

MUCH ADO ABOUT NOTHING:  
THE EFFECT OF MANIFEST DISREGARD ON ARBITRATION  
AGREEMENT DECISIONS

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I. INTRODUCTION

Several recent cases have narrowed the grounds for judicial review of arbitration awards by removing the doctrine of manifest disregard as a possible ground for vacatur.<sup>1</sup> In the aftermath of these decisions, authorities are divided over the effect that these rulings will have on the efficacy of the arbitration process and the incentives that they will provide to parties considering arbitration as a possible method of dispute resolution. Both academics and practitioners have suggested that these developments will cause companies to review and possibly change their contractual arbitration agreements,<sup>2</sup> but why and how? In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court noted that amici for each of the opposing parties came to differing conclusions on this issue: one claimed that parties will

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1. See, e.g., *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010).

2. See Wendy L. Rovira, *Is It Time to Revise Your Arbitration Agreements or Rethink Your Alternative Dispute Strategy?*, 57 LA. B.J. 168 (2009) (suggesting that parties revise their arbitration agreements to specify review based on more lenient state law); David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency in Arbitration After Hall Street Associates*, 8 FLA. ST. U. BUS. REV. 77, 92 (2009) (“The most drastic result of the *Hall Street* decision could be a flight from arbitration in the United States.”).

flee from arbitration without the option of expanded review, while the other asserted that parties avoid arbitration because of expanded review.<sup>3</sup> Both practitioners and academics seem to think that the recent developments will cause firms to avoid arbitration because of the high risk of proceeding without the safety net of judicial review;<sup>4</sup> however, it has also been suggested that the existence of manifest disregard as a ground for judicial review will “discourage the selection of the United States as an arbitral situs” in an international arbitration situation, thereby suggesting that expanded review is unattractive to parties.<sup>5</sup>

As a result of this divide, this Note explores the possible effects of the elimination of manifest disregard on *ex ante* decision making of the contracting parties and of the market as a whole. This Note begins in Part II by providing a brief history of judicial review, vacatur, and modification of arbitration rulings. Next, Part III contains an analysis of common factors that influence a party’s decision when deciding whether to arbitrate in light of the courts’ new, more narrow grounds for review. Finally, Part IV concludes that the mixed effects resulting from the abrogation of manifest disregard will cause minimal change in the practices of individuals and have even less effect over the market as a whole.

## II. BACKGROUND

To understand the current state of arbitration law and reactions to that state, one must first understand the background of arbitration and the basics of applicable statutory law. This section will begin with a brief history of arbitration, focusing on Federal Arbitration Act §§ 9–11 and similar state statutory law. It will then review more closely the evolution of judicial review, vacatur, and modification from *Wilko v. Swan*<sup>6</sup> to *Hall Street* to current judicial interpretations.

### A. FAA

The Federal Arbitration Act (FAA) was passed in 1925 to counteract judicial disfavor of arbitration agreements.<sup>7</sup> The FAA was intended to en-

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3. *Hall St.*, 552 U.S. at 588–89; see also Brief for New England Legal Foundation et al. as Amici Curiae Supporting Petitioner at 15, *Hall St.*, 552 U.S. 576 (2008) (No. 06-989); Brief for U.S. Council for Int’l Business as Amicus Curiae Supporting Respondent at 29–30, *Hall St.* 552 U.S. 576 (2008) (No. 06-989).

4. See, e.g., Kessler, *supra* note 2, at 88–89; see also ADR Brief, *The Calm and the Storm: Arbitration Experts Speak Out on Hall Street Associates*, 26 ALTERNATIVES TO HIGH COST LITIG. 104, 106–07 (2008) (quoting S. Elaine McChesney); Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 950 (2010) (“After *Hall Street*, will parties accept arbitration’s benefits, risks, and finality? A likely answer in many high-stakes cases is probably not.”).

5. Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 246 (2007).

6. 346 U.S. 427 (1953).

7. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995). See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* (1992) (analyzing the entire history of the FAA, including

courage enforcement of arbitration agreements and “to place such agreements upon the same footing as other contracts.”<sup>8</sup> In addition to solving the enforcement issue—addressed in § 2—the FAA also set up a framework for conducting arbitration proceedings in conjunction with the established judicial system, including a stay of trial in favor of arbitration and the selection of arbitrators by the parties.<sup>9</sup> Among these framework-establishing rules is § 9, which requires judicial enforcement of arbitration awards unless the award is subject to vacatur or modification under §§ 10 and 11.<sup>10</sup> Section 10 sets out four grounds for vacatur of an arbitration award:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; 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>11</sup>

Similarly, § 11 establishes slightly more liberal—more easily attained—requirements for modification of an award, including an “evident material miscalculation” or other procedural defects.<sup>12</sup> As a result of these three sections, the FAA greatly limited the grounds for judicial review of an arbitration award.<sup>13</sup> Shortly after the passage of the FAA, most states followed suit by passing laws intended to codify the two goals of the FAA: enforcement and finality.<sup>14</sup>

### *B. “Manifest Disregard” In and After Wilko*

Courts continued to recognize the strict rules of the FAA regarding vacatur until the Supreme Court “opened the door to possibly recognizing

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pertinent legislative history).

8. *Allied-Bruce*, 513 U.S. at 271 (internal quotation marks omitted).

9. James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J. L. & Bus. 745, 754–55 (2009).

10. *Id.*

11. 9 U.S.C. § 10 (2006).

12. 9 U.S.C. § 11 (2006).

13. Berger & Sun, *supra* note 9, at 755–56.

14. *Id.*

non-statutory grounds for vacating an arbitration award in *Wilko*.<sup>15</sup> The Court in *Wilko* addressed the question of whether an agreement to arbitrate a future dispute is a condition in conflict with the Securities Act.<sup>16</sup> In the process of answering this question, the Court said in dicta, “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.”<sup>17</sup> This relatively obscure statement eventually became what is effectively a common law ground for vacatur, adding to the grounds set out in FAA § 10.<sup>18</sup>

After *Wilko* and before *Hall Street*, all federal circuit courts adopted some version of manifest disregard as a ground for judicial review and possible vacatur.<sup>19</sup> These interpretations of the manifest disregard doctrine across the circuits were similar, with the exception of the Seventh Circuit. Generally, the circuits required that 1) the arbitrator or arbitrators knew the law and 2) deliberately failed to apply the applicable law.<sup>20</sup> Several of the circuits also required that the law be clearly applicable to the situation at bar.<sup>21</sup> Accordingly, the courts repeatedly emphasized that the standard was very narrow and required more than an error or misunderstanding of the law by the arbitrator.<sup>22</sup> The Seventh Circuit, meanwhile, adopted an even narrower definition of manifest disregard.<sup>23</sup> In 2001, Judge Easterbrook, attempting to reconcile two separate lines of cases that addressed the issue, ruled that manifest disregard exists only when an arbitrator “direct[s] the parties to violate the law.”<sup>24</sup> Easterbrook reasoned that a narrow interpreta-

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15. Berger & Sun, *supra* note 9, at 761.

16. *Wilko v. Swan*, 346 U.S. 427, 430 (1953).

17. *Id.* at 436–37 (emphasis added).

18. Berger & Sun, *supra* note 9, at 763. It should be noted that there were also other common law grounds for vacatur, including an arbitrary and capricious award, an award against public policy, an award appropriated by undue means, and in the case of evident partiality. THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 359–428 (2d ed. 2007); Berger & Sun, *supra* note 9, at 764–65. However, since *Hall Street*, these grounds have suffered a similar fate to that of manifest disregard. Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1, 13 (2009).

19. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. Appx. 415, 419 (6th Cir. 2008); *see also* Berger & Sun, *supra* note 9, at 763.

20. *E.g.*, *McCarthy v. Citigroup Global Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006) (“[W]e mean by manifest disregard of the law a situation where it is clear from the record that the arbitrator recognized the applicable law—and then ignored it.”).

21. *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388–90 (2d Cir. 2003).

22. *E.g.*, *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) (“[T]he scope of judicial review . . . ‘is among the narrowest known at law . . . .’”) (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1988)); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (“[W]e may not reverse an arbitration award even in the face of an erroneous interpretation of the law.”); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003) (“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 . . . .”) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933–34 (2nd Cir. 1986)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (“Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.”).

23. *George Watts & Son, Inc., v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

24. *Id.*

tion was appropriate to prevent judicial interference with agreements between the parties and with the ability of arbitrators to formulate the compromises that they, as agents of the parties, were hired to reach.<sup>25</sup>

In addition to federal courts, many state courts recognized some form of the manifest disregard doctrine.<sup>26</sup> The Alabama Supreme Court, for instance, examined federal circuit court, U.S. Supreme Court, and state court precedent before concluding that the common features of the examined common law should shape the Alabama law.<sup>27</sup> The court concluded that vacatur was appropriate “only if the arbitrators knew of a well-defined and explicit governing legal principle, clearly applicable to the circumstances at hand, yet chose to ignore that principle or refused to apply it.”<sup>28</sup> Likewise, New York state courts adopted the Second Circuit’s definition of manifest disregard in order to uphold the finality of arbitration awards.<sup>29</sup> Perhaps more broadly, the Louisiana courts ruled that manifest disregard “refers to error which was obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator” and which the arbitrator “decides to ignore or pay no attention to it.”<sup>30</sup> The uniform application of the manifest disregard doctrine across the country was doubtless helped by the adoption in forty-nine states of some version of the Uniform Arbitration Act (UAA), which closely tracked the FAA.<sup>31</sup> Regardless of the exact interpretation given by the court, this relative consistency across the federal circuit courts and many state courts represents the backdrop against which many practitioners and academics compare today’s scope of judicial review of arbitral awards.

### C. Hall Street

The Supreme Court’s ruling in *Hall Street* effectively reversed the nationwide practice of reviewing arbitration rulings for grave mistakes of law. In *Hall Street*, the petitioner landlord (Hall Street Associates, L.L.C.) sued the tenant (Mattel, Inc.), claiming that the lease required the tenant to indemnify the landlord for any costs resulting from a failure to follow environmental laws.<sup>32</sup> While in district court, the parties agreed to arbitrate the claim, and in the arbitration agreement, they stipulated that “[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings

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25. *Id.*

26. Berger & Sun, *supra* note 9, at 767–68 (citing Arkansas, New York, Nevada, and Alabama as implementing their circuit courts’ interpretations, while also noting that Connecticut, Wisconsin, and Utah interpret manifest disregard as one of the statutorily enumerated grounds for vacatur).

27. Birmingham News Co. v. Horn, 901 So. 2d 27, 47–52 (Ala. 2004).

28. *Id.* at 50.

29. Sawtelle v. Waddell & Reed, Inc., 304 A.D.2d 103, 108 (N.Y. App. Div. 2003).

30. Welch v. A.G. Edwards & Sons, Inc., 677 So. 2d 520, 524 (La. Ct. App. 1996). Compare Moncharsh v. Heily & Blase, 832 P.2d 899, 913 (Cal. 1992) (stating that California law does not recognize any extra-statutory grounds for review except as provided in the arbitration agreement).

31. MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 7:2 (2010).

32. Hall St. Assocs, L.L.C. v. Mattel, Inc., 552 U.S. 576, 579 (2008).

of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."<sup>33</sup> To summarize a rather lengthy procedural history: the arbitrator ruled in favor of Mattel on the ground that environmental laws did not require compliance with the Oregon Drinking Water Quality Act, which had been violated by Mattel; the district court reviewed and overturned the ruling according to the standards of review adopted in the arbitration agreement; the Ninth Circuit reversed according to its ruling in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*,<sup>34</sup> holding that provisions in arbitration agreements for expanded judicial review are unenforceable; and, finally, the Supreme Court granted certiorari to decide whether the grounds for judicial review of an arbitration ruling set out in 9 U.S.C. §§ 10 and 11 can be expanded by contract.<sup>35</sup>

The Court held that the FAA provides the exclusive grounds for judicial review, vacatur, and modification, and that such grounds may not be modified by contract.<sup>36</sup> In his majority opinion, Justice Souter highlighted the difference between the judicial expansion and the contractual expansion of the standard of judicial review: "Hall Street sees th[e] supposed addition [of manifest disregard] to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties. But this is too much for *Wilko* to bear."<sup>37</sup> Although Justice Souter acknowledged the difference between judicial and contractual expansion, he goes on to question the judicial use of manifest disregard as well by saying: "Maybe the term 'manifest disregard' was meant to name a new ground . . . maybe it merely referred to the § 10 grounds collectively, . . . [o]r, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4) . . ." <sup>38</sup> The appropriateness of manifest disregard was also called into question by a lengthy textual argument in which Justice Souter concluded that the grounds set out in §§ 10 and 11 of the FAA are exclusive and offer "no hint of flexibility."<sup>39</sup>

The opinion did explicitly leave room, however, for a broader scope of judicial review based on authority outside of the FAA, such as state statute and common law.<sup>40</sup> This void, coupled with the strong arguments of the Court about the exclusivity of the FAA grounds for vacatur, has fractured the former uniformity of the federal and state courts and has led the courts in a myriad of different directions.

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33. *Id.*

34. 341 F.3d 987 (9th Cir. 2003), *rev'g en banc* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997).

35. *Hall St.*, 552 U.S. at 580–81. Note that the court did not set out to determine the fate of manifest disregard, and probably did not intend to pass judgment on judicially-created expansions of the scope of review. *See id.*

36. *Id.* at 578.

37. *Id.* at 585.

38. *Id.*

39. *Id.* at 586–87.

40. *Id.* at 590.

*D. Interpretations of Hall Street and Confusion in the Circuit Courts*

Interpretations of *Hall Street* range from the complete abrogation of manifest disregard to the review of any arbitral ruling that materially varies from a judicial result.<sup>41</sup> The federal circuit courts have been more restrained, either abrogating the doctrine entirely or upholding a version of the old standard of manifest disregard as a judicially created—rather than contractually created—avenue for vacatur. The First, Fifth, and Eleventh Circuits have each ruled that the FAA grounds for judicial review are exclusive and do not include manifest disregard or any other common law grounds for review, vacatur, or modification.<sup>42</sup> In contrast, the Second, Sixth, Seventh, and Ninth Circuits have upheld manifest disregard in some form or another.<sup>43</sup> The remaining circuits have not had the opportunity to, or have chosen not to, reconcile their interpretations of manifest disregard with *Hall Street*.<sup>44</sup>

While several of the circuits uphold the use of the manifest disregard doctrine, each of these circuits has a slightly different definition for manifest disregard, and all of these interpretations seem a bit narrower than the interpretations that existed before *Hall Street*. The Second Circuit, questioning whether the Supreme Court in *Hall Street* abrogated the doctrine of manifest disregard, ruled that manifest disregard should be upheld in much the same state in which it existed before *Hall Street*—applying it only when the arbitrator knew of the applicable law, understood the law to apply to the instant facts, and refused to apply the law.<sup>45</sup> The court reasoned that it needs the option to vacate on grounds of manifest disregard because it bears responsibility to enforce the parties' agreement to arbitrate, and such improper conduct by an arbitrator can upset the agreement.<sup>46</sup> The court did contend, however, that this “severely limited, [and] highly deferential” standard is similar to FAA § 10(a)(4), which allows vacatur when arbitrators exceed

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41. Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 560–62 (2009).

42. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) (ruling that “the categorical language of *Hall Street* compels” a conclusion that FAA §§ 10 and 11 are exclusive grounds for judicial review); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (holding that manifest disregard “is no longer a basis for vacating awards under the FAA”); *Ramos-Santiago v. United Parcel Serv.* 524 F.3d 120, 124 n.3 (1st Cir. 2008) (“We acknowledge the Supreme Court’s recent holding in *Hall Street* . . . that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award . . .”).

43. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1283 (9th Cir. 2009); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev’d on other grounds*, 130 S. Ct. 1758 (2010); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x. 415, 419 (6th Cir. 2008); *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008).

44. *Citigroup Global Mkts.*, 562 F.3d at 354–55.

45. *Stolt-Nielsen*, 548 F.3d at 95; *see also* *T.Co. Metals, L.L.C. v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010); *NYKCool A.B. v. Pacific Fruit, Inc.*, 2010 WL 4812975 at \*6 (S.D.N.Y. 2010).

46. *Stolt-Nielsen*, 548 F.3d at 95.

their powers.<sup>47</sup> It went so far as to say that manifest disregard could be thought of as a judicially-created gloss on § 10(a)(4).<sup>48</sup>

Likewise, the Ninth Circuit has recast its definition as “shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4).”<sup>49</sup> The court reasoned that the Supreme Court did not rule on whether the manifest disregard doctrine falls within the FAA, and therefore, *Hall Street* does not overrule existing Ninth Circuit precedent.<sup>50</sup> The court noted especially Justice Souter’s speculation on the place of manifest disregard in the law—“as some courts have thought, ‘manifest disregard’ may have been shorthand for § 10(a)(3) or § 10(a)(4).”<sup>51</sup> Similarly, the Sixth Circuit, in an unpublished opinion, chose to uphold its former definition of manifest disregard based on the hesitation of the Supreme Court to reject the doctrine in addition to the well-established and nearly universal precedent in favor of the manifest disregard doctrine.<sup>52</sup>

Unlike the Second, Sixth, and Ninth Circuits, which have essentially retained the old common law definition of manifest disregard, the Seventh Circuit has adhered to its narrow interpretation of manifest disregard. In line with Judge Easterbrook’s opinion, mentioned above, the Seventh Circuit has continued to interpret manifest disregard to apply only when 1) the arbitrator orders the parties to disobey the law, or 2) the arbitrator’s order does not adhere to the legal principles specified by the contract.<sup>53</sup> The court acknowledges that it has defined manifest disregard “so narrowly that it fits comfortably” under FAA § 10(a)(4).<sup>54</sup> As a result, the Seventh Circuit’s interpretation has been considered an “[e]ffective [r]ejection of [m]anifest [d]isregard.”<sup>55</sup>

State courts have also had difficulty determining the fate of the manifest disregard doctrine because state courts have been forced to determine whether the rules applicable to the FAA created by *Hall Street* apply to state court cases—in other words, does the federal law regarding the available scope of judicial review preempt state law?<sup>56</sup> *Cable Connection, Inc. v. DIRECTV, Inc.*<sup>57</sup> is often cited as the leading state law case on the issue.<sup>58</sup> While the court in *Cable Connection* did not address manifest disregard

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47. *Id.* (internal quotation marks omitted) (reasoning that when arbitrators willfully disregard the law, the arbitrators have “failed to interpret the contract at all” and, thereby, have exceeded their powers).

48. *Id.* at 94.

49. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

50. *Id.*

51. *Id.* (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008)); *see also* *Bosak v. Soward*, 586 F.3d 1096 (9th Cir. 2009).

52. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. Appx. 415, 419 (6th Cir. 2008).

53. *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008) (citing *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 581 (7th Cir. 2001)).

54. *Wise v. Wachovia Securities, L.L.C.*, 450 F.3d 265, 268 (7th Cir. 2006).

55. *Huber*, *supra* note 41, at 560.

56. *Berger & Sun*, *supra* note 9, at 780–81.

57. 190 P.3d 586 (Cal. 2008).

58. *See, e.g., Berger & Sun*, *supra* note 9, at 781; *Weston*, *supra* note 4, at 944.



directly,<sup>59</sup> its refusal to apply *Hall Street* is instructive as to how other state courts might perceive the applicability of *Hall Street* to state law and, thus, its effect on manifest disregard.<sup>60</sup>

In *Cable Connection*, the court first addressed the question of whether the Court's ruling in *Hall Street* preempted California precedent allowing contractual expansion of the scope for judicial review.<sup>61</sup> The court argued that the Supreme Court intentionally left open the issue of federal preemption by quoting the Supreme Court itself—"The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."<sup>62</sup> The California court also noted the language of §§ 10 and 11, which say that the provisions "are directed to 'the United States court in and for the district where the award was made.'"<sup>63</sup> It compared this language in §§ 10 and 11 to language from §§ 3 and 4 that the California courts had already held to reflect congressional intent to limit application of those sections to the federal courts.<sup>64</sup> Lastly, the *Cable Connection* court noted that *Hall Street* was a case in federal court, governed by federal law, and should be construed narrowly to reflect these facts.<sup>65</sup> As a result, the court held that provisions in the FAA pertaining to the scope of judicial review—and any court decisions regarding those provisions—were procedural in nature and not preemptive of state law.<sup>66</sup> After deciding that there was no issue with preemption, the court followed its precedent and allowed expansion by contract.<sup>67</sup>

Academics have argued that the ruling in *Cable Connection* "comports with the 'plain reading' of the FAA"; however, few other state courts have elected to follow the decision.<sup>68</sup> Many states have elected to apply both the FAA's procedural and substantive rules in state court, including those regarding the doctrine of manifest disregard.<sup>69</sup> For example, the Alabama Supreme Court recently ruled that the FAA controls in any case in which a contract evincing interstate commerce calls for arbitration, and where the FAA controls, *Hall Street* counsels that manifest disregard is not a proper ground for vacatur.<sup>70</sup> The court did not address the distinction between procedural and substantive law; it merely stated that, because federal law con-

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59. *See id.*

60. Weston, *supra* note 4, at 944–46.

61. *Cable Connection*, 190 P.3d at 595. The contract in the case specifically stated that an award "may be vacated or corrected" for an error of "law or legal reasoning." *Id.* at 590 n.3.

62. *Id.* at 596 (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008)).

63. *Id.* at 597 (quoting 9 U.S.C. §§ 10(a), 11(a) (2006)).

64. *Id.*

65. *Id.* at 599.

66. *Id.*

67. *Id.*

68. Weston, *supra* note 4, at 949 (quoting Stephen K. Huber, *State Regulation of Arbitration Proceedings*, 10 CARDOZO J. CONFLICT RESOL. 509, 530–31 (2009)).

69. *Id.* at 948.

70. *Hereford v. D.R. Horton Inc.*, 13 So. 3d 375, 379–81 (Ala. 2009) (overruling *Birmingham News Co. v. Horn*, 901 So. 2d 27 (Ala. 2004)).

trols through the Supremacy Clause and because *Hall Street* has changed federal law, the manifest disregard doctrine is no longer valid.<sup>71</sup> Similarly, both New York and Texas, among others, have chosen to follow the precedent set by *Hall Street* and revoked manifest disregard as a supplemental, judicially created ground for vacatur.<sup>72</sup>

As a result of the confusion in both the state and federal courts, the issue of judicial review and, specifically, manifest disregard remains a hot topic in all levels of the legal field.<sup>73</sup> The resolution of the issue seems to be especially salient to practitioners trying to decide which methods of dispute resolution to include in their clients' contracts and how to construct those agreements.<sup>74</sup> As the next section proposes, however, these changes should not affect practitioners a great deal.

### III. ANALYSIS – DECISION MAKING

#### A. Factors Affecting a Party's Decision to Arbitrate

The courts have primarily noted two attractive features of arbitration: contractual freedom and finality.<sup>75</sup> Others have suggested that any decision regarding arbitration focuses on a trade-off between cost—in time and money—and accuracy.<sup>76</sup> While the courts, academics, and practitioners are correct in part, the truth is that a decision on whether to arbitrate a dispute encompasses many complex factors.<sup>77</sup> Not only are there many factors that might be involved, but the individual factors used and the weights assigned to these factors vary based on the nature of the contract and the type of potential dispute.<sup>78</sup> For the purposes of this Note, I propose a brief set of factors, which is neither exhaustive nor universal, that can influence the average party's decision to pursue arbitration or to undergo judicial dispute resolution. These seven factors include monetary cost, speed, finality, accuracy, predictability, flexibility, and confidentiality.<sup>79</sup> After briefly describing each of these factors, I will attempt to identify the effect of the doctrine of manifest disregard on each of these factors during *ex ante* decision making and, then, extrapolate these conclusions to identify the possible effects of the

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71. *Id.* at 381.

72. *See, e.g.*, *Royce Homes, L.P. v. Bates*, 315 S.W.3d 77, 90 (Tx. Ct. App. 2010); *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 349 (N.Y. Sup. Ct. 1998) (choosing to interpret manifest disregard as a “judicial interpretation of the section 10 requirement”).

73. *See supra* notes 1–5 and accompanying text.

74. *Id.*

75. *See, e.g.*, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586–88 (2008).

76. Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?* 37 HOFSTRA L. REV. 71, 88–89 (2008) (“Changes that reduce the risk of aberrational awards (such as . . . expanded judicial review) are likely to increase cost[s] . . . .”); *see also* Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review is Not Always Pro-Arbitration*, 77 U. CHI. L. REV. 1013, 1014 (2010).

77. Drahozal & Wittrock, *supra* note 76, at 76–77.

78. *Id.*

79. *See id.* at 77–78.

changes in the treatment of manifest disregard on both the market as a whole and the average party deciding on a method of dispute resolution.

Arbitration has long been thought of as a way to cut down on a company's litigation costs;<sup>80</sup> however, increasing notice is being taken of the actual costs of arbitration.<sup>81</sup> One author has referred to arbitration as a "full-blown surrogate for civil trial,"<sup>82</sup> while another has termed it "arbitigation."<sup>83</sup> Regardless of the terms describing arbitration, firms have begun to take a second look at their arbitration clauses due to the possible changes in the costs of arbitration;<sup>84</sup> limitation of the scope of judicial review is just one change that will affect those costs.<sup>85</sup> It is likely that a more liberal scope of judicial review will increase arbitration (and litigation) costs due to both the amount of attorney's fees needed to resolve the issue and increased arbitrator's fees because of a need to write opinions to explain their reasoning to the court.<sup>86</sup> Therefore, the abrogation of manifest disregard will most likely decrease the potential costs of arbitration, and thereby increase its desirability.

The second and third factors are speed and finality, which refer to both costs (in time) and the stresses of a dispute placed on the individual or business. Arbitration is attractive to many parties because, unlike litigation, it does not involve long wait times for a trial date, extensive discovery, or a drawn out appeals process.<sup>87</sup> As Richard Reuben argues, finality leads to efficiency, and efficiency is important because parties have a need to "get their dispute resolved and move on with their lives."<sup>88</sup> Limitation of the scope of judicial review by the courts, therefore, should increase the desirable qualities of speed and finality.<sup>89</sup>

One of the major fears after the change in the grounds for vacatur is that rogue arbitrators will decline to follow the law.<sup>90</sup> This fear results from a change within the fourth and fifth factors: accuracy and predictability. There is much overlap between these two factors; however, essentially, accuracy refers to decisions that minimize the economic cost of errors, and predictability is reflected by the uniformity across cases—the desirability of which

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80. Lou Whiteman, *Arbitration's Fall from Grace*, LAW.COM (July 13, 2006), <http://law.com/jsp/ihc/pub/article.ihc.jsp?id=1152695125655> ("[M]any general counsels turned to arbitration in hopes of slicing their companies' soaring litigation expenses . . .").

81. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation"*, 7 DEPAUL BUS. & COM. L.J. 383, 386–87 (2009); Drahozal & Wittrock, *supra* note 76, at 71.

82. Stipanowich, *supra* note 81, at 387.

83. Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 314 (2003).

84. Drahozal & Wittrock, *supra* note 76.

85. Ginsburg, *supra* note 76, at 1016.

86. *See id.*

87. Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1129–30 (2009).

88. *Id.* at 1129.

89. *Id.*

90. Timothy M. O'Shea, *Arbitration's Appeal: The Grounds Have Narrowed*, 66 BENCH & B. MINN. 31, 31 (July 2009).

is exemplified by our affinity for precedent.<sup>91</sup> The argument offered by Tom Ginsburg is that more review by bodies outside of the arbitral panel, usually by the judiciary, generates more correct decisions and more uniformity across cases.<sup>92</sup>

While the result of expanded judicial review is not in debate, the position of accuracy and predictability in an arbitral setting has been questioned. On one hand, Reuben acknowledges that accuracy “historically has had little place in arbitration precisely because arbitration calls for the exercise of worldly judgment that is informed by a variety of considerations that may not lend themselves to an objective notion of correctness or accuracy.”<sup>93</sup> On the other hand, Timothy O’Shea and Ginsburg argue that accuracy and predictability are desirable qualities to have in arbitration.<sup>94</sup> Whether or not they have a place in arbitration, accuracy and predictability are certainly not undesirable and probably have at least a marginal effect on decisions over whether to arbitrate. Viewed in this light, accuracy and predictability will diminish when the manifest disregard doctrine is removed as a ground for vacatur because of fewer occasions for judicial review,<sup>95</sup> thus decreasing the desirability of arbitration.

As the courts have frequently noted, flexibility or contractual autonomy, factor six, is another desirable quality of arbitration.<sup>96</sup> Arbitration offers flexibility in the sense that it allows parties to choose arbitrators, create the rules of arbitration including the limits of discovery, and eliminate unsuitable rules or techniques.<sup>97</sup> It is evident that the Court in *Hall Street* ruled in favor of finality and, thereby, limited a party’s autonomy because parties no longer have the power to choose the scope of review.<sup>98</sup> The counter argument, however, is that courts since *Hall Street* have increased contractual freedom by striking down the use of manifest disregard as a means of judicial review.<sup>99</sup> This result, advocated by Reuben, stems from the practice of choosing arbitrators who are allowed to rule according to “non-legal standards . . . such as industry customs and standards.”<sup>100</sup> If this is true and is indeed a common practice, then manifest disregard reduces the contractual flexibility of arbitration, making it less desirable.<sup>101</sup> Although the abrogation of the manifest disregard doctrine should make arbitration more desirable

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91. See Ginsburg, *supra* note 76.

92. *Id.* at 1013 (acknowledging that accuracy is naturally in conflict with an increase of speed or a reduction in costs).

93. Reuben, *supra* note 87, at 1129.

94. Ginsburg, *supra* note 76, at 1014 (“Poor quality decisions . . . undermine the attractiveness of arbitration as a whole.”); O’Shea, *supra* note 90, at 33 (admonishing that the lack of an appeal mechanism should serve as a warning to those considering arbitration).

95. See Ginsburg, *supra* note 76, at 1025 (arguing that more review might lead to “better-reasoned awards” and “improve the quality of decisionmaking”).

96. See *supra* note 75 and accompanying text.

97. CARBONNEAU, *supra* note 18, at 21.

98. Reuben, *supra* note 87, at 1130.

99. *Id.* at 1147.

100. *Id.*

101. *Id.*

according to Reuben, it is likely that this attenuated effect will be overridden by the more drastic decrease in contractual flexibility created by *Hall Street*.<sup>102</sup> Because of these conflicting points of view, the overall effect of the abrogation of manifest disregard is negligible.

Last in the list of factors is confidentiality. The confidential nature of arbitration is attractive to many potential parties to an arbitration agreement who might not like their evidence or outcome to be part of the public record.<sup>103</sup> Arbitration also reduces “the risk of disclosure of confidential information.”<sup>104</sup> However, as the scope of judicial inquiry increases, more detailed records must be kept by the arbitrator, and the record of the appeal to the court system will become public.<sup>105</sup> As a result of the higher potential for publicity, the inclusion of manifest disregard as a ground for vacatur will decrease the confidential nature of arbitration proceedings. Conversely, the abrogation of the manifest disregard doctrine by the courts will increase the confidentiality of proceedings, thereby increasing the desirability of arbitration.

### *B. Reviewing the Factors*

The purpose of describing the factors above and noting the effect of manifest disregard on those factors is to emphasize the complex and varied effects of manifest disregard on arbitration agreement decision making. To summarize these generalizations: the abrogation of the manifest disregard doctrine increases the appeal of arbitration on the factors of cost, speed, finality, and confidentiality; the desirability is decreased by the effect on accuracy and predictability; and while its desirability is increased by the effect on flexibility, that effect is largely nullified by the direct effects of *Hall Street*. As a result, it is apparent that the recent abrogation of manifest disregard will have mixed effects on parties as individuals according to their preferences and, therefore, have little effect when aggregated over the market as a whole.

That said, there are situations in the decision-making process that could highlight the importance of limited judicial review. For instance, as the stakes of the dispute increase, accuracy and predictability become more important while cost and speed become less important.<sup>106</sup> Therefore, if the stakes of a dispute are likely to be high, parties will be less likely to undergo arbitration with a limited possibility of appeal to the judiciary.<sup>107</sup> Conversely, in a situation where the quantity of disputes is likely to be high, cost and speed will take precedent over accuracy and predictability because accuracy

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102. *Id.* at 1130.

103. DOMKE, *supra* note 31, § 1.5.

104. Drahozal & Wittrock, *supra* note 76, at 78.

105. *See* Ginsburg, *supra* note 76, at 1016 (noting a “requirement to give reasons” to the reviewing court).

106. *See* Weston, *supra* note 4, at 950.

107. *See id.*

and predictability would average themselves out over the large quantity of cases. In this instance, a regime without manifest disregard is more attractive. The preference of the individual party could also change depending on the type of business or the subject matter of the dispute—e.g., confidentiality might become more important if the business wants to keep out of the public eye.

### C. Mitigating Evidence

Beyond a logical analysis based on the factors involved in a decision, there are several other dynamics that might reduce the influence of changes in the use of manifest disregard, such as the rarity of a successful manifest disregard challenge and “other avenues” to judicial review. The Fifth Circuit suggested in *Citigroup Global Markets, Inc. v. Bacon* that many courts have failed to address the issue substantively because they have chosen to uphold awards regardless of the existence of the doctrine of manifest disregard.<sup>108</sup> This comment highlights not only the small number of courts that have decided the issue of manifest disregard, but also the rarity of successful challenges to arbitration awards under the manifest disregard doctrine. Furthermore, one study has found that manifest disregard is the most common ground for appeal of an arbitral ruling, yet it is remarkably unsuccessful.<sup>109</sup> The authors of this study found that an appeal on manifest disregard was attempted in 35% of trial court cases and in 30% of appellate cases; however, it was only successful in 7% and 8% of cases, respectively.<sup>110</sup> Another study found that manifest disregard was the second most common ground for appeal of an arbitration award and was successful in only 3% of arbitral appeal cases.<sup>111</sup> These failures are in contrast to an appeal on FAA § 10 grounds, which was employed less frequently but was more successful.<sup>112</sup> These statistics prove that, even when it does exist, manifest disregard is “effectively impossible to prove” in the current system.<sup>113</sup> Because most parties should have understood the difficulty of proving manifest disregard, their reliance on it *ex ante* as a desirable quality of arbitration should be minimal and a change in the availability of it should not greatly affect their preferences for arbitration.

Other statistics also seem to bolster the conclusion that the demise of manifest disregard is not affecting the choices of parties to enter arbitration agreements. In the Fifth Circuit, which was the first circuit to remove ma-

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108. *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 354 (5th Cir. 2009).

109. Drahozal, *supra* note 5, at 237 (citing Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167 (2008)).

110. *Id.*

111. *Id.* (citing Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23).

112. LeRoy & Feuille, *supra* note 109, at 188–89.

113. Huber, *supra* note 41, at 557; *see also* Bosak v. Soward, 586 F.3d 1096, 1104 (9th Cir. 2009) (arguing that without reasoned awards from arbitrators, which are not required, “it is all but impossible to determine whether they acted with manifest disregard for the law”).

nifest disregard as a ground for vacatur, the number of successful challenges to arbitration awards has increased.<sup>114</sup> Although this result has doubtless been caused by a number of variables, its counterintuitive nature might lead us to question our presumptions about the actual efficacy of manifest disregard.<sup>115</sup>

The other dynamic that might mitigate the effects of the repeal of manifest disregard is the availability of alternate methods of ensuring judicial review if review is important to the party.<sup>116</sup> In *Hall Street*, the Supreme Court explicitly stated that it did not intend to close “other possible avenues” for judicial review.<sup>117</sup> Some examples of these “other avenues” might be using a choice-of-law provision to select state law<sup>118</sup> or limiting the power of the arbitrator in the arbitration agreement such that disregard of the law will be in excess of the arbitrator’s power.<sup>119</sup> If a state allows for a wider scope of review for arbitration awards, the parties can stipulate in their choice-of-law provision that they would like to proceed under state law; however, it is important that the parties are aware of the actual law of the state and of possible preemption of the state law by the FAA.<sup>120</sup> If a contract does not specify a choice-of-law or is ambiguous as to the choice-of-law, the FAA will most likely control.<sup>121</sup> In addition, parties can appeal for vacatur through FAA § 10(a)(4), which allows vacatur where the arbitrator exceeded her powers, by expressly limiting the arbitrator’s powers in the arbitration agreement.<sup>122</sup> For example, a party can forbid the arbitrator to make legal errors or serious legal errors.<sup>123</sup> This practice also must be attempted carefully, since some courts have disallowed it as an attempt to circumvent *Hall Street*.<sup>124</sup> Each of these mitigating considerations serves to decrease the importance of manifest disregard, especially as the sun sets on the doctrine of manifest disregard as a ground for vacatur.

#### IV. CONCLUSION

On the margin, all other things being equal, the recent limitations on judicial review could affect the choices of a given party, but the wide range of different factors on which it has an effect—for example, decreased accu-

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114. Donald R. Phibin, Jr. & Audrey Lynn Maness, *Still Litigating Arbitration in the Fifth Circuit, but Less Often*, 42 TEX. TECH L. REV. 551, 574 (2010).

115. *See id.*

116. I.e., a party who places a high value on accuracy and predictability. *See supra* notes 107–08 and accompanying text.

117. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

118. Weston, *supra* note 4, at 951; Rovira, *supra* note 2, at 170.

119. Weston, *supra* note 4, at 950.

120. *Id.* at 951–52.

121. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that the arbitration clause at issue incorporated only state substantive law rather than state arbitration rules; therefore, state law regarding punitive damages in arbitration does not apply).

122. Weston, *supra* note 4, at 950; Drahozal, *supra* note 5, at 237.

123. *Id.*

124. *Id.* at 950–51.

racy and increased finality—will cause different results depending on the individual preferences of the party. As a result, it is unlikely that the average individual or firm will rush to eliminate their arbitration agreements or even change them to reflect a preference for state law.<sup>125</sup> It is equally unlikely that these changes will cause a major trend across the arbitration market as a whole, and if there is a trend away from arbitration, it is doubtful that it is a result of the abrogation of the doctrine of manifest disregard.

Additional support for these conclusions can be found in the statistics that show that manifest disregard was and is a comparatively unsuccessful method of appeal and in statistics that fail to show an emerging trend. Also, the ability of parties to be creative and to circumvent the unavailability of manifest disregard should reduce the impact of the recent developments and allow arbitration to remain as desirable as it was before these changes. In other words, parties who chose arbitration before these cases, even if it was for its accuracy and predictability, should not have to eliminate their arbitration clauses after the recent rulings because it is very likely that they can achieve the same levels of accuracy and predictability through a little creativity. Although both academics and practitioners have insisted on perpetuating this fiery debate,<sup>126</sup> the demise of the doctrine of manifest disregard is not likely to greatly affect the desirability of arbitration *ex ante* to individuals or the market as a whole.

*Weathers P. Bolt\**

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125. Although, it is always advisable to rethink arbitration agreements anytime the applicable law changes.

126. Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 272 (2008).

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