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## The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards

Bret F. Randall

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# The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards

## I. INTRODUCTION

Arbitration, intended to reduce federal court caseload,<sup>1</sup> is producing an increased amount of litigation. The proper standard for review of arbitration awards continues to be a puzzle to litigants, and to some extent to the judiciary. Much of the confusion can be traced to two conflicting federal policies. On the one hand, both Congress and federal courts support arbitration as one method of relieving oppressive caseloads. Therefore, to promote the finality of arbitration, courts generally defer to the arbitrator's determination of the merits of an award. For a court to review the merits would reduce arbitration from an efficient, private means of resolving disputes to a mere pre-litigation formality.

On the other hand, absolute deference is inappropriate. The Constitution vests the judicial power of the United States in the federal courts,<sup>2</sup> not in arbitrators. Therefore, federal courts should review the merits when arbitration awards impinge on the judicial power. For example, courts have the responsibility to represent the general public interest and cannot permit a violation of public policy, enforce illegal contracts, or otherwise condone illegal behavior. Therefore, arbitration awards violating public policy or the law require federal court review.

Enacted in 1925, the United States Arbitration Act ("Act")<sup>3</sup> provides four broad standards under which an arbitration award may be vacated.<sup>4</sup> Section ten of the Act "authorizes va-

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1. As one federal circuit court noted, the goal of arbitration is "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981).

2. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish." U.S. CONST. art. III, § 1.

3. 9 U.S.C. §§ 1-14 (1988).

4. 9 U.S.C.A. § 10 (West Supp. 1992) provides in part:

catur of an award in cases of specified misconduct or misbehavior on the arbitrators' part, actions in excess of arbitral powers, or failures to consummate the award."<sup>5</sup> In addition to these statutory standards, the federal judiciary has formulated other standards under which arbitration awards may be vacated.

The purpose of this comment is to identify these judicially created standards and to analyze their history, application, and underlying policies. Federal courts, implementing a policy that favors arbitration, have applied these standards in an unnecessarily formalistic and narrow manner. This comment addresses each of the current standards—essence of the contract, manifest disregard of the law, illegality, and public policy—and concludes that, in order to promote arbitration, federal courts should adopt a broader, more rational approach to reviewing arbitration awards.

## II. THE ESSENCE OF THE CONTRACT STANDARD OF REVIEW

### A. *Historical Background*

The standard of review most often used for arbitration awards, the "essence of the contract" standard, was established by the Supreme Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*<sup>6</sup> In that case, a group of employees was

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(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

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

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

(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.

Detailed discussion of these statutory grounds is beyond the scope of this comment. For an excellent review, see Margaret Shulenberg, Annotation, *Construction and Application of § 10(a-d) of United States Arbitration Act of 1947 (9 USCS § 10(a-d))*, *Providing Grounds for Vacating Arbitration Awards*, 20 A.L.R. FED. 295 (1986).

5. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990).

6. 363 U.S. 593 (1960). *Enterprise Wheel* is one of three related cases decided the same day that are known as the *Steelworkers Trilogy*. The other two cases are

fired for walking off the job to protest the discharge of another employee.<sup>7</sup> The collective bargaining agreement between the union and the employer provided that any disagreements "as to the meaning and application" of the contract should be submitted to final, binding arbitration.<sup>8</sup> The arbitrator reinstated the workers after a ten day suspension but the employer refused to comply with the award.<sup>9</sup> Upon the union's motion to enforce the award, the district court directed the employer to comply. The court of appeals, however, vacated the award.<sup>10</sup>

The Supreme Court reversed, holding that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."<sup>11</sup> The arbitrator has authority to interpret and apply the contract, the parties having bargained for his "informed judgment" regarding the "knowledge of the custom and practices of a particular factory or of a particular industry."<sup>12</sup> The Court recognized only a narrow exception to the finality of an arbitration award.

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.<sup>13</sup>

In short, this deferential standard of review, intended to support the federal policy favoring labor arbitration, forbids courts

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United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (holding that a court cannot rule on the merits of the grievance if the parties have agreed to submit a dispute to arbitration in their collective bargaining agreement), and United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (establishing a presumption of arbitrability for labor disputes if the collective bargaining agreement contains an arbitration clause).

7. 363 U.S. at 595.

8. *Id.* at 594.

9. *Id.* at 595.

10. *Id.* at 595-96. The collective bargaining agreement expired before the award was issued. The court of appeals vacated the award because the reinstatement and the award of back pay could not be enforced. *Id.*

11. *Id.* at 596.

12. *Id.* at 596-97.

13. *Id.* at 597.

from overturning awards arising out of the essence of the underlying contract.

### B. Application

The essence of the contract standard has been applied frequently over the years. Most notably, the Supreme Court expressly reaffirmed the standard in *United Paperworkers International Union v. Misco, Inc.*<sup>14</sup> In *Misco*, the employer appealed an arbitrator's reinstatement of a discharged employee<sup>15</sup> and the district court vacated the award on the ground that it violated public policy; the court of appeals affirmed.<sup>16</sup> In a discussion reminiscent of *Enterprise Wheel*, the Supreme Court reversed, once again asserting that the arbitrator's role in labor disputes is essentially one of a contract-reader. The Court reasoned that arbitral decisions are insulated from judicial review because the parties bargained for "the arbitrator's view of the facts and of the meaning of the contract."<sup>17</sup> The Court concluded that because the parties have "authorized the arbitrator to give meaning to the language of the agreement," the fact that the arbitrator "misread" the contract establishes no ground on which the award can be set aside.<sup>18</sup>

The lower courts have developed numerous variations of the essence of the contract standard. These variations set aside an award if it is "completely irrational,"<sup>19</sup> "unfounded in reason and fact,"<sup>20</sup> "arbitrary and capricious,"<sup>21</sup> "palpably

14. 484 U.S. 29 (1987).

15. *Id.* at 34.

16. *Id.* at 34-35. For a more detailed analysis of *Misco* and the public policy exception, see *infra* part V.

17. *Id.* at 37-38.

18. *Id.* at 38. The Court explained:

[I]nterpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

*Id.*

19. *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986).

20. *United Food & Commercial Workers v. Stop & Shop Co.*, 776 F.2d 19, 21 (1st Cir. 1985). In this case the court said that an arbitration award may be set aside if it is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-

faulty,"<sup>22</sup> not "plausible,"<sup>23</sup> or in "[m]anifest disregard of the law."<sup>24</sup> Whatever label applied, the vast majority of disputed arbitration awards are affirmed under the essence of the contract standard.<sup>25</sup>

### C. Analysis

Seven years before *Misco*, one scholar asserted that reviewing courts all too often explore the merits of arbitral interpretation despite the Supreme Court's clear mandate in *Enterprise Wheel* that courts not pass on the merits of arbitration awards.<sup>26</sup> He noted that we do not need "more verbal formulations of the proper scope of review," but rather a return to a

fact." *Id.*

21. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990).

22. *International Elec. Workers v. Peerless Pressed Metal Corp.*, 489 F.2d 768, 769 (1st Cir. 1973); *Safeway Stores v. American Bakery & Confectionery Workers Int'l Union*, 390 F.2d 79, 82 (5th Cir. 1968).

23. *Holly Sugar Corp. v. Distillery Workers Int'l Union*, 412 F.2d 899, 903 (9th Cir. 1969).

24. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (In addition to other standards, an arbitration award may be set aside if it is in "[m]anifest disregard of the law.").

The "manifest disregard of the law" standard is included in this list because many courts regard it as merely a variation of the essence of the contract standard. However, the two standards are different in many important respects. While essence of the contract is used to determine whether the arbitrator is construing the contract, manifest disregard of the law refers to the arbitrator's failure to rely on outside, governing law. See *infra* part III.

Courts have reasoned that these various formulations of the standard can be reduced to some sort of abuse of discretion standard. See *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) ("We regard the standard of review undergirding these various formulations as identical . . ."); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988) ("[S]everal . . . terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice.").

25. *Ladish Co. v. International Ass'n of Machinists & Aerospace Workers*, 966 F.2d 250 (7th Cir. 1992).

Regardless of the label applied, the general rule stands that an arbitrator may not ignore the plain language of the contract. Though most arbitration awards are affirmed under the essence of the contract standard, courts in a small group of cases have vacated awards that were contrary to the plain language of the contract. *E.g.*, *AP Parts Co. v. UAW*, 923 F.2d 488, 491-92 (6th Cir. 1991) (ignoring the plain language of the contract, the arbitrator "direct[ed] the parties to negotiate again what they had settled" in previous contract talks); *Leed Architectural Prods., Inc. v. United Steelworkers Local 6674*, 916 F.2d 63, 66 (6th Cir. 1990) ("arbitrator disregarded . . . the contract" by allowing an unlawful wage rate to stand and altering the bargained-for rate of other employees to match).

26. *Lewis B. Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 270-74 (1980).

more clear understanding of the basics: the role of the arbitrator.<sup>27</sup>

The various verbal formulations of the *Enterprise Wheel* standard are both unnecessary and confusing. Without a clear recognition that these standards stem from the same source, they expand the grounds for vacating an award, thereby increasing the possibility that a judge will, in fact, review the merits of an award. But most important, these formulations distract the judiciary from the essential question of the arbitrator's function and from the purpose underlying judicial deference to arbitration awards. These considerations should ultimately control any decision regarding the proper scope of review for arbitration awards. Fortunately, many courts are not misled and seem to recognize that all of these verbal formulations refer to the same standard.<sup>28</sup>

Nevertheless, some ambiguity exists even after *Misco's* affirmation of the *Enterprise Wheel* standard. As the Sixth Circuit recently noted, literal application of the *Misco* standard may lead to the absurd result that an arbitration award not interpreting or relying on the contract may nonetheless be insulated from review, so long as the arbitrator was "arguably construing or applying the contract."<sup>29</sup> Because "arguably" is an extremely broad term, nearly all decisions by arbitrators can be said to have some basis in the contract.<sup>30</sup> A more narrow reading of *Misco* is therefore required, not only to effectuate the parties' chosen method of dispute resolution, but to ensure that courts still have the power to set aside an award that reflects the arbitrator's "own brand of industrial justice."<sup>31</sup>

The Sixth Circuit has suggested a two-step inquiry when determining whether an award is "arguably" based on the contract. First, the reviewing court must determine whether the arbitrator interpreted or applied a specific term of the contract. If not, then the award is not arguably drawn from the "essence" of the contract and cannot be enforced. Second, if the

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27. *Id.* at 274.

28. *See supra* note 24.

29. *Browning-Ferris Indus., Inc. v. Teamsters Local Union No. 984*, No. 90-5933, 1991 U.S. App. LEXIS 24760, at \*13 (6th Cir. Oct. 10, 1991) (emphasis added) (quoting *Misco*, 484 U.S. 29, 38 (1987)).

30. *Id.*

31. *Id.* at \*14 (citing *Misco*, 484 U.S. at 36 (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))).

arbitrator's interpretation of the contract is arguably correct,<sup>32</sup> then even the reviewing court's belief that the arbitrator has "committed serious error does not suffice to overturn his decision."<sup>33</sup> The Sixth Circuit's approach confines arbitrators to the terms of the contract and allows for a judicial check on arbitrator "industrial justice." Moreover, this approach is easily applied and supports arbitral finality.

### III. THE MANIFEST DISREGARD OF THE LAW STANDARD OF REVIEW

#### A. *Historical Background*

Although some federal circuit courts maintain that the "manifest disregard of the law" standard is nothing more than a verbal variation of the *Enterprise Wheel* "essence of the contract" standard,<sup>34</sup> in reality, each is an independent standard of review. While the *Enterprise Wheel* standard applies to the arbitrator's interpretation of the *contract*, the manifest disregard of the law standard relates to the arbitrator's interpretation and application of the governing *law* outside the agreement.

The "manifest disregard" standard originated from dicta in the 1953 Supreme Court decision *Wilko v. Swan*.<sup>35</sup> In *Wilko* the Court declared invalid the use of pre-dispute arbitration clauses in securities agreements, primarily because of "the old judicial hostility to arbitration."<sup>36</sup> The *Wilko* Court was uncomfortable with arbitration of security disputes under federal law because arbitrators lack "judicial instruction on the law," awards may be made without explanation or a complete record of the arbitration proceedings, and "[p]ower to vacate an award is limited."<sup>37</sup> The Court noted the following in dicta:

While it may be true . . . that a failure of the arbitrators to decide in accordance with [applicable law] would "constitute grounds for vacating the award pursuant to section ten of the Federal Arbitration Act," that failure would need to be made

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32. *Id.* at \*13.

33. *Misco*, 484 U.S. at 38.

34. See *supra* note 24 and accompanying text.

35. 346 U.S. 427, 436-37 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

36. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942).

37. *Wilko*, 346 U.S. at 436.



clearly to appear. . . . [T]he 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.<sup>38</sup>

Although the Supreme Court later reversed *Wilko* to allow pre-dispute arbitration clauses in securities contracts, the "manifest disregard" language remains influential. Applying this standard, many circuit courts have determined that the arbitrators must "understand and correctly state the law, but proceed to disregard the same" before a court can review the award on the merits.<sup>39</sup> But the most often cited formulation of the manifest disregard standard originated in the Second Circuit. There, the court stated that to meet this standard requires more than a mere misunderstanding with respect to the law:

The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.<sup>40</sup>

Citing the *Steelworkers Trilogy*,<sup>41</sup> the Second Circuit noted that the well-established federal policy favoring arbitration required the adoption of this strict formulation of the manifest disregard of the law standard.<sup>42</sup>

### *B. Application*

Courts are extremely reluctant to vacate an award because of allegations that the arbitrator manifestly disregarded the law.<sup>43</sup> In the name of judicial deference to arbitration awards,

38. *Id.* at 436-37 (emphasis added) (citation omitted).

39. *See, e.g.,* *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 750 (8th Cir.) (quoting *San Martine Compania de Navegacion v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)), *cert. denied*, 476 U.S. 1141 (1986).

40. *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). The Tenth Circuit has adopted virtually the same standard, stating that it requires a "willful unattentiveness to the governing law." *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988).

41. *See supra* note 6.

42. *Bobker*, 808 F.2d at 933.

43. The author has yet to find a case where an arbitration award was vacated because the arbitrator manifestly disregarded the law as presently defined. *See*

the federal circuits have erected a virtually insurmountable standard of review. Before a court can review the propriety of an award, there must be a showing that the arbitrator first correctly ascertained the applicable law and then expressly manifested an intention, on the record, to disregard it. This requires the party moving to vacate the award to make a two-part showing. First, the party must show on the record that the arbitrator correctly ascertained the applicable law. This often proves impossible because arbitrators are not required to give reasons, let alone legal analysis, justifying an award.<sup>44</sup> A failure to make the showing is fatal. In *O.R. Securities, Inc. v. Professional Planning Associates*,<sup>45</sup> Professional Planning Associates entered into binding arbitration to resolve a dispute with WZW Financial Services, Inc. (WZW). Soon thereafter, WZW transferred its assets to O.R. Securities (O.R.), whose attempt to avoid the arbitration failed.<sup>46</sup> After losing at arbitration, O.R. filed suit in federal court to vacate the award, claiming that it had not assumed WZW's liabilities.<sup>47</sup> The court held that because the arbitrators failed to provide any explanation of their award, O.R. could not make a showing that the arbitrators manifestly disregarded the law.<sup>48</sup>

Second, assuming a party seeking vacatur of an award can prove the arbitrators correctly ascertained the applicable law, the party must also show that the arbitrator's express intention to disregard it. As the *O.R. Securities* court explained, "there must be some showing in the record, *other than the result obtained*, that the arbitrators knew the law and *expressly* disregarded it."<sup>49</sup> Due to the inherent difficulty in proving arbitral intent, it is not surprising that few, if any, arbitration awards have been vacated under the manifest disregard standard.<sup>50</sup>

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Shulenberg, *supra* note 4, at 367 (arbitration awards generally not vacated under manifest disregard of the law).

44. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (arbitrators are not required to give reasons for award); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214-15 (2d Cir. 1972) (arbitrators are not required to explain award).

45. 857 F.2d 742 (11th Cir. 1988).

46. *Id.* at 744.

47. *Id.*

48. *Id.* at 747. Likewise, in *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir. 1986), the court refused to find that the arbitrators manifestly disregarded the law because the arbitration award "does not clearly delineate the law applied, nor expound the reasoning and analysis used." *Id.* at 750.

49. 857 F.2d at 747 (emphasis added).

50. See *supra* note 43 and accompanying text.

### *C. Analysis*

The current formulation of the manifest disregard of the law standard of judicial review actually promotes disregard of the applicable law, lacks any potency whatsoever, and undermines rather than supports the federal policy favoring arbitration.

The present doctrine does little more than provide an incentive for arbitrators to disregard the law, especially when the arbitrator is not a lawyer. In effect, when arbitrators are faced with the application of governing law outside the contract, they can avoid any complicated legal analysis by ignoring the issue altogether. As long as they are careful not to give any reasons for the award, their actions will receive absolute deference and never be questioned.

Although some judicial review is necessary to prevent arbitrators from disregarding the law, the federal circuit courts have defined the applicable standard out of existence. Surely, if an arbitrator were to ascertain the law, expressly manifest on the record an intention to ignore it, and do so, the award could be vacated on statutory grounds.<sup>51</sup> The present judicial formulation of the standard, then, is meaningless.

The current application of the manifest disregard standard also ignores the underlying policy consideration of the arbitration system. Ironically, courts consistently point out that the underlying reason for applying this overly deferential standard of review is the strong federal policy favoring arbitration. To adopt a less strict standard, reasoned one circuit court, would undermine arbitration.<sup>52</sup> Even so, the current standard reduces the legitimacy of the arbitration system because it erects an insurmountable barrier to judicial review of arbitration decisions that may completely disregard applicable law, whether statutory or case law. Public trust and confidence in the arbitral system are essential to achieve the goal of relieving congestion in the courts.<sup>53</sup> Therefore, courts should determine

51. An expressed intention on the record to disregard the law could show "corruption, fraud," "evident partiality or corruption in the arbitrators" or that they "exceeded their powers." 9 U.S.C.A. § 10(a)(1)-(5) (West Supp. 1992).

52. *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

53. This is especially true in the context of commercial arbitration as opposed to labor arbitration. Whereas an employer generally waives its right to judicial process in return for a union's promise not to strike, the private litigant does not

whether the current standard of review actually enhances public confidence in the system, thereby increasing the number of disputes resolved privately.

Until the judiciary and Congress realize that the standards of review afforded arbitration affect its very legitimacy, we are left with a private dispute resolution system clearly inferior to litigation. Recognizing this fact, the Eighth Circuit gave "notice" to future litigants that "the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law."<sup>54</sup> The Eighth Circuit concluded that "the courts are not equipped" to these review arbitration awards.<sup>55</sup>

#### IV. THE ILLEGALITY STANDARD OF REVIEW

##### A. *Historical Background*

The standards of illegality and public policy overlap a great deal and are often grouped together by the courts. The Supreme Court recently suggested that the two standards exist independently. "A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy."<sup>56</sup> The Court explained further that the doctrine stems from the dual concepts that courts will not aid any party in committing an "immoral or illegal act," and that the judiciary represents the interests of the public.<sup>57</sup>

Each standard is independent to some extent. The illegality standard is concerned with whether the underlying contract or the award violates the law; the public policy standard, on the other hand, deals with whether enforcing the award would somehow violate the public's interests. Analyzing the illegality and public policy standards and their respective underlying policies separately may help to clarify the judiciary's role in reviewing arbitration awards.

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receive the same kind of benefit for waiving this right. *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986).

54. *Id.*

55. *Id.*

56. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

57. *Id.*

### B. Application

Cases in which an award has been vacated because it violates the law can be grouped into three categories: (1) cases in which the arbitrator has applied an incorrect legal standard; (2) cases in which the underlying contract was made in violation of the law; and (3) awards that compel a violation of the law.

The first category of cases consists of situations in which the arbitrator applies an incorrect legal standard. Although the Supreme Court has stated that federal courts are not allowed to reverse an arbitrator's award based on legal errors,<sup>58</sup> a few circuit courts seem to hold that some egregious legal errors actually violate the law.

The most illustrative case in this group, *Broadway Cab Cooperative, Inc. v. Teamsters & Chauffeurs Local Union No. 281*,<sup>59</sup> involved arbitration pursuant to a collective bargaining agreement. The Ninth Circuit Court of Appeals held that the arbitrator violated "law and public policy" by using the rule of estoppel to "thwart the purposes of a statute of the United States."<sup>60</sup> In doing so, the arbitrator applied "an incorrect legal standard" and contradicted an "explicit mandate of the Supreme Court."<sup>61</sup> The Ninth Circuit reasoned that "[a] con-

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58. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (holding that arbitrators' legal interpretations are not subject to judicial review), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989). Most circuit courts have followed suit. *O.R. Sec., Inc. v. Professional Planning Assoc., Inc.*, 857 F.2d 742, 746 (11th Cir. 1988) (emphasizing that "[c]ourts are generally prohibited from vacating an arbitration award on the basis of errors of law or interpretation"); *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (requiring more for vacatur than "error or misunderstanding with respect to the law"); *Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972) (holding that "[a]n award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law").

59. 710 F.2d 1379 (9th Cir. 1983). For another interesting case, see *General Telephone Co. v. Local 1635*, 427 F. Supp. 398 (W.D. Pa. 1977), where the court vacated an award that held unlawful, and therefore unenforceable, a provision of a collective bargaining agreement that denied sick pay benefits for absence due to pregnancy. The arbitrator, the court noted, went outside the agreement to make the determination, relying on current case law that had recently been overruled by the Supreme Court. *Id.* at 399.

60. *Broadway Cab*, 710 F.2d at 1384.

61. *Id.* The arbitrator, in deciding whether certain sub-contractors were "employees" under the "hot-cargo" provisions of the National Labor Relations Act, relied on principles of estoppel rather than the common law agency test. *Id.* at

trary holding might discourage arbitration because employers would be less likely to submit issues to an arbitrator if they knew that he could disregard the merits of a legal argument that a district court would be forced to consider."<sup>62</sup> The court also noted that only where the arbitrator applies the correct legal standard is his decision subject to the limited review announced in the *Steelworkers Trilogy*.<sup>63</sup>

Similarly, the Second Circuit recently upheld an arbitration award that the district court modified to conform with the federal post-judgment interest rate statute in *Carte Blanche (Singapore) v. Carte Blanch International, Ltd.*<sup>64</sup> Noting that its power to review awards is "narrowly circumscribed" by current case law,<sup>65</sup> the court nevertheless concluded that the district court's modification of the arbitration award was correct.<sup>66</sup>

The second category of cases involves situations in which the underlying collective bargaining agreement or contract is illegal. Although very few cases fall into this category, it nevertheless represents a problematic area not addressed by the Arbitration Act. The underlying rationale of the illegality standard of review is that courts have the ultimate responsibility to refuse to enforce illegal contracts, a duty that is not diminished even when illegal contracts are presented to the court in the context of arbitration awards.

In *Botany Industries, Inc. v. New York Joint Board, Amalgamated Clothing Workers*,<sup>67</sup> the district court vacated an ar-

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1381. The Supreme Court had recently held that in interpreting the "hot-cargo" provision, courts must apply the common law agency test and expressly foreclosed the use of the estoppel principles used by the arbitrator. *Id.* at 1384.

62. *Id.* at 1384.

63. *Id.*

64. 888 F.2d 260 (2d Cir. 1989).

65. *Id.* at 265.

66. *Id.* at 270. The court did not specify which doctrine of review it used to uphold the modification, perhaps because only three years earlier the same court, in a similar case, refused to review an award because the arbitrator had not manifestly disregarded the law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Had the circuit court applied the manifest disregard of the law standard as restrictively as it had in the former case, *Carte Blanche* would surely have been decided differently. *Bobker* suggests that, short of manifest disregard of the law, courts should give absolute deference to arbitrators' interpretations of the law. See *supra* notes 42-44 and accompanying text. Nothing in *Carte Blanche* suggests that any party made such a showing.

67. 375 F. Supp. 485 (S.D.N.Y. 1974), *vacated as moot sub nom.* *Robb v. New York Bd. of Amalgamated Clothing Workers*, 506 F.2d 1246 (2d Cir. 1974) (vacating the decision due to the bankruptcy of one of the parties).

bitration award because the underlying collective bargaining agreement, not the award itself, violated the law. The court avoided the issue of judicial deference to arbitration awards by carefully pointing out that it was not reviewing the merits of the award—the arbitrator's construction of the contract. Rather, the court was "actually concerned with the *lawfulness of its enforcing* the award."<sup>68</sup> Turning to basic contract law, the court focused on the fundamental doctrine that "a contract made in violation of a statute is void"<sup>69</sup> and held that the underlying collective bargaining agreement violated the "hot-cargo" provision of the National Labor Relations Act.<sup>70</sup> In so holding, the court reasoned that "[i]f the agreement is void, it is not legitimized by the arbitral process; and if the agreement is unenforceable, it is not rendered enforceable by an arbitrator's decision. Simply stated, the court cannot enforce an invalid collective bargaining agreement, either directly . . . or indirectly, by enforcement of the award."<sup>71</sup>

In *Jackson Purchase Rural Electric Cooperative Ass'n v. Local Union 816, International Brotherhood of Electrical Workers*,<sup>72</sup> the employer unilaterally discontinued its long-standing practice of deducting union dues from employee paychecks. Although the collective bargaining agreement was silent on the issue of withholding of union dues, the union filed a grievance and the arbitrator ordered the employer to continue to withhold the dues upon obtaining the necessary employee authorization.<sup>73</sup> Withholding union dues without employee authorization is illegal under federal law.<sup>74</sup> The court of appeals invalidated the arbitrator's award because it was based on an illegal implied contract. In a discussion similar to that in *Botany Industries*, the court reasoned that "a promise is unenforceable if

68. *Id.* at 490 (quoting *Local 985, UAW v. W.M. Chace Co.*, 262 F. Supp. 114, 117 (E.D. Mich. 1966)).

69. *Id.*

70. *Id.* at 499.

71. *Id.* at 491.

72. 646 F.2d 264 (6th Cir. 1981).

73. *Id.* at 266. The arbitrator ordered the employer to continue checking off union dues "upon receipt of proper authorization cards from the employees," thus making the practice legal under the Labor Management Relations Act, 29 U.S.C. § 186(c)(4) (providing that if the employer has received written consent from the employees, it may check off union dues). The award, therefore, mandated no affirmative conduct in violation of federal statutes but was based on an illegal contract. 646 F.2d at 266.

74. 646 F.2d at 266. *See* 29 U.S.C. § 186(a)(1) (1988).

legislation so provides" and concluded that "one who has himself participated in an illegal act cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction."<sup>75</sup> Relying on the "strong presumption that agreements in violation of a statute" are void,<sup>76</sup> the Sixth Circuit affirmed the district court's vacatur of the award.<sup>77</sup>

The third category of illegality cases involves arbitration awards that compel a violation of the law. For example, in *General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*,<sup>78</sup> the Fifth Circuit refused to enforce an arbitration award that required the defendant employer to benefit one group of employees at the expense of a second group because such action constituted an unfair labor practice under the National Labor Relations Act.<sup>79</sup> In a similar case, a federal district court vacated an arbitration award that allowed the employer to compel its employees to operate vehicles that did not conform to certain provisions of the state vehicle code.<sup>80</sup>

### C. Analysis

The need for the illegality standard of review is obvious. As discussed earlier, federal courts are powerless to vacate arbitration awards under the manifest disregard of the law standard. Were courts forced to rely on its strict application, none of the above awards would have been vacated because the arbitrators often did not state their reasons for the award, and in cases where they did, they manifested no intention to disregard the law. Analysis of the three categories of illegality cases makes it even more apparent that the illegality standard of review is needed to check arbitration decisions. The first category of cases, where the arbitrator applies an incorrect legal standard, seems most suspect. The Supreme Court has conclu-

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75. 646 F.2d at 267.

76. *Id.* at 266.

77. *Id.* at 268.

78. 579 F.2d 1282 (5th Cir. 1978), *cert. denied*, 441 U.S. 957 (1979). Another example is found in *Glendale Mfg. Co. v. Local No. 520, Int'l Ladies' Garment Workers' Union*, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961).

79. 579 F.2d at 1286.

80. *Local Union 249, General Teamsters v. Consolidated Freightways*, 464 F. Supp. 346, 349 (W.D. Pa. 1979). In another case, the Fourth Circuit held unenforceable an arbitration award that required the employer to negotiate with a union that at the time of the enforcement action no longer represented the employees, having been decertified one week after the award was issued. *Glendale Mfg. Co.*, 283 F.2d at 937-38.



sively held that federal courts do not sit to reverse arbitrators' errors in legal interpretation.<sup>81</sup> *Broadway Cab* and *Carte Blanche* vacated arbitration awards where the arbitrator applied incorrect legal standards because the legal error violated the law and public policy. This rationale seems inconsistent with the Supreme Court's present mandate. Either the courts simply erred or a real difference exists between mere legal error and legal error sufficiently egregious to actually violate law and public policy. But of course, any legal error, by definition, violates the law. The obvious difficulties with this distinction show that the cases may well have been incorrectly decided.

The second category of cases, where the underlying contract is illegal, more clearly demonstrates the need for judicial review. Regardless of how the arbitral process is characterized, one party ultimately presents a contract in a court of law for enforcement. It stands to reason, therefore, that the court should have the last say regarding the contract's validity. If the contract is illegal before arbitration, the arbitral process does not somehow legitimize the contract. Federal courts have the ultimate authority and responsibility to determine the legality of contracts presented for enforcement, whether directly in the context of a civil action, or indirectly, in the context of arbitration awards. The arbitration process, even with its favorable underlying federal policy, does not diminish this responsibility. To give blind deference to arbitration awards in such cases is inappropriate because it may allow parties to avoid the law by resorting to arbitration.<sup>82</sup>

Cases in the last category, in which the award compels a violation of the law, offer the clearest rationale for the illegality standard of review. Because federal courts have the ultimate responsibility for enforcing the law, any arbitration award that on its face compels conduct in violation of the law deserves no deference and should be *per se* invalid.

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81. See cases cited *supra* note 58.

82. Consider the following example. Suppose A and B enter into a contract, which contains an arbitration clause, to wager on the outcome of the World Series, an illegal agreement under state law. After the event, a dispute arises over the contracted point spread and the agreement is submitted to arbitration. The arbitrator rules in favor of B, who then presents the award in federal court for enforcement. Deference to this award would be inappropriate.

V. THE PUBLIC POLICY STANDARD OF REVIEW<sup>83</sup>A. *Historical Background*

The development of the public policy standard can be traced to the Supreme Court's decision in *Hurd v. Hodge*.<sup>84</sup> In *Hurd*, the Court held that federal courts' power to enforce private agreements was subject to the "limitations of the public policy of the United States as manifested in Constitutions, treaties, federal statutes and applicable legal precedents."<sup>85</sup> Although *Hurd* did not specifically deal with arbitration awards, its language appeared sufficiently broad to encompass such cases.

The Supreme Court first addressed the issue of the public policy exception to arbitration awards in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*.<sup>86</sup> Grace had entered into a voluntary conciliation agreement with the Equal Opportunity Employment Board. The agreement, however, conflicted with seniority provisions of the employer's collective bargaining agreement with the union.<sup>87</sup> Later, during a strike, the employer honored the conciliation agreement, thereby violating the collective bargaining agreement with the union.<sup>88</sup>

Pursuant to the collective bargaining agreement, the union filed a grievance with an arbitrator, who determined that, although Grace acted in good faith in honoring the conciliation agreement, it nevertheless violated the collective bargaining agreement.<sup>89</sup> Grace then filed suit to vacate the award on the ground that it violated public policies encouraging both obe-

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83. For an excellent study of the public policy exception to judicial deference to arbitration awards, see Amanda J. Berlowe, Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767 (1988).

84. 334 U.S. 24 (1948). In *Hurd*, property owners sued to enforce property covenants barring the sale of real property in the neighborhood to blacks. *Id.* at 26-27. The court held that federal courts' power to enforce private agreements was restricted by public policy. *Id.* at 34-35. The Court refused to enforce the contract because it violated public policy. No statutory basis for the decision existed because the Fair Housing Act did not exist at the time of this decision.

85. *Id.* at 35.

86. 461 U.S. 757 (1983).

87. *Id.* at 760.

88. *Id.* at 760-61.

89. *Id.* at 763-64.

dience to court orders<sup>90</sup> and voluntary compliance with Title VII.<sup>91</sup> On appeal, the Supreme Court concluded:

As with any contract, . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . [T]he question of public policy is ultimately one for resolution by the courts. If the contract as interpreted [by the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."<sup>92</sup>

Application of this standard, however, proved to be difficult and the Supreme Court again addressed the issue four years later in *United Paperworkers International Union v. Misco, Inc.*<sup>93</sup> There, an employee who operated dangerous machinery was fired after police arrested him for possession of illicit drugs.<sup>94</sup> The union filed a grievance and the arbitrator reinstated the employee, finding that the employer had no just cause for the discharge.<sup>95</sup> The district court vacated the award and the court of appeals affirmed, ruling that reinstatement of the employee violated the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."<sup>96</sup>

The Supreme Court reversed, holding that the court of appeals based its judgment not on the existing "laws and legal precedents," but rather on "general considerations of supposed public interests."<sup>97</sup> The Court was careful to note that although its *W.R. Grace* decision held that a court may refuse to enforce an arbitration award that violates public policy, it did not "sanction a broad judicial power to set aside arbitration

90. A federal district court had ordered *Grace* and the union to abide by the conciliation agreement. *Id.* at 761. *Grace* argued that the arbitration award was a disincentive to obey the court order. *Id.* at 767.

91. *Id.* at 770-71.

92. *Id.* at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)) (citations omitted).

93. 484 U.S. 29 (1987).

94. *Id.* at 32-33. Police found the employee in the company parking lot "in the back seat of this car with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray." *Id.* at 33.

95. *Id.* at 33-34.

96. *Id.* at 35.

97. *Id.* at 44.

awards as against public policy."<sup>98</sup> Thus, the exception is limited to situations where "the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents."<sup>99</sup> Moreover, "no violation of that policy was clearly shown in this case," for there was no showing that the employee was actually operating machinery while under the influence of drugs.<sup>100</sup> "At the very least," the Court concluded, "an alleged public policy must be properly framed under the approach set out in *W.R. Grace*."<sup>101</sup>

Despite this attempt to clarify the public policy exception, the Court failed to address the issues "upon which the certiorari was granted," namely, "whether a court may refuse to enforce an arbitration award only where the award itself violates positive law or requires unlawful conduct" and whether the public policy exception in the context of a collective bargaining agreement is the same as in the context of a contract.<sup>102</sup> Justice Blackmun noted that these "issues are left for another day."<sup>103</sup>

### B. Application

Until Justice Blackmun's day comes, considerable uncertainty remains in the federal circuit courts regarding the proper scope of the public policy exception.<sup>104</sup> In light of the policy of judicial deference to arbitration awards, several federal circuits hold that the award must actually compel a violation of positive law to meet the public policy exception. For example, in *American Postal Workers Union v. United States Postal Service*,<sup>105</sup> the D.C. Circuit refused to vacate an arbitration award reinstating a discharged postal worker. The employee had admitted to converting government funds and was fired. After acquittal on criminal charges, an arbitrator reinstated

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98. *Id.* at 43.

99. *Id.* (internal quotation marks omitted) (citing *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983), and quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

100. *Id.* at 44.

101. *Id.* at 43.

102. *Id.* at 46 (Blackmun, J., concurring).

103. *Id.*

104. Virtually all of the public policy exception cases involve labor arbitration awards where an employee has been reinstated.

105. 789 F.2d 1 (D.C. Cir. 1986).

the employee, finding that no just cause existed for his dismissal.<sup>106</sup> The district court vacated the award, not because it violated law or public policy, but because the court substituted its interpretation of the contract for that of the arbitrator.<sup>107</sup>

Although the D.C. Circuit did not have to reach the issue, it reversed because the award itself compelled no violation of the law.<sup>108</sup> In short, the court stated that "an award will not be vacated even though the arbitrator may have made, in the eyes of judges, errors of fact and law unless it 'compels a violation of law or conduct contrary to accepted public policy.'"<sup>109</sup> The court noted that there is "no legal proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct."<sup>110</sup> The court implied, in effect, that the public policy exception refers only to the public policy against enforcing awards that by their terms compel a party to violate a positive law.

The Ninth Circuit, en banc, has followed suit. In *Stead Motors v. Automotive Machinists Lodge 1173*,<sup>111</sup> a mechanic was discharged after he failed to properly secure the front tire of a client's automobile.<sup>112</sup> The arbitrator ordered the employ-

106. *Id.* at 3. The arbitrator based his finding on an arguably erroneous interpretation of the *Miranda* warning requirements. *Id.* at 3-4. The circuit court, however, noted that mere legal errors by arbitrators were not subject to judicial review. *Id.* at 7.

107. *Id.* at 4.

108. From the facts of the case, it seems clear enough that the circuit court could have reversed because the district court reinterpreted the contract, an action clearly forbidden by the Supreme Court. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (holding that courts should refuse to "review the merits of an arbitration award").

109. *American Postal Workers*, 789 F.2d at 7 (quoting *Gulf States Tel. Co. v. Local 1692, Int'l Bhd. of Elec. Workers*, 416 F.2d 198, 201 (5th Cir. 1969)). See also *Washington-Hyphen Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971).

110. *American Postal Workers*, 789 F.2d at 8. The D.C. Circuit continues to follow this standard. See, e.g., *United States Postal Serv. v. National Ass'n of Letter Carriers*, 810 F.2d 1239, 1241-42 (D.C. Cir. 1987) (refusing to vacate an arbitration award because it does not compel a violation of the law), *cert. granted*, 484 U.S. 984 (1987), *cert. dismissed*, 485 U.S. 680 (1988); see also *E.I. Dupont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 620 (7th Cir.) (Easterbrook, J., concurring) ("[t]he question is whether the contract, as construed, violates positive law"), *cert. denied*, 479 U.S. 853 (1986).

111. 886 F.2d 1200 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946 (1990).

112. *Id.* at 1202. The court noted that in 1984 the employee received a "warning notice for failing properly to tighten the lug bolts on the wheels of a car he had serviced." In 1985, after a dispute, the employee "was advised" that his foreman

ee to be reinstated after 120 days suspension.<sup>113</sup> The plurality rejected the employer's public policy arguments, holding that "[i]f a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars *reinstatement*."<sup>114</sup> In other words, the award must *compel* a violation of law or conduct contrary to accepted public policy.<sup>115</sup>

Judge Trott's dissenting opinion fairly represents the contrary views of other circuits. Judge Trott took issue with the fact that the employee was reinstated "*to the same position from which he was fired*," and refused to accept the plurality's characterization of the case as a mere "reinstatement" of an errant employee.<sup>116</sup> Rather, he noted that the job requires skill and care, as "unsafe cars injure and kill."<sup>117</sup> The concern was obviously for the welfare of the public, a group not represented in this private transaction.<sup>118</sup>

Judge Trott agreed with the Eleventh Circuit's characterization of the public policy exception in *Delta Air Lines, Inc. v. Air Line Pilots Ass'n International*.<sup>119</sup> In *Delta*, a pilot was reinstated by an arbitration panel after being discharged for operating a passenger airliner while under the influence of alcohol.<sup>120</sup> The circuit court vacated the award because it violated public policy. The court stated:

*Misco* requires the finding of a well defined public policy and an award that conflicts with that policy. The public policy of

had "absolute authority" over matters such as proper lug bolt tightening procedures." The incident complained of occurred one month later. *Id.*

113. *Id.* at 1203.

114. *Id.* at 1212. The employer argued that the reinstatement violated two provisions in the California Vehicle Code, which prohibited operation of unsafe vehicles, and he indicated that Stead Motors' certification may be revoked because of the incident. *Id.* at 1204.

Judge Wallace, joined by three others, thought that the plurality should not have reached the issue. *Id.* at 1224-25 (Wallace, J., concurring in part, dissenting in part).

115. Among others, the Sixth Circuit has also joined in this reasoning. See *Interstate Brands Corp. v. Chauffeurs Local Union No. 135*, 909 F.2d 885, 893 (6th Cir. 1990) ("The issue is not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring the reinstatement of a grievance . . . violated some explicit public policy."), *cert. denied*, 111 S. Ct. 1104 (1991).

116. *Stead Motors*, 886 F.2d at 1218-19 (Trott, J., dissenting).

117. *Id.*

118. Judge Trott warned Stead Motors' customers, as well as county residents, to keep their seat belts fastened. *Id.* at 1218.

119. 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 891 (1989).

120. *Id.* at 667-68.

which the Supreme Court speaks in *Misco* seems to be a public policy not addressing the disfavored conduct, in the abstract, but disfavored conduct which is *integral to the performance of employment duties*. The question we are instructed, by *Misco*, to ask is not "Is there a public policy against the employee's conduct?", but, rather, "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?"<sup>121</sup>

After citing a myriad of statutes, rules, and regulations that clearly prohibited the operation of aircraft while under the influence of alcohol,<sup>122</sup> the circuit court explained that when an employee, in performing his duties, violates such clearly established laws and regulations, "a requirement that the employer suffer that malperformance and not discharge the offender does itself violate the same well established public policy."<sup>123</sup>

Judge Trott also agreed with the Eighth Circuit's decision in *Iowa Electric Light & Power Co. v. Local Union 204, International Brotherhood of Electrical Workers*.<sup>124</sup> In *Iowa Electric*, a nuclear power plant machinist, in a hurry to leave for lunch, breached the plant's security system, which was designed to protect the public from harmful radiation.<sup>125</sup> He was discharged but later reinstated by an arbitrator. The circuit court affirmed the vacatur of the arbitration decision, concluding that it violated the well defined public policy requiring strict adherence to federal nuclear safety regulations.<sup>126</sup> The court distinguished *Misco* in part because the safety rules in that case were designed to protect other employees whereas the present safety regulations were fashioned to protect the public as well.<sup>127</sup>

Judge Trott noted that under the standard adopted by the Ninth Circuit, limiting the public policy standard to situations where the award compels a violation of the law, neither *Iowa Electric* nor *Delta* would have qualified for judicial review. Such a restriction "chokes the 'public policy' exception . . . into oblivion."<sup>128</sup>

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121. *Id.* at 671.

122. *Id.* at 672-73.

123. *Id.* at 674.

124. 834 F.2d 1424 (8th Cir. 1987).

125. *Id.* at 1426.

126. *Id.* at 1427.

127. *Id.* at 1427 n.2.

128. *Stead Motors*, 886 F.2d at 1221 (Trott, J., dissenting).

### C. Analysis

The number of cases in which the award actually compels a violation of a positive law is extremely limited. Yet that is what is often required to qualify for the public policy exception. This requirement unnecessarily limits the otherwise viable exception and ignores its underlying policy.

*Misco* expressly recognized that the underlying policy for the exception is that federal courts ultimately represent the interests of the public, who would otherwise be unrepresented in the private action before the court.<sup>129</sup> With this in mind, Judge Trott's arguments make sense. Noting that the restrictive standard requires a showing that the "award itself clearly violates a statutory prohibition," Judge Trott recognized that the "magic word 'reinstatement'" would preclude federal courts from vacating any arbitration award, no matter how egregious the "totality of facts and circumstances."<sup>130</sup> Judge Trott provided the following example. Suppose that a reckless or malicious lab technician were to introduce AIDS-contaminated blood into the nation's blood supply. This transaction would be "beyond the reach of the law in this circuit if a non-lawyer arbitrator, *beholden to no one other than the parties* to the contract in question, decided to" reinstate the employee.<sup>131</sup> He continued:

If an arbitrator uses the word "reinstatement," the federal courts in this circuit are now next to helpless to do anything

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The Second and Third Circuits have joined with the reasoning that supports a more broad application of the public policy exception. In *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 843 (2d Cir. 1990), the Second Circuit affirmed the district court's vacatur of an arbitration award reinstating an employee after the arbitrator found that the employee had committed sexual harassment more than once. The arbitrator had decided that discharge was too severe a penalty for the present stage of the employee's disease. The circuit court agreed with the district judge's reasoning that the well-defined policy against sexual harassment at the workplace "is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser." *Id.*

In a similar case, *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, No. 91-5261, 1992 U.S. App. LEXIS 15559, at \*17-\*18 (3d Cir. June 29, 1992), the Third Circuit upheld the district court's vacatur of an arbitration award "which fully reinstate[d] an employee accused of sexual harassment without a determination that the harassment did not occur" because the award violated public policy.

129. *Misco*, 484 U.S. at 42.

130. *Stead Motors*, 886 F.2d 1200, 1222-23 (9th Cir. 1989) (Trott, J., dissenting).

131. *Id.* at 1224 (emphasis added).



about it. A new form of kryptonite has been invented that renders us impotent to vindicate the public interest in health and safety. What amounts to a general policy favoring [arbitration] . . . now trumps the public policy exception . . . .<sup>132</sup>

In short, the requirement that the award compel a violation of a positive law robs the public policy exception of all its substance. As the Supreme Court noted in *Misco* and *Grace*, the asserted public policy must be "well defined and dominant" and determined by reference to the laws and legal precedents of the land.<sup>133</sup> In the context of labor arbitration, there are simply no well defined and dominant laws against reinstatement when the employee's conduct is not considered. In the context of commercial arbitration, there is simply no well defined and dominant law against, for example, awarding a sum of money pursuant to a contract where the validity of the underlying contract is not considered.

Furthermore, whether a public policy is well defined and dominant is determined by reference to the laws and legal precedents of the land. Therefore, if an award compels a violation of a positive law, then undoubtedly the illegality standard would apply and the so-called public policy exception is left with no separate life of its own.<sup>134</sup> But even if that were not enough, there can be little doubt that if an arbitrator were to order a party to violate a well defined and dominant law, the award could be vacated on one of the statutory grounds.<sup>135</sup>

Finally, a restrictive positive law test is wholly at odds with the underlying purpose of the public policy exception, especially in cases where the health and welfare of large numbers of people are at risk. Thus, as Judge Trott noted, "[a] somewhat broader more rational approach grounded on analysis and informed judgment—confined by 'law and precedent'—makes more sense in that it gives life to the public

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132. *Id.*

133. *See Misco* 484 U.S. at 44.

134. *See supra* part IV. The illegality ground is supported by the policy that no court of law will lend its aid to any party in committing an illegal or immoral act and therefore should govern situations where an award compels a violation of the law. *See Misco*, 484 U.S. at 42.

135. *See* 9 U.S.C.A. § 10(a)(1)-(5) (West Supp. 1992), which provides that an arbitration award may be vacated on the grounds of "corruption, fraud," "evident partiality or corruption in the arbitrators" or that the arbitrators "exceeded their powers."

policy exception rather than suffocating it beyond resuscitation."<sup>136</sup>

## VI. CONCLUSION

Congress has established four statutory grounds upon which an arbitration award may be vacated.<sup>137</sup> The federal judiciary has created four additional standards of review for the vacatur of arbitration awards: (1) essence of the contract, (2) manifest disregard of the law, (3) illegality, and (4) public policy. Most federal courts urge that these judicially created standards of review be applied narrowly in order to support the federal policy favoring arbitration, but many of the standards are currently interpreted so strictly that the judiciary actually undermines the validity of arbitration.

Arbitration is no panacea. It cannot replace the courts, which are ultimately responsible for enforcing the laws of the land and safeguarding the unrepresented public. The arbitrator, often a non-lawyer, is merely a contract-reader. She is entirely beholden to the parties and their contract. While the judiciary should generally defer to the merits of an arbitration award, federal courts should not abdicate their essential role of enforcing the laws of the land and representing the public. Therefore, the federal judiciary should discard its present formalistic approach and adopt "[a] somewhat broader more rational approach grounded on analysis and informed judgment."<sup>138</sup> A more reasonable standard of review may empower federal courts to vacate arbitration awards (1) when there is evidence that the arbitrator has disregarded the law, without requiring an express showing on the record of the arbitrator's intent to disregard the law; (2) when either the award itself or the underlying contract being interpreted is illegal; or (3) when the events underlying the arbitration award violate public policy, not only when the award itself strictly compels a violation of the law.

*Bret F. Randall*

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136. *Stead Motors*, 886 F.2d at 1222 (Trott, J., dissenting).

137. *See supra* note 4.

138. *Stead Motors*, 886 F.2d at 1222 (Trott, J., dissenting).