EXPANDED REVIEW OF ARBITRATION AWARDS
AFTER HALL STREET V. MATTEL

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I. **Hall Street Associates, L.L.C. v. Mattel, Inc.**

On March 25, 2008, the U.S. Supreme Court invalidated a contract clause that provided for expanded judicial review of an arbitration award. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), the Court held that the exclusive grounds for a court to vacate or modify an arbitration award under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (“FAA”) are the limited grounds stated in that Act.

This article discusses the Court’s analysis in *Hall Street*; the California Supreme Court’s decision in *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008), that distinguished *Hall Street* on state law grounds; the continuing viability of the “manifest disregard [of the law]” doctrine as a ground for vacating or modifying an arbitration award; and other potential alternatives for obtaining a more rigorous review of arbitration awards than the limited grounds set out in the FAA.

A. **Statutory and nonstatutory grounds for judicial review prior to Hall Street**

Sections 10 and 11 of the FAA set out very limited grounds for courts to modify or vacate an arbitration award. Section 10 provides that a court may vacate an award:

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

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

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

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 11 provides that a court can modify or correct an award:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

In 1953, the U.S. Supreme Court stated in dicta in *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 98 L. Ed. 168 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), that the “[p]ower to vacate an [arbitration] award is limited” and 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.” Since then, every federal circuit and many state courts have construed that wording to provide an additional basis for modifying or vacating an arbitration award under the FAA. See *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-50 ( Ala. 2004) (citing representative cases from every federal circuit and eleven states), overruled after *Hall Street* by *Hereford v. D.R. Horton, Inc.*, No. 1070396, 2008 WL 4097594 (Ala. Sept. 5, 2008). As the doctrine has developed in the lower federal courts, “manifest disregard [of the law]” exists where “(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well-defined, explicit, and clearly applicable to the case.” *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 69 (2d Cir. 2003) (quoting *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998)).

**B. Contractual expansion of grounds for judicial review prior to *Hall Street***

Before *Hall Street*, the federal Courts of Appeals were split over the exclusiveness of the statutory grounds under the FAA when confirming, vacating, or modifying an award under section 9 of the FAA. The Ninth and the Tenth Circuits had held that the statutory grounds were exclusive. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001). The First, Third, Fifth, and Sixth Circuits had held that parties may agree to expand judicial review beyond the statutory grounds. *Jacada (Europe), Ltd. v. Int’l. Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005); *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001); *Gateway Tech., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995). See *Hall Street*, 128 S. Ct. at 1403, n.5. This split in the circuits led the Supreme Court to grant certiorari in *Hall Street*.

**C. *Hall Street* opinion**

In *Hall Street*, the landlord sued its tenant claiming that the tenant had improperly terminated the lease and seeking indemnification of environmental cleanup costs. The Oregon District Court ruled for the tenant on the termination claim. The parties then
entered into a written agreement to arbitrate the indemnification claim, which the district court approved and entered as an order. The parties’ agreement provided that the district court could vacate or modify the arbitration award if the arbitrator’s findings of facts were not supported by substantial evidence or if the arbitrator’s conclusions of law were erroneous.

The arbitrator ruled for the tenant on the indemnification claim. On the landlord’s motion, however, the district court vacated the arbitration award, citing errors of law, and remanded the case for further consideration by the arbitrator. On remand, the arbitrator followed the district court’s ruling and amended the award to favor the landlord. The district court corrected the arbitrator’s calculation of interest but otherwise upheld the award. The Ninth Circuit reversed, ruling that the provision in the parties’ contract expanding the scope of judicial review beyond the limited grounds identified in the FAA was unenforceable, and remanded the case to the district court. The district court again held for the landlord, albeit on slightly different grounds, and the Ninth Circuit again reversed.

The U.S. Supreme Court granted the landlord’s petition for certiorari and, in a 6-3 decision, agreed with the Ninth Circuit that the FAA provides the exclusive grounds for a court to vacate or modify an arbitration award when enforcement is sought under the expedited judicial review provisions of the FAA. The Court looked to the text of Sections 9 through 11 of the FAA and concluded that the listed grounds for overturning arbitration awards were designed to be exclusive and were not simply default provisions that parties could modify by contract. The Court also reasoned that the FAA’s policy favoring arbitration is consistent with limiting judicial review to just the amount “needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Hall Street*, 128 S. Ct. at 1405. “Any other reading,” held the Court, “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.’” *Id.* (quoting *Kyocera*, 341 F.3d at 998). The Court declined to assess whether its ruling would, on net, encourage or discourage arbitration, saying that “whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.” *Id.* at 1406.

The Court stressed, however, that its holding was limited to cases where awards are reviewed under the FAA. When parties seek enforcement of an arbitration award under state statutes or common law, rather than under the expedited review provided by the FAA, other grounds for vacatur or modification may apply. The Court chose to remand the case before it because of its unusual procedural posture: the arbitration agreement was entered into as part of district court litigation, and the Court was unclear whether the arbitration proceedings (including the district court’s rejection of the arbitration award) should have been viewed as an exercise of the district court’s case management authority rather than review under the FAA. The Court raised this ground
itself at oral argument; neither of the parties nor any of the amici had mentioned this alternative in their briefs.

II. Review of Arbitration Awards under State Law

In light of the limited grounds for review available under the express provisions of the FAA, and the debate about whether “manifest disregard” provides a basis for review, infra, parties to an arbitration agreement are well-served to specify the scope of review they desire in the agreement itself. The enforceability of such provisions, however, remains a question of state law if the scope of review desired is not permitted by the FAA.

A. Hall Street acknowledges viability of enforcement of arbitration awards under state statutory and common law

Hall Street argued 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.’” 128 S.Ct. at 1404 (citation omitted). The Court rejected the argument, holding that although many features of arbitration can be set by contract “the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.” Id.

However, the Court invited parties to agree to grounds other than those contained in the FAA as a basis for expanded review:

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.
Thus, the Court left untouched the availability of expanded review under state statutory and common law.\(^2\)

**B. ** *Cable Connection, Inc. v. DIRECTV, Inc.*

Following *Hall Street’s* invitation, the California Supreme Court in *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal.4th 1334, 82 Cal.Rptr.3d 229, 190 P.3d 586 (Aug. 25, 2008) confirmed contracting parties’ right to use California contract law to create a right to judicial review of arbitration awards, thereby allowing courts to review arbitration awards for errors in law.

*Cable Connection* concerns the terms of DirecTV’s contracts with its retail dealers who provide customers with DirecTV equipment needed to receive its satellite signal. The arbitration clause provided, “The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.” When a dispute arose, arbitration was pursued and the arbitrators determined that classwide arbitration of the dispute was available under California law. *Id.* at 1341-42. DirecTV petitioned to vacate the award in California state court contending “(1) the majority had exceeded its authority by substituting its discretion for the parties’ intent regarding class arbitration; (2) the majority had improperly ignored extrinsic evidence of contractual intent; and (3) even if the majority had not exceeded the authority generally granted to arbitrators, the award reflected errors of law that the arbitration clause placed beyond their powers and made subject to judicial review.” *Id.* at 1342. “The trial court vacated the award, essentially accepting all of DIRECTV’s arguments,” and the Court of Appeal reversed, holding that the trial court exceeded its jurisdiction by reviewing the merits of the arbitrators’ decision.” *Id.* at 1342-43.

After analyzing *Hall Street* and the applicable California authorities, the California Supreme Court held that parties could agree to expanded judicial review of arbitration awards. *Id.* at 1355-56. The Court held that the expanded review is based:

not on statutory restriction of the parties’ contractual options, but on the parties’ intent and the powers of the arbitrators as defined in the agreement. These factors support the enforcement of agreements for an expanded scope of review. If the parties constrain the arbitrators’ authority by requiring a dispute to be decided according to the rule of law, and make plain their intention that the award is reviewable for legal

\(^2\) In part because of the unique nature of the arbitration agreement at issue in *Hall Street* – an agreement in the middle of litigation in the district court – the Court remanded to have the enforceability of the expanded review provision determined. *Id.* at 1407.
error, the general rule of limited review has been displaced by
the parties’ agreement. Their expectation is not that the result
of the arbitration will be final and conclusive, but rather that
it will be reviewed on the merits at the request of either party.
That expectation has a foundation in the statutes governing
judicial review, which include the ground that “[t]he
arbitrators exceeded their powers.”

Id.

At first glance, Cable Connection’s permission for review of the award seems at
odds with the California Arbitration Act, Cal. Code Civ. Proc. §§ 1280 et seq. (“CAA”),
since the CAA does not allow judicial review for errors of law. Instead, like the FAA,
review is limited to instances where the award is: (1) in excess of the arbitrator’s power;
(2) produced by corruption fraud or undue means; or (3) issued by arbitrators that are
corrupt or engage in prejudicial misconduct. See Cal. Code Civ. Proc. § 1286.2 (a); 9

However, the California Supreme Court anchored its departure from Hall Street on
three grounds. It first concluded that California law applied because the parties’ contract
so provided and because Sections 10 and 11 of the FAA limit judicial review only by “the
United States court in and for the district where the award was made.” See 9 U.S.C. §§
10(a), 11(a). Thus, cases pending in state courts are not necessarily subject to the
Supreme Court’s construction of Sections 9 and 10 of FAA, and these provisions do not
preempt inconsistent state law. Id. at 1350, n.12.

The Court also gave great deference to the parties’ freedom to contract, and their
agreement that “the arbitrators shall not have the power to commit errors of law or legal
reasoning, and the award may be vacated or corrected on appeal to a court of competent
jurisdiction for any such error,” which the court found was explicit and unambiguous. Id.
at 1362. It reasoned that the CAA and California public policy favoring arbitration
without the complications of traditional judicial review are based on the parties’
expectations as embodied in their agreement. Thus, “policies favoring the efficiency of
private arbitration as a means of dispute resolution must sometimes yield to its
fundamentally contractual nature, and to the attendant requirement that arbitration shall
proceed as the parties themselves have agreed.” Id. at 1358.

The Court also reasoned that allowing parties to define the scope of judicial
review in arbitration agreements allows for predictability in the business world because
parties are best situated to weigh the advantages of traditional arbitration against the
benefits of court review for the correction of legal error. Id. at 1361.
C. Similar rulings from other states

Additional decisions in accord with *Cable Connection* and contrary to it will be forthcoming as parties to arbitration agreements include terms which reflect *Hall Street’s* mandate. The cases already decided have provided some insight into where the various states’ decisions may go.

In New York, the court in *In re Johnson (Summit Equities, Inc.)*, 864 N.Y.S.2d 873 (N.Y. Sup. 2008), following a National Association of Securities Dealers (“NASD”) arbitration, offered dicta that is helpful for those seeking expanded review. The Court noted that in addition to the FAA’s bases for vacatur, statutory and common law standards also apply. First, the court noted the common law grounds of manifest disregard of the law, whether an award is totally irrational, and whether an award entirely lacks factual support. *Id.* at 888. It then identified the examples of the Age Discrimination in Employment Act and certain insurance regulations which impose additional obligations on arbitrators that could provide the basis for modification or vacatur of the award. *Id.* (citing *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*, 497 F.3d 133, 142 (2d Cir. 2007) and *Petrofsky v. Allstate Ins. Co.*, 54 N.Y.2d 207, 210-211, 445 N.Y.S.2d 77, 429 N.E.2d 755 (1981)). On point in *Johnson*, the Court also ruled that the NASD Rules imposed independent obligations on arbitrators, and recognized the violation of those rules as providing a basis upon which to vacate an arbitration award apart from the provisions of the FAA. *Id.* at 888-89, 896.

In Texas, *Ascension Orthopedics, Inc. v. Curasan, AG*, No. H-07-4033, 2008 WL 2074058 (S.D. Tex. May 14, 2008), confirmed what the Texas Supreme Court had said before *Hall Street*, that parties are essentially foreclosed from agreeing to expanded judicial review, stating that “[t]he statutory grounds allowing a court to vacate, modify, or correct an award are limited to those the [TGAA] expressly identifies.” *Id.* at *3 (quoting *Callahan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002)).

Similarly, in Illinois, *In re Raymond Professional Group, Inc.*, 2008 WL 4968001 (Bnkr. N.D. Ill. Nov. 19, 2008) effectively holds that the Illinois Arbitration Act provides only limited review in accord with the FAA.

In a First Circuit Court of Appeals decision out of Puerto Rico, *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008), the Court reasoned that “Because the case at hand is not an FAA case—neither party has invoked the FAA’s expedited review provisions, and the original complaint was filed in Puerto Rico state court under a mechanism provided by state law—we decline to reach the question of whether *Hall Street* precludes a manifest disregard inquiry in this setting.”

One twist on enforcement under state law (as opposed to the FAA), however, arises from the language of arbitration providers’ rules which is incorporated by reference in parties’ arbitration agreements. For example, in *Qorvis Communications, LLC v.*
Wilson, 2008 WL 5077823 (4th Cir. Dec. 3, 2008), the parties had incorporated the “JAMS Employment Arbitration Rules and Procedures” that provided that “[p]roceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act ... or applicable state law.” Reading this rule, the court held that enforcement was contemplated under the FAA. Although the procedural context did not warrant lengthy discussion, the Court’s decision might be argued to hold that where the FAA is incorporated, and confirmation is pursued in federal court, the grounds for modification or vacatur are limited to those set forth in the FAA.

Somewhat troubling, in light of the express language of Hall Street, are the decisions that view the Supreme Court’s Hall Street decision as foreclosing any agreement for heightened review. See, e.g., Esso Exploration & Production Chad, Inc. v. Taylors Intern. Services, No. 06-5673-CV, 2008 WL 4280059 (2d Cir. Sept. 17, 2008). These cases can be harmonized with Hall Street by reading them to allow heightened review only where it is pursued exclusively under a broader state arbitration act, and not the FAA.

D. Pros and cons of arbitration under the Federal Arbitration Act and state arbitration acts

Given the diversity of decisions interpreting the various states’ arbitration acts, it is overly ambitious to attempt to analyze all of them here, particularly given the limited decisional law after Hall Street. However, the foundation for those acts provides pre-Hall Street commentary that should inform the continuing debate in state courts (and federal courts applying state law). The 2000 Revised Uniform Arbitration Act can be found at http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. Section 23 of the Revised Uniform Act provides the rules for vacating the award, and Section 24 provides the rules for modifying and correcting the award.

Part B of the Commentary to Section 23 discusses the vigorous debate over the so-called “opt-in” judicial review of awards – that is, the ability to opt-in to the judicial review of an arbitration award for errors of law or fact or any other grounds not prohibited by applicable law. The Drafters opted against an opt-in rule for a variety of reasons:

Paramount is the assertion that permitting parties a “second bite at the apple” on the merits effectively eviscerates arbitration as a true alternative to traditional litigation. An

3 The various states’ adoptions of versions of the Uniform Arbitration Act can be found at: http://www.law.cornell.edu/uniform/vol7.html#arbit.
opt-in section in the RUAA might lead to the routine inclusion of review provisions in arbitration agreements in order to assuage the concerns of parties uncomfortable with the risk of being stuck with disagreeable arbitration awards that are immune from judicial review. The inevitable post-award petition for vacatur would in many cases result in the negotiated settlement of many disputes due to the specter of vacatur litigation the parties had agreed would be resolved in arbitration.

The commentary further noted that review would “virtually ensure that, in cases of consequence, losers will petition for vacatur, thereby robbing commercial arbitration of its finality and making the process more complicated, time consuming and expensive,” and that the length and cost of arbitration would increase as a result. The Commentary also notes that judges’ need to review arbitration awards might also reverse the “recently acquired enthusiasm for commercial arbitration.”

The Drafters’ also expressed concerns about the legal propriety of the “opt-in” device. That concern was resolved by *Hall Street*. An opt-in provision is allowed where permitted by a law other than the FAA. This conclusion resolves the Drafters’ other concern about whether parties could create subject matter jurisdiction for the review of an arbitration award. Regardless of whether the matter could be heard in federal court, many state courts stand at the ready to hear disputes not prohibited by the FAA, and permitted to be brought under the state arbitration acts. *Compare Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1994) (refusing broadened judicial review and requiring the parties to proceed according to the Michigan arbitration statute), and *Chicago Southshore and South Bend Railroad v. Northern Indiana Commuter Transportation Dist.*, 682 N.E.2d 156, 159 (Ill. App. 3d 1997), *rev’d on other grounds*, 184 Ill. 151 (1998) (refusing to give effect to the provision of an arbitration agreement permitting a party claiming that the arbitrator’s award is based upon an error of law “to initiate an action at law … to determine such legal issue” and limiting the parties to the mandate of the Illinois Act); *see also NAB Construction Corp. v. Metropolitan Transportation Authority*, 180 A.D. 436, 579 N.Y.S.2d 375 (1992).

While this commentary provides the policy reasons underlying the permission for or prohibition of opt-in clauses, each jurisdiction’s laws must be analyzed separately to determine the face of the changing law after *Hall Street*. 

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E. Drafting arbitration agreements

In the wake of *Cable Connection* and *Hall Street*, the enforceability of arbitration agreements providing for expanded judicial review will largely depend on the agreement’s choice of law and venue provisions, and the rules of the arbitration provider selected. Clauses broadening judicial review beyond the grounds stated in the FAA may not be enforced in cases pending in federal court except where state law provides the rule of decision. State courts in California and elsewhere may enforce such clauses so long as the arbitration agreements are explicit and unambiguous, the agreement is to be arbitrated under the state arbitration act, and the scope of review accords with the statutory grounds for review.

Thus, rather than adopting an arbitration provider’s form clause, careful consideration should be given to the contours of the arbitration clauses to be used in an agreement, particularly when California and similar states’ law is to apply. Clauses that allow for judicial review by a state court for errors of law could eviscerate the efficiencies of arbitration, but protect both parties from results that fail to do justice. To avoid such a result, when drafting arbitration clauses, attention should be paid to the foreseeable but often-ignored consequences of adopting arbitration providers’ form clauses.

Initially, it must be noted that every arbitration agreement affecting interstate commerce is subject to the FAA. 9 U.S.C. §§ 1 & 2 (1988). Once a court determines that the making (formation) of an arbitration agreement is not in issue, it will direct the parties to proceed to arbitration in accordance with the terms of the agreement. 9 U.S.C. § 4 (1988). The role of the courts in reviewing matters subject to arbitration, therefore, is usually limited to determining two issues: 1) whether a valid agreement or obligation to arbitrate exists; and 2) whether one party to the agreement has neglected or refused to arbitrate. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 1805-06, 18 L.Ed.2d 1270, 1277-78 (1967).

L.Ed.2d 648, 655 (1986); Mitsubishi Motors, 473 U.S. at 626. Therefore, if the parties desire that certain issues be arbitrated and others be subject to judicial proceedings, then the issues excepted from arbitration should be expressly, and explicitly identified.

When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally should apply the same ordinary state law principles that govern the formation of contracts. First Options of Chicago v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985, 993 (1995). However, the FAA created a body of federal substantive law of arbitrability, which is applicable to any arbitration agreement within the coverage of the Act. Moses H. Cone, 460 U.S. at 24, 103 S.Ct at 941, 74 L.Ed.2d at 785. And, because courts commonly decide issues of arbitrability, a substantial body of law has developed interpreting broad arbitration clauses. Even when applying general state-law principles of contract interpretation to the interpretation of an agreement within the scope of the FAA, courts give due regard to the federal policy favoring arbitration, and, typically, any ambiguities as to the scope of the arbitration clause itself are resolved in favor of arbitration. Volt Information Sciences, Inc. v. Board of Trustees of Leeland Stanford Junior Univ., 489 U.S. 468, 475-76, 109 S.Ct. 1248, 1253-54, 103 L.Ed.2d 488, 497-99 (1989).

1. Who Decides The “Gateway” Issue of Arbitrability?

One matter to be addressed in drafting an arbitration clause is whether the court or an arbitrator should decide the controversy that has arisen. Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. AT&T Technologies, 475 U.S. at 648, 106 S.Ct. at 1418, 89 L.Ed.2d at 655 (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409, 1417 (1960)).

“Arbitrability” refers to whether parties agreed to submit a particular dispute to arbitration. For the most part, arbitrability involves two interrelated concepts: (1) whether the court or the arbitrator4 should decide the scope of the parties’ agreement to arbitrate, and (2) whether the parties agreed to arbitrate their present dispute. As noted above, the FAA’s policy favoring arbitration requires any doubts concerning the scope of arbitrable issues to be resolved in favor of arbitration. Moses H. Cone, 460 U.S. at 24-25, 103 S.Ct at 941-42, 74 L.Ed.2d at 785-86. However, where the agreement contains an ambiguity as to who decides the so-called “gateway issue” of arbitrability, the Act’s presumption favoring arbitration is reversed so that the court will ordinarily decide this crucial threshold question:

Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so

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4 As used herein “arbitrator” includes either a single arbitrator or, if the parties select, a panel of more than one arbitrator.
the question “who has the primary power to decide arbitrability” turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration?

First Options, 514 U.S. at 944, 115 S.Ct. at 1924, 131 L.Ed.2d at 993.

Parties are free to assign to an arbitrator the question of whether a claim is arbitrable. See Id. But, “unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.” AT&T Technologies, 475 U.S. at 649, 106 S.Ct. at 1418, 89 L.Ed.2d at 655; see also John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47, 84 S.Ct. 909, 912-13, 11 L.Ed.2d 898, 902-03 (1964).

Unfortunately, this critical presumption favoring the court’s authority to decide issues of arbitrability is often unintentionally extinguished: (1) by adopting a standard, broad arbitration clause “recommended” by an arbitration provider; or (2) by failing to carefully consider which arbitration provider is selected. Either way, a client may subsequently come to believe that he or she did not get what was bargained for, which is why careful attention should be paid to arbitration clauses.


In many arbitration clauses, parties commonly agree that all matters “arising out of or relating to” their agreement will be arbitrable. And, they do so at the suggestion of many arbitration providers. Even though they do not expressly so state, these broad “recommended” clauses have been interpreted to confer on the arbitrator the authority to decide his or her own jurisdiction and to divest the courts of all jurisdiction over questions of arbitrability. For instance, the American Arbitration Association suggests that parties use the following broad language for clauses in commercial contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

The International Institute for Conflict Prevention and Resolution (formerly the CPR Institute for Dispute Resolution) (“CPR”) suggests the following standard language:

Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be
finally resolved by arbitration in accordance with the
International Institute for Conflict Prevention and Resolution
Rules . . . .

(Standard Contractual Provisions ¶ A.)

The International Chamber of Commerce (“ICC”) suggests:

All disputes arising out of or in connection with the present
contract shall be finally settled under the Rules of Arbitration
of the International Chamber of Commerce. . .

_Beware._ Courts have recognized that this kind of language is “the paradigm of a
broad clause” and “the broadest language the parties could reasonably use.” _Collins &
Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16, 18 (2d Cir. 1995); Fleet Tire
Service of North Little Rock v. Oliver Rubber Co., 118 F.3d 619, 621 (8th Cir. 1997)._
Even without expressly stating “who decides” arbitrability, this broad language has been
interpreted to mean that the parties intended to submit questions of arbitrability to the
arbitrator, thus overcoming the presumption favoring judicial determination of this
crucial issue. Indeed, many cases confirm that the breadth of an arbitration clause itself
demonstrates a clear and unmistakable intent to have arbitrability decided by the
arbitrator:

In construing arbitration clauses, courts have at times
distinguished between ‘broad’ clauses that purport to refer all
disputes out of a contract to arbitration and ‘narrow’ clauses
that limit arbitration to specific types of disputes. If a court
concludes that a clause is a broad one, then it will order
arbitration and any subsequent construction of the contract
and of the parties’ rights and obligations under it are within
the jurisdiction of the arbitrator.

1988); see also Detroit Medical Center v. Provider Healthnet Servs., Inc., 269 F.Supp.2d
487, 492 (D. Del. 2003)._ Courts have explained that an objective reading of an arbitration clause that refers
“[a]ny and all controversies” to arbitration leads to the conclusion that the parties
intended to arbitrate issues of arbitrability. _PaineWebber Inc. v. Bybyk, 81 F.3d 1193,
1200 (2d Cir. 1996)._ In other words, the referral to arbitration of “all disputes …
concerning or arising out of” an agreement evinces a “clear and unmistakable intent to
submit questions of arbitrability to arbitration.” _Shaw Group Inc. v. Triplefine Intern.
Corp., 322 F.3d 115, 121 (2d Cir. 2003)._ This view is bolstered by the policy against
dividing disputes into substantive and procedural aspects to be determined partly by
arbitrators and partly by the courts. Pettinaro Construction Co., Inc. v. Harry C. Partridge, Jr., & Sons, Inc., 408 A.2d 957, 963 (1979) (citing John Wiley & Sons, 376 U.S. 543; Local 595, Int’l. Assn. of Machinists v. Howe Sound Co., 350 F.2d 508, 511 (3d Cir. 1965)). Some courts have held that such language does not clearly and unmistakably demonstrate the requisite intention of the parties to arbitrate arbitrability. See Spahr v. Secco 330 F.3d 1266, 1270-71 (10th Cir. 2003) (use of “any controversy” or “any and all disputes” does not clearly and unmistakably demonstrate an agreement to arbitrate arbitrability); Carson v. Giant Food, Inc. 175 F.3d 325, 330-31 (4th Cir. 1999) (broad provision committing all interpretive disputes to arbitrator does not satisfy the “clear and unmistakable test”); McLaughlin Gormley King Co. v. Terminix International Co. 105 F.3d 1192 (8th Cir. 1997) (clause requiring arbitration of “any controversy arising out of” or “relating to” the agreement, did not clearly and unmistakably evidence arbitrator’s authority to determine arbitrability”). However, the general trend appears to be to interpret broad arbitration clauses consistent with the general policy favoring arbitration and to relegate to the arbitrator all questions of arbitrability.

Therefore, by adopting commonly used or recommended language in an arbitration clause, parties may unwittingly agree to give up their right to have the courts decide the scope of their arbitration agreement and the extent of the arbitrator’s jurisdiction. Doing so can significantly impact a client’s rights because arbitrators’ decisions are well insulated from review, and the courts ordinarily have little ability to rectify any subsequent errors in law or contract interpretation. Making informed decisions about the language of an arbitration clause and carefully considering the rules of the selected arbitration provider can help clients avoid unwelcome surprises should future disputes ever develop.

3. The Mere Inclusion of a Specific Arbitration Provider in an Agreement Can Result in the Unintended Adoption of Procedural and Substantive Rules

Arbitration clauses commonly state that the parties agree to be bound by the rules of the arbitration provider they select. Often, the parties specifically incorporate the rules of a particular arbitration provider into their agreement. Even if the agreement doesn’t expressly incorporate the provider’s rules, the rules themselves often state that merely by agreeing to arbitrate with the specified provider, for example, the arbitration rules are deemed to be incorporated into the parties’ agreement. See, e.g., JAMS Rule 1(b), AAA Rule R-1(a), CPR Rule 1.1, NAF Rule 1(A).

These simple acts can have unintended consequences. Unless care is taken to understand the effect of the referenced rules, and their potential effect in the future, a client’s legal rights can be altered. By routinely incorporating a certain provider’s rules into an agreement, the parties may unknowingly agree to have the arbitrator determine the scope of his or her own authority. In fact, most arbitration rules contain specific provisions divesting the courts of jurisdiction to decide gateway issues of arbitrability among others.
The AAA’s Commercial Arbitration Rules provide at R-7(a) that: “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” The National Arbitration Forum Rules state at Rule 20(F): “An Arbitrator shall have the power to rule on all issues, claims, responses and objections regarding the existence, scope, and validity of the arbitration agreement, including all objections relating to jurisdiction….”

The JAMS Rules similarly submit questions of the arbitrators’ jurisdiction and arbitrability to the arbitrator. Rule 11(c) of the JAMS Comprehensive Arbitration Rules and Procedures provides:

Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Likewise, the CPR Rules (Rules for Non-Administered Arbitrations of the International Institute for Conflict Prevention and Resolution) expressly provide that “The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” See Rule 8.1. The CPR states, as to Rule 8: “This should allow arbitrators to decide all issues, including arbitrability questions, without the necessity for court intervention.” “Salient Features of the Rules,” ¶ 5. In its “Commentary on Individual Rules,” the CPR explains that Rule 8 is meant to express principles consistent with the U.S. Supreme Court’s decision in First Options of Chicago v. Kaplan, and thus, pursuant to Rule 8, it is up to the arbitrator(s) to decide whether the arbitration will proceed in the face of a jurisdictional challenge.

Some courts have affirmed that language such as that quoted above eliminates the First Options presumption and vests the arbitrator with the authority to determine all challenges to his or her jurisdiction, as well as the scope of the arbitration agreement. In Lifescan, Inc. v. Premier Diabetic Services, Inc., 363 F.3d 1010, 1012 (9th Cir. 2004), a case arising out of a contract for the sale of medical devices and supplies, the Ninth Circuit concluded that by referring to the AAA’s rules in their arbitration clause, the parties incorporated the AAA Rules into their agreement and those rules, “in turn, recognize the arbitrators’ discretion to interpret the scope of their authority.” Id. See also, e.g., Terminix Co., LP v. Palmer Ranch Ltd. P’ship, 432 F.3d 1327, 1332 (11th Cir. 2005) (“By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakeably agreed that the arbitrator should decide whether the arbitration clause is valid.”); Contec Corp. v. Remote Solution Co., Ltd., 398 F.3d 205, 208 (2d Cir.2005); Citifinancial, Inc. v. Newton, 359 F. Supp. 2d 545, 551 (S.D. Miss
Despite the similarity of this language to AAA’s rule, the two courts to address the JAMS rule have split on whether the incorporation of the JAMS Rule expresses a clear and unmistakable intent to submit the issue of arbitrability to arbitration. Compare Lovell v. Harris Methodist Health Sys., 2000 WL 351384 at *3 (N.D. Tex. 2000) (confirming arbitrability decision based upon incorporation by reference) with Martek Biosciences Corp. v. Zuccaro, 2004 WL 2980741 (D. Md. 2004). However, the Martek decision is arguably no longer good law. The Maryland district court in Martek was applying Delaware law to interpret the arbitration clause. In James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76, 80 (Del. Supr. 2006), the Delaware Supreme Court, applying Delaware law and what it characterized as the "federal majority rule," stated that incorporation by reference of the AAA Rules in a broad arbitration clause that generally provides for arbitration of all disputes constitutes a clear and unmistakable intent to submit the issue of arbitrability to the arbitrator. The court went on to hold, though, that because the arbitration clause in question expressly authorized nonbreaching parties to obtain injunctive relief and specific performance in the courts, that federal majority rule did not apply, and something other than incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to the arbitrator.

The effect of incorporating an arbitration provider’s rules into an agreement is not based solely on the FAA. State law contract principles also regularly apply the rule of incorporation by reference to enforce arbitration rules referred to in an arbitration clause. For instance, Delaware has a long history of enforcing parties’ intentions of incorporating by reference documents referred to within an agreement. State ex rel. Hirst v. Black, 83 A.2d 678, 681, 46 Del. 295, 299 (1951) (“It is, of course, axiomatic that a contract may incorporate by reference provisions contained in some other instrument. . . . Where a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties.”) (emphasis added). See also Wolschlager v. Fidelity National Title Ins. Co., 111 Cal. App. 4th 784, 790-791, 4 Cal.Rptr.3d 179, 183-85 (2003) (“It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document”) (and cases cited therein).

Pursuant to the rules of the National Association of Securities Dealers (“NASD”), arbitrability issues also can encompass the timeliness of arbitration demands, which, in turn, can directly impact applicable statutes of limitation. NASD Code § 10304 provides that no dispute “shall be eligible for submission ... where six (6) years have elapsed from
the occurrence or event giving rise to the . . . dispute.” NASD Code § 10324 further provides that “arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code.” In Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), the Supreme Court, citing to these two provisions, resolved a lower court split by holding that the NASD’s time limit rule does not fall within the class of “gateway” arbitrability disputes which are committed to the court’s jurisdiction. Id. at 85-86. See also PaineWebber, 81 F.3d 1193; Pellegrino v. Auerbach, 2006 WL 565643 (S.D.N.Y) (notwithstanding conflicting choice of law provisions, statute of limitations dispute was for arbitrator to decide).

So, regardless of any statute of limitations which would otherwise govern the parties’ dispute, if the parties have agreed to NASD arbitration, their claims may be untimely under the NASD rules. In a recent case, Pellegrino v. Auerbach, Pellegrino, 2006 WL 565643, the trial court left it up to the arbitrator to determine which statutes of limitation governed the claims and whether the statutes expired before the claims were filed with NASD.

As is clear from First Options, parties may, of course, expressly not agree to be bound by certain of the arbitration provider’s rules. They also may expressly state that, notwithstanding their agreement to be bound by the provider’s rules, they do not agree, nor intend, to divest the court of its jurisdiction to decide issues of arbitrability and jurisdiction and expressly do not agree to have such issues determined by the arbitrator. However, be sure to review the arbitration provider’s rules to see if doing so jeopardizes the enforceability of the arbitration clause. For example, the National Arbitration Forum’s Rule 48(E) provides that the Forum or the arbitrator may decline to arbitrate “where the agreement of the Parties has substantially modified a material portion of the Code.”

Another option is just not to select a specific arbitration provider at the time the agreement is signed and to clearly state in the agreement: (1) the specific claims and types of disputes the parties intend to arbitrate and (2) that the parties intend the court to decide all issues of arbitrability, including the scope of the arbitrator’s jurisdiction and/or the applicable statute of limitations. The parties can further agree to the method and deadline for selecting an arbitrator, thus insuring that no party’s rights have been unintentionally waived or altered.

4. Incorporation of Rules relating to Review of an Arbitral Award

In addition to rules relating to arbitrability, arbitration providers also have created rules concerning the enforcement, modification, and vacatur of their arbitrators’ awards. In light of Hall Street, the mere adoption of the provider’s rules, then, implicitly limits the scope of review. See, supra Part C citing Qorvis Communications, LLC v. Wilson, 2008 WL 5077823 (4th Cir. 2008). For example, JAMS Rule 25, concerning “Enforcement of the Award” provides that “Proceedings to enforce, confirm, modify or
vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et seq. or applicable state law.” CPR Employment Dispute Arbitration Procedure Rule 22.1 provides that “Any proceeding pursuant to this Employment Dispute Arbitration is deemed to be an arbitration proceeding subject to the Federal Arbitration Act, 9 U.S.C. §§1-16, if applicable, to the exclusion of any state law inconsistent therewith; or, if the FAA is not applicable, to the law of the state of venue.”

5. Agreeing to Rules That Do Not Yet Exist (By Agreeing to Be Bound By Unknown Future Rule Amendments) Can Also Impair Your Client’s Rights.

The selection of a specific ADR provider and often routine incorporation of an ADR provider’s rules as part of an arbitration clause can subject your client to rules that did not even exist at the time the agreement was signed. For instance, Rule 1(a) of AAA’s Commercial Arbitration Rules provides, in part:

These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules.

The National Arbitration Forum’s “Code of Procedure”, Rule 1(C) provides: “Arbitrations will be conducted in accord with the applicable Code of Procedure in effect at the time the Claim is filed, unless the law or the agreement of the Parties provides otherwise.” The ICC Rules of Arbitration state: “Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.” CPR Rule 1.1 requires: “Unless the parties otherwise agree, these Rules, and any amendment adopted by CPR shall apply in the form in effect at the time the arbitration is commenced.”

Thus, by incorporating an arbitration provider’s rules into an agreement, or by agreeing to be bound by the rules, the parties may be agreeing to be bound by rules the arbitration provider may modify or create in the future. As a result, clients may be subjected to future arbitrations governed by rules very different than existed, and that the parties intended to apply, at the time they executed the agreement. For instance, even if an arbitration provider’s rules do not now vest the arbitrator with the power to decide issues of arbitrability, by the time future disputes develop, new rules may have divested the court of any authority over such disputes, even if the parties did not so intend when the agreement was signed. By expressly adopting an arbitration provider’s rules, and failing to make any exception to them, or by failing to specify that a specific version will govern the parties’ disputes, clients will most likely be deemed to be bound by rules they did not even know of at the time the agreement was signed.
California’s Court of Appeal recently spoke to the issue with respect to JAMS’ arbitration rules in *Evans v. Centerstone Development Co.*, 134 Cal.App. 4th 151, 35 Cal.Rptr.3d 745 (2005). The parties agreed to settle disputes arising from the operation of the real estate development company by resort to JAMS “Streamlined Rules.” Among these was Rule 3 of the 2000 rules which stated that “JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration . . . will apply . . . unless the Parties have specified that another version of the Rules will apply.” *Id.* at 158. The court held that the arbitrator did not exceed his authority by applying the 2002 Rules, although the parties’ agreement was executed when the 2000 Rules were in effect.

There is no reason for clients to agree to be bound by future, unknown arbitration rules, some of which may profoundly affect their rights. The Rules of most arbitration providers acknowledge that the parties may want to agree that prior, or specific, versions of their rules will govern arbitrations. There is scarcely a reason not do so. That way, clients are ensured that they will receive what they bargain for (except to the extent that what they bargain for becomes illegal).

It should be noted that an alternative to judicial review exists if the parties to an agreement are uncomfortable with the finality of an award subject to very limited scrutiny. Many of the arbitration providers have internal appellate procedures and provide appellate panels to review the awards of their arbitrators. See [*infra* Part IV.C.](#) Each of the providers of these appellate services offers suggested language to invoke their appellate procedures. Arbitral appellate review avoids any of the questions associated with *Hall Street* and the need for an exception to the FAA’s limitations.

**III. Is “Manifest Disregard of the Law” Still a Viable Basis for Seeking Judicial Review?**

In *Hall Street*, the Court discussed the doctrine of “manifest disregard [of the law],” but declined to rule explicitly whether that doctrine survived as a basis for judicial modification or vacation of an arbitration award. The early returns from the lower federal courts are split over the continuing viability of that doctrine.

**A. What did the *Hall Street* court say about “manifest disregard of the law”?**

In *Hall Street*, the landlord argued that expandable judicial review of arbitration awards has been accepted as the law since *Wilko’s* articulation of the “manifest disregard [of the law]” standard: “Hall Street [the landlord] sees this supposed addition to § 10 as the camel’s nose: if judges can add grounds to vacate (or modify), so can contracting parties.” *Hall Street*, 128 S. Ct. at 1403.

In rejecting the landlord’s argument, the Court refused to state whether the “manifest disregard [of the law]” standard was a statutory or judicially created standard.
and, thus, whether that standard remained a viable basis for judicial modification or
vacation of an arbitration award. Using language that invites further litigation, the Court
mused:

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. . . . 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.”

128 S. Ct. at 1404 (citations omitted); see also James M. Gaitis, Unraveling the Mystery
of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of
Wilko decision).

B. What have other courts done with this dictum since Hall Street?

Courts have split on whether the “manifest disregard [of the law]” standard for
modifying or vacating an arbitrator’s award survives Hall Street. Some courts have
concluded or suggested that the doctrine is no longer viable. See Ramos-Santiago v.
United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008) (dicta); Prime Therapeutics
LLC v. Omnicare, Inc., 555 F. Supp. 2d 993, 999 (D. Minn. 2008); Robert Lewis Rosen
WL 4097594.

Other courts have held that “manifest disregard [of the law]” remains a valid
ground for vacating arbitration awards. Coffee Beanery, Ltd. v. WW, L.L.C., No. 07-
Int’l Corp., No. 06-3474-cv, 2008 WL 4779582, *6-8 (2d Cir. Nov. 4, 2008); MasTec N.
Am., Inc. v. MSE Power Sys., Inc., No. 1:08-cv-168, 2008 WL 2704912, at *3 (N.D.N.Y.
2008).

In explaining its holding, the Stolt-Nielsen court seized on Hall Street’s wording
that the doctrine might be “‘shorthand’” for the grounds set out in § 10(a)(3) or
§ 10(a)(4). 2008 WL 7779582, at *7 (quoting Hall Street, 128 S. Ct. at 1404); accord
MasTec, 2008 WL 2704912 at *3; Chase Bank, 859 N.Y.S. 2d at 349. It reasoned

Like the Seventh Circuit, we view the “manifest
disregard” doctrine, and the FAA itself, as a mechanism to
enforce the parties’ agreements to arbitrate rather than as
judicial review of the arbitrators’ decision. We must

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therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which “the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.” . . . At that point the arbitrators have “failed to interpret the contract at all,” . . . for parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

2008 WL 7779582, at *8 (citations omitted).

This gloss on the “manifest disregard” doctrine may not be the final word on the subject. The issue is likely to return to the Supreme Court, as it seemingly invited.

IV. Other Alternatives for Review

Parties that wish to arbitrate but also wish to avoid an aberrant result potentially have several options. First, as discussed in Section II above, parties may seek enforcement of arbitration awards under state statutory or common law. Second, if the parties are already in court when they decide to arbitrate, they could (1) solicit a court order directing arbitration with a judicial right of review or (2) request the court to appoint a special master under Federal Rule of Civil Procedure 53. Finally, parties may provide for review by an appellate panel of arbitrators.

A. Party-solicited court order directing parties to arbitrate while maintaining right to review award

Sometimes, as in *Hall Street*, parties are already in court when they decide to arbitrate. In such cases, the parties could petition the court for an order providing for expanded judicial review. The *Hall Street* Court expressly declined to rule whether a district court’s case management authority extends to ordering the parties to arbitrate while maintaining full review of the resulting arbitration award.

The Oregon District Court in *Hall Street* is expected to be the first court to rule on whether a district court’s case management authority extends to a more searching review of an arbitration award issued as a result of a court order. As of the time these materials went to press, the parties are awaiting the court’s direction on a briefing schedule. See *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 531 F.3d 1019, 1019-20 (9th Cir. 2008) (remanding to district court after holding that landlord did not waive the argument that the district court has authority other than the FAA to enforce the arbitration award).
B. Appointment of special master under Federal Rule of Civil Procedure 53

If the parties are already in court when they decide to arbitrate, the parties can also ask the district court to appoint a special master under Federal Rule of Civil Procedure 53 to hear and rule on the case. Under Rule 53, the special master’s findings of fact and conclusions of law will be reviewed for error, unless the parties agree to a different standard. Proceedings before a special master may enable the parties to achieve some of the efficiencies associated with arbitration.

C. Review by arbitral appellate panel

Parties may also obtain a more rigorous review of an arbitration award by drafting their arbitration agreements to provide for an arbitral appellate panel that would review the trial arbitrator’s legal conclusions for legal error, just as appellate courts do when reviewing trial court decisions. No award would be final and subject to enforcement until after the appellate panel had ruled. The arbitration rules of the International Institute for Conflict Prevention and Resolution (CPR) and the Judicial Arbitration and Mediation Services (JAMS) both provide for an appeal process. See http://www.cpradr.org/ClausesRules/ArbitrationAppealProcedure/tabid/79/Default.aspx and http://www.jamsadr.com/rules/optional.asp. The American Arbitration Association has not adopted formal rules for appeals, but it will honor and enforce agreements that incorporate such rules. See Paul Bennett Marrow, A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator, Dispute Resolution J. (Aug./Oct. 2005).

The District Court for the Northern District of Texas recently granted a motion to compel arbitration in a matter in which the parties had provided for review of the arbitrator’s award by a second appellate arbitrator. Redish v. Yellow Transportation, Inc., 2008 WL 2572658 (N.D. Tex. June 24, 2008). In doing so, the court noted, “Nothing in Hall Street or the FAA prohibits the parties from contractually agreeing to a procedure whereby a second arbitrator reviews an arbitration award using standards of review that are applicable to appeals in civil cases.”

Of course, the additional cost of an arbitral appellate panel should be considered before including such a provision in a contract. As ADR organizations caution, appellate rules should not be routinely added to every arbitration provision.

V. CONCLUSION

The contours of a party’s ability to obtain review of an arbitration award for grounds other than those stated in the FAA are still not fully known. Whether parties can turn to state law for a more searching review, as suggested by the Hall Street Court, will depend, among other things, on (1) whether the parties can invoke state law to their dispute; and (2) whether state law indeed permits more expansive judicial review. Other
alternatives, such as the appointment of a special master and review by an arbitral panel, are likely viable but as yet not widely used. Going forward, parties should carefully draft arbitration clauses to specify the procedures to apply in the event of disputes.