

COMMERCIAL ARBITRATION:  
CASES AND PROBLEMS  
Second Edition

2008 Update

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## **Chapter 1 Introduction to Commercial Arbitration**

**Add to the end of note 2 after *AMF Inc. v. Brunswick Corp.* on page 18:**

; *Advanced Bodycare Solutions, L.L.C. v. Thione Int'l, Inc.*, 524 F.3d 1235, 1240 (11<sup>th</sup> Cir. 2008) (“because the mediation process does not purport to adjudicate or resolve a case in any way, it is not ‘arbitration’ within the meaning of the FAA”).

**Add to the end of the first paragraph of note 2 after the Ware excerpt on page 51:**

In 2006, Congress enacted another statute restricting the enforceability of arbitration agreements – this time involving consumer credit disputes with military personnel and their dependents. *See* 10 U.S.C. § 987(e)(3) (“It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which ... the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute”); *id.* § 987(f)(4) (“Notwithstanding section 2 of title 9, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.”). More recently, the 2008 Farm Bill (passed by Congress over President Bush’s veto) required any “livestock or poultry contract” with a pre-dispute arbitration clause to include “a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision,” and to provide conspicuous notice of the provision. 7 U.S.C. § 197c(a), (b).

Currently pending before Congress are bills that would restrict the use of arbitration clauses in nursing home contracts and automobile sale and lease contracts. In addition, the proposed Arbitration Fairness Act would more broadly make predispute arbitration clauses unenforceable in consumer, employment, and franchise contracts, as well as when the clause requires arbitration of “a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” S. 1782, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess., § 4 (2007).

## Chapter 2 Enforcing Domestic Agreements to Arbitrate

Add the following as note 5 after *Buckeye Check Cashing v. Cardegna* on page 70.

5. The Supreme Court rejected an attempt to limit *Buckeye* in *Preston v. Ferrer*, 128 S. Ct. 978 (2008). The Court described the issue in *Preston* as follows:

Ferrer [(TV's "Judge Alex")] claims that Preston was a talent agent who operated without a license in violation of the [California Talent Agencies Act ("TAA")]. Accordingly, he urges, the contract between the parties, purportedly for "personal management," is void and Preston is entitled to no compensation for any services he rendered. Preston, on the other hand, maintains that he acted as a personal manager, not as a talent agent, hence his contract with Ferrer is not governed by the TAA and is both lawful and fully binding on the parties.

Because the contract between Ferrer and Preston provides that "any dispute . . . relating to the . . . validity, or legality" of the agreement "shall be submitted to arbitration," Preston urges that Ferrer must litigate "his TAA defense in the arbitral forum." Ferrer insists, however, that the "personal manager" or "talent agent" inquiry falls, under California law, within the exclusive original jurisdiction of the Labor Commissioner, and that the FAA does not displace the Commissioner's primary jurisdiction..

The dispositive issue, then, ... is simply who decides whether Preston acted as personal manager or as talent agent.

*Id.* at 983. The Court concluded that "*Buckeye*, largely, if not entirely, resolves the dispute before us." *Id.* at 984. It rejected Ferrer's attempts to distinguish *Buckeye* as follows:

Ferrer contends that the TAA is ... compatible with the FAA because §1700.44(a) merely postpones arbitration until after the Labor Commissioner has exercised her primary jurisdiction. The party that loses before the Labor Commissioner may file for *de novo* review in Superior Court. At that point, Ferrer asserts, either party could move to compel arbitration ... and thereby obtain an arbitrator's determination prior to judicial review.

...

... Arbitration, if it ever occurred following the Labor Commissioner's decision, would likely be long delayed, in contravention of Congress' intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."...

A prime objective of an agreement to arbitrate is to achieve "streamlined proceedings and expeditious results." That objective would be frustrated even if Preston could compel arbitration in lieu of *de novo* Superior Court review. Requiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy.

Ferrer asks us to overlook the apparent conflict between the arbitration clause and § 1700.44(a) because proceedings before the Labor Commissioner are administrative rather than judicial....

...

[W]e disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals court. When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.

*Id.* at 985-87.

Replace *Steele v. Lundgren* and notes 1-4 following *Steele* (pp. 71-80) with the following:

**PERRY HOMES v. CULL**  
**Supreme Court of Texas**  
**2008 Tex. LEXIS 423 (May 2, 2008)**

JUSTICE BRISTER delivered the opinion of the Court ....

Since 1846, Texas law has provided that parties to a dispute may choose to arbitrate rather than litigate. But that choice cannot be abused; a party cannot substantially invoke the litigation process and then switch to arbitration on the eve of trial. There is a strong presumption against waiver of arbitration, but it is not irrebuttable and was plainly rebutted here. The Plaintiffs vigorously opposed (indeed spurned) arbitration in their pleadings and in open court; then they requested hundreds of items of merits-based information and conducted months of discovery under the rules of court; finally only four days before the trial setting they changed their minds and decided they would prefer to arbitrate after all. Having gotten what they wanted from the litigation process, they could not switch to arbitration at the last minute like this.

The Plaintiffs argue – and we agree – that sending them back to the trial court not only deprives them of a substantial award but also wastes the time and money spent in arbitration. But they knew of this risk when they requested arbitration at the last minute because all of the Defendants objected. Accordingly, we vacate the arbitration award and remand the case to the trial court for a prompt trial.

### **I. Background**

In 1996, Robert and Jane Cull bought a house from Perry Homes for \$233,730. They also bought a warranty from Home Owners Multiple Equity, Inc. and Warranty Underwriters Insurance Company. The warranty agreement included a broad arbitration clause providing that all disputes the Culls might have against Perry Homes or the warranty companies were subject to the Federal Arbitration Act, and would be submitted to the American Arbitration Association (AAA) or another arbitrator agreed upon by the parties.

Over the next several years, the home suffered serious structural and drainage problems. According to the Culls, the Defendants spent more effort shifting blame than repairing the home. When the Culls sued in October 2000, the warranty companies (but not Perry Homes) immediately requested arbitration; the

Culls vigorously opposed it, and no one ever pressed for a ruling. At the same time, the Culls' attorneys began seeking extensive discovery from all of the Defendants.

After most of the discovery was completed and the case was set for trial, the Culls changed their minds about litigating. Instead they asked the trial court to compel arbitration under precisely the same clause and conditions to which they had originally objected. The trial judge expressed reservations .... Nevertheless, the trial court ordered arbitration because the Defendants had not shown any prejudice from litigation conduct .... The order was signed December 6, 2001, four days before the case was set for trial. The Defendants filed petitions for mandamus in the court of appeals and this Court, both of which were denied without opinion within a few days.

After a year in arbitration, on December 24, 2002, the arbitrator awarded the Culls \$800,000, including restitution of the purchase price of their home (\$242,759), mental anguish (\$200,000), exemplary damages (\$200,000), and attorney's fees (\$110,000). The Defendants moved to vacate the award, again arguing (among other things) that the case should never have been sent to arbitration after so much activity in court. The trial court overruled the objection, confirmed the award, and added post-judgment interest duplicating that already in the award; the court of appeals affirmed after deleting the duplicative interest. We granted the Defendants' petition to consider whether the arbitration award should be set aside because the Culls waived their right to arbitration.

## **II. When Should Orders Compelling Arbitration Be Reviewed?**

... [T]he Culls argue that an order compelling arbitration can only be reviewed *before* arbitration occurs. The Culls address none of the cases in which this Court and the United States Supreme Court have reviewed such orders *after* arbitration. Nor do they address the general rule that parties waive nothing by foregoing interlocutory review and awaiting a final judgment to appeal.

But most important, the Culls do not address section 16 of the Federal Arbitration Act, which expressly prohibits pre-arbitration appeals .... This ban on interlocutory appeals of orders compelling arbitration was added by Congress in 1988 to prevent arbitration from bogging down in preliminary appeals. We have held that routine mandamus review of such orders in state court would frustrate this federal law.

The Culls assert that post-arbitration review is unavailable because an arbitration award can be vacated only for statutory grounds like corruption, fraud, or evident partiality. But reviewing the trial court's initial referral to arbitration is not the same as reviewing the arbitrator's final award; as the United States

Supreme Court has held, courts conduct ordinary review of the former and deferential review only of the latter.

We agree that post-arbitration review of referral may create (as the Culls allege) a “huge waste of the parties’ resources.” But if review is available before arbitration, parties may also waste resources appealing every referral when a quick arbitration might settle the matter. Frequent pre-arbitration review would inevitably frustrate Congress’s intent “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.” We recognize the potential for waste, but that is a risk a party must take if it moves for arbitration after substantially invoking the litigation process.

### III. Do Courts or Arbitrators Decide Waiver?

The Culls also assert that waiver of arbitration by litigation conduct is an issue to be decided by arbitrators rather than courts. To the contrary, this Court and the federal courts have held it is a question of law for the court. Rather than referring such claims to arbitrators, we have decided them ourselves at least eight times, as does every federal circuit court.

The Culls argue this was all changed in 2002 by *Howsam v. Dean Witter Reynolds*, in which the United States Supreme Court said the “presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’” For several reasons, we disagree that this single sentence changed the federal arbitration landscape.

First, “waiver” and “delay” are broad terms used in many different contexts. *Howsam* involved the National Association of Securities Dealers’ six-year limitations period for arbitration claims, not waiver by litigation conduct; indeed, it does not appear the United States Supreme Court has ever addressed the latter kind of waiver. Although the federal courts do not defer to arbitrators when waiver is a question of litigation conduct, they consistently do so when waiver concerns limitations periods or waiver of particular claims or defenses. As *Howsam* involved the latter rather than the former, its reference to waiver must be read in that context.

Second, the *Howsam* court specifically stated that “parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters.” ... By contrast, when waiver turns on conduct in court, the court is obviously in a better position to decide whether it amounts to waiver. “Contracting parties would expect the court to decide whether one party’s conduct before the court waived the right to arbitrate.”

Third, as the *Howsam* Court itself stated, parties generally intend arbitrators to decide matters that “grow out of the dispute and bear on its final disposition,” while they intend courts to decide gateway matters regarding “whether the parties have submitted a particular dispute to arbitration.” Waiver of a substantive claim or delay beyond a limitations deadline could affect final disposition, but waiver by litigation conduct affects only the gateway matter of where the case is tried.

Finally, arbitrators generally must decide defenses that apply to the whole contract, while courts decide defenses relating solely to the arbitration clause. Thus, for example, arbitrators must decide if an entire contract was fraudulently induced, while courts must decide if an arbitration clause was. As waiver by litigation conduct goes solely to the arbitration clause rather than the whole contract, consistency suggests it is an issue for the courts.

Every federal circuit court that has addressed this issue since *Howsam* has continued to hold that substantial invocation of the litigation process is a question for the court rather than the arbitrator -- including the First, Third, Fifth, and Eighth<sup>34</sup> Circuits. Legal commentators appear to agree. So do we.

#### **IV. When Is the Litigation Process Substantially Invoked?**

We have said on many occasions that a party waives an arbitration clause by substantially invoking the judicial process to the other party’s detriment or prejudice. Due to the strong presumption against waiver of arbitration, this hurdle is a high one. To date, we have never found such a waiver, holding in a series of cases that parties did not waive arbitration by:

- filing suit;
- moving to dismiss a claim for lack of standing;
- moving to set aside a default judgment and requesting a new trial;
- opposing a trial setting and seeking to move the litigation to federal court;
- moving to strike an intervention and opposing discovery;
- sending 18 interrogatories and 19 requests for production;
- requesting an initial round of discovery, noticing (but not taking) a single deposition, and agreeing to a trial resetting; or

---

<sup>34</sup> The Eighth Circuit did refer to *Howsam* in one case as requiring waiver to be referred to arbitrators, but that case involved an allegation of waiver by previous arbitration, not litigation. See *Nat’l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 463-66 (8th Cir. 2003).

- seeking initial discovery, taking four depositions, and moving for dismissal based on standing.

These cases well illustrate the kind of conduct that falls short. But because none amounted to a waiver, they are less instructive about what conduct suffices. We have stated that “allowing a party to conduct full discovery, file motions going to the merits, and seek arbitration only on the eve of trial” would be sufficient. But what if (as in this case) only two out of these three are met? And how much is “full discovery”?

We begin by looking to the standards imposed by the federal courts. They decide questions of waiver by applying a totality-of-the-circumstances test on a case-by-case basis. In doing so, they consider a wide variety of factors including:

- whether the movant was plaintiff (who chose to file in court) or defendant (who merely responded);
- how long the movant delayed before seeking arbitration;
- whether the movant knew of the arbitration clause all along;
- how much pretrial activity related to the merits rather than arbitrability or jurisdiction;
- how much time and expense has been incurred in litigation;
- whether the movant sought or opposed arbitration earlier in the case;
- whether the movant filed affirmative claims or dispositive motions;
- what discovery would be unavailable in arbitration;
- whether activity in court would be duplicated in arbitration; and
- when the case was to be tried.

Of course, all these factors are rarely presented in a single case. Federal courts have found waiver based on a few, or even a single one.

We agree waiver must be decided on a case-by-case basis, and that courts should look to the totality of the circumstances. Like the federal courts, this Court has considered factors such as:

- when the movant knew of the arbitration clause;
- how much discovery has been conducted;
- who initiated it;
- whether it related to the merits rather than arbitrability or standing;
- how much of it would be useful in arbitration; and
- whether the movant sought judgment on the merits.

Thus, we disagree with the court of appeals that waiver is ruled out in this case solely because the Culls “did not ask the court to make any judicial decisions

on the merits of their case.” While this is surely a factor, it is not the only one. Waiver involves substantial invocation of the judicial *process*, not just judgment on the merits.

...

We recognize, as we have noted before, “the difficulty of uniformly applying a test based on nothing more than the totality of the circumstances.” But there appears to be no better test for “substantial invocation.” ... How much litigation conduct will be “substantial” depends very much on the context; three or four depositions may be all the discovery needed in one case, but purely preliminary in another.

...

The answer to most questions regarding arbitration “flow inexorably from the fact that arbitration is simply a matter of contract between the parties.” Like any other contract right, arbitration can be waived if the parties agree instead to resolve a dispute in court. Such waiver can be implied from a party’s conduct, although that conduct must be unequivocal. And in close cases, the “strong presumption against waiver” should govern.

## **V. Is a Showing of Prejudice Required?**

Although convinced that the Culls had substantially invoked the litigation process, the trial court compelled arbitration because the Defendants did not prove an arbitrator would not have allowed the same discovery. “Even substantially invoking the judicial process does not waive a party’s arbitration rights unless the opposing party proves that it suffered prejudice as a result.” On at least eight occasions, we have said prejudice is a necessary requirement of waiver by litigation conduct.

The Defendants ask us to reconsider this requirement. They point out that Texas law does not require a showing of prejudice for waiver, but only an intentional relinquishment of a known right. Waiver “is essentially unilateral in its character” and “no act of the party in whose favor it is made is necessary to complete it.” Thus, they argue we cannot impose a waiver rule for arbitration contracts that does not apply to all others.

We decline the Defendants’ invitation based on both federal and state law. The Defendants say the federal courts are split on the issue, but the split is not very wide. Of the twelve regional circuit courts, ten require a showing of prejudice, and the other two treat it as a factor to consider. We have noted before the importance of keeping federal and state arbitration law consistent.

Under Texas law, waiver may not include a prejudice requirement, but estoppel does. In cases of waiver by litigation conduct, the precise question is not so

much when waiver occurs as when a party can no longer take it back.... Texas estoppel law does not allow a party to withdraw a representation once the other party takes “action or forbearance of a definite and substantial character.” Using precisely the same terms, the Restatement does not allow a party to withdraw an option contract when the offeree has taken substantial action based upon it. In these contexts, prejudice is an element of the normal contract rules.

## **VI. Was Arbitration Waived Here?**

### **A. Did the Culls Waive Arbitration?**

It remains only to apply these rules to this case.

Unquestionably, the Culls substantially invoked the litigation process, as their conduct here far exceeds anything we have reviewed before. Before arbitration was ordered, the Culls did not deny taking ten depositions, and the court’s file (of which the trial judge took judicial notice) included:

- their initial objection to arbitration covering 79 pages;
- the Defendants’ responses to requests for disclosure;
- the Culls’ five motions to compel, attached to which were 76 requests for production of documents regarding complaints, inspections, repairs, and settlements relating to eight other homes in the same subdivision;
- Perry Homes’ two motions for protective orders regarding six designees noticed for deposition by the Culls on nine issues (including purchase and preparation of the lot, design and construction of the foundation, sale of this home and others in the subdivision, and attempts to deal with the Culls’ and other foundation complaints), with an attachment requesting categories of documents (including all photos, videos, correspondence, insurance policies, plans, soil tests, permits, subcontractors, contracts for sale, and repairs relating to the house or the suit, all complaints about any house in the subdivision, and Perry Homes’ articles of incorporation, by-laws, minutes, and financials); and
- the Culls’ notices of depositions for three of the Defendants’ experts with 24 categories of documents requested from each (including all documents relating to this case, all their articles, publications, or speeches given in their fields of expertise, all courses or seminars they had attended, all persons they had studied under, and all reference books or treatises in their libraries).

There is simply no question on this record that the Culls conducted extensive discovery about every aspect of the merits.

But under the totality-of-the-circumstances test, discovery is not the only measure of waiver. Here, when the warranty defendants initially moved to compel arbitration, the Culls filed a 79-page response opposing it, asserting that the AAA “is incompetent, is biased, and fails to provide fair and appropriate arbitration panels.” They complained of the AAA’s fees, and asserted that as a result the “purported arbitration clause is unconscionable and unenforceable, and this Court’s enforcement of such would be nothing short of ridiculous and absurd.” This, plus their prayer asking the trial court to deny the motion to compel arbitration “in its entirety,” belies the court of appeals’ conclusion that “the Culls merely opposed the use of the AAA” rather than arbitration itself. In some federal courts, the Culls’ objection alone could suffice to waive arbitration.

The Culls also moved for arbitration very late in the trial process. It is true that Perry Homes moved to continue the trial setting when the Culls sought arbitration, requesting about ten weeks to finish deposing experts. Because the trial court ordered arbitration, no one knows whether the case would have gone to trial ... But in view of the written discovery and depositions already completed, the record is nevertheless clear that most of the discovery in the case had already been completed before the Culls requested arbitration. The rule that one cannot wait until “the eve of trial” to request arbitration is not limited to the evening before trial; it is a rule of proportion that is implicated here.

Then 14 months after filing suit and shortly before the December 2001 trial setting, the Culls changed their minds and requested arbitration. They justified their change of heart on the basis that they wanted to avoid the delays of an appeal. But their change unquestionably delayed adjudication of the merits; instead of a trial beginning in a few days or weeks, the plenary arbitration hearing did not begin until late September of 2002 – almost ten months after the Culls abandoned their trial setting. Moreover, to the extent arbitration reduces delay, it does so by severely limiting *both* pretrial discovery *and* post-trial review. Having enjoyed the benefits of extensive discovery for 14 months, the Culls could not decide only then that they were in a hurry.

It is also unquestionably true that this conduct prejudiced the Defendants. “Prejudice” has many meanings, but in the context of waiver under the FAA it relates to inherent unfairness – that is, a party’s attempt to have it both ways by switching between litigation and arbitration to its own advantage:

[F]or purposes of a waiver of an arbitration agreement[,] prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party’s legal position that occurs when the party’s opponent forces it to litigate an issue and later seeks to arbitrate that same issue.

Thus, “a party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party.”

Here, the record before the trial court showed that the Culls objected to arbitration initially, and then insisted on it after the Defendants acquiesced in litigation. They got extensive discovery under one set of rules and then sought to arbitrate the case under another. They delayed disposition by switching to arbitration when trial was imminent and arbitration was not. They got the court to order discovery for them and then limited their opponents’ rights to appellate review. Such manipulation of litigation for one party’s advantage and another’s detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.

...

Accordingly, we reverse the court of appeals’ judgment, vacate the arbitration award, and remand this case to the trial court for a prompt trial.

### Notes

1. Who should decide whether there has been a waiver, the court or the arbitrator? Section 3 of the FAA provides for a stay pending arbitration, “providing the applicant for the stay is not in default in proceeding with such arbitration,” suggesting that the decision is one for the court. Section 4 of the FAA contains no similar language, however. In *Howsam v. Dean Witter Reynolds, Inc.* (see note 3 after *First Options*), the Supreme Court stated that “the presumption is that the arbitrator should decide ‘allegations of waiver, delay, or a like defense to arbitrability.’” According to the court in *Perry Homes*, the dicta in *Howsam* (which did not involve a claim of waiver) should be limited to claims of waiver in arbitration rather than waiver of the right to arbitrate by conduct in litigation. Is that a sensible distinction?

2. What is the appropriate standard to apply in evaluating a claim of waiver? As the court notes, courts often examine a variety of factors, making a determination of waiver dependent on the facts of the individual case. How does that affect the ability of attorneys to advise their clients on whether a party has waived the right to arbitrate?

3. The court in *Perry Homes* held that prejudice was required to find waiver. As the court noted, not all federal courts require a finding of prejudice. For an example, see the Seventh Circuit’s decision in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390-91 (7<sup>th</sup> Cir. 1995). An excerpt from the opinion is reprinted on page 79 of the casebook.

4. What about the timing of court review of claims of waiver? In *Perry Homes*, the Supreme Court did not review the trial court's finding of no waiver until after the arbitration proceeding had been completed. Why did the appellate courts wait until after the arbitration was over instead of reviewing the order compelling arbitration before the arbitration had begun?

5. Insert note 5 on page 80 of the casebook here.

**Add the following to the end of note 5 after *Simula, Inc. v. Autoliv, Inc.* on page 88:**

; *Efund Capital Partners v. Pless*, 150 Cal. App. 4<sup>th</sup> 1311, 1329 (Cal. App. 2007) (describing *Tracer Research* and *Mediterranean Enterprises* as reflecting a “distinctly minority rule”).

**Add to end of note 4 after *Circuit City Stores, Inc. v. Adams* on page 117:**

The en banc Ninth Circuit rejected the panel holding, reasoning that “[h]ere ... the plaintiff did not seek invalidation of the franchise agreement as a whole on grounds of unconscionability; instead she challenged the unconscionability of solely the arbitration provision.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1263 (9<sup>th</sup> Cir. 2006) (en banc). As a result, the court of appeals concluded, “it was error to hold that consideration of the unconscionability of the arbitration provision was to be determined by the arbitrator.” *Id.*

### **Chapter 3 Arbitrability of Federal Statutory Claims**

**Add to end of note 3 after *American Homestar* on page 193:**

; Koons Ford of Baltimore, Inc. v. Lobach, 919 A.2d 722, 736 (Md. Ct. App. 2007) (“Congress made clear, in § 2310(a)(3)(C), that consumers must retain the ability to adjudicate their claims in court, even if they must first resort to informal dispute settlement procedures”).

**Renumber note 5 after *American Homestar* on page 193 as note 6, and add the following as note 5:**

5. In addition to making predispute arbitration clauses unenforceable in consumer, employment, and franchise contracts, the proposed Arbitration Fairness Act would make a predispute arbitration clause unenforceable when it requires arbitration of “a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” S. 1782, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess., § 4 (2007). What statutes would fall into the categories covered by the Act?

## Chapter 4 The Federal Arbitration Act and State Law

**Add to the end of note 2 following *Citizens Bank v. Alafabco, Inc.* on page 233:**

; Bruner v. Timberlane Manor L.P., 155 P.3d 16, 30 (Okla. 2006) (“declin[ing] to join Alabama, Mississippi and Texas in treating the federal distribution of medicare insurance funds and state distribution of federal-state-matching medicaid funds as indicia of commerce that triggers the FAA”); Satomi Owners Ass’n v. Satomi, L.L.C., 159 P.3d 460, 468 (Wash. Ct. App. 2007) (“[T]he condominium owners purchased real property, not building materials, goods, or services. Whatever hold the FAA had or continues to have over the transactions preceding integration of the materials, goods, and services into the real estate does not extend to the sale of the real property itself.”).

**Renumber the note following *Mastrobuono v. Shearson Lehman Hutton, Inc.* on page 270 as note 1, and add as note 2:**

2. The Supreme Court again addressed the interrelationship of choice-of-law clauses and arbitration clauses in *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (for a description of the facts of *Preston*, see *supra* page 3):

Ferrer’s final attempt to distinguish *Buckeye* relies on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* *Volt* involved a California statute dealing with cases in which “[a] party to [an] arbitration agreement is also a party to a pending court action . . . [involving] a third party [not bound by the arbitration agreement], arising out of the same transaction or series of related transactions.” Cal. Civ. Proc. Code Ann. § 1281.2(c). To avoid the “possibility of conflicting rulings on a common issue of law or fact,” the statute gives the Superior Court authority, *inter alia*, to stay the court proceeding “pending the outcome of the arbitration” or to stay the arbitration “pending the outcome of the court action.”

*Volt Information Sciences* and Stanford University were parties to a construction contract containing an arbitration clause. When a dispute arose and *Volt* demanded arbitration, Stanford sued *Volt* and two other companies involved in the construction project. Those other companies were not parties to the arbitration agreement; Stanford sought indemnification from them in the event that *Volt* prevailed against Stanford. At Stanford’s request, the Superior Court stayed the arbitration. The California Court of Appeal affirmed the stay order. *Volt* and Stanford incorporated § 1281.2(c) into their agreement, the appeals court held. They did so by stipulating that the contract – otherwise silent on the priority of suits drawing in parties not subject to arbitration – would be governed by California law. Relying on the Court of Appeal’s interpretation of the contract, we held that the FAA did not bar a stay of arbitration pending the resolution of Stanford’s Superior Court suit against *Volt* and the two companies not bound by the arbitration agreement.

*Preston* and Ferrer’s contract also contains a choice-of-law clause, which states that the “agreement shall be governed by the laws of the state of California.” A separate saving clause provides: “If there is any conflict between this agreement and any present or future law,” the law prevails over the contract “to the extent necessary to bring [the contract] within the requirements of said law.” Those contractual terms, according to Ferrer, call for the application of California

procedural law, including § 1700.44(a)'s grant of exclusive jurisdiction to the Labor Commissioner.

Ferrer's reliance on *Volt* is misplaced for two discrete reasons. First, arbitration was stayed in *Volt* to accommodate litigation involving third parties who were strangers to the arbitration agreement. Nothing in the arbitration agreement addressed the order of proceedings when pending litigation with third parties presented the prospect of inconsistent rulings. We thought it proper, in those circumstances, to recognize state law as the gap filler.

Here, in contrast, the arbitration clause speaks to the matter in controversy; it states that "any dispute . . . relating to . . . the breach, validity, or legality" of the contract should be arbitrated in accordance with the American Arbitration Association (AAA) rules. Both parties are bound by the arbitration agreement; the question of Preston's status as a talent agent relates to the validity or legality of the contract; there is no risk that related litigation will yield conflicting rulings on common issues; and there is no other procedural void for the choice-of-law clause to fill.

Second, we are guided by our more recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.* Although the contract in *Volt* provided for "arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association," *Volt* never argued that incorporation of those rules trumped the choice-of-law clause contained in the contract. Therefore, neither our decision in *Volt* nor the decision of the California appeals court in that case addressed the import of the contract's incorporation by reference of privately promulgated arbitration rules.

In *Mastrobuono*, we reached that open question while interpreting a contract with both a New York choice-of-law clause and a clause providing for arbitration in accordance with the rules of the National Association of Securities Dealers (NASD). The "best way to harmonize" the two clauses, we held, was to read the choice-of-law clause "to encompass substantive principles that New York courts would apply, but not to include [New York's] special rules limiting the authority of arbitrators."

Preston and Ferrer's contract, as noted, provides for arbitration in accordance with the AAA rules. One of those rules states that "[t]he arbitrator shall have the power to determine the existence or validity

of a contract of which an arbitration clause forms a part.” AAA, Commercial Arbitration Rules R-7(b) (2007). The incorporation of the AAA rules, and in particular Rule 7(b), weighs against inferring from the choice-of-law clause an understanding shared by Ferrer and Preston that their disputes would be heard, in the first instance, by the Labor Commissioner. Following the guide *Mastrobuono* provides, the “best way to harmonize” the parties’ adoption of the AAA rules and their selection of California law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State’s “special rules limiting the authority of arbitrators.”

*Id.* at 987-89.

**Add to the end of note 1 after *Discover Bank v. Vaden* on page 277:**

On remand in *Vaden*, the district court held that the underlying dispute raised a federal question and thus that it had subject matter jurisdiction over the case. The court of appeals affirmed, with Judge Goodwin dissenting. *Discover Bank v. Vaden*, 489 F.3d 594 (4<sup>th</sup> Cir. 2007). Judge Goodwin argued that the underlying dispute did not present a federal question and also took issue with the Fourth Circuit's interpretation of the FAA, stating that "[t]he clear weight of authority is that § 4 does not make federal question jurisdiction over a petition to compel arbitration dependent on the nature of the underlying dispute to be arbitrated." *Id.* at 613.

The Supreme Court granted certiorari in *Vaden* on March 17, 2008, and argument in the case is scheduled for October 6, 2008.



## **Chapter 5 Enforcing International Agreements to Arbitrate**

**Add to the end of note 1 after *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.* on page 294:**

In 2006, UNCITRAL issued a “recommendation” concerning the proper interpretation of Article II(2) – that it “be applied recognizing that the circumstances described therein are not exhaustive.” How much force should American courts give to the UNCITRAL recommendation? Does it undercut the holding in *Kahn Lucas*?



## Chapter 6 The Arbitration Proceeding

**Add new note 4 after *Val-U Construction Co. v. Rosebud Sioux Tribe* on page 355:**

4. In *Rosebud Sioux*, the court of appeals rejected the Tribe's argument that it did not have to participate in the arbitration proceeding unless compelled to do so by a court. On the Tribe's theory, when it did not appear in the arbitration, the arbitrators lacked authority to proceed without them in the absence of a court order. To the contrary, according to the court of appeals, sections 3 and 4 of the FAA are "permissive, not mandatory." A party may, but need not, obtain a court order requiring arbitration. Even without such a court order, the arbitration may proceed on an ex parte basis.

What if instead the Tribe had appeared in the arbitration and objected that the arbitrators lacked authority over it? A handful of recent cases have concluded that "once [respondent] disputed the existence of an arbitration agreement, the [arbitrators] did not have jurisdiction to enter an arbitration award until [claimant] petitioned the courts to compel arbitration." *MBNA America Bank, N.A. v. Christianson*, 659 S.E.2d 209, 215 (S.C. Ct. App. 2008); *see also* *MBNA America Bank, N.A. v. Credit*, 132 P.2d 898, 900 (Kan. 2006) (same) (dicta); *MBNA America Bank, N.A. v. Kay*, 888 N.E.2d 288, at \*8 (Ind. App. 2008) (same). Commentators have been harshly critical of such decisions, finding them contrary to well established law. As Alan Scott Rau states:

Is it possible even to imagine that that an arbitration must grind to a halt whenever such an objection is made? Can it seriously be argued that – even where the court ultimately finds that the parties had indeed agreed to arbitrate – an award rendered prior to such a finding would still have to be vacated? Of course not ....

Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169, 200 (2007); *see also* William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135, 152 n.68 (2007) (“The [court’s] assertion has no foundation in logic, policy, or law.”).

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**Add the following to the end of note 1 after *Birbrower* on page 366:**

*But see* Prudential Equity Group LLC v. Ajamie, 2008 U.S. Dist. LEXIS 14108, at \*8 (S.D.N.Y. Feb. 27, 2008) (refusing to follow *Birbrower* on ground that arbitration proceedings “still retain in most settings their essential character of private contractual arrangements for the relatively informal resolution of disputes”).

The California legislature has extended § 1282.4 so that it now expires January 1, 2011.

Replace *Positive Software Solutions* (pp. 382-387) with the following:

**POSITIVE SOFTWARE SOLUTIONS, INC. v.  
NEW CENTURY MORTGAGE CORP.  
United States Court of Appeals for the Fifth Circuit (en banc)  
476 F.3d 278 (2007)**

EDITH H. JONES, Chief Judge ...:

The court reconsidered this case en banc in order to determine whether an arbitration award must be vacated for “evident partiality,” 9 U.S.C. § 10(a)(2), where an arbitrator failed to disclose a prior professional association with a member of one of the law firms that engaged him. We conclude that the Federal Arbitration Act (“FAA”) does not mandate the extreme remedy of vacatur for nondisclosure of a trivial past association, and we reverse the district court’s contrary judgment .....

#### BACKGROUND

The facts are undisputed. In January 2001, New Century Mortgage Corporation (“New Century”) licensed an automated software support program from Positive Software Solutions, Inc. (“Positive Software”). In December 2002, during negotiations for a renewal of that license, Positive Software alleged that New Century copied the program in violation of the parties’ agreement and applicable copyright law. Positive Software then filed this lawsuit against New Century in the Northern District of Texas alleging breach of contract, misappropriation of trade secrets, misappropriation of intellectual property, copyright infringement, fraud, and other causes of action. Positive Software sought specific performance, money damages, and injunctive relief.

In April 2003, the district court granted Positive Software’s motion to preliminarily enjoin New Century from using the program and, pursuant to the parties’ contract, submitted the matter to arbitration. Following American Arbitration Association (“AAA”) procedures, the AAA provided the parties with a list of potential arbitrators and asked the parties to rank the candidates. After reviewing biographical information, the parties selected Peter Shurn to arbitrate the case, as he had the highest combined ranking. The AAA contacted Shurn about serving as an arbitrator, and he agreed, after stating that he had nothing to disclose regarding past relationships with either party or their counsel.

After a seven-day hearing, Shurn issued an eighty-six page written ruling, concluding that New Century did not infringe Positive Software’s copyrights, did not misappropriate trade secrets, did not breach the contract, and did not defraud

or conspire against Positive Software. He ordered that Positive Software take nothing on its claims and granted New Century \$ 11,500 on its counterclaims and \$ 1.5 million in attorney's fees.

Upon losing the arbitration, Positive Software conducted a detailed investigation of Shurn's background. It discovered that several years earlier, Shurn and his former law firm, Arnold, White, & Durkee ("Arnold White"), had represented the same party as New Century's counsel, Susman Godfrey, L.L.P., in a patent litigation between Intel Corporation and Cyrix Corporation ("the Intel litigation"). One of Susman Godfrey's attorneys in the New Century arbitration, Ophelia Camina, had been involved in the Intel litigation.

The Intel litigation involved six different lawsuits in the early 1990s. Intel was represented by seven law firms and at least thirty-four lawyers, including Shurn and Camina. The dispute involved none of the parties to the arbitration. Camina participated in representing Intel in three of the lawsuits from August 1991 until July 1992, although her name remained on the pleadings in one of the cases until June 1993. In September 1992, Shurn, along with twelve other Arnold White attorneys, entered an appearance in two of the three cases on which Camina worked. Although their names appeared together on pleadings, Shurn and Camina never attended or participated in any meetings, telephone calls, hearings, depositions, or trials together.

Positive Software filed a motion to vacate the arbitration award .... In September 2004, the district court granted Positive Software's motion and vacated the award, finding that Shurn failed to disclose "a significant prior relationship with New Century's counsel," thus creating an appearance of partiality requiring vacatur. New Century appealed, and a panel of this court affirmed the district court's vacatur on the ground that the prior relationship "might have conveyed an impression of possible partiality to a reasonable person." Neither the district court nor the appellate panel found that Shurn was actually biased toward New Century. This court granted New Century's petition for rehearing en banc.

## DISCUSSION

To assure that arbitration serves as an efficient and cost-effective alternative to litigation, and to hold parties to their agreements to arbitrate, the FAA narrowly restricts judicial review of arbitrators' awards. The ground of vacatur alleged here is that "there was evident partiality" in the arbitrator. The meaning of evident partiality is discernible definitionally and as construed by the Supreme Court and a number of our sister circuits.

On its face, “evident partiality” conveys a stern standard. Partiality means bias, while “evident” is defined as “clear to the vision or understanding” and is synonymous with manifest, obvious, and apparent. Webster’s Ninth New Collegiate Dictionary 430 (1985). The statutory language, with which we always begin, seems to require upholding arbitral awards unless bias was clearly evident in the decisionmakers.

The panel decision here disagreed with the straight forward interpretation, however, and concluded that, in “a nondisclosure case in which the parties chose the arbitrator,” the “arbitrator selected by the parties displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator’s partiality.” The panel acknowledged a lack of any actual bias in this award even as it substituted a reasonable impression of partiality standard for “evident” partiality in cases of an arbitrator’s nondisclosure to the parties. The panel believed this different standard to be required by the Supreme Court’s decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*...

How *Commonwealth Coatings* guides this court is a critical issue. Reasonable minds can agree that *Commonwealth Coatings*, like many plurality-plus Supreme Court decisions, is not pellucid.... Justice Black delivered the opinion of the Court and imposed “the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.” He noted that, while arbitrators are not expected to sever all ties with the business world, courts must be scrupulous in safeguarding the impartiality of arbitrators, who are given the ability to decide both the facts and the law and whose decisions are not subject to appellate review. Thus, arbitrators “not only must be unbiased but also must avoid even the appearance of bias,” in order to maintain confidence in the arbitration system.

Justice White, the fifth vote in the case, together with Justice Marshall, purported to be “glad to join” Justice Black’s opinion, but he wrote to make “additional remarks.” Justice White emphasized that “[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.” Indeed, Justice White wrote that arbitrators are not “automatically disqualified by a business relationship with the parties before them if . . . [the parties] are unaware of the facts but the relationship is trivial.” While supporting a policy of disclosure by arbitrators to enhance the selection process, Justice White also concluded, in a practical vein, that an arbitrator “cannot be expected to provide the parties with his complete and unexpurgated business biography.” His opinion fully envisions upholding awards when arbitrators fail to disclose insubstantial relationships.

If one lays primary emphasis on Justice White's statement that he was "glad to join" the plurality, his opinion can be deemed reconcilable with that of Justice Black. Only in that event is the plurality opinion binding on lower courts.

Another compelling reading of the opinions is also possible, however. Justice Black's opinion uses an egregious set of facts as the vehicle to require broad disclosure of "any dealings that might create an impression of possible bias." Justice White, for his part, hews closely to the facts and finds it "enough for present purposes to hold, as the Court does, that where the arbitrator has a *substantial interest* in a firm which has done *more than trivial business* with a party, that fact must be disclosed." (emphasis added). Justice White, thus read, supports ample but not unrealistic disclosure, and he supports a cautious approach to vacatur for nondisclosure. His "joinder" is magnanimous but significantly qualified.

The latter reading is more persuasive, because it accords scope to the full White opinion, unlike the view that focuses on the introductory "glad to join" sentence. Thus, Justice White's concurrence, pivotal to the judgment, is based on a narrower ground than Justice Black's opinion, and it becomes the Court's effective ratio decidendi.

A majority of circuit courts have concluded that Justice White's opinion did not lend majority status to the plurality opinion. While these courts' interpretations of *Commonwealth Coatings* may differ in particulars, they all agree that nondisclosure alone does not require vacatur of an arbitral award for evident partiality. An arbitrator's failure to disclose must involve a significant compromising connection to the parties.

...

Only the Ninth Circuit has interpreted *Commonwealth Coatings*, as the panel majority did, to de-emphasize Justice White's narrowing language. See *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). In *Schmitz*, the court criticized case law suggesting "that an impression of bias is sufficient while an appearance [of bias] is not." *Commonwealth Coatings*, it held, does not merit such a "hairline distinction." *Schmitz* not only interpreted *Commonwealth Coatings* to mandate a "reasonable impression of bias" standard in nondisclosure cases but went on to vacate an arbitral award where the arbitrator had not himself been aware of the potential conflict and had failed to undertake due diligence to ascertain and then disclose it to the parties.<sup>4</sup> Even if one ignores the extension of *Commonwealth*

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<sup>4</sup> In *Schmitz*, the arbitrator's law firm previously had represented Prudential Insurance Co., the parent of Pru-Bache Securities, the prevailing party in the arbitration. The representation involved at least nineteen cases over a thirty-five year period, including a case that ended less than two years before the arbitration. The

*Coatings* by *Schmitz*, the undisclosed relationship between the arbitrator's firm and Pru-Bache's parent company was more current, concrete and financially meaningful than the co-counsel relationship in the present case. *Schmitz* is an outlier that lends little support to Positive Software.

As we have concluded, the better interpretation of *Commonwealth Coatings* is that which reads Justice White's opinion holistically. The resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The "reasonable impression of bias" standard is thus interpreted practically rather than with utmost rigor.

According to this interpretation of *Commonwealth Coatings*, the outcome of this case is clear: Shurn's failure to disclose a trivial former business relationship does not require vacatur of the award. The essential charge of bias is that the arbitrator, Peter Shurn, worked on the same litigation as did Ophelia Camina, counsel for one of the parties. They represented Intel in protracted patent litigation that lasted from 1990 to 1996. Camina and Shurn each signed the same ten pleadings, but they never met or spoke to each other before the arbitration. They were two of thirty-four lawyers, and from two of seven firms, that represented Intel during the lawsuit, which ended at least seven years before the instant arbitration.

No case we have discovered in research or briefs has come close to vacating an arbitration award for nondisclosure of such a slender connection between the arbitrator and a party's counsel. In fact, courts have refused vacatur where the undisclosed connections are much stronger. See, e.g., *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 982, 984 (8th Cir. 2001) (no vacatur; as general counsel for a company, arbitrator had employed sixty-eight attorneys, paying them \$ 2.8 million in fees, from the law firm representing one of the parties in the arbitration); *ANR Coal [Co., Inc. v. Cogentrix of N.C., Inc.]*, 173 F.3d 493, 495-96] (4<sup>th</sup> Cir. 1999) (no vacatur; arbitrator's law firm represented company that indirectly caused the dispute in the arbitration by buying less from the defendant, who in turn sought to buy less from the plaintiff); *Al-Harbi v. Citibank, N.A.*, 318 U.S. App. D.C. 114, 85 F.3d 680, 682 (D.C. Cir. 1996) (no vacatur where arbitrator's former law firm represented party to the arbitration on unrelated matters); *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 432-34 & n.3 (11th Cir. 1995) (no vacatur where arbitrator had memorialized prior scheduling dispute with an attorney from the law firm representing one of the parties and mentioned it eighteen months later at the

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arbitrator had reviewed documents naming the parent company, but did not run a conflict check for the parent or disclose any of his firm's earlier representations of the parent company prior to the arbitration.

arbitration; arbitrator also failed to disclose that he became “of counsel” to a law firm the prevailing party had interviewed for the purpose of obtaining representation in the instant dispute and that had reviewed the contract involved in the case two years prior; court found this, at best, showed a “remote, uncertain, and speculative partiality”); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1255, 1264 (7th Cir. 1992) (arbitrator knew one of the parties, had worked in the same office with him twenty years ago, and saw him about once a year since; the court found this relationship “minimal” and insufficient to vacate); *Merit Ins. [Co. v. Leatherby Ins. Co.]*, 714 F.2d 673, 677, 680 (7th Cir. 1983) (no vacatur; arbitrator had worked directly under the president and principal stockholder of one of the parties for three years, ending fourteen years prior to the arbitration; the Seventh Circuit noted that “[t]ime cools emotions, whether of gratitude or resentment”); *Ormsbee Dev. Co. [v. Grace]*, 668 F.2d 1140, 1149-50 (10th Cir. 1982) (no vacatur where arbitrator and law firm representing a party had clients in common; requiring vacatur under such facts would “request that potential neutral arbitrators sever all their ties with the business world” (internal quotation omitted)).

The relationship in this case pales in comparison to those in which courts have granted vacatur. See, e.g., *Commonwealth Coatings* (business relationship between arbitrator and party was “repeated and significant”; the party to the arbitration was one of the arbitrator’s “regular customers”; “the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit”); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995) (arbitrator was a high-ranking officer in a company that had a substantial ongoing business relationship with one of the parties); *Schmitz*, 20 F.3d at 1044 (arbitrator’s law firm represented parent company of a party for decades, including within two years of the arbitration); *Morelite [Constr. Corp. v. N.Y. Dist. Council Carpenters Benefit Funds]*, 748 F.2d 79, 81 (2d Cir. 1984) (arbitrator’s father was General President of the union involved in the arbitrated dispute).

Finally, even if Justice White’s “joinder” is not read as a limitation on Justice Black’s opinion in *Commonwealth Coatings*, and the controlling opinion emphatically requires arbitrators to “disclose to the parties any dealings that might create an impression of possible bias,” we cannot find the standard breached in this case. The facts of *Commonwealth Coatings* are easily distinguishable. In *Commonwealth Coatings*, the arbitrator and a party had a “repeated and significant” business relationship. The relationship involved fees of about \$ 12,000 paid to the arbitrator by the party, extended over a period of four or five years, ended only one year before the arbitration, and even included the rendering of services on the very projects involved in the arbitration before him. Such a relationship bears little resemblance to the tangential, limited, and stale contacts between Shurn and Camina. Nothing in *Commonwealth Coatings* requires vacatur for the undisclosed relationship in this case.

## CONCLUSION

Awarding vacatur in situations such as this would seriously jeopardize the finality of arbitration. Just as happened here, losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made. Expensive satellite litigation over nondisclosure of an arbitrator's "complete and unexpurgated business biography" will proliferate. Ironically, the "mere appearance" standard would make it easier for a losing party to challenge an arbitration award for nondisclosure than for actual bias.

Moreover, requiring vacatur based on a mere appearance of bias for nondisclosure would hold arbitrators to a higher ethical standard than federal Article III judges. In his concurrence, Justice White noted that the Court did not decide whether "arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." This cannot mean that arbitrators are held to a higher standard than Article III judges. Had this same relationship occurred between an Article III judge and the same lawyer, neither disclosure nor disqualification would have been forced or even suggested. While it is true that disclosure of prior significant contacts and business dealings between a prospective arbitrator and the parties furthers informed selection,<sup>5</sup> it is not true, as Justice White's opinion perceptively explains, that "the best informed and most capable potential arbitrators" should be automatically disqualified (and their awards nullified) by failure to inform the parties of trivial relationships.

Finally, requiring vacatur on these attenuated facts would rob arbitration of one of its most attractive features apart from speed and finality – expertise. Arbitration would lose the benefit of specialized knowledge, because the best lawyers and professionals, who normally have the longest lists of potential connections to disclose, have no need to risk blemishes on their reputations from post-arbitration lawsuits attacking them as biased.

Neither the FAA nor the Supreme Court, nor predominant case law, nor sound policy countenances vacatur of FAA arbitral awards for nondisclosure by an arbitrator unless it creates a concrete, not speculative impression of bias.

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<sup>5</sup> The American Arbitration Association ("AAA"), whose rules governed this proceeding, requires broad prophylactic disclosure of "any circumstance likely to affect impartiality or create an appearance of partiality," so that parties may rely on the integrity of the selection process for arbitrators. Whether Shurn's nondisclosure ran afoul of the AAA rules, however, is not before us and plays no role in applying the federal standard embodied in the FAA.

Arbitration may have flaws, but this is not one of them. The draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship. This case does not come close to meeting this standard.

The judgment of the district court is REVERSED, and the case is REMANDED FOR FURTHER PROCEEDINGS.

WIENER, Circuit Judge, Specially Concurring in Judge Reavley's dissent ...:

As I wholeheartedly concur in Judge Reavley's dissent, I write separately only to add a perspective that I find helpful in analyzing this case and demonstrating that Judge Reavley has gotten it right. I refer in general to the key differences between arbitration under the FAA and litigation in federal court; I refer in particular to one difference that is of prime significance in this case, viz., the disparate ways that the decision maker – an Article III judge on the one hand and an arbitrator on the other – is selected, and the unique role of the potential arbitrator's unredacted disclosure of his relationships with the parties and their counsel to ensure selection of an impartial arbitrator. These general and particular differences underscore why such full and fair disclosure by a potential arbitrator of every conceivable relationship with a party or counsel, however slight, is a prerequisite. No relationship with a party or a lawyer is too minimal to warrant its disclosure, even if, in the end, it might be deemed to be too minimal to warrant disqualification. Such an evaluation by the potential arbitrator, and any withholding of information based on it, are simply not calls that he is authorized to make, yet ones that Lawyer Shurn obviously made.

...

In exchange for the actual or perceived economies of time, money, expertise and confidentiality, the parties to arbitration alone are responsible for who it is that will decide their fates. Subject to only relatively insignificant limitations, the parties (or in the case of panels, each party's selected arbitrator) have virtually absolute control over accepting or rejecting a nominee for the role of decision maker. It cannot therefore be left to the fox, who is the potential arbitrator, to guard the arbitration henhouse, secretly identifying to himself alone all "prior or present relationships," then just as secretly deciding which are worthy of disclosure and which are not. On the contrary, avoidance of partiality in the selection of the arbitrator can be achieved only if, in discharging his duty of disclosure, the potential arbitrator objectively disgorges absolutely every conceivable fact of prior or present relationships with parties or counsel, regardless of how tenuous or remote they might seem to him. He must leave to the parties the value judgment as to which (if any) among those fully disclosed facts constitutes a basis for rejecting the potential arbitrator for bias or the appearance of bias. Only of and after that is done can disclosure translate into disqualification or rejection.

...

Who knows? If Shurn had dutifully reported his prior professional relationships and interaction with counsel for New Century, counsel for Positive Software might nevertheless have accepted Shurn. But Shurn's very act of preemptively deciding, solely on his own, that his prior relationship with counsel for New Century need not be disclosed and then withholding that information, conveys an unmistakable appearance of impropriety. To me, that misstep is more than sufficient to support the objections of Positive Software that it was deprived of its right to be informed of the prior relationship between Shurn and the Susman, Godfrey firm, and to make its own evaluation of the significance of that connection.

...  
REAVLEY, Circuit Judge, dissenting ...:

In 1968 the Supreme Court held that an arbitral award could not stand where the arbitrator had failed to disclose a past relationship that might give the impression of possible partiality. The Court has never changed that holding; it is the law that rules us today. But the majority of this court disapprove of that law because they prefer to protect arbitrators and their awards when they fail to disclose prior relationships with parties or counsel. They therefore change the law for this case and, to make it appear as if their transgression does not matter, trivialize their report of the past relationship. I dissent because this court may not overrule a decision of the Supreme Court.

...  
The majority opinion manages to substitute actual bias, or the reasonable impression of bias, or concrete impression of bias for the Supreme Court's ruling that dealings that might create only an impression of possible bias must be disclosed. And it purports to join other circuits to hold that non-disclosure alone does not require vacatur of an arbitral award. If the circuit courts could overrule the Supreme Court, the majority might be on a bit firmer ground, because the *Commonwealth Coatings* ruling has not been well received by some of the circuit courts....

...  
While I can understand the desire to protect the finality of arbitration awards and avoid a return to extended court expense and delay, this does not justify evading the law of the Supreme Court by misstating it or by avoiding it by bleaching the evidence of possible partiality. Nor should we miss the need to promote the impartiality of arbitrators in this time when that is the favored method of dispute resolution. Influence can so easily corrupt the decision-making process even when it is not recognized by the magistrate or arbitrator himself. And to prove bias or improper influence is rarely possible. It is imperative that we not allow even the good faith or memory of the potential arbitrator to control the disclosure decision for, as the Justices made clear in *Commonwealth Coatings*, it is the protection and reassurance of the party that matters most.

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**In the notes following *Positive Software Solutions*, make the following changes:**

Delete the second sentence of note 1 on page 387, and delete note 8 on page 390.

**Add the following to note 3 after *M/V Allegra* on page 430:**

Since *Intel* was decided, several district courts have permitted discovery under § 1782 in connection with commercial and investment arbitration proceedings. See *In re Roz Trading Ltd.*, 2007 U.S. Dist. LEXIS 2112 (N.D. Ga. Jan. 11, 2007) (arbitration administered by International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna); *In re Oxus Gold PLC*, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007) (investment arbitration conducted under the UNCITRAL rules pursuant to Kyrgyzstan-United Kingdom bilateral investment treaty).

**Correct the citation to *Zuver* on page 432 so that it reads as follows:**

**103 P.3d 753 (2004)**



## Chapter 7 Enforcing Arbitral Awards

**Renumber notes 3-6 following *Halligan v. Piper Jaffray, Inc.* on pages 517-18 and add the following as new note 3:**

3. The Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (see *infra* pages 46-53) held that parties cannot expand the grounds for vacating an award by contract, reasoning that the grounds for vacatur stated in section 10 are exclusive. In so holding, the Court cast serious doubt on the viability of manifest disregard of the law as a nonstatutory ground for vacating awards. Indeed, the Court referred to the “vagueness” of the *Wilko* dictum, explaining:

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. See, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (STEVENS, J., dissenting) (“Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207”). Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.”

Since *Hall Street*, courts have approached the continued viability of manifest disregard in varying ways. Some courts have concluded that manifest disregard is no longer available as a ground for vacating awards. *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (dicta) (describing *Hall Street* as deciding “that 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”); *Prime Therapeutics, LLC v. Omnicare, Inc.*, 2008 U.S. Dist. LEXIS 41306, at \*16 (D. Minn. May 21, 2008) (after *Hall Street*, court “need not address ... extra-statutory grounds for vacating the arbitration award – that the arbitrator ignored the plain and unambiguous language of the agreement and that the arbitrator's

decision was in manifest disregard of the law”); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 2008 U.S. Dist. LEXIS 51446, at \*12 (S.D.N.Y. July 7, 2008) (“the Court finds that the manifest disregard of the law standard is no longer good law”). Other courts, while acknowledging uncertainty over the current status of manifest disregard review, have continued to apply the standard in reviewing awards. *MasTec N. Am., Inc. v. MSE Power Sys., Inc.*, 2008 U.S. Dist. LEXIS 52205, at \*9 (N.D.N.Y. July 8, 2008) (“this Court will view ‘manifest disregard of law’ as judicial interpretation of the Section 10 requirements, rather than as a separate standard of review, and will resort to existing case law to determine its contours”); *Chase Bank USA, N.A. v. Hale*, 2008 N.Y. Misc. LEXIS 2142, at \*14-\*15 (N.Y. Sup. Ct. Mar. 31, 2008) (“It seems appropriate, however, since the standard has apparently not been overruled by the Court, to resort to existing case law to determine its contours.”). A third approach, from a district court in the Seventh Circuit, has been (consistent with Seventh Circuit precedent) to treat manifest disregard as a form of excess of authority under section 10(a)(4) of the FAA, and conclude that it was unaffected by *Hall Street*. See *Joseph Stevens & Co. v. Cikanek*, 2008 U.S. Dist. LEXIS 52611, at \*11-\*12 (N.D. Ill July 9, 2008).

**Add to end of note 1 after *In re Chromalloy Aeroservices* on page 583:**

Most recently, on May 25, 2007, the D.C. Circuit followed *Baker Marine* in refusing to enforce an arbitration award vacated in Colombia. *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007). The court of appeals distinguished *Chromalloy* (which was decided by a D.C. federal district court) on the ground that in that case “an express contract provision was violated by pursuing an appeal to vacate the award.” *Id.* at 937 (quoting appellee’s brief).

Replace *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.* and notes 1-2 (pp. 586-92) with the following:

**HALL STREET ASSOCIATES, L.L.C. v. MATTEL, INC.**  
**United States Supreme Court**  
**128 S. Ct. 1396 (2008)**

JUSTICE SOUTER delivered the opinion of the Court.\*

The Federal Arbitration Act (FAA or Act) provides for expedited judicial review to confirm, vacate, or modify arbitration awards. §§ 9-11. The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.

I

This case began as a lease dispute between landlord, petitioner Hall Street Associates, L. L. C., and tenant, respondent Mattel, Inc. The property was used for many years as a manufacturing site, and the leases provided that the tenant would indemnify the landlord for any costs resulting from the failure of the tenant or its predecessor lessees to follow environmental laws while using the premises.

Tests of the property's well water in 1998 showed high levels of trichloroethylene (TCE), the apparent residue of manufacturing discharges by Mattel's predecessors between 1951 and 1980....

After Mattel gave notice of intent to terminate the lease in 2001, Hall Street filed this suit, contesting Mattel's right to vacate on the date it gave, and claiming that the lease obliged Mattel to indemnify Hall Street for costs of cleaning up the TCE, among other things. Following a bench trial before the United States District Court for the District of Oregon, Mattel won on the termination issue, and after an unsuccessful try at mediating the indemnification claim, the parties proposed to submit to arbitration. The District Court was amenable, and the parties drew up an arbitration agreement, which the court approved and entered as an order. One paragraph of the agreement provided that

“[t]he United States District Court 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,

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\* JUSTICE SCALIA joins all but footnote 7 of this opinion.

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."

Arbitration took place, and the arbitrator decided for Mattel. In particular, he held that no indemnification was due, because the lease obligation to follow all applicable federal, state, and local environmental laws did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act (Oregon Act) ....

Hall Street then filed a District Court Motion for Order Vacating, Modifying And/Or Correcting the arbitration decision on the ground that failing to treat the Oregon Act as an applicable environmental law under the terms of the lease was legal error. The District Court agreed, vacated the award, and remanded for further consideration by the arbitrator. The court expressly invoked the standard of review chosen by the parties in the arbitration agreement, which included review for legal error, and cited *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (CA9 1997), for the proposition that the FAA leaves the parties "free . . . to draft a contract that sets rules for arbitration and dictates an alternative standard of review."

On remand, the arbitrator followed the District Court's ruling that the Oregon Act was an applicable environmental law and amended the decision to favor Hall Street. This time, each party sought modification, and again the District Court applied the parties' stipulated standard of review for legal error, correcting the arbitrator's calculation of interest but otherwise upholding the award. Each party then appealed to the Court of Appeals for the Ninth Circuit, where Mattel switched horses and contended that the Ninth Circuit's recent en banc action overruling *LaPine* in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (2003), left the arbitration agreement's provision for judicial review of legal error unenforceable. Hall Street countered that *Kyocera* (the later one) was distinguishable, and that the agreement's judicial review provision was not severable.

The Ninth Circuit reversed in favor of Mattel in holding that, "[u]nder *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable." ... After the District Court again held for Hall Street and the Ninth Circuit again reversed, we granted certiorari to decide whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive. We agree with the Ninth Circuit that they are, but vacate and remand for consideration of independent issues.

## II

Congress enacted the FAA to replace judicial indisposition to arbitration with a “national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.” *Buckeye Check Cashing, Inc. v. Cardegna*. As for jurisdiction over controversies touching arbitration, the Act does nothing, being “something of an anomaly in the field of federal-court jurisdiction” in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.<sup>2</sup> But in cases falling within a court’s jurisdiction, the Act makes contracts to arbitrate “valid, irrevocable, and enforceable,” so long as their subject involves “commerce.” § 2. And this is so whether an agreement has a broad reach or goes just to one dispute, and whether enforcement be sought in state court or federal. See *Southland Corp. v. Keating*.

The Act also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. §§ 9-11. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. § 6. Under the terms of § 9, a court “must” confirm an arbitration award “unless” it is vacated, modified, or corrected “as prescribed” in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.

The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement.... We now hold that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.

## III

Hall Street makes two main efforts to show that the grounds set out for vacating or modifying an award are not exclusive, taking the position, first, that expandable judicial review authority has been accepted as the law since *Wilko v. Swan*. This, however, was not what *Wilko* decided, which was that § 14 of the Securities Act of 1933 voided any agreement to arbitrate claims of violations of that

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<sup>2</sup> Because the FAA is not jurisdictional, there is no merit in the argument that enforcing the arbitration agreement’s judicial review provision would create federal jurisdiction by private contract. The issue is entirely about the scope of judicial review permissible under the FAA.

Act, a holding since overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.* Although it is true that the Court's discussion includes some language arguably favoring Hall Street's position, arguable is as far as it goes.

The *Wilko* Court was explaining that arbitration would undercut the Securities Act's buyer protections when it remarked (citing FAA § 10) that "[p]ower to vacate an [arbitration] award is limited," and went on to say that "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation." Hall Street reads this statement as recognizing "manifest disregard of the law" as a further ground for vacatur on top of those listed in § 10, and some Circuits have read it the same way. Hall Street sees this supposed addition 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. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (STEVENS, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207."). Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago, Inc. v. Kaplan*, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered." ... But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

To that particular question we think the answer is yes, that the text compels a reading of the §§ 10 and 11 categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic

interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] . . . powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted;" the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, 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 any legal error. "Fraud" and a mistake of law are not cut from the same cloth.

That aside, expanding the detailed categories would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.

In fact, anyone who thinks Congress might have understood § 9 as a default provision should turn back to § 5 for an example of what Congress thought a default provision would look like .... "[I]f no method be provided" is a far cry from "must grant . . . unless" in § 9.

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. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," and bring arbitration theory to grief in post-arbitration process.

...  
When all these arguments based on prior legal authority are done with, Hall Street and Mattel remain at odds over what happens next. Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them. One of Mattel's *amici* foresees flight from the courts if it is. 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.<sup>7</sup>

#### IV

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. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

...

One unusual feature, however, prompted some of us to question whether the case should be approached another way. The arbitration agreement was entered into in the course of district-court litigation, was submitted to the District Court as a request to deviate from the standard sequence of trial procedure, and was adopted

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<sup>7</sup> The history of the FAA is consistent with our conclusion. The text of the FAA was based upon that of New York's arbitration statute. Section 2373 of the code said that, upon application by a party for a confirmation order, "the court must grant such an order, unless the award is vacated, modified, or corrected, as prescribed by the next two sections." 2 N. Y. Ann. Code Civ. Proc. (Stover 6th ed. 1902) (hereinafter Stover). The subsequent sections gave grounds for vacatur and modification or correction virtually identical to the 9 U.S.C. §§ 10 and 11 grounds.

In a brief submitted to the House and Senate Subcommittees of the Committees on the Judiciary, Julius Henry Cohen, one of the primary drafters of both the 1920 New York Act and the proposed FAA, said, "The grounds for vacating, modifying, or correcting an award are limited. If the award [meets a condition of § 10], then and then only the award may be vacated. . . . If there was [an error under § 11], then and then only it may be modified or corrected . . . ." *Arbitration of Interstate Commercial Disputes*, Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H. R. 646, 68th Cong., 1st Sess., 34 (1924)....

In a contemporaneous campaign for the promulgation of a uniform state arbitration law, Cohen contrasted the New York Act with the Illinois Arbitration and Awards Act of 1917, which required an arbitrator, at the request of either party, to submit any question of law arising during arbitration to judicial determination.

by the District Court as an order. Hence a question raised by this Court at oral argument: should the agreement be treated as an exercise of the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16? ...

We are, however, in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA.... We express no opinion on these matters beyond leaving them open for Hall Street to press on remand. If the Court of Appeals finds they are open, the court may consider whether the District Court's authority to manage litigation independently warranted that court's order on the mode of resolving the indemnification issues remaining in this case.

\* \* \*

Although we agree with the Ninth Circuit that the FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11, we vacate the judgment and remand the case for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins, dissenting.

May parties to an ongoing lawsuit agree to submit their dispute to arbitration subject to the caveat that the trial judge should refuse to enforce an award that rests on an erroneous conclusion of law? Prior to Congress' enactment of the Federal Arbitration Act (FAA or Act) in 1925, the answer to that question would surely have been "Yes."<sup>1</sup> Today, however, the Court holds that the FAA does not merely authorize the vacation or enforcement of awards on specified grounds, but also forbids enforcement of perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court. Because this result conflicts with the primary purpose of the FAA and ignores the historical context in which the Act was passed, I respectfully dissent.

...

... As I read the Court's opinion, it identifies two possible reasons for reaching this result: (1) a supposed *quid pro quo* bargain between Congress and litigants that conditions expedited federal enforcement of arbitration awards on acceptance of a

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<sup>1</sup> See *Kleine v. Catara*, 14 F. Cas. 732, 735, F. Cas. No. 7869 (C. C.D. Mass. 1814) ("If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please") (Story, J.).

statutory limit on the scope of judicial review of such awards; and (2) an assumption that Congress intended to include the words “and no other” in the grounds specified in §§ 10 and 11 for the vacatur and modification of awards. Neither reason is persuasive.

While § 9 of the FAA imposes a 1-year limit on the time in which any party to an arbitration may apply for confirmation of an award, the statute does not require that the application be given expedited treatment. Of course, the premise of the entire statute is an assumption that the arbitration process may be more expeditious and less costly than ordinary litigation, but that is a reason for interpreting the statute liberally to favor the parties’ use of arbitration. An unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute.

That purpose also provides a sufficient response to the Court’s reliance on statutory text. It is true that a wooden application of “the old rule of *ejusdem generis*,” might support an inference that the categories listed in §§ 10 and 11 are exclusive, but the literal text does not compel that reading – a reading that is flatly inconsistent with the overriding interest in effectuating the clearly expressed intent of the contracting parties. A listing of grounds that must always be available to contracting parties simply does not speak to the question whether they may agree to additional grounds for judicial review.

Moreover, in light of the historical context and the broader purpose of the FAA, §§ 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties’ “valid, irrevocable and enforceable” agreements to arbitrate their disputes subject to judicial review for errors of law.

Accordingly, while I agree that the judgment of the Court of Appeals must be set aside, and that there may be additional avenues available for judicial enforcement of parties’ fairly negotiated review provisions, I respectfully dissent from the Court’s interpretation of the FAA, and would direct the Court of Appeals to affirm the judgment of the District Court enforcing the arbitrator’s final award.

### Notes

1. The Court in *Hall Street* resolved a longstanding split among the circuits over the enforceability of expanded review provisions – i.e., provisions that seek to expand the grounds for court review of arbitration awards. Most commonly, the provisions provide for de novo court review of the arbitrators’ legal conclusions. Somewhat less commonly, they provide for some degree of court review of the arbitrators’ fact findings. The clause at issue in *Hall Street* provided for both.

2. Who is in better position to determine how extensive court review of an arbitration award should be – the parties? the courts? or Congress? Don't courts determine questions of law all the time, and frequently review factual determinations (such as by juries) for evidentiary support? How would reviewing arbitration awards on those grounds differ? What if parties chose a different standard of review – such as directing the district judge to “review the award by flipping a coin or studying the entrails of a dead fowl?” See *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9<sup>th</sup> Cir 1997) (Kozinski, J., concurring). Should that be permissible?

3. The Court leaves open the possibility of expanded review on some basis other than the FAA. One possibility is under the district court's inherent powers, since the settlement agreement here containing the expanded review provision was approved by the court. Another possibility is by defining the scope of the arbitrators' authority so as to make errors of law reviewable under the section 10(a)(4) excess of authority ground. This approach to expanded review was standard at the time the FAA was enacted. See Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. J. 419, 432 (2003) (“at common law (i.e., prior to the enactment of modern arbitration statutes), parties could contract for court review of arbitral awards for legal error by requiring the arbitrators to follow the law. In such a ‘restricted submission,’ arbitrators exceeded their authority by making a legal error, permitting a court to vacate the award.”).

Courts are divided on whether this device is available after *Hall Street*. Compare *Edstrom Indus., Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 549-50, 552 (7<sup>th</sup> Cir. 2008) (“The question in our case is different. It is whether the arbitrator can be directed to apply specific substantive norms and held to the application.... [P]recisely because arbitration is a creature of contract, the arbitrator cannot disregard the lawful directions the parties have given them....”) with *Wood v. PennTex Resources LP*, 2008 U.S. Dist. LEXIS 50071, at \*21 (S.D. Tex. 2008) (“This reading would impermissibly circumvent *Hall Street*.”).

## **Documentary Supplement**

**Add the following to the list of countries that have ratified the New York Convention on page 6 of the Documentary Supplement:**

Bahamas, Gabon, Marshall Islands, Montenegro, and United Arab Emirates.

**Add the following after the New York Convention on page 6 of the Documentary Supplement:**

**Recommendation Regarding the Interpretation of  
Article II, Paragraph 2, and Article VII, Paragraph 1,  
of the New York Convention**

**(Adopted by UNCITRAL on 7 July 2006)**

*The United Nations Commission on International Trade Law,*

*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

*Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

*Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

*Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958, has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

*Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes,”

*Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

*Taking into account* article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

*Considering* the wide use of electronic commerce,

*Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

*Taking into account also* enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

*Considering that*, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

**Add the following after the Motor Vehicle Franchise Contract Arbitration Fairness Act on page 22 of the Documentary Supplement:**

**10 U.S.C. § 987. Terms of consumer credit extended to members and dependents: limitations**

(e) Limitations. It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which—

...

(3) the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute;

...

(f) Penalties and remedies.

(1) Misdemeanor. A creditor who knowingly violates this section shall be fined as provided in title 18, or imprisoned for not more than one year, or both.

(2) Preservation of other remedies. The remedies and rights provided under this section are in addition to and do not preclude any remedy otherwise available under law to the person claiming relief under this section, including any award for consequential and punitive damages.

(3) Contract void. Any credit agreement, promissory note, or other contract prohibited under this section is void from the inception of such contract.

(4) Arbitration. Notwithstanding section 2 of title 9, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.

...

(i) Definitions. In this section:

(1) Covered member. The term “covered member” means a member of the armed forces who is—

(A) on active duty under a call or order that does not specify a period of 30 days or less; or

(B) on active Guard and Reserve Duty.

(2) Dependent. The term “dependent”, with respect to a covered member, means--

(A) the member’s spouse;

(B) the member’s child (as defined in section 101(4) of title 38);

or

(C) an individual for whom the member provided more than one-half of the individual’s support for 180 days immediately preceding an extension of consumer credit covered by this section.

...

(5) Creditor. The term “creditor” means a person –

(A) who –

(i) is engaged in the business of extending consumer credit; and

(ii) meets such additional criteria as are specified for such purpose in regulations prescribed under this section; or

(B) who is an assignee of a person described in subparagraph (A) with respect to any consumer credit extended.

(6) Consumer credit. The term “consumer credit” has the meaning provided for such term in regulations prescribed under this section, except that such term does not include (A) a residential mortgage, or (B) a loan procured in the course of purchasing a car or other personal property, when that loan is offered for the express purpose of financing the purchase and is secured by the car or personal property procured.

**Add the following after the Motor Vehicle Franchise Contract Arbitration Fairness Act on page 22 of the Documentary Supplement:**

**7 USC § 197c. Arbitration**

(a) In general. Any livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract, to decline to be bound by the arbitration provision.

(b) Disclosure. Any livestock or poultry contract that contains a provision requiring the use of arbitration shall contain terms that conspicuously disclose the right of the contract producer or grower, prior to entering the contract, to decline the requirement to use arbitration to resolve any controversy that may arise under the livestock or poultry contract.

(c) Dispute resolution. Any contract producer or grower that declines a requirement of arbitration pursuant to subsection (b) has the right, to nonetheless seek to resolve any controversy that may arise under the livestock or poultry contract, if, after the controversy arises, both parties consent in writing to use arbitration to settle the controversy.

(d) Application. Subsections (a) (b) and (c) shall apply to any contract entered into, amended, altered, modified, renewed, or extended after the date of the enactment of the Food, Conservation, and Energy Act of 2008 [enacted June 18, 2008].

(e) Unlawful practice. Any action by or on behalf of a packer, swine contractor, or live poultry dealer that violates this section (including any action that has the intent or effect of limiting the ability of a producer or grower to freely make a choice described in subsection (b)) is an unlawful practice under this Act.

(f) Regulations. The Secretary shall promulgate regulations to--

(1) carry out this section; and

(2) establish criteria that the Secretary will consider in determining whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.

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**Add the following after the UNCITRAL Model Law on page 102 of the Documentary Supplement:**

**UNCITRAL Model Law on International Commercial Arbitration  
Revised Articles (2006)**

**[Article 1, paragraph 2]**

2. The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

**Article 2 A. International origin and general principles**

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

**[Article 7]**

*Option I*

**Article 7. Definition and form of arbitration agreement**

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing.

3. An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

5. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

### *Option II*

#### **Article 7. Definition of arbitration agreement**

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

### **Chapter IV A. Interim measures and preliminary orders**

#### **Section 1. Interim measures**

##### **Article 17. Power of arbitral tribunal to order interim measures**

1. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

### **Article 17 A. Conditions for granting interim measures**

1. The party requesting an interim measure under article 17, paragraph 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

2. With regard to a request for an interim measure under article 17, paragraph 2 (d), the requirements in paragraph 1 (a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

### **Section 2. Preliminary orders**

#### **Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders**

1. Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

2. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

3. The conditions defined under article 17 A apply to any preliminary order, provided that the harm to be assessed under article 17 A, paragraph 1 (a), is the harm likely to result from the order being granted or not.

### **Article 17 C. Specific regime for preliminary orders**

1. Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

2. At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

3. The arbitral tribunal shall decide promptly on any objection to the preliminary order.

4. A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

5. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

## **Section 3. Provisions applicable to interim measures and preliminary orders**

### **Article 17 D. Modification, suspension, termination**

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in

exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

#### **Article 17 E. Provision of security**

1. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

2. The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

#### **Article 17 F. Disclosure**

1. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

2. The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph 1 of this article shall apply.

#### **Article 17 G. Costs and damages**

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

### **Section 4. Recognition and enforcement of interim measures**

#### **Article 17 H. Recognition and enforcement**

1. An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon

application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

2. The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

3. The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

### **Article 17 I. Grounds for refusing recognition or enforcement\***

1. Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36, paragraph 1 (a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers

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\* The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36, paragraph 1 (b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

2. Any determination made by the court on any ground in paragraph 1 of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

## **Section 5. Court-ordered interim measures**

### **Article 17 J. Court-ordered interim measures**

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

### **[Article 35, paragraph 2]**

2. The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

**The National Arbitration Forum Code of Procedure (pp. 143-191) has been revised effective August 1, 2007. The revised Code of Procedure is available at [www.adrforum.com](http://www.adrforum.com).**

**The JAMS Employment Arbitration Rules and Procedures (pp. 193-212) have been revised effective March 26, 2007. The revised Rules and Procedures are available at [www.jamsadr.com](http://www.jamsadr.com).**

**The International Arbitration Rules of the American Arbitration Association/International Centre for Dispute Resolution (pp.231-248) have been revised effective March 1, 2008. The revised Rules are available at [www.adr.org](http://www.adr.org).**

**The Cost Scales that accompany the Rules of Arbitration of the International Chamber of Commerce have been revised effective January 1, 2008. The revised Cost Scales are available at [www.iccwbo.org/court/arbitration](http://www.iccwbo.org/court/arbitration).**