregard of the law on the part of the arbitrator was necessary to vacate an award; and fourth, the error need not be readily, if at all, apparent on the "face of the record." *Id.* at 545, 610 A.2d at 398 (Wilentz, C.J., concurring).

148 *Id.* at 547, 610 A.2d at 399 (Wilentz, C.J., concurring).

149 *Id.* at 547-48, 610 A.2d at 399 (Wilentz, C.J., concurring).

consider only whether the award was "just and equitable."[150] Chief Justice Wilentz concluded that, absent "fraud, corruption, or similar wrongdoing," the award should not have been vacated.[151]

Concurring in part and dissenting in part, Justice Stein agreed with the plurality's standard for reviewing an arbitration award.[152] The justice disagreed, however, with the majority's decision to uphold the award in contravention of legal principles regarding delay damages and substantial completion.[153]

It is ironic that the plurality struggled with the legislature's obscure phraseology of "undue means,"[154] yet, in setting its own standard of judicial review, failed to give meaning to such terms as "gross,"[155] "unmistakable," or "undebatable" errors and "manifest disregard"[156] of the law.[157] Further, the plurality's standard presents a potential conflict with the general rule that arbitrators

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150 *Id.* at 548, 610 A.2d at 399 (Wilentz, C.J., concurring).

151 *Id.*

152 *Id.* at 549, 610 A.2d at 399. (Stein, J., concurring in part, dissenting in part). Justice Handler joined in this opinion. *Id.* Judges Andrew Stein and John Keefe, appellate division judges, were temporarily assigned to hear this case in the absence of Justices Garibaldi and Pollock. *Id.* at 556, 610 A.2d at 403.

153 *Id.* at 549-56, 610 A.2d at 400-03 (Stein, J., concurring in part, dissenting in part).

154 *See* San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801-02 (9th Cir. 1961) (noting that if the legislature had wanted "undue means" to encompass a mistake of law, it would have so stated). The *San Martine* court declared that Congress's enactment of the federal arbitration statute, which provided for vacation or modification of an arbitration award, made clear that Congress was aware that an award would not be vacated for legal or factual error. *Id.* Furthermore, the court emphasized that if Congress had intended a different rule, it would have specifically drafted a separate subdivision so stating. *Id.*; *see also* Collingswood Hosiery Mills, Inc. v. American Fed'n of Hosiery Workers, 31 N.J. Super. 466, 469, 107 A.2d 43, 44 (App. Div. 1954) (proposing that reliance on the "undue means" language as statutory support for a decision to vacate an award on the grounds of a mistake of law "puts some strain on the words of that provision").

155 At one point, the *Perini* court referred to *Held* to clarify that a "gross" error was one which suggested fraud or misconduct. *Perini*, 129 N.J. at 493, 610 A.2d at 370 (citation omitted). These components of fraud and misconduct are essential because it is only by their inclusion that a more contextually accurate definition of the phrase "undue means" may be fully achieved. *See Perini*, 129 N.J. at 542, 610 A.2d at 396 (Wilentz, C.J., concurring) (indicating that the "undue means" provision "has nothing to do with errors of law").

156 For definitional problems of the phrase "manifest disregard," see *San Martine*, 293 F.2d at 801 (stating that the *Wilko v. Swan* Court failed to define the phrase or differentiate between a "manifest disregard" of the law and a mere erroneous interpretation of the law) (footnote omitted); Transit Casualty Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346, 1355 (S.D.N.Y. 1987) (stating that an erroneous application of the law was insufficient, yet acknowledging that a precise definition of "manifest disregard of the law" was unavailable) (citation omitted), *aff'd*, 841 F.2d 1117 (2d Cir. 1988); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974) (same) (citation omitted). *But see* Advest, Inc. v. McCarthy, 914

do not have to state their reasons for the award.[158] In the absence of articulated reasons,[159] a reviewing court cannot determine whether an error is apparent on the face of the award, whether an arbitrator "manifestly disregarded" the law, or whether an arbitrator intended to follow the law.[160] The *Perini* decision thus indirectly forces arbitrators to explain their reasons for the award so as to enable the courts to review the awards for errors.[161]

F.2d 6, 10 (1st Cir. 1990) (explaining that "there is nothing talismanic about the phrase 'manifest disregard'") (citation omitted).

Explaining the difficulties with a "manifest disregard" standard, the Ninth Circuit in *San Martine* stated that the standard mandates a "degree of error" test. *San Martine*, 293 F.2d at 801 n.4. Using this test, the *San Martine* court reasoned that the words "manifest disregard" implied that the award would withstand vacation if it was not "too far afield," but would be fatally flawed if it contained an egregious error. *Id.* One unfortunate consequence, the court noted, would be that the results would differ from judge to judge. *Id.*

157 *See Perini*, 129 N.J. at 496, 610 A.2d at 372-73.

158 *See, e.g.*, I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 429 (2d Cir. 1974) (stating that "[i]t seems rather anomalous, but had the arbitral majority failed to render a written opinion in this case, our ability—ignoring the question of our power—to review that decision would be greatly limited") (citation omitted). Further, the Michigan Supreme Court acknowledged that, among other factors, the absence of a verbatim record and formal findings of fact leave reviewing courts without any basis upon which to find substantial legal error. Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 428 (Mich. 1982). *See infra* notes 160-61 (discussing the problems that result when arbitrators fail to articulate reasons for their award).

159 *See* Siderius, Inc. v. M.V. "Ida Prima", 613 F. Supp. 916, 921 (S.D.N.Y. 1985) (commenting on the reality that "[a]rbitrators' decisions are rarely explained.").

160 *See, e.g.*, Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972). The *Sobel* court, discussing the problems of applying a "manifest disregard" standard, observed:

> The problem is how a court is to be made aware of the erring conduct of the arbitrators. Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration[.] . . . The sacrifice that arbitration entails in terms of legal precision is recognized . . . [and] is implicitly accepted in the initial assumption that certain disputes are arbitrable. . . . Given that acceptance, the primary consideration for the courts must be that the system operate expeditiously as well as fairly.

Id. (citation omitted). In light of the foregoing, Chief Justice Wilentz was absolutely correct in stating that the focus of review should be on the parties' intent and not on the intent of the arbitrators. *Perini*, 129 N.J. at 529-30, 610 A.2d at 389-90 (Wilentz, C.J., concurring). Without having the reasons set forth on the award, it would be impossible in the absence of any explanation for courts to decipher the arbitrators' intent.

161 *See, e.g.*, A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992) (asserting that where arbitrators fail to explain their awards, courts could vacate an award in a situation where the award recipient had offered only one meritless defense), *cert. denied*, 113 S. Ct. 970, *reh'g denied*, 113 S. Ct. 1666 (1993). The Ninth Circuit recognized that in avoiding vacation on the grounds of a meritless defense, "[p]anels of arbitrators wishing to avoid relitigation would be forced to state the rea-

Additionally, the *Perini* court, adopting the standard used in public sector arbitration, held that a private sector arbitration award should be sustained so long as the arbitrator's determination of a legal issue is reasonably debatable.[162] In so doing, however, the plurality failed to state clearly whether its holding should be strictly limited to commercial arbitration or whether it may be extended to arbitration proceedings in other arenas, such as family law.[163] Lower courts, deciding whether to confirm an award, will therefore have to determine whether to use the *Perini* standard for all cases or find the standard inapplicable to those cases arising outside commercial law.[164]

What should the bounds of judicial interference be?[165] The answer lies in the very definition of arbitration, which clearly establishes arbitration as a different forum than the courts for resolving disputes;[166] one that is, in fact, often at cross-purposes with the court system.[167] Thus, arbitration should not be judged by court

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sons for their decision in direct contradiction of the universally accepted rule that a statement of reasons is not required and arbitrators are presumed to have relied on permissible grounds." *Id.* (citation omitted).

162 *Perini*, 129 N.J. at 493, 610 A.2d at 371 (citation omitted).

163 *Id.* at 497, 610 A.2d at 373. The court, in commenting on the rarity of appeals, referred only to commercial arbitration awards. *Id.* at 497, 610 A.2d at 373. In the very next sentence, however, the court directly referred to a family law arbitration award that was appealed. *Id.* (citing Faherty v. Faherty, 97 N.J. 99, 101, 477 A.2d 1257, 1259 (1984)).

164 If it is recognized that differences do exist between various arbitrations, and that they do serve different needs, i.e., the object of a construction arbitration dispute is very different from a divorce arbitration dispute in that the one is used for its quick resolution and finality while the other must contemplate more seriously various public policy concerns, then the implementation of different standards of judicial review over these various arbitrations should be considered. *See* Simpson, *supra* note 3, at 53 (noting that, among the recommendations submitted to improve the judicial arbitration program in New Jersey, was the suggestion that "different arbitration rules should be tested to evaluate the relative merits of programs . . . constructed on different rationales of arbitration").

165 Within the same case, differing opinions to the answer to this question have been found. *Compare* Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 437 (Mich. 1982) (Levin, J., concurring) (warning against judicial review of arbitral awards because such review would encourage appellate proceedings and "make arbitration a less attractive alternative to litigation") *with id.* at 431 (noting that the judiciary has a fundamental duty "to assure that its equitable power is exercised in keeping with the rule of law[,]" despite the notion of freedom of contract).

166 *See* HOENIGER, *supra* note 4, § 6.20, at 6-47 (stating that "modern judicial decisions recognize that, absent some express other agreement of the parties, arbitration is a method of dispute resolution fundamentally different from litigation").

167 *See id.*, § 1.06, at 1-7 (analyzing the differences between arbitration and litigation). Hoeniger stated:

> [C]onsiderations of equity, justice, and commercial reasonableness may well play a greater role in the [arbitration] outcome than they do in the

rules or standards. It therefore seems appropriate to deny judicial review where the result is fair,[168] but still allow for review in the limited instance where a substantial injustice occurred.[169]

Whatever the judicial standard of review,[170] however, the solution to the problem posed by *Perini*[171] remains, and perhaps must

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> courtroom. That is hardly a negative. Most business disputes are not black and white. Rather, they involve varying shades of grey. The win-lose, all-or-nothing approach epitomized by litigation is usually not the ideal model for resolving commercial disputes, nor one that generally conforms to the practice and expectations of most business people.

Id.; *see also* Robert Force & Anthony J. Mavronicolas, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration*, 65 TUL. L. REV. 1461, 1469-72 (1991) (discussing the pros and cons of litigation and arbitration within the context of maritime disputes).

168 The fairness standard should hold true, especially in those situations, as in *Perini*, where the agreement specifically provided that the arbitrators have the power to decide on principles of equity and justice. *See* HOENIGER, *supra* note 4, § 6.20, at 6-47. Hoeniger stated that § 43 of the American Association of Arbitration Rules "clearly gives the arbitrators the power to render an award that is *not* based on strict law, but is based in whole or in part on considerations of fairness, reasonableness, and equity." *Id.* The *Perini* plurality only briefly alluded to the notion of fairness, mentioning but once the parties' agreement to follow the Construction Rules of the AAA that allow an arbitrator to render an award that is just and equitable. *Perini*, 129 N.J. at 490-91, 610 A.2d at 369. In so doing, the plurality failed to recognize that parties, in addition to wanting the other benefits of arbitration, perhaps most importantly wish the result to be fair and just. *See* HOENIGER, *supra* note 4, § 6.20, at 6-47 (emphasizing that "a resolution that is broadly fair and equitable is the very result the parties contracted for when they stipulated to arbitrate their disputes"); *see also* Simpson, *supra* note 3, at 54 (recognizing the limited attention paid to the litigants' perception of arbitration as being a generally fair process).

169 *See supra* note 81 (outlining Justice Kennard's dissent to the majority's upholding an arbitrator's award in the face of a substantial injustice).

170 The *Perini* rule may be in some danger of modification or perhaps abolishment in light of the New Jersey Supreme Court's recent review of *In re Tretina Printing, Inc. v. Fitzpatrick Assocs. In re* Tretina Printing, Inc. v. Fitzpatrick Assocs., 262 N.J. Super. 45, 619 A.2d 1037 (App. Div.), *certif. granted*, 133 N.J. 442, 627 A.2d 1147 (1993). The *Tretina* parties, unlike Perini, however, did not argue that mistakes of law were made but rather that the arbitrators ignored the parties' contract, decided issues against the weight of the evidence, and failed to rule on certain claims. *Id.* at 52-53, 619 A.2d at 1040. Further, the *Tretina* court, in observing that the arbitrator manifestly disregarded the "heart of the parties' *contract*," deviated somewhat from the *Perini* standard that looked to whether the arbitrator manifestly disregarded the *law*. *See id.* at 49, 619 A.2d at 1039; *Perini*, 129 N.J. at 496, 610 A.2d at 372-73. Because the issues in *Tretina* are therefore not "on all fours" with those argued in *Perini*, and considering that *Perini* has only recently been decided, it is unlikely that the New Jersey Supreme Court will overrule *Perini*. *See* Source on file with the *Seton Hall Law Review*.

171 In numerous discussions with attorneys and others involved in arbitration generally, the consensus has been that the *Perini* decision, in affirming what many considered an outrageous award, "sent a shudder" through the construction industry. *See* Source on file with the *Seton Hall Law Review*. It is unknown at this early date what the precise impact of the *Tretina* decision will be, but it is clear that those who had earlier embraced arbitration are now more reluctant to do so. *Id.*

initiate from within the AAA itself.[172] The AAA, at the very minimum, must continue to revise and develop its procedures to protect the parties against arbitrator/arbitration abuses not clearly articulated in the arbitration statute.[173] Thus, arbitration would continue to remain "one of the noblest designs ever painted by hand or mind of man on the canvas of life."[174]

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172 There are some, however, who would resist this change because of a legitimate sense of the inevitability of mistakes in any forum. *See, e.g.*, Edgar H. Brenner, Comments at American Bar Association conference on Critical Issues in Arbitration (Nov. 5, 1993) (Text of speech on file with the *Seton Hall Law Review*) (concluding that the etymological similarities between the word "arbitrator" and "arbitrary" as used within the court system brings about "[a] degree of imperfection in the arbitration process [that] must be accepted in rare instances if arbitration is to achieve its purpose in most cases"). Instead, Brenner proposed twelve alternative ways that the parties could reduce the chance of irrational awards and judicial involvement in the arbitration process, e.g., careful drafting of dispute clauses. *Id.*; *see also* Steen, *supra* note 123, at 742, 760 (articulating the need for careful drafting). *But see* Editorial, *Arbitration at the Crossroads*, 133 N.J. L.J. 274 (Jan. 25, 1993) (seeking relief from the legislature to revise the Arbitration Act so as to eliminate judicial review of arbitration awards).

173 *See* AMERICAN ARBITRATION ASSOCIATION, JUDICIAL REFERENCE PROCEDURES, at 2 (Jan. 1990) (allowing parties who provide for Judicial Reference to have their disputes settled by a panel of attorneys or retired judges rather than lay arbitrators). The AAA has already taken some steps to establish supplemental procedures for more difficult cases. *See* AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY PROCEDURES FOR LARGE, COMPLEX DISPUTES at 9, 11 (Mar. 1993) (routing complicated cases to select arbitrators who have the necessary technical and legal expertise); AMERICAN ARBITRATION ASSOCIATION, GUIDELINES FOR EXPEDITING LARGER, COMPLEX CONSTRUCTION ARBITRATIONS (Dec. 1990) (same).

174 Gotshal, *supra* note 1, at 553.