Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard

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Introduction

The federal courts of the United States are immensely overcrowded.[1] Each year, more cases are filed than in the previous year, making the administration of justice progressively more difficult.[2] The search for solutions to this problem has continually focused upon alternative dispute resolution, and, in particular, arbitration.[3] At first glance, the arbitration process may appear to be a panacea. However, not all who have participated in the process would agree that arbitration is the ideal solution.[4]

Frequently, the commercial arbitration process fails to provide all parties to the process with the result they believe they deserve. The same can be said about litigation. When parties to a dispute before a court are deprived of their expectancy because of an error in interpretation of law by the court, the appellate process is available to correct the error. In the arbitration process, however, appellate review is rarely obtainable through the arbitration process itself.[5] As a result, parties who are disappointed with the arbitration process often turn to the federal court system for assistance.

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1. *See generally* Erwin N. Griswold, *The Federal Courts Today and Tomorrow: A Summary and Survey*, 38 S.C. L. Rev. 393 (1987).

2. *See generally id. See also* Charley Roberts, *Rehnquist: U.S. Courts Face Crisis*, L.A. Daily J., Jan. 2, 1992, at 4 ("Left unchecked, [Chief Justice Rehnquist] said, the current caseload crisis in the federal courts will lead to changes that will lower the quality of justice dispensed.").

3. *See, e.g.*, Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir.) ("Undoubtedly, encouraging parties to use this form of alternative dispute resolution in commercial transactions is premised on the concern for easing rising case loads of the judiciary."), *cert. denied*, 476 U.S. 1141 (1986).

4. *E.g.*, *id.* ("Although arbitration often is said to provide simple, inexpensive and expeditious dispute resolution, recent cases before this court, and comments by counsel, as in this case, cast considerable doubt upon such adjectival praise.").

5. *See* Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985) ("If the parties to an arbitration want appellate review of the merits of the arbitrator's decision, they can establish appellate arbitration panels, though they rarely do.").

The Federal Arbitration Act[6] provides the grounds upon which an arbitration award may be vacated in federal court.[7] Courts in some federal circuits have expanded upon these grounds, but have been inconsistent in defining what constitutes a ground sufficient to vacate a commercial arbitration award.[8] As a result, many practitioners who select and employ the arbitration process to resolve commercial disputes do not know upon what grounds an arbitration award may be vacated in the circuit in which they practice.[9]

The intense confusion caused by the conflicting grounds used by the various circuits to vacate commercial arbitration awards demands immediate attention. This Note will identify the statutory and nonstatutory grounds recognized for vacating commercial arbitration awards in the differing circuits.[10] Most importantly, this Note will contemplate whether the statutory grounds for vacation provided by the Federal Arbitration Act[11] are best construed as exclusive, or whether additional judicially-created grounds for vacating commercial arbitration awards are required for the arbitration process to fulfill its intended purposes.

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6. 9 U.S.C. § 1-16 (1988 & Supp. III 1991).

7. 9 U.S.C. § 10(a) (Supp. III 1991).

8. *See, e.g.*, R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 n.1 (5th Cir. 1992). *See also infra* parts IV, V, VI.

9. *See generally* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 468-69 (1988) (discussing bar perception of judicial review of arbitration awards based upon an American Bar Association survey).

10. The Federal Arbitration Act, 9 U.S.C. § 1-16 (1988 & Supp. III 1991), provides the same grounds for vacating arbitration awards in labor disputes within the purview of the Act as those used in reviewing commercial arbitration awards. The courts have developed additional grounds for vacation of arbitral awards in labor disputes that are similar to those recognized by some courts in the commercial context. Although the additional grounds for vacating labor arbitration awards are often discussed alongside grounds for vacating commercial arbitration awards, they are not analogous. Underlying the grounds for vacating labor dispute arbitration awards are policies applicable only to labor disputes. The scope of this Note will be confined to discussing grounds for vacatur of commercial arbitration awards. *See, e.g.*, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987) ("The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations."); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (An arbitrator's "award is legitimate only so long as it draws its essence from the collective bargaining agreement."); Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985) (explaining vacation of arbitration awards in labor dispute cases is influenced by the Taft-Hartley Act (Labor Management Relations Act), 29 U.S.C. § 185.). *See generally* Douglas E. Ray, *Court Review of Labor Arbitration Awards Under the Federal Arbitration Act*, 32 VILL. L. REV. 57 (1987) (discussing grounds for vacating labor arbitration awards).

11. 9 U.S.C. § 10(a) (Supp. III 1991).

I. The Supposed Virtues of Arbitration

In recent years, the legal community has expressed increased approval of arbitration.[12] The past-president of the American Bar Association (ABA) recently expressed his approval for the arbitration process in a speech to the American Arbitration Association.[13] After chronicling the growth in use of alternative dispute resolution, Talbot D'Alemberte, then president-elect of the ABA, quoted former Chief Justice Burger saying: "[I]n the public interest we must move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration, mediation, and conciliation."[14] The former Chief Justice has long advocated resolving commercial disputes through arbitration.[15]

The approval of arbitration has also been displayed in a number of court opinions.[16] Although the arbitral process was once looked upon rather suspiciously by the courts, the Supreme Court has noted that the suspicion seems to have passed.[17] Considering the courts' new-found respect for the arbitral process, and the problems incurred in modern adjudication,[18] arbitration appears to be the wave of the future.

The virtues of arbitrating commercial disputes are often advertised to the practicing bar and commercial public.[19] In the controversial book, *The Litigation Explosion - What Happened When America Unleashed*

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12. *See, e.g.*, Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986) ("Congress, through the Federal Arbitration Act, (citation omitted), as well as the Supreme Court have expressed increased approval of the use of arbitration rather than public adjudication through the courts."), *cert. denied,* 476 U.S. 1141 (1986).

13. Talbot D'Alemberte, Address at American Arbitration Association Arbitration Day '91 (February 27, 1991), *in ABA Officer: ADR Has Come Into Its Own*, Arb. J., Mar. 1991, at 3, 3.

14. *Id.* at 62.

15. *See, e.g.,* Chief Justice Warren E. Burger, Address to the American Arbitration Association and the Minnesota State Bar Association (Aug. 21, 1985), *in Using Arbitration to Achieve Justice*, Arb. J., Dec. 1985, at 3, 6 ("My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases.").

16. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626-27 (1985).

17. *See id.* ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.").

18. Learned Hand once said: "[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." Burger, *supra* note 15, at 4.

19. *See, e.g.*, D'Alemberte, *supra* note 13, at 3; Jean E. Faure, Comment, *The Arbitration Alternative: Its Time Has Come*, 46 Mont. L. Rev. 199 (1985); C. Evan Stewart, *Dissenting Voice on Securities Arbitration*, Legal Times, Aug. 21, 1989, at 23 (Commenting that the securities industry "argues that arbitration is good for all parties.").

the Lawsuit,[20] the author, speaking about alternative dispute resolution in general, commented that the process "usually offers quicker, cheaper, and more reliable resolution than trial court."[21] These virtues are often bestowed upon arbitration.[22] Other supposed virtues include simplicity,[23] privacy,[24] informality,[25] finality,[26] and the benefit of having experienced arbitrators who are knowledgeable about the subject in dispute.[27]

Upon first glance these virtues appear compelling. However, lately they have been called into question.[28] C. Evan Stewart, General Counsel of the Nikko Securities Company International Inc., has commented that "[t]he trumpeted benefits appear substantial. Unfortunately, they are largely illusory."[29]

Many problems which arise in litigation are cured by the appellate process. Because those same problems go unsolved in the arbitration process, commentators and practitioners have argued that the grounds for vacation of commercial arbitration awards provided by the Federal Arbitration Act should be expanded to provide more broad appealability.[30]

II. The Federal Arbitration Act

A. The History of the Act

The Federal Arbitration Act[31] is applicable when parties to a maritime or commercial transaction provide in their contract, or agree in writing

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20. Walter K. Olson, The Litigation Explosion—What Happened When America Unleashed The Lawsuit (1991).

21. *Id.* at 303.

22. *See, e.g.*, American Arbitration Association Commercial Arbitration Rules, introduction (Jan. 1, 1990); Robert Coulson, Business Arbitration—What You Need To Know 9 (1987); Leo Kanowitz, *Alternative Dispute Resolution and The Public Interest: The Arbitration Experience*, 38 Hastings L.J. 239, 255 (1987); Stewart, *supra* note 19.

23. *See, e.g.*, Coulson, *supra* note 22.

24. *See, e.g.*, American Arbitration Association Commercial Arbitration Rules, *supra* note 22.

25. *See, e.g.*, Coulson, *supra* note 22; Stewart, *supra* note 19.

26. *See, e.g.*, Coulson, *supra* note 22; Stewart, *supra* note 19.

27. *See, e.g.*, Kanowitz, *supra* note 22; Stewart, *supra* note 19.

28. *See, e.g.*, Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986); Kanowitz, *supra* note 22, at 303. *See generally* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984) (criticizing arbitration and arguing against its use).

29. Stewart, *supra* note 19.

30. *See, e.g.*, *Stroh Container Co.*, 783 F.2d at 751 n.12 ("Counsel for [appellant] has suggested to us that if the appellate courts are in effect unwilling to provide the same review of an arbitration proceeding as is given to a judgment of a district court, that commercial arbitration will cease and the courts will be further inundated with more litigation."); C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 Ky. L.J. 347, 356 (1991) ("[A]rbitrants need a broadened right of appeal—at a minimum, one in which an arbitrator's interpretation of governing law is reviewable.").

31. 9 U.S.C. § 1-16 (1988 & Supp. III 1991).

after the controversy arises, to settle disputes arising from the transaction or contract by arbitration.[32] Prior to the Act's passage, the proposed bill received overwhelming support from the business community,[33] and as a result, received no dissenting votes in either the House or Senate.[34] President Coolidge signed the Federal Arbitration Act (also known as the United States Arbitration Act) into law on February 12, 1925, and it became effective on January 1, 1926.[35]

Before the Federal Arbitration Act became effective, agreements to arbitrate were unenforceable in the federal courts.[36] The policy of refusal to enforce these agreements began in England where the courts were jealous of, and felt threatened by, the arbitration process.[37] The practice of refusing to enforce agreements to arbitrate was incorporated into the law of the United States via the adoption of England's common law.[38] In order to abrogate the firmly established common law, Congress undertook to pass the Federal Arbitration Act.[39] The House Report on the bill noted:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.[40]

Regularly, the federal courts have remarked that "[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that

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32. 9 U.S.C. § 2 (1988). Section 2 provides:
A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

33. Committee on Commerce, Trade and Commercial Law of the American Bar Association, *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 153 (1925).

34. *Id.*

35. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926).

36. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

37. *Id.* at 1-2.

38. *Id.*

39. *Id.*

40. *Id.* at 1.

would be speedier and less costly than litigation."[41] However, the Supreme Court recently addressed the policies underlying the Federal Arbitration Act in *Dean Witter Reynolds, Inc. v. Byrd*,[42] commenting that "[t]he legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."[43]

Unmistakably though, Congress, in passing the Act, did recognize the incidental benefits of making agreements to arbitrate enforceable.[44] The House Report stated: "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can largely be eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."[45] The Court in *Dean Witter*, after discussing the House Report, concluded:

> Nonetheless, passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principle objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.[46]

These underlying purposes of the Act must be carefully considered when determining whether the provisions of the Federal Arbitration Act should be supplemented.

B. Vacating an Arbitral Award Under the Federal Arbitration Act

A party to an arbitration who seeks to challenge the validity of an arbitration award in federal court pursuant to the Federal Arbitration

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41. Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981) (citations omitted). *See also* Wilko v. Swan, 346 U.S. 427, 431 (1953); Robbins v. Day, 954 F.2d 679, 682 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 745-46 (11th Cir. 1988) (citation omitted); *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) ("The movement finds its origin in the unfortunate congestion of the courts and the delay, expense and technicality of litigation.").

42. 470 U.S. 213 (1985).

43. *Id.* at 219.

44. *Id.* at 220.

45. H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924).

46. *Dean Witter*, 470 U.S. at 220 (footnote omitted).

Act must file an application for an order vacating the award.[47] The application "shall be made and heard in the manner provided by law for the making and hearing of motions."[48] Federal Rule of Civil Procedure 7(b) provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."[49]

Section 10(a) of the Federal Arbitration Act (formerly section 10(a)-(e)) sets forth the grounds upon which an arbitration award may be vacated.[50] The Act provides as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
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> (1) Where the award was procured by corruption, fraud, or undue means.
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> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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47. 9 U.S.C. § 6 (1988).

48. *Id.*

49. FED. R. CIV. P. 7(b).

50. 9 U.S.C. § 10(a) (Supp. III 1991). Although sometimes referred to by the courts as providing provisions for appealing arbitration awards, 9 U.S.C. § 11 (1988) will not be discussed in this note. Section 11 provides:

> In either of the following cases the United States court in the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
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> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
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> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
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> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.[51]

Although the Federal Arbitration Act provides some of the same grounds which are generally available to vacate federal court awards, it does not provide parties to an arbitral award with all the same grounds that are available to parties seeking to vacate court awards. It is essential to a thorough understanding of the Act's provisions for vacatur to recognize that the Federal Arbitration Act provides no express ground upon which an award may be overturned because of a simple mistake of fact or misinterpretation of law by the arbitrators.[52] But are the express grounds provided by Section 10(a) exclusive?

The Supreme Court has not clearly addressed this issue. Although many federal courts acknowledge the provisions of the Act as exclusive,[53] others have recognized additional grounds derived from the language of the Act for vacating commercial arbitration awards.[54] Furthermore, some federal courts have recognized grounds for vacating commercial arbitration awards entirely outside the Act's provisions.[55]

III. The Confusion Begins

In 1953, the Supreme Court decided the landmark case of *Wilko v. Swan*.[56] Wilko, a customer of the defendant securities brokerage firm,

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51. 9 U.S.C. § 10(a) (Supp. III 1991).

52. *See, e.g.*, Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 n.4 (1956) ("Whether the arbitrators misconstrued a contract is not open to judicial review."); Robbins v. Day, 954 F.2d 679, 683 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); Advest v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990) ("The statute contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal bevues.").

53. *See, e.g.*, R.M Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539-40 (5th Cir. 1992) ("[J]udicial review of a commercial arbitration award is limited to Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1 et seq." (citation and footnote omitted)); O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 746 (11th Cir. 1988); Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) ("Sections 10 and 11 of the Act set forth the exclusive grounds for vacating or modifying a commercial arbitration award." (citation omitted)); LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338 (9th Cir. 1986) (The "federal Arbitration Act provides the exclusive grounds for challenging an arbitration award within its purview." (citation omitted)).

54. *See, e.g.*, Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990) ("Although the Supreme Court has held that the grounds for vacating an arbitrator's award are limited to five statutory categories, (citations omitted), several federal courts have found other grounds, derived from the statutory list, for vacating such awards.").

55. *See, e.g.*, *Advest*, 914 F.2d at 8.

56. 346 U.S. 427 (1953).

brought an action to recover damages pursuant to the Securities Act of 1933.[57] Wilko claimed the defendants had made misrepresentations and had omitted important information, thereby inducing Wilko to purchase stock that was later sold at a loss.[58] The margin agreements between the plaintiff and the defendant provided for arbitration of disputes arising out of the securities transactions. The defendants moved to stay trial of the matter pursuant to section 3 of the Federal Arbitration Act,[59] which provides for a stay "until such arbitration has been had in accordance with the terms of the agreement."[60] The district court held that the predispute agreement deprived the plaintiff of the remedies provided by the Securities Act, and therefore, denied the stay.[61] The Second Circuit Court of Appeals concluded that the predispute agreement to arbitrate was valid, and reversed the district court's denial.[62] In deciding that predispute agreements to arbitrate claims under the Securities Acts of 1933 and 1934 were invalid, the United States Supreme Court stated: "Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act."[63] Recently, in *Shearson/American Express, Inc. v. McMahon*,[64] and *Rodriguez De Quijas v. Shearson/American Express, Inc.*,[65] the Court overturned *Wilko*, thus making predispute agreements to arbitrate claims under the Securities Acts of 1933 and 1934 enforceable.[66]

The *Wilko* opinion, however, has considerably more significance than its holding on the issue of the enforceability of predispute arbitration agreements. A dictum from the *Wilko* opinion has caused disarray among the federal circuits regarding the grounds upon which an arbitral award can be vacated. The Court stated, the "[p]ower to vacate an award is limited. . . . In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."[67]

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57. *Id.* at 428.
58. *Id.* at 429.
59. *Id.*
60. 9 U.S.C. § 3 (1988).
61. *Wilko*, 346 U.S. at 429-30.
62. *Id.* at 430.
63. *Id.* at 438.
64. 482 U.S. 220 (1987).
65. 490 U.S. 477 (1989).
66. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).
67. *Wilko*, 346 U.S. at 436-37 (emphasis added).

Since *Wilko*, courts have struggled to determine what grounds are valid for vacating commercial arbitration awards.[68] Not only have courts grappled with whether the "manifest disregard" referred to in *Wilko*[69] was intended by the Court to be a judicially created exception to the Federal Arbitration Act,[70] they have also had difficulty determining what was meant by the phrase "manifest disregard" of the law.[71] Illustrating the courts' frustration, Judge Oakes of the Second Circuit Court of Appeals, in *I/S Stavborg v. National Metal Converters, Inc.*,[72] remarked: "How courts are to distinguish in the Supreme Court's phrase between 'erroneous interpretation' of a statute, or for that matter, a clause in a contract, and 'manifest disregard' of it, we do not know: one man's 'interpretation' may be another's 'disregard.' Is an 'irrational' misinterpretation a 'manifest disregard'?"[73]

IV. The Definitions of "Manifest Disregard" of the Law

A. The Early Approaches

Many courts have announced that judicial review of commercial arbitration awards is severely limited.[74] The Federal Arbitration Act "does not allow courts to roam unbridled in their oversight of arbitral awards."[75] In accordance with this policy, courts accepting the *Wilko* dictum[76] as

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68. *See, e.g.*, R.M Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 n.1 (5th Cir. 1992) ("Circuits differ over whether to augment the statutory bases for review provided in the Arbitration Act, with the manifest disregard of the law standard." (citations omitted)).

69. 346 U.S. at 436.

70. *See, e.g.*, National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 143 n.9 (7th Cir. 1977); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974).

71. *See, e.g.*, *I/S Stavborg*, 500 F.2d at 431 (indicating that inferior courts are having difficulty defining "manifest disregard"); San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961).

72. 500 F.2d at 424.

73. *Id.* at 430 n.13. *See also Saguenay Terminals Ltd.*, 293 F.2d at 801 ("The [*Wilko*] court [sic] did not undertake to define what it meant by 'manifest disregard' or indicate where the line would be drawn between a case of 'manifest disregard' and a case of error in interpretation of the law."); *Id.* at n.4. ("Frankly, the Supreme Court's use of the words 'manifest disregard', has caused us trouble here.").

74. *See, e.g.*, Robbins v. Day, 954 F.2d 679, 683 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223, 225 (7th Cir. 1991); Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 516 (2d Cir.), *cert. denied*, 112 S. Ct. 380 (1991), *cert. denied again*, 112 S. Ct. 1241 (1992); Advest, Inc. v. McCarty, 914 F.2d 6, 8 (1st Cir. 1990).

75. *Advest*, 914 F.2d at 8; *See also Robbins*, 954 F.2d at 683.

76. 346 U.S. 427, 436-37 (1953).

authorizing vacatur of arbitral awards for "manifest disregard" of the law have narrowly defined the standard.[77]

Early attempts at defining "manifest disregard" of the law focused on the arbitrator's understanding of the law. In the 1961 case of *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*,[78] the Ninth Circuit Court of Appeals wrote: "We apprehend that a manifest disregard of the law in the context of the language used in *Wilko v. Swan* might be present when arbitrators understand and correctly state the law, but proceed to disregard the same."[79] Although the early definitions of "manifest disregard" were noble endeavors to explain what a "manifest disregard" of the law was, the definitions were not easily applied to factual situations.[80]

B. The Merrill Lynch v. Bobker Approach

The most notable attempt at creating a functional definition of "manifest disregard" of the law emerged from a recent case before the Second Circuit Court of Appeals. In *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*,[81] Merrill Lynch, a securities brokerage firm, moved to vacate an arbitration award claiming the arbitrators had acted in manifest disregard of the law in granting the arbitration award for the plaintiffs.[82] The dispute heard by arbitrators concerned the applicability of a Securities Exchange Commission (SEC) rule to a particular securities transaction. Upon application to the district court for an order vacating the arbitration award, the court held that the "arbitrators were aware of the [SEC] Rule and its purpose yet proceeded to ignore it."[83] As a result, the district court vacated the award on the ground that the arbitrators had acted in manifest disregard of the law.[84]

Bobker, the plaintiff, then appealed the district court determination.[85] The Second Circuit, formulating a test for "manifest disregard" of the law said:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal

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77. *See infra* Part IV. B-C.
78. 293 F.2d 796 (9th Cir. 1961).
79. *Id.* at 801 (citation omitted).
80. *E.g., id.* at 801-02.
81. 808 F.2d 930 (2d Cir. 1986).
82. *Id.* at 933.
83. *Id.*
84. *Id.*
85. *Id.*

> principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the 'manifest disregard' standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.[86]

Applying the above expressed test to the facts of *Bobker*, the court of appeals determined that the disputed SEC rule was unclear, and thus, the actions of the arbitrators did not meet the test for "manifest disregard" of the law.[87] Instead, the court indicated this was merely a case of the arbitrators misinterpreting the law.[88] Accordingly, the district court order vacating the arbitration award was reversed.[89]

The Second Circuit's explanation of "manifest disregard" of the law in *Bobker* is often cited by courts when reviewing commercial arbitration awards to determine whether the arbitrators acted in "manifest disregard" of the law.[90] It is interesting and informative to note that the court of appeals in *Bobker* failed to find that the arbitrators had acted in "manifest disregard" of the law. In fact, although the "manifest disregard" of the law standard has been discussed in dozens of cases involving judicial review of arbitration awards resulting from securities disputes, no cases have been identified wherein vacation of a securities arbitration award has been clearly upheld on appeal.[91]

C. Use of the "Manifest Disregard" Standard In Other Circuits

Although the *Bobker* approach has been well-received, not all circuits recognizing "manifest disregard" of the law as a ground for vacating

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86. *Id.* at 933-34 (citations omitted).

87. *Id.* at 936-37.

88. *Id.* at 937.

89. *Id.*

90. *See, e.g.*, Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche International, Ltd., 888 F.2d 260, 265 (2d Cir. 1989); Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991); Robbins v. PaineWebber, Inc., 761 F. Supp. 773, 776 (N.D. Ala. 1991), *rev'd*, Robbins v. Day, 954 F.2d 679 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992).

91. *See* Ainsworth v. Skurnick, 909 F.2d 456, 457-58 (11th Cir. 1990) (noting that the district court had vacated the arbitration award as being in "manifest disregard" of the law, but certifying a question to the Florida Supreme Court regarding state law), *aff'd*, 960 F.2d 939, 941 (11th Cir. 1992) (noting that the district court's finding of "manifest disregard" of the law may have been erroneous, but affirming on other grounds), *cert. denied*, 113 S. Ct. 1269, *reh'g denied*, 113 S. Ct. 1883 (1993); *Robbins*, 761 F. Supp. at 773 (finding "manifest disregard" of the law).

a commercial arbitration award have adopted it as their own. In *Robbins v. PaineWebber, Inc.*,[92] Robbins claimed she had been the victim of securities fraud. Upon application to the federal district court for vacatur of the arbitral award, the court determined that the arbitrators must have found fraud because the record of the arbitration supported that finding.[93] Under the Alabama Securities Act, a finding of fraud requires the award of attorney's fees and costs.[94] The district court inferred that, based upon the lump sum award amount, the arbitrators must have disregarded the statutory damages provision, and thus, had acted in "manifest disregard" of the law.[95] In so holding, the court stated: "The error of not applying this provision would be readily and instantly perceived by a typical arbitrator; these arbitrators were cognizant of the proper legal standard and disregarded it in fashioning the award; and their disregard of the applicable law is indisputably apparent on the face of the record."[96] Accordingly, the court vacated the arbitration award.[97]

On appeal, the Eleventh Circuit explained:

> When no rationale is given for a lump sum award, as in this case, before we even consider reviewing the award on grounds not explicitly contained in the statute, we must first determine whether a rational ground for the arbitrator's decision can be inferred from the facts of the case. Where "a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed."[98]

The court concluded: "Our deferential review of the arbitrator's award satisfies us that the arbitrators stayed well within their broad discretion in facilitating a fair hearing and in fashioning the award. Because the district court when vacating the award failed to adhere to the narrow and deferential standard of review, we reverse and confirm the arbitrator's award."[99]

In the *Robbins* opinion, the Eleventh Circuit noted that among those circuits endorsing the "manifest disregard" of the law standard, there is inconsistency as to how the disregard must be manifested.[100] "Some courts require that the arbitrator's subjective awareness of the disregarded

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92. 761 F. Supp. at 773.
93. *Id.* at 777.
94. *Id.* (citing Ala. Code § 8-6-19).
95. *Id.*
96. *Id.* at 776-77 (citing Raiford v. Merrill Lynch, Pierce, Fenner & Smith, 903 F.2d 1410, 1412-13 (11th Cir. 1990)).
97. *Id.*
98. Robbins v. Day, 954 F.2d 679, 684 (11th Cir.) (citing *Raiford*, 903 F.2d at 1412), *cert. denied*, 113 S. Ct. 201 (1992).
99. *Id.* at 685.
100. *Id.* at 683.

law be actually stated in the award, while others are willing to infer awareness."[101] The First and Second Circuits appear to have adopted an approach allowing the court to infer awareness on the part of the arbitrators,[102] while the Eleventh Circuit appears to have endorsed the approach requiring the manifest disregard to be stated in the arbitration award.[103]

Many other courts have discussed, but have not adopted, the "manifest disregard" of the law standard.[104] Illustrating one reason why some circuits have refused to adopt the "manifest disregard" standard, the Eleventh Circuit recently wrote: "This court has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case)."[105] In addition, many of the circuits which have discussed the "manifest disregard" of the law standard have refused to adopt it as their own because it has proven to be extremely difficult to apply to factual situations.

V. Additional Grounds for Vacation

A. The Arbitrary and Capriciousness, Irrationality, Ambiguous or Indefiniteness, and Public Policy Exceptions

Some circuits have developed additional grounds for vacating commercial arbitration awards. For example, the Eleventh Circuit has used

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101. *Id.* at 683-84 (citing O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 746 (11th Cir. 1988)).

102. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) ("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator."); Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990).

103. *See, e.g.*, *O.R. Securities, Inc.*, 857 F.2d at 747 ("If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it."); *Robbins*, 954 F.2d at 679.

104. See, e.g., Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991) ("In seeking to vacate the arbitration award Chameleon also urges us to adopt the so-called 'manifest disregard of the law' exception to the statutory review provisions of the Arbitration Act, (citation omitted). However, we have consistently held that the exclusive grounds for vacating or modifying a commercial arbitration award are found in §§ 10 and 11 of the Arbitration Act. (citation omitted). We have not adopted exceptions to the exclusivity of §§ 10 and 11 and see no reason to do so in this case."); Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1269, *reh'g denied*, 113 S. Ct. 1883 (1993); R.M Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 (5th Cir. 1992); *Robbins*, 954 F.2d at 685; Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 903 F.2d 1410, 1412 (11th Cir. 1990).

105. *Raiford*, 903 F.2d at 1412.

the rationale that an arbitrary and capricious arbitration award may not be enforced.[106] The Second Circuit has noted that a commercial arbitration award which is irrational may be vacated,[107] and that an ambiguous or indefinite commercial arbitration award should not be enforced.[108]

Some courts have indicated that public policy may justify refusal to enforce a commercial arbitration award. The Second Circuit has noted that "[a]lthough contravention of public policy is not one of the specific grounds for vacation set forth in section 10 of the Federal Arbitration Act, an award may be set aside if it compels the violation of law or is contrary to a well accepted and deeply rooted public policy."[109] This ground for refusal to enforce a commercial arbitration award applies not only in the arbitration context but also to contracts in general. The United States Supreme Court has stated:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that public policy, it is the obligation of the courts to refrain from such exertions of judicial power.[110]

B. Is There A Difference Between These Exceptions?

Although the various exceptions are described in many different ways by the courts which have endorsed them, is there truly a difference between them? The First Circuit Court of Appeals recently stated:

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106. *See, e.g.*, *Ainsworth*, 960 F.2d at 941; *Raiford*, 903 F.2d at 1412-13 ("An award is arbitrary and capricious only if 'a ground for the arbitrator's decision can[not] be inferred from the facts of the case.'" (quoting Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1216 (2d Cir. 1972)); *see also* Clemons v. Dean Witter Reynolds, Inc., 708 F. Supp. 62 (S.D.N.Y. 1989).

107. *See, e.g.*, French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974). *Contra* Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264, 267 n.7 (7th Cir. 1988).

108. *E.g.*, Americas Ins. Co. v. Seagull Compania Naviera, 774 F.2d 64, 67 (2d Cir. 1985).

109. Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110-11 (2d Cir. 1980) (citations omitted); *see also* Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir.), *cert. denied*, 446 U.S. 983 (1980). *But see Ellis*, 849 F.2d at 267 n.7.

110. Hurd v. Hodge, 334 U.S. 24, 34-35 (1948). *See also* Muschany v. United States, 324 U.S. 49, 66 (1945) (declaring that public policy is to be determined by reference to specific laws, not general considerations of public interests).

> Although the differences in phraseology have caused a modicum of confusion, we deem them insignificant. We regard the standard of review undergirdering these various formulations as identical, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice."[111]

Although the court's approach may seem overly simplistic, an in-depth analysis of the court's view is beyond the scope of this Note. It is sufficient to note that the determination of whether these grounds should be recognized as justifying vacatur of a commercial arbitration award rests upon the same principal policies implicit in determining whether the "manifest disregard" of the law standard should be recognized.[112]

VI. Is the "Manifest Disregard" of the Law Standard a Judicially Created Ground Independent of the Federal Arbitration Act Provisions for Vacatur?

A detailed analysis of the "manifest disregard" of the law standard raises a fundamental question: Was the dictum in *Wilko v. Swan*[113] intended to create a new and additional ground for vacating commercial arbitration awards? Although some courts frequently refer to the "manifest disregard" of the law standard as a judicially created ground for vacatur of arbitral awards,[114] not all circuits agree.[115]

In *Amicizia Societa Navegazione v. Chilean Nitrate Corp.*,[116] the Second Circuit Court of Appeals stated: "It is true that an award may be vacated where the arbitrators have 'exceeded their powers.' 9 U.S.C.

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111. Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990) (quoting Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988)).

112. An argument may be made that the "public policy" exception is based upon policies applicable to all contracts, and thus, the exception should be viewed from outside the arbitration framework. Discussion of this rationale is beyond the scope of this Note.

113. 346 U.S. 427, 436-37 (1953).

114. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) ("'Manifest disregard of the law' by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in Wilko v. Swan." (citation omitted)).

115. *See, e.g.*, Robbins v. Day, 954 F.2d 679, 683 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); National R.R. Passenger Corp. v. Chesapeake and Ohio Ry. Co., 551 F.2d 136, 143 n.9 (7th Cir. 1977); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974); Amicizia Societa Navegazione v. Chilean Nitrate Corp., 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960).

116. 274 F.2d 805 (2d Cir. 1960).

§ 10[(a)(4)]. Apparently relying upon this phrase, the Supreme Court in *Wilko v. Swan*, suggested that an award may be vacated if in 'manifest disregard' of the law.''[117] This language suggests that the Supreme Court in *Wilko* may have intended merely to illustrate an instance which would fall within the scope of the Federal Arbitration Act's provisions for vacating an arbitration award.

The interpretation of the *Wilko* dictum in *Amicizia* has not attracted much judicial attention;[118] however, implicitly, the interpretation appears to have support.[119] Recently, in *Robbins v. Day*,[120] the Eleventh Circuit commented that ''[a]lthough the Supreme Court has limited the grounds for vacatur to the categories enumerated in 9 U.S.C. § 10, several federal courts have found other grounds, *derived from the statutory list*, for vacating arbitration awards in commercial cases.''[121] By so stating, the court appears to suggest that the ''manifest disregard'' of the law standard, as well as other grounds, stem from, and are not independent of, the Federal Arbitration Act provisions for vacatur.[122] Subsequent to the *Robbins* decision, at least one district court in the First Circuit has construed the *Robbins* opinion to restrict the courts to the use of the statutory grounds for vacating arbitration awards.[123] That court, after denying a plaintiff's motion to vacate a securities arbitration award, quipped: ''[T]he Court predicts an impending bear market on the legal horizon for judicially created means of arbitration vacatur and declines the defendant's invitation to invest in this speculative venture at the current time.''[124]

The *Wilko* opinion may also be read to support the proposition that ''manifest disregard'' of the law was not intended to become an independent, judicially created standard for vacating commercial arbitration awards. The Court stated that the ''[p]ower to vacate an award is limited.''[125] Significantly, the Court followed this sentence with a

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117. *Id.* at 808 (citations omitted).

118. Although not often discussed by the courts, this approach has been noted on occasion. *See, e.g.*, *National R.R. Passenger Corp.*, 551 F.2d at 143 n.9 (''We share the reservations recently expressed by the Second Circuit as to whether the *Wilko* dictum was actually intended to add 'manifest disregard' of the law to the statutory grounds for vacating an award in 9 U.S.C. § 10.'' (citing *I/S Stavborg*, 500 F.2d at 431)). Recall however, since the date of the *National R.R. Passenger Corp.* opinion, the Second Circuit has endorsed the use of the ''manifest disregard'' standard calling it a judicially created standard. *See Bobker*, 808 F.2d at 933.

119. *See infra* notes 125-28 and accompanying text.

120. 954 F.2d 679 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992).

121. *Id.* at 683.

122. *See* 9 U.S.C. § 10(a) (Supp. III 1991).

123. Brown v. Rauscher Pierce Refsnes, Inc., 796 F. Supp. 486 (M.D. Fla. 1992).

124. *Id.* at 505-06.

125. 346 U.S. 427, 436 (1953).

citation to the Federal Arbitration Act provisions for vacation of arbitral awards.[126] Thereafter, the Court does not vary from the statement that the power to vacate is limited, but instead appears to illustrate the use of § 10(a)(4).[127] Granted, this construction of the *Wilko* opinion may be tenuous; however, it is certainly no more tenuous than the significance federal courts have bestowed upon the *Wilko* dicta when attempting to justify use of the "manifest disregard" of the law standard.

Additionally, in a recent case before the Supreme Court, Justice Stevens, in a dissenting opinion, collaterally mentioned that "[a]rbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. § 10."[128] Here too, the fact that the phrase "manifest disregard of the law" is followed by a citation to the Federal Arbitration Act provisions for vacatur, suggests that "manifest disregard" merely refers to or restates the statutory grounds.

VII. Should "Manifest Disregard" of the Law be a Ground for Vacatur, Independent of the Federal Arbitration Act Provisions?

Inevitably, regardless of whether the court intended "manifest disregard" of the law[129] mentioned in *Wilko v. Swan* to be a ground for vacating a commercial arbitration award, independent from the Federal Arbitration Act, when the Supreme Court resolves the issue of whether manifest disregard of the law is an exception to the statutory grounds for vacatur, the determination by the Court will rely heavily upon other factors. Most importantly, the Court must consider the policies underlying the Federal Arbitration Act, and whether the lower courts have the ability to make such an exception functional.

A. The Policy Argument

The predominant policy behind passage of the Federal Arbitration Act was to make arbitration agreements enforceable at law.[130] A secondary purpose "was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation."[131] Both of these policies are compromised

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126. *Id.*

127. *Id.* Note that since *Wilko*, the Federal Arbitration Act has been amended. The former 9 U.S.C. § 10(d), as of 1990, is 9 U.S.C. § 10(a)(4).

128. Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 656 (1985).

129. 346 U.S. at 436.

130. *See supra* note 45 and accompanying text.

131. O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 745-46 (11th Cir. 1988) (quoting Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981)). *See also supra* notes 45-48 and accompanying text.

when parties are forced to arbitrate a dispute, but are later permitted to resort to the court system for an appeal.[132]

What is the advantage in making agreements to arbitrate commercial disputes when the losing party in the arbitration may routinely resort to the courts for relief from the arbitrators' award? Certainly, too, providing court review of the arbitrators' award, regardless of how summary the proceeding is intended to be, results in a resolution of the dispute which is longer in duration and requires more legal assistance than had the arbitration award been enforced.[133] Clearly, the policies underlying the Federal Arbitration Act are not best served by expanding upon the Act's grounds for vacating arbitral awards. It is for this reason that the federal courts have traditionally construed the provisions of the Federal Arbitration Act very strictly.[134]

In addition to thwarting the purposes for which the Federal Arbitration Act was passed, providing grounds for vacation outside the Federal Arbitration Act also frustrates the intent of the parties who bargained for the arbitration process to resolve their disputes. Parties to an arbitration agree to enter the process because the virtues which are advertised to the commercial public are substantial. These virtues quickly disappear when the disappointed party is permitted to resort to the courts. For this reason, the Seventh Circuit recently noted that "an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative."[135]

When the parties have entered into the contract or arbitration agreement freely and have themselves chosen the terms, they should be forced to abide by the terms of the contract as any other contract.[136] After

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132. *O.R. Securities*, 857 F.2d at 746 ("The policy of expedited judicial action expressed in section 6 of the Federal Arbitration Act, 9 U.S.C. § 6, would not be served by permitting parties who have lost in the arbitration process to file a new suit in federal court."); Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967) ("Any such exception [i.e., manifest disregard] must be severely limited, because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.").

133. *Saxis Steamship Co.*, 375 F.2d at 582.

134. *See* Office of Supply, Gov't of the Republic of Korea v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972) ("Judicial review has been thus restricted in order to further the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation and often without any requirement that the arbitrators state the rationale behind their decision.").

135. Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) (quoting E.I DuPont de Nemours v. Grasselli Employees Indep. Assoc. of East Chicago, Inc., 790 F.2d 611, 614 (7th Cir. 1986)).

136. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs."); Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 701 (2d Cir. 1978).

all, "'[i]t is the arbitrator's construction which was bargained for,' and not that of the courts."[137]

B. The Functionality Argument

As the law currently stands, those grounds recognized by some of the circuits as exceptions to the Federal Arbitration Act provisions for vacation do not work well. Because arbitrators are not required to make formal findings of fact,[138] and are generally under no obligation to explain the rationale for the award,[139] there is usually no basis upon which a court may determine whether the arbitrators have manifestly disregarded the law or merely misinterpreted it.[140]

Clearly, if the courts were to insist upon an explanation for every arbitral award, their ability to justify vacating the awards based upon "manifest disregard" of the law would be improved.[141] However, requiring that written opinions accompany commercial arbitral awards defeats several of the reasons parties choose to arbitrate in the first place.[142] The Second Circuit, before endorsing the "manifest disregard" of the law standard in *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*,[143] commented that "[t]he sacrifice that arbitration entails in terms of legal

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137. Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 165 (D.C. Cir. 1981) (quoting United States Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)).

138. *See, e.g.*, Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 8 (1st Cir. 1989).

139. *See, e.g.*, Robbins v. Day, 954 F.2d 679, 684 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); National R.R. Passenger Corp. v. Chesapeake and Ohio Ry. Co., 551 F.2d 136, 143 n.9 (7th Cir. 1977).

140. *National R.R. Passenger Corp.*, 551 F.2d at 143 n.9 (7th Cir. 1977). *See also* Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 656 (1985) (In J. Stevens' dissent, he mentions: "the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable."); O.R. Securities v. Professional Planning Assoc., 857 F.2d 742 (11th Cir. 1988) ("If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it. We recognize that this would be extremely difficult where the arbitrators failed to state the reasons for their decision." *Id.* at 747. "This problem is, perhaps, a strong argument in support of not recognizing manifest disregard of the law as a basis for vacating an arbitration award, but it does not affect our disposition of this case." *Id.* at n.4.).

141. *See* Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); Sobel v. Hertz Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972).

142. *Id. See generally* Stipanowich, *supra* note 9.

143. 808 F.2d 930, 933 (2d Cir. 1986).

precision is recognized, and is implicitly accepted in the initial assumption that certain disputes are arbitrable. Given that acceptance, the primary consideration for the courts must be that the system operate expeditiously as well as fairly."[144]

This is not to say that written opinions accompanying arbitration awards should be beyond the power of the parties' request. An American Arbitration Association Rule allows variance of arbitration procedures by written agreement of the parties to the arbitration.[145] This rule, therefore, permits written opinions when requested by the parties.[146] Instead of merely allowing the parties to request written opinions, the American Arbitration Association Rules might better serve commercial users if procedures were firmly established affording the parties written opinions when desired.[147] Then, if the parties mutually agree that a reasoned written opinion is necessary, they could more easily contract to have one provided.

Arbitration is steadily becoming more similar to the litigation system many hoped it would replace.[148] In order for the arbitration process to continue to provide the benefits that parties seek when they agree to arbitration, written opinions must remain merely an option chosen by parties who have carefully considered the implications a written opinion will likely have on their ability to have the arbitration award vacated in the federal courts.

VIII. The Future of the "Manifest Disregard" of the Law Standard

A. The Current State of Affairs

Today, parties contemplating whether to contract for settlement of disputes by arbitration, and those parties considering how their existing disputes can be efficiently resolved, do not, and cannot know what

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144. *Sobel*, 469 F.2d at 1214 (citations omitted).

145. American Arbitration Association Commercial Arbitration Rules, Rule 1 (Jan. 1, 1990).

146. *See* Stipanowich, *supra* note 9, at 469.

147. *See Id.*

148. *See* Stewart, *supra* note 19, at 349; American Almond Prod. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944). The Securities Exchange Commission recently approved rule changes to NYSE Rule 627, AMEX Rule 614, and NASD Section 37. The amended rules provide that arbitration awards shall contain the names of the parties, a summary of the issues resolved, the relief requested, and the names of the arbitrators. Written opinions may be voluntarily prepared. *See* Exchange Act Release No. 26,805 (May 10, 1989) [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 84,414. It appears that the SEC is moving toward requiring written opinions. For an insider's comments on the rule amendments, see Stewart, *supra* note 19.

grounds may justify vacating an arbitration award in federal court.[149] The various circuits are so divergent on what grounds are sufficient to vacate an arbitral award that the law is essentially in a state of confusion.[150] Because parties involved in the arbitration process do not know what will justify vacation of arbitral awards, the courts are forced to review many motions to vacate which border upon being frivolous. However, the federal courts cannot normally sanction the responsible attorneys because the law on this subject is so unclear.

The United States Supreme Court must soon decide whether "manifest disregard" of the law is an additional ground for vacating commercial arbitration awards, independent of the Federal Arbitration Act, or whether "manifest disregard" merely describes 9 U.S.C. § 10(a)(4). Without guidance from the Court, the law in the circuits will remain hopelessly confused and inconsistent.[151]

Should the Court conclude that "manifest disregard" of the law is an additional ground for vacating commercial arbitration agreements, independent of the Federal Arbitration Act provisions, the Court must define the standard narrowly and clearly so that it will be understandable and useable. Unless narrowly construed, the underlying purposes of the Federal Arbitration Act—enforcing agreements to arbitrate, and speedy and cost-efficient resolution of disputes—will be frustrated.[152]

A well-defined standard will permit parties contemplating whether to provide for arbitration of their disputes to make an informed decision. The commercial public must realize that they get what they bargain for, and if they opt to resolve disputes through arbitration, they are not merely substituting one method of litigation for another.[153] These parties must know up-front what grounds are available for vacating arbitration awards in order for the commercial arbitration process to serve its

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149. *See generally* Stipanowich, *supra* note 9, at 469.

150. *See supra* Parts IV and V.

151. Uniformity of laws throughout the states has historically been a significant concern of the Supreme Court. In the landmark case, Martin v. Hunter's Lessee, 14 U.S. 304 (1816), wherein the Supreme Court's appellate authority over state tribunals was established, Justice Story said: "Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws and treaties and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency, in any two states." *Id.* at 348.

152. *See, e.g.*, Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967).

153. Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986).

intended purpose.[154] Also, a Supreme Court decision narrowly and clearly defining the "manifest disregard" of the law standard, would eliminate much of the needless litigation concerning what grounds are sufficient to vacate a commercial arbitral award.

Although a narrowly and clearly defined standard would be an improvement as compared to the current state of confusion, the commercial public, and the United States in general, would be best served by a Supreme Court opinion declaring the Federal Arbitration Act provisions to be the exclusive grounds for vacating commercial arbitration awards.[155] This view has been expressed by the courts on occasion. More than a decade ago, the Court of Appeals for the District of Columbia asserted that

> [w]here the parties have selected arbitration as a means of dispute resolution, they presumably have done so in recognition of the speed and inexpensiveness of the arbitral process; federal courts ill serve these aims and that of facilitation of commercial intercourse by engaging in any more rigorous review than is necessary to ensure compliance with statutory standards. It is particularly necessary to accord the "narrowest of readings" to the excess-of-authority provision of section [10(a)(4)].[156]

After all, the Federal Arbitration Act was never intended to establish arbitration as the equivalent of litigation. A party opting for arbitration cannot expect the best of both worlds. When a party agrees to arbitration, that party gains the benefits of arbitration, but sacrifices some of the benefits of adjudication, such as the appellate process.

For the arbitration process to survive and fulfill the hopes that Congress and the federal judiciary have invested in it, parties must realize that arbitration is substantially different from the litigation process. Judge Learned Hand expressed this almost fifty years ago when, speaking of parties to arbitration, he said "[t]hey must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery."[157] When parties agree to submit a dispute to the arbitral process, they must also

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154. *See generally*, Kanowitz, *supra* note 22, at 303 ("[I]t is important that the dangers and countervailing considerations surrounding these devices [of alternative dispute resolution] be calculated before resorting to them.").

155. 9 U.S.C. § 10 (Supp. III 1991).

156. Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 164-65 (D.C. Cir. 1981) (quoting Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 703 (2d Cir. 1978)).

157. American Almond Prod. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

realize that in doing so they agree to accept the uncertainties implicit in the arbitral process.[158]

B. What about Justice?

Some advocates for broader appealability of commercial arbitration awards may contend that the goal of the litigation process is to learn the truth, and therefore, that the federal courts should open their doors to appeals from arbitration awards based upon a theory of "manifest disregard" of the law.[159] However, it must be noted that the purpose of the Federal Arbitration Act was not to find truth, but to enforce agreements to arbitrate.[160] No one will deny that the search for truth and justice should be a goal of arbitration. However, this search should be facilitated through the arbitration process itself, rather than by expanding the grounds for vacating arbitration awards.

Opening the courts to the problems which arise in arbitration is no solution. The onus must be upon the American Arbitration Association, the various industry associations, and others with an interest in the success of arbitration to improve the arbitration system itself, to ensure it serves the purpose for which people use it—namely, speedy and cost-efficient resolution of conflict.

The impact of improving the arbitration process from within, rather than by expanding the grounds for vacating arbitration awards, will be substantial. Not only will fewer motions to vacate be brought to the federal courts, but arbitration as an alternative to litigation will be more desirable, as well as truly final. Most importantly, the parties to the arbitration process will know what they can expect from the arbitration process and from the federal courts.

IX. Conclusion

In an effort to ease the overcrowding of federal court dockets, judges, legal commentators, and practitioners have zealously recommended that the commercial public use alternative dispute resolution, and especially, arbitration. Frequently, due to the modern day bent for

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158. Raiford v. Merrill Lynch, Pierce, Fenner & Smith, 903 F.2d 1410, 1413 (11th Cir. 1990).

159. *See generally* Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tul L. Rev. 1, 34 (1987) ("Quality dispute resolution needs procedures that facilitate 'accurate' results. The determination of 'certain' or 'true' results is central to adjudication results and processes.").

160. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.").

arbitration, parties agree to arbitrate commercial disputes without first considering the drawbacks. These parties must recognize that the arbitral process was not intended to be the equivalent of litigation, but instead, is an alternative system which offers the significant benefits of speed and cost efficiency. A necessary drawback of arbitration is that the decision of the arbitrators must be final, subject to the few exceptions set forth in the Federal Arbitration Act. Although the federal court circuits presently disagree whether the grounds for vacation of commercial arbitral awards provided by the Federal Arbitration Act are exclusive, the Supreme Court must eventually so hold in order to ensure that the arbitral process does not become merely a preliminary step to litigation.

This Note is not intended to cast a shadow upon the arbitration process. Instead, it is intended to make parties aware that arbitration is not the same as litigation and that the federal courts cannot offer the same scope of review as is available in adjudication. Parties contemplating whether to use arbitration must carefully consider the advantages and drawbacks to the arbitration process before agreeing to resolve their disputes in this manner. Unquestionably, the decision to forego the federal adjudicatory process in favor of arbitrating potential or pending disputes is not appropriate in all situations.