

**NOTE****JUDICIAL REVIEW OF ARBITRATION AWARDS UNDER STATE LAW***Stephen Wills Murphy\**

INTRODUCTION.....	888
I. JUDICIAL REVIEW OF ARBITRAL AWARDS UNDER STATE AND FEDERAL LAW .....	891
II. ARBITRATION UNDER STATE LAW .....	896
A. <i>Statutory Avenues for Judicial Review of Awards Under State Law</i> .....	898
1. <i>Judicial Review for Arbitral “Excess of Power”</i> .....	898
2. <i>Judicial Review for Arbitral “Misconduct”</i> .....	902
B. <i>Existing Safeguards for the Arbitral Process Under State Law</i> .....	903
III. POTENTIAL AVENUES FOR EXPANDED JUDICIAL REVIEW OF ARBITRATION UNDER STATE LAW: FEDERAL PREEMPTION.....	904
A. <i>Preemption and State Arbitration Laws Following Hall Street</i> .....	906
B. <i>Drafting Arbitration Agreements to Apply State Arbitration Law</i> .....	909
IV. “MANIFEST DISREGARD OF THE LAW” AND OTHER LEGAL ERRORS AS GROUNDS FOR JUDICIAL REVIEW UNDER STATE LAW .....	911
A. <i>The Current Status of Review of Arbitration Awards for Legal Error Under State Law</i> .....	912
B. <i>Statutory Reform of State Law to Allow Review for Legal Error</i> .....	914
V. THE “PUBLIC POLICY EXCEPTION” AS GROUNDS FOR JUDICIAL REVIEW UNDER STATE LAW.....	918
A. <i>The Current Status of the Public Policy Exception Under State Law</i> .....	921

888	<i>Virginia Law Review</i>	[Vol. 96:887
	<i>B. Prospects for the Allowing the Public Policy Exception Under State Law</i> .....	923
	1. <i>Unconscionable Arbitration Agreements Under State Law</i> .....	924
	2. <i>Unconscionable Arbitration Awards Under State Law: A Limited Public Policy Exception</i> .....	925
VI.	FACTUAL ERROR AS GROUNDS FOR REVIEW OF ARBITRAL AWARDS UNDER STATE LAW .....	927
	A. <i>The Current Status of Review for Factual Error Under State Law</i> .....	928
	B. <i>Prospects of Statutory Reform of State Law to Allow Review for Factual Error</i> .....	929
	1. <i>Statutory Reform to Allow Review for Factual Errors Apparent in the Award</i> .....	929
	2. <i>Statutory Reform to Allow Review for Irrational or Unsubstantiated Awards</i> .....	930
VII.	NON-JUDICIAL AVENUES FOR REVIEW OF ARBITRATION AWARDS .....	933
	CONCLUSION.....	936

#### INTRODUCTION

TO parties hoping to resolve a dispute without the cost and delay of litigation, binding arbitration can be an attractive alternative. Parties to arbitration can tailor many features of their arbitration, including procedure and substantive law.<sup>1</sup> But this freedom is limited in at least one significant respect: to ensure the finality of arbitral awards, and to preserve arbitration as a method of resolving disputes without undue cost and delay, statutes restrict

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<sup>1</sup> See, e.g., *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008). For a thorough discussion of the procedures of arbitration, see Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 *Ohio St. J. on Disp. Resol.* 343, 351–81 (1995).

the grounds on which a court can vacate an arbitral award. Generally, parties are bound by the decisions of arbitrators, and courts may not review arbitrators' findings of fact or conclusions of law.<sup>2</sup>

This lack of judicial oversight, combined with the considerable power of arbitrators to grant relief, can make arbitration a risky alternative. In one wrongful termination case in 2009, a California arbitrator awarded the plaintiff \$4.1 billion, nearly \$3 billion of which consisted of punitive damages. A California trial court confirmed the award as a matter of course, without review of the arbitrator's findings.<sup>3</sup> One commentator noted that this large award highlights the risks of arbitration. "You're flying on a trapeze without a safety net," he explained. "Some employers may say, 'We still like the benefits of arbitration . . . but boy, maybe we should think twice about having no safety net at all, no chance when things go wayward.'"<sup>4</sup> Another attorney noted that, even before this award, "one main concern" of parties to arbitration was to find a way "to prevent, or at least review, awards."<sup>5</sup>

Despite these criticisms of the lack of judicial oversight of arbitration, judicial review of arbitration awards is strictly limited by statute. The U.S. Supreme Court recently held in *Hall Street Associates v. Mattel, Inc.* that the Federal Arbitration Act ("FAA"), which normally governs transactions involving interstate commerce, does not allow judicial review of arbitrators' mistakes of law or fact.<sup>6</sup>

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<sup>2</sup> See *infra* Part I.

<sup>3</sup> The total award was \$4,106,833,878.20, which included \$975,425,558.09 in compensatory damages and \$2,926,276,674.27 in punitive damages. Judgment Confirming Final Arbitration Award at 3, App. A at 19, *Chester v. iFreedom Commc'ns*, No. BC353567 (Cal. Super. Ct. L.A. County May 28, 2009).

<sup>4</sup> Joanna Lin, \$4 Billion Award May Be Record in Arbitration Case, L.A. Daily J., June 5, 2009 (Verdicts and Settlements), at 2 (quoting Jay McCauley, an employment arbitrator for the American Arbitration Association).

<sup>5</sup> Amanda Bronstad, Anatomy of an Arbitration Disaster, Nat'l Law J., June 17, 2009, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202431506968> (quoting Michael D. Young).

<sup>6</sup> 128 S. Ct. 1396, 1406 (2008). See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995) (holding that the FAA governs transactions involving interstate commerce).

Because of the limited review allowed under federal arbitration law, state arbitration statutes are now of renewed importance.<sup>7</sup> State arbitration statutes have always applied to arbitration of many disputes, such as those involving state causes of action, family law, and trusts and estates.<sup>8</sup> Furthermore, in *Hall Street* the Supreme Court confirmed that parties can contract to apply state grounds for vacatur in any commercial transaction.<sup>9</sup> Moreover, critics of arbitral discretion may find it more promising to expand the grounds for vacatur under a state statute than to amend the Federal Act.

Currently, judicial review of arbitration may fare no better under state arbitration statutes than under the Federal Act. The arbitration statutes of 47 states and the District of Columbia contain a list of grounds for vacatur that is substantially identical to the Federal Act.<sup>10</sup> These statutes allow vacatur for arbitral corruption and other misconduct, but they make no mention of vacatur for arbitrators' substantive errors of law or fact.<sup>11</sup> Furthermore, the courts of 38 of these jurisdictions interpret those statutory grounds to preclude judicial review of arbitral findings of fact, conclusions of law, or both.<sup>12</sup> This Note will use the term "Majority Rule" to refer to the regimes of these 38 jurisdictions, which combine (1) a restrictive statute based on either the Uniform or Federal Acts and (2) a restrictive reading of that statute that disallows review of arbitral findings of fact, conclusions of law, or both.<sup>13</sup>

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<sup>7</sup> Discussions of judicial review often focus on the Federal Act and federal courts' interpretations of that statute. For example, the Nevada Law Journal recently held a symposium on the subject. Symposium, Rethinking the Federal Arbitration Act: An Examination of Whether and How the Statute Should Be Amended 8 Nev. L.J. 1 (2007).

<sup>8</sup> See *infra* notes 76–81 and accompanying text.

<sup>9</sup> 128 S. Ct. at 1406; see *infra* Section III.A.

<sup>10</sup> See *infra* notes 14–15 and accompanying text.

<sup>11</sup> Federal Arbitration Act of 1925 § 10, 9 U.S.C. § 10 (2000); Rev. Unif. Arb. Act § 23 (2000); Unif. Arb. Act § 12 (1956).

<sup>12</sup> See *infra* notes 17–23 and accompanying text.

<sup>13</sup> Of course, some critics would prefer to amend the Uniform Arbitration Act, rather than leaving it to states to amend their statutes individually. There is some logic to this approach: amendments to individual state laws would have some costs in the form of decreased uniformity and predictability of outcomes between jurisdictions. But ultimately, such concerns are not persuasive for two reasons. First, a number of states already read their common statutory language to allow for review of law or facts, and thus any current uniformity on these issues is overstated. See *supra* notes

This Note will study the extent to which meaningful judicial review exists under the Majority Rule: through statutory grounds, including review for arbitral misconduct and exceeding arbitral power, and through non-statutory grounds, including review of arbitrators' factual errors, arbitrators' legal errors, and whether an award violates public policy. Georgia and Iowa will provide examples of how some jurisdictions have attempted to limit arbitral discretion through statutory amendment. Meanwhile, Virginia will provide the clearest examples of how courts currently address such arguments under the Majority Rule. Unlike some states whose courts have sparsely considered these grounds for review, Virginia's courts have squarely addressed each of these grounds, and thus Virginia's decisions offer some prediction of how similar arguments would fare elsewhere. This discussion will shed light on how parties can seek judicial review of arbitration under existing state law, and on how state law might be amended to allow for some measure of judicial review while still preserving the finality of arbitration.

#### I. JUDICIAL REVIEW OF ARBITRAL AWARDS UNDER STATE AND FEDERAL LAW

Congress, the District of Columbia, and 47 states have passed arbitration statutes with a substantially identical list of grounds for vacatur. At the federal level, the Federal Arbitration Act specifies the grounds for judicial review of an award.<sup>14</sup> At the state level, 9 states have adopted arbitration statutes based on the Federal Act, and 38 states and the District of Columbia have adopted the Uniform Arbitration Act ("UAA") of 1956 or 2000, which sets forth a list of grounds for review that is similar to the Federal Act.<sup>15</sup> These

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10–12 and accompanying text. Second, the Commissioners on Uniform State Laws themselves were hesitant to expand judicial review under the Revised Uniform Arbitration Act in 2000, and they instead left the states to develop case law to determine the propriety of such review. See *infra* note 85.

<sup>14</sup> Federal Arbitration Act of 1925 § 10. The applicability of federal and state statutes is discussed *infra* Part III.

<sup>15</sup> The District of Columbia and 12 states have adopted the Revised Uniform Arbitration Act (2000), and an additional 26 states have adopted the Uniform Arbitration Act (1956). See, e.g., 1986 Va. Acts 1520–23 (codified at Va. Code Ann. § 8.01-581.01 (2008)) (adopting the 1956 Uniform Arbitration Act, with minor revisions).

provisions in the Federal and Uniform Acts, and the state statutes based on those Acts, allow a court to vacate an award for “corruption,” “fraud,” “evident partiality,” and “misconduct” by the arbitrators, or if the arbitrators “exceeded their powers.”<sup>16</sup> Conspicuously absent from these statutes is the ability of the court to intervene and vacate an award for arbitrators’ substantive errors of law or fact.

Moreover, of the 48 state-level jurisdictions that have adopted substantially identical arbitration statutes, the highest courts of 38 of those jurisdictions have interpreted their arbitration statutes to preclude judicial review of arbitrators’ findings of fact, conclusions of law, or both.<sup>17</sup> Of those 38 jurisdictions, the courts of 25 states have interpreted their arbitration statutes to allow for neither judicial review of arbitrators’ findings of fact nor judicial review of arbitrators’ conclusions of law.<sup>18</sup> The Supreme Court recently joined

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Only 3 states have adopted arbitration statutes whose systems of judicial review are not based on the Federal or Uniform Acts: Alabama, New Hampshire, and West Virginia. But the core set of grounds contained in these statutes is still similar to the Federal or Uniform Acts. See Ala. Code § 6-6-14 (2009) (providing that an award “cannot be inquired into or impeached for want of form or for irregularity . . . , unless the arbitrators are guilty of fraud, partiality, or corruption in making it”); N.H. Rev. Stat. Ann. § 542:8 (2009) (allowing vacatur for “fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers,” but also allowing review for “plain mistake,” which has been read to include misapplying the law to the facts under *Sherman v. Graciano*, 872 A.2d 1045, 1046 (2005)); W.Va. Code § 55-10-4 (2009) (dictating that award may not be set aside “except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means, or by mistake, or that there was partiality or misbehavior in the arbitrators, or any of them, or that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made”).

<sup>16</sup> Federal Arbitration Act of 1925 § 10; Rev. Unif. Arb. Act § 23; Unif. Arb. Act § 12.

<sup>17</sup> For a breakdown of these jurisdictions, see *infra* notes 18, 20–22. Only 3 states have adopted arbitration statutes not based on the Federal or Uniform Acts: Alabama, New Hampshire, and West Virginia. An additional 3 jurisdictions—Montana, New Jersey, and Oregon—have reported no decisions interpreting the grounds for vacatur under their state’s version of the Uniform Arbitration Act. Because their case law is uncertain, this Note does not include these jurisdictions in the list of jurisdictions that have expressly rejected or endorsed judicial review of arbitrators’ findings of law or fact.

<sup>18</sup> Of those states that have adopted the Uniform Arbitration Act, the courts of the following states read their arbitration statutes to preclude review of arbitral findings of fact and to preclude review of arbitral conclusions of law: Alaska, Arizona, Arkansas, Colorado, Florida, Hawaii, Idaho, Indiana, Kentucky, Maine, Massachusetts, Mis-

those states. In 2008, the Court in *Hall Street Associates v. Mattel, Inc.* held that the grounds specified by the Federal Arbitration Act are exclusive, and neither a court, nor the parties through their arbitration agreement, can empower a court to review an arbitral panel's findings of law or fact.<sup>19</sup> An additional 13 states allow judicial review of either arbitral findings of fact or conclusions of law, but not both: 11 states allow judicial review of an arbitration panel's legal error,<sup>20</sup> South Dakota arguably allows vacatur for some substantial arbitral factual errors,<sup>21</sup> and Iowa has amended its version of the Uniform Arbitration Act to allow a court to review arbitrators' findings of fact under specific circumstances.<sup>22</sup> Only 7 states have interpreted their version of the Uniform or Federal

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souri, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Tennessee, Vermont, and Virginia. Of those states whose statutes are substantially similar to the Federal Arbitration Act, the courts of the following states read their statutes in that restrictive fashion: California, Connecticut, Mississippi, New York, and Ohio. Some of these state courts, such as Hawaii, Maine, and Massachusetts, do not allow review of arbitral findings of fact or conclusions of law, but they do allow a court to vacate an arbitration award if the award violates public policy. Utah allows vacatur for a violation of "public policy," but it also allows vacatur for mistakes of law. For a discussion of the "public policy exception," see *infra* Part V.

<sup>19</sup> *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404–06 (2008).

<sup>20</sup> The jurisdictions that allow review only for arbitral mistakes of law (and not for arbitral findings of fact) are Delaware, Georgia, Kansas, Louisiana, Michigan, Minnesota, Nevada, Pennsylvania, South Carolina, Washington, and Wisconsin. Georgia's legislature amended its statute to allow for review for manifest disregard of the law. See *infra* Part IV. In a 2007 study, Jennifer Samsel recognized that few states allow for review for legal error, but she noted a "recent movement" of federal circuit courts to allow review for legal error. Jennifer Samsel, Note, *Evolving Judicial Review of Arbitration Awards: Is Massachusetts Lagging Behind in a "Manifest Disregard" of Arbitrators' Substantive Errors of Law?*, 40 *Suffolk U. L. Rev.* 931, 932, 945 & n.105 (2007). To the extent that there was such a "trend" among federal courts, the Supreme Court in *Hall Street* put an end to that trend when it expressly rejected arbitral mistake or disregard of law as grounds for vacatur. 128 S. Ct. at 1404–06.

<sup>21</sup> *Spiska Eng'g v. SPM Thermo-Shield*, 730 N.W.2d 638, 643, 647 (S.D. 2007). In *Spiska Engineering*, the Supreme Court of South Dakota construed S.D. Codified Laws § 21-25A-24 and stated that "the merits of an arbitration decision are insulated from final review by a court" and that "we must confirm the award . . . so long as the arbitrator is even arguably construing or applying the contract." *Id.* (quotations and citation omitted). This language suggests great deference to arbitral findings of fact, but it also suggests that vacatur is allowed if the arbitrators did not actually construe the contract.

<sup>22</sup> Iowa Code § 679A.12 (2009); see also *infra* Subsection VI.B.2. (discussing Iowa's statutory amendments).

Arbitration Acts to allow a court to review arbitrators' findings of both fact and law.<sup>23</sup>

Some courts and commentators defend the limited review of arbitral awards by noting that broader judicial review would spoil the finality of arbitration. One commentator called it a "monumental tragicomedy" that one who submits to arbitration to avoid litigation might, "as a reward for his pains, find[] himself eventually in court fighting not on the merits of his case but on the merits of the arbitration."<sup>24</sup> These commentators argue that even if arbitrators regularly mistake the law or facts, they make up for those errors in their ability to swiftly resolve disputes. The Supreme Court of Iowa has explained it thus: "A refined quality of justice is not the goal in arbitration matters. Indeed such a goal is deliberately sacrificed in favor of a sure and speedy resolution."<sup>25</sup>

Critics of this limited review, however, decry the seemingly unbridled discretion given to arbitrators.<sup>26</sup> A party unsatisfied with an arbitral award is generally without recourse—even if the arbitrators granted an award not supported by the evidence,<sup>27</sup> if the arbitrators misconstrued or even rejected the parties' choice of applicable law,<sup>28</sup> or if the arbitrators granted an award that would otherwise be prohibited by that jurisdiction, such as a perpetual re-

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<sup>23</sup> The jurisdictions whose courts allow judicial review of *both* arbitral findings of fact *and* conclusions of law are the District of Columbia, Illinois, Maryland, Texas, Utah, and Wyoming (under their versions of the Uniform Arbitration Act), and Rhode Island (under its statute that parallels the Federal Arbitration Act).

<sup>24</sup> Jerold S. Auerbach, *Justice Without Law?* 111 (1983) (quoting Nathan Isaacs, Wesley A. Sturges' *A Treatise on Commercial Arbitration and Awards*, 40 *Yale L.J.* 149, 149 (1930) (book review)).

<sup>25</sup> *LCI, Inc. v. Chipman*, 572 N.W.2d 158, 162 (Iowa 1997) (quoting *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 515 (Iowa 1992)).

<sup>26</sup> See, e.g., Brief of Amici Curiae New England Legal Foundation and National Federation of Independent Business Legal Foundation in Support of Petitioner on the Merits at 14, *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989), 2007 WL 2344617.

<sup>27</sup> See, e.g., *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554–55 (2d Cir. 1985) (rejecting the losing party's complaint that the award exceeded the contract price for undelivered oil).

<sup>28</sup> See, e.g., *SIGNAL Corp. v. Keane Fed. Sys.*, 574 S.E.2d 253, 257 (Va. 2003) (disregarding the losing party's complaint that the arbitrators mistook or disregarded the elements of a civil conspiracy charge under Virginia law).



straint on trade.<sup>29</sup> To many, arbitration has become not a cost-effective means to resolve disputes, but rather “a game of chance and an instrument of injustice.”<sup>30</sup>

These critics of limited judicial review want to increase access to arbitration; they are not merely advocates of litigation. But they argue that fear of being bound by the award of a “maverick” arbitrator leads many parties to forego arbitration and to take the more costly and time-consuming route through the court system, with its attendant appellate structure.<sup>31</sup> In a 2005 survey of 400 business litigators in California, approximately 87% preferred litigation to arbitration, and those litigators cited the absence of appellate review as a significant reason for that preference.<sup>32</sup> Another study of over 2800 contracts by publicly-traded companies revealed that over 89% of those contracts did not contain mandatory arbitration clauses.<sup>33</sup> These studies suggest that commercial parties, which have more at stake in a dispute, do not believe in the purported benefits of arbitration.

An examination of the statutory and case law under state arbitration statutes will allow for a discussion of the extent to which these grounds for judicial review remain possibilities. Further, this discussion will suggest proposals applicable in the 38 jurisdictions which have rejected judicial review of arbitrators’ findings of fact, conclusions of law, or both, yet which still grapple with arbitra-

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<sup>29</sup> See, e.g., *Anteon Corp. v. BTG, Inc.*, 62 Va. Cir. 41, 44 (Cir. Ct. Fairfax County 2003). Although in this case the trial judge vacated the award, current law would not allow such vacatur. See *infra* Subsection V.B.2.

<sup>30</sup> *Advanced Micro Devices v. Intel Corp.*, 885 P.2d 994, 1012 (Cal. 1994) (Kennard, J., dissenting). See also Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 Alb. L. Rev. 241, 250 (1999).

<sup>31</sup> Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171, 184 (2003) (“[A] party might so fear the work of a maverick arbitrator that arbitration would not be an option.”).

<sup>32</sup> Rebecca Callahan, *Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum* 35–39 (Apr. 7, 2006) (unpublished manuscript, available at <http://law.bepress.com/expresso/eps/1248>), cited in Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 Harv. J.L. & Pub. Pol’y 579, 588 n.30 (2007).

<sup>33</sup> Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 348–50 (2007).

tion's competing concerns of party autonomy, judicial oversight, and finality.

## II. ARBITRATION UNDER STATE LAW

Arbitration procedure is governed first and foremost by statute, because arbitration itself is only enabled by statutory law. Under the common law, courts often refused to enforce agreements to arbitrate a dispute; courts generally believed that arbitration clauses "oust the jurisdiction" of the courts and substantially reduce an individual's ability to seek redress for a future wrong.<sup>34</sup> State legislatures made arbitration agreements enforceable by passing arbitration statutes, based either on the Uniform Arbitration Act, the Revised Uniform Arbitration Act, the Federal Arbitration Act, or a blend of them.

In 1925, Congress passed the Federal Arbitration Act, which enforces arbitration clauses but limits judicial review of arbitral awards. Section 10 of the FAA, dealing with vacatur of awards, provides in pertinent part:

(a) [T]he United States court . . . may make an order vacating the [arbitration] award upon the application of any party to the arbitration—

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the

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<sup>34</sup> The phrase "oust the jurisdiction of the courts" was cited by early opponents of binding arbitration and was attributed to *Kill v. Hollister*, (1746) 1 Wils. 129, 95 Eng. Rep. 532 (K.B.). See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983–84 & n.9 (1942) (noting the "hypnotic power of the phrase"). In fact, *Kill v. Hollister* had used slightly different wording: it asserted that "parties cannot oust this Court." 1 Wils. 129, 129, 95 Eng. Rep. 532, 532. No matter its precise origin, the phrase "oust the jurisdiction of the courts" has had staying power as a criticism of arbitration agreements.

2010]

*Judicial Review of Arbitration Awards*

897

controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>35</sup>

The arbitration statutes of 9 states have incorporated the same or substantially similar grounds into their arbitration statutes.<sup>36</sup>

In 1956, the Commissioners on Uniform State Laws promulgated the Uniform Arbitration Act. Section 12 of that Act limited the grounds for vacatur and modification of arbitral awards, and it provides in pertinent part:

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was

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<sup>35</sup> Federal Arbitration Act of 1925 § 10(a), 9 U.S.C. § 10(a) (2000). The Federal Arbitration Act was preceded by a New York statute passed in 1920. See N.Y. C.P.L.R. 7511 (McKinney supp. 2010).

<sup>36</sup> Compare Conn. Gen. Stat. Ann. § 52-418 (West 2005) (adopting the same grounds as the federal statute), and Ohio Rev. Code Ann. § 2711.10 (Lexis Nexis 2008) (same), with N.Y. C.P.L.R. 7511 (McKinney supp. 2010) (using language similar to the Federal Act's subsections (1), (2), and (4)), and Cal. Civ. Proc. Code § 1286.2 (West 2007) (using language similar to the FAA and UAA).

such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.<sup>37</sup>

Section 12 of the Uniform Arbitration Act, along with its successor, Section 23 of the Revised Uniform Arbitration Act of 2000, was eventually adopted by 38 jurisdictions—often with only minor revisions.<sup>38</sup>

As noted above, the courts of most of these jurisdictions read their arbitration statutes in a restrictive fashion, and they allow judicial review only under the grounds specified by statute.<sup>39</sup>

#### *A. Statutory Avenues for Judicial Review of Awards Under State Law*

Because most states' courts read their arbitration statutes as providing an exclusive list for vacatur, parties' efforts to find judicial relief under the state statutes most commonly rest upon an attempt to give an expansive reading to the existing statutory grounds for vacatur.<sup>40</sup>

##### *1. Judicial Review for Arbitral "Excess of Power"*

Parties challenging an arbitral award have hoped to convince the state court that certain arbitral errors of fact or law can be such that the arbitrators "exceeded their powers" under, for example, Section 12(a)(3) of the Uniform Act or Section 10(a)(4) of the Federal Act. But such arguments are rarely successful. For example, in the Virginia case of *SIGNAL Corp. v. Keane Federal Systems*, a government contractor hit with treble damages for a civil conspiracy hoped to convince the court that the arbitrators "exceeded their powers" when they found civil conspiracy in the absence of concerted action.<sup>41</sup> The Supreme Court of Virginia re-

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<sup>37</sup> Unif. Arb. Act § 12 (1956); see also Rev. Unif. Arb. Act § 23 (2000) (adopting substantially similar grounds for vacatur).

<sup>38</sup> See supra note 15.

<sup>39</sup> See supra notes 17–23 and accompanying text.

<sup>40</sup> In many jurisdictions, the "excess of power" grounds is often cited by parties hoping for a general review of arbitration. Hayford & Peebles, supra note 1, at 359 (discussing challenges to an award when arbitrators allegedly "exceed [their] authority").

<sup>41</sup> 574 S.E.2d 253, 254 (Va. 2003). The damages totaled \$6,883,029. *Id.* The appealing contractor argued that a disregard of the law "is encompassed in the statutory ground

jected the contractor's argument in that case, and in ensuing cases the court consistently held that arbitrators only exceed their powers when they award on an issue that was not submitted to them.<sup>42</sup> Therefore, the Virginia court has held, once a reviewing court determines that the issue in question is arbitrable, its review under the arbitration statute is complete, and "neither the [trial court] nor this Court may review the merits of the arbitrators' decision."<sup>43</sup>

In fact, in other cases, the Supreme Court of Virginia has similarly found that an arbitrator has not "exceeded his powers" when the arbitrator effectively disregards contract provisions or rewrites the contract between the parties,<sup>44</sup> or when the arbitrators award attorney's fees, even when the arbitration agreement does not explicitly confer on the arbitrators such power.<sup>45</sup> Perhaps the only effective form of judicial constraint upon the power wielded by arbitrators in Virginia is the Virginia court's holding that—absent an express agreement by the parties—it is the court, not the arbitrators, that decides whether a dispute is covered by an arbitration agreement.<sup>46</sup>

Given that most state arbitration statutes do not allow expanded review in the guise of a review for arbitrators' "excess of power," a party hoping to limit arbitrators' discretion should do so *ex ante*, by structuring the arbitration clause to limit what matters are submitted to arbitration in the first place. A study of the applicable case law provides for three possible avenues to do so.

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for vacatur where an arbitrator acts in excess of his authority." Reply Brief of Appellant at 8–9, *SIGNAL Corp. v. Keane Fed. Sys.*, 574 S.E.2d 253 (Va. 2003) (No. 020339), 2002 WL 32919663.

<sup>42</sup> *SIGNAL Corp.*, 574 S.E.2d at 257; see also *Lackman v. Long & Foster Real Estate*, 580 S.E.2d 818, 821–22 (Va. 2003) (stating that the only relevant inquiry under Virginia's version of Unif. Arb. Act § 12(a)(3) (1956), codified at Va. Code Ann. § 8.01-581.010(3), is "whether the issues resolved were within the scope of authority granted the arbitrators in the agreement to arbitrate").

<sup>43</sup> *SIGNAL Corp.*, 574 S.E.2d at 257 (construing Va. Code Ann. § 8.01-581.010(3) (1998), which parallels Unif. Arb. Act § 12(a)(3) (1956)).

<sup>44</sup> *Lackman*, 580 S.E.2d at 821 (holding that it was not an excess of power for the arbitrators to disregard provisions of the contract); *SIGNAL Corp.*, 574 S.E.2d at 257 (holding that it was not an excess of power for the arbitrators to essentially rewrite the contract).

<sup>45</sup> *Bates v. McQueen*, 613 S.E.2d 566, 570 (Va. 2005) (allowing the arbitrators to award attorney's fees because the agreement was sufficiently broad).

<sup>46</sup> *Waterfront Marine Const. v. North End 49ers Sandbridge Bulkhead Groups A, B & C*, 468 S.E.2d 894, 898 (Va. 1996).

First, the arbitration clause itself can be used as a means to restrict the arbitrators' power. This method has been attempted in Virginia, with some success. In Virginia, courts interpret a broad arbitration clause, such as one that submits to arbitration "[a]ny claim or controversy arising out of or relating to this Agreement or a breach hereof," to be sufficiently broad to cover all of the parties' disputes, even those that do not spring from the contract itself.<sup>47</sup> Yet a clause that covers disputes "arising out of" the agreement has been interpreted to cover only disputes regarding the specific transactions covered in the contract itself.<sup>48</sup> Further, an arbitration clause can be written even more narrowly; if it covers only "disputes about the amount of liquidated damages" or "disputes relating to the Contract Documents," the courts in Virginia would allow the arbitrators to decide only those issues that match that category.<sup>49</sup>

Second, a party concerned about particular types of awards, such as punitive damages, might hope to structure the arbitration clause in such a way as to avoid those classes of damages. In the Virginia case of *BBF, Inc. v. Alstom Power*, a supplier of a condenser was required to pay liquidated damages to a power company for a condenser's failure.<sup>50</sup> The supplier complained that the power company's Swiss affiliate had assumed the risk for the condenser's failure, and thus the arbitrators had awarded what amounted to punitive damages: that is, monetary damages without actual damages. The Supreme Court of Virginia rejected the supplier's claim, because in that case, the contract did allow the arbitrators to award

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<sup>47</sup> *McMullin v. Union Land & Mgmt. Co.*, 410 S.E.2d 636, 638–39 (Va. 1991). In *McMullin*, the Supreme Court of Virginia held that a dispute over a transaction that was separate to that addressed by the contract nevertheless "related to" the contract, and thus it was covered by a broad arbitration clause. *Id.* at 638.

<sup>48</sup> *Id.*

<sup>49</sup> In contrast to *McMullin*, the court in *Trustees of Asbury United Methodist Church v. Taylor & Parrish* found that the arbitration agreement covered disputes "arising out of, or relating to, the Contract Documents." 452 S.E.2d 847, 852–53 (Va. 1995) (emphasis added). Because a particular order was not made part of the "Contract Documents," it was not covered by the arbitration clause, and thus a dispute about that order could not be submitted to arbitration. *Id.* at 853.

<sup>50</sup> 645 S.E.2d 467, 470 (Va. 2007).

liquidated damages.<sup>51</sup> Based on this logic, a party could seek to limit what kinds of damages the arbitrators could award; for example, parties could contract to submit to arbitration only the amount of compensatory damages for a future injury. In such a case, arbitrators that expressly awarded punitive damages would have “exceeded [their] powers.”<sup>52</sup> Yet ultimately, such a restriction would not completely restrict arbitrators’ discretion; even under such a restriction, an arbitral panel could award any damages it deemed appropriate, merely by designating those damages as flowing from a category of recovery that is authorized by the agreement.

A third avenue that a party could explore to limit arbitrators’ power would entail a more elaborate arbitration agreement that not only restricts the types of disputes that an arbitral panel could resolve, but also expressly restricts the breadth of the panel’s discretion in how it can resolve those disputes. In one Iowa case, the parties constructed an arbitration agreement that provided the following:

The arbitrator shall only have authority to determine the compliance with the provision of [the] Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of [the] Agreement and shall not make any award which in effect would grant to the Union or the Employer any matters which were not obtained in the negotiation process.<sup>53</sup>

Similarly, a cautious contracting party concerned about an arbitration panel’s award in excess of the statutory cap on damages, for example, might draft an agreement that limits the powers of the arbitrators “to those rights and remedies provided by [a given state’s] law,” or that grants the arbitrators the authority “to award damages, not to exceed [a specified amount].”

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<sup>51</sup> Id.; see also Brief of Appellee at 10, *BBF, Inc. v. Alstom Power*, 645 S.E.2d 467 (Va. 2007) (No. 061317), 2002 WL 4701769 (noting that both parties agreed that the contract empowered the arbitrators to award liquidated damages).

<sup>52</sup> See Va. Code Ann. § 8.01-581.010(3) (2009); Unif. Arb. Act § 12(3) (1956).

<sup>53</sup> *O’Malley v. Gundermann*, 618 N.W.2d 286, 289 (Iowa 2000). In this case, the Iowa court decided an issue unrelated to the actual excess of powers—it dealt with the issue of whether the arbitration agreement was an effective “opt-out” of the Iowa arbitration statute’s review of an award for substantial compliance with the evidence. Id. at 292–93.

These three options provide possible avenues for cautious contract drafters who hope to limit the arbitrators' power and empower a court to review the decision of an arbitrator.

## 2. *Judicial Review for Arbitral "Misconduct"*

In some jurisdictions, parties have successfully led a court to review an arbitral award for errors or abuse that rise to the level of "misconduct prejudicing the rights of any party," under Section 12(a)(2) of the Uniform Act, or similar "misbehavior" under Section 10(a)(3) of the Federal Arbitration Act. In Iowa, for example, an arbitral mistake of judgment might justify vacatur if "such mistake is so great as to indicate partisan bias."<sup>54</sup> This principle is nothing new in arbitration; before the passage of the Uniform Arbitration Act in Virginia in 1986, Virginia courts could vacate an award for an error so great that a court could infer "something like improper conduct" on the part of the arbitrators.<sup>55</sup>

But under arbitration statutes, as interpreted by most jurisdictions' courts, it is unlikely that a party could successfully invoke such a review. Current case law in most states suggests that "misconduct" under state arbitration statutes covers only procedural errors by the arbitrators, such as the arbitrators' failure to consider evidence or allow for the examination of witnesses,<sup>56</sup> or the arbitrators' *ex parte* discussion with witnesses.<sup>57</sup>

Furthermore, it is unlikely that a court in a Majority Rule jurisdiction would allow such a review for arbitral "misconduct." Courts in those states are reluctant to review arbitrators' substantive conclusions; the Supreme Court of Virginia, for example, has held that "[t]he arbitrators are the final judges of both law and fact,

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<sup>54</sup> *Vincent v. German Ins. Co.*, 94 N.W. 458, 460 (Iowa 1903); see also *Celtech, Inc. v. Broumand*, 584 A.2d 1257, 1258–60 (D.C. 1991) (suggesting that an award that is "arbitrary or capricious" might rise to the level of evident partiality).

<sup>55</sup> *Morris v. Ross*, 12 Va. (2 Hen. & M.) 408, 413 (1808) (opinion of Roane, J.); see also *Hollingsworth v. Lupton*, 18 Va. (4 Munf.) 114, 117 (1813) (holding that palpable errors are those of such "a nature, as to induce a belief that they must have proceeded from some improper bias in the minds of the arbitrators, or from some gross misbehaviour or inattention").

<sup>56</sup> See, e.g., *Lackman v. Long & Foster Real Estate*, 580 S.E.2d 818, 820 (Va. 2003) (dismissing this argument on other grounds); *Shipman v. Fletcher*, 82 Va. 601, 609 (1886).

<sup>57</sup> See, e.g., *Lloyd v. Nomikos*, 68 Va. Cir. 27, 31 (Cir. Ct. 2005).



their award not being subject to reversal for a mistake of either.”<sup>58</sup> While a court’s review for fraud, corruption, partiality, and other misconduct requires a court to review only the arbitrators’ procedure, a review of the arbitrators’ substantive decisions, even if only to detect partisan bias, requires a court to delve into the merits of the arbitrators’ conclusions.

*B. Existing Safeguards for the Arbitral Process Under State Law*

Although state courts have generally refused to review the substantive decision of arbitrators, state courts have found some *procedural* safeguards within the Uniform Act. For example, despite the reluctance of the Supreme Court of Virginia to review arbitration awards, in *Bates v. McQueen* that court did vacate an arbitration award.<sup>59</sup> In that case, a landowner and a timber company submitted to arbitration their dispute over a timber operation. The arbitrators did not conduct a hearing; instead, one of the three panel members met with the landowner, and then he and another arbitrator—a bare majority of two out of three—awarded \$14,000 in damages to the timber company.<sup>60</sup> The Supreme Court of Virginia vacated the award, holding that a hearing was required under the statute.<sup>61</sup>

The Virginia court in *Bates* placed such an emphasis on proper procedure by the arbitrators precisely because under the law of Virginia—and of the Majority Rule jurisdictions—arbitrators have significant discretion over issues of law and fact.<sup>62</sup> Thus, while the Virginia court has been reluctant to allow a substantive review of the arbitrators’ decision, it has emphasized that legitimate exercise of the decisional powers of the arbitrators inherently requires compliance with certain procedural safeguards.<sup>63</sup> It was for similar reasons that a Virginia trial court vacated an award when the arbitrators contacted some witnesses independently, since such an ex

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<sup>58</sup> *Bates v. McQueen*, 613 S.E.2d 566, 569–70 (Va. 2005) (quotations and citations omitted).

<sup>59</sup> 613 S.E.2d at 567.

<sup>60</sup> *Id.* at 568.

<sup>61</sup> *Id.* at 569–70 (citing Va. Code Ann. § 8.01-581.010(4) (1998), which parallels Unif. Arb. Act § 12(a)(4) (1956)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

parte discussion called into question the integrity of the proceedings.<sup>64</sup>

These procedural safeguards, however, would not satisfy those critics of arbitration who are concerned about arbitrators who might technically follow procedure but grant an award that does not follow from the legal principles or the evidence. To prevent such abuses, courts would have to allow for substantive review of arbitration awards, in addition to the procedural safeguards that are explicitly provided for under most state arbitration statutes.

### III. POTENTIAL AVENUES FOR EXPANDED JUDICIAL REVIEW OF ARBITRATION UNDER STATE LAW: FEDERAL PREEMPTION

Various attempts have been made to enable judicial review of arbitral awards beyond the arbitral “excess of power” and “misconduct” that is explicitly provided for by statute. Possible avenues for enhanced judicial review of arbitral decisions under state law fall into three categories: (1) review of arbitrators’ application of substantive law; (2) review of the propriety of the arbitrators’ award as a matter of public policy; and (3) review of arbitrators’ findings of fact. The following Sections will discuss the current state of such grounds for vacatur of arbitral awards under state law and the prospects for the future adoption of such grounds, through either judicial decision or statutory amendment. A preliminary concern, however, is whether enhanced judicial review of arbitration awards is foreclosed by federal preemption.

In the field of arbitration, the relationship between federal and state law is as important as it is complex. Federal and state arbitration statutes often provide different grounds for judicial review of arbitral awards. Thus, whether a court applies federal or state grounds for vacatur can be a “pivotal determination.”<sup>65</sup> Yet before *Hall Street Associates v. Mattel, Inc.*,<sup>66</sup> the Supreme Court had not commented on whether parties could contract to apply state arbitration law that offered additional grounds for review.

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<sup>64</sup> Lloyd v. Nomikos, 68 Va. Cir. 27, 31 (Cir. Ct. 2005).

<sup>65</sup> See, e.g., Volk v. X-Rite, Inc., 599 F. Supp. 2d 1118, 1123 (S.D. Iowa 2009).

<sup>66</sup> 128 S. Ct. 1396 (2008).

Generally, a federal or state court must apply the FAA to the arbitration of any contract that involves interstate commerce.<sup>67</sup> But parties may contract to apply the general provisions of a state's arbitration statute—such as the type of notice required—instead of the FAA's provisions, even if the contract involves interstate commerce. To do so, the parties must sufficiently express their intent to apply state arbitration law,<sup>68</sup> and those provisions of the state statute must not conflict with the pro-arbitration policies underlying the FAA.<sup>69</sup> Yet if the state statute conflicts with those policies, the FAA will preempt the state law, and the court must disregard the parties' choice of arbitration law and apply the FAA instead.<sup>70</sup>

The Supreme Court has offered little guidance on what sorts of statutory differences conflict with the FAA's policies and trigger preemption. It is at least clear that parties to a commercial contract cannot apply a state arbitration law that applies more scrutiny to arbitration agreements than to normal contracts.<sup>71</sup> But it is still unclear what other sorts of state arbitration procedures and standards conflict with the FAA,<sup>72</sup> and Supreme Court jurisprudence on the issue has been criticized as “murky at best and bizarre at worst.”<sup>73</sup>

The goal of this Section is not to provide a definitive explanation of this “murky” issue. Instead, this Section seeks to provide guidance for states and courts who wish to expand judicial review of arbitral awards under state law and guidance for parties who wish to conduct judicial review of their arbitration under a state arbitration statute.

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<sup>67</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995).

<sup>68</sup> *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 56–57 (1995).

<sup>69</sup> *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477–78 (1989).

<sup>70</sup> *Id.* at 478.

<sup>71</sup> *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 683 (1996) (holding that the FAA preempted Mont. Code Ann. § 27-5-114(4) (1995), which required that arbitration agreements be “typed in underlined capital letters on the first page of the contract”).

<sup>72</sup> See, e.g., *Volt*, 489 U.S. at 479 (holding that parties could contract to apply California law that gave the parties the ability to stay some arbitrations pending the outcome of related judicial proceedings).

<sup>73</sup> Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in Edward Brunet et al., *Arbitration Law in America: A Critical Assessment* 63, 63 (2006).

*A. Preemption and State Arbitration Laws Following Hall Street*

Until *Hall Street*, some commentators were wary of amending state arbitration statutes to provide for additional grounds of judicial review of arbitral awards, either through statutory amendments to a state statute or through judicial recognition of additional, non-statutory grounds for vacatur. In light of current Supreme Court case law, however, the arguments cited by these commentators are no longer persuasive.

These commentators were not wary of amending arbitration statutes generally; state legislatures continually update their state arbitration statutes to reflect their view of the proper role of arbitrators.<sup>74</sup> And in 2000, the Commissioners on Uniform State Laws amended the 1956 Uniform Arbitration Act and promulgated the Revised Uniform Arbitration Act, which has since been adopted by 13 jurisdictions.<sup>75</sup>

Additionally, these commentators recognize the inherent value in amending state arbitration statutes. These state arbitration statutes apply to a number of disputes, such as those issues arising under state causes of action,<sup>76</sup> those issues involving family law<sup>77</sup> and trusts and estates,<sup>78</sup> and situations when parties contract to apply state law through the choice-of-law provisions that are “routinely included” in contracts.<sup>79</sup> Moreover, while the FAA preempts inconsistent state statutes and thus can apply to proceedings in state court,<sup>80</sup> some state courts nevertheless look to their state arbitration statutes for the default rules and procedures governing arbitra-

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<sup>74</sup> For example, since 2000, of the 12 jurisdictions that have adopted the Revised Uniform Arbitration Act, 5 (the District of Columbia, New Mexico, New Jersey, Utah, and Washington) have each slightly altered their statutes.

<sup>75</sup> See Rev. Unif. Arb. Act (2000), general notes.

<sup>76</sup> See, e.g., *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

<sup>77</sup> Family law attorneys increasingly resort to arbitration to resolve divorces. See, e.g., George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. Am. Acad. Matrimonial L. 429, 430–31 (2003). But courts have been reluctant to allow arbitrators full discretion to resolve disputes in one particular area of family law: child custody. See Rev. Unif. Arb. Act § 23 cmt. C.4 (2000).

<sup>78</sup> Virginians, for example, have a long history of using arbitration to resolve disputes over wills and trusts. *Smith v. Smith*, 25 Va. (4 Rand.) 95, 100–01 (1826).

<sup>79</sup> Rev. Unif. Arb. Act (2000), prefatory note; see also Brunet, *supra* note 73, at 64 (“Choice of law clauses, like arbitration clauses, abound.”).

<sup>80</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995).

tion—including the grounds for judicial review of arbitration awards.<sup>81</sup>

Instead, these commentators were concerned that expanding judicial review in particular might be futile since the Supreme Court might rule that the FAA preempts those state grounds.<sup>82</sup> If the FAA preempted state grounds, then the FAA's grounds for judicial review would always govern arbitration of matters involving interstate commerce, no matter the parties' intent.

In large part for this reason, the Commissions on Uniform State Laws declined to expand judicial review of arbitration when they revised the Uniform Act in 2000. The Commissioners considered expanding the statutory grounds for vacatur to allow vacatur for arbitrators' manifest disregard of the law, and to allow vacatur of an award that violated public policy, but a motion to include those two grounds was defeated.<sup>83</sup> The Commissioners worried that there was a "very significant question of possible FAA preemption," which might make such an amendment futile when applied to contracts involving interstate commerce.<sup>84</sup> The Commissioners summarized,

Given [the omission from the FAA of either standard], there is a very significant question of possible FAA preemption of a [sic] such a provision in the [Revised Uniform Arbitration Act], should the Supreme Court or Congress eventually confirm that the four narrow grounds for vacatur set out in Section 10(a) of the federal act are the exclusive grounds for vacatur . . . . As a result, the Drafting Committee concluded not to add these two grounds for vacatur in the statute.<sup>85</sup>

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<sup>81</sup> See, e.g., *SIGNAL Corp. v. Keane Fed. Sys.*, 574 S.E.2d 253, 256 (Va. 2003) ("A [state] circuit court's review of an arbitration award is limited to the specific statutory criteria contained in Virginia's Uniform Arbitration Act.").

<sup>82</sup> See, e.g., Rev. Unif. Arb. Act § 23 cmt. C.5 (2000) (discussed below).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* The Drafting Committee noted two reasons that it chose not to include those two grounds. The first is quoted above. Second, the Commissioners recognized that the case law in many states was still evolving, and thus the time was not proper for the Committee to fashion a "bright line" rule for states. This second rationale justifies the Commissioners' reluctance to impose one "bright line" test on states; however, this observation that state law is evolving only emphasizes the need for careful delibera-

Before *Hall Street*, the uncertain nature of Supreme Court jurisprudence on the preemptive effect of the FAA made that concern justified. After *Hall Street*, that concern no longer exists.<sup>86</sup>

In *Hall Street*, the Supreme Court expressed its view that the FAA would not preempt a state statute's expanded grounds for judicial review. In that opinion, the Supreme Court stated that parties who wished to avoid the exclusive grounds for vacatur under the FAA could do so by "contemplat[ing] enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."<sup>87</sup> This statement indicates that parties can contract to apply state arbitration statutes with expanded grounds for judicial review, without triggering preemption by the FAA. A number of courts, including the California Supreme Court, have already applied this language from *Hall Street* to allow for the application of state law grounds for vacatur.<sup>88</sup>

Thus, under current Supreme Court jurisprudence, states who wish to allow parties to contract for expanded grounds for judicial review for transactions involving interstate commerce are free to do so without being preempted by the more restrictive list of the Federal Arbitration Act. Until *Hall Street*, the Supreme Court was not clear on what types of judicial review would not trigger preemption, but elsewhere the Supreme Court has offered some guidance on how parties must act if they wish to apply state arbitration law.

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tion among state courts and legislatures about the proper grounds for judicial review. Such is the goal of this Note.

<sup>86</sup> See, e.g., 128 S. Ct. at 1406 (discussed below).

<sup>87</sup> *Id.*

<sup>88</sup> *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 599 (Cal. 2008) (holding that through this language, the Supreme Court "unanimously left open other avenues for judicial review [for cases involving interstate commerce], including those provided by state statutory or common law"); see also *Volk v. X-Rite, Inc.*, 599 F. Supp. 2d 1118, 1123–24 (S.D. Iowa 2009) (holding that through this language, the Court in *Hall Street* "implied that parties could contractually adopt state law arbitration rules"). See generally Robert O. Sheridan, Note, All Almost Quiet on the Expanded Review Front: Supreme Court Rejects Expansion of Judicial Review of Arbitration Awards, 13 *Suffolk J. Trial & App. Advoc.* 93, 115–16 (2008) (supporting limited judicial review of arbitration and criticizing *Hall Street* for allowing parties to contractually apply state arbitration statutes with grounds of review broader than those of the FAA).

*B. Drafting Arbitration Agreements to Apply State Arbitration Law*

In order to apply a state arbitration statute to a contract involving interstate commerce, parties must sufficiently express their intent to apply state arbitration law. The Supreme Court in *Mastrobuono v. Shearson Lehman Hutton* set a high bar for what language expresses such intent under federal law.<sup>89</sup> In *Mastrobuono*, investors sued their brokers in an Illinois federal court, and the brokers moved to compel arbitration based on their investment contract.<sup>90</sup> The arbitrators awarded to the investors compensatory damages of \$159,327 and punitive damages of \$400,000.<sup>91</sup> The defendant brokers appealed the award in federal court, arguing that the contract provided that it “shall be governed by the laws of the State of New York,” and New York’s laws prohibit arbitrators from awarding punitive damages.<sup>92</sup>

On appeal, the Supreme Court allowed the punitive damages. The Court noted that it certainly was possible for the parties to provide in their contract that any arbitration would be governed by the arbitration laws of New York.<sup>93</sup> The Court held, however, that parties’ choice-of-law provision itself did not necessarily demonstrate the parties’ intent to apply New York arbitration law. Instead, the Court noted that the parties’ particular clause might have required only that the arbitrators apply New York substantive law, which allowed a court (as opposed to an arbitrator) to award punitive damages.<sup>94</sup> The Court reasoned that the investors’ argument in support of applying New York arbitration law “is persuasive only if ‘New York law’ means ‘New York decisional law, including that State’s allocation of power between courts and arbitrators, notwithstanding otherwise-applicable federal law.’”<sup>95</sup>

Therefore, at least “as a matter of [federal] law,” a standard choice-of-law provision alone is not sufficient to trigger the appli-

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<sup>89</sup> 514 U.S. 52 (1995).

<sup>90</sup> *Id.* at 54.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 53–55.

<sup>93</sup> *Id.* at 58.

<sup>94</sup> *Id.* at 59–60.

<sup>95</sup> *Id.* at 60.

cation of state arbitration law.<sup>96</sup> In fact, even if parties to a contract include language that suggests that they anticipate conflicts between state law and another body of law, and that state law should govern in those instances, a federal court need not find the requisite intent to apply a state's arbitration law.<sup>97</sup> Rather, under *Mastrobuono*, parties must explicitly require the application of state arbitration law, such as a requirement that the arbitration be conducted under the "allocation of power between courts and arbitrators, notwithstanding otherwise-applicable federal law."<sup>98</sup>

State courts interpreting contracts, however, have set lower bars for what constitutes sufficient intent to apply state arbitration law, and the Supreme Court has held that it will not intrude on state courts' interpretations of contracts.<sup>99</sup> For example, in *Volt*, the California Supreme Court held that the parties intended to apply state arbitration law when their contract provided that "[t]he Contract shall be governed by the law of the place where the Project is located," and the U.S. Supreme Court did not disturb the California courts' interpretation of the contract.<sup>100</sup>

Thus, while federal law provides a high bar for what language constitutes a sufficient expression of intent to apply state arbitration law, some state courts, including those of California, conclude that a general choice-of-law provision is sufficient to apply state

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<sup>96</sup> *Volk v. X-Rite, Inc.*, 599 F. Supp. 2d 1118, 1124–25 (S.D. Iowa 2009) (citing *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 996–97 (8th Cir. 1998)); see also *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005), rev'd on other grounds by *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1396 (2008) (stating that "every circuit that has considered the question . . . [has] held that the mere inclusion of a choice-of-law clause within the arbitration agreement is insufficient to indicate the parties' intent to contract for the application of state law concerning judicial review of awards").

<sup>97</sup> See, e.g., *Volk*, 599 F. Supp. 2d at 1123. In that case, the contract included a general choice-of-law provision in favor of Michigan law, combined with a provision that the procedures of the American Arbitration Association ("AAA") would apply "[t]o the extent not displaced by applicable law." But the district court, applying *Mastrobuono*, held that the mere references to instances in which Michigan law "displaced" the procedures of the AAA did not sufficiently signal the parties' intent that Michigan arbitration law should apply. *Id.* at 1123–25.

<sup>98</sup> *Mastrobuono*, 514 U.S. at 60; see also *UHC Mgmt. Co.*, 148 F.3d at 997 (holding that a contract did not sufficiently express intent to apply state arbitration law because the contract did not include such language).

<sup>99</sup> *Mastrobuono*, 514 U.S. at 60 n.4.

<sup>100</sup> *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989).



arbitration law. Nevertheless, parties to contracts involving interstate commerce might find themselves arguing their contract in federal court.<sup>101</sup> Thus, following *Mastrobuono*, parties wishing to apply state arbitration law should not rely on a general choice-of-law provision in the contract, but should instead include specific language that invokes the law of the jurisdiction and its allocation of power between arbitrators and courts.

#### IV. “MANIFEST DISREGARD OF THE LAW” AND OTHER LEGAL ERRORS AS GROUNDS FOR JUDICIAL REVIEW UNDER STATE LAW

While 27 jurisdictions that have adopted the Uniform or Federal Arbitration Acts do not allow a court to review arbitrators’ interpretations of law, 18 jurisdictions that have adopted these statutes allow a court to conduct a review for arbitrators’ “manifest disregard of the law.”<sup>102</sup> Under the definition adopted by most jurisdictions, such disregard occurs “when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case.”<sup>103</sup>

Most notably, before 2008, federal courts allowed such review under the Federal Arbitration Act. The birth of this standard un-

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<sup>101</sup> For example, in *Mastrobuono*, the contract was interpreted by a federal court because the plaintiff investors sued the defendant brokers in federal court “on a variety of state and federal law theories.” 514 U.S. at 54.

<sup>102</sup> Under the Uniform or Federal Acts, a total of 18 states allow review of arbitral mistakes of law. Of those, 7 states allow for review of an arbitral mistake of law and an arbitral mistake of fact, and an additional 11 states allow for review of an arbitral mistake of law only. The 7 states that allow for review of arbitral law and fact are the District of Columbia, Illinois, Maryland, Rhode Island, Texas, Utah, and Wyoming. The 11 states that allow for review of arbitral mistakes of law only are Delaware, Georgia, Kansas, Louisiana, Michigan, Minnesota, Nevada, Pennsylvania, South Carolina, Washington, and Wisconsin. Georgia allows review of arbitral mistake of law under a modified version of the Uniform Arbitration Act. Georgia’s legislature amended its statute to allow review for manifest disregard of the law (see below). Of the remaining jurisdictions, 3 states—Montana, New Jersey, and Oregon—have reported no decisions interpreting the grounds for vacatur; thus, this Note does not include them among the jurisdictions that allow vacatur for arbitral mistake of law. See generally *supra* notes 17–20 and accompanying text.

<sup>103</sup> *Bazze v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 361 (S.C. 2002), vacated on other grounds, 539 U.S. 444, 454 (2003). See generally 1 Martin Domke, *Domke on Commercial Arbitration* § 33.00 (Revised ed. 2001) (summarizing the standard as: “(1) the arbitrator knew of the governing legal precedent yet refused to apply it or ignored it and (2) the law ignored by the arbitrator was well-defined, explicit and clearly applicable to the case”).

der the FAA can be traced to a statement by the Supreme Court in 1953, in *Wilko v. Swan*.<sup>104</sup> In that case the Court, in deciding that the Securities Act of 1933 voided any agreement to arbitrate claims of violations of that Act, stated that “the interpretations of the law by the arbitrators *in contrast to manifest disregard [of the law]* are not subject, in the federal courts, to judicial review for error in interpretation.”<sup>105</sup> A number of federal circuits and state courts interpreted this language to provide for review for “manifest disregard of the law” in the FAA.<sup>106</sup> But in 2008 in *Hall Street Associates v. Mattel, Inc.*, the Court rejected “manifest disregard of the law” as grounds for vacatur of an arbitral disposition under the Federal Arbitration Act. The Court ruled that an allowance of review for legal error “is too much for *Wilko* to bear,”<sup>107</sup> and the Court held instead that the list of grounds for vacatur in the FAA “provide[s] exclusive regimes” for review under that statute.<sup>108</sup>

*A. The Current Status of Review of Arbitration Awards for Legal Error Under State Law*

The U.S. Supreme Court in *Hall Street* specified that while the Federal Arbitration Act limited the grounds for judicial review of awards, other avenues of review were possible.<sup>109</sup> But even if parties contract to apply state arbitration law, many of those statutes do not allow for such review. Neither the Uniform Arbitration Act nor the Federal Act include “manifest disregard of the law” as grounds for vacatur,<sup>110</sup> and many state courts read their state stat-

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<sup>104</sup> 346 U.S. 427 (1953).

<sup>105</sup> *Id.* at 436–47 (emphasis added).

<sup>106</sup> See, e.g., *McCarthy v. Citigroup Global Markets*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Group*, 343 F.3d 57, 64 (2d Cir. 2003). Other circuits, however, have held that the grounds under Section 10 of the FAA are exclusive. See, e.g., *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 1000 (9th Cir. 2003).

<sup>107</sup> 128 S. Ct. 1396, 1404 (2008).

<sup>108</sup> *Id.* at 1406. Following *Hall Street*, both circuit courts and state courts that previously recognized legal error as grounds for vacatur under the FAA have rejected it. See, e.g., *Citigroup Global Markets v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 381 (Ala. 2009).

<sup>109</sup> *Hall St.*, 128 S. Ct. at 1406.

<sup>110</sup> See Rev. Unif. Arb. Act § 23 & cmt. C (2000).

utes in line with the FAA and have foreclosed judicial review for arbitrators' legal error.<sup>111</sup>

For example, the Supreme Court of Virginia has already interpreted Virginia's arbitration statute in line with the U.S. Supreme Court's recent interpretation of the FAA. In the Virginia case of *SIGNAL Corp. v. Keane Federal Systems*, the arbitrators decided that a contractor had breached a no-hiring provision with its sub-contractor.<sup>112</sup> Furthermore, because the arbitrators found that the contractor had illegally conspired with former employees of the sub-contractor, the arbitrators awarded treble damages in the amount of \$6,883,029.<sup>113</sup> The contractor appealed the award, arguing that when the arbitrators found a civil conspiracy without evidence of concerted action, they provided "a text book example of manifest disregard of the law."<sup>114</sup>

In response to the contractor's argument, the Supreme Court of Virginia not only refused to recognize legal error as a standard for review, but it also treated this result as both simple and inescapable under Virginia's version of the Uniform Arbitration Act. The court refused to adopt manifest disregard of the law as non-statutory grounds for vacatur, "because to do so would require that this Court add words to [Virginia's version of Section 12 of the Uniform Arbitration Act]."<sup>115</sup> As for the actual legal error by the arbitrators—that is, that the arbitrators incorrectly interpreted the requirements of the state's conspiracy statute—the court blankly stated: "We express no opinion regarding the correctness of the arbitrators' legal analysis. The issue before this Court is not whether the arbitrators' conclusions were legally correct, but rather,

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<sup>111</sup> See *supra* note 18 (listing states that have rejected review of arbitrators' conclusions of law); see also *Sooner Builders & Invs. v. Nolan Hatcher Constr. Servs.*, 164 P.3d 1063, 1072 n.14 (Okla. 2007) (providing examples of states that have recognized such review); *id.* at 1072 n.15 (providing examples of states that have rejected such grounds for review).

<sup>112</sup> 574 S.E.2d 253, 254 (Va. 2003).

<sup>113</sup> *Id.*

<sup>114</sup> Reply Brief of Appellant at 9–10, *SIGNAL Corp. v. Keane Fed. Sys.*, 574 S.E.2d 253 (Va. 2003) (No. 020339), 2002 WL 32919663.

<sup>115</sup> *SIGNAL Corp.*, 574 S.E.2d at 257 (construing Va. Code Ann. § 8.01-581.010 (1998), which parallels Unif. Arb. Act § 12 (1956)).

whether the arbitrators had the power to resolve the parties' contractual claims."<sup>116</sup>

In *SIGNAL Corp.*, the Supreme Court of Virginia worried that reviewing arbitrators' conclusions of law would allow disgruntled parties to use a "legal error" review to relitigate the merits of the arbitration.<sup>117</sup> The Virginia court's concerns were warranted. In arguing that the arbitrators had misapplied the law, the appellant argued that the arbitrators had misapplied Virginia law by finding statutory conspiracy in the absence of concerted action. Such a claim, however, was essentially a challenge to the arbitrators' conclusion that such concerted action existed—the claim was an attempt to review the arbitrators' finding not for legal error, but because it lacked substantial support in the record.

### *B. Statutory Reform of State Law to Allow Review for Legal Error*

Under most state arbitration statutes as interpreted by their state courts, "manifest disregard of the law" is not grounds for review of an arbitration award. However, narrowly-tailored statutory amendments, based on the experience of Georgia, might allow for judicial review when arbitrators blatantly disregard the law, while still avoiding the specter that courts will necessarily become embroiled in routinely reviewing the merits of an arbitral award.

In 2003, Georgia amended its arbitration statute to allow judicial review for legal error. The previous year, the Supreme Court of Georgia had held that because the state arbitration statute must be strictly construed, arbitrators could disregard the law, and a court was not empowered to vacate the award.<sup>118</sup> The following year, Georgia's legislators amended their state's version of the Uniform Arbitration Act to include vacatur for an "arbitrator's manifest disregard of the law."<sup>119</sup> Subsequently, Georgia courts have inter-

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<sup>116</sup> *Id.* at 256–57. Applying this case law, one Virginia trial court upheld an arbitral award even though the arbitration clause mandated that the arbitrators apply the law of New York, but the arbitrators decided to apply the law of Virginia, because "such a mistake by the arbitrators does not amount to a ground for vacation." *Russo v. Willis*, No. CH03-1052-1, 2004 WL 1386326, at \*2 (Va. Cir. Ct. June 15, 2004).

<sup>117</sup> 574 S.E.2d at 257.

<sup>118</sup> *Progressive Data Sys. v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 475 (Ga. 2002) (citation omitted).

<sup>119</sup> Ga. Code Ann. § 9-9-13(b)(5) (2007); see Brent S. Gilfedder, Note, "A Manifest Disregard of Arbitration?" An Analysis of Recent Georgia Legislation Adding

preted this provision to allow vacatur of an award if the arbitrators were “conscious of the law and deliberately ignore[d] it.”<sup>120</sup>

One option to amend an arbitration statute to provide for legal error would follow the example of Georgia. Under this option, the state arbitration statute could be amended to include “an arbitrator’s manifest disregard of the law” as separate grounds for vacatur. Critics of the Georgia-type amendment, however, argue that an amendment including “manifest disregard of the law” is too uncertain.<sup>121</sup>

An alternative would be to amend the statute to explicitly include not the statutory language from Georgia, but rather the judicial standard that has been adopted by the courts of states that recognize legal error as extra-statutory grounds for vacatur. Such an amendment would read,

Upon application of a party, the court shall vacate an award where:

...

*The arbitrator knew of a governing legal principle that was well-defined, explicit, and applicable and yet refused to apply it.*

While an amendment of this character would allow for a check on arbitrators who deliberately misconstrue the law,<sup>122</sup> such a provision has its drawbacks. This provision would also require that the court delve into the actual arbitrators’ decision to determine whether the arbitrators deliberately disregarded the law. Courts have been properly skeptical of such review; recall that the Vir-

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“Manifest Disregard of the Law” to the Georgia Arbitration Code as a Statutory Ground for Vacatur, 39 Ga. L. Rev. 259, 276 & nn.104–05 (2004) (citing legislators’ comments); see also David Boohaker, Note, The Addition of the “Manifest Disregard of the Law” Defense to Georgia’s Arbitration Code and Potential Conflicts with Federal Law, 21 Ga. St. U. L. Rev. 501, 506–08 (2004).

<sup>120</sup> ABCO Builders v. Progressive Plumbing, 647 S.E.2d 574, 575 (Ga. 2007) (citing *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997)) (holding that the arbitrator’s alleged miscalculation of a damage award did not amount to disregard of the law).

<sup>121</sup> See Gilfedder, *supra* note 119, at 277.

<sup>122</sup> This was apparently the trial court case in *Russo v. Willis*, No. CH03-1052-1, 2004 WL 1386326, at \*2 (Va. Cir. Ct. June 15, 2004), in which the arbitration agreement called for New York law, but the arbitrators applied Virginia law.

ginia court in *SIGNAL Corp.* was especially wary of a party's attempt to use this as an excuse to relitigate the issue on the merits.<sup>123</sup>

These dual concerns of seemingly unbounded judicial review, on the one hand, and unbounded arbitral discretion, on the other, could be obviated through the following statutory amendment, which would require that the legal error appear within the arbitrators' findings:

Upon application of a party, the court shall vacate an award where:

...

*It is evident from the arbitrator's findings of law that the arbitrator knew of a governing legal principle that was well-defined, explicit, and applicable and yet refused to apply it.*

Yet such a statutory amendment might not go as far as some parties would want. Some parties, such as the losing party in *SIGNAL Corp.*, would want to empower the court to vacate an arbitral award not only when the arbitrators deliberately disregarded the law, but also when the arbitrators merely mistook the law in a prejudicial way. To address that concern, the amendment could be built upon the standard provided by Virginia case law before that state adopted the Uniform Arbitration Act.

Before the passage of the Virginia Uniform Arbitration Act in 1986, Virginia courts allowed for a limited judicial review of arbitrators' legal errors by a court of law, so long as the point of law was not doubtful,<sup>124</sup> and so long as that error appeared on the face of the award.<sup>125</sup> But parties could still decide to submit to arbitra-

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<sup>123</sup> 574 S.E.2d at 257.

<sup>124</sup> See, e.g., *Ross v. Overton*, 7 Va. (3 Call) 309, 319 (1802) (allowing a court to interfere only for "plain deviation[s]" from the law, but not for an arbitration panel's decision on a "doubtful question" of law).

<sup>125</sup> See *Howerin Residential Sales Corp. v. Century Realty of Tidewater*, 365 S.E.2d 767, 769–70 (Va. 1988) (holding that, under Virginia law as it existed before the adoption of the Uniform Arbitration Act, "[t]here is no claim that errors were apparent on the face of the award, so that basis for setting aside the award was not available to the trial court"); *Wyatt Realty Enters. v. Bob Jones Realty Co.*, 282 S.E.2d 8, 10 (Va. 1981) (holding that the award was merely an order requiring one party to pay another, and therefore "[n]o mistake of law appears upon the face of the award").

tors a pure question of law without later court interference.<sup>126</sup> This case law sought to preserve the ability of arbitrators to decide questions of law, while providing for a judge's oversight on the arbitrators' interpretations of existing law. Building upon this case law, the amendment could read:

Upon application of a party, the court shall vacate an award where:

...

*A palpable material mistake of law appears on the face of the award.*

The use of this language would allow vacatur not only for disregard of the law, but for accidental error of law.

Yet the foregoing proposed statutory amendments still have one shortcoming: they would only allow a court to review the legal conclusions of arbitrators if those findings are recorded, and arbitrators who sought to avoid judicial oversight altogether could merely decline to enter findings of law.<sup>127</sup> To address this concern, an amendment could include an additional provision to give more explicit control to the parties in determining whether this ground existed, such as the following:

*The court shall not vacate an award on this ground if a party urging the vacatur has not caused the arbitral findings of law to be reported, or if the parties have agreed that a vacatur shall not be made on this ground.*<sup>128</sup>

This separate provision would allow parties to structure their arbitration to either allow for legal review (by requiring the arbitrators to produce written findings of law) or to foreclose that possibility (by agreeing that legal error shall not be grounds for vacatur).

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<sup>126</sup> See, e.g., *Smith v. Smith*, 25 Va. (4 Rand.) 95, 101 (1826) (holding that a submission to arbitration of "whether the property [three slaves] passed by the will or not" was "purely a question of law," and thus no judicial review was allowed).

<sup>127</sup> See, e.g., *Gilfedder*, supra note 119, at 282–83 (noting that arbitrators can still avoid judicial review by omitting written findings of law, because the Georgia statute does not require written findings).

<sup>128</sup> This clause is based on Iowa's statute that allows for judicial review of arbitrators' factual findings. See Iowa Code Ann. § 679A.12(1)(f) (West 1998) (discussed infra Subsection VI.B.2).

In sum, under the Majority Rule, courts are unable to review arbitration awards for arbitral mistakes of law—or blatant misapplication of law. However, standards for judicial review of legal error in other jurisdictions, and in Virginia case law prior to the adoption of the Uniform Arbitration Act, provide viable principles that could be implemented by statute.

#### V. THE “PUBLIC POLICY EXCEPTION” AS GROUNDS FOR JUDICIAL REVIEW UNDER STATE LAW

A number of jurisdictions have adopted the restrictive grounds for vacatur in the Uniform or Federal arbitration statutes but nevertheless allow their courts to vacate an award if the award violates “public policy.”<sup>129</sup> This “public policy exception” was first developed by the Supreme Court in 1983 in *W.R. Grace & Co. v. Local Union 759*, in which the Court held that because of the contractual nature of arbitration agreements, “[a]s with any contract . . . , a court may not enforce [an arbitration] agreement that is contrary to public policy.”<sup>130</sup> Yet courts could only vacate an award if it violated a policy that was “well defined and dominant, . . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”<sup>131</sup> Four years after *W.R. Grace*, in *United Paperworkers International Union v. Misco, Inc.*, the Court went on to justify the public policy exception on the grounds that if a court could not review awards for such violations, the public’s interest would go unrepresented in arbitration.<sup>132</sup> While the Supreme Court in *Hall Street Associates v. Mattel, Inc.* recently rejected “manifest disregard of the law” as grounds for vacatur, that decision seemingly left untouched the public policy exception.<sup>133</sup> The public policy exception is solidly grounded in Supreme Court jurisprudence—unlike the doctrine of “manifest disregard of the law,” which was based on ambiguous language in *Wilko v.*

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<sup>129</sup> Of those states that have considered the issue, Hawaii, Maine, Massachusetts, and Utah allow a court to vacate an arbitration award if the award violates public policy.

<sup>130</sup> 461 U.S. 757, 766 (1983) (quotation and citation omitted).

<sup>131</sup> *Id.* (quotation and citation omitted).

<sup>132</sup> 484 U.S. 29, 42 (1987).

<sup>133</sup> 128 S. Ct. 1396, 1404–06 (2008).



*Swan*.<sup>134</sup> Moreover, the public policy exception is located in courts' inherent power over contracts, which *Hall Street* did not curtail.

Supporters of the public policy exception argue that it provides a safeguard to ensure that arbitrators do not flout the principles laid down by the government. One advocate of the exception noted that without the public policy exception, while gambling debts are unenforceable in Virginia,<sup>135</sup> a Virginia court would be required to enforce a gambling debt if the parties had first submitted that debt to arbitration!<sup>136</sup>

Broad use of a public policy standard for interfering with arbitral decisions, however, has obvious detrimental consequences. A court's public policy scrutiny of arbitral decisions could well eviscerate the finality of arbitration and would specifically open the door to routine judicial review of arbitrators' legal errors. As one critic put it, the availability of such a form of scrutiny "would allow vacatur of *any* arbitration on *any* legal ground, inasmuch as a violation of the law (as viewed by the losing party) can always be recast as a violation of 'public policy.'"<sup>137</sup> These critics defend their rejection of the public policy exception by noting that even if an award violates an explicit public policy, the offended policy would give way to the legislature's clear policy, expressed in the arbitration statute, in favor of the finality of arbitration awards and limited grounds for review of those awards.<sup>138</sup> For example, under that logic, as applied to the gambling scenario above, the policy of finality of arbitration awards would trump the policy against gambling debts.

Because of these competing concerns, and because the case law on the subject is still in flux, the drafters of the Revised Uniform Arbitration Act of 2000 did not expressly include an award's viola-

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<sup>134</sup> *Id.* at 1403–04 (citing *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) and holding that vacatur for "manifest disregard of the law" "is too much for *Wilko* to bear").

<sup>135</sup> Va. Code Ann. §§ 11-14 to -16 (2006) (providing that all gaming contracts are void).

<sup>136</sup> Reply Brief of Appellant at 2, 11, *BBF, Inc. v. Alstom Power*, 645 S.E.2d 467 (Va. 2007) (No. 061317), 2006 WL 4701770.

<sup>137</sup> Brief of Appellee at 2, *BBF, Inc. v. Alstom Power*, 645 S.E.2d 467 (Va. 2007) (No. 061317), 2006 WL 4701769.

<sup>138</sup> *Id.* at 26–27.

tion of public policy as grounds for vacatur of arbitral decisions.<sup>139</sup> Instead, the drafters remained silent on the issue, in part to let jurisdictions themselves decide whether to adopt the public policy exception.<sup>140</sup>

Nevertheless, even without an express provision in the Uniform Acts, a number of state courts have applied the reasoning of *W.R. Grace* and *Misco* to find a similar public policy exception within their own statute. For example, in construing its state statute, the Supreme Court of Utah borrowed the language of the U.S. Supreme Court in allowing for vacatur of an award if the award violates a “well-defined and dominant” public policy, which the court determines based on a “review of the relevant laws and legal precedents.”<sup>141</sup>

State courts have differed on whether that exception is statutory or non-statutory. The Supreme Court of Utah has held that, “[r]ather than being a statutory ground, the public policy exception is a judicially created ground for vacating an arbitration award,” which is based on a court’s power over contracts.<sup>142</sup> Other states have found the public policy exception to be implied in the arbitration statute itself. The Supreme Judicial Court of Massachusetts, for example, holds that arbitrators “may not ‘award relief of a nature which offends public policy *or* which directs or requires a result contrary to express statutory provision,’”<sup>143</sup> because “[s]uch an award is beyond the arbitrator’s powers.”<sup>144</sup> Thus, in Massachusetts, the public policy exception is recast under the state arbitration provision that corresponds with Section 12(a)(3) of the Uniform Arbitration Act, which allows vacatur if the arbitrators “exceeded

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<sup>139</sup> Rev. Unif. Arb. Act § 23 cmt. C (2000). In fact, in committee a previous version of the Uniform Arbitration Act allowed vacatur if “[t]he arbitrators exceeded their powers, or rendered an award contrary to public policy,” but an amendment struck the second clause. Unif. Arb. Act § 12 (1956).

<sup>140</sup> Rev. Unif. Arb. Act § 23 cmt. C (2000).

<sup>141</sup> *Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941, 951 (Utah 1996) (citing and quoting *Misco*, 484 U.S. at 42, 44 and citing *W.R. Grace*, 461 U.S. at 766).

<sup>142</sup> *Id.*

<sup>143</sup> *Mass. Highway Dep’t v. Am. Fed’n of State, County & Mun. Employees*, 648 N.E.2d 430, 432 (Mass. 1995) (quoting *Plymouth-Carver Reg’l Sch. Dist. v. J. Farmer & Co.*, 553 N.E.2d 1284, 1286 (Mass. 1990)).

<sup>144</sup> *Id.* at 432. The Massachusetts statute in question is Mass. Gen. Laws Ann. ch. 150C, § 11(a)(3) (West 2004).

their powers.”<sup>145</sup> This distinction regarding the source of the public policy exception is important because, while some jurisdictions have not yet ruled on the public policy exception, and the reasoning of some jurisdictions would preclude a statutory or a non-statutory exception—in that they have already held that the “excess of power” inquiry is limited to disputes that are arbitrable—other jurisdictions have precluded any non-statutory grounds for vacatur.<sup>146</sup>

*A. The Current Status of the Public Policy Exception Under State Law*

While some state courts have followed the lead of the U.S. Supreme Court and adopted a public policy exception, courts in the Majority Rule jurisdictions have seemed more skeptical of this exception because it, too, would allow a court to review arbitrators’ decisions. For example, the Supreme Court of Virginia refused to hold that there is inherent in the system the power to review arbitration awards for conflicts with established Virginia legal policy.<sup>147</sup>

This leads to an odd paradox. The Supreme Court in *Hall Street* foreclosed review of arbitral findings of fact and conclusions of law under the Federal Arbitration Act, but a substantial number of states still allow such review.<sup>148</sup> Meanwhile, the Supreme Court has expressly allowed the public policy exception, while many states oppose it. For the party to an interstate commercial transaction who desires public policy review, then, the easy solution would be to conduct the arbitration of the dispute under the Federal Arbitration Act. Yet such a move would grant that party *only* public policy review, as the Federal Arbitration Act does not allow review of findings of fact and conclusions of law. Therefore, for the party seeking public policy review, the most expedient route would be to amend state law to allow for both the desired measure of review of arbitral law and facts and some measure of a public policy exception.

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<sup>145</sup> Unif. Arb. Act § 12(a)(3) (1956).

<sup>146</sup> See, e.g., *SIGNAL Corp. v. Keane Fed. Sys.*, 574 S.E.2d 253, 257 (Va. 2003) (narrowly construing “excess of power” and refusing to add words to the Virginia version of the Uniform Arbitration Act).

<sup>147</sup> *BBF, Inc. v. Alstom Power*, 645 S.E.2d 467, 469–70 (Va. 2007).

<sup>148</sup> See *supra* notes 17–23 and accompanying text.

The reasoning of the Supreme Court of Virginia is instructive on the skepticism of some courts of the public policy exception. In the Virginia case of *BBF, Inc. v. Alstom Power*, a dispute arose over the failure of a condenser unit provided to a power company, and the arbitrators awarded damages of \$2,738,178 to the power company.<sup>149</sup> The supplier of the condenser appealed the award, arguing that the power company had suffered no damages because the company's Swiss affiliate had assumed the risk for such failures.<sup>150</sup> The supplier argued the arbitrators exceeded their powers. Since there were no actual damages, the award amounted to punitive damages, which violated Virginia's public policy against punitive damages for a contract.<sup>151</sup>

Perhaps because the Supreme Court of Virginia in *SIGNAL Corp. v. Keane Federal Systems* had already declared that it would not add grounds to the Virginia statute, the condenser supplier argued that the public policy exception was a *statutory* ground for vacatur.<sup>152</sup> In line with the reasoning of the Massachusetts court, the supplier argued that arbitrators “*exceed their powers* when they purport to enforce agreements for punitive contract damages as in this case, or for gambling debts, or to waive future negligence, in other cases.”<sup>153</sup>

In support of its argument, the supplier cited an earlier Virginia trial court decision that interpreted existing case law to allow for “instances in which an arbitrator exceeds her powers by issuing an award of arbitration that goes against Virginia's public policy.”<sup>154</sup> In that case, the arbitrators found that a party violated a non-compete clause, so the arbitrators banned the guilty party from hiring the other party's employees.<sup>155</sup> According to the trial court, such an award violated Virginia's public policy against unreasonable re-

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<sup>149</sup> 645 S.E.2d at 468.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 468–69.

<sup>152</sup> Reply Brief of Appellant at 2, *BBF, Inc. v. Alstom Power*, 645 S.E.2d 467 (Va. 2007) (No. 061317), 2006 WL 4701770.

<sup>153</sup> *Id.* (emphasis added).

<sup>154</sup> *Id.* at 11 (citing and quoting *Anteon Corp. v. BTG, Inc.*, 62 Va. Cir. 41, 44 (Cir. Ct. 2003)).

<sup>155</sup> *Anteon*, 62 Va. Cir. at 41–42, 45. The case was remanded to the arbitrators to adjust this award, and the new award was never appealed.

straints on trade.<sup>156</sup> If the parties themselves had drawn up such a contract, the trial judge reasoned, the court would have refused to enforce it, so the court similarly refused to uphold the arbitrators' award.<sup>157</sup>

In its opinion in *BBF*, the Virginia court squarely rejected these arguments. The court dismissed the argument that the public policy exception amounted to an excess of arbitral power,<sup>158</sup> and it declined to address the reasoning of the earlier trial court case on that exception. Instead, the court merely stated that it had "consistently rejected efforts to vacate an arbitration award on grounds not specified in [Virginia's version of the Uniform Arbitration Act]"<sup>159</sup> and concluded that the "claim that the award of liquidated damages violated public policy does not state a ground [under the statute] for vacating an arbitration award."<sup>160</sup>

*B. Prospects for the Allowing the Public Policy Exception Under State Law*

It is no surprise that some courts in the Majority Rule jurisdictions have declined to recognize the public policy exception. The public policy exception suffers the same defect as review for legal error: it requires the court to analyze in some measure the decisions of the arbitrators, which seems beyond the reach of the statute. It was for that reason that the Supreme Court of Virginia in *BBF* explicitly rejected the public policy exception as either statutory grounds for vacatur or as non-statutory grounds.

In fact, it is noteworthy that the Supreme Court of Virginia paid no attention to the practical implications of its decision, such as the supplier's claim that a future court would be forced to uphold an arbitration of gambling debts. Rather than address such concerns, the Virginia court merely interpreted the statute and rejected outright the proposed applicability of public policy review of arbitration decisions. Nevertheless, even in such jurisdictions whose courts have rejected the public policy exception, some potential

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<sup>156</sup> Id. at 44 (citing *Modern Env'ts v. Stinnett*, 561 S.E.2d 694, 695 (Va. 2002)).

<sup>157</sup> Id.

<sup>158</sup> *BBF*, 645 S.E.2d at 469.

<sup>159</sup> Id. The statute in question is Va. Code Ann. § 8.01-581.010 (2007), which parallels Unif. Arb. Act § 12(a) (1956).

<sup>160</sup> *BBF*, 645 S.E.2d at 770.

avenues exist to challenge an arbitration award that violates public policy.

### *1. Unconscionable Arbitration Agreements Under State Law*

The Virginia court's blanket dismissal of the public policy exception must have been particularly unsatisfactory to the equipment supplier in *BBF*, who argued that if Virginia did not adopt the public policy exception, it would be forced to uphold arbitration awards that themselves went against public policy, such as an arbitration of a gambling debt. But even in Virginia after *BBF*, a court might not be forced to uphold such an award.

Section 1 of the Uniform Arbitration Act and Section 2 of the Federal Arbitration Act both provide that an arbitration *agreement* is valid, enforceable and irrevocable, except "upon such grounds as exist at law or in equity for the revocation of any contract."<sup>161</sup> In one case handed down before the Supreme Court of Virginia had spoken on the public policy issue, Virginia's intermediate appellate court upheld an arbitration agreement as not against public policy; in so doing, it held that "[a]rbitration agreements *and the award embodied in them* shall not be set aside on appeal unless there exists grounds to set aside a contract in equity such, as unconscionability or, as contrary to public policy."<sup>162</sup> The parties to a later case before the Supreme Court of Virginia debated the value of this logic, but the court did not resolve this dispute over the scope and application of this aspect of its state arbitration statute.<sup>163</sup>

Thus, it is still feasible for an aggrieved party to invoke Section 1 of the Uniform Arbitration Act or Section 2 of the Federal Arbitration Act to vacate an award, not by attacking the award itself, but by attacking the arbitration agreement on which that award is

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<sup>161</sup> Unif. Arb. Act § 1 (1956) (providing that an arbitration agreement is "valid, enforceable and irrevocable"); Federal Arbitration Act of 1925 § 2, 9 U.S.C. § 2 (2000) (similarly providing that an arbitration agreement is "valid, irrevocable, and enforceable").

<sup>162</sup> *Bandas v. Bandas*, 430 S.E.2d 706, 708 (Va. Ct. App. 1993) (emphasis added).

<sup>163</sup> *Lackman v. Long & Foster Real Estate*, 580 S.E.2d 818, 821 (Va. 2003); see Reply Brief of Appellant at 11–12, *Lackman v. Long & Foster Real Estate*, 580 S.E.2d 818 (Va. 2003) (No. 021985), 2003 WL 24301405; Brief of Appellees at 15–16, *Lackman v. Long & Foster Real Estate*, 580 S.E.2d 818 (Va. 2003) (No. 021985), 2003 WL 24301406. The statute at issue was Va. Code Ann. § 8.01-581.01 (1998), which parallels Unif. Arb. Act § 1 (1956).

based. Of course, the victorious party to such arbitration would naturally argue that the public policy in favor of the finality of an award is especially implicated when a party submits to arbitration and then later seeks to avoid the binding effect of the contractually-agreed disposition mechanism. Some federal circuit courts of appeals have allowed review either before or after the arbitration has taken place.<sup>164</sup> Still, judicial review of an arbitration award based on the arbitration agreement has not been totally foreclosed even under the strict Virginia courts' reading of its statute. Therefore, judicial review of the arbitration *agreement* remains a path for a court that is reluctant to compromise the judiciary by supporting a contract that is against public policy.

## *2. Unconscionable Arbitration Awards Under State Law: A Limited Public Policy Exception*

While the public policy exception might allow vacatur for any award that violates public policy, some courts apply a narrower version of the public policy grounds. Under this more limited formulation of the public policy exception, a court cannot vacate an award merely because the award itself conflicts with a "well-defined and dominant" public policy; rather, the court can only vacate the award if *compliance* with the award violates such a public policy—for example, if the award compels one of the parties to violate a statute.<sup>165</sup>

The Supreme Court in *Misco* explicitly refused to reach the issue of whether the public policy exception was limited to circumstances in which compliance with an award violated public policy,<sup>166</sup> and

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<sup>164</sup> See, e.g., *Delta Air Lines v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 670–71 (11th Cir. 1988) (stating merely that "[i]t can hardly be denied that public policy would forbid the enforcement of a contract submitting to arbitration whether a complaint to the EEOC of racial discrimination constitutes just cause for discharge," without reference to whether the enforcement would depend on whether the arbitration was challenged before or after the arbitration was submitted).

<sup>165</sup> See 21 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 57:138 (4th ed. 2001) (defining the two types of the public policy exception as (1) when the award conflicts with, or violates, or is contrary to an identified public policy, and (2) when the award requires a violation of public policy).

<sup>166</sup> 484 U.S. at 45 n.12; see also *id.* at 46 (Blackmun, J., concurring) (interpreting the majority opinion to leave that question to another day). The Court in *W.R. Grace* had ambiguously stated that the public policy exception applied when the contract's "*interpretation*" violates public policy. 461 U.S. at 768 (emphasis added).

some federal circuit courts have adopted the narrower view of the public policy exception, or both the broader and narrower views.<sup>167</sup> For example, the Second Circuit, in *Diapulse Corp. of America v. Carba, Ltd.*, vacated an award on this narrower ground, holding that “an award may be set aside if it compels the violation of law.”<sup>168</sup> In that case, the court reviewed an award that appeared to constitute a permanent restraint on competition between a manufacturer of a product and its supplier.<sup>169</sup> The court held that it could not affirm such a permanent arrangement, since it would compel the parties to violate the federal public policy against unreasonable restraints on trade; the court therefore remanded the case for the trial court to determine whether the award was a permanent restraint on trade.<sup>170</sup>

The more limited public policy exception only requires that the court measure the conduct of the parties after the award. By contrast, the more general public policy exception, which allows for vacatur when the award generally conflicts with public policy, would require the court to delve into the merits of the arbitral decision. Indeed, this was precisely the path that the appealing equipment supplier hoped the Virginia court would take in *BBF*; that party complained not that the award to the power company violated public policy, but that the manner in which the arbitrator reached that decision violated public policy.

This more limited public policy exception would seemingly respond to the concerns of both camps: it would provide a remedy for parties in exceptional circumstances, but it would be simple to consistently implement, and it would prevent a review of the arbitrators’ findings of fact or law.<sup>171</sup> Under the narrower version of the public policy exception, for example, a court could easily and quickly review an award to determine if it constituted a perpetual

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<sup>167</sup> Rev. Unif. Arb. Act § 23 cmt. C.1 (2000) (“[A]ll of the federal circuit courts of appeals have embraced one or both of these standards.”).

<sup>168</sup> 626 F.2d 1108, 1110–11 (2d Cir. 1980). In the same case, the Second Circuit also adopted the broader formulation: it allowed vacatur of an award “contrary to a well accepted and deep rooted public policy.” *Id.*

<sup>169</sup> *Id.* at 1110.

<sup>170</sup> *Id.*

<sup>171</sup> See, e.g., Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 734, 820–23 (1996).



restraint on trade or exceeded a statutory cap on damages.<sup>172</sup> Nevertheless, despite the arguments in favor of a narrow public policy exception, its application in some states, such as Virginia, is still in doubt because this ground for vacatur is not enumerated by statute.

#### VI. FACTUAL ERROR AS GROUNDS FOR REVIEW OF ARBITRAL AWARDS UNDER STATE LAW

Most jurisdictions are especially wary of allowing a court to review arbitrators' findings of fact, since such a judicial review would necessitate some reconsideration of the evidence presented in the arbitration proceedings. If a trial court were to review the arbitrators' findings of fact, a party to arbitration would find itself wading through the court system, relitigating not only the neutrality of the arbitrators or their interpretation of the law, but the actual *merits* of the case and such issues as the credibility and sufficiency of evidence on various points. In the name of the finality of arbitration, such a review is generally unavailable to aggrieved parties, even when the arbitrators committed serious factual errors; for example, the Supreme Court of Alaska has held that "the arbitrator's findings of fact are unreviewable, even in the case of gross error."<sup>173</sup> Nevertheless, some jurisdictions have adopted the Uniform or Federal Acts but still allow a court to vacate an award for factual errors by the arbitrators.<sup>174</sup>

Such factual review would provide a unique check on arbitral discretion. A court's review for arbitrators' legal errors, and for conflicts between an award and public policy, addresses the con-

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<sup>172</sup> See, e.g., *Diapulse*, 626 F.2d at 1110; see also the trial court's disposition in *Anteon Corp. v. BTG Inc.*, Nos. 182218, 177204, 2003 WL 21659449, at \*2 (Va. Cir. Ct. Fairfax County May 6, 2003), in which the court was able to quickly determine that the award required a party to violate public policy.

<sup>173</sup> *Gilbert v. State Farm Ins. Co.*, 171 P.3d 136, 138 (Alaska 2007) (quotation omitted). But if the arbitration does not proceed under the Uniform statute, as in labor disputes or compulsory arbitration, review is permissible. *Id.* at 138 n.7.

<sup>174</sup> There are 8 jurisdictions whose courts allow judicial review of arbitral findings of fact, although their statutes do not expressly allow it. Those jurisdictions are the District of Columbia, Illinois, Maryland, Rhode Island, South Dakota, Texas, Utah, and Wyoming. Iowa has amended its version of the Uniform Act to allow such review (see below). The precise nature of the factual error that triggers vacatur differs by jurisdiction. See generally *supra* notes 21–23 and accompanying text.

cerns of critics of an arbitration panel's ability to flout the law. But such avenues for review do not provide oversight of an arbitrator who might disregard not the law, but the *facts*. Businesses are especially vulnerable to "maverick" arbitrators who disregard the evidence, because the stakes of a claim against a business are generally higher, and because an award of treble damages or punitive damages might be possible under certain facts.<sup>175</sup> In one "cautionary" tale for businesses, an arbitrator decided against a corporation and awarded a lump sum of \$1,670,000, despite the fact that the award exceeded the contract price for undelivered products and that the agreement between the parties specifically disallowed recovery for lost profits and consequential damages.<sup>176</sup> Yet it would require a careful and balanced standard of review for factual error to address those concerns while preserving the finality of arbitration.

*A. The Current Status of Review for Factual Error Under State Law*

Under most state arbitration statutes as interpreted, courts may not review the arbitrators' findings of fact. For example, the Supreme Court of Virginia has held that its version of the Uniform Arbitration Act provides that "[t]he arbitrators are the final judges of both law and fact, their award not being subject to reversal for a mistake of either."<sup>177</sup> Of course, both the Uniform and Federal Acts allow a court to modify an award for "an evident miscalculation of figures."<sup>178</sup> But this provision only applies if the arbitrators merely miscalculated the damages due; it does not apply to overturn the arbitrators' determination of the way to calculate those damages.<sup>179</sup>

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<sup>175</sup> Brief of Amici Curiae New England Legal Foundation and National Federation of Independent Business Legal Foundation in Support of Petitioner on the Merits at 14, *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989), 2007 WL 2344617 (citing *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551 (2d Cir. 1985) and *Advanced Micro Devices v. Intel Corp.*, 885 P.2d 994 (Cal. 1994)).

<sup>176</sup> *Id.* at 14 (citing *Koch Oil*, 751 F.2d).

<sup>177</sup> *Bates v. McQueen*, 613 S.E.2d 566, 570 (Va. 2005).

<sup>178</sup> Unif. Arb. Act § 13(a)(1) (1956); Federal Arbitration Act of 1925 § 11(a), 9 U.S.C. § 11(a) (2006) (providing for correction of an award for an "evident material miscalculation of figures"); see also Rev. Unif. Arb. Act § 24(a)(1) (allowing modification for an "evident mathematical calculation").

<sup>179</sup> See *Calcote v. Fraser Forbes Co.*, 621 S.E.2d 403, 406 (Va. 2005) (in which the parties stipulated on brief that a court is "required to apply the terms of the arbitra-

*B. Prospects of Statutory Reform of State Law to Allow Review for Factual Error*

Given the absence of factual error from the grounds for vacatur under the Uniform or Federal Acts and the refusal of most courts to read such grounds into the statute, a narrowly crafted amendment to the statute may be one of the few mechanisms to allow review of arbitrators' findings of fact.

*1. Statutory Reform to Allow Review for Factual Errors Apparent in the Award*

In order to provide for judicial review of factual error, but to limit the scope of that review, an amendment to a statute could allow for vacatur only for mistakes that are plainly evident. In fact, before it adopted the Uniform Arbitration Act in 1986, Virginia's arbitration statute allowed such limited review: by statute, the court could vacate an award for "errors apparent on [the award's] face."<sup>180</sup> Under that prior statute, as for mistakes that were not present on the face of the award, courts could only review arbitration proceedings for procedural errors.<sup>181</sup> In practice, however, Virginia courts were hesitant to undertake any review of the arbitrators' findings of fact; in one case, the court refused to reconsider those findings, even though one of the arbitrators realized soon after the hearing that he had made a mistake of fact.<sup>182</sup>

To effectively incorporate the doctrine from both this earlier Virginia statute and the prior case law, the text of Section 12 of the Uniform Act could be amended to insert a new ground for vacatur for plain factual errors, such as the following:

Upon application of a party, the court shall vacate an award where:

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tion award and the court [does] not have the authority to consider the issues resolved by the Award or otherwise change the Award").

<sup>180</sup> *Shermer v. Beale*, 1 Va. (1 Wash.) 15, 18 (1791). The Supreme Court of Virginia summarized that such a restriction meant that "no calculations or grounds for an award, which are not incorporated in it, or annexed to it at the time of delivery, are to be regarded or received as reasons or grounds to avoid it." *Wyatt Realty Enters., Ltd. v. Bob Jones Realty*, 282 S.E.2d 8, 9 (Va. 1981) (quotation omitted).

<sup>181</sup> *Head v. Muir*, 24 Va. (3 Rand.) 122, 135 (1825).

<sup>182</sup> *Pollard v. Lumpkin*, 47 Va. (6 Gratt.) 398, 404 (1849).

*Errors of fact are apparent on the face of the award.*

Because this amendment restricts the court's review to errors "on the face of the award," it prevents parties from relitigating the arbitration in court. For example, this amendment would allow vacatur of the award under the facts of *United Paperworkers International Union v. Chase Bag Co.*, decided before Virginia adopted the Uniform Arbitration Act.<sup>183</sup> In that case, the court vacated an award because it concluded that it was obvious from the award that the arbitrator had been grossly inattentive to the provision in a union's contract that set a limitations period on the filing of grievances.<sup>184</sup>

The inclusion of this amendment would allow judicial review when it was evident from the award that an arbitrator had mistaken obvious facts, but it would otherwise leave the arbitrator with the discretion to interpret the evidence. One must keep in mind, however, that even with such an amendment, a "maverick" arbitrator might still present his findings in a way that avoided judicial review. To address this concern, a more elaborate amendment to the statute would be required.

*2. Statutory Reform to Allow Review for Irrational or Unsubstantiated Awards*

The core concern expressed by businesses in their critique of arbitral discretion is that arbitrators' determinations of the facts are unreviewable; an arbitrator has the power to award a monetary amount that is not supported by the facts of the case.<sup>185</sup> Yet state courts generally do not allow sweeping review of awards. For example, the Supreme Court of Virginia has rejected parties' attempts to obtain judicial review of awards, even those "with no rational basis," because review in such cases would necessarily involve relitigation of the merits.<sup>186</sup>

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<sup>183</sup> 281 S.E.2d 807 (Va. 1981).

<sup>184</sup> *Id.* at 810 (quoting *Hollingsworth v. Lupton*, 18 Va. (4 Munf.) 114, 117 (1813)).

<sup>185</sup> See Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 Alb. L. Rev. 241, 248-53 (1999); *supra* notes 26-30 and accompanying text (discussing the concerns of businesses).

<sup>186</sup> See *SIGNAL Corp. v. Keane Fed. Sys.*, 574 S.E.2d 253, 258 (Va. 2003). In *SIGNAL Corp.*, a contractor complained that in calculating damages for wrongful termination, the arbitrators included opportunities to which the subcontractor had not

To address this concern, Iowa has amended its version of the Uniform Arbitration Act to allow for restricted review of arbitrators' findings of fact, should the parties so desire. In general, Iowa has taken the same approach to review of arbitration as the Majority Rule: the Supreme Court of Iowa has held that "[a]s long as an arbitrator's award does not violate one of the provisions of [the statute], we will not correct errors of fact or law."<sup>187</sup>

Iowa has amended its statutory list of grounds for vacatur, however, to allow a court to review an arbitration panel's award to ensure that it is supported by "[s]ubstantial evidence." The statute now provides:

1. Upon application of a party, the district court shall vacate an award if any of the following apply:

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f. Substantial evidence on the record as a whole does not support the award. The court shall not vacate an award on this ground if a party urging the vacation has not caused the arbitration proceedings to be reported, if the parties have agreed that a vacation shall not be made on this ground, or if the arbitration has been conducted under the auspices of the American arbitration association [sic].<sup>188</sup>

The Supreme Court of Iowa has interpreted the "substantial evidence" requirement to mean that "[t]he ultimate question is whether the evidence supports the finding actually made, not whether the evidence would support a different finding."<sup>189</sup> For purposes of review, an award under this standard is "akin to that of a verdict of a jury."<sup>190</sup> The award is upheld if "a reasonable person would accept the evidence as sufficient to reach a conclusion,"<sup>191</sup>

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been entitled. The court found this argument procedurally barred, but under other aspects of previously articulated Virginia case law it is unlikely that such a challenge would have prevailed if permitted.

<sup>187</sup> *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 839 (Iowa 2007) (citing *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 515 (Iowa 1992)).

<sup>188</sup> Iowa Code § 679A.12(1)(f) (2009).

<sup>189</sup> *Ales*, 728 N.W.2d at 839 (quotation omitted).

<sup>190</sup> *LCI, Inc. v. Chipman*, 572 N.W.2d 158, 162 (Iowa 1997) (citation omitted).

<sup>191</sup> *Humphreys*, 491 N.W.2d at 516 (citation omitted).

whereas evidence is not “insubstantial merely because different conclusions can be drawn from the evidence.”<sup>192</sup>

In fact, Iowa courts seem to review arbitration awards more deferentially than jury findings. Unlike a jury, arbitrators may be encouraged to rely on industry-specific professional experiences in assessing evidence, which courts may consequently be hesitant to second-guess.<sup>193</sup>

As a default, the Iowa provision expressly grants the parties review of the sufficiency of the evidence. But parties may contract to avoid this type of review by providing in their arbitration agreements that (1) the arbitration proceedings will not be recorded, (2) no “substantial evidence” review will be allowed, or (3) the American Arbitration Association will govern the arbitration proceedings. Those parties who wish to secure the finality of the award thus have the ability to do so. Then again, because most arbitration proceedings are not recorded, the practical effect of this provision is to limit the number of awards eligible for this review. This provision does not require parties to record proceedings (increasing the cost of arbitration) because parties can choose whether to allow such review.<sup>194</sup>

Thus, Iowa has amended its statute to provide for limited review of arbitrators’ findings of fact. This default provision provides for no more review than a typical arbitration statute, since arbitration proceedings are usually not recorded, but the statute expressly allows *more* judicial review than the Uniform or Federal Acts allow on their own.

A similar amendment to a state arbitration statute that allowed “substantial evidence” review would address concerns about “maverick” arbitrators. In practice, this amendment would provide for a similar method of review as a court would give a jury’s findings. This provides a safeguard against irrational arbitration awards, just as an appellate court’s review of a jury’s finding pre-

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<sup>192</sup> *Ales*, 728 N.W.2d at 829 (citing *State v. Dohlamn*, 725 N.W.2d 428, 430 (Iowa 2006)).

<sup>193</sup> See, e.g., *LCI*, 572 N.W.2d at 161–62.

<sup>194</sup> The cost concern was raised by the National Conference of Commissioners on Uniform State Laws in Revised Uniform Arbitration Act § 23 cmt. B (2000). The Commissioners worried that the possibility of review would make arbitration more expensive because all parties would ensure that the proceedings were recorded to support a later appeal. *Id.*

vents irrational jury awards. Moreover, Iowa's provision allows parties who so desire to avoid this level of review and guarantee immediate and absolute finality for their award.

There is a concern that trial judges, who usually conduct (or at least supervise) the fact-finding process, might be unable to evaluate arbitrators' findings of fact with a proper level of deference. But trial judges do often already review findings of fact with certain deference. For example, in Virginia, a trial court may appoint a commissioner in chancery to conduct hearings and report findings of fact and law to the court.<sup>195</sup> Technically, these reports do not have the weight of a jury verdict on conflicting evidence,<sup>196</sup> but nevertheless the commissioner's report is "armed with a presumption of correctness,"<sup>197</sup> and the commissioner's factual findings are sustained unless the trial court concludes they are not supported by the evidence or are "plainly wrong."<sup>198</sup> Nevertheless, a jurisdiction might feel more comfortable taking this review out of the hands of the trial court altogether; in that case, the statute could be amended to provide that parties may appeal an arbitral panel's findings of fact not to a trial court, but to an *appellate* court, which is more accustomed to deferring to findings of fact by a lower tribunal.<sup>199</sup>

#### VII. NON-JUDICIAL AVENUES FOR REVIEW OF ARBITRATION AWARDS

In sum, the current prospects for substantive judicial review of arbitration awards under state law are poor. For transactions involving interstate commerce, the Supreme Court has recently held that the Federal Arbitration Act does not allow vacatur for legal or factual errors,<sup>200</sup> and while parties can contract to apply state law,

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<sup>195</sup> Va. Sup. Ct. R. 3:23(d) (2009) ("The commissioner shall prepare a report stating his findings of fact and conclusions of law with respect to the matters submitted [to him].").

<sup>196</sup> Va. Code Ann. § 8.01-610 (2007).

<sup>197</sup> *Morris v. United Va. Bank*, 377 S.E.2d 611, 615 (Va. 1989).

<sup>198</sup> *Shepherd v. Davis*, 574 S.E.2d 514, 519 (Va. 2003) (citations omitted).

<sup>199</sup> Judicial review by an appellate court was proposed by the Arbitration Task Force for the American College of Trust & Estate Counsel in Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment*, 41 U. of Miami L. Ctr.'s Philip E. Heckerling Inst. on Est. Plan. ¶ 1604 at 17 (2007).

<sup>200</sup> *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

most state arbitration statutes have been construed to be similarly limited.<sup>201</sup> These existing doctrines suggest that parties should seriously consider the option of creating their own private, contractual review panel of appellate arbitrators, in a process of “arbitral appellate review.”<sup>202</sup>

Arbitral appellate review lacks many of the drawbacks of the appellate structure of the court system. Under such arbitral appellate review, the parties could contract to allow for another arbitration panel to review the first panel’s findings, and the parties could tailor this review to their own particular values and resources. For example, parties could provide that appellate arbitrators can review only the original arbitrators’ application of substantive law, or potential conflicts of the award with existing public policy, or the award’s substantive basis in the facts. Moreover, since parties need not wait for their appeal to be taken up in the court system, an appeal could be conducted quickly, thus allowing an aggrieved party the opportunity to challenge the award, but not through a long and costly delay. Of course, both the scope of the arbitral review and the timing of that procedure should be set out in the arbitration agreement before later disputes arise. If given a choice, the losing party to an arbitration proceeding may hope to expand the scope of arbitral review, or to simply prolong that review, in the hopes of securing a more favorable settlement.

Parties concerned about a “maverick” arbitrator should be especially interested in such an alternative, because it would allow a third party to review the arbitrators’ findings of fact—which courts are “loathe” to do.<sup>203</sup> Indeed, one prescient commentator noted in

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<sup>201</sup> See supra notes 17–23 and accompanying text.

<sup>202</sup> Brief of American Arbitration Association as Amicus Curiae in Support of Affirmance at 21–23, *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989), 2007 WL 2707884; see also Rev. Unif. Arb. Act § 23 cmt. B (2000). Arbitral appellate review has a range of supporters. See Hans Smit, *Hall Street Associates v. Mattel: A Critical Comment*, 17 *Am. Rev. Int’l Arb.* 513, 522–23 (2008); Hayford & Peeples, supra note 1, at 405–06. Judge Richard A. Posner even suggested this in passing in *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991). Posner wrote, “[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award. But they cannot contract for *judicial* review of that award.” *Id.*

<sup>203</sup> See, e.g., *Kinn v. Alaska Sales & Serv.*, 144 P.3d 474, 482 (Alaska 2006) (citing *Ahtna, Inc. v. Ebasco Constructors, Inc.*, 894 P.2d 657, 660 (Alaska 1995)) (holding that the arbitrators’ “findings of both fact and law . . . receive great deference and as a



2010]

*Judicial Review of Arbitration Awards*

935

1927 that businesses might be particularly vulnerable under the limited grounds provided by the newly passed FAA and that businesses should pursue arbitral appellate review:

Of course there may be cases where large sums are at stake and it is felt that there should be an opportunity to review the arbitrators' decision and to correct any mistakes, inadvertent or otherwise. In such comparatively rare cases, the arbitration agreement could well be drawn to provide for a review by a board of appeal.<sup>204</sup>

The American Arbitration Association ("AAA") provides an example of such a clause, which can be tailored to fit the appellate review desired by the parties:

[A]ny party may notify the AAA of an intention to appeal to a second arbitral tribunal, constituted in the same manner as the initial tribunal. The appeal tribunal shall be entitled to adopt the initial award as its own, modify the initial award or substitute its own award for the initial award. The appeal tribunal shall not modify or replace the initial award except [for clear errors of law or because of clear and convincing factual errors]. The award of the appeal tribunal shall be final and binding, and judgment may be entered by a court having jurisdiction thereof.<sup>205</sup>

It seems that appellate arbitral review would satisfy supporters and critics alike. Because it would circumvent long court dockets, such appellate review could be convened quickly, satisfying those who emphasize the importance of the finality of arbitration awards. Furthermore, parties could arrange for as broad or narrow a scope of review as they feel necessary, thus satisfying those who prize personal autonomy in arbitration. Furthermore, a process of review tailored to the parties' goals would allow the parties to conduct arbitration proceedings with an eye towards only permissible

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matter of both policy and law, we are loathe to vacate an award made by an arbitrator").

<sup>204</sup> Wharton Poor, *Arbitration under the Federal Statute*, 36 *Yale L.J.* 667, 676 (1927).

<sup>205</sup> American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* 37 (amended September 1, 2007), available at <http://www.adr.org/si.asp?id=4125>.

types of review, avoiding any unnecessary expense of time and energy during the initial proceeding.

Nevertheless, such an appellate system has its drawbacks. The new arbitral panel may inspire little more confidence in its decisions than the original panel did. In fact, because the sample clause of the AAA allows the appellate tribunal to modify the award or even to substitute its own, parties might face similar concerns of “maverick” arbitrators at the appellate level. One alternative would be to model the arbitral appellate process after a court’s appellate system and to require that if the appellate panel rejects the award, the appellate panel must remand the award to a new set of arbitrators, with some guidance on key principles of law or fact that would bind that process. Such a process would entail further cost to the parties, but it would settle concerns of abuses at either the first or second levels of arbitration. Some parties have tried to increase confidence in the appellate panel by providing in their contracts that appellate arbitrators be former or retired judges.<sup>206</sup> New York takes a different approach: its administrative rules of arbitration for no-fault automobile insurance claims provide for an appeal not to former judges, but to attorneys with particular experience. Under the New York system, any appeal must be taken to a “master arbitrator,” who is required to have at least 15 years experience in the area of no-fault insurance.<sup>207</sup> Yet even such measures cannot cure a fundamental shortcoming of arbitral appellate review: regardless of the credentials or experience of appellate arbitrators, all arbitrators lack the official power and prestige of a judge sitting in his or her official capacity as an agent of the judiciary and the State.

#### CONCLUSION

In *Hall Street*, the Supreme Court rejected extra-statutory grounds for judicial review of arbitration. The Court attempted to mollify that strict holding by noting that parties might seek judicial

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<sup>206</sup> See, e.g., Barry C. Silverman, Voluntary Commercial Arbitration: Carefully Constructed Contract Clauses Can Cure Countless Conflicts, 25 J. Marshall L. Rev. 309, 342 n.161 (1992) (providing an example of an arbitration clause providing that in case of an appeal, the second panel shall “consist[] of former or retired judges, at least two of whom shall be former or retired judges of courts of record in Wyoming”).

<sup>207</sup> 11 N.Y. Comp. Codes R. & Regs. tit. 11, § 65-4.10(b)(1) (2008).

2010]

*Judicial Review of Arbitration Awards*

937

review under state arbitration statutes. The Court's statement, however, did not offer much comfort for proponents of judicial review; 38 state-level jurisdictions have similarly rejected judicial review of arbitral awards in whole or in part. Nevertheless, in those jurisdictions there remain limited avenues through which parties, legislatures, and courts can provide for judicial review of an arbitral award. This review can be achieved by drafting an arbitration agreement to limit the power of arbitrators, amending the arbitration statute to provide for judicial review of arbitrators' findings of fact and law, or finding room in current case law to provide for a narrow public policy exception. For the time being, however, parties concerned with "maverick" arbitrators, on the one hand, or the prospect of arbitration as a mere "prelude" to a long and costly appeal in the courts, on the other, should explore the alternative of a privately contracted arbitral review panel, which can provide a level of review consonant with the parties' own goals for arbitration.