

AN AUSTRALIAN APPROACH TO REPLACING MANIFEST DISREGARD IN COMMERCIAL DISPUTES

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ABSTRACT

Federal courts are split on whether the U.S. Federal Arbitration Act permits courts to set aside arbitration awards that misapply substantive law. While the U.S. Supreme Court decision in Wilko v. Swan has provided support for the position that a court may vacate an arbitration award upon a showing of “manifest disregard” for the law, its decision in Hall Street Associates, LLC v. Mattel, Inc. has suggested to some that courts must enforce awards, even when the arbitrators misstate the applicable law.

The law is certain, however, in Australia, where courts refuse to disturb arbitration awards on the basis of legal error.

This article provides a background on the applicable laws in the United States and Australia for vacating arbitration awards. Multiple cases have presented the U.S. Supreme Court the opportunity to settle the issue; Zeidman v. Lindell Management is a recent example. This article argues the Court should follow Australia’s model for commercial disputes. It does so by analyzing the arbitrary application of current U.S. law and noting the lower costs and greater efficiency Australia’s system provides. It also considers alternatives to the American status quo proposed by other authors.

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I. INTRODUCTION

It seemed like every person in this story made a mistake. Prominent businessman and political activist Mike Lindell claimed Donald Trump was the winner of the 2020 U.S. presidential election and the official vote tallies were wrong.¹ He sponsored a contest offering a large cash prize to anyone who could disprove his assertion.² An entrant submitted proof that Lindell was mistaken. Lindell thought the entrant was wrong, and so the two proceeded to arbitration.³ The arbitrators ruled for the entrant, but they considered legally irrelevant evidence.⁴ A trial court refused to vacate the arbitration award, but the court of appeals reversed and remanded with directions to vacate, explaining that the arbitrators exceeded their authority and discussing the doctrine of “manifest disregard” for the law.⁵

The lawsuit, *Zeidman v. Lindell Management LLC*, attracted media attention because of the political subject matter and famous litigant.⁶ But it also raised an

¹ *Zeidman v. Lindell Mgmt. LLC*, 145 F.4th 820, 822 (8th Cir. 2025).

² *Id.*

³ *Id.* at 822–23.

⁴ *Id.* at 823–24.

⁵ *Id.* at 822–23, 827–828.

⁶ See, e.g., Ali Watkins, *MyPillow Founder Will Not Pay Winnings for Election*

important issue: When should U.S. courts be able to vacate an arbitration award on the basis of an arbitrator misapplying the law? On the one hand, it is unfair to deliberately enforce judgments when a court knows it is based on a mistake. But on the other hand, allowing parties to reargue the legal merits of their cases dramatically inflates the burden of litigation that parties seek to avoid by choosing arbitration. This can be particularly frustrating in complex disputes that involve a series of errors parties seek to correct, like *Zeidman* and many others.

It is an open question whether the U.S. Federal Arbitration Act (the “FAA”)⁷ permits courts to vacate arbitration awards on non-statutory grounds. The U.S. Supreme Court left it open in its 2008 decision in *Hall Street Associates, LLC v. Mattel, Inc.*⁸ It expressly declined to settle it in its 2010 decision in *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*⁹ Lower courts have been split on the issue, with most saying they can vacate an arbitration award in some situations, and some saying they cannot.

Multiple litigants have presented an opportunity to settle the issue. For example, in 2025, the Court was presented with the case of *Peterson v. Minerva Surgical*, but it denied a petition for certiorari.¹⁰ The Court will soon have another chance to rule on the issue: the claimant in *Zeidman* has filed another petition for certiorari, seeking to clarify whether “manifest disregard” for the law is a valid basis upon which a court may set aside an arbitration award.¹¹ The Supreme Court will likely decide whether to grant the petition sometime this year.

For now, the issue is unsettled in the United States. Australia, however, does not have a similar debate over its arbitration law. The settled laws that govern arbitration in Australia do not permit judges to vacate an arbitration decision in circumstances where an arbitrator misapplies the relevant law, unless the arbitration agreement specifically provides for such appeal rights or unless a challenger successfully argues that the misapplication of the law breached public policy.

These laws have worked well: Australian dispute resolution is generally faster and less expensive than its U.S. counterpart, and it also maintains an appropriate level of flexibility to address other limited issues in an underlying arbitration.

This article argues that the Australian approach to reviewing arbitration awards should serve as a model for how the United States should consider commercial arbitration awards. Ultimately, the U.S. Supreme Court should finally reject the

Challenge, Court Rules, *N.Y. Times* (July 24, 2025), <https://www.nytimes.com/2025/07/24/us/elections/mypillow-founder-challenge-winnings.html> (last visited Jan. 10, 2026) [<https://perma.cc/LY3F-83EF>].

⁷ 9 U.S.C. § 10.

⁸ 552 U.S. 576, 590–92 (2008).

⁹ 559 U.S. 662, 672 n.3 (2010).

¹⁰ See Supreme Court Docket, *Peterson v. Minerva Surgical, Inc.*, No. 24-712 (cert. denied Feb 24, 2025).

¹¹ Petition for a Writ of Certiorari, *Zeidman v. Lindell Mgmt. LLC*, No. 25-504 (U.S. Oct. 21, 2025).

standard of “manifest disregard” as a basis for vacating commercial arbitration decisions pursuant to the FAA. It should do so, both to provide a better system of dispute resolution for litigants, but also to maintain the U.S. as a trusted center for international commerce.

Part I of this Article provides a background on the applicable laws governing the enforcement of arbitration awards in the United States and Australia. In particular, it explains how those laws generally require deference to the decisions of arbitrators. Part II explains how exceptions to the general principles set forth in Part I differ in the two countries. While Australia’s exceptions do not include situations in which an arbitrator makes a legal error, U.S. courts do apply such an exception. The *Zeidman* case, in particular, illustrates how U.S. courts apply this rule. Part III argues that the United States should adopt Australia’s policy and abandon manifest disregard as a basis for vacating commercial arbitration awards. It notes how courts often apply the standard arbitrarily, and it argues that the existence of the standard undermines the benefits of arbitration, such as efficiency, finality, and confidentiality. Finally, Part IV considers alternatives proposed by other commentators and explains why the Australian model is superior.

II. AUSTRALIAN AND U.S. COURTS BOTH GENERALLY DEFER TO ARBITRATION DECISIONS

A. *Australian Courts’ Deference to Arbitral Awards*

Two sets of laws primarily establish the legal framework governing arbitration in Australia. The International Arbitration Act 1974 (Cth) (the “IAA”) is a federal statute that governs international arbitration, while a uniform set of state and territorial laws in the Commercial Arbitration Acts (“CAAs”) govern domestic arbitration.¹² Like the United States and many other countries, Australia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹³ (the “New York Convention”), which mandates enforcement of arbitral awards rendered abroad.

Since enactment, Australia has amended the IAA to adopt the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (“the Model Law”),¹⁴ preventing applicable parties from contracting

¹² See *International Arbitration Act 1974* (Cth); *Commercial Arbitration Acts 2010* (NSW) (and equivalent legislation enacted in other Australian states and territories).

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 (1958); Australian Treaty Series 1975 No 25, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, <https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/dfat/treaties/1975/25.html> [https://perma.cc/7AFF-LQM5].

¹⁴ *International Arbitration Act 1974* (Cth), s 16 and sch 2, adopting UNCITRAL Model Law on International Commercial Arbitration, as adopted on 21 June 1985, and amended on 7 July 2006.

out of the Model Law.¹⁵ The CAAs in Australia are also based on the Model Law and aligned at the federal level in Australia with the IAA.¹⁶

This legislation provides a foundation of strong support in Australia for arbitration as a mechanism for alternative dispute resolution to that of a court-litigated determination of a dispute.¹⁷ One of the chief aims of the statute is to facilitate the recognition and enforcement of arbitral awards in Australia.¹⁸ But the objectives of the statutes extend further; they support international trade and commerce by encouraging the use of arbitration as a method of resolving disputes, and they provide arbitration procedures that enable parties to cost-effectively, informally, and quickly resolve commercial disputes.¹⁹

Australian courts tend to adhere to the principle of minimal intervention in arbitration proceedings. History in Australian court practice demonstrates this, as do the further limited powers afforded to Australian courts under the Model Law and, accordingly, the IAA and the CAAs. These restricted powers include granting interim measures of protection, assisting in the taking of evidence, and, where requested by a party, deciding on a challenge to an arbitrator or termination of the role of an arbitrator.²⁰

Further illustrating its courts' deference to arbitration, the grounds for challenging arbitration awards in Australia are limited. Unless there is a contractual provision between the parties for vigorous judicial review, courts in Australia generally do not re-litigate the merits of a dispute. Instead, Australian courts serve a more supervisory role and focus on issues of procedural fairness and compliance with the law. The CAAs and the IAA provide that arbitral awards can be set aside by an Australian court only if it can be proven, among other things, that:

- a. a party to the arbitration agreement was suffering incapacity;
- b. the arbitration agreement is not valid under the applicable law;
- c. a party was not given proper notice of the arbitral proceedings or was otherwise unable to present the party's case;
- d. part or all of the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or
- e. the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties, as long as the agreed procedure that was not followed does not conflict with an applicable

¹⁵ *International Arbitration Act 1974* (Cth) s 2D(e).

¹⁶ *Commercial Arbitration Act 2011* (Vic); *Id.*

¹⁷ *Commercial Arbitration Act 2011* (Vic) ss 1AA, 1AC; *International Arbitration Act 1974* (Cth) s 2D.

¹⁸ *International Arbitration Act 1974* (Cth) s 2D(d).

¹⁹ *International Arbitration Act 1974* (Cth) s 2D(a); *Commercial Arbitration Act 2011* (Vic) s 1AC(2)(b).

²⁰ Articles 13(3), 14, 17J, 27, United Nations Commission on International Trade Law Model Law on International Commercial Arbitration; Section 16, *International Arbitration Act 1974* (Cth); Section 14, *Commercial Arbitration Acts*.

CAA.²¹

An Australian court can also set aside or refuse to enforce an award if it finds that the subject matter of the dispute is not capable of determination by arbitration under the applicable state’s law, or the award is in conflict with the public policy of the applicable state or territory.²² The violation of public policy (or public interests) grounds, however, is a very high standard for parties to meet.²³ Australian courts will only apply the public policy grounds in refusing to enforce an arbitral award when there has been a breach of fundamental principles of morality and justice in the jurisdiction.²⁴ This includes when the making of the award was induced or affected by fraud or corruption and when a breach of “natural justice” occurred in connection with the making of the award.²⁵

The “natural justice” arm of public policy requires evidence of real unfairness or practical injustice, rather than mere technical breaches, before an Australian court will intervene to disturb the arbitral award. In a very rare decision of an Australian court where enforcement of a foreign arbitral award pursuant to the IAA was denied, the Federal Court of Australia in *Beijing Jishi Venture Capital Fund (Limited Partnership) v Liu* declined to enforce an arbitral award granted by the China International Economic and Trade Arbitration Commission (CIETAC) against one respondent because she had not been properly notified of the arbitration proceedings.²⁶ The Federal Court held that this failure constituted a breach of natural justice and, accordingly, contravened public policy.²⁷ Although attempts were made to serve the respondent, the Court determined that service was invalid under both the arbitration agreement and the administering institution’s (CIETAC) rules.²⁸ Still, reflecting Australian courts’ deference to arbitration, the Federal Court granted enforcement of the award against the remaining respondents, despite refusing to enforce the arbitral award against the one respondent who challenged service.²⁹ The decision underscores the necessity of ensuring that all parties receive adequate notice of the subject arbitration proceedings for a subsequent arbitral award to be enforceable in Australia.

Additionally, if a relevant arbitration agreement provides for rights of appeal or review from an arbitrator’s decision, Australian law permits setting aside that decision because the parties agreed to allow the court to do so by their contract. In

²¹ *International Arbitration Act 1974* (Cth) s 8; *Commercial Arbitration Act 2011* (Vic) s 34(2)(a).

²² *Commercial Arbitration Act 2011* (Vic) s 34(2)(b); *International Arbitration Act 1974* (Cth) s 8(7)(a).

²³ *International Arbitration Act 1974* (Cth) s 8(7)(b).

²⁴ *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584, [32].

²⁵ *International Arbitration Act 1974* (Cth) s 8(7A).

²⁶ *Guoao Holding Group Co Ltd v Xue (No 2)* [2021] FCA 477.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

the *Commercial Arbitration Act 2011* (Vic) and other state and territory counterparts, a question of law arising out of an arbitral award made in domestic commercial arbitration can be appealed to a court if (1) the parties agree, (2) when this agreement is made prior to the appeal expiration period, and (3) where the court hearing the appeal grants permission.³⁰ That third requirement makes this a discretionary, rather than an “as of right,” appeal to an Australian court on such a question of law.

In these circumstances, the court must not grant permission to hear the appeal on a question of law unless several of the criteria apply.³¹ In an interesting parallel to U.S. law, the predecessor legislation to the current Australian state and territory CAAs included a “manifest error on the face of the award” criterion that a litigant had to meet before an Australian court would grant permission for an appeal of an arbitral award to be heard on a question of law.³² Australian legislatures deleted this criterion when amending the CAA’s leave to appeal grounds in 2010 and 2011. Currently, to qualify for a judicial review of an arbitral decision, the following criteria must be met:

- the determination of the question will substantially affect the rights of a party;
- the question is one which the arbitral tribunal was asked to determine;
- on the findings of fact in the award, the decision on the question was obviously wrong; or the question was one of general public importance and the decision of the tribunal is at least open to serious doubt; and
- despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court determine the question.³³

B. U.S. Courts Defer to Arbitrators Unless There Is “Manifest Disregard” of the Law

As in Australia, arbitration in the United States is governed by statute. The FAA directs state and federal courts to recognize arbitration as a valid means of dispute resolution, preempting contrary state law.³⁴ Additionally, states have their own statutes that direct their courts to confirm the decisions of arbitrators.³⁵ Furthermore, while two different sets of laws govern domestic and international arbitration in Australia, the FAA applies to both in the United States.³⁶

³⁰ *Commercial Arbitration Act 2011* (Vic) s 34A(1).

³¹ *Commercial Arbitration Act 2011* (Vic) s 34A(3).

³² *Commercial Arbitration Act 1984* (NSW) s 38(5)(b)(i) (repealed).

³³ *Commercial Arbitration Act 2011* (Vic) s 34A(3) (Austl.).

³⁴ Federal Arbitration Act, 9 U.S.C. § 10 (2002).

³⁵ See, e.g., N.Y. C.P.L.R. § 7501 (McKinney 2025); Calif. Code Civ. Proc. § 1281.

³⁶ Specifically, Chapter 2 of the Federal Arbitration Act implements the New York Convention on International Arbitration. See *Corporación AIC, SA v. Hidroeléctrica Santa*

Under the U.S. system, courts regularly enforce agreements to arbitrate disputes. When an agreement to arbitrate exists, courts often stay litigation and compel parties to arbitrate instead.³⁷ Once an arbitrator renders a decision, U.S. courts will entertain actions to confirm awards or vacate arbitral decisions.³⁸

Pursuant to the FAA, U.S. courts generally defer to the decisions of arbitrators.³⁹ The law permits U.S. courts to vacate arbitral awards in certain specified situations the FAA identifies. The law permits vacatur of an award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁴⁰

The U.S. Supreme Court held that the FAA provides the sole grounds to vacate an arbitration award, even when parties expressly agree to permit a court to review their arbitration decision on other grounds.⁴¹

Although the text of the FAA is similar to the Australian legal regime in that it does not provide a basis for courts to challenge an arbitrator’s application of the law, an important distinction between the two approaches is that U.S. courts have interpreted the FAA to include such a basis.⁴² Pursuant to these rulings, U.S. courts may vacate an arbitration award when there has been a “manifest disregard for the law.”⁴³

Legal scholars trace the origin of the “manifest disregard” standard to dicta in the U.S. Supreme Court decision in *Wilko v. Swan*.⁴⁴ The decision in that case

Rita S.A., 66 F.4th 876, 885 (11th Cir. 2023); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter “New York Convention”].

³⁷ See, e.g., *Katz v. Cellco P’ship*, 794 F.3d 341, 345 (2d Cir. 2015) (holding federal law requires a stay following an order compelling arbitration); *Revis v. Schwartz*, 192 A.D.3d 127, 145 (N.Y. App. Div. 2d Dep’t 2020) (affirming order to compel arbitration).

³⁸ See *Corporación AIC.*, 66 F.4th at 882.

³⁹ Federal Arbitration Act, 9 U.S.C. § 10 (2002).

⁴⁰ *Id.* § 10(a).

⁴¹ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 579–80 (2008).

⁴² See *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 f.5 (1st Cir. 1990) (holding that the FAA allows judicial review of arbitrators’ decisions); See, e.g., *Friedler v. Stifel, Nicolaus & Co.*, 108 F.4th 241, 249 (4th Cir. 2024); *Jones v. Michaels Stores, Inc.*, 991 F.3d 614, 616 (5th Cir. 2021).

⁴³ *Advest, Inc.*, 914 F.2d at 10.

⁴⁴ Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of*

noted that, “the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”⁴⁵ The court thus distinguished “error” from a “manifest disregard” of the law, stating the former is not subject to review.⁴⁶

The “manifest disregard” standard is much higher than mere error. The U.S. Supreme Court noted that courts “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.”⁴⁷ Therefore, it decided, “[the fact] that a court is convinced [an arbitrator] committed serious error does not suffice to overturn his decision.”⁴⁸

Many courts and commentators considered whether the U.S. Supreme Court foreclosed use of the “manifest disregard” standard in its *Hall Street v. Mattel, Inc.* decision.⁴⁹ In that case, the Court held that the FAA limited judicial review of arbitral decisions to its enumerated grounds.⁵⁰ In *Hall Street*, the parties to an arbitration agreement agreed in a contract to allow review of an arbitration decision if it rested on “erroneous” grounds.⁵¹ After an arbitration decision for the toy maker Mattel, its landlord Hall Street challenged the decision, claiming it was based on “erroneous” grounds.⁵² The U.S. Supreme Court rejected the challenge and held that the FAA did not permit the parties to add any new grounds to vacate the award that the FAA did not specifically identify.⁵³ This led many to reason that, since “manifest disregard” does not appear in the FAA, the *Hall Street* decision must preclude it too.⁵⁴

Despite the commentary and lack of specificity in the FAA, some U.S. courts continue to apply the “manifest disregard” standard for vacating arbitral awards, even after the 2008 *Hall Street* decision.⁵⁵ Prof. Hiro N. Aragaki proposes that the continued application of the doctrine makes sense in light of the likely intent by the *Hall Street* court not to end the “manifest disregard” standard.⁵⁶

Commercial Arbitration Awards, 30 GA. L. REV. 731, 761 (1996) (citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953)).

⁴⁵ *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953).

⁴⁶ *Id.*

⁴⁷ *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

⁴⁸ *Id.*

⁴⁹ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁵⁰ See Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1, 3–5 (2009); Chad Yates, *Manifest Disregard in International Arbitration*, 13 U. MASS. L. REV. 336, 355 (2018) (citing cases).

⁵¹ *Hall St. Assocs.*, 552 U.S. at 579–80.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Aragaki, *supra* note 50, at 3–5; Yates, *supra* note 50, at 355.

⁵⁵ See, e.g., *Friedler*, 108 F.4th at 249; *Jones*, 991 F.3d at 616. This is not uniform, however. See Part IV.D, *infra*.

⁵⁶ Aragaki, *supra* note 50, at 7.

III. AUSTRALIAN AND U.S. COURTS DIFFER ON WHEN TO VACATE AN AWARD

A. *Australian Courts Will Not Vacate Awards on Factual or Legal Error Grounds*

Strictly speaking, in both domestic and international arbitrations, Australian courts will not vacate arbitral awards on factual or legal merits grounds. However, where it can be shown that the arbitration process was unfair or unlawful, such as where the award erroneously deals with matters beyond the scope of the arbitration agreement, enforcement of the award would be contrary to Australian public policy or public interests, or procedural fairness was not afforded to a party, an Australian court may vacate an award.⁵⁷

In the 2013 case *TCL Air Conditioner (Zhongshan) Co. Ltd. v Judges of the Federal Court of Australia*, a party challenged an award made in an international arbitration proceeding. The plaintiff (“TCL”), a company based and registered in China, entered into a written distribution agreement with a company based and registered in Australia (“Castel”).⁵⁸ This agreement provided for disputes to be determined by way of arbitration in Australia.⁵⁹ Following international commercial arbitration in Australia, TCL was required to pay Castel over AUD\$4,000,000 pursuant to two arbitral awards.⁶⁰ TCL defaulted in payment.⁶¹ Castel applied to the Federal Court of Australia under the IAA to enforce the awards against Castel.⁶² TCL then appealed to the High Court of Australia, the country’s highest court, to set aside the awards.⁶³

The issue before the Australian High Court in *TCL Air Conditioner* was whether the country’s courts had jurisdiction to hear appeals on questions of law arising from an arbitration award.⁶⁴ TCL essentially argued that the Federal Court should be able to refuse to enforce arbitral awards on the ground of error of law and to deny the Federal Court such power would undermine its institutional integrity.⁶⁵ TCL further argued that it was an implied term of the arbitration agreement between the parties that any award must be correct in law.⁶⁶

The High Court rejected TCL’s arguments in this regard and held that,

⁵⁷ *International Arbitration Act 1974* (Cth) s 8 (Austl.).

⁵⁸ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Fed Ct of Austl* [2013] HCA 5 ¶ 42 (Austl.).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 4.

⁶⁶ *Id.*

according to the IAA, Australian courts do not have such jurisdiction.⁶⁷ In making this finding, the High Court stated that, “the task of the Federal Court [is] to determine the enforceability of arbitral awards, by reference to criteria [set out in the Model Law] which do not include a specific power to review an award for error.” The Court emphasized the binding nature of arbitral awards between the disputing parties such that an award cannot be challenged at law or in equity on grounds that the arbitrator made a factual or legal error, reaffirming the principle that Australian courts will generally respect the arbitral process and defer to arbitration decisions.⁶⁸

The High Court indicated deference to arbitration.⁶⁹ It noted that Australian arbitration law was closely modeled on English legislation and followed its common law developments.⁷⁰ Quoting Chief Justice Griffith in 1904, the Court referred to the general rule that an arbitral award is final and conclusive, and to the common law exception to that finality:⁷¹

“The law is clearly settled . . . that when a cause or matters in difference are referred to an arbitrator . . . he is constituted the sole and final judge of all questions both of law or of fact” unless error is apparent on the face of the award. If the award “on the face of it is good” it ought to stand.⁷²

This decision of the highest court in Australia supports autonomy of the parties, underscores the legislative intent of the IAA to minimize judicial intervention in arbitration, and promotes the efficient resolution of disputes through arbitration.⁷³

Similarly, in *Sauber Motorsport AG v Giedo van der Garde BV*,⁷⁴ the Supreme Court of Appeal in Victoria stated that:

Courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator ‘dressed up as a complaint about natural justice.’ Errors of fact or law are not legitimate bases for curial intervention. Unfairness in any particular case will depend upon context, and all the circumstances of that case.⁷⁵

Australian courts do permit limited review concerning misapplication of the law. Where it can be proven that there has been an error in the application of the relevant federal, state, or territory law such that the arbitral award was made in circumstances where the subject matter of the dispute was not capable of determination by arbitration under that law, an Australian court may set the award

⁶⁷ *Id.* ¶ 8.

⁶⁸ *Id.* ¶ 81.

⁶⁹ *Id.* ¶ 92.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786 (Austl.) [hereinafter “*Sauber*”].

⁷⁵ *Id.*

aside.⁷⁶ As the New South Wales Supreme Court noted, “[c]onsistent with the ‘pro-enforcement bias’ of the legislation,” Australian courts will still exercise “significant judicial constraint in considering and determining an article 34 [Model Law] challenge.”⁷⁷

This review is very limited, though. It is rare for a challenge of this kind to succeed, even where such error can be proven. That is because this limited ground is, at its core, more about arbitrability of the dispute rather than legal error. As Chief Justice Menon explained in the case of *AKN v ALC*:

[T]he grounds for curial intervention . . . generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. . . the parties to an arbitration do not have a right to a “correct” decision from the arbitral tribunal. . . . Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.⁷⁸

The *Sauber Motorsport* case further illustrated the limited nature of the review and that Australian courts will not review arbitral awards on alleged legal or factual error grounds.⁷⁹ The case involved a Dutch Formula One driver, Giedo van der Garde, and his management company, Giedo van der Garde BV, in a commercial dispute with Sauber Motorsport AG, a Swiss F1 team.⁸⁰ Van der Garde claimed he had a contractual right to race for Sauber in the 2015 F1 season, which Sauber later denied.⁸¹ The dispute was initially arbitrated by the Swiss Chambers' Arbitration Institution, applying the governing law of England and Wales.⁸² Sauber lost at arbitration and challenged the decision on appeal, claiming, *inter alia*, that the arbitral decision erred in concluding that it was a party to the applicable agreement.⁸³

On appeal by Sauber from the Supreme Court of Victoria in the first instance, the Supreme Court of Appeal in Victoria, citing *TCL Air Conditioner*, refused to disturb the arbitral decision and refused to allow the appeal:

The trial judge emphasized that an enforcement application does not involve anything in the nature of a merits appeal. In our view his conclusions on this issue were correct for the reasons which he gave. The complaint now made in this regard is a complaint as to a legal or factual conclusion which is, to use the words of the

⁷⁶ United Nations Commission on International Trade Law Model Law on International Commercial Arbitration art. 34(2)(b), June 21, 1985, 24 I.L.M. 1302; *International Arbitration Act 1974* ss 7, 16 (Cth).

⁷⁷ *Lieschke v Lieschke* [2022] NSWSC 1705 ¶¶14–15.

⁷⁸ *AKN v ALC* [2015] SGCA 18 ¶ 39 (Austl.).

⁷⁹ *Sauber* ¶ 8.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Sauber* ¶ 17.

Full Court of the Federal Court in TCL, ‘dressed up as a complaint about natural justice’.⁸⁴

An Australian Court will refuse, on occasion, to enforce an arbitration award on public policy grounds, but the threshold is very high. It rarely occurs, and when it does, there must be a breach of the most basic principles of justice and morality in the Australian jurisdiction. The award must “rise to the level of ... being contrary to fundamental norms of justice and fairness in Australia within the context of international commercial arbitration such as to enliven the public policy ground for resisting enforcement,” as was stated by Justice Stewart of the Federal Court of Australia in *Guoao Holding Group Co Ltd v Xue (No 2)*.⁸⁵

The Federal Court in *Guoao* firmly rejected a public policy claim to vacate an arbitral ruling.⁸⁶ That case concerned an award delivered by a tribunal that had been appointed by the Beijing Arbitration Commission in China.⁸⁷ The defendant, Xue, owned a proposed aged care facility.⁸⁸

The claimant, Guoao Holding Group Co. Ltd. (“Guoao”), had agreed to provide development funding for the facility pursuant to an agreement to create a joint venture.⁸⁹ In an arbitration between the parties in China, the tribunal made an award in favor of Guoao that the joint venture be dissolved by “jie chu,” a Chinese law remedy.⁹⁰

Xue asserted public policy arguments in Chinese and Australian courts.⁹¹ First, she sought to vacate the award in a Chinese court.⁹² She claimed that the tribunal had exceeded its authority in making the award and that it was against the public interest because the jie chu remedy led to “the imbalance of rights and obligations of all parties.”⁹³ The Court rejected this argument.⁹⁴

Then, Guoao sought to recover Xue’s interests in Australian assets by applying to the Federal Court of Australia for enforcement of the arbitral award.⁹⁵ Xue defended that enforcement on effectively the same grounds as she had asserted in China, arguing that enforcement of the award in Australia should be refused on public policy grounds pursuant to section 8(7)(b) of the IAA.⁹⁶

The Australian court refused.⁹⁷ Citing the Full Court of the Federal Court of

⁸⁴ *Id.*

⁸⁵ *Guoao Holding Grp Co Ltd v Xue [No 2]* (2022) FCA 1584 (Austl.).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* ¶ 56.

Australia’s decision in the case of *TCL Air Conditioner*, Justice Stewart summarized the concept of public policy as it applies in Australia to the setting aside of an award in an international dispute:

The conception of public policy in the IAA as adopted from the New York Convention is limited to the fundamental principles of justice and morality conformable with the international nature of the subject matter, namely international commercial arbitration. . . . The scope of public policy in this context requires a degree of international harmony and concordance of approach; it is not intended to incorporate any idiosyncratic national approach. . . . Put another way, public policy in this context is limited to the fundamental principles (or norms) of justice and morality (or fairness) of the state, recognizing the international dimension of the context.⁹⁸

Although Australia strongly supports enforcement of arbitral awards, there have been occasions where Australian courts have set aside such awards. In the 2021 case of *Hub Street Equipment Pty. Ltd. v Energy City Qatar Holding Co.* in the Full Federal Court of Australia, the Court overturned the Australian court of first instance’s decision, thereby refusing enforcement of an award by a Qatari-seated arbitral tribunal.⁹⁹

A Qatari company, Energy City Qatar (“ECQ”), and an Australian company, Hub Street Equipment (“Hub”), originally entered into a contract for the supply and installation of street lighting and furniture.¹⁰⁰ ECQ paid Hub an advance of USD\$820,322.16.¹⁰¹ The contract required disputes to be resolved by way of arbitration in Qatar, with a three-member tribunal (each party appointing one arbitrator, and the third chosen jointly or by Qatari courts where the parties could not agree on that third appointment).¹⁰²

ECQ later terminated the contract and requested repayment of Hub’s advance.¹⁰³ Hub initially responded, then ceased communication.¹⁰⁴ Instead of formally notifying Hub under the arbitration clause, ECQ applied directly to a Qatari court, and the court appointed the arbitral tribunal rather than following the procedure set out in the arbitration agreement.¹⁰⁵ The arbitral tribunal issued an award in favor of ECQ, ordering Hub to repay the advance payment plus compensation and arbitration fees.¹⁰⁶ ECQ then sought to enforce the Qatari

⁹⁸ *Id.* ¶ 32.

⁹⁹ *Hub St Equip Party Ltd v Energy City Qatar Holding Co* [2021] FCAFC 110 (Austl.).

¹⁰⁰ *Id.* ¶ 23.

¹⁰¹ *Id.* ¶ 25.

¹⁰² *Id.* ¶ 24.

¹⁰³ *Id.* ¶ 25.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* ¶ 26.

¹⁰⁶ *Id.* ¶ 30.

arbitral award in Australia under the IAA.¹⁰⁷ At first instance, the Federal Court enforced the award.¹⁰⁸

Hub then appealed to the Full Federal Court, arguing that it was not given proper notice of the arbitration proceeding and the composition of the arbitral tribunal was not in accordance with the arbitration agreement between the parties, relying on the grounds set out in sections 8(5)(c) and (e) of the IAA.¹⁰⁹ Chief Justice Allsop and Justices Middleton and Stewart unanimously overturned the first instance decision, thereby refusing enforcement of the Qatari-seated arbitral award.¹¹⁰ In doing so, the Court reasoned that the arbitral tribunal lacked jurisdiction because it was not composed in a manner agreed by the parties.¹¹¹ The Court further declined to exercise its discretion to enforce the award despite the defect, finding that “the composition of the arbitral tribunal other than in accordance with the agreement of the parties is fundamental to the structural integrity of the arbitration; it strikes at the very heart of the tribunal’s jurisdiction.”¹¹²

Hub Street Equipment indicates that Australia’s deference to arbitration is not absolute. Australian courts will vacate arbitral awards on procedural grounds, even if they will defer on substantive legal issues.

B. U.S. courts consider whether arbitrators deliberately chose to ignore the law

U.S. courts often, but not always, confirm arbitral awards even where respondents allege the arbitrator misapplied the law. *Schafer v. Multiband Corp.* provides a clear example.¹¹³ In *Schafer*, an arbitrator held that the Employment Retirement Income Security Act of 1974 (“ERISA”) ¹¹⁴ invalidated an indemnification agreement. The trial court refused to confirm the award because the arbitrator misapplied ERISA.¹¹⁵ The appellate court noted that the “arbitrator’s decision would doubtless be reversed if it were a court decision under the precedent of this court, because the arbitrator’s reading of the relevant section of ERISA is contrary to our precedent.”¹¹⁶ However, instead of reversing the arbitrator, the appellate court reversed the trial court and let the arbitration ruling stand. In doing so, the court noted that the arbitrator did not state that he was aware of the correct

¹⁰⁷ *Id.* ¶ 33.

¹⁰⁸ *Id.* ¶ 34.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ¶ 14.

¹¹¹ *Id.* ¶ 82.

¹¹² *Id.* ¶ 104.

¹¹³ *See, e.g., Schafer v. Multiband Corp.*, 551 F. App’x 814, 818 (6th Cir. 2014).

¹¹⁴ 29 U.S.C. § 1110(a).

¹¹⁵ *Schafer v. Multiband Corp.*, 2013 U.S. Dist. LEXIS 22057, at *2 (E.D. Mich. Feb. 19, 2013).

¹¹⁶ *Schafer*, 551 F. App’x at 814.

law but refused to apply it.¹¹⁷ Accordingly, it affirmed a decision based on an incorrect interpretation of the law.

Another federal appellate court applied the same reasoning in *Peterson v. Minerva Surgical, Inc.*¹¹⁸ In *Peterson*, a litigant argued that an arbitrator applied the incorrect standard under California law.¹¹⁹ The appellate court rejected the challenge, holding that “legal error” was insufficient to disturb an arbitral award without “willful inattentiveness” to the law.¹²⁰ It then held that, “[e]ven if it was a misapplication of California law, we are not convinced [the arbitrator showed] willful inattentiveness.”¹²¹

This principle is not limited to federal courts; it applies in state courts, too. In *Adventure Motorsports Reinsurance, Ltd. v. Interstate Nat’l Dealer Servs.*, an insurer asserted a claim in arbitration against a service provider.¹²² Pursuant to an agreement between the parties, the service provider administered insurance policies and collected funds in reserve to pay claims as needed and to keep a portion for its own compensation.¹²³ The insurer claimed that the provider kept too much of the proceeds for itself.¹²⁴ The arbitrator agreed and awarded some of the proceeds to the insurer.¹²⁵ The trial court confirmed the award.¹²⁶ On appeal, the intermediate appellate court reversed, holding that the arbitrator disregarded contractual language that permitted the provider to charge the fees at issue.¹²⁷ The Supreme Court of Georgia reversed again, noting that, “[h]owever imperfect the Court of Appeals may have judged the arbitrator’s understanding or application of the law to have been, such a failure by the arbitrator does not amount to concrete evidence of a deliberate decision not to apply the applicable law in making the arbitration award.”¹²⁸

The analysis in *Adventure Motorsports* concerned only whether the arbitrator deliberately chose to disregard the law, not whether it applied the law correctly. The Court noted that, “the arbitrator never expressed, during the hearing or in the arbitration award, that the correct law should be ignored rather than followed.”¹²⁹

¹¹⁷ *Id.* at 820.

¹¹⁸ *Peterson v. Minerva Surgical, Inc.*, 2024 U.S. App. LEXIS 20602 (10th Cir. Aug. 15, 2024).

¹¹⁹ *Id.* at *7–8.

¹²⁰ *Id.*

¹²¹ *Id.* at *9.

¹²² *Adventure Motorsports Reinsurance, Ltd. v. Interstate Nat’l Dealer Servs.*, 867 S.E.2d 115 (Ga. 2021).

¹²³ *Id.* at 117.

¹²⁴ *See id.* at 117–18.

¹²⁵ *Id.* at 119–20.

¹²⁶ *Id.* at 120.

¹²⁷ *See Adventure Motorsports Reinsurance v. Interstate Nat’l Dealer Servs.*, 846 S.E.2d 115, 119 (Ga. Ct. App. 2020).

¹²⁸ *Adventure Motorsports*, 867 S.E.2d at 123.

¹²⁹ *Id.* at 122.

Instead, the Court decided that the arbitrator interpreted the agreements differently from the intermediate appeals court and fashioned a remedy accordingly.¹³⁰ The Court then held that the parties' arbitration agreement permitted the arbitrator to do so, which required the Court to confirm the award.¹³¹

To be sure, arbitrators rarely, if ever, state that they are deliberately refusing to apply the law. But in numerous cases, U.S. courts have inferred that arbitrators disregarded the law when they issued decisions that deviated from the law without explanation.

For example, in *Homecomings Fin. Network v. Kotyk*, the U.S. District Court for the District of New Jersey vacated an arbitration award on the grounds that the arbitrator showed "a manifest disregard of the law."¹³² In *Homecomings*, the arbitration claimant had declared bankruptcy.¹³³ After the bankruptcy proceedings began, he disputed the amount due pursuant to a home mortgage loan.¹³⁴ The claimant argued that he owed only the amount due pursuant to a foreclosure judgment.¹³⁵ In contrast, the lender argued that the claimant was liable for the full amount due pursuant to the loan agreement.¹³⁶ The arbitrator agreed with the claimant.¹³⁷ In response, the lender commenced an action in court to vacate the award.¹³⁸ The court did so because it held the arbitrator did not apply the law correctly.¹³⁹ The decision notes that "if the arbitrator had applied the proper law and determined the calculation pursuant to the terms of the underlying loan agreement, the arbitration would have concluded with a decision in [the lender's] favor."¹⁴⁰

But the *Homecomings* court carefully pointed out that its decision did not correct an error in the application of the law but instead addressed deliberate misconduct.¹⁴¹ First, it cited the fact that the lender "made the law known to the Arbitrator, but it appears that the Arbitrator either refused to apply the Bankruptcy law or ignored the law."¹⁴² Second, it lamented that the record contained nothing "to suggest that the Arbitrator did, in fact, apply the proper law, even if incorrectly."¹⁴³ Together, this suggests that the Court would have let the

¹³⁰ *Id.*

¹³¹ *Id.* at 122–23.

¹³² *Homecomings Fin. Network v. Kotyk*, 2007 U.S. Dist. LEXIS 62533, at *9-10 (D.N.J. Aug. 24, 2007).

¹³³ *Id.* at *2.

¹³⁴ *Id.* at *2-3.

¹³⁵ *Id.* at *3.

¹³⁶ *Id.*

¹³⁷ *Id.* at *3-4.

¹³⁸ *Id.* at *4.

¹³⁹ *Id.* at *9-10.

¹⁴⁰ *Id.* at *8.

¹⁴¹ *Id.* at *5.

¹⁴² *Id.* at *8.

¹⁴³ *Id.*

arbitration award stand if it were a mistake of law, and it only vacated the award because the arbitrator's decision was not an error of law but a manifest disregard of it.

Kashner Davidson Sec. Corp. v. Mscisz similarly illustrates this principle.¹⁴⁴ In *Kashner*, a panel of arbitrators ordered counterclaimants to produce documents in discovery.¹⁴⁵ Rather than produce them, the counterclaimants sought to withdraw without prejudice the counterclaims that involved those documents, thereby making the production unnecessary while preserving their right to refile the counterclaims later.¹⁴⁶ As a sanction for failing to produce the documents, the arbitrators dismissed the counterclaims with prejudice, thereby precluding the ability to refile.¹⁴⁷ The claimants succeeded in persuading a trial court to confirm the award that dismissed the counterclaims.¹⁴⁸ But on appeal, the U.S. Court of Appeals for the First Circuit reversed on the grounds that the arbitrators demonstrated a "manifest disregard of the law."¹⁴⁹ It noted that the applicable arbitration rules required the arbitrators to dismiss claims with prejudice only after their imposition of lesser sanctions failed to deter misconduct.¹⁵⁰

As in *Homecomings*, the appellee argued that the court should not correct a mere error in the application of the law so long as the arbitrators acted in "good faith."¹⁵¹ The court rejected this argument since the rule that required the arbitrators to apply a lesser sanction before dismissing a claim was "clear and unequivocal."¹⁵² Accordingly, the court held, "[t]his misapplication of the clear language of the rule can only be deemed an intentional and willful disregard of the law."¹⁵³

Another example of a court rejecting an arbitrator's "manifest disregard of the law" comes from *Gas Aggregation Services. v. Howard Avista Energy*.¹⁵⁴ In *Gas Aggregation Services*, two companies in the natural gas industry entered into a joint venture.¹⁵⁵ One eventually submitted claims against the other in arbitration, alleging, among other things, a breach of contract claim and a state statute claim

¹⁴⁴ *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 79 (1st Cir. 2008).

¹⁴⁵ *Id.* at 72.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 73.

¹⁴⁹ *Id.* at 79.

¹⁵⁰ *Kashner*, 531 F.3d at 79.

¹⁵¹ *Kashner*, 531 F.3d at 78; see also *Homecomings*, 2007 U.S. Dist. LEXIS 62533 at *5 (D.N.J. Aug. 22, 2007)

¹⁵² *Kashner*, 531 F.3d at 79.

¹⁵³ *Id.* See discussion *infra* Part IV(3) (deciding that the misapplication was intentional is inconsistent with other court decisions that ostensibly consider legal errors to be made in good faith).

¹⁵⁴ 319 F.3d 1060, 1069 (8th Cir. 2003).

¹⁵⁵ *Id.* at 1062.

prohibiting consumer frauds.¹⁵⁶ The arbitrators ruled in favor of the claimant and awarded it attorney's fees pursuant to the state statute.¹⁵⁷ But when the claimant asked a federal trial court to confirm the award, that court vacated several portions of the award.¹⁵⁸

On appeal, the court confirmed most of the award, but not all of it.¹⁵⁹ It deferred to the arbitrator's decisions on the merits of the contract claim, noting that "a court cannot substitute a judicial determination for the arbitrator's decision."¹⁶⁰ But it affirmed the vacatur of the attorney's fee award pursuant to the state consumer fraud statute, noting that the law did not apply to transactions by commercial traders.¹⁶¹ The court did not solely state that the arbitrators applied the law incorrectly.¹⁶² Instead, the court cited the applicable precedent that held the law did not apply but then proceeded to apply the law anyway.¹⁶³ The court held that this constituted a deliberate decision to ignore the law and therefore could vacate the decision.¹⁶⁴ It reasoned that, where "an arbitration panel cites relevant law, then proceeds to ignore it, it is said to evidence manifest disregard for the law."¹⁶⁵

U.S. state courts also apply this principle. In *Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.*, the Superior Court of New Jersey considered whether it could disturb the decision of an arbitrator to require an insurance company to pay for services provided by a medical facility.¹⁶⁶ State law required the facility to have a license to operate. However, the arbitrator held that the facility's lack of a license was no obstacle to payment because, among other reasons, the doctor performing work was licensed and the facility was in the process of getting a license.¹⁶⁷ The New Jersey court vacated the award because "the arbitrator manifestly disregarded the licensing laws."¹⁶⁸ The court emphatically stated that, "[i]f an arbitrator can issue an award to an unlicensed medical practitioner who has been warned by the Department of Health that he could not operate until the license is issued, the arbitration process is a sham!"¹⁶⁹

This principle is not unlimited. State courts have hesitated to vacate other

¹⁵⁶ *Id.* at 1062.

¹⁵⁷ *Id.* at 1062-63.

¹⁵⁸ *Id.* at 1063.

¹⁵⁹ *Gas Aggregation Servs.*, 319 F.3d at 1069-70.

¹⁶⁰ *Id.* at 1064 (citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40-41 n.10 (1987)).

¹⁶¹ *Id.* at 1069.

¹⁶² *See id.*

¹⁶³ *Id.* (citing *Ly v. Nordstrom*, 615 N.W.2d 302 (Minn. 2000)).

¹⁶⁴ *Id.* at 1069.

¹⁶⁵ *Id.*

¹⁶⁶ 813 A.2d 621, 622 (N.J. Super. Ct. Law. Div. 2002).

¹⁶⁷ *Id.* at 623-24.

¹⁶⁸ *Id.* at 633.

¹⁶⁹ *Id.*

arbitration awards based on an arbitrator's manifest disregard for the law. In *Associated Humane Societies, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,¹⁷⁰ a New Jersey appeals court refused to vacate an award after a respondent cited *Liberty Mutual*. It held that the court in *Liberty Mutual* vacated the award not only because of the arbitrator's manifest disregard for the law, but also for a public policy reason arising from the operation of unlicensed medical facilities.¹⁷¹ Absent a similar public policy concern or "gross errors of law," that court found no basis for vacatur.

C. *Zeidman illustrates the challenges in applying manifest disregard and presents an opportunity to reconsider it*

The U.S. Supreme Court previously declined to settle the validity of manifest disregard in *Peterson*.¹⁷² The appellant in that case claimed that the arbitral panel misapplied the law when it ruled against him in an employment arbitration.¹⁷³ The Tenth Circuit refused to disturb the result on the basis of "manifest disregard" of the law alone.¹⁷⁴ The appellant then asked the U.S. Supreme Court to reverse, first on the grounds that his waiver of a jury trial for arbitration should not constitute a waiver of his right to a fair application of the law, and second on the grounds that the Tenth Circuit should have applied the "manifest disregard" standard to review the arbitral decision.¹⁷⁵

While the Court did not issue a decision when it denied certiorari in *Peterson*, there are two reasons why it may not have been the ideal case to settle the manifest disregard question. First, the appellant did not seek review of manifest disregard as his primary issue on appeal. And second, the appellant sought to challenge what may very well have been the correct result: deference to the arbitral decision.

The *Zeidman* case, in contrast, presents the U.S. Supreme Court with an opportunity to address its precedent on overturning arbitral awards in a way that places the "manifest disregard" standard front and center. *Zeidman* arises from a well-publicized dispute and presents a high-profile example of a federal appeals court applying the "manifest disregard" standard. As noted in the introduction, the dispute in *Zeidman* arose when the respondent, Mike Lindell, sponsored a contest, offering a large cash prize to anyone who could disprove his theory about the 2020 U.S. presidential election.¹⁷⁶ Specifically, the contest involved data that Lindell presented at a symposium.¹⁷⁷ Contestants could win the prize by proving the data

¹⁷⁰ N.J. Super. Unpub. LEXIS 2583, at *14 (N.J. App. Div. Oct. 29, 2014).

¹⁷¹ *Id.* at 11–12.

¹⁷² See Petition for Writ of Certiorari, *Peterson v. Minerva Surgical, Inc.*, 145 S. Ct. 1183 (2025) (No. 24-712).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 26, 31.

¹⁷⁶ *Zeidman v. Lindell Management LLC*, 145 F.4th 820, 822 (8th Cir. 2025).

¹⁷⁷ *Id.*

Lindell presented was not “valid data from the . . . election.”¹⁷⁸ Zeidman entered the contest, agreed to terms that included an arbitration clause, and submitted evidence that the data was not “packet capture data” from the election.¹⁷⁹ The contest judges did not declare him a winner so he submitted a claim for arbitration.¹⁸⁰ The arbitrators ruled in his favor but since Lindell refused to pay, Zeidman sought confirmation of the award in court.¹⁸¹

The U.S. District Court for the District of Minnesota confirmed the arbitration award.¹⁸² It acknowledged that it “may have reached a different outcome given an independent initial review of the information.”¹⁸³ Still, it confirmed the award since it noted its “responsibility in reviewing an arbitration award is not to reevaluate the merits but rather ensure that the panel acted appropriately.”¹⁸⁴

The U.S. Court of Appeals for the Eighth Circuit reversed.¹⁸⁵ It held that the panel disregarded the law by considering extrinsic evidence to interpret an unambiguous contract.¹⁸⁶ Under Minnesota law, and well-recognized contract law principles, a court does not consider parole evidence to interpret an unambiguous contract.¹⁸⁷ The appeals court held—and the parties agreed—that the contract was unambiguous.¹⁸⁸ The Court found that the arbitrators violated the rule against considering extrinsic evidence because they relied on a statement outside of the contract to decide whether “election” data needed to be “packet capture data.”¹⁸⁹

The Court concluded that this was “manifest disregard,” noting that “the arbitration panel recognized” the applicable law, but instead “imposed its own conception of sound policy.”¹⁹⁰ Accordingly, it reversed the confirmation of the award.¹⁹¹ But the Court did not spend much time in its decision explaining the difference between an error in the law and manifest disregard. In fact, its statement that the arbitration panel knew the applicable law and the Court’s conclusion that the arbitration panel substituted its own judgment are about five paragraphs apart.¹⁹² Instead, the Court stated the applicable law, noted that the arbitrators did not apply it, and then concluded they must have deliberately ignored it rather than

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Zeidman*, 145 F.4th at 822.

¹⁸² *Zeidman v. Lindell Mgmt. LLC*, 718 F. Supp. 3d 934, 941 (D. Minn. 2024)

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Zeidman*, 145 F.4th at 823.

¹⁸⁶ *Id.* at 827–28.

¹⁸⁷ *Id.* at 827 (citing *Travertine Corp. v. Lexington-Silverwood, Ltd. P’ship*, 683 N.W.2d 267, 271 (Minn. 2004)).

¹⁸⁸ *Zeidman*, 145 F.4th at 827.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 828 (citing *Stolt-Nielsen*, 559 U.S. at 675).

¹⁹¹ *Zeidman*, 145 F.4th at 828.

¹⁹² *Id.* at 827–28.

misapplied it.¹⁹³

The *Zeidman* case illustrates the challenges of the “manifest disregard” standard. A difference of opinion exists about whether it applied in this case, as the trial and appeals court viewed the case differently. And while the courts at each level of this case generally agreed that the arbitrators did not apply the law correctly, they came to different conclusions about whether they did so deliberately. This case also reflects a typical situation where arbitrators do not expressly state that they are abandoning the law, but instead one in which courts need to infer arbitrators’ intent based on the arbitrators’ incorrect interpretation.

Regardless of whether the *Zeidman* petition for certiorari succeeds, the U.S. Supreme Court should settle the issue because a split of authority exists among different appellate circuits and state courts as to the “manifest disregard” standard.¹⁹⁴

IV. THE AUSTRALIAN APPROACH IS BETTER BECAUSE THE U.S. APPROACH IS OFTEN UNHELPFUL, ARBITRARY, AND DOES NOT PROVIDE THE TRADITIONAL BENEFITS OF ARBITRATION

Parties choose arbitration because, among other reasons, it is more efficient and parties can reliably enforce awards in many jurisdictions.¹⁹⁵ The current application of the “manifest disregard” standard in the U.S. for the enforcement of arbitral awards, however, fails to deliver those benefits as well as Australian law does.

It is difficult to conclusively evaluate and measure how well the laws of the United States and Australia promote arbitration and reduce dispute resolution costs. There are many arbitration service providers in each country so there is no single source for comprehensive data. Arbitrations are generally held privately, which deprives interested parties of the ability to analyze crucial data that may exist for litigation. Therefore, there is no total number of arbitrations that one can compare to the number of court proceedings to learn which country’s system encourages parties to arbitrate more disputes.

Still, there are some means to compare how the two systems perform. One method is to evaluate the type of errors that courts address when challenging an arbitral decision to see if Australia’s more deferential approach has resulted in the affirmance of plainly unpalatable or unfair results. Another is to evaluate the speed

¹⁹³ *Id.* at 828.

¹⁹⁴ See Part IV.D, *infra*; *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 353 (5th Cir. 2009).

¹⁹⁵ WHITE & CASE LLP & THE SCHOOL OF INT’L ARB. AT QUEEN MARY, UNIV. OF LONDON, 2025 INTERNATIONAL ARBITRATION SURVEY – THE PATH FORWARD: REALITIES AND OPPORTUNITIES IN ARBITRATION, 5 (2025), <https://www.whitecase.com/sites/default/files/2025-10/white-case-qmul-international-arbitration-survey-report-2025.pdf> (last accessed Jan. 09, 2026).

at which the two systems operate, given it is possible the faster system provides greater relief more often to the parties at a lower cost. And finally, one can examine whether America's less deferential system applies the law consistently, thereby allowing parties to rely on a certain and predictable system.

With these criteria in mind, the Australian system is superior for the resolution of commercial disputes. This article does not consider the implications of arbitration in certain fields in which policy implications could demand more scrutiny of an arbitrator's legal conclusions, such as those involving consumer protection or public safety. But for general commercial disputes, the Australian system more reliably delivers the benefits parties seek when they choose arbitration.

A. The U.S. System Addresses Minor Errors of Law Compared to the Non-Enforcement Grounds the Australian System Addresses

The determination of the gravity of an error is subjective. What seems like a grave injustice to one person may seem like a technicality to another. To be fair, commentators may describe any disputed application of law as technical, but some disputed applications may be more arcane than others. Once commentators can assess the value of the courts' corrections to arbitrators' legal errors, they can evaluate whether the value outweighs the costs of additional litigation as well as the loss of the traditional benefits arbitration provides parties, such as finality and speed.

With that said, the errors that U.S. courts corrected in the cases cited in this article were often more technical than substantive.

For example, in *Homecomings*, the Court decided between two competing amounts a homeowner and a lender argued the homeowner owed on a mortgage.¹⁹⁶ The arbitrator sided with the borrower, but the Court vacated the award in favor of the lender.¹⁹⁷ There, the underlying error changed the amount payable by the appellee, but only by about \$10,000.¹⁹⁸ Although the legal issue was significant, the practical effect was relatively low, especially compared to the costs and effort arising from litigating and deciding the appeal.

Liberty Mutual is similar. In that case, the legal issue involved was substantial: whether an unlicensed clinic could recover costs for services its employees rendered.¹⁹⁹ But the practical effect was minimal since the amount in dispute was less than \$2,000.²⁰⁰

The *Kashner* decision posed the opposite problem. The court's decision in

¹⁹⁶ *Homecomings Fin. Network v. Kotyk*, No. 07-cv-1414 (FLW), 2007 U.S. Dist. LEXIS 62533, at *3-4 (D. N.J. Aug. 22, 2007).

¹⁹⁷ *Id.* at *1.

¹⁹⁸ *Id.* at *3.

¹⁹⁹ *Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.*, 813 A.2d 621, 623 (N.J. Super. Ct. Law Div. 2002).

²⁰⁰ *Id.* at 624.

that case had a profound impact on the status of the dispute, as the court refused to honor an arbitration award of approximately \$420,000.²⁰¹ But while the practical economic effect of the decision was substantial, the issue over which the court reversed the arbitrator's decision was a technical one rather than a substantive one: whether the failure to comply with a discovery request should have resulted in the dismissal of a counterclaim that, in essence, was an affirmative defense.²⁰²

Another case involving a court's reversal of an arbitrator's decision over a technical matter is *Gas Aggregation Servs.*²⁰³ There, the effect of the court's decision was substantial, influencing a \$250,000 attorney's fees element of an award.²⁰⁴ But the legal issue over which the court reversed the arbitrator's decision was again technical: whether a state consumer fraud statute applied to transactions by commercial traders.²⁰⁵

Zeidman breaks this pattern, however. While the amount at stake in that case was substantial, as the court vacated a \$5 million award,²⁰⁶ the disputed issue was not technical. Rather, the disputed issue concerned a basic canon of contract law: the use of parol evidence in the interpretation of an unambiguous agreement.²⁰⁷ *Zeidman* may be an outlier, but that is precisely why it may be an ideal case for judicial review of the manifest disregard standard. Many other cases seeking judicial review of an arbitration decision may not present substantial enough issues to merit the attention of the U.S. Supreme Court.

In stark contrast to United States courts, Australian courts face the opposite issue. While U.S. courts may inefficiently spend resources addressing minor issues, Australian courts may ignore major ones.

For example, in *TCL Air Conditioner*, the two arbitral awards that were the subject of the High Court of Australia proceedings were significant, amounting to an award of AUD\$4,000,000 in favor of Castel.²⁰⁸ Likewise, in *Guoao*, the arbitrator's award that was the subject of the proceeding was made against Ms. Xue's interests in the amount of AUD\$42,412,075.²⁰⁹

In both of those cases, the Australian courts rejected the litigants' claims that

²⁰¹ *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 71–73 (1st Cir. 2008). The dismissed counterclaim was for “unspecified damages.” See ECF No. 1-3, Index No. 05-cv-11331-JLT (D. Mass.). But it appears to be a defense to the claimant's \$421,000 claim. See ECF No. 23-20, Index No. 05-cv-11433-MLW (D. Mass.).

²⁰² *Kashner Davison Sec. Corp.*, 531 F.3d. at 76.

²⁰³ *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1069 (8th Cir. 2003).

²⁰⁴ *Id.* at 1063.

²⁰⁵ *Id.* at 1069.

²⁰⁶ *Zeidman v. Lindell Mgmt. LLC*, 145 F.4th 820, 825, 828 (8th Cir. 2025).

²⁰⁷ *Id.* at 827.

²⁰⁸ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (13 March 2013) (Austl.).

²⁰⁹ *Guoao Holding Grp Co Ltd v Xue* [No 2] [2022] FCA 1584 (22 December 2022) (Austl.), [65]. Award amount noted at the April 22, 2025, conversion rate.

the arbitral awards offended public policy. The subject of the challenge in *Guoao* was expressly about public policy and whether an Australian court would enforce a particular type of Chinese law remedy that Xue alleged was fundamentally unfair.²¹⁰ And while the grounds TCL cited in *TCL Air Conditioner* were not expressly about public policy, TLC argued that the enforcement of an award based on an error of law could challenge the institutional integrity of the country's court system.²¹¹ Regardless of these compelling arguments, the Australian courts did not disturb these awards.

The Australian method, however, may be superior to the American system on balance. Specifically, even though the amounts in dispute in the Australian cases were high, the parties freely accepted arbitration as their method of dispute resolution and freely accepted the risks associated with limited appellate review. More generally, while Australian courts reserve the right to intervene in arbitral cases for public policy reasons, their reluctance to do so limits a litigant's ability to use public policy grounds or grounds "dressed up" as "natural justice" as an end run around the finality arbitration is meant to provide.

B. *The Australian System Resolves Challenges More Quickly*

Litigation in U.S. courts concerning arbitral decisions sometimes proceeds more slowly than arbitration itself. This substantially undermines a key benefit of arbitration and frustrates the parties who wait for a true resolution to their dispute.

The most complex arbitration proceedings, which are typically cross-border commercial disputes, usually last about two years. The average International Chamber of Commerce arbitration in 2023 lasted about two years.²¹² The International Center for Dispute Resolution reported in 2018 that its arbitrations lasted, on average, a little over a year.²¹³ By contrast, subsequent court litigation about those arbitrations may last just as long or even longer.

The *Zeidman* arbitration took seventeen months from filing to arbitral award.²¹⁴ But the litigation over it has already taken more than two years and is still ongoing.²¹⁵ This included filings in state court in Minnesota, removal to federal court, an appeal in the Eighth Circuit, and a pending petition for

²¹⁰ *Ibid.* [32].

²¹¹ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (13 March 2013) (Austl.).

²¹² ICC, *ICC Dispute Resolution 2023 Statistics*, at 15 (2024), https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf (last accessed Feb. 17, 2025).

²¹³ International Centre for Dispute Resolution & Am. Arbitration Ass'n, *Arbitration Report*, at 2, https://www.icdr.org/sites/default/files/document_repository/AAA241_ICDR_Time_and_Cost_Study.pdf (last accessed Feb. 17, 2025).

²¹⁴ *Zeidman*, 23-cv-1759 (D. Minn.) ECF No. 1-3 at 3, 33.

²¹⁵ See Petition for Writ of Certiorari, *Zeidman v. Lindell Mgmt. LLC*, 718 F. Supp. 3d at 938 (No. 25-504).

certiorari.²¹⁶ And if there is a review by the U.S. Supreme Court, there may be further litigation on remand.

The *Homecomings* arbitration lasted six months; the borrower filed it in August 2006, and the arbitrator issued his decision in February 2007.²¹⁷ The litigation that vacated the decision proceeded in a similarly quick fashion, with a decision six months later in August 2007.²¹⁸ But a key reason for its speed was the fact that the borrower did not respond to the court petition.²¹⁹ A possible reason for the borrower's default is that given the borrower lost his house, he likely had less resources to litigate than a mortgage lender.

The litigation over the *Gas Aggregation Servs.* arbitration lasted for more than three years after the arbitration award.²²⁰ This process was far longer than the arbitration itself, which began sometime after April 1999 and concluded in July 2001.²²¹

Similarly, the *Kashner* litigation was far more complex and lengthy than the underlying arbitration.²²² The arbitration began in May 2004, and concluded just over a year later in June 2005.²²³ However, the litigation included a state lawsuit, which proceeded to a state appellate court, and two separate federal lawsuits.²²⁴ As a result, the litigation took nearly five times longer than the arbitration. One of the federal lawsuits progressed to an appeal that was decided in 2008.²²⁵ Furthermore, ancillary proceedings continued until 2010.²²⁶

²¹⁶ See Petition for Writ of Certiorari, *Zeidman*, (No. 25-504) at 11-13.

²¹⁷ *Homecomings Fin. Network v. Kotyk*, 2007 U.S. Dist. LEXIS 62533, at 3 (D.N.J. Aug. 24, 2007).

²¹⁸ *Id.* at 10.

²¹⁹ *Id.* at 4.

²²⁰ *Gas Aggregation Servs.*, 319 F.3d at 1062-63. The arbitration panel in *Gas Aggregation Services* issued its decision on July 10, 2001. *Id.* Its supplemental award including attorney's fees came two months later. *Id.* Following the award, the parties litigated confirmation of the award before a federal district court and then litigated the appeal, which was decided on February 24, 2003. *Id.* at 1069-70. The appellee asked the appeals court to reconsider its decision, which it denied the following month. *Gas Aggregation Servs. v. Howard Avista Energy, LLC*, 2003 U.S. App. LEXIS 5799, at *1 (8th Cir. Mar. 26, 2003). The parties litigated another aspect of the appeal in 2003 and, in a November 10, 2004, decision, the appeals court reversed part of the trial court's decision. *Gas Aggregation Servs. v. Howard Avista Energy, LLC*, 388 F.3d 639, 642 (8th Cir. 2004).

²²¹ *Gas Aggregation Servs. v. Howard Avista Energy*, 319 F.3d at 1062-63.

²²² *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68.

²²³ *Kashner*, 05-cv-11433 (D. Mass.) ECF No. 1-3 at 2.

²²⁴ *Mscisz v. Kashner Davidson Secs. Corp.*, 844 N.E.2d 614 (Mass. 2006); *Mscisz v. Kashner Davidson Secs. Corp.*, 05-cv-11331 (D. Mass.); *Kashner*, 05-cv-11433 (D. Mass.).

²²⁵ *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68.

²²⁶ *Kashner Davidson Secs. Corp. v. Mscisz*, 2010 U.S. Dist. LEXIS 76688, *6-7 (D. Mass. Jun. 25, 2010).

In its decision, the *Liberty Mutual* court did not provide the exact dates on which the parties filed their various claims, but the dates the court did cite suggest the court proceedings were more efficient than those in prior cases.²²⁷ The underlying dispute began sometime after the insurer denied a claim on November 5, 1999.²²⁸ The trial court decision is dated September 27, 2002.²²⁹ This dispute likely proceeded more quickly than other similar cases because the little amount at issue rendered an appeal more expensive than it was worth.²³⁰

Even decisions in which U.S. courts ultimately defer to arbitrators take a long time. The *Schaefer* arbitration took less than a year; it began on October 18, 2011, and concluded with a decision in June 2012.²³¹ Nonetheless, the litigation took more than three years. The trial court's decision came on February 19, 2013.²³² The appeal was decided in January 2014.²³³ But that did not end the litigation. The appellee asked the U.S. Supreme Court to review the case, but it declined.²³⁴ The trial court held additional proceedings that concluded later that year when the court affirmed the arbitral award later, but the appellate court again reversed the arbitrator's decision, this time in October 2015.²³⁵ The trial court finally vacated the arbitral award on April 27, 2016.²³⁶

In *Peterson*, the claimant initiated arbitration in January 2020, and the arbitrator issued a final award in November 2023.²³⁷ Yet, before the final award, the claimant asked a federal court in September 2023 to vacate the proceedings.²³⁸ Ultimately, the district and appellate courts deferred to the arbitrator, but the process continued for two more years, culminating in the denial of a writ of certiorari by the U.S. Supreme Court.²³⁹

In contrast, Australian commercial litigation following arbitration proceeds quicker than similar cases in the United States, perhaps because Australian courts

²²⁷ *Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.*, 813 A.2d 621, 621(N.J. Super. Ct. Law. Div. 2002).

²²⁸ *Id.* at 623.

²²⁹ *Id.* at 621.

²³⁰ *Id.* at 624.

²³¹ *Schafer v. Multiband Corp.*, No. 12-13152, 2013 U.S. Dist. LEXIS 22057, at *11–13 (E.D. Mich. Feb. 19, 2013).

²³² *Id.* at *25.

²³³ *Schafer v. Multiband Corp.*, 551 F. App'x 814, 814 (6th Cir. 2014).

²³⁴ *Schafer v. Multiband Corp.*, No. 13-1263, 2014 U.S. LEXIS 4310, at *1 (June 23, 2014).

²³⁵ *Schafer v. Multiband Corp.*, 629 F. App'x 653, 656–58 (6th Cir. 2015).

²³⁶ *Schafer v. Multiband Corp.*, No. 12-cv-13152, 2016 U.S. Dist. LEXIS 55855, at *19 (E.D. Mich. Apr. 27, 2016).

²³⁷ *See Peterson v. Minerva Surgical, Inc.*, No. 19-2050-KHV, 2023 U.S. Dist. LEXIS 218847, at *5 (D. Kan. Dec. 8, 2023).

²³⁸ *Id.*

²³⁹ *See Peterson v. Minerva Surgical, Inc.*, No. 24-712, 2025 U.S. LEXIS at *589 (Feb. 24, 2025), *cert. denied*, 2024 U.S. App. LEXIS 20602 (10th Cir. Aug. 15, 2024).

are more deferential than their American counterparts. And because Australian courts are more deferential to arbitrators' decisions, parties have less incentive to appeal arbitrators' decisions at all.

For example, the parties in *TCL Air Conditioner* commenced arbitration in Australia in July 2008, with arbitral awards being made on December 23, 2010 and January 23, 2011.²⁴⁰ Approximately seven weeks after the second award, following TCL's failure to pay Castel the awarded amounts, Castel applied to the Federal Court of Australia to enforce the awards.²⁴¹ Around 10 months later, on January 3, 2012, Justice Murphy ruled that the Federal Court had jurisdiction under the IAA to enforce the arbitral awards.²⁴² TCL appealed the Federal Court's decision to the High Court of Australia, but the appeal was refused about a year later, on March 13, 2013.²⁴³ Although the court litigation took just under two years to conclude, this litigation involved two different courts and court proceedings.²⁴⁴ Each component of that litigation only took around a year.²⁴⁵

The *Sauber* case involved even faster litigation.²⁴⁶ In that case, the Swiss arbitral award was made on March 2, 2015, and the applicants filed proceedings in the Supreme Court of Victoria in Australia only three days later to enforce the award against Sauber Motorsport AG.²⁴⁷ On March 9, 2015, the Court heard the matter on an urgent basis and Justice Croft handed down judgment on March 11, 2015, following an expedited hearing.²⁴⁸

Following Justice Croft's decision, Sauber Motorsport AG immediately appealed to the Supreme Court's Court of Appeal in Victoria, which heard the case the next morning and delivered its judgment that same day.²⁴⁹ Giedo van der Garde subsequently filed a civil contempt application against Sauber Motorsports AG and its CEO, alleging non-compliance with the arbitral award and the Court's order.²⁵⁰ The court heard the matter within a few days. Remarkably, this represented an enforcement application for an international arbitration award that progressed from commencement in court through appeal to further enforcement measures in under

²⁴⁰ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (13 Mar. 2013) (Austl.).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 61–63

²⁴⁶ *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 (11 Mar. 2015) (Austl.); *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786 (Austl.).

²⁴⁷ *Van der Garde*, [2015] VSC 80 (Austl.).

²⁴⁸ *Id.*

²⁴⁹ *Sauber Motorsport*, 317 ALR 786 (Austl.).

²⁵⁰ James Galloway, *Giedo van der Garde Ends Contempt of Court Action Against Sauber*, SKY SPORTS (Mar. 16, 2015), <https://www.skysports.com/f1/news/12478/9757977/giedo-van-der-garde-ends-contempt-of-court-action-against-sauber> [<https://perma.cc/2F4A-AQ8U>].

one week—an unprecedented pace in Australia.²⁵¹

Guoao provides another example of rapid litigation in Australian courts. In March 2024, the Federal Court of Australia sentenced Xue for contempt of court arising from her breach of freezing orders.²⁵² Although this decision came three years after the arbitral award issued by the Beijing Arbitration Commission,²⁵³ much of that time was occupied by multiple proceedings before Chinese courts with respect to the award.²⁵⁴ *Guoao* only applied to the Federal Court of Australia to enforce the foreign arbitral award under § 8(3) of the IAA and for freezing orders in August 2022.²⁵⁵ The substantive hearing was held not long afterwards on December 13, 2022, and the Court delivered its associated judgment and orders less than two weeks later, on December 22, 2022.²⁵⁶ While the subsequent contempt of court matters terminated around a year later, the substantive judgment in the litigation took only around five months for the Australian Court to hand down.²⁵⁷

C. *The U.S. System Can Be Inconsistent*

Setting aside the comparative merits of the Australian system, the U.S. system itself suffers from a problem inherent to any appellate review: inconsistency. This article is not the first to observe the fact that courts do not apply consistent standards to define manifest disregard.²⁵⁸

The line between “manifest disregard” and mere legal error is not consistently drawn, a problem helpfully illustrated in legal scholarship written by Kate Kennedy. Kennedy analyzes *Patten v. Signator Ins. Agency*, a case in which a U.S. appeals court held that an arbitrator’s interpretation of an agreement was “not reasonable”.²⁵⁹ That standard suggests a difference between a “reasonable” error and an “unreasonable” one, which requires a subjective interpretation that is likely to be inconsistent.

²⁵¹ Associated Press, *Sauber, Giedo Van der Garde Settle*, ESPN (Mar. 18, 2015), https://www.espn.com/racing/f1/story/_/id/12506068/sauber-ex-driver-giedo-van-der-garde-settle-contract-dispute [<https://perma.cc/4EXC-49SY>].

²⁵² *Guoao Holding Group Co Ltd v Xue (Contempt)* [2024] FCA 278, [5] (25 Mar. 2024) (Austl.).

²⁵³ *Id.* at [2].

²⁵⁴ *Id.*

²⁵⁵ *Guoao Holding Group Co Ltd v Xue (No. 2)* [2022] FCA 1584, [6] (22 Dec. 2022) (Austl.).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See, e.g., Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 60 (2010); Kate Kennedy, Note, *Manifest Disregard in Arbitration Awards: A Manifestation of Appeals Versus a Disregard for Just Resolutions*, 16 J.L. & POL’Y 417, 417 (2007).

²⁵⁹ Kennedy, *supra* note 258, at 431–32 (citing *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 233 (4th Cir. 2006)).

The test for reasonableness is also, as Kennedy noted, not the same as the test the courts claim to apply, which is for “manifest disregard.”²⁶⁰ To illustrate that point, if two reasonable interpretations of a law exist, an arbitrator could deliberately apply one that the courts have rejected. In that situation, the arbitrator could have made a reasonable error yet still exhibited manifest disregard.

In practice, even when courts state the rules for the manifest disregard standard, they often do not explain how those rules apply to the case at bar. For example, in *Liberty Mutual*, the Court identified two elements of “manifest disregard”: a misapplication of the law and the arbitrator’s awareness of the law.²⁶¹ Citing *M&C Corp. v. Erwin Behr GmbH & Co.*, the *Liberty Mutual* court observed that vacatur is appropriate, “only if the court is able to conclude that the arbitrator knew the correct law but nevertheless ‘made a conscious decision’ to ignore it in fashioning the award.”²⁶² Nevertheless, the *Liberty Mutual* court proceeded to vacate the award without citing evidence that the arbitrator knew the correct law.²⁶³

It could be that the *Liberty Mutual* court made its decision for two reasons. First, the court could have inferred the arbitrator’s knowledge of the law based on its citation to the correct law. And second, the court could have reasoned that the decision involved an unlicensed medical practice. Given the public safety implications of confirming an award in favor of the unlicensed medical practice, the court could have declined to enforce an erroneous decision because the public policy concerns overrode the otherwise deferential “manifest disregard” standard. However, because the decision lacked clear reasoning, it is difficult to know for sure.

A similar issue exists in *Zeidman*. There, the appeals court noted that the arbitration panel knew the rule that extrinsic evidence should not be considered when interpreting an unambiguous agreement.²⁶⁴ Citing no other basis, the court concluded that the arbitrators manifestly disregarded the law.²⁶⁵ While the arbitrators’ knowledge of the applicable rule supports the court’s conclusion that the arbitrators disregarded the rule, it does not foreclose the possibility that the arbitrators misapplied the law. Without direct evidence on the question, courts can only guess, and those guesses will necessarily be inconsistent across cases.

Other cases do not provide any clearer analyses, but they do illustrate the challenges courts face in applying the manifest disregard standard. The *Schafer* case also involved subject matter with public policy implications: the management

²⁶⁰ *Id.* at 432.

²⁶¹ *Liberty Mut.*, 813 A.2d at 631–32.

²⁶² *Id.* (citing *M&C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 (6th Cir. 1996)).

²⁶³ *Id.* at 633.

²⁶⁴ *Zeidman v. Lindell Mgmt.*, 145 F.4th 820, 827 (8th Cir. 2025).

²⁶⁵ *Id.*

of employee benefit plans.²⁶⁶ However, the Court still deferred to the arbitrator.²⁶⁷ As noted *supra* in Section III.B, the arbitrator in *Schafer* cited the correct statute, ERISA, but did not apply the judicial decisions that interpreted the law differently. While the arbitrator's final result differed from what the judicial decisions mandated, the court still deferred to its decision, unlike the courts in *Liberty Mutual* and *Zeidman*.²⁶⁸

A similar inconsistency arises when courts consider whether an arbitrator followed contractual rules. For example, in *Kashner*, the Court held that the arbitrators disregarded NASD Rule 10324, which allowed sanctions "to obtain compliance" by a party.²⁶⁹ The Court reasoned that dismissal of a counterclaim "was not intended to obtain compliance" and, in fact, made compliance "irrelevant" by ejecting a participant from the arbitration.²⁷⁰ The Court held that the arbitrators "certainly knew" the sanctions rules because they rejected several other requests for sanctions.²⁷¹ Accordingly, it held that the misapplication of the rule met the "manifest disregard" standard.²⁷²

The *Kashner* decision is inconsistent with the one in *Adventure Motorsports*. In that case, the Court required a statement by the arbitrator that it was disregarding the law instead of relying on a mere inference.²⁷³ The *Adventure Motorsports* court rejected an attempt to infer that the arbitrator engaged in "manifest disregard" when the court cited *ABCO Builders, Inc. v. Progressive Plumbing, Inc.*²⁷⁴ In the *ABCO* case, one party presented the correct legal basis for damages to an arbitrator, who proceeded to apply an incorrect legal basis to the dispute.²⁷⁵ The *ABCO* court let the award stand.²⁷⁶ Following that precedent, *Adventure Motorsports* also let the award stand, noting that the arbitrator "never expressed, during the hearing or in the arbitration award, that the correct law should be ignored rather than followed."²⁷⁷

In contrast, given that Australia has specifically incorporated the Model Law into domestic legislation by way of the IAA and the CAAs, Australian courts generally apply consistent standards when considering whether to set aside an arbitral award. However, it is important to be aware that Australian jurisprudence

²⁶⁶ *Schafer v. Multiband Corp.*, 551 F. App'x 814, 815 (6th Cir. 2014).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 820; *Liberty Mut.*, 813 A.2d at 631–32; *Zeidman*, 145 F.4th at 827.

²⁶⁹ *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 78–79 (1st Cir. 2008).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 79.

²⁷² *Id.*

²⁷³ *Adventure Motorsports Reinsurance Ltd. v. Interstate Nat'l Dealer Servs.*, 867 S.E.2d 115, 123 (Ga. 2021).

²⁷⁴ *Id.* (citing *ABCO Builders, Inc. v. Progressive Plumbing, Inc.*, 647 S.E.2d 574, 575–76 (Ga. 2007)).

²⁷⁵ *ABCO*, 647 S.E.2d at 576.

²⁷⁶ *Id.*

²⁷⁷ *Adventure Motorsports*, 867 S.E.2d at 122.

is evolving, and the outcome will ultimately depend on the facts of the case, the nature of the dispute, the parties involved, and jurisdictional considerations.

The Australian cases cited in this article reflect a consistent approach. In *TCL Air Conditioner*, the High Court of Australia specifically applied section 8 of the IAA, finding that Australian Courts lack jurisdiction to determine the enforceability of arbitral awards by reference to any criteria not included in the Model Law (and the IAA).²⁷⁸ The court expressed that the criteria it must apply does not include any specific power to review an arbitral award for factual or legal error.²⁷⁹

Similarly, in *Sauber*, the Victorian Supreme Court applied the terms of the IAA consistently when faced with an assessment of whether there were grounds for refusal of enforcement of a foreign arbitral award.²⁸⁰ The Court emphasized the finality and enforceability of international arbitral awards and that sections 8(5) and 8(7) of the IAA (which Sauber sought to rely on in attempting to resist enforcement of the award) provide only limited grounds for denying enforcement.²⁸¹

These cases reflect the pro-enforcement policy set forth in the IAA and in the New York Convention to which Australia is a party, reaffirming that Australian courts will not re-examine the merits of an award but will instead construe any application to set aside an award narrowly and in accordance only with the IAA criteria. As Justice Croft highlighted in *Sauber*, this reinforces the key strengths of finality and certainty in the Australian approach for parties in international arbitration.²⁸²

Justice Stewart, in applying the relevant IAA criteria in *Guoao Holding Group Co Ltd v. Xue*, again construed those criteria narrowly, confirming that the grounds to deny enforcement of foreign awards on public policy grounds under section 8(7)(b) of the IAA did not apply because it only applied in circumstances contrary to fundamental norms of justice and fairness in Australia within the international commercial arbitration context of the dispute.²⁸³ That is, the Federal Court was again steadfast in applying the criteria and framework of the IAA, construing them in a confined way and demonstrating consistency and certainty of approach.²⁸⁴ This case reinforced the principle that Australian courts will not re-litigate the merits of an arbitral award, except in domestic commercial arbitration where all appellate criteria under the CAAs are met, including the grant of permission by the

²⁷⁸ *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, [111] (13 Mar. 2013) (Austl.).

²⁷⁹ *Id.* at [81].

²⁸⁰ *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, [7]–[8] (Austl.).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Guoao* (No.2), [2022] FCA 1584 [35] (Austl.).

²⁸⁴ *Id.* at [36].

Australian court.

D. The U.S. System Undermines Expectations in International Arbitration

While the U.S. is a center of global commerce, none of the top five global seats of arbitration are in the U.S., according to a recent survey.²⁸⁵ To be sure, the seat of an arbitration may differ from the jurisdiction in which an award is enforced. Still, uncertainty in the enforcement of arbitration awards may persuade commercial parties to avoid business in the U.S.. The uncertainty is unnecessary and U.S. courts could promote the country's economic interests by addressing it.

The New York Convention governs the enforcement of international arbitration awards in the courts of signatory states.²⁸⁶ And the Convention does not include an exception for "manifest disregard" or any similar standard.²⁸⁷ Accordingly, participants in cross-border commerce and, in the event of dispute, arbitration may assume that a court will not consider the manifest disregard standard when enforcing an award.

U.S. courts may defy this assumption. For example, in *Risen Energy Co. v. Focus Futura Holding Participacoes S.A.*, the U.S. District Court for the Southern District of New York applied the "manifest disregard" standard before ultimately rejecting a challenge to an international arbitration award.²⁸⁸ The court did so because it noted that the New York Convention did not identify sufficient grounds for vacating the award, and so the Court applied the standards otherwise applicable in the FAA.²⁸⁹

The court in *KT Corp. v. ABS Holdings, Ltd.*, similarly applied the "manifest disregard" standard to an international arbitration.²⁹⁰ And the court cited an appeals court case that also applied the same standard.²⁹¹ However, it did so when considering the losing party's motion to vacate the award.²⁹² When considering the prevailing party's cross-motion to confirm the award, the court noted that the New York Convention limited the court's analysis to the enumerated defenses it proceeded to consider, none of which amounted to a manifest disregard of the

²⁸⁵ WHITE & CASE, 2025 INTERNATIONAL ARBITRATION SURVEY 5–7 (2025). To be sure, none of the top seats are in Australia, either, but other factors may contribute to this fact, such as its relatively small population and its geographic distance from major trading partners.

²⁸⁶ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 12, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3.

²⁸⁷ See Noah Rubins, "Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States, 12 AM. REV. INT'L ARB. 363, 371 (2001).

²⁸⁸ No. 23 Civ. 10993, 2024 U.S. Dist. LEXIS 104709, at *6 (S.D.N.Y. June 11, 2024).

²⁸⁹ *Id.* (citing *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105 (2d Cir. 2019)).

²⁹⁰ No. 17 Civ. 7859, 2018 U.S. Dist. LEXIS 115268, at *13 (S.D.N.Y. July 10, 2018).

²⁹¹ *Id.* at *12 (citing *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016)).

²⁹² *Id.* at *9.

law.²⁹³ While there is a technical difference between confirming an award, which is necessary to obtain a judgment that a creditor can use to collect assets, and vacating an award, which a party can attempt to do before confirmation, the difference is academic. In practice, had the court vacated the award on the grounds of manifest disregard, there would be no award to confirm.

Importantly, and adding to the uncertainty in international arbitration in the U.S., is the split among U.S. courts about whether to apply the manifest disregard standard at all. The Second, Fourth, Sixth, Ninth, and Tenth Circuits all apply the standard.²⁹⁴ In contrast, the Fifth, Seventh, and Eleventh Circuits do not.²⁹⁵ State courts are similarly split, with Alaska,²⁹⁶ Delaware,²⁹⁷ New Jersey,²⁹⁸ New York,²⁹⁹ Nevada,³⁰⁰ and South Carolina³⁰¹ applying the “manifest disregard” standard, and Alabama,³⁰² California,³⁰³ Texas,³⁰⁴ and West Virginia³⁰⁵ do not.

Contracting parties may be unaware of this split among courts, or they may be unable to predict the court in which a party will challenge or seek enforcement of an arbitration award. Parties often submit these claims when an opposing party has assets, in a pique of displeasure following a surprise loss, or disgust that an opponent refuses to abide by the arbitral decision. And given the number of possible fora in the United States in which to submit arbitral claims for court

²⁹³ *Id.* at *7.

²⁹⁴ *See* *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 670 (2010) (noting the Second Circuit’s holding that manifest disregard survived *Hall Street*); *Dewan v. Walia*, 544 F. App’x 240, 245 (4th Cir. 2013); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415, 419 (6th Cir. 2008); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1243 (10th Cir. 2018).

²⁹⁵ *See* *Citigroup Global Mkts. v. Bacon*, 562 F.3d 349, 353 (5th Cir. 2009); *Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281, 284 (7th Cir. 2011); *Frazier v. Citifinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010).

²⁹⁶ *See* *Dunham v. Lithia Motors Support Servs.*, No. S-15068, 2014 Alas. LEXIS 55, at *26 (Apr. 9, 2014).

²⁹⁷ *See* *SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745, 750 (Del. 2014).

²⁹⁸ *See, e.g.*, *Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.*, 813 A.2d 621, 623 (N.J. Super. Ct. Law Div. 2002).

²⁹⁹ *See, e.g.*, *Nexia Health Techs., Inc. v. Miratech, Inc.*, 176 A.D.3d 589, 591 (N.Y. App. Div. 2019).

³⁰⁰ *See, e.g.*, *Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist.*, 131 P.3d 5, 10 (Nev. 2006).

³⁰¹ *See, e.g.*, *Weimer v. Jones*, 610 S.E.2d 850, 852 (S.C. Ct. App. 2005).

³⁰² *See, e.g.*, *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 381 (Ala. 2009).

³⁰³ *See, e.g.*, *Siegel v. Prudential Ins. Co. of America*, 79 Cal. Rptr. 2d 726, 739 (Cal. Ct. App. 1998).

³⁰⁴ *See, e.g.*, *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016) (applying the Texas Arbitration Act, Tex. Civ. Prac. & Rem. Code § 171.021).

³⁰⁵ *See, e.g.*, *Cunningham v. LeGrand*, 785 S.E.2d 265, 272 (W. Va. 2016).

review, it can be impracticable to research the law in each jurisdiction.

Decisions like *Zeidman* that apply the “manifest disregard” standard could possibly come as a surprise to contracting parties that choose to include arbitration provisions in reliance on the New York Convention. They may select arbitration because they believe it will offer finality when, if a party proceeds to enforce an award in the United States, they may have to endure more litigation. With this foreknowledge, contracting parties may instead opt to include a forum selection clause that requires disputes to be litigated in a country with a faster judicial process and where application of the law is clearer. Doing so may also reduce the scrutiny a U.S. court applies if judgment enforcement proceedings arise within the states. U.S. judges and lawmakers may seek to avoid that trend to maintain the country’s major role in international commerce, but any change in the judiciary or legislature has not come as of yet.

The Australian system provides a strong model for international commerce, as it strictly applies the New York Convention’s internationally harmonized principles governing recognition and enforcement of arbitral awards between Contracting States.

In *Guoao*, the respondents argued that enforcement would be contrary to public policy due to manifest unfairness or imbalance in the remedies.³⁰⁶ The Court applied a narrow Australian conception of public policy, holding that only violations of fundamental principles of justice and morality qualify for the public-policy exception to the enforcement that Article V(2)(b) of the New York Convention provides.³⁰⁷ This is consistent with Article V(1)(c) of the New York Convention, which does not include errors of law as grounds to justify a court refusing to enforce an arbitrator’s award.³⁰⁸

Sauber also reflects consistency with international expectations.³⁰⁹ In the Victorian Supreme Court’s enforcement hearing in the first instance of *Sauber*, the respondent argued that the award addressed matters outside the arbitration agreement’s scope.³¹⁰ The Australian court decided, with reference to the award and consistent with Article V(1)(c) of the New York Convention, that the arbitral tribunal did not exceed its authority in making the award.³¹¹ The respondent also claimed that enforcement would violate public policy because, among other things, the award breached principles of natural justice by not involving certain third parties.³¹² In arriving at its decision, the Court reiterated the narrowness of the public policy exception in Australia that Article V(2)(b) of the New York Convention requires in assessing the enforcement of a foreign award, and refused

³⁰⁶ *Guoao* (No. 2), [2022] FCA 1584 (Austl.).

³⁰⁷ *Id.*

³⁰⁸ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3.

³⁰⁹ *Van der Garde*, [2015] VSC 80 (Austl.).

³¹⁰ *Id.* at [7].

³¹¹ *Id.* at [25].

³¹² *Id.* at [7].

to revisit the merits or utility of the award.³¹³

The High Court of Australia's decision in *TCL* was another endorsement for the limited, non-merits-based review of international arbitral awards under Australia's IAA and international standards.³¹⁴ In arriving at its decision, the High Court highlighted Australia's obligation as a contracting state to the New York Convention.³¹⁵ In doing so, it traced the origins of section 8 of the IAA and the Model Law's Articles 35-36 to the Convention's Articles III to V.³¹⁶ The Court held that neither the Model Law nor the New York Convention allows for review of awards for errors of law unless they trigger a relevant ground for refusal, such as an excess of authority or a breach of public policy.³¹⁷ Furthermore, it noted that the absence of a right under Australian law to refuse enforcement due to legal error is both deliberate in drafting history and design and consistent with the New York Convention.³¹⁸

V. THE AUSTRALIAN APPROACH IS SUPERIOR TO THE PROPOSED ALTERNATIVES

Other writers have proposed alternatives for the "manifest disregard" standard. The Australian model of strict deference to an arbitrator's application of the law is superior to these alternatives.

One writer defends manifest disregard on its merits and proposes that Congress amend the FAA to expressly include it as grounds for setting aside an arbitral award.³¹⁹ He writes:

Without manifest disregard of the law as a ground for vacating an award, courts may be faced with the prospect of having to enforce an arbitration award where the award on its face openly refuses to follow established law. Enforcing such an award would harm the legitimacy of the judicial system and also could result in a political backlash against the arbitration process.³²⁰

This, however, is the exact decision that contracting parties made when they chose to arbitrate disputes rather than subject disputes to the default system of litigation in a court system with appellate review. In exchange for the efficiency of arbitration, parties agree to forgo a process that exists to correct legal errors. If anything, problems that arise with arbitration would enhance the legitimacy of the judicial system as its primary alternative. Moreover, this writer's predictions of a backlash against the arbitration process have not come to pass as the U.S. Supreme

³¹³ *Id.* at [20].

³¹⁴ *TCL Air Conditioner*, [2013] HCA 5 (Austl.).

³¹⁵ *Id.* at [21].

³¹⁶ *Id.*

³¹⁷ *Id.* at [111].

³¹⁸ *Id.* at [48].

³¹⁹ Christopher Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 247 (2007).

³²⁰ *Id.*

Court introduced “manifest disregard” over seventy years ago, and arbitration has not diminished in popularity. In fact, parties arbitrate before the International Chamber of Commerce in the U.S. more than parties in any other country.³²¹

The writer suggests that the added burden of litigation of “manifest disregard” claims could be addressed by narrowly defining “manifest disregard” or allowing prevailing parties on appeal to recover legal fees.³²² The problems with manifest disregard, however, do not stem entirely from its lack of a narrow definition. Under its narrowest definition, which is an arbitrator’s conscious and deliberate disregard of the applicable legal standard, courts still inconsistently apply the standard based on their own inferences and suspicions, because arbitrators are unlikely to state that they are choosing not to follow the law. Moreover, the suggestion ignores the inconsistent application of the standard, which makes it difficult for litigants to determine whether their “manifest disregard” claim is strong before deciding whether to risk having to pay opposing counsel’s fees. This is especially true in cases like *Zeidman*, where district appellate courts have different views on the same issue.

Another writer proposes that courts review arbitration awards for legal error, but only upon the request of a party subject to mandatory arbitration pursuant to an agreement she did not draft.³²³ This addresses a valid concern: that people who enter agreements should be able to rely on proper application of the law. Normally, appellate review is what ensures that any errors by a first instance tribunal are corrected. This approach ensures that people should not waive that review unless they deliberately drafted an agreement that does so. And it recognizes that many agreements with arbitration provisions are between parties with different levels of negotiating power.

This approach, however, opens up a debate about which party drafted an agreement. For many contracts of adhesion, this may be clear. But for others, it may be ambiguous, especially for agreements that have been heavily negotiated. In those cases, this approach leaves in place the same problems that exist in the status quo. Moreover, many agreements contain clauses that state that both parties had equally drafted the agreement, leaving it to a finder of fact to examine the enforceability of such a clause.

Like the first writer, the second one recognizes that his proposal undercuts the finality of arbitration. He argues that additional litigation is a fair price to pay for the protection of parties with less bargaining power who are subject to mandatory arbitration. However, while there are many cases where it may be easy to identify a power imbalance, there are many others where it is a closer call. Widespread litigation over the issue could swallow the very benefit that arbitration provides.

³²¹ See International Chamber of Commerce, *ICC Dispute Resolution 2024 Statistics* at 7 (June 24, 2025) https://iccwbo.org/wp-content/uploads/sites/3/2025/06/2024-Statistics_ICC_Dispute-Resolution.pdf [<https://perma.cc/DQ63-ECMZ>] (citing the United States as the most popular country for international arbitration).

³²² Drahozal, *supra* note 319, at 247.

³²³ Burch, *supra* note 258, at 75.

This writer also suggests empowering courts to sanction parties for frivolous appeals on the basis of manifest disregard. This proposal allows the “manifest disregard” standard to remain in place while discouraging litigants from citing it unless they are likely to succeed on that basis. This idea has the same issues as the first writer’s suggestions because it does not affect the inconsistency with which courts apply the rule. It also ignores the very imbalance of power that the writer cites for his primary proposal, as a wealthier litigant may risk sanctions and get another shot at victory while a less wealthy litigant may not have the resources to pursue such a course.

A third writer criticizes the “manifest disregard” standard, but proposes that an improvement could be limiting the standard to cases in which the arbitrator was aware of the correct law, while ignoring entirely the degree of an arbitrator’s error.³²⁴ The author touts the proposal as “exceedingly easy to implement” because it does not require a court to subjectively determine the degree to which the arbitrator erred on the law.³²⁵

The problem with this approach is that it sounds a lot like the status quo. Because arbitrators typically do not declare that they are ignoring applicable law, courts infer that they are doing so by noting a reference to the correct law and then evaluating the degree to which arbitrators deviated from it. The writer does not propose an alternative method to determine whether an arbitrator deliberately disregarded the law. So, his proposal functionally operates as a subjective evaluation of the degree of legal error, the very system he proposes to replace.

Another problem with this approach is that any avenue to challenge an arbitral award for legal error brings with it the problems that exist in the status quo: arbitrariness and inefficiency. Justice Stein, then of the Supreme Court of South Australia, identified this issue when he wrote a decision enforcing a Chinese arbitral award that, “[a]rbitral awards are intended to provide certainty and finality. Arbitration is an efficient, impartial, enforceable and timely method to resolve commercial disputes.”³²⁶

A third problem with this approach is that it assumes a sole arbitrator hears a case. When there is a panel of arbitrators, however, it may not be clear what legal knowledge any individual arbitrator possessed and what influence that knowledge had on the ultimate result.

A fourth writer proposed that parties draft their arbitration agreements with provisions that entitle litigants to challenge an award on the grounds of “manifest disregard,” but only to an appellate arbitral panel rather than to a court.³²⁷ This approach has several positive qualities. It maintains the traditional benefits of arbitration, such as efficiency and privacy. And it mitigates the harm that arises

³²⁴ Hayford, *supra* note 44, at 816–818.

³²⁵ *Id.* at 818.

³²⁶ *Nantong Drayson Composite Material Co Ltd v Greyco Pty Ltd* [2023] SASC 52, [30] (Austl.).

³²⁷ Yates, *supra* note 50, at 363–64.

from a review for legal error, which will inevitably lead to delays and costs, by resolving that review in a quicker, and likely cheaper, manner as compared to the more cumbersome process of litigation.

This writer concedes, however, that this does not solve the problems with the “manifest disregard” standard for parties who do not include the provision.³²⁸ Parties can already agree to an arbitration procedure that allows for arbitration of an appeal. And many major providers of arbitration services can easily accommodate requests for appellate review. Still, U.S. courts continue to hear arguments challenging arbitral decisions on legal merits. This is because not every arbitration agreement contains such a procedure, and some expressly preclude it.

To implement this approach, courts or statutes could require any arbitration clause to include such a procedure. This may not be very helpful, though, since parties who did not expressly agree to have arbitrators engage in an appellate review may disagree about how to select the review panel and how to handle other critical details of the process. Moreover, as this writer acknowledges, this process may be fruitless if the losing party still goes to court and argues that the arbitral review panel misapplied the law.³²⁹ And, finally, this may just double the cost and time spent in arbitration, because there may be little incentive for a losing party in arbitration not to challenge an award before a new arbitral panel. In the end, this approach fails to provide the benefits litigants seek in arbitration, like certainty or efficiency, and only prolongs proceedings further and increases costs.

Another alternative comes from the English courts, who refuse to enforce an arbitration award that is “obviously wrong.”³³⁰ An advantage to this approach is that it does not attempt to discern the subjective intent of an arbitrator, but instead focuses on an issue of greater importance to the outcome of the case: the degree to which the arbitrator failed to appropriately apply the law. The term “obviously” also suggests a higher standard, which may remind courts to generally defer to arbitral decisions and instill some confidence in arbitrating parties that courts will enforce an arbitral award.

However, this standard is, unfortunately, just as capricious as the “manifest disregard” standard. What is obvious to one judge may not be obvious to another. Furthermore, the term “obvious” relates more to the ease with which a judge can determine the error rather than the magnitude of it. And the existence of any grounds on which to challenge the arbitrator’s legal decision invites the same lengthy and costly challenges that the “manifest disregard” standard presents today.

VI. CONCLUSION

The current state of appellate review of legal decisions by arbitrators in the United States is untenable. The split in authority among state and federal circuit

³²⁸ *Id.* at 365.

³²⁹ *Id.*

³³⁰ Arbitration Act 1996, c. 23, § 69 (UK).

courts makes it difficult for parties to know what to expect when they bargain for an arbitration provision. The absence of “manifest disregard” as a basis for review in the FAA and in the New York Convention may surprise participants in international commerce who expect U.S. courts to defer to arbitrators as their counterparts abroad do.

No legal system is perfect, and the Australian system of strict deference to arbitrators warrants the criticism elaborated on above. In particular, Australian courts’ have a history of deliberately enforcing some decisions that misapply the law, save for limited circumstances that offend public policy or deprive litigants of fair consideration of their rights.

Nonetheless, the U.S. should consider the experience of the Australian legal system when it considers whether to abandon, modify, or codify the “manifest disregard” standard. For contracting parties that seek fast, final, and predictable decisions in arbitration, Australia has demonstrated that deference to those decisions yields superior results to the costly and inconsistent litigation parties face in the United States due to its invitation to losing parties in arbitration to drag disputes into years of uncertain court battles.

Mike Lindell sought to draw attention to a grave injustice and call upon the public to reconsider how it decides a major issue. He has succeeded, though perhaps not as intended, by showing the world that arbitration in the United States does not provide the quiet, efficient resolution parties often seek. His lawsuit, or one like it, should prompt the U.S. Supreme Court to rebuild the trust of commercial parties in the U.S. and abroad by following Australia’s example to end the manifest disregard standard.

