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RE-THINKING THE FEDERAL ARBITRATION ACT § 10: VACATING “MANIFEST DISREGARD”
By
Brian Forgue*

I. INTRODUCTION

The Federal Arbitration Act (FAA) § 10 governs the process and grounds by which a court can vacate an arbitral award.¹ FAA § 10 outlines four interpretive provisions that qualify as grounds to vacate an arbitrator’s award.² The FAA provides that the fourth ground for vacating an arbitral award is triggered when the arbitrators have “exceeded their powers.”³ The ambiguity surrounding excess of authority has garnered attention from many state and federal courts, including the Supreme Court of the United States.^{4,5} The attention from the Supreme Court mainly arises from the common law rule granting vacatur due to “manifest disregard” of the law, finding refuge under the ambiguous umbrella of § 10(a)(4).

Manifest disregard is an amorphous, yet oft claimed ground for vacatur that has been read into the FAA § 10 over the years in arbitration case law.⁶ A losing party to arbitration can claim *post-hoc* that the award was rendered in manifest disregard of law, thus invalidating the arbitrator’s award. Cases centered on manifest disregard have wreaked havoc on lower court systems across many jurisdictions, thus warranting attention from the Supreme Court for clarification.⁷ As evidenced by the decisions discussed in this comment, however, the Supreme Court might not clarify as much about manifest disregard as one would hope.

This comment will focus on the common law rule of manifest disregard of the law as grounds for vacatur under FAA § 10(a), and how such a rule has been not only established in case law, but also read into the FAA after decisions in three notable Supreme Court cases that faced this issue.⁸ First, this comment will briefly discuss the

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¹ The Federal Arbitration Act, 9 U.S.C. § 10 [hereinafter “the FAA”]

² *Id.*

³ 9 U.S.C. § 10(a)(4)

⁴ Hall Street Associates LLC v. Mattel, Inc., 128 S. Ct. 1396 (2008).

⁵ Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758 (2010).

⁶ See, e.g., Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349 (5th Cir. 2009).

⁷ Hall Street, 128 S. Ct. 1396, at 1403 n.5 (2008) (deciding issue whether private contracting for expanded judicial review is in manifest disregard of the law).

⁸ Hall Street Associates, 128 S. Ct. 1396 (2008); Stolt-Nielsen S.A., 130 S. Ct. 1758 (2010).

history and the intent of the FAA. Second, it will examine the background of FAA § 9, § 10 and § 11, their application, and their particular collective effect in the statutory scheme of the FAA. Third, this article will conduct an in depth analysis of the FAA's excess of authority provision. Fourth, particular focus will be given to how the Supreme Court dealt with claims of manifest disregard as a ground for vacatur under § 10(a)(4) in *Hall Street, Stolt-Nielsen*, and *BG Group PLC v. Republic of Argentina*.⁹ Finally, this comment will critique the manifest disregard rule, and propose a rewritten § 10 that will provide a clear, unambiguous framework as to which grounds will be sufficient, and the proper interpretation of such grounds for vacating an arbitral award.

A. *History of the FAA*

Congress enacted the U.S. Arbitration Act, 9 U.S.C. §§ 1-14, also known as the Federal Arbitration Act (FAA) on February 12, 1925.¹⁰ The FAA was drafted primarily as a procedural statute meant to govern the disputes of merchants in very narrow and highly specialized trades and practices.¹¹ Today, however, arbitration as a practice has evolved both internationally and domestically into the preferred method of adjudication between private parties and governments alike, with the blessing of the United States Supreme Court.¹² A single arbitrator or an arbitrating panel, acts in a judge-like capacity to resolve disputes between parties. Consistent with the original intent of the FAA, arbitrators and arbitrating panels are typically experts in the industry in which the dispute arises. Therefore, they are able to provide more subject matter expertise and familiarity with the nuances that an industry-specific dispute embodies.¹³

B. *Original Intent of the FAA and Arbitration Practice Today*

Courts are typically deferential to the parties' rights to freedom of contract because "arbitration is a matter of consent not coercion,"¹⁴ and if parties have agreed to a valid arbitration agreement, unless any improprieties under FAA § 10 are found to have

⁹ See *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014).

¹⁰ See generally Arnold M. Zack, *The Federal Arbitration Act*, Cornell University School of Industrial and Labor Relations, available at https://www.ilr.cornell.edu/alliance/resources/Legal/federal_arbitration_act.html

¹¹ Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 Tul. L. Rev. 1945, 1946 (1996).

¹² *Id.* at 1.

¹³ *Id.* at 24

¹⁴ *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 109 S. Ct. 1248, 1256 (1989).

occurred, courts will enforce the agreement and uphold the federal policy favoring arbitration.¹⁵

The Supreme Court stated in *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University* that, “The Act [FAA] was designed ‘to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate,’” and places such agreements “‘upon the same footing as other contracts . . .’”¹⁶ The principle of contract freedom allows parties in the arbitration context to tailor arbitration agreements however they wish providing for where the arbitration takes place, the quantity and scope of the arbitrator’s authority, how the award will be configured, and the admissibility of expert witnesses in the arbitral proceedings.¹⁷ Enforcing and effectuating such private agreements according to the terms of the contract is consistent with the intent of Congress in creating the FAA.¹⁸

FAA § 10 embodies the ideals of contract freedom that permeate the American law surrounding arbitration; where the arbitrator renders a decision outside the bargain of the parties, a court may then—and only then—vacate the award. FAA § 10 is the crux to the notion of finality of the arbitral process, and this section provides the grounds on which arbitral awards can be vacated by a court.¹⁹ It is also important to briefly discuss the functions and the language Congress used in drafting FAA § 9 and § 11, which highlights the interplay of these two sections on the main focus of this comment, FAA § 10.

II. BACKGROUND OF THE FAA §§ 9- 11

The functions of FAA §§ 9- 11 combine to define the three most pertinent stages and potential pitfalls of an arbitral award. Section 9 summarizes the arbitrator’s award and confirmation procedure; § 10 enumerates specific grounds for vacating an arbitral award; and § 11 outlines the process by which courts can modify or correct an arbitral award.²⁰ Collectively, the scheme of these three sections governs the recourse parties to arbitration agreements can seek after an award has been rendered. In the following analysis of *Hall Street*, *Stolt-Nielsen*, and *BG Group*, ancillary but important to the analysis of § 10, the

¹⁵ *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 103 S. Ct. 927, 941 (1983)(stating questions of arbitrability must be resolved with a “healthy regard for the federal policy favoring arbitration.”); *see also* *Arthur Andersen v. Carlisle et al.*, 129 S. Ct. 1896, 1902 (2009).

¹⁶ *Volt*, *supra* note 14, at 1253.

¹⁷ *See generally* Thomas E. Carbonneau, Commentary, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 Vand. J. Transnat’l L. 1189, 1204 (2003).

¹⁸ *Dean Witter Reynolds, Inc., v. Byrd*, 105 S. Ct. 1238, 1242 (1985) (stating that main Congressional purpose in drafting the FAA was to enforce private agreements to arbitrate, not foster “expeditious resolution of claims.”).

¹⁹ 9 U.S.C. § 10(a)(1)-(4)

²⁰ 9 U.S.C. §§ 9-11

Supreme Court analyzes and applies relevant portions of FAA § 9 and § 11 separately, as well as §§ 9- 11 in conjunction with one another.

A. *FAA § 9*

FAA § 9 outlines the enforcement mechanism, the jurisdiction, and the overall procedure of confirming an arbitral award.²¹ Unless grounds for vacatur or modification are present, a court “must grant” a confirmation order that is properly brought.²² Section 9 provides for a one year period after the award is rendered for the winning party to petition a court to confirm the award and begin the enforcement process.²³ The one year enforcement period has historically been the subject of dispute, with some jurisdictions treating the enforcement period strictly, like a statute of limitations, and some jurisdictions treating it as merely a guideline.²⁴ Interestingly, some courts have taken the view that the arbitration agreement itself denotes an implicit contract which binds the parties to the arbitrator’s award.²⁵ This means that if one party fails to adhere to the arbitrator’s decision, that party has breached the very contract that bound the parties when they originally agreed to arbitrate.²⁶

In terms of enforcement, parties can contract at the front end of the agreement for a court in a specific jurisdiction to handle the confirmation petition. The confirmation process is not without teeth, and not simply for the sake of formality.²⁷ The court’s issuance of an official confirmation of an arbitral award is the first step in forcing compliance on the losing party.²⁸

²¹ 9 U.S.C. § 9

²² 9 U.S.C. § 9; *see also* 4 Commercial Arbitration § 137:1 (citing *Reeves Bros. v. Capital—Mercury Shirt Corp.*, 962 F. Supp. 408, 35 U.C.C. Rep. Serv. 2d 62 (S.D. N.Y. 1997)).

²³ 9 U.S.C. § 9

²⁴ *Kentucky River Mills v. Jackson*, 206 F.2d 111, 120 (1953) (FAA § 9 one-year enforcement period, providing for *statutory* enforcement of awards usually will not bar confirmation of a *common law* award after the one-year period passes); *see also* *Snyder v. Cress*, 791 A.2d 1198, 1201 (2002) (conduct research on time limitations in specific jurisdiction is prudent as some common-law arbitrations are governed by state statute, not federal).

²⁵ *See generally* 4 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration § 138:4 Limitations period* (2014).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

B. *FAA § 11 and the Doctrine of Separability.*

FAA § 11 enables United State federal courts to modify and correct formalistic errors contained in an arbitral award.²⁹ The doctrine of separability is applied in the case law through § 11.³⁰ The separability doctrine requires enforcement of the arbitration clause of a contract regardless of the validity of the underlying contract in which the arbitration agreement exists.³¹ Requiring enforcement of an arbitration provision despite validity issues with the underlying contract aligns with Congress's intent for the FAA to make agreements to arbitrate valid and enforceable in federal court.³² The doctrine accomplishes this by separating the agreement to arbitrate and the remainder of the contract to as two independent agreements, thus lessening the odds that an otherwise valid agreement to arbitrate would be invalidated by a fatal flaw in the underlying contract.³³

An illustration of the doctrine of severability arose in *Prima Paint v. F&C Manufacturing*.³⁴ Consistent with the national federal policy favoring arbitration,³⁵ the Supreme Court employed the doctrine of separability and allowed the enforcement of an arbitration clause in an otherwise invalid and fraudulent contract.³⁶

Further, an arbitral award is not fatally flawed even if the arbitrator rules on a matter not submitted to them, for the intent of § 11 is to “preserve due process without unnecessary public intrusion into private arbitration procedures.”³⁷

²⁹ 9 U.S.C. § 11.

³⁰ *Buckeye Check Cashing Inc., v. Cardegna*, 126 S. Ct. 1204, 1210 (2006); *see also* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 87 S. Ct. 1801, 1806 (1967).

³¹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 87 S. Ct. 1801, 1806 (1967).

³² Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 453 (1998).

³³ Kristen Weisenberger, *From Hostility to Harmony: Buckeye Marks a Milestone in the Acceptance of Arbitration in American Jurisprudence*, 16 AM. REV. INT'L ARB. 551, 557-58 (2005).

³⁴ *Prima Paint*, 87 S. Ct. 1801.

³⁵ *Moses H. Cone*, 103 S. Ct. 927.

³⁶ *Prima Paint*, 87 S. Ct. 1801.

³⁷ 4 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration § 132:5 Award on unsubmitted matter* (2014)(describing process when an award that is valid in part and invalid in part can be “severed” by the court, if the severed portion does not impinge on the merits of the case).

C. *FAA § 10*

Section 10 governs the grounds for vacating an arbitral award. The language of the statute explicitly states that the United States court “may” vacate an award if one or a combination of grounds enumerated in § 10 are met.³⁸ There are relatively few grounds upon which a party can challenge an arbitral award, and they are largely procedural rather than substantive, and parallel those grounds upon which parties generally claim defense in contract law.³⁹ The practice of review on the merits of a case after an award has been rendered is inconsistent with the role of the courts when a party seeks vacatur.⁴⁰ The statutory provisions for vacatur are as follows:

- (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 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.⁴¹

Despite the construction of § 10 supporting a very limited basis for review, § 10 provides the recourse a party must seek if their particular circumstances warrant vacation of an arbitral award. Importantly, however, these are the only enumerated grounds for vacatur in § 10.⁴² A strict textual interpretation to § 10 does not allow common law rules

³⁸ 9 U.S.C. § 10(a)(1)-(4)

³⁹ 9 U.S.C. § 10(a)(1) (Where an award was procured by corruption, fraud, or undue means).

⁴⁰ Andrew M. Campbell, Annotation, *Construction and Application of § 10(a)(4) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(4)) Providing for Vacating of Arbitration Awards Where Arbitrators Exceed or Imperfectly Execute Powers*, 136 A.L.R. Fed. 183 (1997)(citing *Tucker v. American Bldg. Maintenance*, 451 F. Supp. 2d 591 (S.D. N.Y. 2006) (holding that a federal court cannot vacate an arbitral award in arbitration under the FAA merely because it is convinced that the arbitration panel made the wrong call on the law; on the contrary, the award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached).

⁴¹ *See generally* 9 U.S.C. §10(a)(1)-(4)

⁴² Brad Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the “Manifest Disregard” of the Law Standard*, 27 Ind. L. Rev. 241 n.52 (1993) (stating that no express ground for vacatur in § 10 exists for “mistake of fact or misinterpretation of the law by the arbitrators.”).

such as manifest disregard to warrant vacatur simply because the legislature did not provide for such when drafting the FAA. Additionally, allowing broad, sweeping, merits based review undermines the essential effectiveness and efficiency of the arbitral process, when the intent of the FAA was to enforce private agreements to arbitrate.⁴³ In *Hall Street* and *Stolt-Nielsen*, however, the Supreme Court vastly broadened the applicable grounds to vacate through manifest disregard and left the decisional law governing § 10 vacatur before *BG Group* on shaky, uncertain ground.

D. What is Manifest Disregard?

“The inquiry as to whether the arbitrators exceeded their powers focuses on the contractual authority of the arbitrator to decide an issue, not whether the issue was correctly decided. Moreover, the burden of proving that the arbitrators exceeded their authority is very great.”⁴⁴ Another interpretation provides, “. . . we 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.’”⁴⁵

Manifest disregard is a judicially created, common law ground for vacatur, often believed to have found its origins in dicta from the Supreme Court’s opinion in *Wilko v. Swan*.⁴⁶ Unfortunately, the interpretation from *Wilko* left many lower courts and legal commentators unsure of how to define manifest disregard, and more specifically, how and when to apply such a standard.⁴⁷ It is prudent to note that the adjudicatory power the arbitrator possesses derives from the contract of the parties only, and arbitrators should never impute their own idea of justice beyond what the parties have contracted for.⁴⁸ This

⁴³ Dean Wittier Reynolds, 105 S. Ct. 1238.

⁴⁴ See generally 4 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration § 146:1 Generally* (2014) (outlining scope of permissible grounds for § 10 vacatur in commercial arbitration).

⁴⁵ *McCarthy v. Citigroup Global Markets Inc.*, 463 F.3d 87 at 91-92 (Citing *Advest Inc. v. McCarthy*, 914 F.2d 6, 9 (1990)).

⁴⁶ *Wilko v. Swan*, 74 S. Ct. 182, 187-88 (1953) (stating 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.”).

⁴⁷ 14 A.L.R.6th 491 (Originally published in 2006) Adoption of Manifest Disregard of Law Standard as Nonstatutory Ground to Review Arbitration Awards Governed by Uniform Arbitration Act (UAA) Elizabeth D. Lauzon, J.D. (“The manifest disregard of the law standard for vacating an arbitration award is an extremely narrow and judicially created rule with limited applicability. The standard to be applied is whether the arbitrator understands and correctly states the law, and then boldly proceeds to disregard it in fashioning the award.”).

⁴⁸ *Salem Hosp. v. Massachusetts Nurses Ass’n*, 449 F.3d 234, 237 (1st Cir. 2006).

type of minimalism and deference to the parties' contract is arguably mirrored in the very structure of the FAA as a matter of Congressional intent.⁴⁹

III. THE TUMULTUOUS APPLICATION OF MANIFEST DISREGARD.

A. *Hall Street Associates v. Mattel Inc.*⁵⁰

Hall Street Associates is an odd decision by the Supreme Court because it rules against the emphatic national federal policy favoring arbitration,⁵¹ and simultaneously undercuts the freedom of contract theory that pins the practice of arbitration together. The operative portion of the arbitration agreement in *Hall Street* is as follows:

The US District Ct. for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: i) where the arbitrator's findings of facts are not supported by substantial evidence, or ii) where the arbitrator's conclusions of law are erroneous.⁵²

The criteria in this agreement to vacate, modify, or correct an arbitral award attempts to direct the Court to engage in two types of practices. First, it invites a merits review of the arbitration after an arbitral award has been issued, which Congress intended courts to do only in the most egregious cases,⁵³ and further, some courts have reasoned merits review should never happen despite painfully obvious legal or factual errors in the award.⁵⁴ The second practice revolves around choosing which level of review the court should use at this stage of the arbitral process. The main issue in *Hall Street* was whether private parties could privately contract for the type and scope of judicial review for modification, vacatur, or confirmation of an arbitral award.⁵⁵ The Supreme Court held

⁴⁹ Julie E. Patalano, Note, *Contracting for Judicial Review of Arbitration Agreements: Sidestepping the FAA Weakens Arbitration Viability*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 81, 94 (2003)(In developing the FAA, Congress created a scheme where courts remained outside the arbitral review process and only reviewed the merits of a case in the most extreme cases).

⁵⁰ *Hall Street*, 128 S. Ct. 1396.

⁵¹ *Contra* *Moses H. Cone*, 103 S. Ct. 927.

⁵² *Hall Street*, 128 S. Ct. 1396, at 1400-01.

⁵³ Patalano, *supra* note 49, at 85.

⁵⁴ *Advest*, 914 F.2d 6, at 8 (1990) ("Even where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards.").

⁵⁵ *See* *Hall Street*, 128 S. Ct. 1396.

that the statutory grounds for confirming, vacating or modifying arbitral awards were “exclusive” and could not be modified by the parties’ contract.⁵⁶

The Ninth Circuit handled two cases which further illustrate the uncertainty surrounding the power of contracting parties to dictate the scope of judicial review. The United States Court of Appeals for the Ninth Circuit in 1997 held in *LaPine Tech. Corp. v. Kyocera Corp.* that federal courts had to honor the agreement made by parties who contracted for a heightened level of judicial scrutiny at the end of the arbitral process.⁵⁷ This case was later overruled by *Kyocera v. Prudential-Bache Trade Services, Inc.*⁵⁸. The Ninth Circuit, six years later, held that the FAA set forth the exclusive grounds for federal courts to review arbitral awards, and “private parties have no power to alter or expand those grounds” by means of private contract.⁵⁹

Hall Street would subsequently adopt the *Kyocera* reasoning to hold that the scope of judicial review for arbitration awards could not be modified by private contract.⁶⁰ A portion of the majority’s reasoning is arguably sound that by allowing *de novo* review of arbitral awards, courts will inevitably review the merits of arbitrator decisions, thus undermining several key elements as to the efficiency and finality of arbitral awards.⁶¹ Additionally, implicit in their reasoning, the Supreme Court opines that judicial powers of review, and the Courts’ jurisdiction, derives from legislative mandate in the FAA.⁶² The Court’s holding that the FAA grounds are “exclusive” suggests that it is inappropriate for the judiciary to receive powers of review from sources other than Congress, especially the contract of private parties.⁶³

Most germane to manifest disregard, the petitioner in *Hall Street* interprets a portion of *Wilko v. Swan* to hold that an arbitrator’s interpretation of the law is open to expanded judicial review as provided for by private contract of the parties.⁶⁴ In attempts to clarify *Hall Street*, however, the Supreme Court only furthers confusion surrounding

⁵⁶ See *Hall Street*, 128 S. Ct. 1396.

⁵⁷ *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, (9th Cir. 1997).

⁵⁸ *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 994 (9th Cir. 2003).

⁵⁹ *Id.*

⁶⁰ *Hall Street*, 128 S. Ct. 1396; *see also*, *Advest*, 914 F.2d 6.

⁶¹ *Hall Street*, 128 S. Ct. 1396, at 588 (“Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”).

⁶² *Id.* at 589 (“We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.”).

⁶³ See *Hall Street*, 128 S. Ct. 1396.

⁶⁴ See *Wilko*, 74 S. Ct. 182.

this manifest disregard standard.⁶⁵ The Court opines that the phrase “manifest disregard” possibly refers to all of the grounds for vacatur under § 10, or that the phrase acts simply as a colloquial shorthand encompassing situations where, for example, arbitrators are “guilty of misconduct” pursuant to section § 10(a)(3) or when arbitrators “exceed their powers” pursuant to § 10(a)(4).⁶⁶

A large point of confusion lies in whether manifest disregard is applied as a catch-all standard for any of the four provisions for vacatur in § 10, or whether “manifest disregard” is applied as an additional, broad, exclusive standard which parties can now claim to vacate an arbitral award.⁶⁷ If manifest disregard is indeed the latter and now an additional avenue to challenge awards, the finality of the arbitrator’s decision is weakened and the virtues of the arbitral process diminish as the process further resembles the traditional judicial form of adjudication. Also, if manifest disregard exists as a non-statutory avenue for vacatur, courts are invited to second guess the arbitrator’s understanding and interpretation of the relevant law. Without finality in the arbitrator’s decision, arbitration simply becomes a “prologue to prolonged litigation.”⁶⁸ Losing parties claiming manifest disregard of the law will become the norm, inevitably inviting the courts to conduct a merits review of an arbitration, thereby protracting the process. Ultimately, this would only further diminish the autonomous nature of the arbitrator and the arbitrator’s decision.

*B. Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*⁶⁹

Stolt-Nielsen involved a dispute between a shipping company and parcel tankers engaged in shipping goods by sea.⁷⁰ The dispute arose in a highly specialized industry, involving very experienced merchants. After discovering *Stolt-Nielsen*’s illegal price fixing practices, *AnimalFeeds* brought a putative class action suit.⁷¹ The contract between these two parties, however, included an arbitration agreement that did not mention recourse or liability in the context of class action suits.⁷²

⁶⁵ Hall Street, 128 S. Ct. 1396.

⁶⁶ *Id.*

⁶⁷ *See e.g.* Hall Street, 128 S. Ct. 1396.

⁶⁸ *Remmey v. Painewebber Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112, 115 S. Ct. 903, 130 L.Ed.2d 786 (1995).

⁶⁹ *Stolt-Nielsen*, 130 S. Ct. 1758.

⁷⁰ *Id.* at 1764

⁷¹ *Id.* at 1765.

⁷² *Id.* at 1764.

The principle issue for the Supreme Court was whether imposing class arbitration where an arbitration clause was silent on the issue was consistent with FAA § 1.⁷³ The majority held that parties cannot submit to class arbitration without expressly agreeing to do so.⁷⁴ Silence in the contract was insufficient to prove the parties agreed to class arbitration.⁷⁵ With the Supreme Court’s decision, the language in § 10(a)(4) where the arbitrator “exceeded their powers” was afforded a new definition. Before *Stolt-Nielsen*, “exceeded their powers” typically referred to a situation when arbitrators ruled on a matter that was not submitted to them in the parties’ contract. As long as the portion of the award ruled on by the arbitrator that was not submitted did not implicate the merits of the case, the doctrine of separability through § 11 allowed the court to strike that portion of the award and enforce only what was relevant.⁷⁶

Instead, the court found that an arbitrator exceeded her authority by ruling on precisely the issue submitted by the parties.⁷⁷ Justice Ginsburg notes in her dissent that the majority somehow reclassifies the panel’s ruling as a decision in manifest disregard of the law, and decides in accordance with their own interpretation of the governing law.⁷⁸ Essentially, “exceeded their authority” now means that when a reviewing court disagrees with the arbitrator’s interpretation of the law as applied to the facts of a given case, the award was rendered in manifest disregard of the law, and can be vacated under § 10(a)(4); this method of review epitomizes the merits review of an award.

Infamously, the Supreme Court left the status of manifest disregard unclear. The majority stated:

We do not decide whether “manifest disregard” survives our decision in *Hall Street Associates v. Mattel*, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10. *AnimalFeeds* characterizes that standard as requiring a showing that the arbitrators “knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.”⁷⁹

⁷³ 9 U.S.C. § 1.

⁷⁴ *Stolt-Nielsen*, 130 S. Ct. 1758, at 1775.

⁷⁵ *Id.*

⁷⁶ *Buckeye*, 126 S. Ct. 1204; *see also* *Prima Paint*, 87 S. Ct. 1801.

⁷⁷ *Stolt-Nielsen*, 130 S. Ct. 1758 at 1780. (Ginsburg, J dissenting) (explaining the panel performed its function, ruling only on permissibility of class arbitration. Further stating the issue was not ripe for review and the majority merely substituted their own judgment for that of experienced, leading arbitrators).

⁷⁸ *Id.* at 1777.

⁷⁹ *Stolt-Nielsen*, 130 S. Ct. 1758, at 1768 n.3 (2010).

Despite the fact that this case stands together with *Hall Street* as an anomalous decision which cuts against the national federal policy supporting arbitration,⁸⁰ Justice Alito and the majority expressly state they are punting the ambiguity created by *Hall Street* that surrounds the meaning and application of manifest disregard.⁸¹ Though the majority stated they did not decide the meaning of manifest disregard, their holding suggested that when a court disagrees with the arbitrator’s interpretation and subsequent application of the law in a given case, this can and will be considered manifest disregard subject to vacatur under § 10.

C. *BG Group PLC v. Republic of Argentina.*⁸²

BG Group unequivocally restores the autonomy and power that might have been stripped from arbitrators by the Supreme Court’s decisions in *Hall Street* and *Stolt-Nielsen*. This decision not only fully restores arbitrator authority, but it also takes arbitrator authority to a whole new level previously unseen in the modern day practice of arbitration. The result rightfully leaves casual observers of arbitration baffled.

BG Group not only involved a dispute between two private parties, but a dispute that escalated to the point where the issue between these two entities was properly governed by a portion of an international treaty.⁸³ A portion of the dispute resolution provision in the Bilateral Investment Treaty (“BIT”) between the United Kingdom and Argentina was at issue in this case.⁸⁴ The provision stated that either party can submit a dispute between one of the nations and an investor of another to a competent tribunal in the country where the investment was made—more simply, a local court⁸⁵ (hereinafter “local litigation requirement”). Further, the agreement provides for arbitration:

(i) where after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal, the said tribunal has not given its final decision; or (ii) where the final decision of the aforementioned tribunal has been made but the parties are still in dispute.⁸⁶

⁸⁰ Moses H Cone, 103 S. Ct. 927.

⁸¹ *Stolt-Nielsen*, 130 S. Ct. 1758.

⁸² *BG Group*, 134 S. Ct. 1198.

⁸³ Agreement for the Promotion and Protection of Investments, Gr.Brit.- Arg., art. VIII, § 2, Dec. 11, 1990, 1765 U. N. T. S. 38.

⁸⁴ *BG Group*, 134 S. Ct. 1198, at 1203-04.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1203.

The first prong of the provision required BG Group to seek relief in local Argentinian courts and only when after 18 months, and only when the tribunal has not rendered their decision, then BG Group can submit their dispute to arbitration.⁸⁷ Given the economic crisis that struck Argentina in 2011/2012 and the resulting fallout, however, BG Group thought it unlikely that they would see a profitable return on their investment in MetroGAS, and prematurely submitted their dispute to arbitration without complying with the treaty's 180 day local litigation requirement.⁸⁸ The issue was submitted to an arbitral tribunal in Washington, D.C.⁸⁹

The primary issue in this case is who decides, the court or the arbitrator, the governing interpretation and application of the local litigation requirement? The majority concluded that such a procedural, gatekeeping question is for the arbitrator to decide and for courts to review with "considerable deference" to the arbitrator's ruling.⁹⁰ The majority held that treaties are simply contracts between nations,⁹¹ and that the local litigation requirement was merely a "procedural condition precedent to arbitration."⁹²

Most relevant to this comment and manifest disregard, at the District Court level, Argentina sought to vacate the award rendered for lack of arbitrator jurisdiction citing § 10(a)(4) for arbitrators who have "exceeded their powers."⁹³ Argentina asked the district court to add subject matter inarbitrability to the list of definitions sufficient for vacatur under §10(a)(4).

The holding from *BG Group* creates several additional questions for manifest disregard. Would Argentina have had a stronger claim citing "manifest disregard" rather than subject matter inarbitrability? Does manifest disregard already impliedly include subject matter inarbitrability?

A token of solace to be taken from this case might be that given the extreme deference granted to arbitrators by the Supreme Court, the arbitrator's almost unfettered authority might now preclude a higher court, including the Supreme Court, from applying review for vacatur consistent with *Hall Street* and *Stolt-Nielsen*. Perhaps the Court's deference will now apply to an arbitrator's interpretation and application of governing law. It is unlikely to have mattered how Argentina framed their claim for vacatur, but the answers to these questions are no more clear than they were prior to the decisions in *Hall Street*, *Stolt-Nielsen*, and *BG Group*. This leads me to my critique and proposed fix to the manifest disregard standard.

⁸⁷ BG Group, 134 S. Ct. 1198, at 1203

⁸⁸ *Id.* at 1204.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1207-08.

⁹¹ *Id.* at 1208.

⁹² BG Group, 134 S. Ct. 1198, at 1207.

⁹³ *Id.* at 1205.

IV. CRITIQUE OF MANIFEST DISREGARD

The common law rule of manifest disregard has successfully eluded a uniform definition and application. Lower courts wrangled with its ambiguity for years, and when the Supreme Court stepped in to provide a workable definition, they squandered the opportunity both in *Hall Street* and *Stolt-Nielsen*. Reports show that the intent of Congress in creating recourse to vacatur in § 10 of the FAA was to have such nullification of arbitral awards apply in only the most egregious cases.⁹⁴ Manifest disregard has been warped beyond recognition through common law interpretation, assuming it had a recognizable definition at the outset. Having manifest disregard apply as the Supreme Court opines in *Hall Street* has a deleterious effect on the practice of arbitration. As a result, the losing party to arbitration can now claim manifest disregard and the Supreme Court is unsure of how to apply the standard, yet treats it as an enumerated ground for vacatur under § 10. The opinion in *Stolt-Nielsen* continues to convolute the definition by stating that the Supreme Court did not actually define manifest disregard, yet applied it in their decision to mean that whenever the Supreme Court disagrees with the interpretation of the law by the arbitrator, the award is rendered in manifest disregard and is therefore, subject to § 10 vacatur.

In a system where common law decisions interpret and define statutory provisions, what results when the highest court fails to understandably and uniformly define a standard that has such an impact on the practical benefits of arbitration? Below is a proposed solution.

V. PROPOSED SOLUTION FOR § 10 VACATUR

When a rule becomes mangled beyond recognition, the slate must be wiped clean. Section 10 vacatur is an available challenge to an award in the narrowest of circumstances of arbitration proceedings. By its very nature, arbitration is designed to be more expedient and efficient than the traditional court system.⁹⁵ With that said, parties forfeit the full protections of the courts when they choose voluntarily to engage in arbitration, including the right to an appeal. After all, arbitration is a product of contract.⁹⁶ If a party wants all the protections of a court of law, simply put, that party should not consent to arbitration. Therefore, the only grounds for vacatur of an arbitral award for a party fully knowing the extremely limited nature of review, will be those grounds expressly enumerated in the FAA. Common law rules and interpretations have shaped vacatur into an unrecognizable determination, and such interpretations created an unsustainable application of vacatur.

Solving the ambiguity surrounding manifest disregard and § 10 vacatur should be left to Congress. Congress has the resources and investigative power to determine

⁹⁴ See Patalano, *supra* note 49.

⁹⁵ See *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

⁹⁶ *Id.*

whether manifest disregard is worth preserving.⁹⁷ Preservation of this standard, however, will likely only lead to more confusion. The legislature wrote the FAA with enumerated grounds for vacatur, intending them to be narrow.⁹⁸ Courts have interpreted the provisions, albeit incorrectly, and have created their own rules over years of adjudication. At present, the common law rule has become so muddled and at odds with Congressional intent that it has come full circle and Congress is the proper body to wipe the slate clean and start anew.

There must be rights protection written into the statute of § 10, but these protections must be supremely limited in scope, and only exist to ensure a fair, expedient arbitration process. Only the most egregious cases of arbitrator misconduct will invalidate an award. Therefore, a possible solution would be to completely do away with the manifest disregard as a valid ground for vacatur under § 10. When parties choose to arbitrate, they enter a contract for the swift and final decision of an arbitrator. Forfeiture of expediency and specialized adjudication is the concession for traditional court protection of rights, the availability of appeal, and a possible reversal of a judicial decision. A potential rewrite of FAA § 10 is as follows:

Section 10. Same; Vacation; Grounds; Rehearing

(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 arbitration⁹⁹

- (1) Where the award was procured by illegal acts, corruption, bribery, collusion, fraud, duress, or undue means by either, both, or all arbitrating parties;
- (2) Where arbitrator engages in misconduct including, but not limited to, accepting bribes, collusion, prejudicing rights of either party, refusal to hear evidence or testimony relevant to the dispute, failure to disclose past, present, or future business or personal relationships with arbitrating parties. Materiality and significance of disclosed relationships by the arbitrator shall be for the arbitrating parties to determine during arbitrator selection;
- (3) In the case of a tribunal or panel wherein parties each designate one arbitrator and those designees appoint a third, neutral arbitrator, the duties imposed by sections (1) & (2) shall apply to all arbitrators, but with extra emphasis on the neutral arbitrator;
- (4) Definitions:

⁹⁷ *General Motors Corp. v. Tracy* 117 S.Ct. 811, 309 (1997) (citing *Bush v. Lucas*, 103 S. Ct. 2404, 2417 (1983) (noting that Congress's resources to conduct fact finding investigations are greater than those of the courts).

⁹⁸ *See Patalano, supra* note 49.

⁹⁹ 9 U.S.C. § 10(a)- I would keep the same introduction to the statute. The only provisions re-written in this note are provisions (a)(1)-(a)(4).

- a. “Failure to disclose” means that an arbitrator must disclose even the most tangential of relationships with any arbitrating party appearing before them. Failure to disclose will result in a *per se* presumption of arbitrator partiality, regardless of the significance of disclosure, materiality of the disclosure to the proceedings, or length of time after the award the undisclosed information is discovered, and will vacate the award. The cost of arbitrating the issue again with an impartial arbitrator shall shift to the party with whom the previous arbitrator had an undisclosed relationship.
 - b. “Prejudicing rights” refers to the procedure of how the arbitral proceeding is conducted. Though the arbitrator possesses much influence over the proceedings, the arbitrator shall not hinder a party’s procedural right to a fair and expedient adjudication consistent with section (2). This definition does not allow substantive review of factual assertions in the record.
- (5) The provisions enumerated in this section, and these provisions alone, shall provide the only recourse to vacating an award. Any attempt of a court of law to circumvent the provisions enumerated in this section vis-à-vis, common law rules justifying vacatur will not be recognized, nor enforced. Any perceived ambiguity shall be interpreted narrowly and strictly construed to the provisions in this section.

VI. CONCLUSION

Vacatur is a necessary evil to the finality of arbitration. Vacatur provides recourse for aggrieved parties in only the most narrow circumstances and guards against egregious arbitrator misconduct. The Supreme Court has led arbitration jurisprudence down several different paths in recent years with the abovementioned decisions. Arbitration as a practice is currently in a very expansive and permissive place due to its efficiency and practicality. Without such a remedy as vacatur, the practice of arbitration is incomplete. Thus, Congress should revise § 10 and overrule the existing precedent regarding manifest disregard.