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An Opportunity Lost: The Supreme Court’s Failure to Recognize the Implications of Its Holding in Hall Street Associates, L.L.C. v. Mattel, Inc.

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**Introduction**

After years of uncertainty, the Supreme Court of the United States (“Supreme Court”) in *Hall Street Associates, L.L.C. v. Mattel, Inc.*\(^1\) has resolved the issue, in the negative\(^2\), of whether parties can contract to expand the judicial review provisions in sections 10\(^3\) and 11\(^4\) of Article 1 (“Art.”) of the Federal Arbitration Act (“FAA”)\(^5\). Although the Supreme Court resolved this specific issue, its analysis was incomplete, as it failed to recognize how the meaning of the language included in section 9 of Art. 1 of the FAA was very similar to that in section 207 of Art. 2 of the FAA. Additionally, the decision creates unnecessary confusion in this area of the law, by leaving several other related issues unresolved.

The unresolved issues include: (i) which provisions in Art. 1 of the FAA parties can and cannot agree to change\(^6\); (ii) whether parties can agree to apply vacatur provisions from state...
arbitration schemes to arbitrations governed by Art. 1 of the FAA\(^7\); (iii) whether the Hall majority’s decision only applies to manifest disregard of the law, or, if parties can still agree to have their awards reviewed under additional grounds of review not enumerated in sections 10 and 11 of Art. 1 of the FAA\(^8\); (iv) whether parties can agree that select or none of the grounds of review in sections 10 and 11 of Art. 1 of the FAA must be applied to their awards\(^9\); and (v) the Hall decision’s impact on whether parties can contract to expand the judicial review provisions in Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NY Convention”)\(^10\), which applies to Art. 2 of the FAA\(^11\) and governs non-domestic arbitration awards\(^12\) (the unresolved issues in (i)-(v) above, are collectively referred to as, the “Open Issues”).

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\(^7\) See infra at pp. 27-29.
\(^8\) See infra at p. 29.
\(^9\) See infra at p. 30.
\(^10\) Art. V of the NY Convention states:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   (e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
   (b) The recognition or enforcement of the award would be contrary to the public policy of that country. (emphasis added).

\(^11\) Art. 2 of the FAA governs non-domestic arbitration awards. See infra at n. 161 for a discussion of the distinction between domestic and non-domestic awards.
\(^12\) See infra at pp. 30-31.
Facts and Procedural History

Mattel, Inc. (“Mattel”) leased a parcel of real property in Oregon (the “Property”) from Hall Street Associates, L.L.C. (“Hall”). The Property was used as a manufacturing site. The lease stated that Mattel would indemnify Hall, for its own, or its predecessor lessees, failure to follow any environmental laws. In 1998, high levels of trichloroethylene (“TCE”) were discovered in the Property’s well. The TCE was discharged by the tenant that leased the Property prior to Mattel. Eventually, Mattel and one of the Property’s predecessor lessees signed a consent order with the Oregon Department of Environmental Quality, providing for cleanup of the Property.

Mattel gave Hall its notice of intent to terminate the lease in 2001. Thereafter, Hall initiated a lawsuit alleging that Mattel: (i) did not have the right to terminate the lease when it did (the “Termination Issue”) and (ii) was required to indemnify Hall for the costs associated with cleaning up the TCE (the “Indemnification Issue”).

A bench trial was conducted on the Termination Issue before the United States District Court for the District of Oregon (the “Oregon District Court”). Mattel was victorious on the Termination Issue. The parties then attempted to mediate the Indemnification Issue, but the mediation was unsuccessful.

The Oregon District Court subsequently granted the parties’ request to arbitrate the Indemnification Issue. The Oregon District Court entered the parties’ arbitration agreement as a formal court order (the “Arbitration Order”). The relevant provision in the Arbitration Order reads as follows:

[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or

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13 Hall, 128 S.Ct. at 1400.
14 Id. at 1400.
15 Id.
16 Id.
17 Id.
18 Id.
19 Hall, 128 S.Ct. at 1400.
20 Id.
21 Id.
22 Id.
23 Hall, 128 S.Ct. at 1400.
24 Id.
25 Id.
correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.\(^\text{26}\)

The arbitrator initially decided the Indemnification Issue in favor of Mattel.\(^\text{27}\) The arbitrator found that although the pollution on the Property violated the Oregon Drinking Water Quality Act (the “Oregon Act”), the Oregon Act concerned human health, not environmental contamination.\(^\text{28}\) As a result, the violation was outside the scope of the indemnification clause in the lease, which only applied to environmental laws.\(^\text{29}\)

In response, Hall petitioned the Oregon District Court to overturn the arbitrator’s decision because of its characterization of the Oregon Act as a human health regulation, instead of an environmental regulation.\(^\text{30}\) The Oregon District Court agreed with Hall’s argument about the classification of the Oregon Act, vacated the arbitrator’s award, and remanded the action back to the arbitrator for further consideration.\(^\text{31}\) In its decision, the Oregon District Court specifically relied on the judicial review clause in the Arbitration Order, which allowed for review of legal errors, and on the Ninth Circuit’s decision in LaPine Technology Corp. v. Kyocera Corp., 130 F. 3d 884, 889 (9th Cir. 1997) (hereinafter, “\textit{Lapine I}”), which held that parties’ contracts to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA are enforceable.\(^\text{32}\)

On remand, the arbitrator followed the Oregon District Court’s rationale and held that the Oregon Act was an environmental regulation, not a human health regulation. The arbitrator then amended its prior award so that it now favored Hall.\(^\text{33}\) Both parties sought modification of the award, and the Oregon District Court again applied the expanded review provision from the Arbitration Order.\(^\text{34}\) In reaching the same conclusion as it did before, the Oregon District Court upheld the award in favor of Hall and also corrected the arbitrator’s interest calculation.\(^\text{35}\)

Hall and Mattel each appealed the Oregon District Court’s second decision to the Ninth Circuit Court of Appeals.\(^\text{36}\) The timing of this appeal was significant. Between the time the

\(^{26}\) Id. at 1400-01 (citation omitted)(emphasis added).
\(^{27}\) \textit{Hall}, 128 S.Ct. at 1401.
\(^{28}\) Id.
\(^{29}\) Id.
\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) \textit{Hall}, 128 S.Ct. at 1401.
\(^{35}\) Id.
\(^{36}\) Id.
Oregon District Court rendered its initial decision, which was subsequently modified, and when the Ninth Circuit initially heard this dispute, the Ninth Circuit had overruled \textit{Lapine I} with its \textit{en banc} decision in \textit{Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.}, 341 F3d 987, 1000 (2003)(hereinafter, \textquotedblleft \textit{Lapine II}	extquotedblright). In \textit{Lapine II}, the Ninth Circuit concluded that parties \textit{could not} contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA.\footnote{Id.}

Relying on \textit{Lapine II}, the Ninth Circuit reversed the Oregon District Court’s second decision in favor of Hall, and reached the same result as the arbitrator initially reached.\footnote{Id.} Moreover, the Ninth Circuit instructed the Oregon District Court to confirm the original arbitration award (not the subsequently modified award), unless vacatur was appropriate under one of the grounds of review specifically enumerated in either section 10 or 11 of Art. 1 of the FAA.\footnote{Id.}

On remand, the Oregon District Court did not follow the Ninth Circuit’s ruling and once again ruled in favor of Hall.\footnote{Id.} In doing so, the Oregon District Court relied on another ground of review not enumerated in either section 10 or 11 of Art. 1 of the FAA – that the arbitrator had invoked “an implausible interpretation of the lease.”\footnote{Id.} On appeal, the Ninth Circuit yet again reversed the Oregon District Court, because implausibility was also not a ground of review enumerated in either section 10 or 11 of Art. 1 of the FAA.\footnote{Id.} The Supreme Court then granted \textit{certiorari} to decide whether “the grounds for vacatur and modification provided by sections 10 and 11 of the FAA are exclusive.”\footnote{Id.}

\textbf{The Majority’s Decision}

Justice Scalia, writing for the majority, initially observed that the foremost purpose underlying Art. 1 of the FAA was to enforce arbitration agreements the same way as any other contracts.\footnote{Hall, 128 S.Ct. at 1401 (citations omitted).} He also observed that the FAA was a unique statute because it did not independently confer federal jurisdiction over a dispute.\footnote{Id. (citation omitted).} Instead, it required an independent jurisdictional foundation prior to its application.\footnote{Id. (citation omitted).} However, contracts satisfying this independent
jurisdictional requirement, and which also affect commerce, are “valid, irrevocable, and enforceable.”

The majority next observes that Art. 1 of the FAA includes three mechanisms available to enforce an arbitration award. It allows for the: (i) confirmation; (ii) vacatur; or (iii) modification / correction of an award. Parties making an application for any of these orders are entitled to streamlined treatment as a motion, in lieu of the separate contract action that would otherwise be required. Section 9 of Art. 1 of the FAA requires that a court “must” confirm an award “unless” it is vacated, modified or corrected “as prescribed” in section 10 of Art. 1 of the FAA, which includes the grounds of review under which an award can be vacated, or section 11 of Art. 1 of the FAA, which lists the grounds for modifying or correcting an award.

Justice Scalia then briefly discussed how the circuits were split on the issue of whether the grounds of review in sections 10 and 11 of Art. 1 of the FAA are exclusive, or, if they

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47 Id. (Undercutting an argument made by numerous courts and commentators previously addressing whether parties can contract to expand the vacatur provisions in sections 10 and 11 of Art. 1 of the FAA, see e.g. Lapine II, 341 F. 3d at 1000 (citations omitted) and Eric Chafetz, The Propriety of Expanded Judicial Review Under the FAA: Achieving a Balance Between Enforcing Parties’ Agreements According to Their Terms and Maintaining Arbitral Efficiency, 8 CARDOZO J. CONFLICT RESOL. 1, 29, n. 206 (2006)(citations omitted), the majority found that since Art. 1 of the FAA does not independently bestow federal jurisdiction over a dispute, parties’ contracts to expand judicial review do not improperly create federal jurisdiction by contract. Hall, 128 S.Ct. at 1402, n. 2.).

48 Hall, 128 S.Ct. at 1402.

49 Id. at 1402.

50 Id.

51 Id. (The majority, unlike the dissent, argued that both Hall and Mattel intended for Art. 1 of the FAA, and as a result, its vacatur provisions, to apply to their dispute. As such, neither party, could, in the first instance before the Supreme Court, rely on “an independent state-law contract claim or defense specific to the arbitration agreement”. Hall, 128 S.Ct. at 1402, n. 3).

52 Section 9 of Art. 1 the FAA reads in pertinent part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. (emphasis added).

53 See supra at n. 3 for the text of section 10 of Art. 1 of the FAA.

54 See supra at n. 4 for the text of section 11 of Art. 1 of the FAA.

55 Hall, 128 S.Ct. at 1402.

56 See supra at n. 3 for the text of section 10 of Art. 1 of the FAA.

57 See supra at n. 4 for the text of section 11 of Art. 1 of the FAA.
“are mere threshold provisions open to expansion by agreement.” He also recognized how the Ninth Circuit held both views while this case was moving through the court system.

Hall made two main arguments in support of its position that the vacatur provisions in Art. 1 of the FAA were threshold provisions. First, Hall argued that since the Supreme Court’s decision in Wilko v. Swan, 346 U.S. 427 (1953), there is no doubt that the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA can be supplemented. Specifically, Hall relied on the following language from the Wilko decision: “the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation.” Based on this language, and on certain circuit court’s interpretations of it, Hall argued that manifest disregard of the law is an additional ground of review parties can rely upon when seeking to vacate an arbitration award governed by Art. 1 of the FAA.

To the contrary, however, the majority found that the language Hall relied upon from Wilko required a starkly different interpretation. In fact, the Wilko court intended for the language to mean that: (i) arbitration awards are not subject to general review of an arbitrator’s errors and (ii) a court’s power to vacate an arbitration award is extremely limited. Moreover, the majority recognized how certain courts have found that Wilko’s use of the phrase “in contrast to manifest disregard”, does not supplement the grounds of review in sections 10 and 11 of Art. 1 of the FAA, but instead refers to them collectively. Or alternatively, how other courts have found that “in contrast to manifest disregard” refers specifically to sections 10(a)(3) and 10(a)(4)

58 Hall, 128 S.Ct. at 1403.
59 Id.
60 Hall, 128 S.Ct. at 1403.
61 See supra at n. 3 for the text of section 10 of Art. 1 of the FAA.
62 See supra at n. 4 for the text of section 11 of Art. 1 of the FAA.
63 Hall, 128 S.Ct. at 1403.
64 Id. (citation omitted)(emphais added).
65 Id. (emphasis added); see also Birmingham News Company v. Horn, 901 So.2d 27, 48-49 (2004) (collecting cases illustrating how every circuit has recognized manifest disregard of the law as an additional ground of review), overruled by Hereford v. D.R. Horton, Inc., 1070396, 2008 WL 4097594, *3-*5 (2008)(observing that after Hall the grounds of review in sections 10 and 11 of Art. 1 of the FAA are exclusive).
66 Hall, 128 S.Ct. at 1403 (citations omitted).
67 Hall, 128 S.Ct. at 1404.
68 Id. at 1404.
69 Id. (citations omitted); see infra at n. 185.
collectively, authorizing vacatur of an award where the arbitrators were “guilty of misconduct” or “exceeded their powers.”

Likewise, even assuming that Hall’s interpretation of Wilko’s language is correct, and judges can recognize manifest disregard of the law as an additional ground of review, that is a far cry from private parties attempting to reach the same result by contract. The majority then found that: “[w]e, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment, [ ] and now that its meaning is implicated, we see no reason to accord it the significance that Hall [ ] urges.”

Second, relying on Dean Witter Reynolds Inc. v. Byrd, 470 U. S. 213, 220, 105 S.Ct. 1238 (1985), Hall argued that parties should be allowed to agree that their arbitration awards can be reviewed for legal error “because arbitration is a creature of contract” and Art. 1 of the FAA is “motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.” In rebutting this argument, the majority observed how “[t]here is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies. [Despite what Byrd says,][t]his does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.”

Moreover, the Hall majority observed that the Byrd decision includes language concerning how the efficient resolution of disputes is not the most important purpose underlying Art. 1 of the FAA. In other words, the Byrd decision did not conclusively determine the proper balance – in all factual contexts – between two of the most important purposes underlying Art. 1 of the FAA: (i) enforcing parties’ agreements according to their

70 Id. (citations omitted); see infra at n. 185.
71 Id. at 1403-04; see also Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp. 2d, 997-99 (D. Minn. 2008) (observing that after Hall neither parties can agree to apply, nor courts can apply, any grounds of review outside of those specified in section 10 of Art. 1 of the FAA); but see Qwest Communications Int’l, 08-CV-00358, 2008 WL 4216261, *3-*4 (D. Colo. September 12, 2008) (arguing that the Hall court treated parties contracting to apply manifest disregard of the law differently from courts applying manifest disregard of the law).
72 Hall, 128 S.Ct. at 1403-04 (emphasis added).
73 Id. at 1404.
74 Id. at 1405 (emphasis added).
75 Efficiency, in this context, refers to the amount of time an arbitration takes from start to finish.
76 Hall, 128 S.Ct. at 1405-06 (emphasis added) (According to the majority, with the observation about expeditious resolution of disputes, “the [Byrd] Court was merely trying to explain that the inefficiency and difficulty of conducting simultaneous arbitration and federal-court litigation was not a good enough reason to defer the arbitration.”); see also Eric Chafetz, Looking Into a Crystal Ball: Courts’ Inevitable Refusal to Enforce Parties’ Contracts to Expand Judicial Review of Non-Domestic Arbitral Awards, 9 Pepperdine Dispute Resol. J. 1, 110-11 (2008).
terms like any other contracts; and (ii) the efficiency arbitration as an alternate means of dispute resolution is supposed to provide.\footnote{77 Chafetz, supra n. 76 at pp. 100-11, 113-15.}

In further support of its conclusion that the grounds of review in sections 10 and 11 of Art. 1 of the FAA are exclusive, the majority pointed out that all but one of the grounds included in those sections, concern either egregious or extreme arbitral conduct.\footnote{78 Id.} Vacatur is allowed under the only ground that is not as extreme, when there are imperfections involving the form of an award, not imperfections based on an award’s merits.\footnote{79 Id.} All told, the statutory drafters clearly delineated between “fraud” and “mistake of law”, with the latter not intended to be a ground for vacatur.\footnote{80 Id. at 1404-05.}

The majority also points to section 5\footnote{81 Section 5 states:}[81] of Art. 1 of the FAA for an example of a default provision from Art. 1 of the FAA.\footnote{82 Hall, 128 S.Ct. at 1405.} It observes that the use of the phrase “if no method be provided” in section 5, is drastically different than “must grant …unless” in section 9.\footnote{83 Id.} The majority then ties its argument based on the text of section 9 of Art. 1 of the FAA, back to its interpretation of Byrd, and recognizes the importance of preserving arbitral efficiency:

[i]nstead of fighting the text, it makes more sense to see the three provisions, §§9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,’ (citations omitted) and bring arbitration theory to grief in post-arbitration process.\footnote{84 Id. at 1405 (emphasis added).}

The majority next addressed conflicting policy arguments made by the litigants and also by certain parties writing amicus briefs on the parties’ behalves.\footnote{85 If parties can contract to expand the judicial review of arbitration awards under Art. 1 of the FAA, there will be a flight from the courts, or, alternatively, if they cannot, there will be a flight from arbitration. Hall, 128 S.Ct. at} Finally, the majority is careful
to point out that its holding does not preclude “more searching review based on authority outside the statute as well.”\textsuperscript{86} For example, parties can still contract to have their awards enforced under state statutory or common law\textsuperscript{87}, two sources where the scope of judicial review \emph{may} be broader than in sections 10 and 11 of Art. 1 of the FAA.\textsuperscript{88}

\textbf{Dissenting Opinion}

Justice Stevens and Justice Kennedy argued in a dissenting opinion that the majority did not place enough emphasis on the most important policy underlying Art. 1 of the FAA, that parties’ arbitration agreements should be enforced according to their terms, like any other contracts.\textsuperscript{89} According to the dissent, the majority’s flawed reasoning was based on the following two unsubstantiated positions:

(1) a supposed \textit{quid pro quo} bargain between Congress and litigants that conditions expedited federal enforcement of arbitration awards on acceptance of a statutory limit on the scope of judicial review of such awards; and (2) an assumption that Congress intended to include the words “and no other” in the grounds specified in §§10 and 11 for the vacatur and modification of awards.\textsuperscript{90}

Contrary to the majority, and adopting the reasoning of those circuit courts that have found that Art. 1 of the FAA’s judicial review provisions are threshold provisions, the dissent concluded that the majority placed \textit{too much} emphasis on arbitral efficiency, and not enough emphasis on enforcing parties’ agreements according to their terms, and in doing so, incorrectly

\textsuperscript{86} Id.
\textsuperscript{87} See infra at pp. 27-29; see also Cable Connection, Inc. v. Directv, Inc., 82 Cal. Rptr. 3d 229, 233, 240-48 (2008)(observing how after \textit{Hall} parties can still contract to expand the judicial review provisions applicable to the statute, as the grounds enumerated in the statute are exclusive. \textit{Id}.\textsuperscript{88}
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 1406-07 (The majority also declined to address an argument about whether the District Court’s enforcement of the arbitration clause in the Arbitration Order was a proper exercise of its powers pursuant to Federal Rule of Civil Procedure 16, to manage its cases as it sees fit, because the argument was not previously addressed by the Ninth Circuit. \textit{Hall}, 128 S.Ct. at 1407.).
\textsuperscript{90} \textit{Hall}, 128 S.Ct. at 1408.
concluded parties could not contract to expand the judicial review provisions in Art. 1 of the FAA. 91

Critical Analysis of the Hall Decision

The Supreme Court in Hall resolved the long standing circuit split over whether parties’ contracts to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA were enforceable. 92 The Hall majority made two main arguments in support of its conclusion that the grounds of review in sections 10 and 11 are not threshold provisions parties can contract to change. First, how the text in section 9 of Art. 1 of the FAA does not allow for the application of any grounds of vacatur outside of those enumerated in sections 10 and 11. Second, how the policies underlying Art. 1 of the FAA 93, discussed and balanced by the Supreme Court in Byrd, lead to the same conclusion. 94 Neither of these arguments, however, is entirely persuasive, as the majority’s analysis of both is incomplete. Additionally, the Hall court failed to rely upon those courts’ decisions that have analyzed whether parties can contract to expand the judicial review provisions applicable to the NY Convention, despite how the text in section 9 of Art. 1 of the FAA, has a virtually identical meaning as the text in section 207 Art. 2 of the FAA. Finally, the Hall court does not recognize the implications of its holding, as it leaves the Open Issues unresolved. 95

Art. 1 of the FAA’s Statutory Text

The Hall majority’s first argument, premised on the text of section 9 of Art. 1 of the FAA, is consistent with those courts’ decisions that have treated the grounds of review in sections 10 and 11 as exclusive, and not as mere threshold provisions. 96 The majority emphasizes Congress’s inclusion of the terms “must”, “prescribed in” and “unless” in section 9 of Art. 1 of the FAA, and observes that, based on the use of those terms, Congress could not have intended for parties to be able to contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA. The majority does recognize that all the circuit courts

91 Id.
92 But see infra at nn. 179 and 185 for a discussion of how various courts that have analyzed the Hall decision have concluded that the Hall majority did not decide the issue of whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA.
93 Hall, 128 S.Ct. at 1406, n. 7.
94 See supra at pp. 8-9.
95 See infra at pp. 23-31.
96 See infra at n. 179.
previously addressing this issue have not reached the same conclusion. As the majority observed in footnote 5 of its opinion:

> [t]he Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review. See [Lapine II, 341 F. 3d at 1000]; Bowen v. Amoco Pipeline Co., 254 F. 3d 925, 936 (CA10 2001). The First, Third, Fifth, and Sixth Circuits, meanwhile, have held that parties may so contract. See Puerto Rico Tel. Co. v. U. S. Phone Mfg. Corp., 427 F. 3d 21, 31 (CA1 2005); Jacada (Europe), Ltd. v. International Marketing Strategies, Inc., 401 F. 3d 701, 710 (CA6 2005); Roadway Package System, Inc. v. Kayser, 257 F. 3d 287, 288 (CA3 2001); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F. 3d 993, 997 (CA5 1995). The Fourth Circuit has taken the latter side of the split in an unpublished opinion, see Syncor Int’l Corp. v. McLeod, 120 F. 3d 262 (1997), while the Eighth Circuit has expressed agreement with the former side in dicta, see UHC Management Co. v. Computer Sciences Corp., 148 F. 3d 992, 997–998 (1998).97

The majority’s decision is consistent with the Ninth and Tenth Circuit’s holdings, and dicta from the Eighth Circuit’s decision. However, like the courts’ analysis in these decisions, the Hall majority fails to look sufficiently beyond the text of sections 9 through 11 of Art. 1 of the FAA, and focus on the proper balance between Art. 1 of the FAA’s two most important underlying policies.98

**Byrd and the two Main Policies Underlying Art. 1 of the FAA**

As to the second argument, the Hall majority, relying on Byrd, but not other relevant Supreme Court decisions, sought to balance two of the most important policies underlying Art. 1 of the FAA – (i) the enforcement of parties’ agreements according to their terms, like any other contracts and (ii) the efficiency arbitration as an institution is supposed to provide, when compared to litigation. Although the Hall court eventually reaches the correct conclusion, its analysis of the Byrd decision is unpersuasive.

A Customer Agreement associated with a securities account opened by Lamar Byrd ("Byrd") at Dean Witter Reynolds Inc. ("Dean Witter) contained an arbitration clause.99 The arbitration clause stated: "[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration."100 Byrd sued Dean Witter in federal court and alleged various violations of the federal securities laws and also

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97 *Hall*, 128 S.Ct. at 1403, n. 5 (emphasis added); see also *Sheridan*, supra n. 87 at 96-98.
98 See supra at pp. 8-9.
99 *Byrd*, 470 U.S. at 214, 105 S.Ct. at 1239.
100 *Id.* at 215, 105 S.Ct. at 1239 (quoting App. to Pet. for Cert. 11).
Dean Witter argued that the District Court should order arbitration of the pendant state claims, and at the same time, stay arbitration of those claims until the federal claims were litigated in federal court. Dean Witter assumed that the causes of action brought pursuant to the federal securities laws had to be litigated in federal court and did not request that they be arbitrated. The District Court denied Dean Witter’s request and the Ninth Circuit Court of Appeals affirmed the District Court’s decision.

The question presented to the Supreme Court in Byrd was, "whether, when a complaint raises both federal securities claims and pendent state claims, a Federal District Court may deny a motion to compel arbitration of the state-law claims, despite the parties’ agreement to arbitrate their disputes." The Supreme Court held that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be possibly inefficient maintenance of separate proceedings in different forums." In reaching this conclusion, the Supreme Court found that the overriding goal of the FAA was not to "promote the expeditious resolution of claims," but to enforce arbitration agreements to the same extent as any other contracts, according to their terms. The court observed:

[w]e therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act--enforcement of private agreements and encouragement of efficient and speedy dispute resolution--must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. [ ] By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.

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101 Id. at 214, 105 S.Ct. at 1239.
102 Id. at 215, 105 S.Ct. at 1239.
103 Byrd, 470 U.S. at 215, 105 S.Ct. at 1239.
104 Id. at 215-216, 105 S.Ct. at 1239.
105 Id. at 216, 105 S.Ct. at 1239.
106 Id. at 217, 105 S.Ct. at 1239 (emphasis added).
108 Id. at 221, 105 S.Ct. at 1242-1243 (emphasis added)(However, the court observed "this is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes." Id., 105 S.Ct. at 1242 (citing H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).
Although the *Hall* majority’s holding was arguably correct, due to the lack of ambiguity in the text of section 9 of Art. 1 of the FAA, the majority’s analysis of the *Byrd* decision and in turn the policies underlying Art. 1 of the FAA, were unpersuasive. Significantly, although required by *Byrd*, the *Hall* majority did not explicitly point to a “countervailing policy” from another federal statute that would allow for a different balance between the two main policies underlying Art. 1 of the FAA.\footnote{See supra at p. 13.} The court could have, but did not, make a compelling argument during its discussion of *Byrd* that the text of, and policies underlying, section 9 of Art. 1 of the FAA, required a different balance of the two policies than was reached in *Byrd*.

Instead, Justice Scalia incorrectly observed that the *Byrd* court did not establish a balance between enforcing parties’ agreements according to their terms and efficiency as, “the [*Byrd*] Court was merely trying to explain that the inefficiency and difficulty of conducting simultaneous arbitration and federal-court litigation was not a good enough reason to defer the arbitration.”\footnote{Id. at 221, 105 S.Ct. at 1242-1243 (citations omitted)(emphasis added)(The actual position taken by the Supreme Court in *Byrd*, is arguably consistent with the dissenting justices’ opinion in *Hall*. That is, enforcing parties’ agreements according to their terms is the most important policy underlying Art. 1 of the FAA. As a result, the dissent argued that parties should be able to contract to expand the judicial review provisions in Art. 1 of the FAA, despite the language included in section 9 of Art. 1 of the FAA and Art. 1 of the FAA’s underlying legislative history.).} This interpretation is untenable. The *Byrd* Court concluded, based on the facts before it, that the primary purpose underlying Art. 1 of the FAA was to enforce parties’ agreements according to their terms, not efficiency. Moreover, based on this conclusion, the *Byrd* Court held that certain claims had to be litigated, while others had to simultaneously arbitrated, despite the resulting inefficiency. Due to *Byrd*’s actual conclusion, the *Hall* majority’s misguided analysis must be questioned.

The *Hall* decision must be further questioned, as it also ignores other cases analyzing *Byrd*, or that should have analyzed *Byrd*.

**Volt**

Notably, the majority did not cite the Supreme Court’s prior decision in *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248 (1989), which was decided after, and speaks to the balance of, the two policies addressed in *Byrd*.\footnote{See *Sheridan*, supra n. 87 at 96-98 (observing how the *Hall* dissent, unlike the majority, cites *Volt* in support of its conclusion).} *Volt* is clearly relevant
to the second argument addressed by the *Hall* majority, as it was heavily relied upon by most, if not every, circuit court addressing the circuit split resolved in *Hall*.

In *Volt*, the Appellant, Volt Information Sciences, Inc. ("Volt"), and the Appellee, Board of Trustees of Leland Stanford Junior University ("Stanford"), were parties to a construction contract. The contract included an arbitration clause and a choice-of-law clause. After a dispute arose between the parties, Volt formally demanded arbitration. In response, Stanford filed a complaint in California Superior Court alleging various causes of action.

Volt then filed a petition in the California Superior Court to compel arbitration of the dispute, and Stanford shortly thereafter moved to stay the arbitration. Stanford relied on Cal.Civ.Proc.Code Ann. § 1281.2(c), which allows, in part, for a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where "there is a possibility of conflicting rulings on a common issue of law or fact." The Superior Court refused to compel arbitration, and instead, relying on section 1281.2(c), "stayed the arbitration proceedings pending the outcome of the litigation." Art. 1 of the FAA does not include a provision analogous to section 1281.2(c).

The California Court of Appeals affirmed the California Superior Court's decision. The Court of Appeals made various observations and stressed that the FAA's purpose was "'not [to] mandate the arbitration of all claims, but merely the enforcement ... of privately negotiated arbitration agreements.'" The California Supreme Court denied Volt's petition for discretionary review. The Supreme Court then granted *certiorari*.

The Supreme Court in *Volt* found that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability,

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112 The majority’s failure to cite *Volt* was likely intentional, as its holding is arguably inconsistent with Justice Scalia’s first argument premised on the text of section 9 of Art. 1 of the FAA. However, *Volt*’s limiting/qualifying language overlooked by many courts and commentators discussing the circuit split, addressed *infra* at pp. 16-17, arguably would have provided the *Hall* majority with additional support for its holding.

113 See supra at p. 12.

114 *Volt*, 489 U.S. at 470.

115 The arbitration clause required any disputes between the parties "arising out of or relating to this contract or the breach thereof" be arbitrated. *Id.* The choice of law clause read "[t]he Contract shall be governed by the law of the place where the Project is located." *Id.*

116 *Id.*


118 *Id.* at 471.

119 *Id.* at 471.

120 *Id.*

121 *Id.* (citations omitted).

122 *Id.* at 472-473.
When addressing whether contractual agreements to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA are enforceable, circuit courts have relied on the following language from Volt:

[i]n recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." [Southland] (finding pre-empted a state statute which rendered agreements to arbitrate certain franchise claims unenforceable); [Perry] (finding pre-empted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims).  

The Supreme Court continued:

[b]ut it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [see Mitsubishi], so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, [see Byrd], we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

The Volt decision also contains certain limiting/qualifying language, (some of which is included in the above-quoted passages), disregarded or glossed over by most courts and commentators addressing whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA.  

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123 Id. at 469 (emphasis added).
124 See Chafetz, supra n. 47, at p. 43.
125 Volt, 489 U.S. at 478-79 (emphasis added).
126 Id. at 470 (emphasis added).
127 The terms limiting and qualifying are used interchangeably throughout the remainder of this article and are intended to have the same meaning.
128 See Chafetz, supra n. 47, at 11-13, 43-47; Chafetz, supra n. 76 at pp. 106-09.
are clearly enforceable, *Volt's* limiting language leads to uncertainty as to whether all agreements to apply state law provisions are enforceable. In other words, even though the drafters of Art. 1 of the FAA *did not* intend for Art. 1 of the FAA to entirely preempt state-law arbitration schemes, after *Volt*, it is unclear which state law provisions parties can and cannot agree to adopt.\(^{130}\)

The qualifying language in *Volt* includes the Supreme Court's pronouncement that the state law parties attempt to apply through their agreements must not either "*undermine* the goals and policies of the FAA" or "do[ ] *violence* to the policies behind the FAA."\(^{131}\) Other limiting language includes the observation that preemption only occurs when state law "*stands as an obstacle* to the accomplishment and execution of the full purposes and objectives of Congress."\(^{132}\) A final potentially limiting phrase is the Supreme Court's declaration that "parties are *generally free* to structure their arbitration agreements as they see fit."\(^{133}\) As all the limiting language does not have the same meaning, it is impossible to tell from *Volt*, which limiting language the Supreme Court wanted the lower courts to apply to a given case.\(^{134}\) This leads to confusion and a difficulty predicting when parties' agreements to apply state law in actions governed by Art. 1 of the FAA will be preempted.\(^{135}\)

Although ignored by the *Hall* majority, most of the circuit courts that have addressed whether parties can contract to expand the judicial review provisions enumerated in sections 10 and 11 of Art. 1 of the FAA, argue that *Volt's* holding is not only relevant to the application of state law, but also to the expansion issue.\(^{136}\) Accordingly, the argument follows, if parties intend for more thorough judicial review of their awards than is provided for in sections 10 and 11 of Art. 1 of the FAA, then based on *Volt’s* reasoning, courts must honor the parties’ intentions and apply their more comprehensive and agreed upon standards of review.\(^{137}\) Arguably, those

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\(^{130}\) See Chafetz, *supra* n. 47, at 12-13, *see also* Chafetz, *supra* n. 76, at pp. 106-09.

\(^{131}\) *Volt*, 489 U.S. at 478, 479 (emphasis added); *see also* Chafetz, *supra* n. 47, at 11-13; Chafetz, *supra* n. 76, at 106-09.

\(^{132}\) *Volt*, 489 U.S. at 477 (emphasis added); *see also* Chafetz, *supra* n. 47, at 11-13, Chafetz, *supra* n. 76, at pp. 106-09.

\(^{133}\) *Volt*, 489 U.S. at 479 (emphasis added); *see also* Chafetz, *supra* n. 47, at 11-13, Chafetz, *supra* n. 76, at pp. 106-09.

\(^{134}\) See Chafetz, *supra* n. 47, at 12-13, *see also* Chafetz, *supra* n. 76, at pp. 106-09.

\(^{135}\) See Chafetz, *supra* n. 47, at 12-13, *see also* Chafetz, *supra* n. 76, at pp. 106-09.

\(^{136}\) See Chafetz, *supra* n. 47, at 43-47, *see also* Chafetz, *supra* n. 76, at pp. 106-09.

\(^{137}\) See Chafetz, *supra* n. 47, at 12-13, *see also* Chafetz, *supra* n. 76, at pp. 106-09.
agreements providing for broader judicial review would also be subject to the aforementioned limiting language.\textsuperscript{138} 

The Volt court’s analysis is clearly relevant to the issue of whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA.\textsuperscript{139} The parties in both instances intended to apply a concept not included in Art. 1 of the FAA, albeit in different contexts, without direct authority in Art. 1 of the FAA allowing for the concept’s application. It is clear, however, why the Hall majority did not cite the Volt decision. Volt’s holding, that parties can agree to apply certain facets of state law, is irreconcilable with the majority’s holding in Hall, that parties can only apply the grounds of review in sections 10 and 11 of Art. 1 of the FAA.\textsuperscript{140} What the Hall majority likely did not recognize, however, is that despite Volt’s holding, its limiting language would have invited an argument that not all provisions in parties’ arbitration agreements – arguably including a provision expanding Art. 1 of the FAA’s judicial review provisions – are enforceable. 

By not even citing Volt and its limiting language, the Hall majority’s analysis must be further scrutinized. 

\textit{First Options} 

Justice Scalia and the majority also do not cite the Supreme Court’s decision in First Options v. Kaplan, 514 U.S. 938 (1995). This decision, like the qualifying language in Volt, would have provided additional support for the Hall majority’s resolution of the second argument, that the correct balance between the two polices – enforcing parties’ agreements according to their terms and efficiency – was not previously determined in all factual contexts by Byrd. In First Options, the Supreme Court balanced these two policies in the context of whether an arbitrator or a court should decide the issue of arbitrability. In addressing the proper balance, First Options, for some reason, did not rely on Byrd, although it was decided after Byrd.\textsuperscript{141} 

First Options concerned a securities dispute between First Options of Chicago, Inc. ("First Options"), Manuel Kaplan ("Mr. Kaplan") and Carol Kaplan ("Ms. Kaplan"), and Mr. 

\textsuperscript{138} See Chafetz, supra n. 47, at 11-13, 43-47; see also Chafetz, supra n. 76, at pp. 106-09.  
\textsuperscript{139} The Volt court’s analysis, for the same reasons, is also relevant to whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention. See infra at pp. 30-31; see e.g. Chafetz, supra n. 76.  
\textsuperscript{140} But see supra at p. 9.  
\textsuperscript{141} First Options, 514 U.S. at 945 (because the First Options court did not rely on the Byrd decision, an argument can be made that the Supreme Court did not intend for the Byrd court’s balance of the two policies to be determinative in all factual contexts).
Kaplan's wholly owned investment company, MK Investments Inc. ("MKI").\footnote{First Options, 514 U.S. at 940.} MKI, Mr. Kaplan and Ms. Kaplan (Mr. Kaplan and Ms. Kaplan are collectively referred to as the "Kaplans"), incurred a substantial amount of debt to First Options after the 1987 stock market crash.\footnote{Id.}

The Kaplans and MKI entered into an agreement to alleviate the Kaplans’ debt load.\footnote{Id. at 940.} Of the documents related to this agreement, only a workout agreement signed by MKI, but not the Kaplans, contained an arbitration clause.\footnote{Id. at 941.} The Kaplans and MKI could not satisfy all of their debts to First Options and First Options sought arbitration against the Kaplans and MKI.\footnote{Id. at 940.} Since only MKI signed the document containing the arbitration clause, the Kaplans refused to arbitrate.\footnote{Id.} Despite the Kaplans refusal, the arbitrators allowed the arbitration to go forward against MKI and the Kaplans.\footnote{First Options, 514 U.S. at 940.} The federal district court affirmed the arbitration award.\footnote{Id.}

The Third Circuit then overruled the district court, holding that the Kaplans did not have to arbitrate their disputes.\footnote{Id. at 941.} The Supreme Court granted \textit{certiorari} to resolve two questions, only one of which is important for the discussion in this article. The important question is, "[whether] the parties agree[d] to submit the arbitrability question[ ] itself to arbitration?"\footnote{Id. at 943.} The court eventually determined that the terms of the parties’ agreement govern who decides the issue of arbitrability.\footnote{Id. at 946.}

Before reaching this conclusion, the Supreme Court examined three counter-arguments made by First Options when supporting its position on how to answer the question.\footnote{Id. at 943.} Two of the counter-arguments are relevant to balancing Art. 1 of the FAA’s most important underlying purposes – maintaining arbitral efficiency and enforcing parties' agreements according to their terms. The first counter-argument proposed that "permitting parties to argue arbitrability to an arbitrator without being bound by the result would cause delay and waste in the resolution of
disputes.” The second, was “that the Arbitration Act [ ] requires a presumption that the Kaplans agreed to be bound by the arbitrators' decision, not the contrary.”

In responding to the first counter-argument, the court implies that the "slow[ing] down of the dispute resolution process" is material if "factual[ ] circumstances … could permit a confident conclusion" the dispute resolution process would in fact be slowed down. In addressing the second counter-argument, the court specifically states that the FAA’s underlying purpose was "not to resolve disputes in the quickest manner possible", but to enforce arbitration agreements according to their terms, like any other agreement. Moreover, that the second argument is legally erroneous and "there is no strong arbitration-related policy favoring First Options in respect to its particular argument..."

On the one hand, the First Options court observed in response to the first argument, that efficiency is material if a “confident conclusion” can be reached that the dispute resolution process will be slowed down because of something the parties agreed to, but on the other hand, in response to the second argument, efficiency is not the dominant policy underlying Art. 1 of the FAA and it is trumped by enforcing parties’ agreements according to their terms. Expanded judicial review obviously makes arbitration slower and less efficient, as courts are required to engage in a more thorough review of an arbitration award, than if asked to apply one of the grounds of review in sections 10 or 11 of Art. 1 of the FAA. The ambiguity created by the Supreme Court’s response to First Options’ two counter-arguments, would have provided the Hall majority with additional support for its conclusion that the proper balance between the two policies had not been definitively determined in Byrd, allowing the court to make an independent assessment of the balance. However, since the Hall majority ignored the ambiguity in the First Options decision as well, its holding must be called into further doubt.

\[^{154}\text{Id.}\]
\[^{155}\text{Id.}\]
\[^{156}\text{Id. at 946-47.}\]
\[^{157}\text{Id.}\]
\[^{158}\text{Id.}\]
\[^{159}\text{See Chafetz, supra n. 47, at 54-57; see also Chafetz, supra n. 76, at p. 114.}\]
\[^{160}\text{See Chafetz, supra n. 47, at 54-57; see also Chafetz, supra n. 76, at p. 114.}\]
The Similarity of the Meaning of the Language in
Section 9 of Art. 1 of the FAA and Section 207 of Art. 2 of the FAA

The *Hall* majority also fails to recognize how its analysis is similar to the analysis of those courts that have addressed whether parties can contract to expand the judicial review provisions in Art. V of the NY Convention, which applies to non-domestic arbitration awards. The *Hall* majority emphasizes the text of various provisions in Art. 1 of the FAA, but it some how does not recognize how the text in section 9 of Art. 1 of the FAA, applying to domestic awards, and section 207 of Art. 2 of the FAA, applying to non-domestic awards, has a virtually identical meaning. Both provisions address the universe of vacatur provisions applicable to each respective statutory framework. Section 9 of Art. 1 of the FAA applies to domestic awards and states:

[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

Section 207 of Art. 2 of the FAA applies to non-domestic arbitration awards and states:

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161 The term "domestic" is not defined in Art. 1 of the NY Convention. Various circuit courts have concluded section 202 of Art. 2 of the FAA defines awards "not considered as domestic" for purposes of the NY Convention. See Chafetz, supra n. 76, at p. 64, n. 6 (citations omitted). Section 202 of the NY Convention reads in pertinent part:

[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. *An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.* For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States. (emphasis added).

Based on section 202, arbitration awards for purposes of the NY Convention have been classified as non-domestic in only two instances. First, federal courts have held that an arbitration award is non-domestic if one or more party is not a United States' citizen. Second, an award is considered non-domestic if it is between United States' citizens, but has a reasonable relation with a foreign state. See Chafetz, supra n. 76, at p. 64, n. 6 (citations omitted).

162 See Chafetz, supra n. 76, at pp. 98-100.

163 (emphasis added).
[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.164

Although section 207 of Art. 2 of the FAA and section 9 of Art. 1 of the FAA do not include identical language, both statutes’ operative/material terms165, including "shall" and "must", have virtually identical meanings. First, in the context of laws, regulations or directives, "shall" is used to "express what is mandatory."166 Likewise, "must" is defined as "be required by law, custom, or moral conscience" or "be commanded or requested".167 As both terms describe something that has to be done without exception, their meanings are virtually identical. Since the meanings of the terms are virtually identical, the statutory provisions should be applied in the same manner, if the other operative terms surrounding them also have the same meanings.

Second, section 207 includes the material term "specified" and section 9 uses the operative term "prescribed", before laying out the provisions parties have to rely upon when filing a motion to vacate an arbitration award.168 The term "specified" means "to name or state explicitly or in detail"169, while the term "prescribed" means "to specify with authority", "to lay down a rule" or "to lay down as a guide, direction, or rule of action".170 Both of these terms set a defined limit on which vacatur provisions a party can rely upon when seeking to vacate an arbitration award under either Art. 1 of the FAA or the NY Convention and Art. 2 of the FAA. Therefore, as the meaning of the language modifying the grounds of review is virtually identical, the provisions arguably should be construed in the same fashion.171

Finally, both provisions include the material term "unless", which in this context means "except on the condition that: under any other circumstance than."172 The use of the term "unless" establishes that an award falling under either statute can only be vacated if one of the vacatur provisions subsequently specified is satisfied.173

164 (emphasis added).
165 The terms operative and material are used interchangeably throughout the remainder of this article and are intended to have the same meaning.
166 See Merriam Webster Dictionary at http://www.m-w.com/dictionary/shall.
168 See Merriam-Webster, supra n. 76, at pp. 98-100.
169 See Merriam Webster Dictionary at http://www.m-w.com/dictionary/specified
171 See Chafetz, supra n. 76, at pp. 98-100.
172 See Merriam Webster Dictionary at http://www.m-w.com/cgi-bin/dictionary.
173 See Chafetz, supra n. 76, at pp. 98-100.
The use of the term "unless", coupled with "shall" and/or "must", and "prescribed" and/or "specified", would seem to conclusively establish that the grounds of review set forth in sections 10 and 11 of Art. 1 of the FAA and Art. V of the NY Convention, are the only grounds of review a party can rely upon when attempting to vacate an arbitration award under either Art. 1 of the FAA or Art. 2 of the FAA and the NY Convention.174

Consistent with the above textual analysis, all of the appellate courts construing section 207, have concluded that the vacatur provisions applicable to Art. 2 of the FAA, found in Art. V of the NY Convention, are exclusive and not mere threshold provisions.175 To the contrary, before Hall, there was a circuit split over whether parties could contract to expand Art. 1 of the FAA’s judicial review provisions.176 If the Hall majority’s analysis was complete, to bolster its conclusion, it would have recognized the striking similarity between the meanings of the material terms in section 9 of Art. 1 of the FAA and section 207 of Art. 2 of the FAA, and pointed to the unanimous decision by those courts holding that section 207 of Art. 2 of the FAA requires the application of only the vacatur provisions in Art. V of the FAA. By not recognizing the similarities between the statutes, the Hall majority missed yet another opportunity to reinforce its conclusion and give some direction with respect to the Open Issues.

Open Issues

Although the Hall court did hold that arbitration awards falling under Art. 1 of the FAA could no longer be reviewed under a manifest disregard of the law standard177, its decision left the Open Issues unresolved.178

174 See Chafetz, supra n. 76, at pp. 98-100.
176 See supra at p. 12.
177 See supra at pp. 5-10; but see infra at n. 181.
178 See infra at pp. 23-31.
Limits on Contracting to Change the Provisions in Art. 1 of the FAA

The Hall majority’s decision attempts to clarify how much discretion parties have when tailoring the arbitration process to fit their respective needs. Specifically, parties may tailor many aspects of the actual arbitration, but the grounds of judicial review are off limits due to the text of, and legislative history underlying, the relevant provisions in Art. 1 of the FAA. The Hall court’s decision should have stopped courts from enforcing all parties’ contracts (governed by Art. 1 of the FAA) to expand the judicial review provisions in sections 10 and 11.179 The

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179 After Hall, various district and circuit courts have held that the grounds of review in section 10 and/or 11 of Art. 1 of the FAA are exclusive. See Ramos-Santiago v. United Parcel Service, 524 F.3d 120, 214 (1st Cir. 2008) (acknowledging that after Hall, manifest disregard of the law is no longer a valid ground of review); Robert Lewis Rosen Assoc., Ltd. v. Webb, 566 F. Supp. 2d 228, 232-33 (S.D.N.Y. 2008) (concluding that manifest disregard of the law is no longer an independent ground of review, but applying it “assuming arguendo” that it remains a valid and independent ground of review); ALS & Assoc. v. Agm. Marine Constructors Inc., 557 F. Supp. 2d 180, 185 (D. Mass. 2008) (refusing to apply manifest disregard of the law after the Hall decision); Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp. 2d, 997-99 (D. Minn. 2008) (observing that after Hall, neither parties can agree to apply, nor courts can apply, any grounds of review outside of those specified in section 10 of Art. 1 of the FAA); Ascension Orthopedics, Inc. v. Curasan, AG, No. H-07-4033, 2008 WL 2074058, *1-*2 (S.D. Tex. May 14, 2008) (observing that after Hall, it is “unequivocal” that the grounds of review in section 10 of Art. 1 of the FAA are exclusive); D.R. Horton, Inc., 2008 WL 4097594 at *3-*5 (holding that after Hall parties cannot contract to expand the judicial review provisions in section 10 of Art. 1 of the FAA); National Resort v. Cortez, 2008 U.S. Dist. Lexis 55745, 4 and n. 2 (5th Cir. 2008) (same); see also Thomas E.L. Dewey and Kara Siegel, ‘Hall Street’ and the Shrinking Scope of Judicial Review of Arbitral Awards, 5/15/08 N.Y.L.J. 24, col. 5 (2008) (observing that after Hall the grounds of review in section 10 of Art. 1 of the FAA may be exhaustive); Arthur D. Felsenfeld and Antonette Ruocco, ‘Manifest Disregard’ After ‘Hall Street’: The Early Returns, 9/18/08 N.Y.L.J. 24 (col. 1) (2008) (observing that after Hall, certain courts have concluded that the grounds of review in section 10 of Art. 1 of the FAA are exhaustive).

Additionally, various courts have: (i) not taken a position on what, if any, effects the Hall decision had on the validity of manifest disregard of the law as an independent ground of review, because the award before the respective court was clearly not made in manifest disregard of the law or (ii) treated and applied manifest disregard of the law as an additional ground of review only because it is unclear whether the doctrine is still viable after Hall, not because the manifest disregard of the law doctrine survived Hall. See Rogers v. KBR Tech. Services, Inc., No. 08-20036, 2008 WL 2337184, *2 (5th Cir. June 9, 2008) (not reaching a conclusion about the viability of manifest disregard of the law after Hall); Supreme Oil v. Abondolo, No. 07-CV-6479 & 6537, 2008 WL 2925300, *2-*3 (S.D.N.Y. July 31, 2008) (not reaching the issue of whether manifest disregard of the law survives Hall because the plaintiff did not raise the issue and the award before the court was clearly not made in manifest disregard of the law); Hartford Fire Ins. Co. v. The Evergreen Org., Inc., No. 07 Civ. 7977, 2008 WL 4185371, *5, n. 3 (S.D.N.Y. September 2, 2008) (same); Americredit Fin. Serv. v. Oxford Manag. Serv., No. 07-CV-3948, 2008 WL 4371752, *3-*6 (E.D.N.Y. September 18, 2008) (applying manifest disregard of the law out of abundance of caution because it is unclear how the Second Circuit would resolve the issue); Esso Exploration and Productions Chad, Inc. v. Taylors Int'l Services, Ltd., No. 06-5673-CV, 2008 WL 4280059, *1-*2 (2d Cir. September 17, 2008) (not deciding the issue of whether manifest disregard of the law survives Hall because the manifest disregard standard cannot be satisfied based on the facts before the court); Acuna v. Aerofreeze, Inc., No. 2:06-CV-432, 2008 WL 4744749, *2 (E.D. Tx October 29, 2008) (not reaching the issue, but applying manifest disregard of the law because it is unclear after Hall whether the Fifth Circuit would still treat manifest disregard of the law as a separate ground of review); Qwest, 2008 WL 4216261 at *3-*4 (observing how the issue was not resolved and applying manifest disregard of the law because the standard cannot be satisfied based on the facts before the court); O’Leary v. Salomon Smith Barney, No.
decision also should have stopped all courts from applying any grounds of review outside of those enumerated in sections 10 and 11 of Art. 1 of the FAA.\footnote{180}

However, not all courts have reached these obvious conclusions. Certain courts have inexplicably concluded that manifest disregard of the law remains an additional ground of review, independent from the grounds of review enumerated in sections 10 and 11 of Art. 1 of the FAA, which can be agreed to by parties and/or applied by courts.\footnote{181} These interpretations of \textit{Hall} ignore how the \textit{Hall} court unequivocally held – based overwhelmingly on the text of section 9 of Art. 1 of the FAA – that the grounds of review in sections 10 and 11 of Art. 1 of the FAA are exclusive. Significantly, how the \textit{Hall} majority refused to accord the language in \textit{Wilko} – “in manifest disregard of the law” – the significance \textit{Hall} urged, authorizing the application of manifest disregard of the law as an extra-statutory ground of review.\footnote{182} Also, how the majority observed how “[t]here is nothing malleable about ‘must grant,‘ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies. [Despite what \textit{Byrd} says][t]his does not sound remotely like a provision meant to tell a
court what to do just in case the parties say nothing else.”

Finally, those courts ignore how it is clear from the dissenting justices’ opinion, that the majority intended to hold that the grounds of review in sections 10 and 11 of Art. 1 of the FAA are exclusive, and that manifest disregard of the law can no longer be treated as an additional ground of review.

Even more surprising, unsubstantiated, and illogical, are those courts that argue that the Wilko court’s use of the of the phrase “in contrast to manifest disregard”, actually refers to the grounds of review in section 10 collectively, or, to the ground in section 10(a)(4) individually or combined with the ground in section 10(a)(3). Even assuming that manifest disregard of the law refers to one of these variations; the analysis of whether an award was made in manifest disregard of the law is entirely unique from the analysis undertaken when applying any of the grounds of review in section 10. In fact, all district and circuit courts have developed comprehensive bodies of law that they apply when analyzing whether an award was made in manifest disregard of the law. Accordingly, if this interpretation is adopted, manifest disregard of the law remains an additional or unique ground of review that is not included in either section 10 or 11 of Art. 1 of the FAA. Allowing its application – regardless of which variation – clearly runs afoul of the Hall court’s holding, that the grounds of review in sections 10 and 11 of Art. 1 of the FAA are the only grounds of review parties can agree to apply and courts can apply.

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183 Id. at 1405 (emphasis added).
184 Id. at 1408-09.
185 See Stolt-Nielson SA v. Animalfeeds Int’l Corp., No. 06-3474, 2008 WL 4779582 (2d Cir. November 4, 2008)(observing how after Hall, manifest disregard of the law refers to the grounds of review in section 10 of Art. 1 of the FAA collectively); Stevens & Co. v. Cikanek, No. 08-C-706, 2008 WL 2705445, *4 (N.D. Ill. July 9, 2008)(observing how after Hall, manifest disregard of the law is a narrow ground of vacatur encompassing all of the grounds of review in section 10 of Art. 1 of the FAA, or, is another way to refer to the ground of review in section 10(a)(4), which is violated when an arbitrator exceeds its power); Mastec North America, Inc. v. MSE Power Systems, Inc., No. 1:08-CV-168, 2008 WL 2704912 (N.D.N.Y. July 24, 2008) (observing that after Hall, manifest disregard of the law is an interpretation of all the section 10 grounds of review collectively); Eastern Seaboard Concrete Const. Co. v. Gray Const., No. 08-37-P-S, 2008 WL 1803781, *4 (D. Maine April 18, 2008)(same); Wood v. Pennix Resources LP, No. H-06-2198, 2008 WL 2609319, *6-8 (S.D.TX June 27, 2008)(recognizing that manifest disregard of the law may be a “derivation” of one or more of the section 10 grounds of review); Johnson v. Summit Equities, 864 N.Y.S. 2d 873, 886-87 (Sup. Ct. NY 2008)(applying Art. 1 of the FAA and observing that after Hall, manifest disregard of the law is an interpretation of section 10(a)(4) of Art. 1 of the FAA); Halliburton Energy Services, Inc., 553 F. Supp. 2d at 751-53(arguing that after Hall, manifest disregard of the law could refer to one or more of the grounds of review in section 10 of Art. 1 of the FAA); NL Indus., 2008 WL 3165687 at *3-*6 (same); Chase Bank, 859 N.Y.S.2d at 348-49 (applying manifest disregard of the law as an interpretation of the section 10 requirements); see also Dewey and Siegel, supra n. 179 at col. 5 (advocating that after Hall, manifest disregard of the law refers to the grounds of review in section 10 of Art. 1 of the FAA collectively and arguing that remand to the arbitration panel for clarification is the best way to resolve this issue); see also Felsenfeld and Ruocco, supra n. 179 at col. 1(observing that after Hall, certain courts have concluded that manifest disregard of the law refers to all the grounds of review in section 10 of Art. 1 of the FAA collectively).
Moreover, combined with certain courts’ unsubstantiated insistence that manifest
disregard of the law survives the Hall decision as an additional ground of review, the mere
fact that the Supreme Court heard this dispute will inevitably lead to uncertainty about whether
parties can still agree to alter other aspects of a court’s review of an arbitration award, or, other
non-judicial review related facets of an arbitration. This uncertainty will continue until each
issue that arises is resolved by the Supreme Court.

For example, the validity of at least one form of judicial review previously authorized by
certain courts is now in doubt. Numerous courts have discussed in dicta, or, affirmatively have
permitted, parties to contract for an appellate arbitration panel to review their arbitration awards,
and apply standards of review that are more comprehensive than the standards in sections 10 and
11 of Art. 1 of the FAA. Judicial review conducted by an appellate arbitration panel is not
included in either section 10 or section 11 of Art. 1 of the FAA. Accordingly, it is unclear now
whether parties can still agree to this type of review after Hall. This uncertainty translates into
risk, which will inevitably lead to future hesitation by parties when they think about changing,
via contract: (i) the way their arbitration awards are reviewed and (ii) countless other aspects of
the arbitral process. In turn, the Hall decision will undercut one of the most important purposes
underlying Art. 1 of the FAA, enforcing parties’ agreements according to their terms, as
provisions parties include in their arbitration agreements may now be unenforceable.

The Application of State or Common Law Vacatur Provisions

The Hall majority was careful to point out that parties can still rely upon state statutes or
the common law if they want to subject their arbitration awards to broader judicial review. By
referring to these alternate means of review, it is unclear whether the Hall majority was
authorizing courts applying Art. 1 of the FAA to honor parties’ agreements to apply state and
common law vacatur provisions, or, if it was trying instead to encourage parties to include a

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186 See supra at n. 181.
187 Most significantly, due to the decisions of those courts that have insisted manifest disregard survives Hall as an
independent ground of review or as a combination of one or more grounds of review, the Supreme Court will likely
be forced to re-visit the identical issue it clearly resolved in Hall.
188 See Lapine II, at 1000; Bowen, 254 F.3d at 934; Redish v. Yellow Transportation, Inc., No. 3-07-CV-1065-0,
2008 WL 2572658, *4 (N.D. Tx. June 24, 2008)(arguing that after Hall parties can still agree to have a second
arbitrator review their arbitration award because Hall does not speak to this issue) see also Chafetz, supra n. 47, at
48-49; Sheridan, supra n. 87 at 96-98 (advocating use of appellate arbitration panels, putting forth an “end around
solution” and encouraging “artful draftsmanship” in response to the Hall decision).
189 See supra at pp. 9-10; Sheridan, supra n. 87 at 104 (discussing the Hall majority’s “Cryptic Language” when
addressing the potential application of “state statutory or the common law”).
provision in their arbitration agreements requiring a state court to review an arbitration award. Regardless of the majority’s intent, both potential results are problematic.

If the Hall majority was authorizing courts to apply state law vacatur provisions, then its reasoning is consistent with the Supreme Court’s reasoning in Volt. Volt allowed parties to agree, subject to the limiting language\textsuperscript{190}, that certain provisions from a state’s arbitration statute (California’s in Volt), but not included in Art. 1 of the FAA, could be applied by a court addressing an arbitration governed by Art. 1 of the FAA. Additionally, numerous courts – but not the majority in Hall, which emphasized the text of section 9 of Art. 1 of the FAA – have taken Volt’s reasoning one step further and held that it could be extended to parties’ agreements to expand the judicial review provisions in sections 10 and 11. Although consistent with Volt’s holding, allowing the application of state or common law vacatur provisions is inconsistent with the Hall majority’s holding that the vacatur provisions in sections 10 and 11 of Art. 1 of the FAA are exclusive.\textsuperscript{191} Accordingly, it is impossible to reconcile how on the one hand, the Hall majority can conclude that the vacatur provisions applicable to Art. 1 of the FAA are exclusive, but on the other, argue that parties’ agreements to apply state and common law vacatur provisions, which may be different from those in Art. 1 of the FAA\textsuperscript{192}, are enforceable.

Instead, the Supreme Court may have been encouraging parties to include arbitration provisions calling for review of their arbitration awards by state courts.\textsuperscript{193} This result is also troublesome because state court systems are less efficient than the federal court system, due to the volume of cases they are required to hear. This inefficiency will inevitably discourage

\textsuperscript{190} See supra at pp. 16-18.
\textsuperscript{191} In other words, due to the language in section 9 of Art. 1 of the FAA and to a lesser extent its underlying legislative history, the Hall court drew a line in the sand and found that parties’ agreements to modify the judicial review provisions in Art. 1 of the FAA, must be treated differently from agreements to modify other aspects of the arbitral process.
\textsuperscript{192} One state’s arbitration scheme that includes broader grounds of review than those in Art. 1 of the FAA is New Jersey. See Smith, supra n. 129 at 566 (recognizing that the vacatur provisions in New Jersey’s arbitration scheme are broader than those in the FAA).
\textsuperscript{193} If this is the case, the Hall court assumes that a given state’s vacatur provisions and the language modifying those vacatur provisions are materially different than the language in sections 9 through 11 of Art. 1 of the FAA. However, this is often not the case, as many state arbitration schemes and their respective vacatur provisions are modeled after and very similar to Art. 1 of the FAA. See e.g. Summit Equities, 864 N.Y.S. at 886 (observing how the provisions in Art. 1 of the FAA and New York state’s arbitration scheme are very similar); Mastec, 2008 WL 2704912 (Same); Cable Connection, 82 Cal. Rptr. 3d at 236 (observing how the provisions in Art. 1 of the FAA are very similar to those in California’s Arbitration Act); Raymond Professional Group, Inc. v. William A. Pope Co., 07 A 00137, 2008 WL 4968001 at * 11 (N.D. Ill. November 19, 2008)(observing that Art. 1 of the FAA is virtually identical to the Illinois Arbitration Act); see also Albert G. Besser, Arbitration Vacatur: The Supreme Court Bars One Route And Muddles the Other-Manifest Mistake is Dead!, 34-Fall Vt. B.J. 67 (2008)(recognizing that there are only minimal differences between Art. 1 of the FAA and the Vermont Arbitration Act).
certain parties from arbitrating their disputes falling under the ambit of Art. 1 of the FAA, because they are (i) not allowed to agree to the scope of arbitral review that a federal court can apply and (ii) have to wait an exorbitant amount of time for their arbitration awards to potentially be reviewed by a state court in a broader manner than allowed for under Art. 1 of the AAA. Additionally, if this is what the Hall majority envisioned, it assumes, without providing any support, that state arbitration statutes or the common law even allow for expanded judicial review. Irrespective of which interpretation the majority intended, less people will arbitrate their disputes due to the Hall decision. As a result, another one of the most important purposes underlying Art. 1 of the FAA, ending hostility towards arbitration, will be ignored.

**Grounds of Review Other than Manifest Disregard of the Law That are Not Enumerated in Sections 10 and 11 of Art. 1 of the FAA**

Other than manifest disregard of the law, the majority does not discuss any grounds of review that are not included in sections 10 and 11 of Art. 1 of the FAA. Other grounds of review courts have implied, include, when an award is “completely irrational,” “arbitrary or capricious,” contrary to “public policy,” and where an award fails to draw its essence from the underlying contract. Although after Hall neither parties nor courts will likely be allowed to apply any grounds of review outside of those specified in sections 10 and 11 of Art. 1 of the FAA, by not at least discussing those additional grounds of review in dicta, the Supreme Court failed to close the door on parties relying on, and circuit courts applying, the grounds. This will result in a further waste of scarce judicial resources, as parties could still raise, and the circuit courts could still have to entertain, in contravention of the Hall holding, vacatur proceedings based on these additional grounds of review not enumerated in either section 10 or 11 of Art. 1 of the FAA.

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194 But see e.g., Smith, supra n. 129 at 566 (recognizing that the vacatur provisions in New Jersey’s arbitration scheme are broader than those in Art. 1 of the FAA).
196 See Chafetz, supra n. 47, at 42, n. 266 (citations omitted).
197 See Chafetz, supra n. 47, at 42, n. 267 (citations omitted).
198 See Chafetz, supra n. 47, at 42, n. 268 (citations omitted).
199 See Chafetz, supra n. 47, at 42, n. 269 (citations omitted).
200 But see supra at notes 181 and 185. The decisions of those courts still allowing for the application of manifest disregard of the law, fail to address any other extra-statutory grounds of review that courts have applied. Accordingly, it is impossible to be sure whether their analysis would apply to other additional grounds of review besides manifest disregard of the law.
Contracting to Eliminate Certain or all Grounds of Review in Sections 10 and 11 of Art. 1 of the FAA

The Hall decision also does not speak to whether parties can contract to reduce or eliminate the grounds of review included in sections 10 and 11 of Art. 1 of the FAA. The two arguments that the Hall court makes in support of its conclusion – the textual and policy arguments—do not resolve this alternate issue. In fact, the text of the statute does not speak to this issue at all. Moreover, the effect of limiting or eliminating judicial review, would further the two main policies underlying Art. 1 of the FAA – enforcing parties’ agreements according to their terms and the efficiency arbitration as an institution is supposed to provide. An agreement limiting or eliminating judicial review would enforce parties’ contracts to limit or do away with judicial review and also lead to a more efficient dispute resolution process, as there would be no review. However, this result would be problematic because numerous courts have found that the review provisions enumerated in sections 10 and 11 of Art. 1 of the FAA, albeit limited to circumstances equivalent to fraud, are extremely important.

The Hall Decision’s Impact on Non-Domestic Arbitration Awards

The Hall majority does not recognize the implications of its decision on non-domestic arbitration awards, those governed by Art. 2 of the FAA and the NY Convention. As a result of the Hall majority’s holding and the circuit courts’ unanimous determination that parties cannot contract to expand the judicial review provisions in Art. V the NY Convention, the Supreme Court will likely not be asked to grant certiorari to a case where parties are seeking to

201 See supra at pp. 6-9.
202 See Hoeft v. MVL Group, Inc., 343 F.3d 57, 64, 66 (2d. Cir. 2003)(“Parties seeking to enforce arbitration awards through federal-court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard. Therefore, we must examine the merits of the District Court’s conclusion that the arbitrator manifestly disregarded the law in rendering his award…..Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors. In enacting § 10(a), Congress impresses limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct. This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts. Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with § 10(a).”)(emphasis added); but see Aerojet-Gen. Corp. v. Am. Arbitration Ass’n, 478 F.2d 248, 251 (recognizing how certain courts have allowed parties to contract to eliminate all judicial review if there is evidence that was the parties’ explicit intent).
203 See supra at n. 161 for a discussion about non-domestic arbitration awards.
204 But see supra at notes 181-185.
205 See supra at n. 10.
expand the judicial review provisions applicable to the NY Convention. However, the Hall decision will still have far reaching affects on the scope of judicial review available for non-domestic arbitration awards. The most significant involves whether the vacatur provisions in and implied under Art. 1 of the FAA can be applied to non-domestic arbitration awards, through Art. V(1)(e) of the NY Convention.\textsuperscript{206} Most courts addressing arbitration awards: (i) governed by Art. 2 of the FAA and the NY Convention and (ii) both rendered and sought to be enforced in the United States, have concluded that Art. V(1)(e) allows parties to apply the vacatur provisions in and implied under sections 10 and 11 of Art. 1 of the FAA, to non-domestic awards.\textsuperscript{207} The implied grounds of review include manifest disregard of the law.

Due to the Hall majority’s holding, parties will likely no longer be able to apply manifest disregard of the law\textsuperscript{208} through Art. V(1)(e) of the NY Convention, and as discussed supra at p. 29, will also likely not be able to apply any of the other grounds of review that have been implied under sections 10 and 11 of Art. 1 of the FAA. This result is significant, because it will minimize the affects of Art. V(1)(e) when it comes to arbitration awards both made and sought to be reviewed in the United States under the NY Convention and Art. 2 of the FAA. Parties will now likely only be allowed to apply the grounds of review in sections 10 and 11 of Art. 1 of the FAA to actions governed by the NY Convention, which, although worded differently, are really not much different than the grounds of review in Art. V of the NY Convention. This result will likely either lead to: (i) less parties agreeing to arbitrate their non-domestic disputes, because their awards can no longer be reviewed in a broader fashion than provided for in the NY Convention or (ii) more parties being attracted to arbitration for their non-domestic disputes, due to the certainty of less wasteful litigation promised by limited review. Although one cannot be certain what will occur, it is obvious that the Hall court’s refusal to address the Open Issues leads to further uncertainty and less predictability.

\textbf{Conclusion}

In granting certiorari to resolve the circuit split over whether parties can contract to expand the judicial review provisions in sections 10 and 11 of Art. 1 of the FAA, the Hall majority intended to draw a bright line to provide certainty for contracting parties. However, on

\textsuperscript{206} See Chafetz, supra n. 76 at pp. 103-05.
\textsuperscript{207} See Chafetz, supra n. 76 at pp. 103-05.
\textsuperscript{208} But see supra at nn.181 and 185.
top of placing too much emphasis on the text of section 9 of Art. 1 of the FAA, and improperly construing *Byrd*, the *Hall* majority also simultaneously ignored two of the most important Supreme Court decisions – *Volt* and *First Options* – that the circuit courts previously addressing the expansion issue relied upon.\(^\text{209}\) Moreover, the majority failed to recognize the similarity between the meanings of the material language included in section 9 of Art. 1 of the FAA and section 207 of Art. 2 of the FAA, which language stands for the proposition that the grounds of review included in the respective statutory sections are exhaustive and cannot be circumscribed by a court or contracting parties. Finally, due to the failure to address the Open Issues\(^\text{210}\), the *Hall* decision will also have the unintended effect of leading to more uncertainty. As a result of this uncertainty, the *Hall* decision will discourage parties from agreeing that Art. 1 of the FAA, and specifically its grounds of vacatur, should apply to their disputes.\(^\text{211}\) This inevitable decrease in the number of arbitrations harkens back to a time prior to *Wilko*,\(^\text{212}\) when arbitration was frowned upon, and will be the unintended, but inevitable, legacy of the *Hall* court’s decision.

\(^{209}\) *See supra* at pp. 14-20.

\(^{210}\) *See supra* at pp. 23-31.

\(^{211}\) Those courts concluding that the *Hall* decision: (i) did not stop parties from contracting to apply, or courts from applying manifest disregard of the law; (ii) did not reach a conclusion on whether manifest disregard of the law survives as an independent ground of review, or (iii) concluded manifest disregard of the law is an interpretation of one or more of the grounds of review in section 10 of Art. 1 of the FAA, only work to increase the uncertainty.

\(^{212}\) *See supra* at pp. 6-7.