# Salvaging Manifest Disregard of the Law in American Arbitration

## Prospects and Possibilities for Expanded Grounds of Judicial Review after Hall Street Associates v. Mattel Inc.

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### 1. Introduction [arriba]

The purpose of this Note is to explore the topic of manifest disregard of the law as a continuing basis for vacatur of awards after the recent Supreme Court decision in Hall Street Associates, L.L.C. v. Mattel, Inc.1 In the first part this Note will examine the origins and historical application of the manifest disregard of the law standard of judicial review of arbitration awards. Secondly, the Note will discuss Hall Street and its prodigy in relation to current status of extra-statutory judicial review of US arbitral awards.

Lastly, the Note will summarize the circuits' responses to these developments and the continuing possibilities for parties to seek wider judicial review outside of the Federal Arbitration Act2, (FAA). Finally, this Note will offer some perspectives on a possible future direction of the FAA interpretation to take account of the limitations imposed by Hall Street.

### 2. The Origins of the Manifest Disregard for the Law Doctrine [arriba]

The origins of the pre-Hall Street vacatur ground of "Manifest Disregard of the Law" can be traced to dicta in the case of Wilko v. Swann where it was said that "[i]n unrestricted submission . . . 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".3 This dictum in Wilko seemingly set in motion a new basis for vacatur without specifying

its origins or source. There does not appear to be any deeper common law roots to the manifest disregard of the law standard that stretch to a time before Wilko; its basis seems predicated on the dicta of Wilko alone. Wilko left completely unclear whether the Court was seeking to establish a new extra-FAA common law principle for vacatur, summarize in a single phrase combined elements of all of the grounds for vacatur listed in FAA § 10 or whether it was premised on defining or expanding a single enumerated ground of FAA vacatur such § 10(a)(3) or § 10(a)(4). As will be demonstrated, this lack of understanding for the original legal foundation of the manifest disregard of the law doctrine has particular significance for seeking vacatur in the post-Hall Street era.

### 3. Defining the Standard for Manifest Disregard of the Law Pre-Hall Street Associates v. Mattel Inc. [arriba]

A. Defining the Manifest Disregard of the Law Standard in American Jurisprudence after the Dicta in Wilko v. Swann

It has been suggested that review on the basis of manifest disregard of the law is most "closely related to whether [the arbitrators] award is contrary to the terms of the contract"4; however it is "different in nature from the fuzzier concepts . . . [such as exceeding contractual authority]" 5 . . . the latter being exercised in the case "where the parties explicitly provide that the arbitrators must correctly apply the law, generally or specifically, [where] a failure to do so will be contrary to the terms of the contract."6 This "Manifest disregard --- for which vacation of the award is available --- requires " ' something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.'7 . . . 'that the arbitrator understood and correctly stated the law but

proceeded to ignore it.'"8 This pre-Hall Street doctrine was "extremely limited"9 and existed for both statutory claims and non-statutory arbitration claims.10

Thomas Carbonneau posits that the "classical formulation is that [manifest disregard] pertains to a situation in which the arbitrators describe the applicable law cogently and knowledgeably and then deliberately ignore it in reaching their determination."11 In essence, manifest disregard of the law will necessarily follow if the arbitrators blatantly and volitionally use "amiable composition" or a comparable equity of their own choosing, without express consent from the parties or authority under the contract.12 Clearly, the situation described by Carbonneau is one of the most flagrant typologies of manifest disregard for the law; however it is by no means exhaustive.

The second circuit case of New York Telephone Co. v. Communications Workers of America Local 110013 provides an excellent example of the application of manifest disregard of the law standard of review in practice. In this case the arbitrator demonstrated that he was aware of the law; however he felt that it was about "time for a new court decision" and made the award solely on this self-determined basis. This reasoning allowed for vacatur on the basis of manifest disregard since the arbitrator had volitionally and purposefully substituted his own equity for the actual law in the field.14

It is simple to envision other instances where both during proceedings and in their award, the arbitrators may step beyond a mere non-reviewable "error of law" in the Wilko sense and instead closer to something that shows manifest disregard of the law. What is doctrinally consistent until the decision in Hall Street is that where vacatur on the basis of manifest disregard was sought, it was for the aggrieved party to establish on a balance of probabilities that the arbitrator's disregard for the law was in fact a "manifest disregard." The aggrieved party was required to demonstrate that the submission reached this level of "manifestness" that was deserving of judicial review, rather than that of just a mere error of law. Since Wilko, "manifest" must mean more than simple "disregard" of the law, which would be a simple error and non-reviewable.

A persistent difficulty in the universal application of any standard of manifest disregard outside of a statutory arbitral context has been the question of what should be done in the absence of a written and reasoned arbitral award. The determination of manifest disregard of the law outside of a statutory arbitration largely depends on the existence of some reasoned award, without which judicial review could be wholly frustrated.15 Without the existence of a reasoned award, the award would normally be upheld "if any rational basis for it can be posited."16

B. Traditional Bases for Vacatur on the Manifest Disregard of Law Standard

Traditionally, where there has been a reasoned award, statutory context, or no rational basis allowing for the use of manifest disregard standard of review, several distinctive typologies have emerged:

i. Ignored applicable law17

ii. Irrationality18

iii. Demonstrably wrong19

iv. Federal Statutory protections20

v. Factual Findings21

vi. “Arbitrary and Capricious”22

This list of potential reasons for seeking vacatur on a manifest disregard of the law or related basis is by no means exhaustive. There has been a certain malleability of manifest disregard of the law standard to allow vacatur of awards on diverse underlying causes for judicial concern and intervention. As a result of its ill-defined origins and scope and the flexibility among courts in the sometimes inconsistent application of the manifest disregard doctrine, it became a catch all for the judiciary to overturn an award without the necessity to tie its relationship to the established FAA § 10 grounds. Even

pre-Hall Street, manifest disregard was neither available to the same extent nor carried a consistent definition in every circuit.23 The reasons and evidence needed to invoke manifest disregard varied widely depending upon which jurisdiction one was litigating the case.24

**4. The End of Manifest Disregard of the Law Doctrine?: Understanding the Holding in Hall Street Associates v. Mattel Inc.** [arriba]

A. The Stare Decisis in Hall Street Associates v. Mattel Inc.

Hall Street Associates, L.L.C. v. Mattel, Inc.,25 arose out of a lease dispute between Hall Street Associates, L.L.C. as landlords and their tenant Mattel. Inc. which sought arbitration.26 After the arbitrator made an award for Mattel, Hall Street Associates,

L.L.C. appealed to the district court, which vacated the award on the basis that the de novo standard of review expressly called for by the parties in their arbitration agreement, is exclusive to the courts for all legal errors.27 After a second arbitration award for Hall Street, L.L.C., both parties again appealed to the district court which upheld the award.28 Both parties then appealed to ninth circuit, where Mattel Inc. successfully advanced the argument that ““[u]nder Kyocera the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.”29 Following the ninth circuit’s reversal the Supreme Court granted certiorari.30

The main issue decided in Hall Street was “whether statutory grounds for prompt vacatur and modification may be supplemented by contract”. The Court held that “the statutory grounds [found in FAA §10] are exclusive.”31 In reaching this conclusion the Court determined that the language of FAA §9 was decisive in determining flexibility in the application of FAA §10 and §11 since “there is nothing malleable about ‘must grant’ [the order] which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.”32

On the issue of manifest disregard itself there was no clear ruling. The Court instead advanced an argument that:“Wilko's phrasing is too vague to support [a general] interpretation, since “manifest disregard” can be read as merely referring to the [FAA] § 10 grounds collectively, rather than adding to them . . . or as shorthand for the [FAA] § 10 subsections authorizing vacatur when arbitrators were “guilty of misconduct” or “exceeded their powers.”33

In reaching their decision, the majority’s core concern was to maintain the right balance between three discreet concerns: party contractual autonomy, efficiency of the arbitration processes, and legal certainty or finality of an award.34 In finding the FAA § 10 statutory grounds exclusive the Court identified “that finality

should prevail over parties' freedom to expand the scope of judicial review under the FAA."35

On the one hand the ruling in Hall Street is decisive with regards to the unavailability of any expandable judicial review authority by parties in their contracts.36 On the other hand by conclusively providing for the first time that the FAA § 10 grounds are exclusive and not clarifying the meaning of the dicta in Wilko or the legal basis for

manifest disregard of the law; the Court left open core questions concerning its continued existence, the extent of any revision, and the nature and scope of legal reasoning behind any revised standard of review.

B. The Supreme Court's refusal in Stolt-Nielsen to Settle the Outstanding Question of Manifest Disregard.

i. What is not proscribed must be permitted?

In Stolt-Nielsen S.A. v. AnimalFeeds International Corp. the Supreme Court affirmed a petition to vacate an arbitration on the basis that an arbitration panel could not impose "class arbitration on parties whose arbitration clauses are "silent" on that issue"37. The procedural history began with the United States District Court for the Southern District of New York, vacating the arbitration award on the basis that the arbitrator had exceeded his powers.38 On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded the case, denying the petition to vacate.39 The Supreme Court granted certiorari and was careful to confine their discussion of vacatur to § 10(a)(4) of the FAA on the statutory ground that the arbitrator "exceeded [his] powers".40 In a footnote Justice Alito felt the need to take an additional precaution by explicitly not deciding the issue of whether "manifest disregard" survives Hall Street, stating:

"We do not decide whether " 'manifest disregard' " survives our decision in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 585, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 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.""41

In many ways the majority opinion in Stolt-Nielsen raises more questions than it answers since it was decided on the ground of arbitrator excess42 in that the "task of an arbitrator . . . to interpret and enforce a contract, not to make public policy."43 The FAA § 10(a)(4) reasoning could have equally been argued under pre-Hall Street doctrine as "manifest disregard" for law of contract, irrationality, and/or lack of legal consent for the type arbitral decision making. If anything, Stolt-Nielsen reaffirms an inherent connectivity between the grounds enumerated in § 10(a)(4) of the FAA and the concept of "manifest disregard" of the law.44

ii. Manifest Disregard Allowed by Implication

Carbonneau believes that "The Court, despite [their][footnote omitted] protestations to the contrary, wants to jettison manifest disregard from the U.S. . . . and transfer its previous function into the statutory ground relating to excess of authority."45 However, if this was the case, the Court could have enunciated it, meaning that more plausible interpretation is that the Court in Stolt-Nielsen has again decided to "park" the issue of manifest disregard, reserving its opinion until a more appropriate or opportune time to answer the question with finality. This

judicial “parking” of the key issue as to whether “manifest disregard” survives Hall Street, when ample grounds existed to provide finality, coupled with expressly declining to do so, seems to serve as an open

invitation to the lower courts to continue its usage (or abolition) as they see fit, albeit without express authority or endorsement.

**5. Navigating Towards a New Legal Basis for a Normative Doctrine: Circuit Reaction to Hall Street Associates v. Mattel Inc.** [arriba]

The circuit courts’ responses to Hall Street have been diverse, divided, and unhelpful in attaining further clarity or consistency in resolving the status of manifest disregard as a ground to vacate an FAA arbitral award. Just as the circuits did not adopt a uniform or consistent approach to applying manifest disregard of the law as a standard pre-Hall Street, they now find themselves equally if not more divided in their judicial responses to this vague decision. These responses have ranged from an absolute abandonment of the standard to the endorsement of previous case law supporting manifest disregard of the law and its continued use as a valid ground for seeking vacatur.

The circuits’ responses broadly fall into five categories: abolition, quasi-abolition, adoption, hesitant adoption, and avoidance.46

A. Abolition (7th, 8th and 11th circuits)

The seventh, eighth, and eleventh Circuits have rejected any possibility that manifest disregard survives Hall Street. The eight circuit applying the Hall Street precedent found that “an arbitral award may be vacated only for the reasons enumerated in the [FAA]”47. Similarly, the eleventh circuit has held that “our judicially-created bases for vacatur are no longer valid in light of Hall Street.”.48 Most recently, the seventh circuit held that “‘manifest disregard of the law’ is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act”.49 None of these circuits has suggested any further utility for the manifest disregard of the law standard of review, even as shorthand for any or all of the grounds listed in the FAA.

B. Quasi-Abolition (1st, 5th circuits)

In Ramos-Santiago v. United Parcel Service, the first circuit reasoned that after Hall Street “manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act.”50 However, in the more recent case of Kashner Davidson Sec. Corp. v. Mscisz, the first circuit found ambiguously that “[t]he continued vitality of the manifest disregard doctrine in FAA proceedings is a difficult and important issue that the courts have only begun to resolve.”51 This conflicting language leaves it difficult to discern whether the first circuit has concluded that manifest disregard is no longer available or whether it is seeking to avoid entertaining review on this basis until the issue is clarified by other circuits or the Supreme Court.

Similarly, the fifth circuit has been less unequivocal about a total abolition manifest disregard and vague in holding that “to the extent that manifest disregard of the law constitutes a non-statutory ground for vacatur, it is no longer a basis for vacating awards under the [FAA].”52 This statement seems to suggest the possibility that manifest disregard of the law may still be sought if it is tied to a single or even a combination of statutory grounds in the FAA.

C. Adoption (2nd, 4th and 9th circuits)

The second, fourth, and ninth circuits have endorsed manifest disregard of the law in the light of Hall Street, albeit in significantly different ways.

Before being appealed to the Supreme Court, in Stolt-Nielsen, the second circuit held that manifest disregard "reconceptualized" "remains a valid ground for vacating arbitration awards" because it is a "judicial gloss on the specific grounds for vacatur enumerated in section 10" of the FAA.53 Subsequent to the Supreme Court's failure to address the manifest disregard issue in Stolt-Nielsen, the second circuit reaffirmed its commitment to the standard in T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., where it clarified the threshold needed for vacatur on this basis in that "seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a 'heavy burden.'"54

Similarly, the ninth circuit in Comedy Club, Inc. v. Improv West Associates,55 held that "after Hall Street Associates, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4)." In Biller v. Toyota Motor Corporation, the ninth circuit not only affirmed the availability of manifest disregard of the law, but began a common law expansion of the meaning behind § 10(a)(4) in holding that "arbitrators exceed their powers in this regard not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational, or exhibits a manifest disregard of law."56

In adopting the standard, the fourth circuit was conclusive on the continuance of manifest disregard standard but indecisive on its legal basis in reasoning that "manifest disregard continues to exist either 'as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."'57

D. Hesitant Adoption (6th, and D.C. Circuit)

Several circuits have responded to Hall Street by taking a hesitant or reserved position towards total adoption of the manifest disregard standard. These circuits have allowed the standard but either avoided ruling on it themselves or providing any express reasoning as to its continued availability.

The sixth circuit similarly said "[i]n light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principal".58 In the same year the sixth circuit seems to have vacillated and took the position that "Hall Street's reference to the 'exclusive' statutory grounds for obtaining relief casts some doubt on the continuing vitality of [manifest disregard of the law] theory".59 However more recently the sixth circuit has returned to their original reasoning in that while "[t]here is some doubt" as to the status of manifest disregard of the law "the Supreme Court has not expressly rejected the theory"60.

Similarly, the District of Columbia Circuit skirted coming to a conclusion on the issue of manifest disregard, by evaluating a case against the former standard61 and

"[a]ssuming without deciding that the "manifest disregard of the law" standard still exists after Hall [Street]."62 While the court's assumption seems to point to some form of adoption, there is no express reasoning in dicta or endorsement.

E. Avoidance (3rd, 10th circuits)

The third circuit has so far avoided ruling on the issue of manifest disregard or saying anything in dicta except that "[b]ased on the facts of this case, we need not

decide whether manifest disregard of the law remains, after Hall Street, a valid ground for vacatur."63

Since Hall Street, the tenth circuit has at least thrice managed to avoid ruling on the existence of manifest disregard. In rejecting review "We need not decide whether § 10 provides the exclusive grounds for vacating an arbitrator's decision, because defendants demonstrate neither manifest disregard of the law nor violation of public policy."64 In a later case they reiterated almost the same position in that "[w]hether manifest disregard for the law remains a valid ground for vacatur is an interesting issue, but as the district court noted, one not central to the resolution of this case."65 More recently, the tenth circuit traced the elaborate history and analysis of manifest disregard and noted the divide amongst the circuits before ultimately concluding, "in the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned. And it is not necessary to do so because this case does not present exceedingly narrow circumstances supporting a vacatur based on manifest disregard of the law."66 The long analysis indicates a judicial frustration with the issue and a longing to grapple with it, while being hesitant to decide it conclusively.67

**6. Using State Arbitration Law as a Basis for Statutory, Common Law, or Contractually Expanded Review after Hall Street** [arriba]

One avenue that still may be open to parties in which to seek more extensive judicial review of their arbitration awards is in the state courts, provided that FAA preemption does not apply or prevent such review. All fifty states and District of Columbia have their own respective arbitration legislation. More expansive review using a manifest disregard standard may be available using state arbitration law either where the state has passed a statute allowing for wider review, the wider review is available at common law in that state, or the parties have explicitly specified a wider scope of review in their contractual arbitration clause permitted under that state's law.68 Following Volt Information Sciences Inc. v. Board of Trustees of the Leland Stanford Junior University69, parties may also specify the law of a particular state as the situs or governing law in relation to their arbitration clause, which theoretically would allow for this law to govern, even in those cases heard or removed to federal court on diversity and subject matter jurisdictions, where the FAA would normally govern.70

Even where a state has passed a statute allowing for wider review, the review is available at common law in that state, or where the parties have specified a wider scope of review, there is still the problem of possible FAA preemption. However, only California, having recently decided a case on this issue71, and New Jersey, allow parties to expand the scope of review.72 FAA preemption of state law is based on the theory of conflict preemption.73 Where there is a conflict of substantive law, the FAA will govern over conflicting state provisions. Regardless of logic, for the purposes of preemption the FAA has traditionally been treated as severable rather than as a unitary whole. While it is clear that certain sections of the FAA such as § 2 will preempt state law, it is still not clear with respect to others.74 Opponents of § 10 applicability in state courts argue that the language of §10 addresses the federal court only and that Congress did not intend for it to apply in state proceedings.75 In Southland Corp. v. Keating76 the Supreme Court decided that the FAA does in fact apply in state court where the issue is one of substantive law.77 If the construction of an FAA section is considered procedural, state substantive law can control.

Another avenue of possible application of state law is in respect to the fact that FAA will also only apply to arbitrations that affect inter-state commerce.78 Any arbitration outside of inter-commerce will be eligible for expanded review without being preempted by § 10 of the FAA.

Despite the challenges of discerning preemption and applicability, the Supreme Court indicated in Hall Street that wider review in state court may be of increasing importance to arbitration, and invites parties and lower courts to explore these possibilities:

"[in] holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. 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."79

There is an open door to resuscitate some form of manifest disregard at the state level. However, provided the legal hurdles, potential pitfalls, and asynchronicity across jurisdictions, this is far from the most desirable method for resolving any gaps left by Hall Street.

**7. Expanded Review Using Federal Rules of Civil Procedure, Rule 16** [arriba]

Hall Street leaves open the possibility that parties might seek review from the district judge under the Federal Rules of Civil Procedure Rule 16 where the agreement to arbitrate was reached during the course of judicial proceedings and parties have contracted for this wider standard.80 There is a diversity of opinion that has emerged as to whether it is a wide-open possibility or whether it is confined to situations where the court's order is not solely based on the FAA.81 What is clear however is that there is at least some room for an argument for extended review in these unusual circumstances, which continues to persist post-Hall Street.82

**8. Private Appellate Panels Outside Article III Judicial Review** [arriba]

Although this Note will not attempt to deal with this question completely, another option for parties considering expanded review post-Hall Street is the possibility of allocating such review to a private appellate arbitration panel.83 In contrast to contracting for greater review before the courts, this method creates a second level review within the arbitration processes itself as part of the arbitration clause. Currently JAMS84, CPR85, NAF86, and AAA/ICDR87 rules provide for the possibility of parties electing for a further arbitral stage of review in their arbitration clauses.

**9. Considerations for International Arbitration Arising From Hall Street** [arriba]

It is worthy of note that even before Hall Street it has never been clear whether or the extent to which the non-statutory ground of manifest disregard could be utilized in relation to enforcement of awards under the New York Convention88 in relation to international commercial arbitration.89 Given manifest disregard's extra-statutory nature and ill-defined relationship with the New York Convention's exclusive grounds, it is not surprising that the case law offers a myriad of differing solutions that do not settle this question. 90However, given the more recent reasoning in Hall Street91 it is likely that the Convention defenses would now be considered exclusive on the same prevailing logic.92

The New York Convention enforcement of international commercial arbitration awards is another area left with open questions after Hall Street that will need further judicial consideration of the possible future grounds to refuse enforcement of these awards based on manifest disregard of the law. To the extent New York Convention Treaty Grounds can be aligned with the FAA, it would be best to establish a consistent use of any standard that develops in place manifest disregard for use both domestically and internationally. When considering how to define future review on the basis of manifest disregard of the law, the Supreme Court must take into account its impact on the future of

international arbitration in the United States, since sophisticated parties may feel uncomfortable engaging in a process that only has a limited scope of review.93 The assurance of rule of law in arbitration and the principle of party autonomy, rather than finality, may prove to be more important criteria in arbitration forum shopping.

**10. Towards a Comprehensive Solution: Interpreting Existing FAA Grounds as a Basis for Continued Review Using Some Form of the Manifest Disregard Standard** [arriba]

In Hall Street the court decided against the expansion of the limited grounds listed in

§ 10 in that:

“the old rule of ejusdem generis has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just an legal error.”94

At first glance it would seem that the court is curtailing any possibility for statutory expansion beyond the FAA § 10 enumerated grounds. However, those FAA § 10 grounds, in particular excess of authority, may be enough in and of themselves, when interpreted broadly at common law, to encompass much of what has previously been scrutinized under the manifest disregard of the law standard.

When the parties incorporate explicit legal guidelines into their arbitration clauses that limit the arbitrators’ authority, any excesses beyond that contractual grant of authority will necessarily trigger the application of FAA § 10(a)(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.” Excess of authority also has an inherent connectivity to the “manifest” that was previously required by the pre-Hall Street doctrinal standard of review for manifest disregard of the law. When an arbitrator’s conduct rises to such a level that it could be classified as being “manifest” with regards to the law, it is likely that it is simultaneously in excess of the power the parties envisioned in their arbitration clause. As seen in the Supreme Court’s decision in Stolt-Nielsen, there is an inherent connectivity between “manifest disregard” concept and potential excesses of power by the arbitrator in relation to FAA § 10(a)(4).95 Manifest disregard of the law is at the start of a continuum that at some point reaches a threshold of “exceeding their powers” which is reviewable under FAA § 10(a)(4). The overlap between these two concepts has the potential to be substantial, even if not complete.

Where the parties do not explicitly provide for a “legal decision” in their writing, there may still be a possibility of the arbitrators’ award “going off the reservation” so far as what is commonly understood to be a legal norm or the “rule of law”, that may still qualify for review under FAA § 10(a)(4).

Judicial precedent, preferably at the Supreme Court level, has the possibility of defining the parameters of the statutory FAA § 10(a)(4) as being close to the coverage of the pre-Hall Street concept of manifest disregard of the law. Additionally, a decision at the Supreme Court would harmonize the availability of a common standard of review across the circuits. The Court should be mindful at the same time to clarify the outstanding questions regarding the applicability of FAA § 10 to the states and the review under the New York Convention.

Another approach that can be embraced by the Supreme Court to fill any remaining gap areas is to use manifest disregard as a shorthand or “judicial gloss”96 of all of the grounds in FAA § 10. This approach can be complementary to providing better definition of FAA § 10(a)(4). Also, it would be useful to parties where smaller arbitral actions vitiate against the reasoning for the statutory grounds enumerated in FAA § 10 and collectively reach a threshold that is sufficiently onerous to amount to manifest disregard of the law based on the entire section.

**11. Conclusion** [arriba]

Since the decision in Wilko, manifest disregard of the law has never resulted in a clear standard consistently applicable in each of the circuits. It has also never been clear where the true legal origins of manifest disregard can be found, whether an extra statutory common law derivative of dicta in Wilko or somehow intrinsically linked to FAA § 10(a) either using the statutory language of a single FAA § 10(a) ground or as a shorthand for multiple grounds. Neither Hall Street nor Stolt-Nielsen satisfactorily resolves this predicament, save for the lone ruling on the exclusivity of those FAA § 10(a) statutory grounds as a basis for vacatur.

As a result of the issue of manifest disregard being sequestered to the judicial parking lot, the disparity between the circuits in the interpretation and application of manifest disregard persists in the post-Hall Street era. There is also no satisfactory resolution by the Supreme Court to the question of FAA § 10(a) preemption over state law, which continues to allow parties to potentially seek more extensive review in certain state jurisdictions. Additionally, the application of any manifest disregard type review to international arbitrations remains an open question. The Supreme Court needs to urgently address the reparation of the unsatisfactory condition of the manifest disregard of the law standard. To ensure a consistent rule of law in American arbitration, the manifest disregard standard must be either conclusively abolished or defined within the FAA’s exclusive grounds. As previously argued, this can be achieved by taking a more nuanced definition of FAA § 10(a)(4) or by creating a judicial shorthand for the combined FAA § 10(a) grounds. Since manifest disregard has come to be a widely known and understood legal standard, there is a definite utility in salvaging as much as possible of the concept within the confines of the FAA.

**Notas** [arriba]

1 552 U.S. 576 (2008)
2 9 U.S.C.

3 Wilko v. Swann, 346 U.S. 427, 437 (1953)
4 Ian R. Macneil, Richard E. Speidel, Thomas J. Stipanowich, Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act § 40.7.1 at 40:81, Release No. 1, February 1995.
5 Id.
6 Id. at 40:82. In this instance the ground of vacatur is squarely within the FAA excess of authority ground, leaving manifest disregard for cases where it is not so expressly clear on what basis the parties intended the award to be made.
7 Id. at 40:87 quoting Dravno v. Krasner, 572 F.2d 348, 352 (2d Cir. 1978).
8 Id. quoting Siegel v. Titan Indus. Corp. 779 F.2d 891, 892-93 (2d Cir. 1985).
9 Id. at 40:83.
10 Id. at 40:82.
11 Carbonneu, Thomas E., 14 Cardozo J. Conflict Resol. 593, 604.
12 Id.
13 256 F.3d 89, 91 (2d.Cir. 2001)
14 Pieper, Thomas N. "Manifest Disregard of the Law" after Hall Street – From One Circuit Split to the Next. 22-SPG Int'l L. Practicum 47, 47.
15 Born, Gary B., International Commercial Arbitration in the United States, Kluwer Law an Taxation Publishers, 1994 at 523-24
16 Id. at 524
17 See Born at 520-21. That the arbitrators were aware of the applicable law and chose not to apply it or where they outright ignored the applicable law or the possibility of its existence. Often this is a clearly "erroneous interpretation of the contract." See also Harry Hoffman Printing Inc. v. Graphic Comm. Int'l Union, Local 261, 950 F.2d 95 (2d Cir. 1991).
18 See Born at 520-21. Some courts have suggested that and award that is irrational and without factual basis may be vacated. See also Raiford v. Merill Lynch, Pierce, Fenner & Smith, Inc. 903 F2.d 1410, 1411 (11th Cir. 1990).
19 See Born at 520-21. Where an arbitrator makes an "error on 'well defined, explicit, and clearly applicable point of law' ' must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator'" See also Merrill Lynch Pierce, Fener, & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).
20 See Born at 520-21. Where federal statutory protections are arbitrable under U. S. law, it has been suggested that the manifest disregard of the law standard would be applicable to ensure proper and uniform interpretation of these fundamental provisions. See also Born at 368-82 & 543-44 for complete discussion of this vast area.
21 See Born at 50-21. There is "virtually no review of arbitrators" factual findings under the manifest disregard of the law standard, however if an arbitrator had absolutely no factual basis for supporting an arbitral award, it has been hinted that a minuscule scope of review might exist. See also United Paperworkers Intl Union v. Misco Inc. 484 U.S. 29, 39 (1987).
22 See Stevens, Sandra Tvarian, Judicial Review of Arbitration Awards Before and After Hall Street, 42-FALL Brief 32, 35 (2012). Before Hall Street some courts applied an "arbitrary and capricious" standard of review where the decision was completely unsupported by the facts of the case. This standard is closely analogous to some aspects of manifest disregard of the law. See also Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992) ("[A]n [arbitration] award that is arbitrary or capricious is not required to be enforced. An award is arbitrary and capricious only if 'a ground for the arbitrator's decision cannot be inferred from the facts of the case."' (citations omitted)).
23 See Katherine A. Helm, The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?, DISP RESOL. J. 16 (Nov. 2006/Jan. 2007)

24 Id.
25 552 U.S. 576 (2008)
26 Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 579 (2008)
27 Id.
28 Id. at 580
29 Id. at 581 quoting 113 Fed.Appx. 272, 272–273 (2004).
30 Id.
31 Id. at 578
32 Id. at 587-88
33 Hall Street Assoc., 552 U.S. 576, 579 (2008)
34 Burns, Brian T., Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street, 78 Fordham L. Rev. 1813, 1825 (2010).
35 Id.
36 See Supra at note 31
37 Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 687 (2010)
38 Jed S. Rakoff, J., 435 F.Supp.2d 382.
39 Sack, Circuit Judge, 548 F.3d 85.
40 Stolt-Nielsen, 559 U.S. at 671-72
41 Id.
42 9 U.S.C. § 10(a)(4)
43 Id. at 672.
44 Id.
45 Carbonneau, Thomas E., 14 Cardozo J. Conflict Resol. 593, 620.
46 For an analyses of circuit jurisprudence See Gronlund, Ann C., The Future of Manifest Disregard As a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court's Ruling in Hall Street Associates, L.L.C. v. Matel Inc., Iowa Law Review, 96 1351 at 1364-70
47 Medicine Shoppe International, Inc. v. Turner Investments, Inc., 614 F.3d 485, 489 (8th Cir. 2010). The court declined to review claims made outside of those statutory grounds contained in the FAA.
48 Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313, 1324 (11th Cir. 2010).
49 Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc., 660 F.3d 281, 285 (7th Cir. 2011).
50 524 F.3d 120, 124 n.3 (1st Cir. 2008).
51 601 F.3d 19, 22-23 (1st Cir. 2010).
52 Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 355 (5th Cir. 2009).
53 Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94 (2d Cir. 2008).
54 592 F.3d 329, 339 (2d Cir. 2010).
55 553 F.3d 1277, 1290 (9th Cir. 2009).
56 668 F.3d 655, 665 (9th Cir. 2012).
57 Wachovia Sec., LLC v. Brand, 671 F.3d 472, 483 (4th Cir. 2012).
58 Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415, 419 (6th Cir. 2008).
59 Grain v. Trinity Health, Mercy Health Servs. Inc., 551 F.3d 374, 380 (6th Cir. 2008).
60 Ozormoor v. T-Mobile USA, Inc., 459 F. App'x 502, 505 (6th Cir. 2012).
61 See LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702, 706 (D.C.Cir.2001) ("(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.").
62 Affinity Financial Corp. v. AARP Financial, Inc., 468 Fed.Appx. 4, 5 (D.C.Cir. 2012).
63 Paul Green Sch. of Rock Music Franchising, LLC v. Smith, 389 F. App'x 172, 177 (3d Cir. 2010).

64 Hicks v. Cadle Co., 355 F. App'x 186, 197 (10th Cir. 2009).
65 DMA Int'l, Inc. v. Qwest Communications Int'l, Inc., 585 F.3d 1341, 1345 n.2 (10th Cir. 2009).
66 Abbott v. Law Office of Patrick J. Mulligan, 440 Fed.Appx. 612, 620 (10th Cir. 2011).
67 Id. at 617-20.
68 See Burns, Brian T., Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street, 78 Fordham L. Rev. 1813, 1839 (2010).
69 109 S.Ct. 1248 (1989).
70 See Burns at 1834. See also 1 Ian R. Macneil, Richard E. Speidel, Thomas J. Stipanowich, Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act, Release No. 1, February 1995 § 10.8.2.2, at 10:80 ("In federal courts, all the sections of the comprehensive FAA will govern.").
71See Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 597 n.12 (Cal. 2008).
72 See Burns at 1849.
73 Gadberry, Gavin J. and Schaap, Dan L., "Federal Arbitration Act ('FAA') Preemption of State Law", Underwood, Wilson, Berry, Stein & Johnson, P.C. at 3 (May 13, 2004).
74 Burns at 1853.
75 Burns at 1850-51.
76 See Southland Corp. v. Keating, 465 U.S. 1, 21 (1984).
77 For a further discussion, See also Burns at 1827. Southland established unequivocally that §2 would be applied in the states. The applicability in state court of other sections remains in question.
78 See Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S.Ct. 2037 (2003). Interpreted to mean the furthest extent of such commerce. See also Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).
79 Hall Street Assocs., 552 U.S. 576 at 589 (2008).
80 See Hall Street Assocs., 552 U.S. 576 at 589-92 (2008). (majority opinion). See also Kessler, David K., Why Arbitrate? The Quest For Efficiency In Arbitration After Hall Street Associates, 8 Fla. St. U. Bus. Rev. 77. 8 Fla. St. U. Bus. Rev. 77, 91.
81 Kessler at 91.
82 Id.
83 For a further discussion, See Marrow, Paul Bennett, A Practical Approach to Affording Review of Commercial Arbitration Awards: Using and Appellate Arbitrator, Chapter 41, AAA Handbook on Commercial Arbitration.
84 See www.jamsadr.com/.
85 See www.cpradr.org/.
86 See www.adrforum.com/.
87 See www.adr.org/aaa/faces/rules/.
See also http://www.drinkerbiddle.com/resources/publications/2013/New-AAA-ICDR-Optional- Appellate-Arbitration-Rules-Questions-Abound?Section=SpeakingEngagements/.
88 New York Convention, Article V, 1958.
89 Born, Gary B., International Commercial Arbitration in the United States, Kluwer Law an Taxation Publishers, 1994 at pg. 521.
90 See Id. at 521-22 for a complete discussion.
91 See Supra discussion of Hall Street.
92 Born at 517.
93 Kessler at 92. See Hall Street Assocs., 552 U.S. 576 at 589 (2008).
94 Hall Street Assocs., 552 U.S. 576 at 585-88 (2008).
95 Stolt-Nielsen at 671-72.
96 Stolt-Nielsen at 94.