

## **Evolving Judicial Review of Arbitration Awards: Is Massachusetts Lagging Behind in a “Manifest Disregard” of Arbitrators’ Substantive Errors of Law?**

*“[A]n arbitrator ‘may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power.’”*<sup>1</sup>

### I. INTRODUCTION

The latter half of the twentieth century generated a commercial environment friendly to dispute resolution outside the judicial arena.<sup>2</sup> Evolving as a creature of contract, arbitration arose from the ashes of failing business relationships to promote efficiency, economy, and finality in disagreements by placing an ultimate resolution in the hands of a third-party neutral.<sup>3</sup> Federal and state governments fostered this movement by codifying arbitration standards and adopting uniform policies favoring this form of dispute management.<sup>4</sup>

Arbitration awards are generally unavailable for review because the process remains a private risk-management tool.<sup>5</sup> Statutes provide the primary

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1. Noah Rubins, “*Manifest Disregard of the Law*” and *Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT’L ARB. 363, 367 (2001) (citing nineteenth century Scottish decision, *Mitchell v. Cable* [1848] 10 D. 1297); *see also* *Tr. of the Boston & Me. Corp. v. Mass. Bay Transp. Auth.*, 294 N.E.2d 340, 343 (Mass. 1973) (emphasizing arbitrators’ autonomy in light of narrow scope of judicial review available over decisions). “Where the parties have ‘received what they agreed to take, the honest judgment of the arbitrator as to a matter referred to him,’ the law is clear that the award is binding, and thus free from judicial interference . . . .” *Tr. of the Boston & Me. Corp.*, 294 N.E.2d at 344 (citation omitted) (quoting *Phaneuf v. Corey*, 76 N.E. 718, 719 (1906)).

2. *See* Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151, 152 (2002) (observing potential litigants’ favoritism of simple, speedy alternate dispute resolution process); *see also* Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 53-60 (1997) (drawing distinctions between arbitration and litigation); 1 DAVID A. HOFFMAN & DAVID E. MATZ, *MASSACHUSETTS ALTERNATIVE DISPUTE RESOLUTION* § 3.02 (1994) (discussing local community and court movements fostering development of arbitration).

3. *See* Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 105-06 (1997) (noting trend of businesses utilizing voluntary binding arbitration as preferred method of dispute resolution).

4. *See* Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-16 (2000) (establishing federal guidelines for arbitration); *see also* MASS. GEN. LAWS ch. 251, §§ 1-19 (2004) (setting forth Massachusetts’s guidelines for arbitration in state commercial disputes).

5. *See* *Conn. Valley Sanitary Waste Disposal, Inc. v. Zielinski*, 763 N.E.2d 1080, 1085 (Mass. 2002) (reiterating emphatically negative effect award review creates in arbitral forum); *see also* *ZVI Constr. Co. v.*

limitation on substantive inquiry into an arbitrator's decision.<sup>6</sup> Typical grounds for vacatur include corruption, fraud, awards procured by undue means, evidence of partiality, procedural deficiencies resulting from arbitrator misconduct, or arbitrators' excessive use of power.<sup>7</sup> Interestingly enough, errors of law, even those so egregious as to indicate a disregard for substantive governing principles in a particular jurisdiction, are not grounds for statutory vacatur in most jurisdictions.<sup>8</sup>

A recent movement within the United States circuit courts, however, produced a common-law category of award vacatur suitable for situations in which an arbitrator acts in "manifest disregard of the law."<sup>9</sup> This trend also influences arbitration in state courts as an increasing number of jurisdictions entertain the common-law "manifest disregard" standard to evaluate vacatur requests.<sup>10</sup> Courts supporting this movement prohibit arbitrators from functioning in a "legal vacuum," and thus act in a supervisory capacity by catching material errors even where parties waived adherence to applicable

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Drywall Sys., Inc., 761 N.E.2d 482, 489-90 (Mass. 2002) (limiting judicial review of arbitrators' decisions to instances of fraud); *City of Lawrence v. Falzarano*, 402 N.E.2d 1017, 1024 (Mass. 1980) (noting strong public policy supporting arbitrators creating equitable balance between parties); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 132 (2002) (stating "substantive review of arbitration awards would render arbitration a meaningless precursor to litigation"); *infra* notes 128-130 and accompanying text (highlighting sample of state laws challenging "manifest disregard of the law" recognition). Schmitz also highlights the industry-specific flexibility in arbitration provisions and levels of arbitrator expertise. Schmitz, *supra*, at 134-38.

6. See *Zielinski*, 763 N.E.2d at 1085-86 (acknowledging slender grounds for decisional review); see also *Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co.*, 553 N.E.2d 1284, 1285 (Mass. 1990) (listing overstepping authority, fraudulent or arbitrary conduct, or procedural irregularity as grounds for court inquiry).

7. See 9 U.S.C. § 10(a) (2004) (noting grounds for vacatur of arbitral award); MASS. GEN. LAWS ch. 251, § 12(a) (2004) (containing similar grounds as FAA).

8. See MASS. GEN. LAWS ch. 251, § 12 (2004) (omitting error or mistake of law as statutory ground for review); *Softkey, Inc. v. Useful Software, Inc.*, 756 N.E.2d 631, 635 (Mass. App. Ct. 2001) (restating error of law not subject to review); *Tr. of the Boston & Me. Corp. v. Mass. Bay Transp. Auth.*, 294 N.E.2d 340, 343 (Mass. 1973) (recognizing binding nature of grossly erroneous conclusion); *Grobet File Co. of Am., Inc. v. RTC Sys., Inc.*, 524 N.E.2d 404, 406 (Mass. App. Ct. 1988) (excluding even grossly erroneous arbitral findings from judicial review). *But see* N.H. REV. STAT. ANN. § 542:8 (2004) (providing for appeal of arbitration decisions within one year on "plain mistake" grounds).

9. See Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 466-70 (1998) [hereinafter Hayford, *A New Paradigm*] (discussing circuit court adoption of "manifest disregard" standard for award vacatur); see also Rubins, *supra* note 1, at 368-70 (noting discrepancies among circuits in formulating "manifest disregard" standard).

10. See *Garrity v. McCaskey*, 612 A.2d 742, 747-48 (Conn. 1992) (setting forth three prong "manifest disregard" test before including review via Connecticut statutory provision); see also *Harris v. Bennett*, 503 S.E.2d 782, 786 (S.C. Ct. App. 1998) (requiring excess of mere error in misapplication of law for "manifest disregard" standard to apply); *Detroit Auto. Inter-Ins. Exch. v. Gavin*, 331 N.W.2d 418, 430 (Mich. 1982) (expressing important judicial role in correcting material error of law); *Westminster Constr. Corp. v. PPG Indus., Inc.*, 376 A.2d 708, 711 (R.I. 1977) (noting "manifest disregard of the law" standard results from Supreme Court's *Wilko* decision); *City of Madison v. Madison Prof'l Police Officers Ass'n*, 425 N.W.2d 8, 11 (Wis. 1988) (recognizing "manifest disregard" and "perverse misconstruction" as non-statutory grounds for vacatur).

principles of law.<sup>11</sup> Typically, in examining whether an arbitrator “manifestly disregarded” the law, courts employ a two-part analysis, coupling the clarity of an applicable legal principle and the degree to which it was known and ignored by the arbitrator.<sup>12</sup> Critics of this practice note the difficulty in uniformly applying the “manifest disregard” standard and point to its erosion of the finality and legitimacy of arbitration proceedings.<sup>13</sup>

The inconsistent treatment of the “manifest disregard” standard among the states may result from judicial and legislative failure to define the standard consistently.<sup>14</sup> To alleviate this obstacle, many states, including Massachusetts, prefer strict adherence to statutorily prescribed occasions for vacatur.<sup>15</sup> Jurisdictions have reacted to the eroding finality of arbitration awards in four specific ways: reducing the “manifest disregard” standard to mere words that lack force; creating a “manifest disregard” subheading within the common-law realm of arbitration evaluation; utilizing the “manifest disregard” standard while disguising it as another statutory ground for vacatur; and legislatively providing for substantive review of particular errors via statute, including those made in “manifest disregard” of the applicable law.<sup>16</sup>

This Note analyzes the efficacy of applying a common-law “manifest disregard of the law” award vacatur ground in jurisdictions that have not yet adopted it.<sup>17</sup> Additionally, it explores the implications of applying “manifest

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11. See *Gavin*, 331 N.W.2d at 430 (stating judiciary’s most important role as identifying material errors where arbitrators “exceeded their powers”).

12. See Hayford, *A New Paradigm*, *supra* note 9, at 467-70 (surveying case law defining “manifest disregard”).

13. See *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 65-66 (Colo. 2004) (stressing preservation of arbitration’s integrity and cost-effectiveness); *La. Physician Corp. v. Larrison Family Health Ctr., L.L.C.*, 870 So. 2d 575, 577-78 (La. Ct. App. 2004) (presuming arbitral awards valid in “manifest disregard” context because parties accept risk when entering arbitration).

14. See *Rubins*, *supra* note 1, at 368 (highlighting variance among courts in applying “manifest disregard” standard); see also 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:137 (4th ed. 2005) (noting some consensus in standard’s requirement of blatant misapplication of law accompanied by knowledge of error). Compare *Westbrook Sch. Comm. v. Westbrook Teachers Ass’n*, 404 A.2d 204, 209 (Me. 1979) (defining “manifest disregard” in context of contract terms), and *City of Minneapolis v. Police Officers Fed’n*, 566 N.W.2d 83, 87 (Minn. Ct. App. 1997) (requiring departure from agreement and principles of contract construction for “manifest disregard” finding), with *Gavin*, 331 N.W.2d at 434 (requiring presentation of legal principles to arbitrators accompanied by failure to apply them), and *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 951 (Utah 1996) (demanding error necessarily obvious coupled with conscious failure to use governing principle).

15. See *Siegel v. Prudential Ins. Co. of Am.*, 79 Cal. Rptr. 2d 726, 739 (Cal. Ct. App. 1998) (employing California rule to prevent reviewing merits of arbitral award); see also *Action Box Co., Inc. v. Panel Prints, Inc.*, 130 S.W.3d 249, 251-52 (Tex. App. 2004) (construing Texas’s arbitration statute as prohibiting vacatur for “manifest disregard” without case law suggesting otherwise); *Coors Brewing Co.*, 114 P.3d at 65 (mandating award confirmation in absence of statutory prohibition); *Sch. Comm. of Hanover v. Hanover Teachers Ass’n*, 761 N.E.2d 918, 921 (Mass. 2002) (explaining specific grounds for judicial inquiry in Massachusetts).

16. See *infra* Parts II.E.1-II.E.4 (highlighting different jurisdictions’ treatment of “manifest disregard” vacatur standard).

17. See *infra* Part III (weighing costs of permitting “manifest disregard” against benefits of prohibiting its use).

disregard of the law” in Massachusetts, particularly in light of the state’s long history of preserving the autonomy and integrity of arbitrators’ awards.<sup>18</sup> Part II begins by exploring the arbitration process and the general expectations created by entering into agreements to arbitrate.<sup>19</sup> Part II continues by describing arbitration’s success as a method of alternative dispute resolution in the United States, due largely to the legitimacy and finality associated with the arbitration process.<sup>20</sup> Parts II.D and II.E discuss the origin of “manifest disregard of the law,” its place in the federal common law associated with award vacatur, and its various applications in state courts.<sup>21</sup> Part III examines the benefits and disadvantages of applying the “manifest disregard” standard to arbitration appeals.<sup>22</sup> Part III.B weighs the practical difficulties in applying “manifest disregard” analysis to vacatur claims, and Part III.C suggests evaluating “manifest disregard” allegations using a misconduct-focused standard.<sup>23</sup>

This Note suggests that a clearly defined “manifest disregard” standard would diminish confusion among courts and litigants if approached uniformly, primarily focusing on arbitrator misconduct rather than the degree of error associated with the award.<sup>24</sup> In addition, this Note advises that imposing monetary sanctions against parties bringing frivolous appeals will make “manifest disregard” a more meaningful vacatur ground because it will compel parties to think twice before bringing an unmeritorious action for review.<sup>25</sup>

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18. See *infra* Part II.E.5 (outlining state’s current arbitration practices); see *infra* Part III.C (urging Massachusetts to avoid employing “manifest disregard” vacatur ground).

19. See *infra* Parts II.A-II.B (defining goals of arbitration and identifying unique characteristics of process).

20. See *infra* Parts II.C (tracing history of arbitration in United States).

21. See *infra* notes 64-143 (discussing development of “manifest disregard” in federal common law and highlighting various interpretations in states).

22. See *infra* Part III.A (debating importance of legitimacy and finality versus equity in result and deference to arbitrator).

23. See *infra* Part III.B (discussing difficulty in approaching “manifest disregard” from standard based on error of law, not misconduct); see also *infra* Part III.C (making suggestion for Massachusetts when considering adopting “manifest disregard”). Please note that this suggestion is applicable to all jurisdictions, even those that have already established a “test” to evaluate “manifest disregard of the law” charges against an arbitrator. See *infra* note 193 and accompanying text.

24. See *infra* Part III.C (advocating applying “manifest disregard” principle beginning with arbitrators’ state of mind). See generally Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117 (1998) [hereinafter Hayford, *Restoring Order*] (advocating uniform application of common-law standard by aligning with current statutory vacatur grounds).

25. See *infra* Part III.C (considering tighter common-law definitions of “manifest disregard” and discussing benefits of imposing sanctions); see also B.L. Harbert Int’l, LLC v. Hercules Steel Co., 441 F.3d 905, 913-14 (11th Cir. 2006) (threatening sanctions for frivolous appeals). But see generally Karon A. Sasser, Comment, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337 (2000/2001) (discussing necessity for available error-of-law review versus traditional statutory limitation on appeal).

## II. HISTORY

### A. Arbitration and Its Core Functions

“Arbitration” denotes an elective method for resolving conflicts by which a neutral third party evaluates the strength of adverse claims and issues binding decisions upon the parties.<sup>26</sup> Chosen as a private resolution process between partners in business, arbitration is hailed as an economical and expeditious alternative to judicial recourse.<sup>27</sup> While arbitration is a bargained-for proceeding, it typically arises in two contexts: by demand or by submission.<sup>28</sup> In either case, it is the direct consequence of an agreement between parties who would not otherwise have been compelled to substitute arbitration for litigation.<sup>29</sup> It is a “tailor-made forum” that permits parties to tackle their differences “without sacrificing . . . orderliness . . . or fairness . . . .”<sup>30</sup>

Settling disputes via arbitration is not specific to any particular industry.<sup>31</sup> Rather, a variety of businesses ranging from commercial and consumer arenas to labor and employment settings favor its process.<sup>32</sup> A strong feature of arbitration is its ability to protect and preserve ongoing relationships between regularly contracting parties within a particular industry.<sup>33</sup> An arbitrator’s

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26. See BLACK’S LAW DICTIONARY 112 (8th ed. 2004) (defining “arbitration”). “Arbitration” is defined as “[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.” *Id.*

27. See *Plymouth-Carver Reg’l Sch. Dist. v. J. Farmer & Co.*, 553 N.E.2d 1284, 1285 (Mass. 1990) (citing *Marino v. Tagaris*, 480 N.E.2d 286, 288 (Mass. 1985)) (claiming “predictability, certainty, and effectiveness” intertwined with voluntary arbitration). The Supreme Judicial Court of Massachusetts similarly noted that a strong public policy exists within the state to favor arbitration as an alternative to litigation in settling commercial disputes. *Id.*; see also *Davis*, *supra* note 2, at 53-60 (listing prominent and valued features of arbitration).

28. *Maggio & Bales*, *supra* note 2, at 158-59 (describing contractually binding options to establish arbitration proceeding). In arbitration by demand, one party seeks enforcement of rights gained by voluntary, binding terms agreed upon prior to undertaking a business relationship. *Id.* In contrast, arbitration by submission occurs when an ongoing dispute is voluntarily directed toward arbitration proceedings without a prior, formal, or binding agreement. *Id.* at 159.

29. See *Maggio & Bales*, *supra* note 2, at 159 (reiterating volition required to enforce arbitration agreement by contract).

30. See Paul Finn, *Mediation and Arbitration*, in 47 MASSACHUSETTS PRACTICE SERIES § 9.5 (2004) (quoting Paul M. Herzog, *Commercial Arbitration*, 4 BOSTON B.J. No. 1, 10 (1960)) (noting arbitration’s flexibility regarding selection of issues, forum, presiding arbitrator(s), and rules of evidence). Finn defines arbitration as a “contractual proceeding” wherein the parties consent to and select judges of their choice as a substitute for litigation. *Id.* at § 9.2; see also *Davis*, *supra* note 2, at 51, 55 (recognizing parties’ agreement central to defining arbitration process).

31. See *Levin*, *supra* note 3, at 114 (listing variety of business areas where arbitration as dispute resolution applies).

32. See *Maggio & Bales*, *supra* note 2, at 158 (tracking historical use of arbitration through popular modern applications); see also *Sasser*, *supra* note 25, at 343-44 (observing breadth of FAA).

33. See *Schmitz*, *supra* note 5, at 134 (directing attention to “peace preservation” in local communities and acceptance of ruling’s finality). Long before arbitration became mainstream, merchants and traders preferred the flexibility and privacy of alternate proceedings to ensure the stability of business relationships.

familiarity with the subject matter and technicalities of the business is also an attractive incentive to using this method of dispute resolution.<sup>34</sup>

### B. Arbitration Versus Litigation

Arbitration's most distinguishable trait is its informality.<sup>35</sup> Litigation entails a complex combination of formal evidence requirements, procedural rules, and statutorily defined methods of discovery and filing.<sup>36</sup> Judicial recourse also involves attentiveness to substantive law, while arbitration may serve primarily as a fact-finding device governed by a field expert.<sup>37</sup> Additionally, an arbitrator's findings need not take the form of an "opinion" as is traditionally produced by a judge. Instead, it may contain a blanket statement relaying the award without factual findings or legal conclusions.<sup>38</sup>

Less rigidity in procedural formality may produce a disappointing, yet obvious drawback of arbitration—the inability to appeal a binding judgment.<sup>39</sup> Award review is extremely limited and is designed to foster efficiency and preserve the integrity of the contract; absent fraud, corruption, or abuse by an

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*Id.* at 136.

34. See Schmitz, *supra* note 5, at 136 (pointing to arbitrators' expertise as sufficient reason to accept final, technical determinations). *But see* Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 172-73 (2003) (exposing concern regarding "industry" arbitrators lacking sophistication to appreciate legal issues beyond industry technicalities).

35. See Davis, *supra* note 2, at 55-56 (focusing on voluntary nature of agreement before arbitration process begins).

36. See Davis, *supra* note 2, at 54 (tracing tedious formalities of bringing opponent to court). Many individual industries that organized self-regulating dispute resolution forums conducive to the needs of their business areas adopted the simplified procedures set forth by the American Arbitration Association. *Id.* at 56. See generally J. Bert Grandoff, *Dispute Resolution*, Construction Cont. L. Rep., Dec. 13, 2002, at 3 (delineating differences between arbitration and litigation). Some, however, argue arbitration is not always a cost effective and timely process. *Id.* Relaxed evidentiary rules may produce an "anything goes" attitude toward admitting various materials. *Id.* As a result, the expense associated with administrative fees can "easily cost as much as trials" and the quantity of "evidence" presented may require extended arbitration sessions. *Id.*

37. See Davis, *supra* note 2, at 54-55 (suggesting decision-maker primary difference between arbitration and litigation proceedings).

38. See Maggio & Bales, *supra* note 2, at 166 (listing lack of arbitrators' written findings as primary difficulty in usurping awards); see also Levin, *supra* note 3, at 116-17 (noting American Arbitration Association's discouragement of issuing written opinions). American Arbitration Association (AAA) commercial awards are succinct, consisting of a single page with nothing other than a conclusory decision. Levin, *supra* note 3, at 116-17. "There is no requirement . . . that the arbitrator give a statement of reasons for his decision, setting forth findings of fact and conclusions of law." *Tr. of the Boston & Maine Corp. v. Mass. Bay Transp. Auth.*, 294 N.E.2d 340, 390 (Mass. 1973) (quoting *Patton v. Baird*, 42 N.C. 255, 260 (7 Irde. Eq. 255) (1851)). Unreasoned awards may be analogized to jury verdicts; "[t]he duty is best discharged by a simple announcement of the result of [the arbitrators'] investigations." *Fazio v. Employers' Liab. Assurance Corp.*, 197 N.E.2d 598, 601 (Mass. 1964); see also *Purvis Sys., Inc. v. Am. Sys. Corp.*, 788 A.2d 1112, 1118 (R.I. 2002) (clarifying arbitrators under no obligation to set forth reasoning or findings of fact); *Garrity v. McCaskey*, 612 A.2d 742, 746 n.6 (Conn. 1992) (emphasizing memorandum of decision need not accompany arbitrator's award).

39. See Levin, *supra* note 3, at 109-12 (cautioning statutory rights may limit parties' circumscription of remedies).

arbitrator, courts have traditionally upheld arbitral decisions.<sup>40</sup>

Arbitration agreements generally preclude parties from seeking traditional adjudication in the event that they are dissatisfied with a proceeding's outcome; the price paid for arbitration's efficiency is an enforceable, bargained-for commitment with heavily restrictive vacatur possibilities.<sup>41</sup> Although parties may delineate substantive law guidelines within the agreement itself, few actually do.<sup>42</sup> Instead, basic arbitration provisions generally lack guidance as to what substantive law, if any, should control the arbitrator's decision.<sup>43</sup> Surprisingly, the most popular arbitration clause that parties incorporate into agreements fails to establish a determinative role for substantive law in dispute resolution.<sup>44</sup>

### C. Statutory Protection for Arbitration

Because the system of arbitration is inherently at odds with the availability of the judiciary to hear claims, it initially operated against judicial jealousy.<sup>45</sup> Early public policy favored non-binding and less conclusive results, virtually ensuring that all disgruntled arbitrating parties received a second bite at the apple if the first was unpleasant.<sup>46</sup> This hostility toward arbitration was linked to the narrow scope of review available for aggrieved parties; even then, fraud was the sole grounds for appeal.<sup>47</sup>

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40. See Finn, *supra* note 30, at § 10.2 (quoting Massachusetts cases denying review for error of fact or law absent fraud). The parties must be willing to "receive[] what they agreed to take, the honest judgment of the arbitrator as to a matter referred to him." *Bernard v. Hemisphere Hotel Mgmt., Inc.*, 450 N.E.2d 1084, 1086 (Mass. App. Ct. 1983) (quoting *Phaneuf v. Corey*, 190 Mass. 237, 247 (1906)); see also 4 AM. JUR. 2D *Alternative Dispute Resolution* § 235 (2005) (characterizing statutory grounds for vacatur as those enumerated by statute).

41. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 740-41 (1996) [hereinafter Hayford, *Law in Disarray*] (describing arbitration process as sacrifice of legal precision for finality and certainty); see also Maggio & Bales, *supra* note 2, at 156 (noting participants' waning confidence in finality without expanded judicial review).

42. See Levin, *supra* note 3, at 112-13 (characterizing arbitrators' commitment to apply substantive law as rare and disobliged).

43. See Levin, *supra* note 3, at 112-13 (noting failure to allocate risk of legal uncertainty leaves arbitrators without substantive guidance).

44. See Levin, *supra* note 3, at 117-18 (exemplifying reliance on equitable and practical considerations coupled with experience in making awards). "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the [applicable] Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof." *Id.* at 113 (alteration in original). The AAA's provision clearly omits any reference to substantive law application. *Id.* Although alternative clauses are provided to parties by the AAA, the organization comments that experienced parties rarely divert from the standard arbitration provision. *Id.* at 115.

45. See Schmitz, *supra* note 5, at 137 (criticizing early courts' view of arbitration as threat to own power).

46. See Maggio & Bales, *supra* note 2, at 160 (acknowledging suspicion of early jurists regarding arbitration as undermining authority); see also Davis, *supra* note 2, at 60-63 (recalling need to protect citizens from agreements that prevented access to judicial forum).

47. See Davis, *supra* note 2, at 60-63 (describing early English and American attitudes toward

The 1920s witnessed the first hints of an explosion that was later labeled by the Supreme Court as a “national policy favoring arbitration.”<sup>48</sup> In this era, individual state legislatures produced laws directing courts to enforce binding arbitration terms, attempting to counteract the staunch judicial opposition to arbitration.<sup>49</sup> Massachusetts embraced this concept in 1925 by enacting a statute validating written arbitration agreements.<sup>50</sup> Before this time, common law governed arbitration of local disputes, and parties in Massachusetts faced a hostile judiciary when trying to enforce these arrangements.<sup>51</sup>

Congressional codification of the Federal Arbitration Act (FAA) further diminished animosity toward arbitration by securing an unparalleled status for private contractual agreements to arbitrate disputes.<sup>52</sup> To reinforce arbitration’s place in commercial activity, section 10 of the FAA provided limited criteria for award vacatur.<sup>53</sup> Common-law principles developed around these narrow grounds as federal and state courts adopted their own standards and guidelines for review and vacatur.<sup>54</sup> In the meantime, a new uniform law modeled after

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arbitration).

48. See Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 176 (2002) (expounding on Supreme Court’s interpretation of the Federal Arbitration Act of 1925). The *Southland* Court of 1984 “transport[ed] the jurisdictionally cautious 1925 statute into the rich post-New Deal jurisdictional environment.” *Id.* at 192; *Southland Corp. v. Keating*, 465 U.S. 1, 12-13 (1984). Although a movement by state legislatures to revamp state arbitration statutes occurred contemporaneously, the Court opined that it could not “believe Congress intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction,” thus extending it to all contracts in interstate commerce. *Southland*, 465 U.S. at 15 (emphasis in original).

49. See Maggio & Bales, *supra* note 2, at 160 (noting legislatures’ role when courts blatantly refused to enforce arbitration awards).

50. See Finn, *supra* note 30, at § 9.4 (characterizing adoption of arbitration statute as result of FAA’s and states’ codification of similar provisions).

51. See Finn, *supra* note 30, at § 9.3 (reiterating courts’ fear that binding arbitration would oust courts’ jurisdictional power). Similarly, arbitration decisions were refused equitable enforcement because the decision itself affected a remedy traditionally provided by Massachusetts courts. *Id.*

52. See Davis, *supra* note 2, at 62-64 (providing for validity, irrevocability, and enforceability of arbitral issues arising from specific contracts and transactions); see also 9 U.S.C. § 2 (2000) (expanding federal arbitration protection to interstate commerce).

53. 9 U.S.C. § 10 (2000) (enumerating limited vacatur grounds). The FAA permits vacatur in instances:

- (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . . ; (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.

*Id.*

54. See Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 873 (2004) (examining vacatur where arbitrator behaves “arbitrarily and capriciously”). A decision is also available for review in some jurisdictions if the award is violative of public policy, or if the arbitrator “manifestly disregards” the law in his or her findings. *Id.*

the FAA played a role in shaping state arbitration practice.<sup>55</sup> The Uniform Arbitration Act (UAA), a basis for many state arbitration statutes, was strikingly similar to the FAA.<sup>56</sup> It too crafted a strong framework for state law acceptance of the finality of arbitrators' decisions.<sup>57</sup> The UAA is a carbon copy of the FAA in terms of vacatur and the limited availability of substantive appeal.<sup>58</sup> It preserved the integrity of the arbitration process by refusing vacatur merely because the "relief [granted by arbitration is] such that it could not or would not be granted by a court of law or equity."<sup>59</sup>

In 1997, a drafting committee assembled to review the UAA and current trends in state arbitration.<sup>60</sup> A heated debate surrounded a new proposal that would have provided for vacatur if the parties "opted in" for review based on errors of law where a decision substantially prejudiced one party.<sup>61</sup> A similar conflict arose over the common-law application of the "manifest disregard of the law" standard employed by certain courts as a non-statutory basis to review arbitral awards.<sup>62</sup> Neither proposed provision gained inclusion into the recently promulgated Revised Uniform Arbitration Act (RUAA), leaving arbitration "a desirable alternative to litigation . . . [without making] arbitration simply another form of litigation."<sup>63</sup>

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55. See *infra* notes 56-59 and accompanying text (discussing vacatur provision of UAA).

56. See Schmitz, *supra* note 5, at 124-25 (observing strong similarities between FAA and UAA as arbitration enforcement schemes); see also American Arbitration Association, *RUAA and UMA Legislation from Coast to Coast*, <http://www.adr.org/sp.asp?id=26600> (Aug. 31, 2005) (observing forty-nine jurisdictions adopted original 1955 version of UAA).

57. See Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 1-2 (2001) (addressing UAA's success in overcoming states' former hostile attitudes toward arbitration).

58. See Schmitz, *supra* note 5, at 153-56 (illustrating UAA's finality as act permits limited procedural grounds for vacatur). Awards procured by fraud, corruption, or undue means are impermissible. UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280-81 (1997). Echoing FAA prohibitions, the UAA imposed vacatur where arbitrators failed to remain impartial, exceeded their powers, or substantially prejudiced the rights of a party after failing to proceed properly. *Id.* at § 12(a)(2)-(4).

59. See UNIF. ARBITRATION ACT, § 12(a), 7 U.L.A. 280-81 (1997); see also Schmitz, *supra* note 5, at 155-56 (recognizing foregone vacatur options where arbitrator acts on principles of fairness and equity in balancing parties' rights). An arbitrator's treatment of substantive law principles is untouched by the UAA just as it is in the FAA. Levin, *supra* note 3, at 108 (reiterating shallow pool for vacatur justification). The UAA implicitly denies recognition to "error of law" claims, even those that are egregious. *Id.* at 110.

60. See Heinsz, *supra* note 57, at 2 (noting attendance of prominent legal personalities and organizations). Representatives of the dispute resolution segments of the American Bar Association, private arbitration associations, including the AAA, and participants in industries intimately involved in arbitration practices frequented the series of eight meetings over a period of three years. *Id.*

61. See Heinsz, *supra* note 57, at 27 (recognizing failure to revise UAA to include "opt in" error of law reviewability).

62. See Heinsz, *supra* note 57, at 30 (mentioning past circuit and state court use of "manifest disregard of the law" non-statutory ground).

63. See RUAA DRAFTING COMMITTEE, POLICY STATEMENT: REVISED UNIFORM ARBITRATION ACT (RUAA) (May 15, 2000), available at <http://www.law.upenn.edu/bll/ulc/uarba/arbps0500.htm> (expressing committee's desire to keep arbitration process efficient, expeditious, economical, fair, and final). The drafters determined that a new "manifest disregard" standard could overload the trial courts with arbitration award appeals and that no bright-line test for vacatur existed. Heinsz, *supra* note 57, at 34-35 (highlighting lack of

*D. Federal Court Activity:  
Carving the Scope of “Manifest Disregard of the Law”*

A series of United States Supreme Court decisions in the latter half of the twentieth century shaped the current state of arbitration law.<sup>64</sup> In these cases, the Court promoted arbitration by praising its efficiency and preserving the parties’ underlying intent when entering into an agreement to arbitrate.<sup>65</sup> In promoting non-judicial dispute resolution, the Court affirmed its stance favoring arbitration by limiting the review and vacatur of arbitration awards to statutory criteria, leaving few common-law grounds for recourse.<sup>66</sup> The *Wilko* doctrine, however, would eventually add one more vacatur ground to an aggrieved party’s arsenal of award review—an examination of arbitration rulings made in “manifest disregard of the law.”<sup>67</sup>

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clear standard for applying “manifest disregard of the law”). The RUA does not prohibit challenges to arbitrator authority on these grounds; common law dictates if and when these non-statutory grounds may be used. National Conference of Commissioners on Uniform State Laws, Commentary, UNIF. ARBITRATION ACT, § 23, 7 U.L.A. 86 (2000) (amendment notes) (noting two primary reasons for refusing “manifest disregard” inclusion: federal preemption and inconsistent judicial interpretation).

64. See generally Davis, *supra* note 2 (expounding on evolution of Supreme Court doctrine promoting national arbitration policy). Cases dating from 1953 to 1991 created the foundation for statutory treatment of arbitration law in the United States. *Id.* at 63-76.

65. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (recognizing importance of FAA in securing timely and cost effective dispute resolution). Note, however, that *Wilko* weighed certain public policy goals more heavily than arbitration after condoning arbitration in general. See *id.* Where arbitration policy conflicted with another public policy (e.g. protecting securities investors), the public interest controlled. *Id.* In essence, the *Wilko* Court deemed arbitration a “waiver” of rights granted by the 1933 Securities Act, thus preventing the right to judicial access at both the trial and appellate levels. *Id.* at 435. In other cases, the Supreme Court demonstrated its commitment to satisfying the “clear congressional purpose” of promoting speedy dispute resolution. See *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (permitting arbitrators to hear claims of fraudulent inducement to foster efficiency and prevent delay in courts); *cf.* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (ordering fragmentation of state arbitration issues and federal causes of action to honor parties’ intent). The *Dean Witter* Court denied that the FAA’s *only* goal was to promote speedy resolution of disputes; it held that ability to arbitrate rested on the bargained-for agreement to arbitrate. See *Dean Witter Reynolds*, 470 U.S. at 219; see also Davis, *supra* note 2, at 67 (summarizing Court’s interpretation of arbitration policy as preserving parties’ intent).

66. See Davis, *supra* note 2, at 69-70 (discussing *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), where arbitration agreement and judgment honored compliance with public policy); see also *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (permitting arbitration when statute promoting public policy conflicts with arbitration policy); Davis, *supra* note 2, at 70-71 (discussing identical reasoning in *Wilko* and *McMahon* with opposite results). *McMahon* was a blatant erosion of the *Wilko* doctrine because it placed public interest directly against arbitration policy. *Id.* at 70.

67. See *Wilko*, 346 U.S. at 436 (acknowledging limited appellate power in vacatur of awards). The Court then relayed, in language separate from the case’s holding, that “[i]n unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject . . . to judicial review for error in interpretation.” *Id.* at 436-37. Only a clearly visible departure from the governing Securities Act in a ruling could count as a ground for vacatur. *Id.*; see also Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 505 (1998) (recognizing standard’s origin in Supreme Court dictum); Hayford, *Restoring Order*, *supra* note 24, at 120 (acknowledging “manifest disregard” dictum as sole source of standard’s subsequent diffusion).

In *Wilko v. Swan*<sup>68</sup> the Court protected parties who were pressured to arbitrate claims resulting from investment transactions arising under the Securities Act of 1933 (Act).<sup>69</sup> The Court recognized that it was placing two competing federal policies at odds: the first indulged arbitration and the second protected securities investors.<sup>70</sup> The Court stated, “Congress has afforded participants in transactions . . . an opportunity generally to secure prompt, economical, and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment.”<sup>71</sup> The Court ultimately ruled that only claims unrelated to the Act could be subject to arbitration due to the fear that a buyer’s waiver of litigation rights violates the basic substantive provisions of the Act.<sup>72</sup>

In recognizing that award vacatur for an arbitrator’s failure to comply with the Act’s provisions if failure to comply was “clearly apparent,” the Court slipped into ambiguous commentary explicating a new, narrow, non-statutory ground for review.<sup>73</sup> It stated that “[i]n unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject . . . to judicial review for error in interpretation.”<sup>74</sup> With such language, and independent of the Court’s holding, the “manifest disregard” standard was born in dictum.<sup>75</sup>

*Wilko*’s influence on evaluating arbitration vacatur grounds did not disappear, despite the Supreme Court’s overturning the decision in 1989.<sup>76</sup> In

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68. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

69. *See id.* at 428-29, 438 (relaying facts of stock purchase and agreement containing arbitration provision between disgruntled customer and broker).

70. *Id.* at 438 (acknowledging irreconcilable nature of arbitration goals and investor protection).

71. *Id.* at 438 (keeping in mind legislative goals behind arbitration policy). Immediately thereafter, the Court weighed buyers’ rights by noting that “Congress has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights.” *Id.*

72. *See Wilko*, 346 U.S. at 438 (placing investors’ substantive rights ahead of arbitration and prohibiting waiver of litigation of claims under Act). Additionally, the *Wilko* court divulged its suspicion of field (or industry) arbitrators who make decisions “without judicial instruction on the law” and “without explanation of their reasons.” *Id.* at 436.

73. *See id.* at 436 (illustrating Court’s fear of arbitrators’ erroneous interpretations of law escaping review). The informality of the arbitration process produces untranscribed accounts of reasoning which leads to conclusory statements, thereby shielding arbitrator error from judicial scrutiny. *Davis, supra* note 2, at 89. *But see* Hayford, *Restoring Order, supra* note 24, at 136-37 (suggesting “manifest disregard” possibly harmonized with Section 10(a) of FAA if misconduct-based approach adopted).

74. *See Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (suggesting protection afforded to buyers trading securities if making “manifest disregard of the law” allegations).

75. *See Wilko*, 346 U.S. at 436-37 (propounding first mention of “manifest disregard” standard applied to arbitrators’ error of law); *see also* Hayford, *Restoring Order, supra* note 24, at 120 (citing *Wilko* dictum as “sole basis” for new vacatur ground); Maggio & Bales, *supra* note 2, at 154 (crediting Supreme Court for opening judicial door to “manifest disregard” review).

76. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-86 (1989) (reaffirming national enthusiasm for arbitration while overturning *Wilko*); *see also* *Davis, supra* note 2, at 89 (noting contradiction of *Wilko* position while describing Court’s likely unwitting creation of “manifest disregard”

*Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>77</sup> the Supreme Court clearly recognized that interpretations of law were not subject to review; however, the Court's clarification of the term "manifest" arguably failed to distinguish "misapplication" of the law from its "non-application."<sup>78</sup> An ensuing series of cases interpreting and applying "manifest disregard of the law" soon enhanced the already blurred line between objectivity and subjectivity concerning arbitrators' intent and behavior while interpreting and applying applicable law.<sup>79</sup> As continues to be seen, the difficulty in determining an arbitrator's state of mind while forming his or her opinion makes the "manifest disregard" standard difficult to define and apply consistently.<sup>80</sup> Lack of uniformity among the circuit courts, where the standard's recognition and application began to spread, directly resulted from the Supreme Court's lack of early guidance in defining it.<sup>81</sup>

*Montes v. Shearson Lehman Brothers, Inc.*<sup>82</sup> represents one of the few cases vacating an arbitral award under the "manifest disregard" veil.<sup>83</sup> In *Montes*, an

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doctrine).

77. 490 U.S. 477 (1989).

78. See Davis, *supra* note 2, at 90-91 (pondering exact intent of Supreme Court after ambiguous use of vocabulary). The misapplication of the phrase "manifest disregard" has itself created unremitting criticism in both legal academia and among the circuit courts, all spawning from what was "probably" dictum. *Id.* at 92 (recognizing contortion of language to suit individual circuit court needs); see also Hayford, *A New Paradigm*, *supra* note 9, at 471 (discounting standard's credibility as misplaced); Hayford, *Law in Disarray*, *supra* note 41, at 775 (noting minimal collateral references to "manifest disregard" standard in later Supreme Court decisions). Critics of the "manifest disregard" standard appreciate the difficulty in utilizing it to review arbitrators' substantive errors of law. Davis, *supra* note 2, at 99. The standard lacks measurement of the error's "magnitude, quality, and consequence," while contradicting the intent of those parties bound to sacrifice legal precision for efficiency. *Id.* at 100-01.

79. See Hayford, *A New Paradigm*, *supra* note 9, at 474 (considering evaluation of arbitrator's state of mind and knowledge of issue). Critics view the "manifest disregard" standard as a two-step test: (1) determining an arbitrator's knowledge of the relevant law; and (2) determining the degree to which the arbitrator ignored the law if in fact known. *Id.* at 475.

80. See Hayford, *Law in Disarray*, *supra* note 41 at 775 (noting little additional guidance from subsequent Supreme Court decisions). A bright line needs to be constructed before the "manifest disregard" standard can be applied uniformly. *Id.* at 778. The difference between a "nonreviewable error of law and the manifest disregard thereof" needs elaboration before the Supreme Court develops motivation to reconcile its discrepancy with the FAA grounds for vacatur. *Id.*

81. See Hayford, *Law in Disarray*, *supra* note 41, at 775-77 (discussing Second Circuit's interpretation of "manifest disregard").

82. 128 F.3d 1456 (11th Cir. 1997).

83. *Id.* (permitting award vacatur where attorney urged arbitrator to disregard applicable law numerous times); see also *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (observing *Montes* remains only case satisfying "exacting requirements" of this exception). The *Hercules* court recognized that four factors appeared in *Montes* that will "seldom recur":

Those facts are that: 1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; 2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel's award; 3) neither in the award itself nor anywhere else in the record is there any indication that the panel disapproved or rejected the suggestion that it rule contrary to law; and 4) the evidence to support the award is at best marginal.

employee charged the arbitrators with manifestly disregarding an applicable federal statute that would have compensated her for overtime hours.<sup>84</sup> The employer's attorney recognized the pertinent statute's existence, yet repeatedly encouraged the arbitrators to ignore its weight.<sup>85</sup> He argued that the arbitrators could consider both law and equity, thus releasing them from strictly interpreting legal precedent.<sup>86</sup>

In ruling, the Eleventh Circuit reiterated that “[a]n arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”<sup>87</sup> The court continued, however, to use what was “in the record” to infer what was *not* in the record.<sup>88</sup> The arbitrators' lack of formal assertions regarding the relevant statute, coupled with the employer's urging to disregard it, led the court to employ the “manifest disregard” vacatur standard.<sup>89</sup> The Eleventh Circuit concluded that “there [was] nothing in the record to refute the suggestion that the law was disregarded.”<sup>90</sup>

A Second Circuit case decided shortly after *Montes* represents another rarity in award vacatur. In *Halligan v. Piper Jaffray*,<sup>91</sup> an employee presented strong evidence that he was a victim of age discrimination, thereby placing his claim within a clearly governing law.<sup>92</sup> Noting that vacatur for manifestly disregarding the law is “severely limited,” the court nevertheless concluded that the arbitrators decided incorrectly against “overwhelming evidence.”<sup>93</sup> After recognizing that arbitrators are not required to produce reasoned awards, the court insisted that a specific inference be permitted—awards lacking explanation may suggest that arbitrators manifestly disregarded the law if a clearly governing law was rendered virtually irrelevant by the arbitrator without

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*Hercules*, 441 F.3d at 911 (citing *Montes*, 128 F.3d at 1464 (Carnes, J., concurring)).

84. *Montes*, 128 F.3d at 1463 n.9 (setting forth terms of FLSA and distinguishing between “exempt” and “non-exempt” employee status). Ms. Montes contended that she was a non-exempt employee with no supervisory or operational role, thereby entitling her to overtime wages. *Id.* at 1462-63. The applicable statute, presented to the arbitrators during the proceedings, gave guidance regarding how to categorize employees. *Id.* at 1459.

85. *See id.* at 1459 (noting attorney asked arbitrators to disregard FLSA even if they found employee “non-exempt”).

86. *Id.* (illustrating range of arbitrators' considerations).

87. *Id.* at 1461 (reiterating common “manifest disregard” construction as more than sheer error of law).

88. *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1463 (11th Cir. 1997) (demonstrating court's imputation of legal knowledge upon arbitrators).

89. *Id.* at 1462 (noting record similarly failed to offer clear support for award).

90. *Id.*

91. 148 F.3d 197 (2d Cir. 1998).

92. *Id.* at 198 (recollecting general agreement of both parties regarding federal statute's control over dispute).

93. *Id.* at 203 (valuing aggrieved party's evidence as consistent *only* with favorable finding).

explanation.<sup>94</sup>

Other circuits employing this standard all agree that a party seeking vacatur must not merely object to the arbitrator's decision or state sheer error of law as grounds for review, but must allege something more.<sup>95</sup> For example, the Second Circuit includes within "manifest disregard" a definition of error that encompasses something "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator" that results from the arbitrator's appreciation of, but refusal to apply, a "clearly governing legal principle."<sup>96</sup> In other circuits, the governing legal principle must not be "subject to reasonable debate,"<sup>97</sup> and a record must exist that demonstrates that the arbitrators knew the law and explicitly disregarded it, or that the arbitral award directed parties to break the law.<sup>98</sup> Typically, then, award review resulting from a "manifest disregard of the law" will require a party to prove that: (1) a clearly governing law existed and the award grossly departed from that law due to misinterpretation or misapplication; and, (2) the arbitrator knew of and understood the law, yet consciously disregarded the it.<sup>99</sup>

These decisions, based largely on degree-of-error analysis, opened the judicial forum to multiple applications of the "manifest disregard" principle.<sup>100</sup> In essence, federal courts began to retain a de facto license for examining the

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94. *Id.* at 204 (acknowledging failure to construct reasoned awards as evidence of manifestly disregarding law). Because the court deemed Halligan's proof heavily convincing, combined with counsel's display of applicable law, the court held that the panel "ignored the law or the evidence or both." *Id.*

95. See Hayford, *Law in Disarray*, *supra* note 41, at 776 (observing general agreement among federal courts requiring more than mere interpretive error).

96. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (defining "manifest disregard" while utilizing *Wilko dictum* as basis). The Ninth Circuit observes a similar standard, but requires that the arbitrators understand and correctly state the law, then proceed to ignore it. *San Martine Compania de Navegacion v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) (requiring similar prerequisites before constituting error in "manifest disregard").

97. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (requiring decision to "fly in the face of clearly established legal precedent").

98. See *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 136 (6th Cir. 1996) (requiring availability of well-settled legal principle); see also *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1255 (7th Cir. 1994) (changing former stance to favor "manifest disregard" standard); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (presupposing law of "widespread familiarity, pristine clarity and irrefutable applicability" supports "manifest disregard" finding); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988) (reiterating exception requires "willful inattentiveness" to controlling legal principle). Also, an important factor in determining whether the arbitrator "manifestly disregarded" applicable law is whether the parties designated that arbitrators use particular substantive law in interpreting the arbitration issues. Levin, *supra* note 3, at 112-13. Similarly, the parties must have presented the controlling law to the arbitrator, and the reviewing authority must know how the arbitrator weighed principles of equity over principles of law in a *subjective* state. Hayford, *Restoring Order*, *supra* note 24, at 131-32. These factors are further compounded by the absence of required writings accompanying awards. *Id.*

99. See Hayford, *A New Paradigm*, *supra* note 9, at 468-69 (discussing "two constituent elements" of "manifest disregard" analysis); see also *supra* note 98 (discussing various formulations of elements included within "manifest disregard" analysis).

100. See Hayford, *Restoring Order*, *supra* note 24, at 130 (arguing presumption of arbitral knowledge large flaw in "manifest disregard" analysis).

factual merits of disputes.<sup>101</sup> Moreover, the decisions make a hidden demand for documented opinions where an award is questionable; absent a statement of the arbitrators' reasoning, a court may presume an egregious error of law was made if the parties presented a governing principle to the arbitrators.<sup>102</sup> Where writing opinions remains optional, arbitrators face persistent incentives to rule without writing in the hope of diverting any vacatur attempts based on "manifest disregard" inquiries.<sup>103</sup> Most importantly, the "manifest disregard" ground shifts attention from the knowledge of the arbitrators to the degree of legal error made, thereby imputing "constructive" knowledge to the arbitrator, depending upon how well known the violated legal principle is.<sup>104</sup> Even when flawed, the definitions and "tests" associated with "manifest disregard" federal jurisprudence have trickled their way into state arbitration proceedings.

### E. Current State Approaches to Defining Vacatur Grounds

#### 1. Statutory Recognition of "Manifest Disregard of the Law"

Few state statutes make errors of law reviewable, or include "manifest disregard of the law" as a ground for vacatur.<sup>105</sup> Substantive review, if any, is often narrowed within special circumstances to serve particular policy goals or assist a particular segment of the public.<sup>106</sup> Those statutes that include a "manifest disregard" exception to enforcing an award do not "define" it within the statute; instead, the judiciary is charged with shaping its meaning through common law.<sup>107</sup>

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101. Hayford, *Restoring Order*, *supra* note 24, at 130-31 (applying weight of facts to case where burden rests in arbitrators, not courts).

102. See Hayford, *Restoring Order*, *supra* note 24, at 131 (fearing incentive for arbitrators to avoid written rulings while suggesting documentation necessary to survive vacatur).

103. See Hayford, *Restoring Order*, *supra* note 24, at 126 (theorizing manifest disregard standard creates perception of "futility" in placing award in writing).

104. See Hayford, *Restoring Order*, *supra* note 24, at 127 (criticizing "constructive" knowledge creation for arbitrator where legal principle is clear and well-settled). This creates the inaccurate inference that the arbitrator *actually* knew of the principle he or she subsequently ignored. *Id.* It completely distorts, if not destroys, the subjective nature of the "manifest disregard of the law" analysis. *Id.*

105. See N.H. REV. STAT. ANN. § 542:8 (2004) (allowing arbitral appeal within one year of decision if "plain mistake" evident); see also GA. CODE ANN. § 9-9-13(b)(5) (2005) (including "the arbitrator's manifest disregard of the law" as basis for vacatur).

106. See Levin, *supra* note 3, at 111-12 (discussing three state statutes carving exceptions to "error of law" review based on parties' identity). Lacking recognition in most statutory schemes, substantive law takes the backburner to legislative guidance. *Id.* at 112. An arbitrator's recognition of substantive law only arises through party choice, thus sometimes leaving facts as a stronger force than law in arbitration. *Id.*

107. See GA. CODE ANN. § 9-9-13(b)(5) (2005) (listing "manifest disregard" as vacatur ground without establishing statutory definition); see also *Humar Props., LLLP v. Prior Tire Enters., Inc.*, 605 S.E.2d 926, 927-28 (Ga. Ct. App. 2004) (affirming written transcript of hearing required as evidence of "manifest disregard"). The Georgia Court of Appeals requires that an aggrieved party to arbitration bear the burden of proof in demonstrating that the arbitrator manifestly disregarded the law with prior knowledge of it. *Humar Props.*, 605 S.E.2d at 927. In New Hampshire, if the court determines that arbitrators "would not have made such an award

The Georgia legislature—the first to pass a bill formally recognizing “manifest disregard of the law” as a ground for vacatur—noted its “common sense” value in preventing arbitrators from knowingly violating the law.<sup>108</sup> It adopted the new provision after the Supreme Court of Georgia construed the applicable state arbitration code strictly, and banned judicially mandated vacatur for “manifest disregard.”<sup>109</sup> The legislature was likely influenced by the dissent of a Georgia Supreme Court justice who critiqued the majority decision that prohibited the “manifest disregard of the law” standard.<sup>110</sup> The persuasive dissent suggested that refusal to recognize “manifest disregard of the law” as a ground for vacatur would dissuade contracting parties from choosing arbitration when they know that an arbitrator could willingly disregard the law with a judicial stamp of approval.<sup>111</sup> Additionally, this vacatur ground can be viewed as a “necessary component of the courts’ ‘obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of . . . statutes.’”<sup>112</sup>

## 2. Direct Common Law Recognition

Although “manifest disregard of the law” makes its way into few state

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had they known what the law was,” setting aside the award for a mistake of law is appropriate. N.H. Ins. Co. v. Bell, 427 A.2d 27, 28 (N.H. 1981) (citing *Piersons v. Hobbes*, 33 N.H. 27 (1856)); see also N.H. REV. STAT. ANN. § 542:8 (2004) (providing for appeal on “plain mistake” grounds without legislative definition of term); *Flood v. Caron*, 441 A.2d 733, 735 (N.H. 1982) (modifying or correcting arbitration award includes mistakes made in both errors of law and fact).

108. See Andrew S. Lewinter, *Civil Practice, Section III, Provide for Vacation of an Arbitration Award Based Upon an Arbitrator’s Manifest Disregard for the Law*, 20 GA. ST. U. L. REV. 28, 46 (2003) (describing effort to protect consumers when arbitrators knowingly disregard background substantive law); Brent S. Gilfedder, Note, “A Manifest Disregard of Arbitration?” *An Analysis of Recent Georgia Legislation Adding “Manifest Disregard of the Law” to the Georgia Arbitration Code as a Statutory Ground for Vacatur*, 39 GA. L. REV. 259, 264-65 (2004) (questioning whether adding “manifest disregard” standard contributes to confusion in arbitration law).

109. See *Progressive Data Sys., Inc. v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 475 (Ga. 2002) (refusing to recognize non-statutory permission for vacatur). The Georgia court stated that its duty is to construe strictly any statutes in derogation of the common law, even though other courts accept this standard of vacatur. *Id.*; see also Lewinter, *supra* note 108, at 48 (acknowledging Georgia bar’s opposition to codification of “manifest disregard” standard); David Boohaker, Note, *The Addition of the “Manifest Disregard of the Law” Defense to Georgia’s Arbitration Code and Potential Conflicts with Federal Law*, 21 GA. ST. U. L. REV. 501, 507-08 (2004) (depicting unintentional expansion of “manifest disregard” from consumer to commercial arena).

110. See *Progressive Data Sys.*, 568 S.E.2d at 476-78 (Carley, J., dissenting) (recognizing “universal” acceptance of standard and necessity).

111. See *id.* at 478 (fearing negative perception of arbitration if “manifest disregard of the law” forbidden as vacatur ground).

112. See *id.* at 477-78 (quoting *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 761 (5th Cir. 1999)); see also *Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 761 (5th Cir. 1999) (preventing arbitrators from consciously circumventing controlling precedent); *Progressive Data Sys.*, 568 S.E.2d at 477-78 (Carley, J., dissenting) (adopting *Williams* reasoning). Justice Carley’s dissent also emphasizes that an arbitrator’s disregard for applicable law signifies purposeful misconduct that inevitably constitutes an “overstep [of] his or her legitimate authority.” *Progressive Data Sys.*, 568 S.E.2d at 476 (Carley, J., dissenting).

arbitration statutes, “it has nonetheless crept into the [common] law of arbitration,” lacking any framework for a “clear-cut distinction between a ‘mistake of law,’ which . . . is not a ground for disturbing an award, and a ‘manifest disregard of the law,’ which under the *Wilko* case is a ground.”<sup>113</sup> Without statutory definitions, state courts began to construct their own interpretations of “manifest disregard,” sometimes relying on federal case law, and generally requiring more than mere legal error, failure to understand the law, or failure to apply it correctly.<sup>114</sup>

Courts adopting this standard frequently defer to the growing majority of jurisdictions that harbor the protection afforded by “manifest disregard of the law” and explore its various applications before settling on their own tests.<sup>115</sup> In responding to its desire to protect judicial integrity, as well as public policy, the Montana Supreme Court adopted “manifest disregard of the law” review as a “reasoned approach . . . consistent with [its] responsibility to uphold the laws of th[e] State.”<sup>116</sup> Similarly, a Nevada court implied that it “would become [an] active agent of substantial injustice” should it permit arbitrators to manifestly disregard controlling law.<sup>117</sup> In any event, state courts employing the judicially created doctrine of “manifest disregard” still appreciate arbitration’s advantages, recognizing that inconclusive awards may “signify the *commencement*, not the end, of litigation.”<sup>118</sup> Arguably, the focus in these jurisdictions remains on ensuring the proper interpretation of governing state statutory and common law.<sup>119</sup>

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113. See *Westminster Constr. Corp. v. PPG Indus., Inc.*, 376 A.2d 708, 711 (R.I. 1977) (recognizing non-statutory exception to upholding arbitral awards); see also R.I. GEN. LAWS § 10-3-12 (2005) (excluding “manifest disregard” language from state arbitration statute).

114. See *Purvis Sys., Inc. v. Am. Sys. Corp.*, 788 A.2d 1112, 1115 (R.I. 2002) (categorizing “manifest disregard” within realm of arbitrator’s actual knowledge and noting active failure to apply it). The Supreme Court of Rhode Island added to the Second Circuit’s interpretation of “manifest disregard” by opining that an award based on a “passably plausible” interpretation of the relevant contract extinguishes any review for “manifest disregard.” *Id.*; see also *Birmingham News Co. v. Horn*, 901 So. 2d 27, 48-52 (Ala. 2004) (listing exhaustively each circuit court’s definition of “manifest disregard” from which state review arises); *supra* notes 95-98 and accompanying text (demonstrating federal courts’ similar position requiring something in addition to minimal error in interpretation).

115. See *Geissler v. Sanem*, 949 P.2d 234, 237 (Mont. 1997) (citing numerous decisions upholding review for “manifest disregard of the law”); see also *id.* at 239 (Gray, J., concurring) (highlighting importance of persuasive sister state authority interpreting Uniform Act statutes).

116. *Id.* at 237-38 (majority opinion) (concluding “manifest disregard of the law” standard as “better reasoned approach”).

117. See *Graber v. Comstock Bank*, 905 P.2d 1112, 1115 (Nev. 1995) (emphasis omitted) (instructing standard does not entail plenary review).

118. See *Batten v. Howell*, 389 S.E.2d 170, 171 (S.C. Ct. App. 1990) (internal citation omitted) (quoting precedent of *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 333 S.E.2d 781 (1985), favoring arbitration as “quick and inexpensive”); see also *Pier House Inn, Inc. v. 421 Corp.*, 812 A.2d 799, 803 (R.I. 2002) (assuring finality with limited review of merits of arbitrator’s award).

119. Compare *supra* notes 116-117 and accompanying text (illustrating courts’ desire to uphold applicable state law), with *supra* note 111 and accompanying text (demonstrating practical concern for public’s loss of faith in arbitration’s legitimacy).

### 3. “Manifest Disregard” Couched in Other Common Law Vacatur Grounds

A third category of states recognize “manifest disregard of the law” as a defense to arbitration award enforcement, but derive it from other statutory grounds.<sup>120</sup> Specifically, Connecticut and Utah courts insist that arbitrators exceed their power if they knowingly fail to import applicable substantive law into the dispute.<sup>121</sup> These judiciaries favor a process perceived by adverse parties as legitimate and controlled by substantive law rather than one involving the mere “sensibilities of arbitrators who are knowledgeable about industry practice and custom . . . .”<sup>122</sup>

To uphold an award where an arbitrator demonstrated an “extraordinary lack of fidelity to established legal principles” would not only erode society’s confidence in private dispute resolution, but would also promote egregious misperformance of an arbitrator’s duty.<sup>123</sup> Modern principles of good faith and fair dealing are components of all arbitration agreements by operation of

120. See CONN. GEN. STAT. § 52-418(a) (2004) (outlining various grounds for vacating award); UTAH CODE ANN. § 78-31a-124(d) (2005) (listing arbitrator exceeding authority as grounds for award vacatur); see also *Garrity v. McCaskey*, 612 A.2d 742, 746 (Conn. 1992) (refusing to “create new exception independent of [arbitration statute]”). A recent case illustrates Connecticut’s adoption of a “manifest disregard” test as applicable to an arbitrator’s behavior that is violative of Connecticut’s arbitration statute. *Indus. Risk Ins. v. Hartford Steam Boiler Inspection & Ins. Co.*, 868 A.2d 47, 52-53 (Conn. 2005). In addition, the *Hartford Steam* court crafted a three-pronged test requiring that: (1) manifest disregard of the law arise from an obvious error perceptible by an average arbitrator; (2) an arbitrator consciously ignores a governing principle; and (3) misused law is explicitly applicable to the dispute. *Id.* at 52-53. Similarly, Utah courts defined “manifest disregard” as an arbitrator exceeding his power, which emanates from a statutory ground for award vacatur. See *Pac. Dev., L.C. v. Orton*, 2001 UT 36, ¶ 7, 23 P.3d 1035 (Utah 2001). “An arbitrator is bound to apply governing law and may not simply disregard it; hence, manifest disregard constitutes an abuse of the authority conferred upon the arbitrator by the parties.” *Id.* at ¶ 7 n.3, 1035.

121. See *City of Bridgeport v. Bridgeport, Conn. Police Dep’t Employee Local 1159*, No. CV 96336521, 1997 Conn. Super. LEXIS 2975, at \*8 (Conn. Super. Ct. Nov. 5, 1997) (internal citation omitted) (reserving vacatur for instances arbitrator exercises “extraordinary lack of fidelity to established legal principles”); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 951 (Utah 1996) (implying disregarding governing authority violates arbitrator’s authority). But see *Detroit Auto. Inter-Ins. Exch. v. Gavin*, 331 N.W.2d 418, 434 (Mich. 1982) (announcing materiality of error as question on review, not misconduct alone). Michigan’s Supreme Court took a unique stance on defining “manifest disregard of the law.” *Id.*

[Where] it clearly appears on the face of the award or the reasons for the decision . . . that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.

*Id.* (alteration in original) (quoting *Howe v. Patrons’ Mut. Fire Ins. Co. of Mich.*, 185 N.W. 864, 867-68 (Mich. 1921)).

122. See Levin, *supra* note 3, at 124 (preferring practical, equitable resolution to rights remedied by legal technicalities). “Arbitrators are not necessarily trained in the law and are men and women of varying ability and expertise.” *Gavin*, 331 N.W.2d at 434.

123. See *Hartford Steam*, 868 A.2d at 52 (internal citation omitted) (focusing on behavior of arbitrator, not necessarily degree of error in judicial review); see also *Garrity*, 612 A.2d at 746 (expressing vacatur appropriate if award discloses infidelity to arbitrators’ obligations). The *Garrity* court feared that judicial stamps on egregious departures from substantive law would displace society’s confidence in arbitration’s legitimacy. *Garrity*, 612 A.2d at 747-48.

contract law; thus, arbitrators are bound to apply them while acting as the sole interpreters and enforcers of agreements between the parties.<sup>124</sup> Consequently, what the parties bargain for is not entirely unrestricted in terms of discretion; the arbitrators must exercise their powers as reasonably contemplated by the agreement and delineated by the dispute resolution clause.<sup>125</sup> If they fail to do so, arbitrators risk “manifestly disregarding” the authority given to them for interpreting agreements via arbitration using applicable substantive law.<sup>126</sup> As a result, the “manifest disregard” classification in these jurisdictions comes closer to a standard that gauges arbitrators’ misconduct.<sup>127</sup>

#### 4. Rejecting “Manifest Disregard of the Law”

States that do not authorize vacatur of arbitral awards based on the “manifest disregard of the law” ground frequently do so by strictly construing the governing statute.<sup>128</sup> Applying plain meaning to statutory language prevents the judiciary from impressing a meaning upon legislative text that lawmakers refused to convey themselves.<sup>129</sup> The Supreme Court of Virginia stated that “[w]here the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding that the legislature did not mean what it has actually expressed.”<sup>130</sup>

Other states rejecting “manifest disregard of the law” as a vacatur ground have merely reiterated the importance of an alternate, binding forum for private dispute resolution.<sup>131</sup> In fact, one California case suggested that the efficacy in

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124. See *Garrity*, 612 A.2d at 748 (recognizing parties do not expect arbitrator to have unlimited discretion); see also *Orton*, 2001 UT 36 at ¶¶ 11-12 (considering “manifest disregard of the law” abuse of authority resulting from contractual provisions).

125. See *Garrity*, 612 A.2d at 748 (noting seemingly broad discretion limited by reasonable expectations of arbitrating parties).

126. *Id.* at 747-48 (reasoning “egregious misbehavior” will undermine public confidence in arbitration mechanisms).

127. See Hayford, *supra* note 24, at 135 (proposing focus on arbitrator’s behavior and misconduct best application of “manifest disregard” standard).

128. See *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 63 (Colo. Ct. App. 2004) (illustrating Colorado’s strictly limited arbitration scheme); see also *Signal Corp. v. Keane Fed. Sys., Inc.*, 574 S.E.2d 253, 256 (Va. 2003) (limiting reviewable grounds as those prescribed by Virginia’s Uniform Arbitration Act). The *Signal* court strongly affirmed its commitment to invoking only plain meaning in interpreting statutes. *Signal Corp.*, 574 S.E.2d at 256. “Conspicuously missing from this statute is a provision that permits a court to vacate a judicial award when the arbitration panel has exhibited a ‘manifest disregard of the law.’” *Id.* at 257.

129. See *Coors Brewing*, 114 P.3d at 65-66 (presuming legislators’ awareness of evolving case law in areas in which it legislates). An additional rationale for denying effect to “manifest disregard” evaluations is preserving the legitimacy of arbitration. *Id.* at 66. Without certainty of outcome, the popularity of alternative processes will cease as more individuals view arbitration as the onset of litigation. *Id.* at 66.

130. See *Signal Corp.*, 574 S.E.2d at 257 (internal citations omitted) (refusing to adopt “manifest disregard of the law” as reason for review).

131. See *Conn. Valley Sanitary Waste Disposal, Inc. v. Zielinski*, 763 N.E.2d 1080, 1085 (Mass. 2002) (reiterating strong public policy favoring alternative to commencing lawsuit); see also *Drywall Sys., Inc. v. ZVI Constr. Co.*, 761 N.E.2d 482, 484 (Mass. 2002) (presuming arbitrability exists unless positive evidence contradicts presumption); *Plymouth-Carver Reg’l Sch. Dist. v. J. Farmer & Co.*, 553 N.E.2d 1284, 1285 (Mass.

applying “manifest disregard of the law” to award review is uncertain at best.<sup>132</sup> In addition to speculating about how few awards are actually reconsidered after employing a standard which is “very narrowly limited,” the California Court of Appeals asserted that its current policy furthered arbitration goals by limiting review of an award’s merits.<sup>133</sup>

### 5. *The Current State of Massachusetts Law*

Arbitration has grown into a favored role in Massachusetts dispute resolution.<sup>134</sup> Very little, if any, Massachusetts common law addresses an arbitrator’s “manifest disregard” of applicable legal principles.<sup>135</sup> Historically, arbitral decisions remained untouched unless procedural or affirmative misconduct by the arbitral tribunal occurred.<sup>136</sup> These narrow occasions for review resulted, in part, from its adoption of vacatur provisions mirroring those set forth in the UAA.<sup>137</sup> The Massachusetts General Court is currently entertaining a bill that will revise its current arbitration statute; however, this bill does not include any additional grounds for vacatur.<sup>138</sup>

Although Massachusetts has not explicitly expressed an opinion on parties’ use of “manifest disregard of the law” as cause for vacatur, case law and prior legislative activity suggests that its application would be prohibited.<sup>139</sup>

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1990) (avoiding undermining arbitration’s effectiveness, predictability, and certainty); *Floors, Inc. v. B. G. Danis of New England, Inc.*, 401 N.E.2d 839, 844 (Mass. 1980) (hailing arbitration as “simplified” way to resolve commercial disputes); *Fernandez v. Farmers Ins. Co. of Ariz.*, 857 P.2d 22, 25-26 (N.M. 1993) (discussing numerous benefits of arbitration).

132. *See Siegel v. Prudential Ins. Co. of Am.*, 67 Cal. Rptr. 2d 726, 735 (Cal. Ct. App. 1998) (rejecting categorically “manifest disregard” option for aggrieved parties).

133. *See id.* (quoting case law asserting severe restriction in applying “manifest disregard” standard).

134. *See Finn, supra* note 30, at § 9.4 (describing enactment of Massachusetts’s arbitration statute with desire to promote process, not merely tolerate it); *see also supra* notes 50-51 (discussing increased role of and respect for arbitration in Massachusetts).

135. *See supra* notes 5-6, 8, 27, 40 (illustrating typical high regard for arbitrator’s decisions in Massachusetts). *But see* *Travelers Cas. & Sur. Co. of Am., Inc. v. Long Bay Mgmt. Co.*, Nos. 015490BLS, 014749, 2004 WL 2341339, at \*3 (Mass. Super. Ct. Sept. 7, 2004) (alluding to “manifest disregard” standard as grounds for award vacatur in Massachusetts trial court).

136. *See supra* notes 5, 131 (reiterating Massachusetts’s policy favoring arbitration with slim grounds for review). *But see* *City of Boston v. Boston Police Patrolman’s Ass’n*, 824 N.E.2d 855, 860-61 (Mass. 2005) (outlining narrow “public policy” exception for vacatur not found in statute); *Concerned Minority Educators of Worcester v. Sch. Comm. of Worcester*, 466 N.E.2d 114, 116 (Mass. 1984) (recognizing arbitrator’s decision should draw essence from contract providing for arbitration, also not appearing in statute).

137. *See* MASS. GEN. LAWS ch. 251, § 12 (enumerating grounds for vacatur in Massachusetts); *see also* UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 102-768 (1956) (amended 1956) (forming basis for state arbitration codes); UNIF. ARBITRATION ACT, §§ 1-33, 7 U.L.A. 9-94 (2000) (accomplishing same).

138. *See* H.B. 1813, 185th Gen. Ct., Reg. Sess. (Mass. 2007) (outlining details of revised arbitration law in Massachusetts).

139. *See* *Conn. Valley Sanitary Waste Disposal, Inc. v. Zielinski*, 763 N.E.2d 1080, 1084 (Mass. 2002) (insisting judicial review of arbitration award narrow); *Plymouth-Carver Reg’l Sch. Dist. v. J. Farmer & Co.*, 553 N.E.2d 1284, 1286 (Mass. 1990) (providing string of cases demonstrating state courts’ commitment to promoting arbitration). Massachusetts provides for arbitral award review on grounds other than those listed in Chapter 251, section 12 of the Massachusetts General Laws, but does so in limited circumstances. *Compare*

Recognizing that “arbitrators have broad authority to establish a balance between the parties,”<sup>140</sup> Massachusetts courts have refused to disturb arbitrators’ rulings even if “an arbitrator has committed an error of law or fact in arriving at his decision.”<sup>141</sup> In balancing the rights of the parties, arbitrators may consider legal arguments as well as principles of equity.<sup>142</sup>

When considering the Uniform Arbitration Act of 1955, the Massachusetts legislature refused to adopt a provision for vacating an award “so grossly erroneous as to imply bad faith on the part of the arbitrators.”<sup>143</sup> The legislature’s deliberate statutory exclusion, coupled with the state’s strong policy favoring arbitration, suggests that it will be an uphill battle before Massachusetts arbitration participants-turned-litigants successfully incorporate “manifest disregard” into their vacatur arsenal.

### III. ANALYSIS

#### A. *How Useful is Using “Manifest Disregard of the Law” to Vacate Arbitral Awards?*

“Manifest disregard of the law” is a tempting ground upon which to rest an argument that an arbitrator’s award should be vacated.<sup>144</sup> Cases, however, rarely arise containing the factual predicates to vacate an award based on this standard, largely relegating “manifest disregard” to a procedural fiction.<sup>145</sup>

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MASS. GEN. LAWS ch. 251, § 12 (2004) (listing grounds for arbitral award review), with MASS. GEN. LAWS ch. 90, § 7N1/2 (2005) (permitting appeal for consumer dissatisfied with arbitration under Lemon Law), and MASS. GEN. LAWS ch. 142A, § 4 (2004) (permitting award review for residential homeowners in disputes with contractors).

140. See *City of Lawrence v. Falzarano*, 402 N.E.2d 1017, 1024 (Mass. 1980).

141. See *McGovern v. Middlesex Mutual Ins. Co.*, 269 N.E.2d 445, 446 (Mass. 1971).

142. See *Falzarano*, 402 N.E.2d at 1024 (assuring court cannot overstep arbitrators’ judgment in assessing issues properly in front of them).

143. *McGovern*, 269 N.E.2d at 446 (discussing 1955 Uniform Arbitration Act’s inclusion of vacatur provision). Although the provision survived for one year in the uniform law, it was never enacted in Massachusetts. *Id.*

144. See *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 66 (Colo. Ct. App. 2004) (predicting frequent requests by litigants to examine award through “manifest disregard” lens); see also *Travelers Cas. & Sur. Co. of Am., Inc. v. Long Bay Mgmt. Co.*, Nos. 015490BLS, 014749 2004 WL 2341339, at \*3 (Mass. Super. Ct. Sept. 7, 2004) (suggesting “manifest disregard” standard as grounds for award vacatur in Massachusetts). Although cited as a valid and narrow circumstance for vacatur, “manifest disregard” is neither currently recognized in Massachusetts, nor supported by the cases proposed as supporting that proposition. *Id.* Mention of developing, yet not adopted, standards in dicta may cause serious confusion to appellants, resulting in an ultimate detriment to arbitration policy and its efficiency. Marcus Mungoli, Comment, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY’S L.J. 1079, 1114-16 (2000).

145. See *Westminster Constr. Corp. v. PPG Indus., Inc.*, 376 A.2d 708, 711 (R.I. 1977) (providing early recognition of difficulty in satisfying “manifest disregard” exception to enforcing award); *Harris v. Bennet*, 503 S.E.2d 782, 786 (S.C. Ct. App. 1998) (omitting citation) (noting vacatur under “manifest disregard” umbrella “exceedingly rare”); see also *Levin*, *supra* note 3, at 139 (discussing scarcely reported decisions vacating award for “manifest disregard”); *supra* note 83 and accompanying text (demonstrating scarcity of cases upholding

Despite the standard's inability to vacate a substantial number of awards, "manifest disregard" has the potential to clog the judiciary with claims that parties bargained to have heard in an alternate forum.<sup>146</sup>

Prior to the Georgia legislature's passage of the state's newly revised arbitration code, statutory vacatur of an arbitrator's award for "manifestly disregarding" applicable substantive law was unavailable anywhere in the United States.<sup>147</sup> The status quo remained for quite some time for good reasons. Practically speaking, the "manifest disregard of the law" vacatur ground makes a hidden demand for documented awards and undermines the legitimacy, finality, and efficiency associated with the arbitration process.<sup>148</sup> Theoretically speaking, jurisdictions applying "manifest disregard" do so in different ways, thus the result has been multiple interpretations of the same principle.<sup>149</sup> Furthermore, some applications of "manifest disregard" incorrectly focus on the arbitrator's degree of error instead of his misconduct.<sup>150</sup>

Current applications of the "manifest disregard" standard may become a court's disguised attempt to substitute its own judgment de novo for the arbitrator's.<sup>151</sup> In a vast majority of jurisdictions, evaluating the merits of an award or evaluating the degree of error an arbitrator made in applying the law to the merits is inappropriate.<sup>152</sup> If states do not improve the quality and clarity of vacatur grounds, arbitration's utility and boundaries will erode.<sup>153</sup> Privileges granted to aggrieved parties who submit to arbitration must be limited, precise, and clearly communicated to preserve the integrity of the arbitration process and finality of awards.<sup>154</sup>

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vacatur based on "manifest disregard" exception).

146. See *Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co.*, 553 N.E.2d 1284, 1285 (Mass. 1990) (preferring least obstructive path to resolution via arbitration).

147. See *supra* notes 108-111 and accompanying text (outlining practical considerations of H.B. 702 before passage). This statutory provision remains exclusive to Georgia.

148. See *supra* notes 38, 102-103 and accompanying text (contending unreasoned awards facet of arbitration process).

149. See *supra* notes 95-99 and accompanying text (setting forth terminology associated with and components of "manifest disregard" analysis).

150. See *supra* notes 100, 104 and accompanying text (demonstrating error-of-law analysis equates to error in applying "manifest disregard").

151. See *supra* notes 82-94, 101, 104 and accompanying text (discussing judiciary's seemingly improper role interpreting *Montes* and *Halligan* circuit court decisions).

152. See *supra* notes 94-104 and accompanying text (demonstrating propensity to calculate degree of substantive legal error of award); see also Levin, *supra* note 3, at 139 (stressing limited vacatur of arbitral awards among both federal and state courts); Hayford, *Restoring Order*, *supra* note 24, at 127-31 (theorizing "big error" approach to "manifest disregard" analysis); *supra* notes 105-107 (discussing statutes permitting "error of law" as ground for review).

153. See Hayford, *Law in Disarray*, *supra* note 41, at 814 (advising insulation from inquiry into merits of decision).

154. See Hayford, *Law in Disarray*, *supra* note 41, at 816 (promoting standardization of "manifest disregard" standard to identify particular behavior as triggering vacatur).

### B. Practical and Theoretical Considerations

Adopting a “manifest disregard” standard in any state will create a daunting task for its judiciary. The informal nature of the arbitral process lends itself to unreasoned awards, which impede a court’s attempts to separate arbitrators’ willful intent from their unconscious errors of law.<sup>155</sup> An appellant’s failure to produce a record of the arbitration proceedings or documentation of an arbitrator’s reasoning may undercut a “manifest disregard of the law” claim because the appellant will be unable to prove that the arbitrator knew the relevant law before disregarding it.<sup>156</sup> Conversely, if a record exists, any factual support for the arbitrator’s award can prevent subversion of his conclusion.<sup>157</sup> Thus, in some cases, adopting the “manifest disregard” standard will dissuade arbitrators from making reasoned awards to protect themselves from revealing their decision-making process in the hope that a court cannot satisfy the subjective component required by the “manifest disregard” standard.<sup>158</sup> In other instances, like *Halligan*, arbitrators might decide to construct reasoned awards to prevent a court from assuming that they “manifestly disregarded” applicable law because they failed to address it in their findings; however, this latter result would lead to increased arbitration costs based on time spent placing decisions in writing.<sup>159</sup>

If a court cannot properly identify an arbitrator’s awareness of the law, but seeks to vacate his award based on a “manifest disregard” theory, it is forced to adopt a “constructive” mentality for the arbitrator instead of examining his subjective knowledge and intent.<sup>160</sup> This removes a fundamental step from the “manifest disregard” analysis—the step that separates arbitral misconduct from an arbitrator’s misapplication of the law.<sup>161</sup> Essentially, a large degree of error

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155. See *supra* notes 102-103 (describing absence of reasoned findings in American arbitration system); see also Hayford, *A New Paradigm*, *supra* note 9, at 445-47 (opining reasoned awards undermine purpose of arbitration and open door to increased appeal requests). But see *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (indicating lack of decision might encourage “manifest disregard” finding). “[T]he failure of the arbitrators to explain the award can be taken into account.” *Id.*

156. See *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 795 (Mo. Ct. App. 1998) (recognizing arbitrator’s reasoning not prerequisite to award’s validity); see also *Purvis Sys., Inc. v. Am. Sys. Corp.*, 788 A.2d 1112, 1118 (R.I. 2002) (confirming lack of explicit findings produces no basis for award vacatur); Hayford, *Restoring Order*, *supra* note 24, at 140 n.5 (explaining why reasoned awards are unlikely in commercial arbitration).

157. See *Harris v. Bennett*, 503 S.E.2d 782, 787 (S.C. Ct. App. 1998) (refusing vacatur of award where factual inferences and legal conclusions “barely colorable”). The *Harris* case notes that arbitrators need not expound on their reasoning if grounds for the award can be directly “inferred” from the facts. *Id.* at 786.

158. See *supra* note 103 (stressing deliberate insulation of awards from vacatur by keeping document unreasoned); see also Hayford, *Restoring Order*, *supra* note 24, at 126 (noting substantial disincentive for arbitrators to prepare reasoned awards).

159. See *supra* note 38 (alluding to simplicity in process, in part, for cost-effectiveness).

160. See *supra* note 104 and accompanying text (demonstrating inappropriate way to obtain “manifest disregard” finding).

161. See *supra* notes 76-94 and accompanying text (elaborating on bifurcated evaluation of arbitrators’ awareness of legal principles coupled with conscious ignorance); Hayford, *Restoring Order*, *supra* note 24, at

reflected by a law's general familiarity to the profession and its uncanny applicability to the facts will convince a reviewing court that an arbitrator "could not possibly have decided the case as the arbitrator did, unless she chose to disregard the law."<sup>162</sup> Proceeding in that manner completely removes the arbitrator's subjective state of mind from the court's consideration and creates review primarily based on an error—specifically, one that is not reviewable in the vast majority of states.<sup>163</sup>

Employing a standard that carries such uncertainty in application and contributes to vacating very few awards inhibits the primary function of the system—binding, private rulings.<sup>164</sup> The utility of the "manifest disregard of the law" standard as a valid ground for reconsidering an arbitral award is debatable at best.<sup>165</sup> States favoring speedy dispute resolution must recognize the post-award tactics that the "manifest disregard" ground engenders.<sup>166</sup> Initiating a petition for vacatur where a party suspects an inequitable award promotes the overall false impression among other arbitral participants that resorting to the courts will secure a correct decision.<sup>167</sup> Of utmost importance is remembering that "manifest disregard" may "serve[] as a breeding ground for outlandish theories of arbitral misconduct devised to escape the effects of a 'bum' award."<sup>168</sup>

### C. *The Future of "Manifest Disregard" in Massachusetts*

To avoid having Massachusetts trial courts become a magnet for "bum" awards, state legislators and courts should reject efforts to assimilate the "manifest disregard of the law" standard into otherwise acceptable causes for vacatur. Adding the "manifest disregard of the law" vacatur ground to Massachusetts common law or statute creates the danger of eroding

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127-28 (criticizing "big error" approach to "manifest disregard" standard and elements of offensive award).

162. See Hayford, *Restoring Order*, *supra* note 24, at 127 (posing scenario where arbitrator's subjectivity becomes irrelevant if court will "bootstrap" inference of knowledge).

163. See Hayford, *Restoring Order*, *supra* note 24, at 127 (recognizing negation of "mens rea" element of "manifest disregard" analysis); see also *supra* Part II.E.1 (describing limited instances in which statutory vacatur grounds include review for error of law).

164. See *supra* notes 35-41 (distinguishing methods and reviewable characteristics of litigation and arbitration).

165. See *supra* notes 145-169 and accompanying text (weighing advantages of utilizing standard against prohibiting it entirely).

166. See *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 66 (Colo. Ct. App. 2004) (predicting frequent requests by litigants to examine awards for "manifest disregard of the law"); Davis, *supra* note 2, at 132 (recounting criticism of arbitration's incompatibility with expanded review, turning process into "watered down" litigation).

167. See Hayford, *A New Paradigm*, *supra* note 9, at 500 (describing rare instances in which courts deny accuracy of original award).

168. See Mungioni, *supra* note 144, at 1115. One court, expressing "exasperat[ion] by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards," suggested sanctions as a penalty for "trying to convert arbitration losses into court victories." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006).

consistently applied precedent in Massachusetts arbitration cases.<sup>169</sup> This vacatur category inherently contradicts the foundation on which Massachusetts arbitration is built.<sup>170</sup>

The great latitude given to arbitral decision-making in Massachusetts echoes a single provision of its Uniform Arbitration Act for Commercial Disputes: “the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.”<sup>171</sup> The statute provides an overarching limitation on a court’s interference with arbitrators’ decisions.<sup>172</sup> The Supreme Judicial Court supports that policy, stating that arbitrators’ autonomy is of paramount importance to the alternative dispute resolution process.<sup>173</sup> Arbitrators may create an equitable balance between the parties’ competing interests; as a result, arbitrators are not required to produce written findings of fact or law upon asserting their decisions and striking that balance.<sup>174</sup>

The Massachusetts General Court is currently entertaining the adoption of amendments made to the UAA via House Bill 1813.<sup>175</sup> Currently, Massachusetts’s vacatur provision mirrors that of the UAA.<sup>176</sup> In considering this legislation, the General Court should also recognize that the RUAA Drafting Committee refused to accept the “manifest disregard” standard on numerous grounds.<sup>177</sup> The Committee primarily disliked its incompatibility

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169. See *supra* notes 134-142 and accompanying text (permitting consideration of equitable principles in arbitrator’s decision-making arsenal).

170. See *supra* note 5 (listing Massachusetts cases upholding arbitrators’ discretion in balancing parties’ equitable interests).

171. MASS. GEN. LAWS ch. 251, § 12(a)(5) (2004) (prohibiting judicial relief unless arbitral misconduct occurred in proceedings).

172. See *id.* at § 12 (discussing limited grounds for vacatur); see also *supra* notes 139-142 and accompanying text (stressing limited vacatur to preserve arbitrator’s discretion).

173. See *Tr. of the Boston & Me. Corp. v. Mass. Bay Transp. Auth.*, 294 N.E.2d 340, 343 (Mass. 1973) (emphasizing arbitrators’ autonomy in light of narrow scope of judicial review available over decisions). “Where the parties have ‘received what they agreed to take, the honest judgment of the arbitrator as to a matter referred to him,’ the law is clear that the award is binding, and thus free from judicial interference. . . .” *Tr. of the Boston & Me. Corp.*, 294 N.E.2d at 344 (citation omitted) (quoting *Phaneuf v. Corey*, 76 N.E. 718, 719 (1906)).

174. See *supra* notes 38, 155-157 and accompanying text (stressing general consensus, available also in Massachusetts, alleviating need for written award findings).

175. See H.B. 1813, 185th Gen. Ct., Reg. Sess. (Mass. 2007) (setting forth proposal for revising state’s current Uniform Arbitration Act for Commercial Disputes). Should Massachusetts adopt this proposed legislation, the vacatur of arbitral awards will be addressed under the new section 23. *Id.* Additionally, the provision stating “[t]he fact that such a remedy [just and appropriate under the circumstances] could not or would not be granted by the court is not a ground . . . for vacating an award under section 23,” will appear in section 21. *Id.*

176. See *supra* notes 136-139 and accompanying text (discussing UAA and highlighting development of Massachusetts arbitration policy); see also UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 102-768 (1956) (amended 1956) (forming basis for state arbitration codes); UNIF. ARBITRATION ACT, §§ 1-33, 7 U.L.A. 9-94 (2000) (accomplishing same as RUAA).

177. See *supra* note 63 (reasoning against “manifest disregard” standard’s adoption because no solid Supreme Court guidance).

with current FAA provisions and its anti-“bright line” applicability.<sup>178</sup> The RUAA Commissioners significantly doubted whether the nation’s highest court would verify “manifest disregard” status as FAA compliant based largely on circuit court decisions rendering “manifest disregard” application unsettled and conflicting.<sup>179</sup>

If Massachusetts embraces the RUAA without changing the new section 23 vacatur grounds, its statutory stance on “manifest disregard” will remain in tune with its long-standing appreciation for arbitration.<sup>180</sup> Massachusetts has already expressed its disdain for reviewing arbitrators’ errors of law, even if egregious.<sup>181</sup> Empirical data suggests, however, that the “manifest disregard” trend is sweeping through state courts.<sup>182</sup> It is quite obvious that Massachusetts would be “bucking the trend,” so to speak, if it prohibited parties from using this ground to vacate an award made in “manifest disregard of the law.”<sup>183</sup>

Although ill-advised, should the state legislature or the judiciary choose to employ this standard, it must be done so in a precise manner that is designed to evaluate the misconduct of the arbitrator, not the arbitrator’s incorrect interpretation of the law.<sup>184</sup> To accomplish this, the reviewing court must first evaluate the arbitrators’ understanding of the law; if the arbitrator merely misunderstood the law, the “manifest disregard” analysis should cease.<sup>185</sup> If, however, the arbitrator knew the law, the second component of the analysis may be completed.<sup>186</sup> If the court determines that, after examining the award, the arbitrator ignored the applicable law that he *knew*, the award may be vacated.<sup>187</sup> If both parts of the test are satisfied, the vacatur “speaks not to the correctness of the arbitrator’s decision on the law, but to the manner in which the arbitrator reached that decision.”<sup>188</sup>

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178. See *supra* note 63 (refusing to place “manifest disregard” among other vacatur grounds).

179. See *supra* notes 62-63 and accompanying text (outlining reasons for rejecting insertion of “manifest disregard” into RUAA vacatur grounds); see also Hayford, *A New Paradigm*, *supra* note 9, at 471 (stating “manifest disregard” standard rests on “slender . . . reed” of Supreme Court dictum).

180. See *supra* notes 60-63 and accompanying text (discussing revision of UAA while prohibiting “manifest disregard” vacatur ground after debate).

181. See *supra* note 8 (enumerating instances where arbitral award remains free from review).

182. See *supra* Parts II.E.1-II.E.3 (highlighting statutes and court decisions permitting vacatur if arbitrators “manifestly disregard” controlling law).

183. See *supra* Parts II.D and II.E.1-II.E.3 (demonstrating adoption of “manifest disregard” vacatur ground in both federal common law and state common and statutory law).

184. See Hayford, *A New Paradigm*, *supra* note 9, at 492-93 (recognizing mere error in interpreting law cannot satisfy “manifest disregard” analysis).

185. See Hayford, *A New Paradigm*, *supra* note 9, at 492-93 (describing first step in properly employing “manifest disregard” analysis).

186. See Hayford, *A New Paradigm*, *supra* note 9, at 492-93 (arguing misperceptions or misinterpretations of law cannot “count” for second part of misconduct-based analysis).

187. See Hayford, *A New Paradigm*, *supra* note 9, at 492-93 (illustrating misconduct-centered approach to rectify incorrect finding although law understood by arbitrator).

188. See Hayford, *Restoring Order*, *supra* note 24, at 135 (describing appropriate method for determining whether arbitrator “manifestly disregarded” applicable law).

An additional filter to ensure that “manifest disregard” claims do not disrupt reviewing courts’ dockets is applying sanctions for bringing frivolous appeals.<sup>189</sup> Discouraging unmeritorious appeals not only reduces congestion for the courts, but also guarantees that the potential appellee receives “the principle benefits of arbitration.”<sup>190</sup> Moreover, it discourages baseless litigation, and sends a message to parties that arbitration is a meaningful, final, and efficient process.<sup>191</sup>

When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken . . . . The more [frivolous] cases there are . . . in which the arbitration is only the first stop along the way, the less arbitration there will be.<sup>192</sup>

This recommendation is not unique for Massachusetts. In fact, states utilizing the “manifest disregard” standard should consider ways to tighten their application of this vacatur ground to ensure that parties will not be dissuaded from using an arbitral forum to resolve disputes out of fear that the arbitrator’s decision will be rendered meaningless.<sup>193</sup>

#### IV. CONCLUSION

Is Massachusetts “manifestly disregarding” arbitrators’ substantive errors of law? Perhaps in the eyes of some, but it is doing so for good reason. Limiting parties’ ability to take a so-called second bite out of the arbitral apple not only promotes the cost-effectiveness, efficiency, and legitimacy of arbitration as a process, but also frees reviewing courts from hearing disputes already resolved by qualified individuals via bargained-for procedures.

The ideal standard for “manifest disregard of the law” is no standard at all. However, should Massachusetts, or any other state adopt this vacatur provision via statute or common law, it must do so in a coherent, streamlined manner, aligning the “misconduct” component of the standard with the arbitrator’s actual behavior. Generally this analysis will prove fruitless in obtaining vacatur because the lack of reasoned awards may create a tall hurdle for appealing parties to jump before proving that the arbitrator subjectively knew

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189. See *B.L. Harbert Int’l, LLC, v. Hercules Steel Co.*, 441 F.3d 905, 914 (11th Cir. 2006) (introducing new way to prevent unmeritorious review of arbitration awards); *SII Investments, Inc. v. Jenks*, No. 8:05-CV-2148-T-23MAP, 2006 U.S. Dist. LEXIS 51753, at \*19 (M.D. Fla. July 27, 2006) (enforcing *Hercules’* threat on litigants). “When the Eleventh Circuit decided *Hercules Steel*, the court plainly warned all . . . [I]mposing a monetary sanction is the most effective and fair means . . . of deterring [appellant] and others similarly situated from filing baseless lawsuits.” *Jenks*, 2006 U.S. Dist. LEXIS 51753, at \*19 (assessing sanctions to counsel).

190. See *id.* at 913.

191. See *id.* (fearing fewer parties turning to arbitration if “arbitrator is only the first stop along the way”).

192. *Id.* (recognizing same).

193. See *supra* notes 39-41, 164-168 and accompanying text (discussing finality and efficiency as primary goals of arbitration).

the law, and then inappropriately ignored it in relation to the facts. In rare instances where “manifest disregard of the law” might have occurred, the analysis serves to prevent error-of-law inquiry from being the sole focus of the dispute.

To make the “manifest disregard of the law” vacatur ground meaningful, courts must enforce their commitment to keeping the arbitral forum the primary forum for dispute resolution if so indicated by the parties. Imposing sanctions for frivolous attempts to vacate awards is an appropriate way to keep the arbitration process and the use of “manifest disregard” meaningful, and appropriately narrow.

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