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Judicial Review of Arbitration Awards in the Fifth Circuit.

Christopher D. Kratovil

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JUDICIAL REVIEW OF ARBITRATION AWARDS IN THE FIFTH CIRCUIT

CHRISTOPHER D. KRATOVIL¹

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JUDICIAL REVIEW OF ARBITRATION AWARDS

“My client just lost an arbitration, so now what are my options?”
In recent years, variations of this simple question have been among

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the most frequent inquiries directed at appellate lawyers. In the wake of a defeat in arbitration, trial lawyers and clients come to their appellate counsel desperate for some method by which to escape the arbitrator's decision. Most leave their appellate counsel's office gravely disappointed after having been informed that arbitration awards will be set aside by the courts "only in very unusual circumstances."² Nonetheless, as arbitration becomes an increasingly large part of the U.S. legal system,³ replacing jury trials, appellate lawyers will continue to be confronted with this query. Thus, this Article seeks to enable appellate lawyers to explain to trial counsel and clients what their options are following a defeat in arbitration—although trial counsel and clients will generally not be fond of the answer. The Article then proposes a method for preemptively escaping this dilemma by including an appellate provision in the underlying arbitration agreement.

I. THE RISE AND REALITY OF ARBITRATION

The Federal Arbitration Act (FAA)⁴ fully endorses arbitration and liberally encourages its use as an alternative to traditional litigation.⁵ This strong federal policy favoring arbitration is designed

2. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *cf. Glover v. IBP, Inc.*, 334 F.3d 471, 473-74 (5th Cir. 2003) (discussing the standard of review for arbitration awards and noting deference to arbitrator decisions); *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 n.4 (5th Cir. 2001) (outlining the four limited circumstances under which the FAA permits vacatur of an arbitration award).

3. *See Benjamin J.C. Wolf*, Note, *On-line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 *CARDOZO J. INT'L & COMP. L.* 281, 289 (2006) (noting that, in international commercial contracts, arbitration clauses are almost universal).

4. 9 U.S.C. §§ 1-16 (2000).

5. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating that the FAA creates federal substantive law applicable to arbitration and noting that courts have consistently held that arbitration questions should be addressed in light of the national policy favoring arbitration). A separate but very similar arbitration statute governs arbitrations in Texas that do not affect interstate commerce. *See TEX. CIV. PRAC. & REM. CODE* §§ 171.001-.098 (Vernon 2005) (articulating Texas's statutes on arbitration). The FAA governs all arbitrations that "involv[e]" interstate commerce, and the Supreme Court has determined that the FAA applies quite broadly to all transactions "*within the flow of interstate commerce.*" 9 U.S.C. § 2 (2000); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995). The FAA is routinely applied by state courts, including Texas courts. *See, e.g., In re L & L Kempwood Assocs., L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 127 (Tex. 1999) (stating that the FAA "extends to any contract affecting commerce"); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (involving a

“to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.”⁶ Congress intended the FAA “to ‘enable *business men* to settle their disputes expeditiously and economically, and [to] reduce the congestion in the [f]ederal and [s]tate courts.’”⁷

A fierce debate rages in certain legal circles regarding whether arbitration has actually delivered on its promises of speed, efficiency, and cost reduction. One faction passionately maintains that arbitration is a superbly efficient and low-cost alternative to traditional litigation,⁸ while an equally passionate opposing faction derides arbitration as essentially a hoax, offering proceedings that are every bit as cumbersome and expensive as trial, but without trial’s procedural safeguards, judicial expertise, or access to meaningful appellate review.⁹ This Article is not meant to resolve the great

litigant alleging entitlement to arbitration under both the FAA and the Texas Civil Practice and Remedies Code). Accordingly, this Article will be confined to the FAA.

6. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) (quoting *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998)); see also *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 906 (11th Cir. 2006) (declaring that the FAA “liberally endorses and encourages arbitration as an alternative to litigation”). The Eleventh Circuit maintains that the goals of the FAA can only be achieved through deferential judicial review. *Id.* at 907. If parties who lose in an arbitration proceeding are free to re-litigate their cases in a judicial forum, then arbitration has obviously done little to reduce the cost, delay, and inefficiency of litigation. *Id.*

7. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125 n.2 (2001) (quoting Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923)); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (discussing the FAA’s purpose). According to the Court, the purpose of the FAA “was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Id.* See generally Jonathan H. Peyton, Note, *What Arbitration Clause?: The “Appropriate” Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 757 (2003) (analyzing the use of pre-dispute arbitration agreements by employers as a method of minimizing expenses and resolving disputes quickly).

8. See Benjamin J.C. Wolf, Note, *On-Line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT’L & COMP. L. 281, 290 (2006) (describing surveys of practicing attorneys that indicate that arbitration provides a speedier and more efficient alternative to litigation).

9. See Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 359-60 (2002-03) (discussing the drawbacks to mandatory arbitration in insurance coverage disputes). The authors note:

There are no arbitration precedents because proceedings and results are confidential; no common understanding of the meaning of repeatedly-used provisions emerges un-

debate on the merits of arbitration, and the author professes that he is a dedicated agnostic on the subject. The key point is that many transactional lawyers and clients—in other words, the people who actually draft and enter into contracts containing arbitration clauses—are firmly convinced of arbitration's merits. For better or worse, arbitration is here to stay—at least until such time as there is a sea change in the preferences of transactional lawyers and clients.¹⁰

Indeed, the number of arbitrations appears to be on a steady rise. In enacting the FAA, Congress predicted that “by avoiding ‘the delay and expense of litigation,’” the FAA would appeal “to big business and little business alike, . . . corporate interests [and] . . . individuals.”¹¹ Congress was correct. The number of cases filed in federal court and ultimately tried to a jury has been steadily declining—from 11.5 percent in 1962 to 1.8 percent in 2002.¹² While it is impossible to measure with accuracy how many of these cases are being arbitrated,¹³ the American Arbitration Association

less they are standard-form provisions whose meaning has been publicly litigated; and parties who consider purchasing insurance policies that require arbitration of coverage disputes have no way to anticipate the interpretations that insurers selling these policies may place on such policy provisions when a loss occurs and a claim is filed.

Id. at 360. In addition, parties who subject themselves to mandatory arbitration provisions lose the benefits of a trial judge and appellate review. *Id.* at 359. See generally John Council, *Headaches and Pains: The Pounding Doesn't Always Stop After an Arbitration Award*, TEX. LAW., May 29, 2006, at 1, 16 (noting that attorneys have become increasingly dissatisfied with the arbitration process and are willing to take the risky and expensive steps necessary to seek appellate review of arbitration decisions).

10. The preference for arbitration could be declining in certain transactions. See Benjamin J.C. Wolf, Note, *On-line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 290 (2006) (noting that arbitration is less preferential in high-dollar contract disputes).

11. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)); see also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (discussing the legislative history of the FAA). The Court noted congressional recognition of public frustration related to the cost and delay of litigation and their hopes of reducing such frustration, in part, by enforcing parties' agreements to arbitrate. *Id.* at 220.

12. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

13. Cf. Benjamin J.C. Wolf, Note, *On-line but out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 289-90 (2006) (noting that, while there is data to indicate that the use of pre-dispute arbitration agreements appears to be rising, other data indicates that arbitration is becoming less popular in high-dollar disputes).

(AAA) has experienced a corresponding growth in the number of arbitration proceedings in its docket.¹⁴ Moreover, many cases filed in federal court are sent to arbitration or other alternative dispute resolution mechanisms by the courts themselves.¹⁵ Against this backdrop of ever increasing arbitration, the question becomes, “What options are available to the losing party after arbitration?”

II. THE JUDICIAL ROLE UNDER THE FAA: CONFIRMING OR VACATING THE AWARD

Consistent with its focus on speed, efficiency, and cost reduction, a critical goal of arbitration is to establish “finality” at the earliest point possible.¹⁶ Unfortunately, early finality is antithetical to robust appellate review, which postpones finality until after the conclusion of appellate proceedings. Permitting prolonged post-award proceedings would strip arbitration of much of the speed, efficiency, and cost savings it purportedly offers. The FAA, recognizing this tension between the goals of arbitration and the reality of appellate review, sharply limits the grounds for challenging an arbitrator’s award in court.¹⁷ Nonetheless, the FAA does provide an “extraordinarily narrow” path for challenging the results of an arbitration proceeding.¹⁸

14. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515 (2004). The AAA had less than 1,000 cases on its docket in 1960; by 2002, that number had grown to 17,000. *Id.*

15. *See id.* at 514 (noting that 24,000 cases were referred by federal courts to some sort of alternative dispute resolution in the year 2001 alone). The Judicial Improvements and Access to Justice Act of 1988 established pre-trial, non-binding arbitration in ten federal districts, including the Western District of Texas. *See* 28 U.S.C. §§ 651-658 (1994) (codifying the Judicial Improvements and Access to Justice Act of 1988).

16. *See* *Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987) (recognizing that, “to effectuate the national policy favoring arbitration,” proceedings require “expeditious and summary hearing, with only restricted inquiry into factual issues” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983))). *But cf.* Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 362 (2002-03) (observing that, because of arbitration’s finality, neither party has effective redress “when a mistake of law is made”).

17. *See* 9 U.S.C. §§ 10-11 (2000) (listing the situations where an arbitration award can be either vacated or modified).

18. *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 393 (5th Cir. 2003) (quoting *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995)); *cf.* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (noting that those participating in the arbitration process are protected from arbitrator bias because

A. *The Confirmation Process*

An arbitration award issued under the FAA does not take on the force of law until after it has been “confirmed” by a court.¹⁹ The prevailing party files a motion to confirm the arbitration award either with the court specified in the arbitration agreement, or “[i]f no court is specified in the agreement of the parties, then . . . [with] the United States court in and for the district within which such award was made.”²⁰ “The court must grant such an order unless the award is vacated, modified, or corrected.”²¹ “Confirmation” transforms the arbitration award into a judgment of the court, binding and enforceable in the same manner as any other judgment issued by the court.²² Under the FAA, a confirmed arbitration award must be recognized and enforced by all federal courts.²³

The commencement of the confirmation process opens the “extraordinarily narrow” window for judicial review of arbitration awards. The challenge to the arbitration award is made by opposing the motion to confirm and by filing a motion to vacate.²⁴ The district court then conducts an “exceedingly deferential” review of the arbitrator’s award to determine if there is any legal basis for vacating it.²⁵

decisions can be overturned with evidence of partiality or corruption); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (arguing that, although limited, the provisions for vacatur provided for in the FAA are sufficient to ensure arbitrator compliance with the statute).

19. See 9 U.S.C. § 9 (2000) (outlining the procedure for confirmation); see also Stuart M. Widman, *Surveying the Split: More Theories on Confirming Awards Where There Are or Appear to Be More Than One Claim or Issue*, ALTERNATIVES TO HIGH COST LITIG., July/Aug. 2006, at 120 (noting that “arbitration awards do not become judgments unless and until a district court says so”).

20. 9 U.S.C. § 9 (2000).

21. *Id.*

22. See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (arguing that expansive judicial review after an arbitration award would go against FAA policy). In order to achieve the objective of the FAA, courts must enforce agreements to arbitrate as well as the resulting awards. *Id.*

23. *Id.*

24. 9 U.S.C. § 10 (2000).

25. *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 380 (5th Cir. 2004); see *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788-89 (8th Cir. 2003) (discussing the standard of review for confirming or vacating arbitrator awards). Even if serious error is committed by the arbitrator, the award will still be confirmed if “the arbitrator is even arguably” adhering to the contractual terms “and acting within the scope of his authority.” *Id.* at 788.

The court of appeals, in turn, reviews the district court's decision to grant or deny the motion to vacate *de novo*, but bears in mind that the grounds for disrupting the underlying award are extremely limited and that great deference must be shown to the arbitrator's award.²⁶ Indeed, rather paradoxically, the court of appeals's *de novo* review of the district court's action on the motion to vacate makes it *less likely* that the arbitrator's award will be judicially overturned: "De novo review on the ultimate issue of unfairness enables us to assess whether the district court accorded sufficient deference in the first instance, an assessment that a more restrictive appellate review would cripple."²⁷ In other words, the appellate review of the district court's action on vacatur is designed, in substantial part, "to reinforce the strong deference due an arbitral tribunal."²⁸

B. Statutory Grounds for Vacatur

The district court has the statutory authority under the FAA to vacate an arbitration award in only four situations:

- (1) where the award was procured by *corruption, fraud, or undue means*;
- (2) where there was *evident partiality or corruption* in the arbitrators, or either of them;
- (3) where the arbitrators were *guilty of misconduct* in refusing to postpone the hearing, upon sufficient cause shown, or in *refusing to hear evidence* pertinent and material to the controversy; or of *any other misbehavior* by which the rights of any party have been prejudiced; or

26. *Brabham*, 376 F.3d at 380-81 (reviewing an order vacating an arbitration award).

27. *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1021 (5th Cir. 1990). For examples of party dissatisfaction with this extremely deferential standard, see *Folger Coffee Co. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.-UAW, Local Union No. 1805*, 905 F.2d 108, 111 (5th Cir. 1990) (affirming the district court's enforcement of an arbitration award despite the fact that the arbitrator clearly looked beyond the terms of the written agreement: "Arbitrators must only show that the award is 'rationally inferable' in 'some logical way' to the agreement."), and *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990) (holding that the district court did not err in upholding an arbitration award where the evidence was not that the arbitrators exceeded their powers, but rather that they improperly executed them).

28. *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993) (*per curiam*), *abrogated on other grounds by Brabham*, 376 F.3d 377; *accord Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002).

- (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.²⁹

Each of the above grounds for vacatur deals with the integrity and propriety of the arbitration process itself, and not with the legal or factual accuracy of the arbitrator's award. Stated simply, none of the four FAA statutory grounds for vacating an arbitration award is designed to correct a good-faith error of fact or law by the arbitrator, no matter how egregious.³⁰ As such, a petition to vacate an arbitration award on statutory grounds is fundamentally different than a typical appeal of a court's decision. A petition to vacate represents a direct challenge to the fundamental fairness of the arbitration proceeding, while a standard appellate brief is directed at errors of fact or law purportedly made by the lower court.³¹

Phrased more bluntly, when an arbitration award is attacked via a petition to vacate based on the FAA's statutory grounds, it is not enough for an arbitrator to have been egregiously wrong or grossly incompetent—instead, the arbitrator must have been corrupt or otherwise fundamentally unfair. “When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's ‘improvident, even silly, factfinding’ does not provide a basis for a reviewing court to refuse to enforce the award.”³² This is obviously an extremely high bar to clear.

29. 9 U.S.C. § 10(a) (2000) (emphasis added).

30. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (declaring that federal courts have no business re-litigating the merits of an underlying claim when reviewing an arbitration decision). The Court reasoned that, because the parties bargained for arbitral resolution of the claim, it is not the place of federal courts to substitute their judgment for that of the arbitrator absent dishonesty. *Id.* at 509-10. In very limited circumstances, however, the FAA allows for modification or correction of an arbitrator's award. See 9 U.S.C. § 11 (2000) (outlining the procedural grounds for the modification or correction of an arbitral award).

31. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (stating that “[c]ourts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts”).

32. *Garvey*, 532 U.S. at 509 (quoting *United Paperworkers*, 484 U.S. at 39); see, e.g., *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 357-58 (5th Cir. 2004) (emphasizing that courts are not authorized to review an arbitration award on the merits); *Int'l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003) (noting that, when reviewing an arbitration decision involving a collective bargaining agreement, courts cannot overrule an arbitrator who simply misinterpreted a contract).

The Fifth Circuit has characterized the FAA's statutory refusal to permit the courts to correct even serious errors of law or fact by an arbitrator as the price that the parties have agreed to pay in return for the speed, cost reduction, and efficiency benefits purportedly offered by arbitration:

Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial; but because the advantages of arbitration are speed and informality, the arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him. Thus, *whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect [arbitration] proceedings without a sound statutory basis for doing so.*³³

The Supreme Court has expressed a similar concept, holding that the parties to an arbitration agreement contractually sacrifice the protections of the judicial process and risk errors by the arbitrator:

“[P]lenary review . . . would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final It is the arbitrator's construction which [is] bargained for; and so as far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”³⁴

More bluntly still, the Supreme Court later confirmed that “if an ‘arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,’ the fact that ‘a court is convinced he committed serious error does not suffice to overturn

33. *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 394 (5th Cir. 2003) (emphasis added); *cf. Bidas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 363 (5th Cir. 2003) (declaring that only a “manifest disregard of the law” warrants vacating an arbitration award in the Fifth Circuit). *But see* *Butler v. Munsch, Hardt, Kopf, & Harr, P.C.*, 145 F. App'x 475, 477 (5th Cir. 2005) (recognizing two non-statutory grounds for vacating an arbitration award). *See generally* Bruce E. Meyerson, *How U.S. Courts Have Boosted the Power of Arbitrators*, ALTERNATIVES TO HIGH COST LITIG., Sept. 2004 (delineating the expanding responsibilities that courts are placing in arbitrators' hands).

34. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *see also* *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401, 405 (5th Cir. 2003) (stating that ambiguity as to arbitrator decisions must be resolved in favor of the arbitrator unless the decision is outside the scope of the arbitration agreement). Judicial modification of an arbitration award is only appropriate where the arbitrator exceeds his contractual authority, not where interpretations may vary. *Id.* at 405-06.

his decision.’”³⁵ The bottom line is that the FAA’s statutory grounds for vacatur simply do not provide a mechanism for reversing even serious legal or factual errors by the arbitrator.

Nonetheless, as outlined below, successful challenges to arbitration awards based on the four FAA statutory grounds do occur, albeit rarely.

1. Exceeding Defined Powers

The most common—and generally the most promising—of the statutory challenges to an arbitration award is that 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.”³⁶ The apparent promise of this method is rooted in the fact that it is the only one of the four FAA statutory grounds not to require some sort of affirmative misconduct or corruption by the arbitrator. It is more palatable to most attorneys to attempt to convince the court that the arbitrator has overstepped his powers than it is to argue that the arbitrator is guilty of “corruption, fraud,” or other “misconduct.”³⁷

Proving that the arbitrators exceeded their powers is no easy task. First, “[i]n deciding whether the arbitrator exceeded its authority, [the courts] *resolve all doubts in favor of arbitration*.”³⁸ The extent of the arbitrator’s powers are, of course, defined by the arbitration agreement, and “[t]he power and authority of arbitrators in an arbitration proceeding is dependent on the provisions under which the arbitrators were appointed.”³⁹ As such, the courts “must affirm the arbitrator’s decision if it is *rationaly inferable*

35. *Garvey*, 532 U.S. at 509 (quoting *E. Associated Coal Corp., v. Mine Workers*, 531 U.S. 57, 62 (2000)); *accord* *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368, 371 (5th Cir. 2004).

36. 9 U.S.C. § 10(a)(4) (2000).

37. 9 U.S.C. § 10(a)(1), (3) (2000).

38. *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994); *accord* *Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Group, Inc.*, 93 F. App’x 1, 5 (5th Cir. 2004) (citing *Executone*, 26 F.3d at 1320-21). Reasonable and supportable findings are sufficient to demonstrate that an arbitrator acted within his authority. *Id.*

39. *Brook v. Peak Int’l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002) (quoting *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991)). Minor departures from the arbitration agreement will not necessarily preclude enforcement of an arbitration award. *Id.* at 673.

from the letter or the purpose of the underlying agreement.”⁴⁰ In other words, if the arbitration agreement even arguably authorizes the arbitrator’s actions, the courts will not second guess or vacate those actions. Consistent with this understanding, “[i]f the arbitrator’s findings are reasonable and [are supported] by law or custom in the field, then the arbitrator did not exceed his authority.”⁴¹

The critical point is that, despite its promising initial appearance vis-à-vis its three FAA statutory counterparts, attacking an arbitration award on the basis that the arbitrators acted in excess of their power is simply not a promising route to vacatur. So long as the arbitrator did not act in complete disregard of the underlying arbitration agreement, it is likely that the courts will defer to any “rational” understanding of the arbitration agreement put forth by the arbitrator.

2. Corruption, Fraud, Bias, or Misconduct

The FAA statutory vacatur provisions permit a party to challenge and overturn an arbitration award where there has been actual fraud, corruption, or misconduct on the part of an arbitrator.⁴² Instances of such manifest impropriety, however, are exceedingly rare and do not warrant a great deal of discussion. Let it suffice to say that if there is a bona fide problem with the integrity of an arbitrator or arbitration proceeding, the FAA authorizes the courts to vacate the award produced by the tainted proceeding.⁴³ In other

40. *Executone*, 26 F.3d at 1320 (emphasis added); see also *Dow Chem. Co. v. Local No. 564, Int’l Union of Operating Eng’rs*, 83 F. App’x 648, 654 (5th Cir. 2003) (holding that, where an arbitration award can be rationally inferred from the contract, it does not matter that the arbitrator failed to provide an explanation for the award). See generally Stephen K. Huber, Survey Article, *The Arbitration Jurisprudence of the Fifth Circuit, Round II*, 37 TEX. TECH L. REV. 531, 546-50 (2005) (discussing post-arbitration judicial proceedings).

41. *Am. Cent. E. Tex. Gas Co.*, 93 F. App’x at 5. An arbitrator familiar with the legal elements as well as the facts of a particular case is more likely to make a reasonable finding that is not erroneous or outside his authority. *Id.* at 10.

42. 9 U.S.C. § 10(a) (2000).

43. The exotic nature of true arbitrator misconduct is further confirmed by the fact that most commercial arbitrators are selected by reputable, self-regulating organizations such as the AAA, which impose and enforce a code of ethics on their arbitrators and seek to punish misconduct by their arbitrators. American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes*, www.adr.org (select “Rules/Procedures,” then “Ethics and Standards,” then “The Code of Ethics for Arbitrators in Commercial Disputes”) (last visited Nov. 11, 2006) (on file with the *St. Mary’s Law Journal*). Moreo-

words, to the extent that the fundamental fairness and propriety of the proceedings are called into legitimate question, the courts will exercise supervisory authority over the arbitration process, including the vacatur of improperly obtained awards.

However, when attempting to obtain vacatur of an arbitration award via a showing of misconduct or actual bias, “only clear evidence of [bias] . . . justifies the denial of summary confirmation of an arbitration award For an award to be set aside, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative.”⁴⁴ Once again, this is a high bar for a party challenging an arbitration award to clear.

3. “Evident Partiality”

Separate and distinct from a showing of actual bias or real partiality is the “evident partiality” standard, wherein a potential arbitrator fails to “disclose to the parties any dealings that might create an impression of possible bias.”⁴⁵ Recent Fifth Circuit case law confirms the notion that an arbitrator’s failure to disclose a “significant business relationship” can create a “reasonable impression of partiality.”⁴⁶ This presents a much lower threshold for vacatur than does showing actual bias.

While an arbitrator’s actual bias and an arbitrator’s evident partiality resulting from nondisclosure both require vacating any arbi-

ver, because most arbitrators presumably wish to be considered for future proceedings, it is in their self-interest to behave in an ethical and responsible fashion.

44. *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982). *But see* *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 501 (5th Cir. 2006, rehearing pending) (adopting a more lenient standard for nondisclosure cases). In distinguishing nondisclosure cases from actual bias cases, the Fifth Circuit noted that parties can make an informed decision in choosing arbitrators only when possible partiality is disclosed. *Id.*

45. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 148-49 (1968). The intent of Congress when enacting the FAA was to provide for an impartial arbitration. *Id.* at 147. Just as a civil judgment would be subject to challenge in light of any undisclosed relationship between the judge and another party, so too is an arbitration award. *Id.* at 148. *See generally* *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 427 (9th Cir. 1996) (stating that “[a] reasonable impression of bias sufficiently establishes evident partiality because the integrity of the process by which arbitrators are chosen is at issue in nondisclosure cases”).

46. *See Positive Software Solutions*, 436 F.3d at 502 (holding that an arbitrator displays partiality by failing to disclose information that would create an impression of partiality).

tration award under 9 U.S.C. § 10(a)(2), the two standards are distinct:

The policies of 9 U.S.C. § 10 . . . support the notion that the standard for nondisclosure cases should differ from that used in actual bias cases. In a nondisclosure case, the integrity of the process by which arbitrators are chosen is at issue. Showing a “reasonable impression of partiality” is sufficient in a nondisclosure case because the policy of section 10(a)(2) instructs that the parties should choose their arbitrators intelligently. *The parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed. Whether the arbitrators’ decision itself is faulty is not necessarily relevant.* But in an actual bias determination, the integrity of the arbitrators’ decision is directly at issue. That a reasonable impression of partiality is present does not mean the arbitration was the product of impropriety.⁴⁷

In other words, 9 U.S.C. § 10(a)(2) requires courts to vacate arbitration awards crafted by an arbitrator who failed to disclose any “non-trivial” relationship with one of the parties or its counsel at the outset of the arbitration proceedings.⁴⁸ As the Fifth Circuit observed: “[A]n arbitrator selected by the parties displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator’s partiality.”⁴⁹

If, as the panel opinion in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*⁵⁰ holds, all “non-trivial” and “significant business” relationships “must be disclosed to the parties if the integrity and effectiveness of the arbitration process is to be pre-

47. *Id.* at 501 (emphasis added) (quoting *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994)).

48. *Id.* at 502.

49. *Id.*; see *Commonwealth Coatings*, 39 U.S. at 148-49 (recognizing that arbitrators are necessarily tied to the business world in order to supplement their income). A heightened level of scrutiny regarding arbitrator partiality is necessary, however, because arbitrators decide cases with potentially very limited appellate review. *Id.* at 149. The Supreme Court has noted that requiring disclosure in no way hinders the effectiveness of the arbitration process. *Id.* See generally *Alexander Panio, Sphere Drake Insurance Limited v. All American Life Insurance Company: The Seventh Circuit Continues the Evisceration of the Dictum in Commonwealth Coatings*, 2 J. AM. ARB. 405, 406-12 (2003) (discussing evident partiality or corruption on the part of the arbitrator as a basis for vacating an arbitration judgment).

50. 436 F.3d 495 (5th Cir. 2006, rehearing pending).

served,”⁵¹ the question shifts to the depth of this “demanding” disclosure requirement. It is here that some hope for a party seeking to vacate an arbitration award arises, as it appears that even a years-old, concluded, and arms-length business relationship between an arbitrator and a party may sometimes be sufficient to negate an arbitration award if it goes undisclosed. In *Positive Software Solutions*, the Fifth Circuit ruled that the arbitrator’s failure to disclose that he had been co-counsel with one of the party’s counsel for a third-party client some seven years earlier required vacatur of the arbitration award, despite the fact that: (1) the arbitrator had never met or spoken to the arbitration party’s counsel prior to the arbitration; (2) their “co-counsel” relationship was not economic in nature and was in the context of a case involving seven law firms and thirty-four lawyers representing a single client; and (3) the arbitrator’s involvement in the earlier case commenced after the party’s attorney’s involvement had largely ceased.⁵² Thus, the lesson of *Positive Software Solutions* is that a potential arbitrator’s relationship with a party or its counsel need not be recent or close to require disclosure and that the failure to disclose such a relationship may lead to the vacatur of the arbitration award pursuant to 9 U.S.C. § 10(a)(2).

As a practical matter, the approach taken by the party seeking to overturn the arbitration award in *Positive Software Solutions* is one of the few options open to a client desperate to escape an unfavorable arbitration result: “Following the arbitration award, Positive Software conducted a detailed investigation into [the arbitrator’s] background” and thereby discovered his former co-counsel’s relationship with the opposing party’s lead attorney.⁵³ It was, of

51. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 504 (5th Cir. 2006, rehearing pending).

52. *Id.* at 503-05 & n.47. Parties to arbitration expect full disclosure. *Id.* at 503. These disclosures should include any financial, business, professional, or personal relationships which could potentially affect arbitrator partiality. *Id.* The American Arbitration Association’s Code of Ethics for Arbitrators acts as guidance in evaluating disclosure requirements, although it is not binding on courts. *Id.*

53. *Positive Software Solutions*, 436 F.3d at 497. The arbitrator had been reminded on three separate occasions prior to accepting the appointment of his duty to disclose facts that may result in implied or actual partiality, but he failed to disclose anything. *Id.* Failure of the arbitrator to disclose a prior business relationship with one of the party’s lead attorneys was discovered only through a detailed investigation after the arbitration award. *Id.* The arbitrator’s failure to disclose precluded the parties from making an informed choice, thus permitting vacatur of the award. *Id.*

course, the information obtained in the “detailed investigation into [the arbitrator’s] background” that ultimately led to the award’s reversal. While this author is extremely reticent to endorse replacing advocacy on the merits with invasive private detective work, the Fifth Circuit has tacitly endorsed this course of action and has implicitly invited frustrated parties to conduct detailed investigations into their arbitrators’ backgrounds.⁵⁴ Appellate advocates need to be aware that, in the wake of *Positive Software Solutions*, the unfortunate reality is that post-arbitration detective work aimed at arbitrators may now be part of their job descriptions.

C. *Non-Statutory Grounds for Vacatur*

“For many years, section 10 of the FAA ‘describe[d] the only grounds on which a reviewing court [could] vacate an arbitration award.’”⁵⁵ But in the decade since the Supreme Court’s recognition that parties are bound by an arbitrator’s decision not in “manifest disregard” of the law,⁵⁶ the Fifth Circuit has grudgingly come to accept very limited “non-statutory” grounds for vacatur of arbitration awards. These non-statutory grounds for vacatur are in addition to and go beyond the four statutory factors laid out in 9 U.S.C. § 10(a).⁵⁷

54. See *Positive Software Solutions*, 436 F.3d at 497 (providing one example where such a detailed investigation led to vacatur of the arbitration award); cf. *Evans Indus., Inc. v. Lexington Ins. Co.*, No. Civ. A. 01-1546, 2001 WL 803772, at *5 (E.D. La. July 12, 2001) (not designated for publication) (stating that an arbitrator has no duty to conduct an investigation to uncover marginally disclosable facts). At the same time, courts have been reluctant to announce a consistent doctrine “encouraging the losing party in every arbitration to conduct a background investigation of each arbitrator in the hope of uncovering evidence of a former relationship with the prevailing party.” *Id.* at *4. In addition, conducting such a detailed investigation could be difficult for parties challenging an arbitration award, as seeking to depose arbitrators is “repeatedly condemned” by the courts. *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 430 (9th Cir. 1996).

55. *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) (quoting *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993) (per curiam), *abrogated by Brabham*).

56. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477 (1989)).

57. See *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004) (listing additional grounds for vacating an arbitration award outside of those statutorily prescribed); see also Kristen M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL

In the Fifth Circuit, however, “manifest disregard of the law and contrary to public policy are the *only* nonstatutory bases recognized . . . for vacatur of an arbitration award.”⁵⁸ Thus, while the Fifth Circuit’s grudging adoption of two non-statutory grounds for vacatur represents a significant expansion of the extraordinarily narrow grounds of the FAA, review of an arbitrator’s award remains “exceedingly deferential” and vacatur is still permitted “only on very narrow grounds.”⁵⁹ An examination of these two relatively new non-statutory grounds for vacatur confirms that obtaining judicial reversal of an arbitration award remains an uphill battle.

1. Manifest Disregard of the Law

The “manifest disregard of the law” basis for vacatur is not designed to permit the courts to second-guess the arbitrator’s rulings on the law. “[T]he failure of an arbitrator to correctly apply the law is not a basis for setting aside an arbitrator’s award.”⁶⁰ Instead, as defined by the Fifth Circuit and several of its sister circuits:

[M]anifest disregard for the law “means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term ‘disregard’ implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it.”⁶¹

The Fifth Circuit requires the party filing a motion to vacate to satisfy a three-part test in order to prove manifest disregard of the law: (1) the arbitrators must have “appreciate[d] the existence of a clearly governing principle but decided to ignore or pay no atten-

CIRCUIT REV. 391, 403-04 (2006) (discussing non-statutory grounds for review of arbitration awards).

58. *Kergosien*, 390 F.3d at 353 (emphasis added); *accord Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 216 (5th Cir. 2006).

59. *Brabham*, 376 F.3d at 380.

60. *Kergosien*, 390 F.3d at 356.

61. *Id.* at 355 (quoting *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 395 (5th Cir. 2003)); *see also Sarofim*, 440 F.3d at 217 (emphasizing that the test is *manifest* disregard; mere error or misunderstanding of the law is not sufficient to justify vacatur); *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 762 (5th Cir. 1999) (“[W]here on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice”) (citation omitted).

tion to it”; (2) “the governing law ignored by the arbitrators must be well defined, explicit, and clearly applicable”; and, separately, that (3) upholding the arbitrator’s award would result in a “significant injustice.”⁶²

In light of the foregoing, judicially assaulting an arbitration award on the grounds that it is in manifest disregard of the law is an exceptionally difficult undertaking. Nonetheless, manifest disregard for the law remains the single most frequently used method for seeking vacatur of arbitration awards.⁶³

Despite its common use, caution should be exercised before alleging manifest disregard of the law, as this ground for vacatur is chronically misunderstood as a vehicle for allowing the courts to correct ordinary mistakes of law. The courts have little patience for such arguments. Indeed, the Eleventh Circuit recently expressed deep frustrations with “poor loser[s]” whose petition to vacate did “not come within shouting distance” of showing manifest disregard of the law.⁶⁴ The court stated:

If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator’s decision will be honored sooner instead of later. Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions.⁶⁵

The Eleventh Circuit “is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards” and henceforth is “ready,

62. See *Brabham*, 376 F.3d at 381-82 (discussing manifest disregard standard); *Sarofim*, 440 F.3d at 217 (applying manifest disregard standard of review); *Kergosien*, 390 F.3d at 355-56 (discussing the three steps involved in a proper manifest disregard analysis).

63. See National Conference of Commissioners on Uniform State Laws, Uniform Arbitration Act, section 23 comment C2 (2000), <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm> (stating that “[m]anifest disregard of the law” is the seminal nonstatutory ground for vacatur of commercial arbitration awards”) (last visited Nov. 11, 2006) (on file with the *St. Mary’s Law Journal*); see also 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, 1080 (2000) (describing the “manifest disregard of the law” standard as “the most recognizable and universally accepted non-statutory standard of review for an arbitration award”).

64. *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907, 911 (11th Cir. 2006).

65. *Id.* at 913.

willing, and able to consider imposing sanctions in appropriate cases.”⁶⁶ While the Fifth Circuit has not yet issued a similar warning, the Eleventh Circuit’s decision in *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*⁶⁷ should put parties on notice that manifest disregard challenges to arbitration awards should not be brought casually or as a matter of course.

2. Contrary to Public Policy

The second and final non-statutory ground for vacatur recognized in the Fifth Circuit is that “a court may refuse to enforce an arbitration award that is contrary to public policy.”⁶⁸ Vacating an arbitration award because it is in violation of public policy has been authorized by the Supreme Court:

If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”⁶⁹

The party challenging an arbitration award on policy grounds is not free to simply argue policy in a void and hope for a sympathetic court. Instead, the party filing the petition to vacate must direct reference to “laws and legal precedents” that are “‘explicit, ‘well defined’ and ‘dominant.’”⁷⁰ In no event are invocations of “general considerations of proposed public interests” sufficient to challenge an arbitration award.⁷¹ In other words, in this context the old law school adage, “If you don’t have the law on your side, argue public policy,” simply does not work. In order to argue policy suc-

66. *Id.* at 914.

67. 441 F.3d 905.

68. *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 396 (5th Cir. 2003); *see also Sarofim*, 440 F.3d at 219 (applying public policy grounds in vacating an arbitration award).

69. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

70. *Prestige Ford*, 324 F.3d at 396 (quoting *W.R. Grace & Co.*, 461 U.S. at 766); *see also Sarofim*, 440 F.3d at 219 (noting that the standard for “contrary to public policy considerations” must rise above mere generalizations). Failure of the complaining party to adequately define the public policy relied upon results in failure of the petition to vacate. *Id.* at 219 n.9.

71. *Sarofim*, 440 F.3d at 219 (citing *W.R. Grace & Co.*, 461 U.S. at 766).

cessfully, the policy must be linked to law and precedent.⁷² As such, judicial reversals of arbitration awards based solely on public policy arguments are exceedingly rare.⁷³

3. Other Potential Non-Statutory Grounds for Vacatur

Although it has formally recognized only manifest disregard of the law and violation of public policy as the non-statutory bases for vacating an arbitration award, the Fifth Circuit has also observed in dictum that:

Most state and federal courts recognize[] one or more nonstatutory grounds warranting vacatur of an arbitral award, including: (1) the arbitrator's manifest disregard of the law; (2) the award's conflict with a strong public policy; (3) the award being arbitrary and capricious; (4) the award being completely irrational; or (5) the award's failure to draw its essence from the underlying contract.⁷⁴

It appears unlikely, however, that the Fifth Circuit will actually adopt any of these additional non-statutory grounds for vacatur in the foreseeable future.

First, characterizing an arbitration award as “completely irrational” appears to be just an alternative way of expressing that the award was made in manifest disregard of the law. It is difficult to conceive of an award that would survive the “manifest disregard of the law” analysis but then be vacated on the basis of “complete irrationality.” To the extent that the award is factually, but not legally, irrational, the anti-corruption and anti-bias statutory provisions of 9 U.S.C. § 10(a) would presumably be implicated. However, if the award were factually irrational and that irrationality was the product of the arbitrator's incompetence or stupidity rather than bias or corruption, then, as previously discussed, both

72. *W.R. Grace & Co.*, 461 U.S. at 766.

73. See Donna M. Bates, Note, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT'L L.J.* 823, 887 (2005) (recognizing that public policy, non-arbitrability and unconscionability arbitration defenses are rare in the United States); see also Kristen Angus, *Arbitration*, 76 *DENV. U. L. REV.* 681, 685 (1999) (noting that the Tenth Circuit's decision in *Davister Corp. v. United Republic Life Insurance Co.*, 152 F.3d 1277 (10th Cir. 1998), which held that the policy of protecting consumers outweighs the national policy favoring arbitration, represented a rare situation in which a federal court chose to overrule applicability of the FAA absent explicit statutory direction).

74. *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 757-58 (5th Cir. 1999).

Supreme Court and Fifth Circuit case law indicate that such an award should not be overturned by the courts.⁷⁵

Second, the Fifth Circuit has explicitly “reject[ed] arbitrariness and capriciousness as an independent nonstatutory ground for vacatur under the FAA” because it “would simply duplicate existing grounds.”⁷⁶ For example, an award that is issued in manifest disregard of the law could properly be characterized as “arbitrary and capricious.” In rejecting arbitrariness and capriciousness as an independent ground for vacatur, the Fifth Circuit has noted that “[i]n the interest of establishing clear and deferential standards of review . . . we must avoid hashing the existing grounds for vacatur into analytical bits, only to see those bits take on a life of their own and inexorably overwhelm the deference accorded to arbitration awards.”⁷⁷

Third and finally, the Fifth Circuit has also made quite clear that “the ‘essence test’ . . . is not a separate nonstatutory ground for vacatur but is part and parcel of 9 U.S.C.[] § 10(a)(4) of the FAA (the arbitrator exceeded his powers).”⁷⁸ After gently deriding the “essence test” as “rather metaphysical,” the Fifth Circuit, in *Kergosien v. Ocean Energy, Inc.*,⁷⁹ explained that this test requires an analysis identical to determining whether the arbitrator has exceeded his powers: “Under the essence analysis, ‘[t]he single question is whether the award, however arrived at, is rationally inferable from the contract.’”⁸⁰ In order to draw its essence from the contract, the arbitration award “must, in some logical way, be

75. See *Major League Baseball Ass’n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam) (stating that the tribunal should not substitute its own judgment for that of the arbitrator’s, even in the face of serious error, if the arbitrator acted within his scope of authority); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 394 (5th Cir. 2003) (maintaining that a court must have a sound statutory basis for condemning imperfect arbitration proceedings); see also *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368, 371 (5th Cir. 2004) (recognizing that an arbitration award must be affirmed if the arbitrator was acting within the scope of his powers).

76. *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 385 (5th Cir. 2004); see also *Sarofim*, 440 F.3d at 216 (re-emphasizing that there are only two non-statutory grounds on which to vacate an arbitration award: those that are contrary to public policy and those that are in manifest disregard of the law).

77. *Brabham*, 376 F.3d at 385-86 (5th Cir. 2004).

78. *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004).

79. 390 F.3d 346 (5th Cir. 2004).

80. *Kergosien*, 390 F.3d at 353-54 (quoting *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 n.3 (5th Cir. 1990)).

derived from the wording or purpose of the contract.”⁸¹ Thus, it is difficult to envision a scenario in which the arbitration award does not derive its essence from the contract, even as the arbitrator was nonetheless properly acting within the scope of his powers under that same contract. Stated another way, if the arbitrator exceeds his powers, the award he issues does not, by definition, draw its essence from the contract.

D. *The Long Odds Against Motions to Vacate*

When a trial lawyer or client approaches appellate counsel seeking options in the wake of an arbitration defeat, the foregoing list of the grounds for vacatur probably provides them with little comfort. The reality of the matter is that once arbitration has occurred and an award issued, “[t]he party still can ask a court to review the arbitrator’s decision, *but the court will set that decision aside only in very unusual circumstances.*”⁸² Our trial colleagues and clients may not enjoy hearing this evaluation, but at least it has the virtue of truth.

Of course, as the Fifth Circuit’s recent decision in *Positive Software Solutions* illustrates, the quest for vacatur of an arbitration award is not always futile—it just takes unusual facts and circumstances to achieve.⁸³ But while *Positive Software Solutions* may give would-be award challengers some degree of hope, the Eleventh Circuit’s decision in *Hercules Steel* should give them significant pause. As should be plain “to even the least astute reader” of that decision, the Eleventh Circuit intends to begin imposing sua

81. *Id.* at 353; see also *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994) (defining awards that are outside the arbitrator’s jurisdiction as those that that cannot be explained as furthering the goals of the contract).

82. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (emphasis added); see *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (observing that an arbitrator’s interpretation of the law is not subject to judicial review for error, as opposed to a manifest disregard of the law), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (not designated for publication) (explaining that an arbitration award is enforceable despite a misinterpretation of law or incorrect legal reasoning; the award will only be reversed if the arbitrator states the law correctly, but purposely disregards it).

83. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 501 (5th Cir. 2006, rehearing pending) (upholding the vacatur of an arbitration award where the arbitrator displayed “evident partiality” by failing to disclose his prior service as co-counsel in a prior litigation with one party to the proceeding).

sponte sanctions on “poor loser[s]” who bring meritless challenges to FAA arbitration awards.⁸⁴ In anticipation of other courts (including potentially the Fifth Circuit) following the Eleventh Circuit’s lead, the losing party in an arbitration should carefully and candidly evaluate the merits of its challenge to an arbitration award before troubling the courts with a motion to vacate.

III. AN OUNCE OF PREVENTION: CONTRACTING FOR APPELLATE REVIEW

There seems to be a sense among many trial lawyers and clients that an increased degree of appellate scrutiny of arbitration awards is desirable, at least in larger cases.⁸⁵ After an arbitration agreement is entered into, however, the parties are limited to challenging awards issued thereunder via the “extraordinarily narrow” vacatur provisions of the FAA, as outlined above.⁸⁶ While there is nothing that can be done to expand the scope of appellate review over an arbitration award that has already issued, a bit of foresight can anticipate and avoid this situation before it develops. The time to focus on appellate options is not after the arbitration has been lost, but instead before the arbitration agreement is entered into. To the extent you suspect that your client will not, in the event of a loss at arbitration, be content with the very limited bases for vacatur normally available, the time to craft appellate options is during the formulation of the arbitration agreement itself.

Arbitration is inherently a creature of contract.⁸⁷ As such, the parties are free to craft whatever provisions they see fit into their arbitration agreement:

84. *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907, 914 (11th Cir. 2006); *cf. Malice v. Coloplast Corp.*, 629 S.E.2d 95, 98 (Georgia Ct. App. 2006) (emphasizing that the purpose of arbitration is to avoid litigation).

85. *See generally* John Council, *Headaches and Pains: The Pounding Doesn’t Always Stop After an Arbitration Award*, TEX. LAW., May 29, 2006, at 1, 16 (detailing a May 18, 2006 hearing in state district court in Dallas where the losing party attempted to overturn an arbitration award because the arbitrator allegedly had a migraine headache).

86. *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 393 (5th Cir. 2003).

87. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (proclaiming that an arbitration agreement “is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute”); *see also* *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 66 (2d Cir. 2003) (“Unlike arbitration, however, judicial review is not a creature of contract, and the authority of a federal court to

Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.⁸⁸

In other words, if you or your clients are intimidated by the daunting finality of arbitration awards, there is a simple and libertarian solution to the problem; when drafting the arbitration clause, draft provisions for more robust appellate review of the arbitration award. This gives the client the best of both worlds: the speed, efficiency, informality, and cost savings generally associated with arbitration, combined with the availability of meaningful appellate review. Inserting a provision for appellate review in an arbitration agreement transforms arbitration into much less of a high-wire act without a net. There are two methods for contracting for expanded appellate review of an arbitration award, one public and one private.

A. *The Public Method: Altering the Standard of Review Applied by the Courts*

The Fifth Circuit was the first federal court of appeals to explicitly hold that the parties to an arbitration agreement may contractually alter the standard of review applied by the courts to the arbitration awards in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*⁸⁹ *Gateway* was a revolutionary decision because it finally empowered parties to an arbitration agreement to expand the scope of judicial review of the award beyond the narrow “one size fits all” vacatur provisions of the FAA.

The parties to the arbitration agreement in *Gateway* had agreed that “[t]he arbitration decision shall be final and binding on both parties, except that *errors of law shall be subject to appeal.*”⁹⁰ The

review an arbitration award—or any other matter—does not derive from a private agreement.”); *Katz v. Feinberg*, 167 F. Supp. 2d 556, 565-66 (S.D.N.Y. 2001) (stating that “[b]ecause arbitration is a creature of contract, the arbitrability of an issue derives fundamentally from the parties’ agreement to arbitrate”), *aff’d*, 290 F.3d 95 (2d Cir. 2002).

88. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994); *cf. Scherk*, 417 U.S. at 511 (noting that the purpose of the FAA was to enforce arbitration agreements as contracts).

89. 64 F.3d 993 (5th Cir. 1995).

90. *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995).

district court refused to enforce this clause, however, holding instead that “the parties [had] sacrificed the simplicity, informality, and expedition of arbitration on the altar of appellate review.”⁹¹ The Fifth Circuit flatly rejected the district court’s reasoning, declaring that “[p]rudent or not, the contract expressly and unambiguously provides for review of ‘errors of law’; to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties.”⁹² In other words, the district court’s concerns about sacrificing efficiency and simplicity of arbitration are trumped by the contractual nature of arbitration and the mutual intent of the parties. The *Gateway* panel, led by (now Chief) Judge Edith Jones, went on to conclude that “[w]hen, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, *federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract.*”⁹³

Consistent with *Gateway*, the vacatur provisions of the FAA (both statutory and non-statutory) must be understood as default standards that apply only where the parties have not contractually agreed to their own standards.⁹⁴ The Fifth Circuit has consistently and repeatedly reaffirmed its holding in *Gateway*.⁹⁵ Indeed, the Fifth Circuit has even expanded the scope of *Gateway* by permit-

91. *Id.* at 997.

92. *Id.*

93. *Id.* (emphasis added).

94. See *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 292 (3d Cir. 2001) (stating that, while arbitration agreements are subject to the FAA, the parties are free to specify by contract the rules under which the arbitration proceeding will be conducted); *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (not designated for publication) (noting that parties are free to contractually expand judicial review to supplement the FAA’s default standard (citing *Gateway*, 64 F.3d at 997)).

95. See *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790, 793 (5th Cir. 2002) (enforcing an arbitration clause which provided that “[t]he [a]ward of the [a]rbitrator shall be binding on the parties hereto, although each party shall retain his right to appeal any questions of law, and judgment may be entered thereon in any court having jurisdiction”); see also *Prescott v. Northlake Christian Sch.*, 369 F.3d 491, 496 (5th Cir. 2004) (stressing that contractual modification of arbitration agreements is acceptable); *Specialty Healthcare Mgmt, Inc., v. St. Mary Parish Hosp.*, 220 F.3d 650, 654-55 (5th Cir. 2004) (asserting that, because parties are generally free to negotiate the terms of their arbitration agreements, they should be subject to enforcement by the courts).

ting parties to contract not just for judicial review of errors of law by the arbitrator, but also for errors of fact.⁹⁶

Several other federal circuits have joined the Fifth Circuit in holding that the contractual alteration by parties to an arbitration agreement of the standard of review to be applied by courts is permissible. For example, the Third Circuit characterized the FAA's vacatur standards as "off-the-rack" and was explicit in stating that "the FAA permits parties to contract for vacatur standards other than the ones provided in the FAA."⁹⁷ Similarly, in *Syncor International Corp. v. McLeland*,⁹⁸ the Fourth Circuit enforced a clause agreed to by the parties requiring de novo judicial review of the arbitrator's conclusions of law.⁹⁹

One Texas Court of Appeals, in *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*,¹⁰⁰ applying the FAA, acknowledged the ability of the parties to an arbitration agreement to alter the standard of judicial review applicable to awards: "[t]he parties may agree to expand judicial review of an arbitration award beyond the scope of the FAA."¹⁰¹ The *Tanox* court concluded, however, that the parties before the court "lack[ed] the clear and express language altering the standard of review" and thus were left with the FAA default standard of review.¹⁰² Although the Texas Supreme Court has not reached the issue, a concurring opinion in *Mariner*

96. See *Hughes Training Inc. v. Cook*, 254 F.3d 588, 590 (5th Cir. 2001) (enforcing an arbitration clause providing that "in actions seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury").

97. *Kayser*, 257 F.3d at 288, 293.

98. No. 96-2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997) (not designated for publication).

99. *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (not designated for publication).

100. 105 S.W.3d 244 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

101. *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 251 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (citing *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001)).

102. *Id.* But see *Hughes Training*, 254 F.3d at 590 (upholding an arbitration agreement that stated: "in actions seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury"); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (enforcing an arbitration agreement providing explicitly that "errors of law shall be subject to appeal").

Financial Group, Inc. v. Bossley,¹⁰³ authored by Justice Priscilla Owen (now a member of the Court of Appeals for the Fifth Circuit), cited *Gateway* approvingly.¹⁰⁴ Justice Owen emphasized the need for parties to lucidly state their intent to expand the scope of judicial review of the arbitration award, noting that “those courts that have held that parties may expand the scope of judicial review by agreement have said that any such agreement must be explicit.”¹⁰⁵

In stark contrast, three federal circuits have expressly rejected the holdings of *Gateway* and its progeny, drawing on the strong federal policy of arbitrator independence and arguing that private parties cannot expand the jurisdiction of the federal courts.¹⁰⁶ As the Tenth Circuit explained in *Bowen v. Amoco Pipeline Co.*,¹⁰⁷ “through the FAA Congress has provided explicit guidance regarding judicial standards of review of arbitration awards. . . . The decisions directing courts to honor parties’ agreements and to resolve close questions in favor of arbitration simply *do not dictate that courts submit to varying standards of review imposed by private contract.*”¹⁰⁸ Similarly, the Eighth Circuit warned that “where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.”¹⁰⁹ Finally, the en banc Court of Appeals for

103. 79 S.W.3d 30 (Tex. 2002).

104. *Mariner Fin. Group, Inc. v. Bossley*, 79 S.W.3d 30, 44 (Tex. 2002) (Owen, J., joined by Phillips, Hecht, & Jefferson, JJ., concurring).

105. *Id.* at 47; see *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 296 (3d Cir. 2001) (holding that a generic choice-of-law provision is insufficient to show intent to opt out of the FAA’s default vacatur standards).

106. See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 933-37 (10th Cir. 2001) (characterizing a contractual modification of judicial review as an interference with the judicial process); see also *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997-1000 (9th Cir. 2003) (en banc) (holding that private parties cannot contractually expand judicial review of arbitration awards beyond the review provided for in the FAA); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998) (dictum) (stating that the arbitration process is different than the adjudicative process, and parties should not expect the same level of review).

107. 254 F.3d 925 (10th Cir. 2001).

108. *Id.* at 934 (emphasis added).

109. *UHC Mgmt. Co.*, 148 F.3d at 998 (quoting *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986)).

the Ninth Circuit has rejected the holding of *Gateway*,¹¹⁰ overruling a Ninth Circuit panel decision in the process.¹¹¹

As a result of *Bowen* and the decisions following it, there is a deep, irreconcilable multi-circuit split that will ultimately require resolution by the Supreme Court.¹¹² However, no case on the Supreme Court's current docket promises to resolve this issue.¹¹³ Until such time as the Supreme Court does resolve this circuit split, *Gateway* remains the law both in the Fifth Circuit and in Texas courts applying the FAA, and parties to an arbitration agreement remain free to contract for whatever form of judicial review of arbitration awards they see fit.

B. *The Private Method: Outsource the Appeal*

For parties seeking meaningful appellate review of arbitration awards, there is an even more viable option available than contracting to alter the standard of review applied by courts to arbitration awards: a client has already decided to outsource the trial to an arbitrator, so why not outsource the appeal too? A provision in the arbitration agreement for a private appeal of any award makes possible meaningful appellate review without resort to the courts. Judge Posner of the Seventh Circuit has—rather predictably—endorsed precisely this approach: “If the parties want, *they can contract for an appellate arbitration panel to review the arbitrator’s*

110. *Kyocera*, 341 F.3d at 1000 (joining the Seventh, Eighth, and Tenth Circuits in holding that private parties cannot alter the rules by which federal courts proceed).

111. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) (holding that a federal court must honor an arbitration agreement where “the parties indisputably contracted for heightened judicial scrutiny of the arbitrators’ award”), *overruled by Kyocera*, 341 F.3d 987.

112. *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 514 (1962). The Court stated:

It is implicit in the choice Congress made that ‘diversities and conflicts’ may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court.

Id.

113. Supreme Court of the United States, Granted and Noted List, Cases to be Argued October Term 2006, <http://www.supremecourtus.gov/orders/06grantednotedlist.pdf> (last visited Nov. 11, 2006) (on file with the *St. Mary’s Law Journal*).

award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract.”¹¹⁴

A private appellate process following an arbitration award offers several advantages over either accepting the “off-the-rack” vacatur standards of the FAA or contracting to alter the standard of review applied by the courts. First, a private appeal of an arbitration award is consistent with the contractual underpinnings of arbitration, as it allows the parties to resolve their dispute using whatever procedures and standards they select.¹¹⁵ Second, unlike clauses that alter the standard of review applied by a court, a post-award private appeal does not introduce a public component into what is inherently a private and confidential process.¹¹⁶ As such, a private appeal preserves the confidentiality of the arbitration process in a way that an appeal through the traditional judicial system obviously cannot.¹¹⁷ Third, a private appeal allows the parties to avoid the uncertainty and unsettled state of the law resulting from the *Gateway/Bowen* circuit split.¹¹⁸ Stated simply, if the Supreme

114. *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (first emphasis added); cf. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (emphasizing that a federal court's power is extremely limited when parties have contracted to submit all disputes to an arbitrator).

115. See *Hughes Training Inc. v. Cook*, 254 F.3d 588, 592-93 (5th Cir. 2001) (stressing that “parties are generally free to structure their arbitration agreements as they see fit” (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995))). Indeed, parties to arbitration agreements are free to provide that *state* law will apply. See *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 292 (3d Cir. 2001) (noting that, if parties agree to be subject to state procedural law, the federal policy favoring arbitration is satisfied as long as their agreement is enforced). This does not mean that such an arbitration agreement is no longer subject to the FAA. *Id.* “When a court enforces the terms of an arbitration agreement that incorporates state law rules, it does so not because the parties have chosen to be governed by state rather than federal law. Rather, it does so because *federal law* requires that the court enforce the terms of the agreement.” *Id.*

116. See *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (stating that an attack on a confidentiality component of an arbitration agreement is an attack on the nature of arbitration itself); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.* 341 F.3d 987, 998 (9th Cir. 2003) (en banc) (asserting that the grounds for vacatur expounded in the FAA serve to “permit unnecessary public intrusion into private arbitration procedures”); see also Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 360 (2002-03) (noting that “arbitrations are essentially confidential”).

117. See Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 261 (1999) (noting that “it is more difficult to maintain secrecy where the arbitration record is subject to court review”).

118. Compare *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 292 (3d Cir. 2001) (concluding that parties may contractually opt out of the FAA's vacatur standards and

Court ultimately overrules *Gateway*, parties who have instead opted for private appellate provisions will be unaffected. Fourth and finally, a private post-award appellate process can be crafted in such a manner as to preserve the goals of speed and efficiency that are the hallmarks of arbitration. For example, a typical appeal to the Fifth Circuit takes over one year,¹¹⁹ but the parties to a private appeal of an arbitration award can set their own accelerated schedule, thereby permitting the resolution of the private appeal in a fraction of the time required to resolve a judicial appeal.¹²⁰ Similarly, the courts offer a two-tiered system of appellate review, while a private appeal would, in all probability, involve only one-tiered review, thereby preserving considerable efficiency. In light of the foregoing factors, a private appellate provision seems to present the better alternative than a provision such as the one upheld in *Gateway* that expands the grounds for judicial review of an arbitration award.

No major arbitration organization has a rule against the use of a private post-award appellate process. Quite the opposite, the Rules of the International Institute for Conflict Prevention and Resolution (CPR) and the Judicial Arbitration and Mediation Service (JAMS) both make provision for “optional arbitration appeals procedures.”¹²¹ Similarly, the rules of the National Arbitration Forum (NAF) acknowledge the possibility of a private appeal, but do

substitute their own), *and Syncor Int’l Corp v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (not designated for publication) (noting that, as parties are free to decide which issues are arbitrable, so too may parties contractually provide for more expansive judicial review), *and Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (holding that parties may contractually expand judicial review of an arbitration agreement), *with Kyocera*, 341 F.3d at 1000 (holding that a federal court may only review arbitration decisions on the grounds provided in the FAA), *and Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001) (determining that parties may not contractually expand judicial review of arbitrator decisions). *See also UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998) (dictum) (noting that, assuming it is possible to contract for expanded judicial review of an arbitration award, intent to do so must be unequivocally expressed in the agreement).

119. In the wake of Hurricanes Katrina and Rita, the time necessary to resolve an appeal in the Fifth Circuit has become longer still.

120. *See Kayser*, 257 F.3d at 292 (noting that parties are free to specify the procedural rules applicable in their arbitration agreements).

121. Judicial Arbitration and Mediation Service, Optional Arbitration Appeal Procedure, www.jamsadr.com (select “Rules/Clauses,” then “Optional Appeal Procedure”) (last visited Nov. 11, 2006) (on file with the *St. Mary’s Law Journal*); International Institute for Conflict Prevention & Resolution, Arbitration Appeal Procedure, <http://www.cpradr.org>

not establish a procedure governing such appeals: "Parties may modify or supplement these rules as permitted by law. Provisions of this [c]ode govern arbitrations involving an appeal or a review de novo of an arbitration by other [a]rbitrators."¹²² Finally, the rules of the AAA neither prohibit nor endorse appellate arbitration appeals.¹²³ But they do provide maximum flexibility, stating that "[t]he [p]arties, by written agreement, may vary the procedures set forth in these rules."¹²⁴ In other words, under AAA Rules, the parties appear to have a free hand to craft whatever private appellate procedure they see fit.

C. *When to Add an Appellate Provision to an Arbitration Agreement*

There are many arbitration proceedings in which some form of appellate review is essential and in which the absence of available review may result in a very unhappy client. A client should not enter into a high-stakes arbitration agreement without at least considering the need for including some sort of appellate option. Obviously, not every arbitration agreement requires an appeals clause; for arbitration agreements governing small transactions, or in situations where rapid resolution is essential, adding an appellate provision to the arbitration agreement may be counter-productive. A safe rule of thumb would be: if, in the event of a loss at a hypothetical trial, your client would be inclined to appeal, then an appellate provision should probably be added to the arbitration agreement in which your client is surrendering the right to that trial. If, on the other hand, your client would not be inclined to appeal from a loss at trial, omitting the appellate clause and taking your chances in a dauntingly final arbitration is probably advisable.

(select "CPR Clauses, Rules, Codes & Procedures," then "Arbitration Appeal Procedure") (last visited Nov. 11, 2006) (on file with the *St. Mary's Law Journal*).

122. National Arbitration Forum, Code of Procedure, Rule 1D, www.arb-forum.com (select "Programs & Rules," then "Code of Procedure Arbitration," then "The Code of Procedure," then select a "Code of Procedure" document) (last visited Nov. 11, 2006) (on file with the *St. Mary's Law Journal*).

123. American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, www.adr.org (select "Rules/Procedures," then "Rules," then "Commercial Arbitration Rules and Mediation Procedures") (last visited Nov. 11, 2006) (on file with the *St. Mary's Law Journal*).

124. *Id.* Rule R-1(a).

Appellate attorneys—including the author—are obviously in favor of increased appellate review of the sometimes seemingly “lawless” and starkly final arbitration process.¹²⁵ Most attorneys are not inclined to perform a high-wire act without a net, nor do they want to play an important football game without instant replay. In order to make increased appellate options available following an arbitration award, transactional attorneys and clients—the people who negotiate contracts and draft arbitration clauses—will need to be made aware of both the problem and the solution. Unless transactional attorneys and clients know in advance that their failure to include an appellate provision in an arbitration agreement will doom them to profoundly limited post-award appellate options,¹²⁶ such clauses will remain rare.

IV. CONCLUSION

One long-term solution to the problem of the profoundly limited appealability of arbitration awards would be to move toward the English arbitration system, under which judicial review for legal error committed by the arbitrator is always permitted: “Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.”¹²⁷ Such a change to the FAA would require action by Congress and—unhappily for appellate lawyers—no such change appears to be in the works. We are left then with our current system of appellate review.

Under the current system, there are only “extraordinarily narrow” grounds for vacatur of an arbitration award. While *Positive Software Solutions* does offer some hope of broader grounds for vacatur, it requires attorneys to become private investigators, look-

125. See Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 359-60 (2002-03) (arguing that, because parties to an arbitration proceeding lose access to the appellate courts, they risk many adverse consequences).

126. See Section 1 of this Article, discussing the narrow provisions for review of arbitration decisions.

127. Arbitration Act 1996, ch. 23, § 69(1) (1996) (Eng.). The English and American systems of arbitration are fundamentally different. While the English system allows for judicial review unless the parties specifically contract otherwise, the FAA provides for limited review, and only a handful of circuits, as noted, have held that parties may contractually expand these provisions.

ing into even the distant past of the arbitrator. A better solution is to simply change the way that arbitration agreements are written. Transactional attorneys and clients have the opportunity, in crafting the arbitration agreement, to create their own agreed-upon mechanism for review of any arbitration award. Absent an increase in the use of appellate provisions in arbitration agreements, however, appellate lawyers will remain the bearers of bad news when trial attorneys and clients come to us in the wake of an arbitration defeat.