

Vacatur of Awards Under the Tennessee Uniform Arbitration Act: Substance, Procedure, and Strategies for Practitioners

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I. INTRODUCTION

In 1983, the Tennessee General Assembly passed the Tennessee Uniform Arbitration Act (“TUAA” or “the Act”).¹ The Act repealed all prior inconsistent laws on arbitration and reversed the common law rule that agreements to arbitrate a future dispute are unenforceable.² The prior version of the Tennessee arbitration statutes were codified at Tenn. Code Ann. sections 23-501 to 23-519 and were substantially unchanged from 1852 until the advent of TUAA.³ Although most TUAA proceedings are between private parties, governmental entities, as allowed by law, may invoke TUAA.⁴

With a few exceptions, the legislature patterned TUAA after the Uniform Arbitration Act, which is a model statute that the National Conference of Commissioners on Uniform State Laws drafted in 1955 and that numerous American jurisdictions enacted

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1. TENN. CODE ANN. §§ 29-5-301 to -320 (2012).

2. Act of May 11, 1983, ch. 462, 1983 Tenn. Pub. Acts 946 (Tenn. 1983); *Brown v. KareMor Int’l, Inc.*, No. 01A01-9807-CH-00368, 1999 WL 221799, at *2 (Tenn. Ct. App. Apr. 19, 1999) (comparing TUAA and common law).

3. See *Meirowsky v. Phipps*, 432 S.W.2d 885, 886 (Tenn. 1968) (describing pre-TUAA standards).

4. Cf. *Chattanooga Area Reg’l Transp. Auth. v. T.U. Parks Constr. Co.*, No. 03A019712CH00524, 1999 WL 76074, at *5 (Tenn. Ct. App. Jan. 28, 1999) (stating the statute would need to include these entities by specific reference before they may enter into arbitration); *Tipton Cty. Dep’t of Pub. Instruction v. Tipton Cty. Bd. of Educ. v. Delashmit Elec. Co.*, No. 02A01-9704-CH-00084, 1998 WL 158774, at *3 (Tenn. Ct. App. Apr. 7, 1998) (stating school boards, counties, and other political subdivisions in the state may invoke the Act).

thereafter.⁵ Because of the close relation of TUAA and other states' arbitration statutes, TUAA provides that it "shall be construed as to effectuate its general purpose to make uniform the laws of those states which enact it."⁶ On the other hand, Tennessee courts carefully point out that while "the objective of uniformity cannot be achieved by ignoring [the] utterances of other jurisdictions," sister court opinions on their Uniform Act are not binding upon Tennessee tribunals.⁷ Indeed, the Tennessee Supreme Court has gone so far as to say, "We do not construe Tenn. Code Ann. [section] 29-5-320 as an inexorable command to make up a scorecard of the states that have accepted and rejected a particular interpretation of a provision of the Uniform Arbitration Act and then to follow the majority view without further discussion or analysis."⁸

Another important point of comparison is the Federal Arbitration Act ("FAA"),⁹ which Tennessee courts cite frequently as persuasive—but not necessarily binding—authority in TUAA cases.¹⁰ This comparison is also important because Tennessee state and federal courts both have jurisdiction of FAA cases. Thus, a claimant may properly file an action in state court to obtain relief under the governing FAA with respect to arbitration agreements

5. See Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 891 (2010). In 2000, the National Conference of Commissioners approved a Revised Uniform Arbitration Act, which seventeen states (not including Tennessee) have adopted. All told, forty-seven states plus the District of Columbia have adopted the Uniform Arbitration Act or substantially similar legislation. See *id.*

6. TENN. CODE ANN. § 29-5-320 (2012); see also *Buraczynski v. Eyring*, 919 S.W.2d 314, 319 (Tenn. 1996); *Wachtel v. Shoney's, Inc.*, 830 S.W.2d 905, 909 (Tenn. Ct. App. 1991) (providing good summary of the policies for consistent interpretation of uniform acts).

7. *Buraczynski*, 919 S.W.2d at 318–19 (quoting *Holiday Inns, Inc. v. Olsen*, 692 S.W.2d 850, 853 (Tenn. 1985)); see also *Wachtel*, 830 S.W.2d at 909 (stating a good summary of principles).

8. *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 612 (Tenn. 2013).

9. 9 U.S.C. §§ 1–16 (2012).

10. *E.g.*, *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 257–59 (Tenn. 2010); *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448, 450–51 (Tenn. 1996).

involving interstate commerce.¹¹ This article will make frequent use of decisions from other jurisdictions to address issues that are unclear or insufficiently addressed in TUAA case law.

TUAA has only grown in importance for the commercial law system since its enactment in 1983. Tennessee appellate courts have strongly endorsed TUAA as a fair and efficient alternative to conventional civil litigation.¹² Tennessee courts view arbitration as a “valuable tool”¹³ that is “favored by legislative policy”¹⁴ because it can make resolution of disputes “more efficient, more economical, and equally fair” to the parties.¹⁵ Tennessee courts have said about TUAA, “[T]he legislature sought to facilitate and promote a quicker, more cost effective, less cumbersome, yet binding means of dispute resolution.”¹⁶

In keeping with this pro-arbitration policy, courts have stated that the Tennessee arbitration statutes are remedial and any issue of interpretation “ought to be resolved in line with [their] liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.”¹⁷ Therefore, Tennessee courts have observed that the scope of an arbitration agreement under TUAA (as opposed to

11. *E.g.*, *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999).

12. *E.g.*, *Arnold*, 914 S.W.2d at 449 (“[A]rbitration is attractive because it is a more expeditious and final alternative to litigation.” (quoting *Boyd v. Davis*, 897 P.2d 1239, 1242 (Wash. 1995))). Currently, a lively debate exists in the academic community on whether arbitration as applied to mass market consumer contracts is a fundamentally fair process. One commentator has said that “[m]any well-articulated and convincing critiques have been aimed at ‘mandatory’ arbitration, and some equally strong counterarguments have also been made.” Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 369 (2008).

13. *Golden v. Hood*, No. E1999-02443-COA-MR3-CV, 2000 WL 122195, at *2 (Tenn. Ct. App. Jan. 26, 2000) (citing Tenn. R. S. Ct. 31 prmb.).

14. *Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc.*, No. 03A01-9903-CV-00112, 1999 WL 1068678, at *3 (Tenn. Ct. App. Nov. 25, 1999).

15. *Golden*, 2000 WL 122195, at *2 (quoting Tenn. R. S. Ct. 31 prmb.).

16. *T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C.*, 93 S.W.3d 861, 868 (Tenn. Ct. App. 2002) (citing cases).

17. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:20 (4th ed. 2001) (alteration in original) (citations omitted).

its enforceability *vel non*)¹⁸ must receive as “broad a construction as the words will allow.”¹⁹ A further consequence is that courts must resolve “any doubts” in favor of requiring arbitration.²⁰

Nevertheless, as one authority observes, “[I]n spite of the increased use of arbitration, the law concerning arbitration is still considered to be esoteric and often misunderstood by attorneys and judges alike.”²¹ Compounding this challenge is that commentary is brief on TUAAs arbitration and essentially unaddressed in law journals.²² One of the most challenging TUAAs topics is the action for vacatur (annulment) of an arbitral award, where claimants regularly prove unsuccessful in their efforts. Because actions for vacatur are often the most hotly-disputed matters between the arbitral parties, this article focuses on this subject to assist practitioners develop their strategies as they seek to advance their clients’ interests.

After this Introduction, the next part of the article covers the arbitration essentials inclusive of definitions, the scope of judicial review, and the policy favoring finality of awards. The third

18. *Urology Assocs. v. CIGNA Healthcare of Tenn.*, No. M2001-02252-COA-R3-CV, 2002 WL 31302922, at *5 (Tenn. Ct. App. Feb. 18, 2003) (citing cases).

19. *Id.*

20. *Dale Supply Co. v. York Int’l Corp.*, No. M2002-01408-COA-R3-CV, 2003 WL 22309461, at *7 (Tenn. Ct. App. Oct. 9, 2003); *see Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc.*, No. 03A01-9903-CV-00112, 1999 WL 1068678, at *2 (Tenn. Ct. App. Nov. 25, 1999) (“[Q]uestions of law are to be resolved with respect for the public policy concerning arbitration.”); *id.* at *4 (explaining there is no requirement that the arbitration clause use the word “arbitration”); *Wachtel v. Shoney’s, Inc.*, 830 S.W.2d 905, 908 (Tenn. Ct. App. 1991); *see also Wilks v. Pep Boys*, 241 F. Supp. 2d 860, 863 (M.D. Tenn. 2003) (citing “any doubt” rule).

21. 27 AM. JUR. 3D *Proof of Facts* § 103 (1994).

22. *See* 27 JOSEPH T. GETZ & MICHAEL I. LESS, TENNESSEE PRACTICE SERIES, CONSTRUCTION LAW HANDBOOK, ch. 14 (2013); 16 WILLIAM BROWN, ET AL., TENNESSEE PRACTICE SERIES, DEBTOR-CREDITOR LAW AND PRACTICE, pt. I, ch. 2, § 2:121 (2d ed. 2013); 13 ELLEN BRONAUGH VERGOS, TENNESSEE PRACTICE SERIES, LEGAL FORMS REAL ESTATE LEASES § 7:1 (2d ed. 2001 & Supp. 2015); 2 THOMAS LEVEILLE & LORI FARRIS FLEISHMAN, TENNESSEE LITIGATION FORMS AND ANALYSIS, ch. 18 (Sept. 2013); 1 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 3:21 (2013); Lewis L. Laska, *A General Practitioner’s Guide to Commercial Arbitration and the 1983 Tennessee Uniform Arbitration Act*, 20 TENN. B.J. 23 (1984).

part addresses TUAA agreements, awards, and related procedures. The fourth part provides an overview of the substantive and procedural aspects of vacatur and the modification of arbitral awards. The fifth part is the most extensive in the article and describes vacatur as a judicial control mechanism. This part addresses the standards for record review in vacatur cases and then examines at length the five statutory grounds for vacatur in Tennessee. The fifth part also covers a topic that has practically no Tennessee commentary, but bears noting by practitioners: whether Tennessee still recognizes common law arbitration. The section also covers common law grounds for vacatur. The most important candidates for common law (non-statutory) vacatur are the arbitrator's "manifest disregard of the law" in rendering the decision and where the arbitrator's decision violates public policy.²³

In keeping with the title of this article, the sixth part contains a wide-ranging procedural and substantive critique of arbitration in Tennessee. Examples of the topics discussed in this section include the supposed superiority of arbitration over litigation, the questionable judicial gloss on TUAA regarding the narrow judicial standard of arbitral awards, the unduly permissive judicial stance toward a minimal record in arbitration proceedings, and many other substantive and procedural points. Throughout, the article will emphasize legal strategies for practitioners, especially in unclear or contested areas of Tennessee arbitration jurisprudence.

II. ARBITRATION ESSENTIALS: "ARBITRATION" DEFINED, THE SCOPE OF JUDICIAL REVIEW, AND THE NEED FOR FINALITY

A. "Arbitration" Defined

While not defined in TUAA, "arbitration"—a "matter of contract"²⁴—"is a consensual proceeding in which the parties select decision-makers of their own choice and then voluntarily submit their disagreement to those decision-makers for resolution in

23. See *infra* Section V.I (analyzing cases explaining theory).

24. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 84 (Tenn. 1999) (quoting *AT&T Techs., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648 (1986)); see also *Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union*, No. 513, 221 F.2d 644, 647 (6th Cir. 1955) (explaining there is no independent right for a party to require arbitration without the right to have the issue determined by a court).

lieu of adjudicating the dispute in court.”²⁵ Arbitration is a “quasi-judicial proceeding” that is adversarial in nature.²⁶ Ordinarily, it includes hearings, prior notice to the parties, documentary evidence, and witness testimony.²⁷ An arbitration award is tantamount to a court judgment and, unless the party in opposition proves in a vacatur proceeding that the award violated the applicable statutory criteria, it will be conclusive as to the parties’ rights and liabilities.²⁸

While, as indicated above, arbitration shares some general traits with conventional civil actions, it also differs significantly on the formalities of litigation. The most prominent distinction is arbitration’s generally minimal reliance on the rules of evidence. Accordingly, when parties submit their dispute to arbitration, they “always risk[] procedural and evidentiary shortcuts.”²⁹ Many

25. *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 149 (Tenn. Ct. App. 2001); *see also* *Smith v. Bridgestone/Firestone, Inc.*, 2 S.W.3d 197, 206 (Tenn. Ct. App. 1999) (“Arbitration . . . is an ‘adjudication’ of conflicting interests by a neutral third party.” (quoting *Strozier v. Gen. Motors Corp.*, 635 F.2d 424, 425 (5th Cir. 1981))); *Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc.*, No. 03A01-9903-CV-00112, 1999 WL 1068678, at *4 (Tenn. Ct. App. Nov. 29, 1999) (“[A]rbitration is ‘[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.’” (alteration in original) (quoting *Arbitration*, BLACK’S LAW DICTIONARY (6th ed. 1990))). TUA covers only binding arbitration; the parties alternatively may elect to use non-binding arbitration outside the statutory constraints. *Id.*

26. *State v. R.I. Emp’t Sec. All., Local 401*, 840 A.2d 1093, 1097 (R.I. 2003).

27. *Merrimack Mut.*, 59 S.W.3d at 150. For a judicially-approved instance where the parties used an arbitration-like proceeding but where the parties employed measures to avoid the finality characteristic of arbitration and where an agent of the owner served as an arbitrator, *see Blount Excavating*, 1999 WL 1068678, at *1; *see also* *Smith v. Smith*, 989 S.W.2d 346, 348 (Tenn. Ct. App. 1998) (holding similarly).

28. *Americas Ins. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64, 67 (2d Cir. 1985); *Container Tech. Corp. v. J. Gasden Pty., Ltd.*, 781 P.2d 119, 121 (Colo. App. 1989); *Turpin v. Love*, 1973 WL 16997, at *4 (Tenn. Ct. App. Aug. 14, 1973) (“[F]indings by the arbitrator . . . [have] the same binding effect upon the [p]laintiff as a judicial determination by a court of competent jurisdiction.”).

29. *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 554 (N.D. Tex. 2006) (quoting *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 731 (N.D. Tex. 1997)).

years ago, Judge Learned Hand explored the tradeoff a party makes when it selects arbitration over litigation:

Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.³⁰

Two arbitration agreements exist in these proceedings: the one between the parties—often called the “submission”—and the one between the arbitrator(s) and the parties.³¹ The submission is the roadmap for the proceedings and defines the issues for decision.³² The submission may take one of two forms: a stand-alone arbitration agreement or an arbitration clause in the principal contract for the goods or services.³³ Indeed, the submission has such importance that it contains a “presumption” of arbitrability, i.e., the parties have agreed to submit a particular issue to arbitration.³⁴ A court should not refuse to issue an order to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.³⁵

30. *Am. Almond Prods. Co. v. Consol. Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944).

31. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:45 (4th ed. 2001); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 295–96 (2012).

32. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:45 (4th ed. 2001) (discussing submissions in arbitration).

33. THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 48–49 (4th ed. 2012).

34. 1 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 15:2 (3d ed. 2013).

35. *Metro Const. Co. v. Cogun Indus., Inc.*, No. 02A01-9608-CH-00207, 1997 WL 538914, at *3 (Tenn. Ct. App. Sept. 4, 1997) (quoting *United Steelworkers v. Mead Corp.*, 21 F.3d 128, 131 (6th Cir. 1994)); *Wachtel v. Shoney’s, Inc.*, 830 S.W.2d 905, 908 (Tenn. Ct. App. 1991). For additional discussion of

Where a party agrees to arbitration, it relinquishes “much” of its right to receive a judicial decision on the merits.³⁶ Indeed, courts and commentators have characterized arbitration as a type of “forum selection clause.”³⁷ Courts commonly observe that “[a]n agreement to arbitrate does not affect the rights and duties of the parties,” but “simply shifts the forum of dispute settlement” for resolving the parties’ differences.³⁸

The above statement that arbitration “does not affect the rights and duties of the parties”³⁹ can be misleading because courts and arbitrators have different responsibilities for adhering to statutory and case law principles. While judges are strictly bound by the law, arbitrators operate on a more relaxed standard. Many courts hold that, where a party seeks vacatur on the grounds that the arbitrator—either during the proceedings or in the decision—has made an erroneous legal interpretation, this alleged misapplication of the law, by itself, is *not* grounds for overturning an arbitral award.⁴⁰ To an extent, this problem is alleviated by the doctrine that arbitration awards are not legal precedents and do not bind the courts (or future arbitrators).⁴¹ In numerous succeeding parts, this article will discuss the ramifications of the relaxed legal standards governing arbitration proceedings.

arbitrability, see 1 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 15 (3d ed. 2013) (discussing the analysis of determination of issues by court or arbitrator; parties’ intention; arbitrable issues—in general; arbitrable issues—presumptions and burden of proof (including broad or restrictive clauses; subject matter; and waiver)).

36. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 (Tenn. 1996) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

37. *E.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 *UCLA L. REV.* 1189 n.221 (2011).

38. *E.g.*, *T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C.*, 93 S.W.3d 861, 868 (Tenn. Ct. App. 2002) (citing *Buraczynski v. Eyring*, 919 S.W.2d 314, 319 (Tenn. 1996)).

39. *See id.*

40. *See, e.g.*, *Arnold*, 914 S.W.2d at 451 (“[E]rrors of law or fact, or an erroneous decision of matters submitted to [arbitration] are insufficient to invalidate an award fairly and honestly made.” (quoting *Turner v. Nicholson Props., Inc.*, 341 S.E.2d 42, 45 (1986))).

41. *See Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 147 (4th Cir. 1993).

B. The Scope of Judicial Review

In the same vein as the strong policy favoring arbitrability, courts have a “limited role” in reviewing an arbitration decision as the courts follow a “deferential” standard of review.⁴² This process is not *de novo*.⁴³ As a result, the trial court acts as an appellate court to the arbitrator in vacatur cases,⁴⁴ whereby the court does not reweigh the evidence presented to the arbitrator.⁴⁵ Similarly, the formal review at the Tennessee Court of Appeals or the Tennessee Supreme Court is not *de novo*, except that questions of law will be considered without deference to the lower court.⁴⁶

Based on these constraints, the courts’ review of an arbitration decision is “one of the narrowest standards of judicial review in all of American jurisprudence.”⁴⁷ The policy is to avoid the undue “judicialization” of the arbitration process⁴⁸ and to ensure that arbitration does not become an additional expensive and time-

42. *D & E Constr. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518 (Tenn. 2001); *Arnold*, 914 S.W.2d at 448, 450; *La. Safety Sys., Inc. v. Tengasco, Inc.*, No. E2000-03021-COA-R3-CV, 2001 WL 1105395, at *5 (Tenn. Ct. App. Sept. 21, 2001). *But see* *Parr v. Tower Mgmt. Co.*, No. 01A01-9811-CV-00573, 1999 WL 415169, at *4 (Tenn. Ct. App. June 23, 1999) (stating that courts are “severely limited” in their authority to retry the issues parties raise in arbitration cases).

43. *AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85, 92 n.6 (E.D.N.Y. 2008).

44. 4 AM. JUR. 2d *Alternative Dispute Resolution* § 206 (2014) (stating the movant must, also, rely upon a statutory or common law ground for vacatur for the trial court to have jurisdiction).

45. *Vt. Built, Inc. v. Krolick*, 969 A.2d 80, 86 (Vt. 2008).

46. *Pugh’s Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 258 n.4 (Tenn. 2010). *But see* *Sanders v. Harbor View Nursing & Rehab. Ctr.*, No. W2014-01407-COA-R3-CV, 2015 WL 3430082, at *3 (Tenn. Ct. App. 2015) (“We review the trial court’s conclusions of law *de novo*. We review the trial court’s findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise.” (citation omitted)). By a similar logic, the trial court has no duty of deference to the arbitrator for his conclusions of law. *Id.*

47. *Morgan Keegan & Co. v. Smythe*, No. W2010-01339-COA-R3-CV, 2014 WL 2462853, at *2 (Tenn. Ct. App. May 29, 2014) (quoting cases); *see also* *Bronstein v. Morgan Keegan & Co.*, No. W2011-01391-COA-R3-CV, 2014 WL 1314843, at *2 (Tenn. Ct. App. Apr. 1, 2014).

48. *E.I. DuPont de Nemours & Co. v. Grasselli Emps. Indep. Ass’n of E. Chi., Inc.*, 790 F.2d 611, 614 (7th Cir. 1986).

consuming layer to the already complex litigation process. “Judicialization” occurs where the process inappropriately lends itself to conventional legal and evidentiary appeals that would render informal arbitration a mere prelude to the more cumbersome and time consuming judicial review process.⁴⁹

As indicated above, the scope of judicial review is narrow. Courts may set aside an arbitration decision only in “very unusual circumstances,” and the award will stand unless shown to be “clearly erroneous.”⁵⁰ The standard for arbitral reversal must be based on statute or the deprivation of a party’s due process. A reviewing court cannot consider the merits of an arbitration award even when the aggrieved party alleges that the award is tainted by errors of fact or law or by the arbitrator’s misunderstanding or misrepresentation of the contract.⁵¹ Finally, the submission⁵² could affect the scope of judicial review. For example, if the parties’ agreement states that the arbitrator is the final judge of the admissibility of evidence, and that the ordinary rules of evidence do not apply, the arbitrator’s rulings on this point are not reviewable by a subsequent court.⁵³ In this way, TUAAs serve as an “efficient and economical system of alternative dispute resolution.”⁵⁴

49. See *Cat Charter, L.L.C. v. Schurtenberger*, 646 F.3d 836, 845 (11th Cir. 2011) (citing *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)).

50. See *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 450 (Tenn. 1996) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)); see also *Cat Charter*, 646 F.3d at 842–43 (“[A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.” (citing *Nat’l Wrecking Co. v. Int’l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993))); *Remmy v. Painewebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (finding that parties would cease to use arbitration if courts did not resist the temptation to re-decide arbitral decisions); *Nat’l Wrecking Co.*, 990 F.2d at 960 (“Judicial review of arbitration awards is narrow because arbitration is intended to be the final resolution of disputes.”); *E.I. DuPont*, 790 F.2d at 614 (“[A]n extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution.”).

51. *Vt. Built, Inc. v. Krolick*, 969 A.2d 80, 86 (Vt. 2008).

52. See *supra* notes 31–34 and accompanying text.

53. *Davis v. Reliance Elec.*, 104 S.W.3d 57, 63 (Tenn. Ct. App. 2002).

54. *Arnold*, 914 S.W.2d at 450; see also *Buraczynski v. Eyring*, 919 S.W.2d 314, 318, 318 n.3 (Tenn. 1996) (“[P]ublic policy favors alternative dispute resolution because it is quicker, less expensive and relieves court conges-

Some jurisdictions go even further and state that an arbitration award will not be appealable where the parties (1) contractually agreed to resolve their dispute through binding arbitration and (2) expressly agreed to waive the right of judicial review of the arbitrator's decision.⁵⁵ These principles would likely apply in Tennessee because our courts recognize a party's right to waive an appeal.⁵⁶

C. The Need for Finality

The above-mentioned strong pro-enforcement policy advances the core need for finality in arbitration cases, even though "harsh results" can and will occur.⁵⁷ The Tennessee Supreme Court has remarked,

If an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An [arbitration] award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact, may be suggested by the dissat-

tion. . . . [A]dvantages to arbitration . . . [include] finality of decisions and informality of procedure and rules . . .").

55. *Hirsh v. Gursky*, No. BC182550, 2002 WL 31266350, at *3 (Cal. Dist. Ct. App. Oct. 10, 2002).

56. *See Diggs v. DNA Diagnostic Ctr.*, No. W2012-01617-COA-R3-CV, 2013 WL 3972191, at *4 (Tenn. Ct. App. Aug. 2, 2013) (holding that voluntary dismissal is tantamount to waiving the right of appeal); *Metro. Dev. & Hous. Agency v. Hill*, 518 S.W.2d 754, 760–61 (Tenn. Ct. App. 1974) (holding that a party cannot appeal from a judgment that they voluntarily recognized the validity of).

57. *Motorcarrier Petroleum Grp. v. T. R. Auto Truck Plaza*, No. 02A01-9509-CV-00207, 1996 WL 266652, at *2 (Tenn. Ct. App. May 21, 1996).

isfied party. Thus . . . arbitration, instead of ending would tend to increase litigation.⁵⁸

Obviously, the above passage, in stating there is “no right of appeal,” is partially mistaken or at least misleading with regard to TUAA because there is definitely a right of appeal through the vacatur process of Tenn. Code Ann. sections 29-5-313 and 29-5-314. Therefore, the better interpretation of the above passage is that the Tennessee Supreme Court was essentially emphasizing the importance of finality in arbitration.

In another aspect of the need for finality in arbitration, the law advances party autonomy and freedom of contract. A 1997 Tennessee Court of Appeals case observed,

These parties signed a contract with an arbitration clause. It is for the arbitrator to decide the legal obligations of the parties, based upon the legal principles applicable to the fact of this case. *Since the parties agreed to arbitration, it is not for the courts to decide their controversies.*⁵⁹

Other courts explicitly acknowledge this freedom of contract policy in their decisions construing the local version of the Uniform Arbitration Act. Thus, according to the Connecticut Supreme Court in *L & R Realty v. Connecticut National Bank*,⁶⁰

58. *Arnold*, 914 S.W.2d at 449, 451 (alterations in original) (quoting *Carolina Va. Fashion Exhibitors Inc. v. Gunther*, 255 S.E.2d 414, 420 (N.C. Ct. App. 1979)).

59. *B.L. Hodge Co. v. Roxco, Ltd.*, No. 03A01-9704-CH-00144, 1997 WL 644960, at *4 (Tenn. Ct. App. Oct. 16, 1997) (emphasis added); *see also* *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 357 (Tenn. Ct. App. 2001) (“[P]arties are free to structure an arbitration agreement as they see fit.”); *Jones v. Cubberley*, No. 03A01-9210-CH-00370, 1993 WL 17721, at *1 (Tenn. Ct. App. Jan. 29, 1993) (“Courts are justified in exercising great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy and inexpensive process . . . freely chosen by the parties.” (quoting *Hooten Const. Co. v. Borseberry Const. Co.*, 769 P.2d 726, 727 (1989))).

60. 715 A.2d 748, 753 (Conn. 1998); *accord* *Miller v. Miller*, 707 N.W.2d 341, 345 (Mich. 2005); *Peterson & Simpson v. IHC Health Servs., Inc.*, 217 P.3d 716, 721 (Utah 2009).

“[a]rbitration agreements illustrate the strong public policy favoring freedom of contract and the efficient resolution of disputes.”⁶¹

It would be a mistake, however, to conclude that TUAA pursues the goal of finality in every aspect. Other objectives besides finality are important. Balanced against the strong finality policy is the need to avoid excessive emphasis on unchangeable outcomes. Some TUAA examples of provisions placing proper emphasis on objectives other than finality are Tenn. Code Ann. section 29-5-302, which requires written arbitration agreements, and Tenn. Code Ann. section 29-5-307, which precludes a party from waiving the right to representation by an attorney at an arbitration hearing or other proceeding.⁶²

III. TUAA AGREEMENTS, AWARDS, AND RELATED PROCEDURES

A party challenging an arbitration award may seek the relief from a court or the remedy may arise after a court orders a submission to the arbitrators.⁶³ Upon application of a party, the court under Tenn. Code Ann. section 29-5-312 shall confirm an award, unless a party, acting within the time limits found in TUAA,⁶⁴ urges grounds for vacating, modifying, or correcting the award.⁶⁵

The above statute, in allowing “confirmation,” is “primarily a mechanism whereby a court adds its imprimatur to an arbitrator’s decision.”⁶⁶ Put another way, the confirmation of an arbitration award occurs in a summary proceeding where the court converts

61. *L & R Realty*, 715 A.2d at 753; *see also* THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 36 (4th ed. 2012) (“[C]ontract freedom, [is] a theme that runs through the core of the U.S. law of arbitration.”).

62. *T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C.*, 93 S.W.3d 861, 869 (Tenn. Ct. App. 2002).

63. TENN. CODE ANN. § 29-5-310 (2012).

64. *See* TENN. CODE ANN. §§ 29-5-313 to -314.

65. TENN. CODE ANN. § 29-5-312.

66. *United Steel Workers Local Union 978 v. Packaging Corp.*, No. 1:09-cv-01055, 2010 WL 396353, at *4 (W.D. Tenn. Jan. 27, 2010) (stating a reviewing court under TENN. CODE ANN. § 29-5-312 is not free to add its own interpretation of the award).

the final arbitration award into the final judgment of the court.⁶⁷ Either party to the arbitration decision may invoke vacatur as a remedy⁶⁸ but the alleged excessiveness or inadequacy of the award is generally not grounds for appeal absent one of the statutory grounds for challenge, such as fraud, corruption, or other misconduct.⁶⁹

Where the aggrieved party petitions to vacate the award by authority of Tenn. Code Ann. section 29-5-313⁷⁰ (discussed above), the prevailing party has no requirement to file a counter petition to confirm. Instead, the prevailing party, in answering the petition to vacate, may include a request for the court to confirm the award.⁷¹ If neither party appeals the trial court's confirmation or vacatur of the award, then neither party has preserved its right to appellate review of the trial court's judgment.⁷²

An arbitration decision carries the "same dignity" as a court of competent jurisdiction in matters of res judicata or collateral estoppel.⁷³ Because of these issues, a party might contend that a subsequent court cannot give preclusive effect (in the sense of collateral estoppel) to an arbitral award if it lacks detailed findings of fact. Concededly, no requirement exists for an arbitrator's detailed findings of fact and conclusions of law unless the parties agree to this documentation requirement in their submission.⁷⁴ Nevertheless, courts have found that the absence of detailed findings of fact

67. *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006); *Farmers Crop Ins. All. v. Latux*, 422 F. Supp. 2d 898, 899 (S.D. Ohio 2006); 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 40:5 (3d ed. 2013).

68. See TENN. CODE ANN. 29-5-313(a)(1) (providing that a "party" upon application may seek the remedy).

69. *Id.*; see 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:129 (4th ed. 2001).

70. See *supra* notes 63–65 and accompanying text.

71. *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 608 (Tenn. 2013).

72. *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 257 (Tenn. 2010) (stating that it is not enough for an agreement to address an appeal from an arbitrator's award).

73. *Turpin v. Love*, 1973 WL 16997 (Tenn. Ct. App. Aug. 14, 1973) (deciding case based on pre-TUAA law).

74. See *infra* notes 456–75 and accompanying text.

is not “necessarily fatal” if preclusion can be “necessarily implied from the nature of the claim and award.”⁷⁵

TUAA does not address the subject of remands by the court to the arbitrator. As a suggested strategy for the practitioner, FAA case law can provide a helpful analogy. Although the cases are not unanimous, the basic rule should be that remand is proper where the arbitrator is the only ruling body sufficiently close to the facts of the case to resolve award uncertainties, but where the resolution is clear and beyond significant doubt, no remand should be needed.⁷⁶

IV. VACATUR AND MODIFICATION OF AWARDS—OVERVIEW

A. Substantive Requirements

A court’s mere disagreement with the arbitrator’s decision is not a basis for vacatur.⁷⁷ TUAA governs the scope of judicial review of arbitration awards; therefore, a number of decisions pro-

75. *In re Beckemeyer*, 222 B.R. 318, 321 (Bankr. W.D. Tenn. 1998) (quoting *Universal Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991)).

76. *United Steel Workers Local Union 978 v. Packaging Corp.*, No. 1:09-cv-01055, 2010 WL 396353 (W.D. Tenn. Jan. 27, 2010) (construing statute); *see id.* at *7 (“The Sixth Circuit ‘has recognized the need for an arbitrator’s ‘clarification of an ambiguous award when the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation.’”); *see also* TENN. CODE ANN. § 27-3-128 (2012) (basing remand on statutory grounds); *Mut. Fire, Marine & Inland Ins. v. Norad Reinsurance*, 868 F.2d 52, 58 (3d Cir. 1989) (“A district court itself should not clarify an ambiguous arbitration award but should remand it to the arbitration panel for clarification. . . . [R]emand to the arbitrator is the appropriate disposition . . . when an award is patently ambiguous.” (quoting *Oil, Chem. & Atomic Workers Int’l Union Local 4-367 v. Rohm & Hass*, 677 F.2d 492, 495 (5th Cir. 1982))). *But see id.* at 58 (“A remand is inappropriate, however, where it would force a decision of an issue not previously submitted to the arbitrators.” (quoting *Oil, Chem. & Atomic Workers*, 677 F.2d at 495)); *Fischer v. CGA Comput. Assocs.*, 612 F. Supp. 1038, 1041 (S.D.N.Y. 1985) (stating that the court should not order a remand where the court can resolve any ambiguities in the award by modification by way of 9 U.S.C. § 11 (2012)).

77. *Bangor Gas Co. v. H.Q. Energy Servs. Inc.*, 695 F.3d 181, 187 (1st Cir. 2012); *see also United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (“[C]ourts have no business overruling [the arbitrator] because their interpretation of the contract is different from his.”).

vide that TUAA restricts a trial court's review to the statutory circumstances that create grounds for modification or vacation of an arbitration award.⁷⁸ Stated more elaborately, the Tennessee Supreme Court has held that (1) an arbitration agreement may not provide for a judicial review of an arbitration award outside TUAA boundaries and (2) TUAA limits the process by which a court may review the arbitrator's award. The upshot is that parties may not make the arbitral decision the judgment or ruling of the trial court and permit an appeal therefrom.⁷⁹

When the case does come up for review, courts presume that an arbitrator has properly performed his duties and "all presumptions and intendments are in favor of an award."⁸⁰ Therefore, in an essential strategy, the moving party must allege sufficient facts showing that grounds exist for overturning the arbitrator's award decision.⁸¹

Where a party files an objection to the award, the court, under Tenn. Code Ann. section 29-5-313(a), "shall vacate an award" where:

(A) The award was procured by corruption, fraud or other undue means;

(B) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbi-

78. *D & E Const. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518 (Tenn. 2001) (quoting *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 447-48 (Tenn. 1996)). For a possible exception to this doctrine regarding common law arbitration, see *infra* Section V.H.

79. *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 257 (Tenn. 2010). See generally *Becky L. Jacobs, Case, Pugh's Lawn Landscape Company, Inc. v. Jaycon Development Corporation: The Tennessee Court of Appeals Limits the Judicial Review of Arbitration Awards*, 11 *TRANSACTIONS: TENN. J. BUS. L.* 199 (2009); Tom Cullinan, Note, *Contracting For An Expanded Scope of Judicial Review in Arbitration Agreements*, 51 *VAND. L. REV.* 395 (1998) (noting contrariety of decisions).

80. *Harmon v. Komisar*, 15 Tenn. App. 405 (1932); see also *Arnold*, 914 S.W.2d at 448-49 ("[T]he finality that courts should afford the arbitration process weighs heavily in favor of the award.").

81. *Smith v. Spears*, No. 05-0586, 2005 WL 5467960 (Tenn. Ch. Ct. 2005).

trators or misconduct prejudicing the rights of any party;

(C) The arbitrators exceeded their powers;

(D) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to Tenn. Code Ann. section 29-5-306 [the statute on hearings], as to prejudice substantially the rights of a party; or

(E) There was no arbitration agreement and the issue was not adversely determined in proceedings under Tenn. Code Ann. section 29-5-303 [the statute on orders and proceedings] and the party did not participate in the arbitration hearing without raising the objection.⁸²

A few of these grounds have extensive case law interpretation while others have minimal explanation. For the lesser-interpreted grounds, it is necessary and proper to refer to case law from other jurisdictions construing their analogous version of the Uniform Arbitration Act.⁸³ Practitioners deciding on strategy should also know that the Tennessee Court of Appeals has observed that FAA and TUAA contain “virtually identical language establishing the relevant grounds for vacating an arbitrator’s decision.”⁸⁴

The grounds for vacatur are restricted to “exceptional circumstances” reflecting distinctly unacceptable business conduct.⁸⁵ These statutory grounds represent “egregious departures” from the

82. TENN. CODE ANN. § 29-5-313(a) (2012).

83. See TENN. CODE ANN. § 29-5-320 (stating that Tennessee courts should construe TUAA in light of other jurisdictions considering their version of the Uniform Arbitration Act).

84. *Bailey v. Am. Gen. Life & Accident Ins.*, No. M2003-01666-COA-R3-CV, 2005 WL 3557840, at *8 n.7 (Tenn. Ct. App. Dec. 29, 2005).

85. THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 313 (4th ed. 2012).

parties' arbitration agreement.⁸⁶ The United States Court of Appeals for the Fourth Circuit in *Remmey v. PaineWebber, Inc.*,⁸⁷ explained at length the policy for limited judicial review in vacatur cases:

A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, "[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."

Thus, in reviewing arbitral awards, a district or appellate court is limited to determining "whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it."

A party will not allege valid grounds for vacating or objecting to the award merely because a court of law or equity could not or would not grant the requested relief.⁸⁸ In fact, while arbitrators

86. See *AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85, 92 (E.D.N.Y. 2008).

87. 32 F.3d 143, 146 (4th Cir. 1994) (citations omitted); see also *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("[Arbitration] is a private system of justice offering benefits of reduced delay and expense. A restrictive standard of review is necessary to preserve these benefits and to prevent arbitration from becoming a 'preliminary step to judicial resolution.'").

88. TENN. CODE ANN. § 29-5-313(a)(2), construed in *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 451 (Tenn. 1996).

often have strict limits based on the parties' agreement on what issues they may decide, they can also have a "broad grant of authority to fashion remedies."⁸⁹ Where grounds do exist for vacatur, assuming no conflict with the parties' submission, an arbitrator with equitable powers may award declaratory and injunctive relief.⁹⁰ Practitioners for prevailing parties are strongly advised to be proactive in their strategy for suggesting creative remedies for capitalizing on a favorable decision.

B. Procedural Requirements

When seeking to vacate an award, a party under TUAA ordinarily must file the application within ninety days after receipt of the award decision.⁹¹ In accordance with Tenn. Code Ann. section 29-5-313(a), where the objection is based upon corruption, fraud, or other undue means, the party must seek redress within ninety days after the party knows, or should have known, such grounds.⁹² If the court denies the application to vacate and no motion to modify or correct the award is pending, the court must confirm the award.⁹³

Where the court determines to vacate the award, the court may order an arbitral rehearing under the following criteria.⁹⁴

89. *Cal-Circuit ABCO, Inc. v. Solbourne Comput., Inc.*, 848 F. Supp. 1506, 1509 (D. Colo. 1994) (citing decisions).

90. *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365–66 (Tenn. Ct. App. 2001) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)); *see also* E.R. Tan, Annotation, *Availability & Scope of Declaratory Judgment Actions in Determining Rights of Parties, or Powers and Exercise Thereof by Arbitrators, Under Arbitration Agreements*, 12 A.L.R. Fed. 3d 854 (1967); M.L. Cross, Annotation, *Power of Arbitrators to Award Injunction or Specific Performance*, 70 A.L.R. Fed. 2d 1055 (1960).

91. TENN. CODE ANN. § 29-5-313(b).

92. *Id.* *But see* *Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc.*, No. 03A01-9903-CV-00112, 1999 WL 1068678, at *5 (Tenn. Ct. App. Nov. 29, 1999) (stating that time limits not controlling where the proceeding lacked the essential characteristic of being an arbitration proceeding under TUAA); *Funk v. Target Nat'l Bank/Target Visa*, No. E2006-02010-COA-R3-CV, 2007 WL 1555843 (Tenn. Ct. App. May 30, 2007) (noting ninety day required timeframe to apply for application to vacate an arbitration under TENN. CODE ANN. § 29-5-313(b) (1983), and finding arbitration award void for lack of signature by an arbitrator).

93. TENN. CODE ANN. § 29-5-313(d).

94. *Id.* § 29-5-313(c).

First, except where the court vacates the award where there was no arbitration agreement and the party did not participate in the hearing without raising an objection, the court may order a rehearing before new arbitrators.⁹⁵ If the agreement designates the process for selecting any new arbitrators, the agreement will control on identifying the new arbitrators.⁹⁶ If the agreement fails to provide such a provision, the court will select the arbitrators.⁹⁷ Second, if the court vacates the award because the arbitrators exceeded their powers, unjustifiably refused to postpone the hearing, or prejudicially refused to hear a party's material evidence, the court may order a rehearing before either the same arbitrators who made the award or their duly appointed successors.⁹⁸ The rehearing process must again produce a timely award based on the arbitration agreement and requires a time frame that commences from the date of the order.⁹⁹

Courts should be wary of ordering a rehearing if it would be contrary to the judicial policy of promoting efficiency. Thus, where the rehearing would impose needless delay and cost and would create another round of proceedings where the court must again decide whether to confirm the award decision, such a process "would merely serve to exalt form over substance."¹⁰⁰

Two concepts, vacatur and correction/modification of awards—are theoretically distinct but often closely related in practice. In addition to, or along with, requesting vacatur, a party may seek correction or modification of an award.¹⁰¹ Where the movant submits an application for modification or correction within ninety

95. *Id.*

96. *Id.*; *see also id.* § 29-5-304 (describing judicial selection of arbitrators).

97. *Id.* § 29-5-304 (2012) (describing process).

98. *Id.* § 29-5-313(c).

99. *Id.*

100. *Spector v. Torenberg*, 852 F. Supp. 201, 207 (S.D.N.Y. 1994).

101. TENN. CODE ANN. § 29-5-314(c). This statute applies only to the enumerated events. *United Steel Workers Local Union 978 v. Packaging Corp. of Am.*, No. 1:09-cv-01055, 2010 WL 396353, at *4 (W.D. Tenn. Jan. 27, 2010) (distinguishing use of TENN. CODE ANN. § 29-5-312 on confirmation of awards). *See generally* 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 40:4 (3d ed. 2013) (addressing modification of awards).

days after receipt of the award decision, the court shall modify or correct the award in the following circumstances:

- (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;¹⁰²
- (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.¹⁰³

In granting the application, the court shall duly modify and confirm the award as corrected. Otherwise, the court must confirm the original award,¹⁰⁴ which in either instance shall be enforceable as any other court judgment or decree.¹⁰⁵ Practitioners should carefully observe the distinctions between “correction/modification” and “vacatur” of the award and make the strategic choice in seeking one or both remedies as necessary.

Practitioners must also be acutely aware of how the appellate courts review other closely related questions about whether these issues pertain to questions of fact or questions of law. The identification of the ruling legal standards is a question of law that Tennessee appellate courts review *de novo*. Similarly, the application of the law to facts and to mixed questions of law and fact is reviewed *de novo*.¹⁰⁶ “When the review of an arbitration decision raises a question of law, the [trial] court reviews the question de

102. Compare TENN. CODE ANN. § 29-5-314(a), with 4 AM. JUR. 2D *Alternative Dispute Resolution* § 224 (2014) (noting the mistake must be apparent on the face of the record and the arbitrator could have corrected the error had it been brought to his attention).

103. TENN. CODE ANN. § 29-5-314(a), (c).

104. *Id.* § 29-5-314(b).

105. *Id.* § 29-5-315; see also *id.* § 29-5-316 (stating rules on judgment roles and docketing); *id.* § 29-5-319 (rules on making of appeals).

106. *Franklin City Bd. of Educ. v. Crabtree*, 337 S.W.3d 808, 811 (Tenn. Ct. App. 2010).

novo, as does the court of appeals.”¹⁰⁷ A prominent treatise explains the parameters of this question for review:

Under the de novo standard of review, questions regarding the arbitrability of an issue, the validity and scope of an arbitration agreement, the waiver of arbitration, the [trial] court’s grant or denial of a motion to compel arbitration, the [trial] court’s grant of summary judgment in a suit to vacate the arbitration award, the district court’s confirmation of an award, and the [trial] court’s analysis of compliance with statutory requirements are reviewed de novo by the court of appeals.¹⁰⁸

Under TUA, appeals as a matter of right to the Tennessee Court of Appeals are taken in the “same manner and to the same extent” as occur with appeals from orders or judgments in the typical civil action.¹⁰⁹ Thus, under Tenn. R. App. Rule 4(a), a party making an appeal as of right must file the action within thirty days after the date of entry of the judgment in question. If the trial court dismissed the action, then Tenn. R. App. Rule 3 comes into play.¹¹⁰ In a Rule 3 appeal, the parties have “broad latitude” to raise issues, consistent with the other rules of appellate procedure.¹¹¹ When the party takes an interlocutory appeal under Tenn. R. App. 9, such as an interlocutory appeal from the trial court’s order to partially vacate an arbitration award, the only valid issue is the one(s) the trial court granted a party permission to address in such an interlocutory appeal.¹¹² Where the trial court has granted a motion to compel arbitration of an issue, the trial court should stay the matter and not

107. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 39:13 (3d ed. 2013).

108. *Id.* § 39:14.

109. TENN. CODE ANN. § 29-5-319(b).

110. *Thompson v. Terminix Int’l Co.*, No. M2005-02708-COA-R3-CV, 2006 WL 2380598 (Tenn. Ct. App. Aug. 16, 2006).

111. *Smith v. Hukowicz*, No. M2001-01320-COA-R9-CV, 2003 WL 132483, at *6 (Tenn. Ct. App. Jan. 16, 2003) (quoting *Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 914 (Tenn. Ct. App. 2000)).

112. *Id.*

dismiss it.¹¹³ If the issue regarding arbitration is separable from the rest of the case, the trial court may order a stay for only that issue.¹¹⁴

Because a trial court reviewing an arbitration award functions more like an appellate body subject to an extremely narrow standard of review, Tennessee appellate courts do not equate an order vacating an arbitration award and ordering a new arbitration with an order granting a new trial.¹¹⁵ The Tennessee Supreme Court has succinctly explained the posture of a case where the trial court issues an order vacating an arbitral award:

An order that vacates an arbitration award and orders a second arbitration is an order “denying confirmation of an award” for the purposes of Tenn. Code Ann. section 29-5-319(a)(3), regardless of whether the party opposing the petition to vacate the award filed a separate cross-petition for confirmation under Tenn. Code Ann. section 29-5-312 or whether the trial court has expressly denied confirmation in its written order.¹¹⁶

Most courts hold that, where a party does not invoke the right of appeal under the appropriate procedural vehicle, this omission generally will be a waiver of the moving party’s rights regarding enforcement of arbitration provided the opposing party was prejudiced thereby.¹¹⁷

113. *Terminix Int’l Co.*, 2006 WL 2380598, at *3 (stating that an order granting a motion to compel arbitration and to stay the action is not directly appealable under TENN. CODE ANN. § 29-5-319 (2012)).

114. *Id.* at *18. While very few cases address this point in Tennessee, a number of other jurisdictions do so more extensively. *See* 1 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 11:1 (3d ed. 2013).

115. *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 611 (Tenn. 2013).

116. *Id.* at 612; *Morgan Keegan & Co. v. Starnes*, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *4 (Tenn. Ct. App. June 20, 2014). *See generally* R. A. Vinluan, Annotation, *Appealability of Judgment Confirming or Setting Aside Arbitration Award*, 7 A.L.R. Fed. 3d 608 (1966) (providing an annotation of federal and state arbitration decisions).

117. *Long v. Miller*, No. E2006-02237-COA-R3-CV, 2007 WL 2751663, at *7 (Tenn. Ct. App. Sept. 21, 2007) (untimely appeal deemed a waiver).

V. TUAA GROUNDS FOR VACATUR

A. “Vacatur” as a Judicial Control Mechanism

In legal parlance, “vacatur” is the act of annulling or setting aside an entry of record or a judgment.¹¹⁸ Tennessee appellate decisions have stated that TUAA in Tenn. Code Ann. section 29-5-313, discussed below, contains the exclusive grounds for annulling an award,¹¹⁹ which means that the parties and courts may not expand (or inferentially restrict) the statutory grounds for review.¹²⁰

A court may not vacate an award merely because it disagrees with the arbitrator¹²¹ or concludes that the dollar value of the award was incorrect.¹²² Thus, vacatur is not a vehicle for a court to render a decision based on the judge’s view of the equities or of an ideal state of the law.¹²³ A “real party in interest” type analysis

118. *Walter v. Gunter*, 788 A.2d 609, 614 n.8 (Md. 2002) (citing BLACK’S LAW DICTIONARY (5th ed. 1979)). For additional commentary on vacatur, see Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 AM. JUR. TRIALS § 211 (2004); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509 (2009); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998); Eric Lucentini, Note, *Taking A Fresh Look at Vacatur of Awards Under the Federal Arbitration Act*, 7 AM. REV. OF INT’L ARB. 359 (1996); Laird E. Lawrence & Christopher R. Ward, *The Availability and Scope of Appeal of Arbitration Awards Under the Federal, Uniform and State Acts*, AM. BAR ASS’N BRIEF, Spring 2000, at 32; Marc S. Dobin, *Appealing the Unappealable: Vacating Arbitration Awards*, AM. BAR ASS’N BRIEF, Fall 1996, at 69.

119. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448–49 (Tenn. 1996); *Davis v. Reliance Elec. Indus.*, 104 S.W.3d 57, 61 (Tenn. Ct. App. 2002) (stating that courts are “limited to the statutory grounds”).

120. *Arnold*, 914 S.W.2d at 448–49.

121. *Id.*; *Adams TV of Memphis, Inc. v. Int’l Bhd. of Elec. Workers*, Local 474, No. 48639 T.D., 1996 WL 590434, at *2 (Tenn. Ct. App. Oct. 15, 1996); *see also Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 642 (9th Cir. 2010) (stating that courts will not vacate an award just because the court might have interpreted the contract differently); *Emp’rs Ins. of Wausau v. Nat’l Union Fire Ins. of Pittsburgh*, 933 F.2d 1481, 1486 (9th Cir. 1991) (noting that no authority exists to vacate an award because of an arbitrator’s alleged error in contract interpretation).

122. *Lagstein*, 607 F.3d at 641.

123. *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1204 (9th Cir. 1989) (en banc).

governs which claimant can bring a vacatur case; thus, a corporate relationship can be sufficient depending on the facts to permit a corporation that is not a party to the arbitration agreement to bring a claim that belongs to an affiliated entity.¹²⁴

The theme of vacatur is that parties are entitled to a fair hearing, but not a perfect one.¹²⁵ Vacatur of an award is designed to occur in “rare instances;”¹²⁶ one case even mentions the “severe remedy of vacatur.”¹²⁷ Where the record reveals as little as a “barely colorable” justification for the arbitration decision, courts typically will sustain the outcome,¹²⁸ even if the court is convinced that the arbitrator made the “wrong call” on the law.¹²⁹

Courts view vacatur through the lens of deciding arbitration cases expeditiously and at lower cost than ordinary litigation.¹³⁰ Therefore, as one commentator observes, “Anyone attempting to vacate an arbitrator’s decision has an uphill battle inasmuch as it is the stated policy of the courts to give every intendment of validity to an award.”¹³¹ No statistics were found regarding the relative merits in Tennessee of arbitration versus litigation in terms of outcomes and lower cost.

In deciding vacatur, the trial court should make findings of fact and conclusions of law. The trial court must “accord defer-

124. *In re Fried, Krupp, GmbH, Krupp Reederei Und Brennstoff-Handel-Seeschiffahrt*, 674 F. Supp. 1022, 1026 n.1 (S.D.N.Y. 1987).

125. *Emp’rs Ins. Of Wasau*, 933 F.2d at 1491.

126. *See Wachtel v. Shoney’s, Inc.*, 830 S.W.2d 905, 909 (Tenn. Ct. App. 1991) (citing *Ierna v. Arthur Murray Int’l, Inc.*, 833 F.2d 1472, 1476–77 (11th Cir. 1987)).

127. *Lagstein*, 607 F.3d at 647; *see also* THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 58 (4th ed. 2012) (“Vacatur . . . is exceedingly unlikely to occur.”).

128. *In re Andros Compania Maritima*, 579 F.2d 691, 704 (2d Cir. 1978); *F. Hoffman-La Roche Ltd. v. Qiagen Gaithersburg, Inc.*, 730 F. Supp. 2d 318, 326 (S.D.N.Y. 2010).

129. *F. Hoffman-La Roche Ltd.*, 730 F. Supp. 2d at 326.

130. *Cat Charter, L.L.C. v. Schurtenberger*, 646 F.3d 836, 846 (11th Cir. 2011).

131. Neil A. Helfman, *Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration*, 27 AM. JUR. 3D *Proof of Facts* § 103 (1994).

ence” to the arbitrator’s award,¹³² which means that the scope of review is “narrow” and “limited.”¹³³ One reason for this judicial deference is that the parties have contracted to have the dispute settled by the arbitrator, and therefore, they have agreed to accept his view of the facts and the meaning of the contract.¹³⁴ Where a trial court considers the award in light of a motion to vacate, it will consider “evidence of fairness incident to the arbitration.”¹³⁵ Furthermore, in conformance with general principles of appellate review, a party may not acquiesce in the arbitration proceeding without objection and then, disappointed by the result, raise a complaint before the court that the party could earlier have presented to the arbitrator.¹³⁶

Another strong reason counsels against liberal grounds for overturning an arbitral decision: the reviewing court is *not* considering a decision of another person or board that is part of the state’s governmental apparatus. The United States Supreme Court observed in *Alexander v. Gardner-Denver Co.*,

A proper conception of the arbitrator’s function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends

132. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 (Tenn. 1996); *La. Safety Sys., Inc. v. Tengasco, Inc.*, No. E2000-03021-COA-R3-CV, 2001 WL 1105395, at *4–5 (Tenn. Ct. App. Sept. 21, 2001).

133. *Arnold*, 914 S.W.2d at 448; *see also* *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990) (“[J]udicial review of an arbitration award is extraordinarily narrow and this Court should defer to the arbitrator’s decision when possible.” (quoting *Antwine v. Prudential Bache Sec. Inc.*, 899 F.2d 410, 413 (5th Cir. 1990))).

134. *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 330 (1st Cir. 2000) (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987)). For an extensive discussion of this issue in Tennessee, *see Arnold*, 914 S.W.2d at 452.

135. *Jones v. Cubberley*, No. 03A01-9210-CH-00370, 1993 WL 17721, at *1 (Tenn. Ct. App. Jan 29, 1993) (stating that an evidentiary hearing is not required when the movant is merely attempting to retry the merits of the arbitration).

136. *Parr v. Tower Mgmt. Co.*, No. 01A01-9811-CV-00573, 1999 WL 415169, at *4 (Tenn. Ct. App. June 23, 1999).

the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.¹³⁷

Because it is “axiomatic” that no state action occurs with the conduct and rulings of a private arbitrator, arbitration procedures are not susceptible to a constitutional due process challenge.¹³⁸

While the courts routinely emphasize the need for speed and cost savings as the driving policy for limited vacatur review,¹³⁹ Tennessee courts infrequently mention (if at all) an important countervailing policy. Even conceding that the arbitrator is not a public officer, the party prevailing in the arbitration can invoke the coercive power of the state to enforce the judgment. To this extent, the arbitrator is an adjunct of the state and the law must account for this involvement.

Several sister jurisdictions give more weight to the public policies that flow from the arbitrator’s de facto status as part of the governmental apparatus. As the District of Columbia Court of Appeals observed in *Wolf v. Sprenger & Lang, PLLC*, a necessary counterweight to arbitral speed and efficiency is “the need to establish justified confidence in arbitration among the public.”¹⁴⁰ A New Jersey case also emphasizes that “it is our strongly held view that honest, fair and impartial arbitration is as important as the fi-

137. 415 U.S. 36, 52 n.16 (1974) (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955)).

138. See *Davis*, 59 F.3d at 1190. (“[T]he state action element of a due process claim is absent in private arbitration cases.”) (citing *Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987)). The Uniform Arbitration Act procedures are constitutional. See 1 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 7:3 (3d ed. 2013); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 1642–43 (2005) (stating that there is no violation of Fourteenth Amendment due process or Seventh Amendment jury trial guaranty).

139. E.g., *Cat Charter, L.L.C. v. Schurtenberger*, 646 F.3d 836, 846 n.17 (11th Cir. 2011); *Schmidt v. Finberg*, 942 F.2d 1571, 1573 (11th Cir. 1991).

140. 86 A.3d 1121, 1133 (D.C. 2013) (quoting *Bolton v. Bernabei & Katz, P.L.L.C.*, 954 A.2d 953, 959 (D.C. 2008)).

nality of arbitration.”¹⁴¹ As the Vermont Supreme Court has stated,

To the extent that justified confidence in arbitration is established, it can only aid the courts in meeting the public’s need for speedy, inexpensive and fair dispute resolution. The courts must respect an arbitrator’s determinations; otherwise, those determinations will merely add another expensive and time consuming layer to the already complex litigation process. If the courts merely rubber-stamp arbitrators’ decisions, however, litigants will hesitate to entrust their affairs to arbitration. *It is this delicate balance which courts reviewing arbitration decisions must strive to attain.*¹⁴²

Because the run of Tennessee cases omit this co-equal policy governing vacatur, a strong argument exists that such decisions fail to capture the full function of vacatur in arbitration matters.

B. Record Review in Vacatur Cases

Parties may arrange for a verbatim transcript of the arbitration hearing.¹⁴³ Because TUAA does not require a transcript, parties might bypass the opportunity, creating a situation where an appellate court must review cases without this information.¹⁴⁴ Consistent with TUAA’s narrow standard of review, a 1999 Tennessee Court of Appeals opinion said that the likely outcome with a trial record that lacks a transcript of the proceedings is that the appellate court will have “no basis” to find that the decision below was “clearly erroneous” as to warrant reversal.¹⁴⁵ Along the same

141. *Barcon Assocs. v. Tri-Cnty. Asphalt Corp.*, 430 A.2d 214, 219 (N.J. 1981).

142. *R. E. Bean Constr. Co. v. Middlebury Assocs.*, 428 A.2d 306, 309 (Vt. 1980) (emphasis added).

143. *Parr v. Tower Mgmt. Co.*, No. 01A01-9811-CV-00573, 1999 WL 415169, at *6–7 (Tenn. Ct. App. June 23, 1999).

144. *See id.*

145. *Id.* at *7 (quoting *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 449 (Tenn. 1996)); *see also* *Kline v. O’Quinn*, 874 S.W.2d 776, 783 (Tex. App. 1994) (noting that without a transcript of the arbitration proceedings, a court must presume that “adequate evidence” supports the award).

lines, a Wyoming arbitration decision states that absent a record, the court must presume that the evidence was sufficient and that the arbitrator was fair and impartial and acted within his legal authority.¹⁴⁶

A related issue is that TUAA has no requirement for arbitrator findings of fact and rulings of law. The arbitral decision could be as minimal as a lump sum award with no accompanying rationale.¹⁴⁷ A leading 1996 Tennessee Supreme Court decision, *Arnold v. Morgan Keegan & Co.*, expresses concerns that a different and overly-burdensome standard to make more elaborate findings and conclusions would encourage appellate courts to review *de novo* the trial court's rulings on vacatur and undercut the goal of speedy and efficient resolution of controversies:

The agreement in this case provided that the arbitrators were not required to make written findings of fact and law. Such is normally the case. Thus, under usual circumstances, any ground for vacating or modifying the arbitration award will usually appear on the face of the award, not within the transcript. It would be unfair and incongruous to hold that an arbitration award in hearings in which a transcript was made is more open to attack than in a case in which no transcript was made. Thus, the case under submission was no more open to review by the trial court than was any other arbitration case.

. . . .

146. *In re Wyo. Game & Fish Comm'n*, 773 P.2d 941, 994-95 (Wyo. 1989); *see also* *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 267 (Tex. App. 1995) ("Without a record, we are to presume that adequate evidence was presented to support the arbitrator's award."); *Rutter v. McLaughlin*, 612 P.2d 135, 136 (Idaho 1980) (missing portions of a record are presumed to support the arbitrator's decision).

147. *See in re Koch Oil, S.A. & Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985); *Kurt Orban Co. v. Angeles Metal Sys.*, 573 F.2d 739, 740 (2d Cir. 1978) ("Arbitrators are not required to disclose the basis upon which their awards are made . . . [C]ourts will not look beyond the lump sum award in an attempt to analyze the reasoning processes of the arbitrators." (citation omitted)).

“The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation. Immediate settlement of controversies by arbitration removes the necessity of waiting out a crowded court docket

Arbitration’s desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial *de novo*.”¹⁴⁸

Put another way, courts disdain “[t]hinly veiled attempts to obtain appellate review of an arbitrator’s decision” on the merits in the guise of a vacatur inquiry.¹⁴⁹

The *Arnold* decision is in line with the common statement that, “[g]enerally, arbitrators are no more obligated to give reasons for an award than is a jury required to explain a verdict.”¹⁵⁰ The law also provides that “it is not the function of courts to agree or disagree with the reasoning of the arbitrator[,]” but only to assess the decision, and therefore, it becomes much less important for the reviewing court to analyze the arbitrator’s rationale.¹⁵¹ Because an arbitrator can make an award based on broad principles of fairness and equity, courts have concluded that to require detailed factual and legal conclusions would deprive the arbitrator of this discre-

148. *Arnold*, 914 S.W.2d at 449 (quoting *Boyd v. Davis*, 897 P.2d 1239, 1242 (Wash. 1995)); see also Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 735 (1996) (noting same approach nation-wide).

149. *Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) (quoting *Gingiss Int’l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995)).

150. *Nat’l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 349 (Mo. Ct. App. 1995); see also *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 245 n.4 (1962) (making a similar statement).

151. *Guardian Builders, LLC v. Uselton*, 154 So. 3d 964, 968 (Ala. 2014); see also 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 30:6 (3d ed. 2013) (“The general rule is that arbitrators need not provide any reasons for their award, and if the the [sic] award is rationally inferable from the facts it must be confirmed.”).

tion and would convert the vacatur process into a misguided search for mistake of law or fact in the decision.¹⁵² The Tennessee Supreme Court in the *Arnold* case emphatically stated this approach is not permissible:

Courts, thus, do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. As long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.¹⁵³

The standard is so liberal that no requirement exists for the arbitrator to provide precise mathematical calculations of the damages.¹⁵⁴

Is there an out for the parties to modify the rules on arbitrator explanations for the decision? It will aid the analysis on this point by looking to similar arbitration statutes in other jurisdictions. As indicated above, while an arbitrator does not necessarily exceed his authority under the FAA, 9 U.S.C. § 10(a)(4), when he fails to provide reasons for the award, he can still exceed his authority by failing to render an award in the form required by the arbitration agreement.¹⁵⁵ Thus, for example, the arbitrator can exceed his authority by disregarding a requirement in the parties' submission to make findings of fact and conclusions of law.¹⁵⁶ If

152. See *Payton v. Jackson*, 756 S.E.2d 555, 557–58 (Ga. Ct. App. 2014).

153. *Arnold*, 914 S.W.2d at 449.

154. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1278 (10th Cir. 2005). Expert witnesses might be needed on damages and a pre-hearing brief could also be advisable. See *Meyers Assocs., LP v. Goodman*, No. 3:14-cv-1174, 2014 WL 5488761, at *13–14 (M.D. Tenn. Oct. 29, 2014) (praising this practice).

155. See *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992).

156. See *Cat Charter, L.L.C. v. Schurtenberger*, 646 F.3d 836, 843 n.14 (11th Cir. 2011) (rejecting criticism of a federal district court in a different circuit that it would not be possible for an arbitrator to exceed his powers by not

the agreement requires a “reasoned award,” such an award can express varying levels of detail that constitutes more than a simple result but less than full-fledged findings of fact and conclusions of law.¹⁵⁷ A fair reading of the above quoted term, nothing else appearing, is that the arbitrator must document an award listing or mentioning expressions or statements that justify his decision.¹⁵⁸ These FAA decisions are good analogous authority in TUAAs matters.

The absence of a transcript could create another adverse consequence for claimants. Assume that a transcript exists in fact, but is not part of the record on appeal; accordingly, when a moving party fails to file an available transcript of the proceedings, the appeal can be frivolous under Tenn. Code Ann. section 27-1-122. The result could be that a court may award an appropriate level of damages against the appellant, which can include interest on the judgment and the appellee’s expenses.¹⁵⁹

*C. Award Procured by Corruption, Fraud or Other
Undue Means (TENN. CODE ANN. SECTION 29-5-313(a)(1)(A))*

No Tennessee cases were found interpreting Tenn. Code Ann. section 29-5-313(a)(1)(A), where an award was procured by corruption, fraud, or other undue means. The most that can be said is that several pre-TUAA decisions from nineteenth century Tennessee courts disapprove of fraudulent arbitral awards.¹⁶⁰ While Tennessee cases largely fail to consider modern-day vacatur based

doing enough (quoting *ARCH Dev. Corp. v. Biomet, Inc.*, No. 02-C-9013, 2013 WL 21697742, at *4 n.4 (N.D. Ill. July 30, 2003)); see also 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 34:7 (3d ed. 2013) (“Of course, the parties may, by agreement, require that arbitrators include findings of fact and conclusions of law, and the failure to provide them may subject the award to attack because the arbitrators had exceeded their powers.”).

157. *Cat Charter*, 646 F.3d at 844; see also *House v. Vance Ford-Lincoln-Mercury, Inc.*, 328 P.3d 1239, 1246 (Okla. Civ. App. 2014) (noting standards for detail when the parties’ submission required a “reasoned award”).

158. *Cat Charter*, 646 F.3d at 845 n.16 (citing the “sparse precedent” addressing the nature of a “reasoned award”).

159. *Long v. Miller*, No. E2006-02237-COA-R3-CV, 2007 WL 2751663, at *10 (Tenn. Ct. App. Sept. 21, 2007).

160. See, e.g., *Mathews v. Mathews*, 48 Tenn. (1 Heisk.) 669, 674–75 (1870) (stating one party’s threat to prosecute the other party for perjury qualified as fraudulent conduct justifying the set aside of the arbitration award).

on corruption, fraud, or other undue means, other jurisdictions construing similar arbitration statutes have set down some well-settled principles.

1. Corruption

Corruption is “the state of being corrupt; a perversion of integrity; bribery,” and “corrupt” means “guilty of dishonest practices, as bribery; lacking integrity; crooked: a corrupt judge.”¹⁶¹ The referenced language apparently means the corruption of a party, witness, arbitrator, or other person involved in the proceedings.¹⁶² No Tennessee decisions were found on this theory, and the case law from other jurisdictions is scant as well. The most likely reason is that courts apparently treat “corruption” as a synonym for “fraud.”¹⁶³

The above referenced duplication of terminology appears in other grounds under Tenn. Code Ann. section 29-5-313(a)(1). Thus, both Tenn. Code Ann. section 29-5-313(a)(1)(A) (“award procured by corruption”) and Tenn. Code Ann. section 29-5-313(a)(1)(B) (“evident partiality . . . corruption”) mention “corruption” by the arbitrator. This repeat of like terminology causes confusion. The law and practice of arbitration in Tennessee would be enhanced if the General Assembly clarified Tenn. Code Ann. section 29-5-313 by making clear, non-overlapping grounds for vacatur.

2. Fraud

To the extent it can be differentiated from “corruption,” “fraud” requires proof of “bad faith” during the arbitral proceed-

161. *Las Palmas Med. Ctr. v. Moore*, 349 S.W.3d 57, 69 (Tex. App. 2010) (quoting WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 454, 455 (2003)).

162. See William H. Hardie, Jr., *Judicial Review of Arbitration Awards in the Alabama Courts*, 69 ALA. LAW. 435, 436 (2008).

163. See generally Andrew M. Campbell, Annotation, *Construction and Application of § 10(a)(1)–(3) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(1)–(3)) Providing for Vacating of Arbitration Awards Where Award Procured by Fraud, Corruption, or Undue Means, Where Arbitrators Evidence Partiality or Corruption and Where Arbitrators Engage in Particular Acts of Misbehavior*, 141 A.L.R. Fed. 1 (1997).

ings, such as bribery, undisclosed arbitrator bias, or willfully destroying or withholding evidence.¹⁶⁴ The movant must establish the following elements of fraud: (1) proof by clear and convincing evidence, (2) the claimant's exercise of due diligence prior to or during the arbitration would not have revealed the fraud, and (3) a material relation existed with respect to an issue in the arbitration such that the fraud prevented the complaining party from fully and fairly presenting his case (which differs from whether the outcome would have been different had the fraud not occurred).¹⁶⁵ The fraud must be willful and deliberate but this category would exclude constructive fraud, quasi-fraud, or any other merely fraud-like conduct.¹⁶⁶

Fraud is difficult to prove in vacatur cases because the claimant will often experience serious challenges in proving the alleged conduct directly influenced the outcome.¹⁶⁷ Based on the strong policy favoring arbitration, and to preserve finality,¹⁶⁸ there needs to be "an extremely high degree of improper conduct," more so than the common law variety of fraud.¹⁶⁹ The party alleging fraud also must show that the fraud was not discoverable with due diligence before or during the arbitration proceeding.¹⁷⁰ One variety (among numerous possible circumstances) where an award will be procured by fraud would be where the arbitrator engaged in numerous ex parte contacts with one of the parties and this arbitra-

164. *MPJ v. Aero Sky, L.L.C.*, 673 F. Supp. 2d 475, 494 (W.D. Tex. 2009) (citations omitted).

165. *MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499*, 345 F.3d 616, 622 (8th Cir. 2003); *see Hardeman v. Burge*, 18 Tenn. (1 Yer.) 202, 204–05 (1836) (noting that an allegation of arbitrator corruption and misconduct must be proven by clear and conclusive evidence, especially when there has been a long lapse of time).

166. *Barber v. Union Carbide Corp.*, 304 S.E.2d 353, 357 (W. Va. 1983).

167. *See Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 822–23 (8th Cir. 2001).

168. *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982) (courts "must be slow" to vacate an award based on fraud).

169. *Pac. & Arctic Ry. & Navigation Co. v. United Trans. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991); *see United Trans. Union v. BNSF Ry. Co.*, 710 F.3d 915, 931 (9th Cir. 2013).

170. *MidAmerican Energy Co.*, 345 F.3d at 622 (citation omitted); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (citation omitted).

tor showed “complete unwillingness to respond, and indifference, to any evidence or argument” in support of the other party’s positions.¹⁷¹ The word “procured” in Tenn. Code Ann. section 29-5-313(a)(1)(A) implements the legislative intent for “a nexus between the alleged fraud and the basis for the [arbitral] decision.”¹⁷²

One frequent point of contention in the decisional law is whether the amount of the award alone can evidence arbitrator fraud or corruption. A prominent treatise observes, “To justify setting aside an award based on its inadequacy, the inadequacy must be so strong, gross, and manifest that it would be impossible to state it to a person of common sense without producing an exclamation about its unfairness.”¹⁷³

Other issues exist under this type of statute. One common variety of fraud as a basis for vacatur is where a party submits false testimony or other evidence or effects a fraudulent concealment of relevant facts.¹⁷⁴ By contrast, improper non-disclosures of documents during pre-hearing discovery will not suffice for “fraud.”¹⁷⁵ It bears noting that as with a number of grounds for vacatur, the same act can qualify under more than one statutory theory. Thus, for example, an *ex parte* conversation between the arbitrator and

171. See *United Trans. Union*, 952 F.2d at 1148; see also *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994) (“[T]he party seeking a vacation of an award on the basis of *ex parte* conduct must demonstrate that the conduct influenced the outcome of the arbitration.” (quoting *M & A Elec. Power Co-op v. Local Union No. 702*, 977 F.2d 1235, 1237 (8th Cir. 1992))); *Emp’rs Ins. of Wausau v. Nat’l Union Fire Ins. Co.*, 933 F.2d 1481, 1490–91 (9th Cir. 1991) (moving party must prove prejudice resulting from the *ex parte* conduct). But see *Spector v. Torenberg*, 852 F. Supp. 201, 210 n.9 (S.D.N.Y. 1994) (“[T]he burden may shift to the party seeking confirmation [of the award] to demonstrate the absence of prejudice if the party seeking vacatur makes a preliminary showing that the *ex parte* contacts were carried out in [a] secretive or conspiratorial manner.”).

172. *Forsythe Int’l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990).

173. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:131 (4th ed. 2001) (citing *Second Soc’y of Universalists in Town of Bos. v. Royal Ins.*, 109 N.E. 384 (Mass. 1915)).

174. George Chamberlin, *Cause of Action to Vacate Arbitration Award on Ground of Corruption, Fraud, or Undue Means in Procuring Award*, in 2 *CAUSES OF ACTION 2D* § 5 (2d ed. 1993).

175. See *Pontiac Trail Med. Clinic, P.C. v. PaineWebber, Inc.*, No. 9201972, 1993 WL 288301, at *4 (6th Cir. 1993) (unpublished table opinion).

another person could also qualify as arbitrator misconduct under Tenn. Code Ann. section 29-5-313(a)(1)(B).¹⁷⁶ Tennessee law is unclear on whether a court may set aside an arbitration award where a party, and not the arbitrator, commits the fraud procuring the award.¹⁷⁷ The federal cases do not appear to draw this distinction to excuse a party's misconduct.¹⁷⁸

3. Undue Means

The phrase "undue means" in a statute allowing vacatur of an arbitration award "signifies [conduct] akin to fraud and corruption."¹⁷⁹ The irregularity for "undue means" must have caused "an unjust, inequitable, or unconscionable award."¹⁸⁰ Some authorities require conduct that involves immoral or illegal grounds.¹⁸¹ An example could be where the party has obtained an award by improper intimidation or threats against the arbitrator.¹⁸²

The Mississippi Supreme Court has ruled that the quoted term means "nefarious conduct" that "equals intentional malfeasance" which differs from "an incorrect or sloppy conclusion of law,"¹⁸³ "simple [errors] of law or fact"¹⁸⁴ or "sloppy or overzeal-

176. See 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:133 (4th ed. 2001).

177. *Bishop v. Yarbrough Constr. Co.*, C.A. No. 02A01-9411-CH-00256, 1996 WL 490629, at *4 n.1 (Tenn. Ct. App. Aug. 29, 1996). *But see* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 227 (2015) (stating that an award may be set aside when one party had ex parte communications with an arbitrator on material issues).

178. See, e.g., *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 n.7 (11th Cir. 1988) (stating "no doubt" that the perjury of a witness constitutes fraud under the FAA).

179. *Spiska Eng'g, Inc. v. SPM Thermo-Shield, Inc.*, 678 N.W.2d 804, 806 (S.D. 2004) (citation omitted); see *Drinane v. State Farm Mut. Auto. Ins.*, 584 N.E.2d 410, 414 (Ill. App. Ct. 1991).

180. *Trombetta v. Raymond James Fin. Servs., Inc.*, 907 A.2d 550, 570 (Pa. Super. Ct. 2006) (citation omitted).

181. *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992) (citation omitted); *AmeriPath, Inc. v. Hebert*, No. 05-12-00321-CV, 2014 WL 3827834, at *15 (Tex. Ct. App. Aug. 14, 2014) (citation omitted).

182. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* §§ 27:6 to 27:8 (3d ed. 2013).

183. *Robinson v. Henne*, 115 So. 3d 797, 802 (Miss. 2013) (citation omitted); see also *Doctor's Assocs. v. Windham*, 81 A.3d 230, 237 (Conn. App. Ct.

ous lawyering.”¹⁸⁵ As stated more elaborately by the Wisconsin Supreme Court, “[O]ne must conclude the term ‘undue means’ to include a more comprehensive area of acts of fraud and corruption while simultaneously restricting such expanded area of acts to those acts which are inappropriate, unjustified or improper methods of procuring an arbitration award.”¹⁸⁶

By contrast, “undue means” will be absent where the unfair conduct was ancillary or collateral to the award¹⁸⁷ or where the arbitrator considered evidence that was “merely legally objectionable.”¹⁸⁸ Where a party offers a defense (or claim) that the arbitrator decides lacks merit, but another party calls this party’s behavior “undue means,” this conduct is part of the business of litigation and has no necessary connotation of wrongfulness or immorality.¹⁸⁹ If the party opposite had sufficient notice of the other party’s (or the arbitrator’s) alleged misdeeds and through due diligence could have avoided their impact, “undue means” would be absent as well.¹⁹⁰

D. Evident Partiality by an Appointed Neutral Arbitrator or Corruption in any Arbitrators or Misconduct Prejudicing the Rights of Any Party (TENN. CODE ANN. Section 29-5-313(a)(1)(B))

Tenn. Code Ann. section 29-5-313(a)(1)(B) is confusing because it lumps together three different types of misconduct, several of which are already covered under other statutes. Thus, the

2013) (“[T]o establish ‘undue means’ . . . a party must prove ‘nefarious intent or bad faith’ . . . or conduct that is ‘immoral if not illegal.’” (quoting *McCullough*, 967 F.2d at 1403)).

184. *Robinson*, 115 So. 3d at 802.

185. *Barcume v. City of Flint*, 132 F. Supp. 2d 549, 556 (E.D. Mich. 2001) (quoting *McCullough*, 967 F.2d at 1403).

186. *City of Manitowoc v. Manitowoc Police Dept.*, 236 N.W.2d 231, 238 (Wis. 1975).

187. See *Taheri Law Grp., A.P.C. v. Sorokurs*, 98 Cal. Rptr. 3d 634, 639–40 (Cal. Dist. Ct. App. 2009).

188. *Am. Postal Workers Union v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995) (citation omitted).

189. *A.G. Edwards & Sons, Inc. v. McCullough*, 967 F.2d 1401, 1404 (9th Cir. 1992).

190. *Nolan v. Kenner*, 250 P.3d 236, 238 (Ariz. Ct. App. 2011); see *Conoco, Inc. v. Oil, Chem. & Atomic Workers Int’l Union*, 26 F. Supp. 2d 1310, 1320 (N.D. Okla. 1998) (citation omitted).

statute in paragraph (a)(1)(B) covers awards reflecting “corruption” or “misconduct,” which is also partially the province of paragraph (a)(1)(A). Another difference is that paragraph (a)(1)(B) applies a “prejudice” requirement for arbitrator “corruption” or “misconduct,” but paragraph (a)(1)(A) has no requirement for “prejudice” for awards procured through fraud, corruption, or other undue means. The General Assembly should streamline these factors to avoid this duplication and uncertainty.

The remainder of this part of the article will focus on “evident partiality” from Tenn. Code Ann. section 29-5-313(a)(1)(B), which is unmentioned in any other provision of Tenn. Code Ann. section 29-5-313(a)(1).¹⁹¹

1. “Evident Partiality” Defined

An essential attribute of arbitration is a neutral and impartial arbitrator.¹⁹² Courts should be highly scrupulous in assessing the impartiality of arbitrators, even more so than their review of the qualifications of judges. The rationale is that the former class of persons have “free rein” to decide the law and the facts, and arbitral decisions are largely exempt from appellate review.¹⁹³ Notably, no requirement exists that the award also be unjust to establish this ground for vacatur.¹⁹⁴ A trial court considering a motion for vacatur on this basis has “sound discretion” to decide the issue.¹⁹⁵

As just indicated, arbitral discretion is not unlimited under either TUAA or the FAA,¹⁹⁶ but complete impartiality or absolute

191. The references to “corruption” and “misconduct” in TENN. CODE ANN. § 29-5-313(a)(1)(B) (2012) have the same interpretation as under TENN. CODE ANN. § 29-5-313(a)(1)(A) (2012).

192. *Team Design v. Gottlieb*, 104 S.W.3d 512, 520 (Tenn. Ct. App. 2002) (citation omitted). *See generally* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:132 (4th ed. 2001) (“At common law, an award could be vacated if the arbitrator engaged in simple bias . . .”).

193. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968).

194. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:132 (4th ed. 2001).

195. *Torres v. Piedmont Builders, Inc.*, 686 S.E.2d 464, 466 (Ga. Ct. App. 2009) (footnote omitted).

196. *See* TENN. CODE ANN. § 29-5-313(a)(1)(B) (2012); 9 U.S.C. § 10(a)(3) (2012).

disinterestedness is not the test.¹⁹⁷ Arbitrators are also not subject to the same standard for disqualification as applies to Article III judges in the federal court system.¹⁹⁸ Because proof of actual bias and outright chicanery “is often impossible to obtain,” the majority of courts in the United States do not require this high level of proof for arbitrator bias.¹⁹⁹ Instead, the prevailing test, as in Tenn. Code Ann. section 29-5-313(a)(1)(B), is “evident partiality.”²⁰⁰ Given the nature of the non-disclosure, evident partiality will be found “where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”²⁰¹

The claimant should prevail on an “evident partiality” vacatur challenge where the arbitrator either has an actual conflict *or* he knows of, but does not disclose, facts that would lead a reasonable person to believe that a potential conflict exists.²⁰² The “evident partiality” comes from the nondisclosure itself, regardless of whether the underlying information of its own force establishes partiality or bias.²⁰³

The Tennessee Court of Appeals succinctly summarized the standard for this ground of vacatur:

[T]he party challenging the arbitrators’ decision must show that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration. The challenging party carries the burden to establish specific facts that indi-

197. *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1003 (Okla. Civ. App. 1993) (citation omitted).

198. *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82–83 (2d Cir. 1984).

199. *Carina Int’l Shipping Corp. v. Adam Mar. Corp.*, 961 F. Supp. 559, 568 (S.D.N.Y. 1997).

200. *Morelite*, 748 F.2d at 84.

201. *Id.*; see also 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:73 (4th ed. 2001) (addressing arbitrator’s required scope of disclosure); 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION §§ 25:9 to 25:18 (3d ed. 2013).

202. *Gianelli Money Purchase Plan & Tr. v. ADM Inv’r Servs.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

203. *Burlington N. R.R. v. TUCO, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997) (citing *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 147 (1968)).

cate improper motives on the part of the arbitrator. The alleged partiality must be direct, definite, and capable of demonstration, and an amorphous institutional predisposition toward the other side is not sufficient because that would simply be the appearance-of-bias standard that [the Sixth Circuit] [has] previously rejected. [T]he question before this Court is whether the party challenging the arbitrators' decision has carried its heavy burden to establish specific facts that indicate improper motives on the part of the arbitrator.²⁰⁴

The arbitrator's volitional conduct is needed to prove such grounds.²⁰⁵ An objective test will apply; the arbitrator's decision must reflect that a "reasonable person would have to conclude that an arbitrator was partial to the other party in the arbitration."²⁰⁶ Partiality also requires more than inference or supposition.²⁰⁷ An excellent way to draw the ire of the courts in this area is where counsel for a moving party makes repetitive and pejorative charges of arbitrator partiality that amount to a "drumfire of charges" barren of factual support that only satisfy the emotional needs of such counsel and their clients and defeat the whole purpose of arbitration.²⁰⁸ On the other hand, when entered into evidence in a judicial proceeding, an arbitrator's self-serving declaration that he tried the

204. *Bronstein v. Morgan Keegan & Co.*, No. W2011-01391-COA-R3-CV, 2014 WL 1314843, at *10–11 (Tenn. Ct. App. Apr. 1, 2014) (citations and internal quotations omitted) (alteration in original); *see also* *Morgan Keegan & Co., v. Starnes*, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *9–10 (Tenn. Ct. App. June 20, 2014) (adopting FAA case law assessing arbitrator evident partiality).

205. *See Tarpley v. Searcy*, No. M2000-03094-COA-R3-CV, 2002 WL 870089, at *3–4 (Tenn. Ct. App. May 7, 2002) (noting that an arbitrator was not evidently partial to a party where he was unaware at the time of the case that the party was married to his nephew's ex-wife).

206. *Bronstein*, 2014 WL 1314843, at *2 (citing *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306 (6th Cir. 2008)); *see also Morelite*, 748 F.2d at 84.

207. *Bronstein*, 2014 WL 1314843, at *10.

208. *See Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1495 (S.D.N.Y. 1987).

case in a fair manner irrespective of the appearance of bias will not necessarily remove the taint.²⁰⁹

An award regular on its face may be overturned for statutorily-covered arbitrator misconduct and a reviewing court may consider evidence on this issue extrinsic to the arbitrator's decision.²¹⁰ A significant caveat, however, is that where the moving party raises a legitimate issue of undue arbitrator partiality, a court should permit at least limited discovery of the arbitrator.²¹¹ In this way, the moving party will have a fair opportunity to explore the relationship at issue between the arbitrator and the other party.²¹²

A panel of arbitrators presents some unique issues on this topic of arbitrator misconduct. The panel can consist of party appointed arbitrators and neutral arbitrators.²¹³ Notably, this basis for arbitrator disqualification does not necessarily apply to party-appointed arbitrators whom the courts expect to be partial (and perhaps even partisan) to the side recommending the arbitrator's appointment.²¹⁴ This test applies only to arbitrators that the parties accept as neutral decision makers.²¹⁵ Neutral arbitrators are not the

209. 6 C.J.S. *Arbitration* § 207 (2014).

210. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 217 (2014); *see also* Team Design v. Gottlieb, 104 S.W.3d 512, 518 n.7 (Tenn. Ct. App. 2002) (stating an award regular on its face cannot be impeached but may be challenged upon objections that go to the alleged misbehavior of the arbitrators).

211. Kauffman v. Haas, 318 N.W.2d 572, 574 (Mich. Ct. App. 1982).

212. *Id.*

213. Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007).

214. *Id.* at 552; Tate v. Saratoga Sav. & Loan Ass'n, 216 Cal. App. 3d 843, 858 (1989) (“[B]ias in a party arbitrator is expected and furnishes no ground for vacating an arbitration award, unless it amounts to ‘corruption.’”); *see also* ATSA of Cal., Inc. v. Cont'l Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983) (permitting partisan arbitrators). Under the ABA/AAA Code of Ethics, a party-appointed neutral arbitrator is subject to the same duty of disclosure as any other neutral arbitrator. THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES CANON 2 (AM. BAR ASS'N 1983).

215. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759 (11th Cir. 1993) (deeming it unobjectionable where the party-appointed arbitrator consulted with the party about evidence of record after the former's appointment and before the hearing); *see also* U.S. Care, Inc. v. Pioneer Life Ins. Co., 244 F. Supp. 2d 1057, 1064 (C.D. Cal. 2002) (citing cases establishing a lower duty of disclosure for party-appointed arbitrators).

agent of either party and they sit in a quasi-judicial capacity.²¹⁶ At the same time, however, party-appointed arbitrators, consistent with the parties' submission, are still required to act in good faith and with integrity and fairness.²¹⁷ Consistent with the liberal policy favoring arbitration of disputes, a court may appoint a substitute arbitrator after upholding vacatur against the award based on arbitrator bias.²¹⁸

2. Evidence of Partiality

The relationship raising concerns of arbitrator partiality must be so substantial personally, socially, professionally, or financially from the perspective of a reasonable member of the public aware of all the facts that the relationship casts serious doubt on the arbitrator's impartiality.²¹⁹ Consistent with the overarching policy that judicial review of arbitration awards is "narrowly limited," along with the presumption that awards shall be confirmed, the evident partiality basis for vacatur must be "strictly construed."²²⁰

Courts are "not quick" to set aside an award for the arbitrator's failure to disclose information linking the arbitrator in a relationship with a party,²²¹ even if such non-disclosure might have violated current ethical norms for arbitrators.²²² The evidence for a meritorious claim must be "direct, definitive and capable of demonstration" versus being merely "remote, uncertain and specu-

216. See *Carroll v. Alsup*, 64 S.W. 193, 197 (Tenn. 1901); *Cowan v. Murch*, 37 S.W. 393, 395 (Tenn. 1896).

217. *Sunkist*, 10 F.3d at 759.

218. *Third Nat. Bank in Nashville v. WEDGE Grp., Inc.*, 749 F. Supp. 851, 855 (M.D. Tenn. 1990).

219. *Midwest Generation EME, L.L.C. v. Continuum Chem. Corp.*, 768 F. Supp. 2d 939, 950–51 (N.D. Ill. 2010); *Mahnke v. Super. Ct.*, 103 Cal. Rptr. 3d 197, 206–07 (Cal. Dist. Ct. App. 2009).

220. *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

221. *In re Andros Compania Maritima*, 579 F.2d 691, 700 (2d Cir. 1978); *Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 317–18 (S.D.N.Y. 1987).

222. *Sanford Home for Adults*, 665 F. Supp. at 318 (noting that the violation under review was "at worst" a "technical violation").

lative.”²²³ Again, the parties’ submission is important in this area, especially when the document establishes ethical rules for arbitrator conduct as a component of the ground rules for the proceeding.

A court will not vacate an award where the only evidence of partiality is that the arbitrator’s decision was unfavorable to the complaining party.²²⁴ Arbitrators are empowered to decide what is relevant, material, and cumulative and to determine the rules of procedure.²²⁵ Similarly, the courts have concluded that alleged procedural or evidentiary errors, by themselves, have little or no probative weight that will show bias.²²⁶ Indeed, courts are deferential in this area toward arbitrators to the point that they place their “faith in the ‘deterrent value’ of an arbitrator’s concern for his ‘professional reputation,’ ‘especially where the arbitrator is a lawyer.’”²²⁷ Courts are also sensitive to the prospect that an overly lenient standard of evident partiality could encourage parties to conduct background investigations of arbitrators, which would serve to increase the cost and decrease the finality of arbitration.²²⁸ Another inevitable consequence of such investigations is they would tend to harass arbitrators and to deter them from accepting such service in the future.²²⁹

223. *Gianelli*, 146 F.3d at 1312 (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 117, 1202 (11th Cir. 1982)); *Tamari v. Bache Halsey Stuart Inc.*, 619 F.2d 1196, 1200 (7th Cir. 1980); *see also* *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) (“[C]ourts have rejected claims of evident partiality based on long past, attenuated or insubstantial connections between a party and an arbitrator.”).

224. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:132 (4th ed. 2001).

225. *See* *Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford*, 526 F. Supp. 2d 424, 428 (S.D.N.Y. 2007).

226. *See* *Areca, Inc. v. Oppenheimer & Co.*, 960 F. Supp. 52, 56–57 (S.D.N.Y. 1997) (“[F]ederal courts have concluded that evident partiality may not be shown by alleged procedural or evidentiary errors, by legitimate efforts to move the case along, or by failure to follow the rules of evidence.” (quoting *Sisti v. Merrill, Lynch, Pierce, Fenner & Smith*, No. 91 00102-R, 1991 WL 575874, at *3 (E.D. Va. Apr. 22, 1991))).

227. *Sanford Home for Adults*, 665 F. Supp. at 318 (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983)).

228. *Merit Ins. Co.*, 714 F.2d at 683.

229. *See id.*

The fact patterns regarding arbitrator misconduct are highly varied.²³⁰ The courts will examine whether there are inferences from objective facts that do not comport with arbitral impartiality.²³¹ A party need not necessarily show proof of “actual bias,” but the evidence must go beyond the mere “appearance of bias.”²³² Some criteria relevant to the determination of evident partiality are: (1) any personal interest, pecuniary, or otherwise the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of the relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.²³³ Another factor can be the “peculiar commercial practices in the geographic area.”²³⁴ Most decisions indicate that a court has no general power to intervene in an ongoing arbitration case, such as a ruling during the proceedings that the judge deems the arbitrator unfairly biased.²³⁵

230. See 4 AM. JUR. 2D *Alternative Dispute Resolution* § 220 (2014) (noting fact patterns showing or not showing partiality).

231. *Pitta v. Hotel Ass’n of N.Y. City, Inc.*, 806 F.2d 419, 423 (2d Cir. 1986).

232. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007); see also *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 148 (4th Cir. 1994) (stating that arbitrators “are not held to the ethical standards required of Article III judges” (quoting *Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 146 (4th Cir.1993))); *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1969) (White, J., concurring) (allowing disqualification of arbitrators based on a mere appearance of bias would unnecessarily “disqualify the best informed and most capable potential arbitrators”) (relied upon in *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 n.3 (2d Cir. 1984)); *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996) (requiring “reasonable impression of bias”); *Sidarma Societa Italiana Di Armamento Spa, Venice v. Holt*, 515 F. Supp. 1302, 1307 (S.D.N.Y. 1981) (finding that it is not enough that the arbitrator’s perspective on the case is colored by his personal business experience or that the arbitrator might expect future business from the parties before him).

233. *Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 130 (4th Cir. 1995); *Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 320 (S.D.N.Y. 1987).

234. *Carina Int’l Shipping Corp.*, 961 F. Supp. 559, 568 (S.D.N.Y. 1997); *Morelite*, 748 F.2d at 84.

235. Compare W.J. Dunn, Annotation, *Disqualification of Arbitrator by Court or Stay of Arbitration Proceedings Prior to Award, on Ground of Interest,*

A good example of an insubstantial connection between the arbitrator and a party that does not show undue partiality occurred in *Morgan Keegan & Co., Inc. v. Starne*.²³⁶ In this case, the arbitrator and a party had a superficial, professional acquaintanceship where they were employed by the same company in different cities more than twenty years before the arbitration.²³⁷ Another situation that is more trivial than probative is where the arbitrator appeared disinterested, shrugged his shoulders, discouraged further statements from the claimant, or even was abrasive.²³⁸ Further, no impropriety exists where the arbitrator merely asks questions of witnesses (which can include cross-examination) to facilitate the proceedings.²³⁹

3. Arbitrator's Duty of Self-Investigation and Disclosure

The arbitrator can have a legal obligation as required by an arbitral contract or the parties' submission to make a reasonable investigation of nontrivial facts pertaining to his fitness to serve and to disclose to the parties any relationship that raises a question of bias.²⁴⁰ Where the arbitrator breached the duty of self-

Bias, Prejudice, Collusion or Fraud of Arbitrators, 65 A.L.R.2d 755 (1959) (noting that in some jurisdictions, a court may intervene in the arbitration pursuant to its general equity powers), *with* *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney*, 780 F. Supp. 885, 894–96 (D. Conn. 1991) (finding no categorical prohibition against disqualification of an arbitrator prior to the conclusion of the arbitration) (citing cases)).

236. No. W2012-00687-COA-R3-CV, 2014 WL 2810209 (Tenn. Ct. App. June 20, 2014) (stating that small talk between the arbitrator and a participant during breaks in the proceedings is not evidence of bias or evident partiality).

237. *Id.* at *10.

238. *See* *Nasta v. Paramount Pictures Corp.*, No. 87 Civ. 1599 (WK), 1991 WL 183353, at *5 (S.D.N.Y. Sept. 11, 1991).

239. *See* *Butler v. Boyles*, 29 Tenn. 155, 155 (1849); *Burton v. Cruise*, 118 Cal. Rptr. 3d 613, 622 (Cal. Dist. Ct. App. 2010) (noting the “conversational” nature of some arbitration proceedings); *see also* *Spector v. Torenberg*, 852 F. Supp. 201, 209 (S.D.N.Y. 1994) (“[A]n arbitrator is not precluded from developing views regarding the merits of a dispute early in the proceedings, and an award will not be vacated because he expresses those views.”).

240. *See* *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007) (stating that the arbitrator's lack of actual knowledge of the presence of a conflict does not excuse non-disclosure where the arbitrator has reason to believe that a non-trivial conflict of interest might exist). *But see*

investigation, vacatur will be appropriate only where the undisclosed conflict was “real and ‘not trivial.’”²⁴¹ The arbitrator’s failure to disclose a financial or personal relationship, apart from the actual potential for a conflict, may establish the claim of bias.²⁴²

Lower courts have echoed Justice White’s concurring opinion in the U.S. Supreme Court’s decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,²⁴³ that “arbitrators would be well advised if they desired their decision not to be subject to the kind of attack here involved if they did as admonished by Mr. Justice White [to] ‘err on the side of disclosure.’”²⁴⁴ Tennessee courts also have stated that a party may waive this ground for relief for purposes of vacatur when the party knowingly remains silent about this problem during the proceedings, raises no objection to the arbitrator’s alleged bias, but decides to complain after the arbitrator issues a decision adverse to that person.²⁴⁵

Gianelli Money Purchase Plan & Tr. v. ADM Inv’r Servs., 146 F.3d 1309, 1313 (11th Cir. 1998) (adopting per se rule that a finding of evident partiality will be absent where the arbitrator lacked “actual knowledge of the information upon which an alleged ‘conflict’ was founded”). For a comprehensive summary of the case law on arbitrator disclosure of the relationship this official has with the parties, see *Hobet Mining, Inc. v. Int’l Union, United Mine*, 877 F. Supp. 1011 (S.D. W. Va. 1994).

241. *New Regency Prods, Inc.*, 501 F.3d at 1110 (citation omitted) (quoting *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 499 n.4 (4th Cir. 1999)).

242. *Toyota of Berkeley v. Auto. Salesman’s Union*, 834 F.2d 751, 756 (9th Cir. 1987) (citing *Sheet Metal Workers Int’l Ass’n v. Kinney Air Conditioning*, 756 F.2d 742, 746 (9th Cir. 1985); *Merit Ins. v. Leatherby Ins.*, 714 F.2d 673, 678 (7th Cir. 1983); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1149 (10th Cir. 1982)).

243. 393 U.S. 145, 150 (1968) (White, J., concurring).

244. *U.S. Wrestling Fed’n v. Wrestling Div. of AAU, Inc.*, 605 F.2d 313, 319 (7th Cir. 1979).

245. *Bailey v. Am. Gen. Life & Accident Ins.*, No. M2003-01666-COA-R3-CV, 2005 WL 3557840, at *5 (Tenn. Ct. App. Dec. 29, 2005); see also *Cook Indus. v. C. Itoh & Co.*, 449 F.2d 106, 107–08 (2d Cir. 1971) (stating that an “[a]ppellant cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first”).

E. The Arbitrators Exceeded Their Powers
(TENN. CODE ANN. Section 29-5-313(a)(1)(C))

1. The Statutory Standards

An arbitration award must “draw its essence from the agreement of the parties.”²⁴⁶ Because arbitration is “a matter of consent, not coercion,” parties are “generally free” to structure their contracts as they deem appropriate and to specify the ground rules governing the arbitration.²⁴⁷ In keeping with this statement, the Tennessee Supreme Court has said that parties “cannot be forced to arbitrate claims that they did not agree to arbitrate.”²⁴⁸ From the above doctrine comes the rule that the arbitrator’s scope of authority regarding the issues in the case depends on the terms of the parties’ arbitration agreement.²⁴⁹ It bears emphasis that this ground for challenge considers only whether the arbitrator exceeded his delegated powers, which inquiry differs from the merits of his decision.²⁵⁰

An arbitrator’s authority depends upon the matters that the parties’ agreement either covers expressly or that are implied by necessity.²⁵¹ A number of decisions recognize that the arbitrator’s

246. *Wasco, Inc. v. R.P. Indus., Inc.*, No. 01-A-01-9407-CH00343, 1994 WL 706663, at *3 (Tenn. Ct. App. Dec. 21, 1994) (citing *Int’l Talent Grp., Inc. v. Copyright Mgmt., Inc.*, 769 S.W.2d 217 (Tenn. Ct. App. 1988)).

247. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 84 (Tenn. 1999) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)).

248. *Id.* at 84, *cited in T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C.*, 93 S.W.3d 861, 870 (Tenn. Ct. App. 2002) (stating that an “indirect agreement to arbitrate is enforceable as long as it is clear”). This principle coincides with the common law (pre-TUAA) rule. *See, e.g., Mays v. Myatt*, 62 Tenn. 309 (1874).

249. *D & E Constr. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518 (Tenn. 2001); *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 450 (Tenn. 1996); *Int’l Talent Grp. v. Copyright Mgmt. Co.*, 769 S.W.2d 217, 218 (Tenn. Ct. App. 1988); *see also Williams Holding Co. v. Willis*, 166 S.W.3d 707, 711 (Tenn. 2005); *Davis v. Reliance Elec.*, 104 S.W.3d 57, 61 (Tenn. Ct. App. 2002) (“[S]o long as the arbitrator is acting within his scope of authority, ‘the fact that a court is convinced he committed serious error does not suffice to overturn his decision.’” (quoting *Arnold*, 914 S.W.2d at 449)).

250. *Gordon Sel-Way, Inc. v. Spence Bros.*, 475 N.W.2d 704, 710 (Mich. 1991).

251. *Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795, 799 (Tex. App. 2008).

jurisdiction is defined by both the contract containing the arbitration clause and the submission agreement that illuminates that agreement.²⁵² Accordingly, an arbitrator exceeds his power “when he rules on issues not submitted to him by the parties”²⁵³ or “grant[s] relief not authorized in the arbitration agreement.”²⁵⁴ Thus, for example, an arbitration clause in an employment contract does not necessarily require the employee to submit a complaint under the Tennessee Human Rights Act to arbitration.²⁵⁵

In assessing the issue of party intent in a submission or contract, courts often consider the correspondence regarding the terms in the demand for arbitration and related documents.²⁵⁶ Where the clause broadly requires the arbitration of all disputes arising from the agreement—unlike a narrower clause that limits arbitration to specific disputes—the clause reaches all aspects of the parties’ agreement²⁵⁷ and the presumption favoring arbitrability applies even more strongly.²⁵⁸ These principles stem from case law that courts are “to give as broad a construction to an arbitration agreement as the words and intentions of the parties, drawn from

252. *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994) (noting that by their conduct parties can agree to submit an issue to the arbitrator that they were not compelled to submit according to their agreement); *D & E Const.*, 38 S.W.3d at 518 (“[T]he scope of an arbitrator’s authority ‘is determined by the terms of the agreement between the parties which includes the agreement of the parties to arbitrate the dispute.’” (quoting *Int’l Talent Grp.*, 769 S.W.2d at 218)).

253. *Vt. Built, Inc. v. Krolick*, 969 A.2d 80, 87 (Vt. 2008) (quoting *Hoelt v. MVL Grp.*, 343 F.3d 57, 71 (2d Cir. 2003)).

254. *Morgan Stanley & Co. v. Core Fund*, 884 F. Supp. 2d 1229, 1231 (M.D. Fla. 2012).

255. *Brown v. KareMor Int’l, Inc.*, No. 01A01-9807-CH-00368, 1999 WL 221799, at *2 (Tenn. Ct. App. Apr. 19, 1999).

256. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987); *Costle v. Freemont Indem. Co.*, 839 F. Supp. 265, 273 (D. Vt. 1993).

257. *Neal v. Hardee’s Food Sys.*, 918 F.2d 34, 37–38 (5th Cir. 1990).

258. *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986); *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). For a decision reconciling an agreement containing both a narrow and a broad arbitration clause, see *Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633 (2d Cir. 1993).

their expressions, will warrant, and to resolve any doubts in favor of arbitration.”²⁵⁹

Where a claimant in a contract dispute alleges that the arbitrator exceeded his authority, the record must show that the arbitrator did not rely upon his personal opinion about the parties’ contractual intent or on his own conceptions of sound public policy.²⁶⁰ Instead, the courts will decide the scope of arbitrator authority by interpreting the arbitration terms of the agreement under “ordinary state law principles” of party intent.²⁶¹ In deciding whether the arbitrator exceeded his authority, courts resolve “any doubts in favor of arbitration.”²⁶² In fact, arbitration “should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”²⁶³ FAA decisions on this point are persuasive authority in TUA cases.

2. Role of Contract Interpretation

The controlling issue is not whether the arbitrator construed the parties’ contract correctly, “but whether he construed it at all.”²⁶⁴ Where an arbitration clause covers a specific type(s) of dispute(s), a court cannot require arbitration on claims outside that scope; thus, for example, where the clause covers “all factual disputes” between the parties, the clause cannot compel arbitration of

259. See *Wachtel v. Shoney’s Inc.*, 830 S.W.2d 905, 908 (Tenn. Ct. App. 1991).

260. See *Wolf v. Sprenger + Lang, P.L.L.C.*, 86 A.3d 1121, 1133–34 (D.C. 2013).

261. *T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C.*, 93 S.W.3d 861, 870 (Tenn. Ct. App. 2002); see also *McAllister Bros. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980) (“[O]rdinary principles of contract and agency determine which parties are bound by an agreement to arbitrate.”).

262. *Hardaway v. Goodwill*, 1994 WL 585767, at *2 (Tenn. Ct. App. Oct. 19, 1994) (quoting *Wachtel*, 830 S.W.2d at 908).

263. *Taylor v. Butler*, 142 S.W.3d 277, 281 (Tenn. 2004) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)); see also 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:22 (4th ed. 2001).

264. *Oxford Health Plans, L.L.C. v. Sutter*, 133 S. Ct. 2064, 2071 (2013).

all legal *and* factual matters in dispute between the parties.²⁶⁵ Another example of such a limitation is an arbitrator may not award relief in excess of the dollar limit the parties accepted in their agreement.²⁶⁶ Tennessee courts also recognize that when the parties employ a broad arbitration clause covering numerous items, it will be correspondingly more difficult for a party to argue that a dispute is outside the agreement.²⁶⁷ The above doctrines are entrenched in Tennessee arbitration jurisprudence, predating TUA by many years.²⁶⁸

In labor disputes, arbitrators frequently construe collective bargaining agreements; so long as the arbitrator draws his interpretation “from the essence” of the agreement (which concept is interpreted “expansively”)²⁶⁹ and he does not “dispense his own brand of industrial justice,” the arbitrator’s decision will likely stand.²⁷⁰ While the Labor Management Relations Act of 1947, as amended, (and not the FAA) governs labor arbitration,²⁷¹ the same approach exists in commercial arbitration.²⁷² Accordingly, the collective

265. *Encompass Ins. v. Hagerty Ins. Agency*, No. 1:08-cv-337, 2009 WL 160776, at *11 (W.D. Mich. Jan. 22, 2009).

266. *Int’l Talent Grp. v. Copyright Mgmt.*, 769 S.W.2d 217, 219 (Tenn. Ct. App. 1988).

267. *See Bodor v. Green Tree Servicing, L.L.C.*, No. M2007-00308-COA-R10-CV, 2007 WL 2409675, at *2 (Tenn. Ct. App. Aug. 24, 2007).

268. *See Jackson v. Chambers*, 510 S.W.2d 74, 76 (Tenn. 1974) (“The arbitrators had no authority to go in their inquiries beyond the powers delegated by the terms of the submission.” (citing *Mays v. Myatt*, 62 Tenn. 309 (1874))).

269. *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1324–25 (5th Cir. 1994); *see also Mich. Mut. Ins. v. Unigard Sec. Ins.*, 44 F.3d 826, 830–31 (9th Cir. 1995) (“[A]n award does not draw its essence from the contract if the arbitrators exceeded their powers in crafting the award, if the award is contrary to public policy, or if the arbitrators acted in manifest disregard of the law” (citing *Local Joint Exec. Bd. of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir. 1987))); *Int’l Bd. of Teamsters, Local 519 v. United Parcel Serv.*, 275 F. Supp. 2d 944, 951–52 (E.D. Tenn. 2001), *vacated on other grounds*, 335 F.3d 497 (6th Cir. 2003) (discussing the “essence” of the agreement).

270. *Int’l Talent Grp.*, 769 S.W.2d at 220 (quoting *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1129–30 (3d Cir. 1972)).

271. *See THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION* 38 n.105, 86–94 (4th ed. 2012).

272. *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1026 (7th Cir. 2013). Section One of the FAA does not apply to employment contracts, but this exclusion is itself narrowly construed. *See THOMAS E.*

bargaining cases may properly be cited as persuasive authority on cognate issues in commercial arbitration cases. Courts commonly cite labor arbitration cases, which are subject to the federal common law of labor relations, in arbitration cases subject to the FAA.²⁷³

A less-frequently cited, but equally valid, doctrine is that, even where an arbitration agreement does not cover a particular issue, the parties, by their knowing conduct during arbitration, may agree to send an issue to the arbitrator for resolution.²⁷⁴ As an FAA decision pointed out,

It is a fundamental contract principle that a contract provision may be modified by the actions or expressions of the parties. The practical construction or interpretation of a contract by the parties is an important indication of the intent of the parties and courts give great weight to such interpretations. “Few things can better evidence the meaning of a contract than the actions of the parties themselves.”²⁷⁵

As indicated above, the most common question on this theory of vacatur is whether the arbitrator has stayed within the bounds of his appointed authority. Under the analogous FAA, the decisions have “consistently accorded the narrowest of readings” on whether the arbitrator has exceeded his powers.²⁷⁶ Although some courts hold that the arbitrator’s interpretation of the scope of his conferred authority does not bind a reviewing court, other decisions state that the parties, by consent, may confer this authority on

CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 127–47 (4th ed. 2012).

273. See Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 *Y.B. ON ARB. & MEDIATION* 56 (2014) (analyzing cases).

274. *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991); *Carey v. Conn. Gen. Life Ins.*, 93 F. Supp. 2d 165, 168 (D. Conn. 1999).

275. *Globe Transp. & Trading (U.K.) Ltd. v. Guthrie Latex, Inc.*, 722 F. Supp. 40, 44 (S.D.N.Y. 1989) (citations omitted) (quoting *Ottley v. Palm Tree Nursing Home*, 493 F. Supp. 910, 914 (S.D.N.Y. 1980)).

276. *ReliaStar Life Ins. of N.Y. v. EMC Nat’l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997).

the arbitrator.²⁷⁷ In any event, the arbitrator's determination of the scope of his delegated authority must be subservient to the terms of the arbitration agreement.²⁷⁸ On the other hand, the better view is that courts are not bound by an arbitration agreement stating the award shall be final on all questions of law and fact. The reason is that such a term effectively deprives an aggrieved party of its statutory right to seek vacatur of an improper award.²⁷⁹

3. Ambiguity in Arbitration Agreements/Arbitrator Decisions

A number of cases address whether a vacatur action may lie because the arbitrator's award decision is ambiguous. A mere ambiguity in an opinion accompanying an arbitration award on whether the arbitrator exceeded his authority is insufficient for vacatur.²⁸⁰ Another fertile area for litigation, discussed below, is whether vacatur is available where the parties' submission or the arbitration agreement was ambiguous on which issues are arbitrable.²⁸¹

Under settled law, courts must strongly consider the policy favoring arbitration and construe any ambiguities on arbitrability in favor of arbitration.²⁸² Another principle of interpretation that can reconcile conflicting contractual language is that a court may order

277. *Globe Transp.*, 772 F. Supp. at 45.

278. *See Synergy Gas Co. v. Sasso*, 853 F.2d 59, 63–64 (2d Cir. 1988) (“[T]he ‘scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission.’” (quoting *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987))).

279. *See United States v. Farragut*, 89 U.S. 406 (1874). *But see Swenson v. Bushman Inv. Props., Ltd.*, 870 F. Supp. 2d 1049, 1054–56 (D. Idaho 2012) (noting that there is a split of authority in the circuits); 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:128 (4th ed. 2001) (favoring the view that parties may waive their right to an appeal).

280. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

281. *See infra* Section V.E.4.

282. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 475 (1989); *Local Union No. 336 v. Detroit Gasket & Mfg. Co.*, 521 F. Supp. 39, 40 (E.D. Tenn. 1981) (“Consequently, although the parties are bound to arbitrate only those disputes they have agreed to arbitrate, all doubts or ambiguities must be resolved in favor of arbitration.” (citing *Controlled Sanitation Corp. v. Dist. 128*, 524 F.2d 1324 1328 (3d Cir. 1975))).

arbitration of claims under one agreement that is part of a larger agreement containing an arbitration clause.²⁸³ A court may even go so far as to conclude that the “nature of the award itself” may cure the ambiguity.²⁸⁴

The easiest way to avoid an ambiguity on arbitrability is, if a party believes that an agreement on a particular issue should not be subject to arbitration, it can say so in the contract.²⁸⁵ In keeping with the policy to uphold arbitration awards wherever possible, if the arbitration decision goes beyond a mere ambiguity and is so ambiguous that the award cannot be interpreted, the courts may not vacate but should be able to remand the case to the arbitrator(s) below for clarification.²⁸⁶

A sound reason exists for requiring a substantive, material ambiguity for vacatur instead of a technical one. First, submissions by the parties and opinions prepared by arbitrators rarely reach the level of sophistication characteristic of judges. It would be unrealistic to expect that the parties in their agreement, or the arbitrator(s) in their opinions, can avoid all uncertainty or lack of clarity. If the rule were otherwise, parties dissatisfied with the award decision would simply go on a hunt for ambiguity in the agreement or the opinion and compel courts to overturn the award for apparently harmless errors. Second, if the broader rule were the standard, it would prompt arbitrators to “play it safe by writing

283. *Frounfelker v. Identity Grp.*, No. M2001-02542-COA-R3-CV, 2002 WL 1189299, at *4 (Tenn. Ct. App. June 5, 2002); *see also* *Dickson Cty. v. Bomar Constr. Co.*, 935 S.W.2d 413, 415 (Tenn. Ct. App. 1996) (declining to interpret two clauses to find a repugnancy on whether the parties had agreed to arbitration but, instead, decided to reconcile the language that showed an agreement to arbitrate).

284. *Sheet Metal Workers Int’l Ass’n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745 (9th Cir. 1985).

285. *Frounfelker*, 2002 WL 1189299, at *4.

286. *Emp’rs Ins. of Wausau v. Nat’l Union Fire Ins.*, 933 F.2d 1481, 1488 n.6 (9th Cir. 1991); *Refino v. Feuer Transp., Inc.*, 480 F. Supp. 562, 565 (S.D.N.Y. 1979). *But see* *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.10 (1987); *Westvaco Corp. v. Local 579, United Paperworkers, Int’l Union*, Civ. A. No. 90-30091-F, 1992 WL 121372, at *9 (D. Mass. Mar. 5, 1992) (noting that when a court vacates an arbitration award, it should not resolve the merits of the dispute but should, when possible, remand the case to the arbitrator). The legal status of remands in Tennessee arbitration is unclear. *See infra* note 475 and accompanying text.

no supporting opinions. . . . This would be undesirable for a well-reasoned opinion would engender confidence in the integrity of the process and aid in clarifying the underlying agreement.”²⁸⁷ Thus, courts will resolve any ambiguity in the award decision, if possible, in favor of an interpretation that supports confirmation of the award.²⁸⁸ In fact, courts go so far as to say that “[t]he showing required to avoid confirmation’ of an arbitration award ‘is very high.’”²⁸⁹

4. Gaps in Arbitration Agreements/Arbitrator Decisions

Another problem related to ambiguity is what course of action should an arbitrator take when the submission is silent on the precise question in controversy? Although some case law supports the view that “arbitrators cannot change or alter the terms of a contract between the parties,”²⁹⁰ other decisions indicate the arbitrator may “look beyond the written contract” if the contract has such a gap.²⁹¹ When facing such a contractual gap, the arbitrator can overcome potential objections that he lacked the authority to decide such questions if he relies on established precepts of contract construction. Similar principles govern arbitration agreements and arbitrator decisions.

Although some Tennessee decisions reference the principles of contractual ambiguity to resolve the problem of missing language,²⁹² the more appropriate approach is that a gap in an

287. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

288. *Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co.*, 794 F. Supp. 1265, 1272 (S.D.N.Y. 1992) (citing decisions).

289. *Morgan Keegan & Co. v. Starnes*, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *10 (Tenn. Ct. App. June 20, 2014) (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983)).

290. *Stokely-Van Camp, Inc. v. United Steelworkers, Local Union No. 7198*, 480 F. Supp. 48, 49 (E.D. Tenn. 1971).

291. *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng’rs Beneficial Ass’n*, 889 F.2d 599, 602 (5th Cir. 1979).

292. *See Adams TV of Memphis, Inc. v. Int’l Bhd. of Elec. Workers, Local 274*, 932 S.W.2d 932, 935 (Tenn. Ct. App. 1996) (stating that where a collective bargaining agreement provided that an employee could be discharged for just cause, but was silent on the procedures, the arbitrator properly devised the procedures).

agreement or a decision cannot be interpreted one way or another because there is no language to construe.²⁹³ The whole point of a gap is that there is no coverage for the particular issue. The better view is the document can be saved, however, where established notions of offer and acceptance can overcome the contractual silence. Alternatively, the *Restatement (Second) of Contracts*, Section 208, can provide a solution. The *Restatement* states that when the bargain is sufficiently defined to be a contract, but they have not agreed on a point essential to the determination of their rights and duties, a court (and inferentially an arbitrator) may supply a term that is reasonable under the circumstances.²⁹⁴

Another alternative to resolve an interpretive gap is the case law doctrine that a contract term may be implied, even though not stated expressly, when the reviewing authority can “plainly determine from the agreement that the obligation or duty was necessarily or indispensably included within the contemplation of the parties so that they deemed it unnecessary or too obvious to mention, or where the term is needed to give effect to the bargain.”²⁹⁵ Lastly, some decisions authorize “equitable considerations in resolving a dispute on which the contract is silent.”²⁹⁶ This approach would find favor under the broad principle that the courts in deciding arbitration disputes may rely upon equitable and policy considerations.²⁹⁷ Further, this approach comports with the judicial policy to uphold arbitration awards “whenever possible.”²⁹⁸

5. Limits on Grants of Relief

An arbitrator may still act within his authority, and the award will not be vacated under Tenn. Code Ann. section 29-5-313(a)(1)(C), even if a court could not grant the same relief in sim-

293. See 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE § 8:57 (2006) (citing authorities).

294. See *id.* § 8:58.

295. See *id.* § 8:21.

296. *Exec. Life Ins. of N.Y. v. Alexander Ins.*, 999 F.2d 318, 320 (8th Cir. 1993).

297. *Id.*

298. *City of Des Plaines v. Metro. All. of Police*, Chapter No. 240, 30 N.E.3d 598, 603 (Ill. App. Ct. 2015).

ilar circumstances.²⁹⁹ Perhaps the best example of this scenario is that while a court may not ignore the applicable law in granting relief to a party, arbitrators making a fair and honest decision do not operate under the same constraint. “As long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.”³⁰⁰

Courts further advise that the issue is not whether the arbitrator got the contract’s meaning right or wrong. The arbitrator’s construction will be upheld, no matter “good, bad, or ugly.”³⁰¹ Putting it more bluntly, no requirement exists for an arbitrator to follow the law in resolving the dispute³⁰² because courts simply review whether the arbitrator acted within his powers and not whether he did so correctly.³⁰³ The parties contracted for the arbitrator’s opinion, so they must live with the consequences of their agreement, however mistaken the arbitrator’s decision.³⁰⁴ A different approach “opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.’”³⁰⁵ Where so inclined, and nothing else appearing, the

299. TENN. CODE ANN. § 29-5-313(a)(2) (2012), *cited in* D & E Constr. Co. v. Robert J. Denley Co., No. 02A01-9812-CH-00358, 1999 WL 685883, at *3 (Tenn. Ct. App. Sept. 3, 1999); *see also* Compania Chilena de Navegacion Interoceanica v. Norton, Lilly & Co., 652 F. Supp. 1512, 1516 (S.D.N.Y. 1987) (stating that arbitrators have “broad discretion in fashioning remedies” and may grant equitable relief that a court could not).

300. Millsaps v. Robertson-Vaughn Constr. Co., 970 S.W.2d 477, 480 (Tenn. Ct. App. 1997) (quoting Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 449 (Tenn. 1996)).

301. S. Commc’ns Servs., Inc. v. Thomas, 720 F.3d 1352, 1360 (11th Cir. 2013).

302. Berglund v. Arthroscopic & Laser Surgery Ctr. Of San Diego, L.P., 187 P.3d 86, 91 (Cal. 2008).

303. Anthony v. Kaplan, 918 S.W.2d 174, 177 (Ark. 1996).

304. Oxford Health Plans L.L.C. v. Sutter, 133 S. Ct. 2064, 2070–71 (2013); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960).

305. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 588 (2008) (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)) (stating the general goal for arbitration).

arbitrator may even decide the case on “broad principles of fairness and equity.”³⁰⁶

The arbitrator’s choice of remedy in vacatur cases merits more deference than his reading of the underlying contract.³⁰⁷ Thus, if the arbitrator is so inclined, he may order specific performance of the contract.³⁰⁸ The only exception is that a remedy will be off the table if the arbitration agreement or the parties’ submission expressly or implicitly forbids the remedy or if the agreement states that another remedy shall be exclusive.³⁰⁹ When the claimant receives an award, practitioners, in devising their strategy, should be prepared to suggest beneficial avenues of relief that the arbitrator might otherwise overlook.

F. The Arbitrators Refused to Postpone the Hearing Upon Sufficient Cause or Refused to Hear Material Evidence at the Hearing or Otherwise Conducted the Hearing as to Prejudice Substantially the Rights of a Party (TENN. CODE ANN. Section 29-5-313(a)(1)(D))

1. Party Discretion and Rules of Procedure

Before striking their deal, parties to a prospective arbitration rarely bargain about arbitration terms because few rational parties would enter into a contract they think will descend into disagreement and dispute. To minimize the potential for disputes and other difficulties, many parties in arbitrations employ standard forms and procedures, such as the standard agreements and uniform rules of the American Arbitration Association, the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes, and like organizations. These standard forms alleviate to

306. *Payton v. Jackson*, 756 S.E.2d 555, 557 (Ga. Ct. App. 2014) (quoting *Barron Reed Constr. v. 430 L.L.C.*, 622 S.E.2d 83, 85 (Ga. Ct. App. 2005)).

307. *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797, 803 (5th Cir. 2013) (“The remedy lies beyond the arbitrator’s jurisdiction only if there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract.” (quoting *Executive Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994))).

308. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 35:3 (3d ed. 2013).

309. *Sverdrup/ARO, Inc. v. Int’l Assoc. of Machinists*, 532 F. Supp. 143, 146 (E.D. Tenn. 1980).

an extent any unfairness or inconsistency potentially resulting from the arbitrator's administration of the applicable procedures. These formats also save parties from predicting what could be issues difficult to forecast at the time of award.³¹⁰ Although these rules and procedures "do not have the force of law,"³¹¹ once the claimant and respondent adopt these rules (nothing else appearing), the parties are bound by them.³¹²

In arbitration, the parties may agree upon "virtually any procedure they desire" absent illegality or violation of public policy.³¹³ A rebuttable presumption of fairness attaches to those mutually adopted procedures.³¹⁴ Thus, nothing wrong exists with an informal and even relaxed hearing atmosphere.³¹⁵ If they choose, parties can dispense with a hearing.³¹⁶ They even may provide for a specific arbitration process that would exclude a hearing.³¹⁷ Nevertheless, absent such a valid waiver or the failure to provide for a specific arbitration process that lacks a hearing, Tenn. Code Ann. section 29-5-306 is mandatory on the hearing procedure. This lengthy statute provides in pertinent part: "The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."³¹⁸

310. Alan R. Gilbert, Annotation, *Refusal of Arbitrators to Receive Evidence, or to Permit Briefs or Arguments, or Particular Issues as Grounds for Relief from Award*, 75 A.L.R.3d 132 (1977). *But see* 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 8:18 (3d ed. 2013) (discussing battle of the forms under U.C.C. 2-207); 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE §§ 4:34 to 4:36 (2006) (discussing Tennessee law on U.C.C. 2-207).

311. *Merit Ins. v. Leatherby Ins.*, 714 F.2d 673, 680 (7th Cir. 1983).

312. *See Reeves Bros., Inc. v. Capital Mercury Shirt Corp.*, 962 F. Supp. 408, 411 (S.D.N.Y. 1997); *see also* 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION, §§ 5:1 TO 5:21 (3d ed. 2013) (giving an overview of arbitrator ethical considerations).

313. *Searcy v. Herold*, No. M2003-02037-COA-R3-CV, 2005 WL 2387159, at *3 (Tenn. Ct. App. Sept. 28, 2005) (citing *Team Design v. Gottlieb*, 104 S.W.3d 512, 517-18 (Tenn. Ct. App. 2002)).

314. *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 428 (9th Cir. 1996).

315. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 148-49 (4th Cir. 1994).

316. *See* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:94 (4th ed. 2001) (addressing a party's waiver of a hearing).

317. *Id.*

318. TENN. CODE ANN. § 29-5-306(2) (2012).

In essence, the statutory hearing promised by TUA in Tenn. Code Ann. section 29-5-306 will become a contract term implied by law irrespective of its physical omission from the agreement.³¹⁹ By contrast, while a party has no pre-hearing statutory right to discovery of potentially relevant evidence,³²⁰ where the parties' agreement provides for discovery or the arbitrator otherwise allows discovery, an arbitrator's prejudicial discovery rulings can be grounds for vacatur when they were in bad faith or so grossly incorrect as to amount to affirmative misconduct.³²¹

2. Burden of Proof

Where the party alleges that the arbitrator acted improperly in failing to postpone the hearing for what the party deemed to be good cause—which is grounds for complaint under Tenn. Code Ann. section 29-5-313(a)(1)(D)—the burden of proof is high. In addition to showing that the arbitrator's decision “substantially prejudiced” the party's rights, the movant must show that the alleged arbitral misconduct stemmed from bad faith or gross error and caused the denial of “fundamental fairness” of the arbitration itself.³²²

The burden is high in part because courts give arbitrators “a degree of discretion” in deciding whether to grant a requested

319. *See generally* Wasco, Inc. v. R.P. Indus., No. 01-A-01-9407-CH00343, 1994 WL 706663, at *3 (Tenn. Ct. App. Dec. 21, 1994) (“Laws affecting either the construction, enforcement or discharge of a contract which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form part of it as fully as if they had been expressly referred to or incorporated in its terms.”); *see also* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:24 (4th ed. 2001) (“In statutory arbitration, the terms of the statute are by implication a part of the arbitration agreement.”).

320. *Reece v. U.S. Bancorp Piper Jaffray, Inc.*, 80 P.3d 1088, 1092 (Idaho 2003).

321. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (reversing the lower court's granting of a motion to vacate because, even assuming “that the arbitrator erred in refusing to consider the disputed evidence, his error was not in bad faith or so gross as to amount to affirmative misconduct”).

322. *Bisnoff v. King*, 154 F. Supp. 2d 630, 635–37 (S.D.N.Y. 2001); *Transit Cas. Co. v. Trenwick Reinsurance Co.*, 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987).

postponement.³²³ The movant also must show by clear and convincing proof that the arbitrator abused that discretion insofar as his decision precluded the party from making a full presentation of its case³²⁴ by foreclosing “pertinent and material evidence.”³²⁵ The other reason the burden is high is that, with fewer procedural rules, arbitrators can conduct the proceedings quicker and cheaper.³²⁶

3. Arbitrator Discretion in Allowing Evidence

Cases construing a similar ground for vacatur under the FAA or the Uniform Arbitration Act illustrate the narrow scope of the policy of Tenn. Code Ann. section 29-5-313(a)(1)(D) in regard to the receipt of evidence. Because arbitrators are not required to follow “all the niceties” observed in conventional litigation,³²⁷ the rules of evidence are typically relaxed in arbitration hearings.³²⁸ Thus, for example, arbitrators are not bound by the parol evidence rule,³²⁹ and hearsay proof can be proper.³³⁰ Accordingly, the arbi-

323. *Naing Int’l Enters. v. Ellsworth Assocs.*, 961 F. Supp. 1, 3 (D.D.C. 1997).

324. *Roe v. Cargille, Inc.*, 333 F. Supp. 2d 808, 815 (W.D. Ark. 2004).

325. *Naing*, 961 F. Supp. at 3.

326. *Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1315–16 (Alaska 1997) (stating that the review of an arbitrator’s procedural decisions should be extremely deferential and observing that challenges are rarely successful to arbitrator determinations to deny a continuance); *see also* *Sheet Metal Workers Int’l Ass’n Local No. 162 v. Jason Mfg., Inc.*, 900 F.2d 1392, 1398 (9th Cir. 1990) (observing that a party must have good cause for requesting a continuance but that the “arbitrary denial” of a continuance request “may” serve as a ground for vacatur). For the Tennessee decisions on a trial court’s discretion to rule on a motion for continuance, an apt analogy in arbitration cases, *see* *Box v. Gardner*, No. W2012-00631-COA-R3-CV, 2012 WL 6697579, at *3 (Tenn. Ct. App. Dec. 26, 2012).

327. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (quoting *Bell Aerospace Co. Div. of Textron v. Local 516*, 500 F.2d 921, 923 (2d Cir. 1974)).

328. *Bordonaro v. Merrill Lynch, Pierce, Fenner & Smith*, 805 N.E.2d 1138, 1140 (Ohio Ct. App. 2004).

329. *Dominick & Dominick, Inc. v. Inv’r Servs. & Savs. Corp.*, No. 86 Civ. 7265 (MGC), 1991 WL 143716, at *6 (S.D.N.Y. 1991).

330. *Barker v. Gov’t Emps. Ins.*, 339 F. Supp. 1064, 1067 (D.D.C. 1972) (quoting *Petroleum Separating Co. v. Interamerican Ref. Corp.*, 296 F.2d 124, 124 (2d Cir. 1961)).

trator's use of the wrong evidentiary standard or his acceptance of evidence otherwise inadmissible in court will not necessarily justify vacatur.³³¹

This policy for relaxed procedural rules dates back to the common law of arbitration.³³² Courts are lenient in this area because parties typically select arbitrators for their special skill or knowledge of the subject matter, not necessarily for their legal acumen.³³³ Indeed, the parties may select arbitrators for the very reason that they may need little or no evidence to make a particular finding on either the fact of liability or compensation due the claimant:

In general, arbitrators who are selected because of their special fitness or knowledge may, in the absence of other restrictions, rely wholly or partly on their knowledge or on information they may possess. Unlike a court or jury, which is to rely only on the facts presented by witnesses at a trial, arbitrators may draw on their personal knowledge in making an award. Thus, evidence need not necessarily be heard where experts are chosen as arbitrators and the parties rely on the knowledge of those experts in making the award.³³⁴

A related issue is that arbitrators have no requirement to allow parties the leeway to introduce every item of relevant proof; the guidance is that the arbitrators need only have "enough evidence to make an informed decision."³³⁵ Therefore, arbitrators

331. *State Dep't of Ins. v. First Floridian Auto & Home Ins.*, 803 So. 2d 771, 776 (Fla. Dis. Ct. App. 2001). *Cf. Dean Witter Reynolds, Inc. v. Deislinger*, 711 S.W.2d 771, 772 (Ark. 1986) (noting that the mere exclusion of evidence otherwise admissible in court is not grounds for vacatur); *City of Fairbanks Mun. Utils. Sys. v. Lees*, 705 P.2d 457, 461 (Alaska 1985) (stating that the exclusion of evidence is grounds for vacatur when the result is the "complete omission of critical evidence").

332. *See Ryan v. Reed Air Filter Co.*, 11 Tenn. App. 472 (1930).

333. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:79 (4th ed. 2001).

334. *Id.*

335. *A.S. Seateam v. Texaco Pan., Inc.*, No. 97 CIV. 0214(MBM), 1997 WL 256949, at *9 (S.D.N.Y. May 16, 1997).

have “broad discretion” to decide whether additional evidence is necessary or would merely prolong the proceedings.³³⁶ As just indicated, courts will balance the policies of arbitrators’ needing sufficient evidence to make an informed decision versus the policy against compromising the speed and efficiency of arbitration.³³⁷

The upshot is that arbitrators are not bound to hear all of the evidence that the party wishes them to consider; however, the arbitral panel must give each of the parties to the dispute, consistent with a party’s right to a “fair hearing,” an adequate opportunity to present its evidence and arguments.³³⁸ Even when the evidence is pertinent, material, and admissible, a reviewing court considering a requested vacatur based on the arbitrator’s exclusion of such evidence must find that the arbitrator’s exclusion was both prejudicial to the proffering party and inconsistent with fundamental fairness.³³⁹ “Prejudice” in this context means that the moving party must show that, but for the arbitrator’s mistaken ruling on the receipt of evidence, the arbitrator should have made a different

336. 563 *Grand Med. P.C. v. N.Y. State Ins. Dep’t*, 787 N.Y.S.2d 613, 616 (N.Y. 2004); *see also* *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 817 (D.C. Cir. 2007) (stating that an arbitrator has the authority to decide whether proffered evidence is merely cumulative).

337. *See* *Areca, Inc. v. Oppenheimer & Co.*, 960 F. Supp. 52, 54–55 (S.D.N.Y. 1997).

338. *Forsythe Int’l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1023 (5th Cir. 1990); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985); *see also* *Hall v. Cable Lock Found. Repair, Inc.*, 80 So. 3d 1157, 1161 (La. Ct. App. 2011) (stating that an arbitrator has discretion on whether to qualify a witness as an expert).

339. *Emp’rs Ins. of Wausau v. Nat’l Fire Ins.*, 933 F.2d 1481, 1490 (7th Cir. 1991) (“[A] showing of prejudice is a prerequisite to relief based on an arbitration panel’s evidentiary rulings.”); *Sherrock Bros. v. DaimlerChrysler Motor Co.*, 465 F. Supp. 2d 384, 394 (M.D. Pa. 2006) (“[O]nly the most egregious error which adversely affects the rights of [a] party constitutes misconduct in refusing to hear evidence pertinent and material to the controversy.” (quoting *Grosso v. Barney*, No. 03-MC-115, 2003 WL 22657305, at *6 (E.D. Pa. Oct. 24, 2003))); *AT&T Corp. v. Tyco Telecomm. (U.S.) Inc.*, 255 F. Supp. 2d 294, 303 (S.D.N.Y. 2003); *see also* *Shearson Hayden Stone Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981) (“The Arbitration Act does not allow vacation of an award for new evidence.”); *Nationwide Mut. Ins. v. First State Ins.*, 213 F. Supp. 2d 10, 19 (D. Mass. 2002) (stating that there is no requirement for arbitrators to consider newly discovered evidence).

award.³⁴⁰ Accordingly, courts will grant vacatur on this ground only with “the most egregious error” that prejudices the aggrieved party’s right to a fair hearing.³⁴¹ Notably, such error does not include allegations based on newly discovered evidence.³⁴²

Some special rules govern in this area. One rule of evidence peculiar to arbitration cases is that an arbitrator’s award in a prior arbitration case—even between the same parties—is not necessarily precedential and does not preclude either party from raising the same issues subsequently.³⁴³ Another requirement is that, to preserve a ground of error in anticipation of a hearing in court, the aggrieved party, during the proceeding, must have made clear its objection and tendered an offer of proof during the arbitration process.³⁴⁴ Reviewing courts will not consider challenges to an arbitrator’s findings on witness credibility.³⁴⁵

Another predicate for preserving an argument for judicial review is that the record must show that the appellant requested this opportunity to submit additional evidence and the arbitrator denied the movant this right.³⁴⁶ Thus, in a 2000 Tennessee Court of Appeals decision, the appellant argued that it had witnesses ready to testify and that the arbitration panel improperly refused to hear this evidence.³⁴⁷ The problem for the plaintiff was that the record failed to show that the plaintiff requested this opportunity to

340. *Emp’rs Ins. of Wausau*, 933 F.2d at 1490.

341. *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1512 (S.D.N.Y. 1987).

342. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 38:26 (3d ed. 2013).

343. *See Westvaco Corp. v. Local 579, United Paperworkers, Int’l Union*, Civ. A. No. 90-30091-F, 1992 WL 121372, at *7 (D. Mass. Mar. 5, 1992).

344. *See Terk Techs. Corp. v. Dockery*, 86 F. Supp. 2d 706, 709 (E.D. Mich. 2000); *Farm Constr. Serv., Inc. v. Robinson*, 487 N.E.2d 873, 873 (Mass. Ct. App. 1986); Alan R. Gilbert, Annotation, *Refusal of Arbitrators to Receive Evidence, or to Permit Briefs or Arguments, on Particular Issues as Grounds for Relief from Award*, 75 A.L.R.3d 132 (1977).

345. *Fairbanks Mun. Utils. Sys. v. Lees*, 705 P.2d 457, 462 (Alaska 1985) (stating that, absent a showing of corruption, fraud, or undue means in obtaining an arbitration award, an arbitrator’s failure to consider credibility evidence pertaining to a party is insufficient to establish vacatur).

346. *Rebound Care Corp. v. Universal Constructors, Inc.*, No. M1999-00868-COA-R3-CV, 2000 WL 758610, at *8 (Tenn. Ct. App. June 13, 2000).

347. *Id.*

present the witnesses or that the panel ruled to the contrary.³⁴⁸ Accordingly, the court of appeals rejected the appellant's assignment of error.

This ground from Tenn. Code Ann. section 29-5-313(a)(1)(D) is sometimes closely related to the ground that the arbitrator was guilty of misconduct at the proceedings as provided in Tenn. Code Ann. section 29-5-313(a)(1)(B). Thus, in other jurisdictions, courts have upheld vacation of an award where the arbitrator improperly and prejudicially refused to grant an adjournment at the hearing, thereby preventing the party from submitting material evidence on its behalf.³⁴⁹ These cases also would be sound authority in Tennessee.

G. No Arbitration Agreement Existed and the Issue was Not Adversely Determined at the Proceeding and the Party Participating in the Hearing Raised an Objection
(TENN. CODE ANN. SECTION 29-5-313(a)(1)(E))

In *Louisiana Safety Systems, Inc. v. Tengasco*, the Tennessee Court of Appeals explained vacatur as allowed under Tenn. Code Ann. section 29-5-313(a)(1)(E):³⁵⁰

The purpose behind the statute is straightforward. The statute prohibits a party from claiming no arbitration agreement exists without first giving the trial court or the arbitrator an opportunity to decide before arbitration whether an arbitration agreement does in fact exist. . . . Once an unfavorable award was made, [a party] cannot then claim there was no agreement to arbitrate. Litigants are not allowed to submit issues to arbitration without objecting on the basis that no arbitration agreement exists, and then object if an adverse award is handed down. Such a

348. *Id.*

349. See 4 AM. JUR. 2D *Alternative Dispute Resolution* § 218 (2014) (citing *Woodco Mfg. Corp. v. G.R. & R. Mfg., Inc.*, 378 N.Y.S.2d 504 (N.Y. App. Div. 1976)).

350. No. E2000-03021-COA-R3-CV, 2001 WL 1105395 (Tenn. Ct. App. Sept. 21, 2001).

“lie and wait” attitude would eviscerate the arbitration process.³⁵¹

If the arbitration agreement were voidable at the option of the party, such as where an infant lacks capacity and does not ratify the transaction, this circumstance would be an example of “no arbitration agreement” under the statute.³⁵² Regarding the theory of vacatur, a party waives any claimed error made during the course of arbitration by failing to voice a specific objection before the arbitrator.³⁵³

H. Common Law (Non-Statutory) Grounds for Vacatur

Tennessee has a long history of arbitration rules and procedures. These decisions predate the TUAA by many years with cases decided well before the turn of the 20th century. The question becomes whether the common law grounds for vacatur from that era are good law in the 21st century.

The status of common law, as opposed to statutory, arbitration is uncertain in Tennessee. The 1968 Tennessee Supreme Court case of *Meirowsky v. Phipps*³⁵⁴ upheld the common law rule that a party can revoke an agreement to arbitrate future disputes at any time before the arbitrator has rendered a valid award. The Tennessee Supreme Court as late as 1976 fully endorsed *Meirowsky*.³⁵⁵ Notably, the cases yet to be overruled show Tennessee courts have applied common law arbitration since the early nineteenth century (as will be seen below).³⁵⁶ It also follows that if

351. *Id.* at *6; *see also* *Anderson Cty. v. Architectural Techniques Corp.*, No. 03A01-9303-CH-00110, 1993 WL 346473, at *5 (Tenn. Ct. App. Sept. 9, 1993) (“There [was] no proof in this record that the appellants ‘did not participate in the arbitration hearing without raising the objection’ [that there was no arbitration agreement].”).

352. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:136 (4th ed. 2001).

353. *Id.* at § 57:95.

354. 432 S.W.2d 885, 887 (Tenn. 1968) (stating that with existing disputes, a party could be subject to an action for damages for breach of the agreement).

355. *Cavalier Ins. v. Osment*, 538 S.W.2d 399, 403 (Tenn. 1976). For additional discussion of common law arbitration, *see* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 207 (2014).

356. *See infra* notes 379–93 and accompanying text.

common law arbitration survives, then common law grounds for vacatur remain viable.

Prior to TUAAs, the Tennessee Supreme Court in a 1974 decision approved the long-standing notion of common law arbitration with regard to agreements to arbitrate future disputes.³⁵⁷ Accordingly, where the agreement to arbitrate was never entered of record in any court, “[t]he common law is applicable.”³⁵⁸ In the last case to consider the continuing vitality of *Meirowsky*, the Tennessee Supreme Court in 1982 did not address this question.³⁵⁹ Notably, when the Tennessee Supreme Court issued *Meirowsky*, as well as in earlier decisions,³⁶⁰ common law arbitration coexisted with a pre-TUAA statutory program on arbitration for existing disputes.³⁶¹ This line of authority—which has not been overruled—indicates that the Tennessee Supreme Court sees no inherent conflict with a dual track system of common law and statutory arbitral remedies—including vacatur.

Recent pronouncements from Tennessee appellate decisions are that TUAAs’s legislative intent is to “severely limit judicial review of arbitration awards” and to limit the grounds for vacatur to the express grounds in the statutes.³⁶² These observations would tend to indicate that the common law version of arbitration (and common law vacatur) is extinct and supplanted by statute. In

357. *Jackson v. Chambers*, 510 S.W.2d 74 (Tenn. 1974).

358. *Id.* at 76.

359. *Tenn. River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853, 856 (Tenn. 1982). A modern day Tennessee decision appears to leave open the possibility of common law arbitration. *See Cannon Cty. Bd. of Educ. v. Wade*, No. M2006-02001-COA-R3-CV, 2008 WL 3069466, at *5 n.6 (Tenn. Ct. App. July 31, 2008) (“[W]e need not resolve the question of [whether common law] standards . . . apply in lieu of those established in statute or opinions based on statute.”).

360. *See infra* notes 379–93 and accompanying text.

361. TENN. CODE ANN. §§ 29-5-301 to -320 (2012).

362. *Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 858 (Tenn. Ct. App. 2001); *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 450 (Tenn. 1996). In *Tuetken v. Tuetken*, 320 S.W.3d 262, 270 (Tenn. 2010), the Tennessee Supreme Court reaffirmed its holding in *Pugh’s Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252 (Tenn. 2010), stating: “We take this opportunity to reaffirm our holding in *Pugh’s* that the judicial review of an arbitrator’s award is confined to the grounds enumerated in the TUAAs.” *Tuetken*, 320 S.W.3d at 270.

actuality, a number of sister court decisions have considered this precise question on the relation of common law and statutory arbitration. The cases are of two minds on this point.

Some jurisdictions hold that because arbitration statutes are in derogation of the common law and shall be strictly construed, common law (non-statutory) grounds are not available.³⁶³ Some policy reasons for this position are that there would be increased judicial disapproval of awards and that even the prospect of greater judicial disapproval would increase costs, reduce efficiencies, and undermine the finality of arbitration awards.³⁶⁴ The many definitions of common law arbitration would also increase the difficulty of deciding whether such a basis for vacatur has merit.³⁶⁵

As will be explained in greater detail below,³⁶⁶ the better view is that common law arbitration (and common law vacatur) survives in Tennessee as a supplement to statutory arbitration. A more searching review based on the common law could properly serve as a basis for vacating or modifying arbitration awards. As the United States Supreme Court in its 2008 decision of *Hall Street Associates, L.L.C. v. Mattel, Inc.*³⁶⁷ said, “The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.”³⁶⁸ Because the Tennessee Supreme Court in 2010 specifically endorsed the *Hall Street* reasoning and rationale in *Pugh’s Lawn Landscape Co. v. Jaycon Development Corp.*³⁶⁹ as a “guide” for Tennessee arbitration jurisprudence, a good argument exists that if the common law arbitration (and vacatur) theory survives at the federal level, it continues to co-exist as a form of non-statutory vacatur under Tennessee law.

363. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 207 (2014).

364. *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 65 (Colo. App. 2004).

365. *Id.* at 61.

366. See *infra* notes 371–78 and accompanying text.

367. 552 U.S. 576 (2008).

368. *Id.* at 590 (emphasis added).

369. 320 S.W.3d 252, 258 (Tenn. 2010); see also *id.* at 259 (“Parties ‘may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.’” (quoting *Hall St. Assocs.*, 552 U.S. at 590)).

Although no post-TUAA decision squarely addresses the point, this conclusion in favor of dual track statutory and common law arbitration (and vacatur) rests on settled rules of Tennessee statutory construction. As stated by a respected authority, where a state law abolishes common law arbitration, common law arbitration is no longer viable, but where no repeal or modification is evident from the legislation, “that state continues to recognize common law arbitration.”³⁷⁰ This is exactly what happened with TUAA, which is silent on any wholesale abolishment of the common law remedy of arbitration. Indeed, as far back as 1873, in considering whether common law arbitration survived the enactment of a statutory arbitration regime, the Tennessee Supreme Court explicitly answered the question in the affirmative—and the case has never been overruled.³⁷¹

While as indicated above, the issue of common law arbitration is very much open in Tennessee, the most reliable guide to legislative intent is if the relevant statute does not abrogate the common law action, the remedies become cumulative.³⁷² Our courts have stated, “[W]here a common law right exists, and a statutory remedy is subsequently created, the statutory remedy is cumulative unless expressly stated otherwise.” Further, the Legislature is presumed to know the state of the law on the subject under consideration at the time it enacts legislation.³⁷³ Applying these precepts solves the conundrum because TUAA has no express repeal of the common law arbitral remedy.

370. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, *COMMERCIAL ARBITRATION* § 4:8 (2014).

371. *Meirowsky v. Phipps*, 432 S.W.2d 885, 886 (Tenn. 1968); *Halliburton v. Flowers*, 59 Tenn. 25 (1873) (holding that the provisions of the Code as to arbitration have added to, not abrogated, the common law upon the subject). *See generally* 6 C.J.S. *Arbitration* §§ 4, 7 (2014) (noting rule in some jurisdictions that statutory arbitration does not abrogate common law arbitration but that the statutory and common law methods of arbitration are distinct, concurrent, supplementary, and cumulative remedies aiming at the same result); 1 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 6:2 (3d ed. 2013); Sturges & Reckson, *Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN. L. REV. 819 (1962).

372. *Halliburton*, 59 Tenn. at 25.

373. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 899 (Tenn. 1992). The legislature frequently provides that a given statutory remedy is exclusive, but it did not make this statement for TUAA. *See id.* at 899 n.1.

For the same reasons, where statutory and common law arbitration co-exist, a party may be entitled to invoke common law arbitration (and vacatur) where statutory arbitration is unavailable.³⁷⁴ Importantly, where the agreement to arbitrate does not clearly address whether the arbitration statute or the common law doctrine applies, “[t]hen common law rules control the review of an award.”³⁷⁵ Adding further weight to these arguments, several respected commentaries classify Tennessee as recognizing common law arbitration.³⁷⁶

Perhaps the most compelling argument why common law arbitration (and vacatur) survive in Tennessee comes from the history of the Uniform Arbitration Act, which was first promulgated in 1955 and which the General Assembly adopted in TUA (Tennessee has not enacted the Revised Uniform Arbitration Act of 2000). As one authority observes,

The Uniform Arbitration Act (UAA) 1955 did not explicitly either preserve or exclude common-law arbitration; it was simply silent on the subject. Significantly, however, the Committee of the Whole on the Uniform Arbitration Act stated that the Uniform Act was not intended to abrogate common-law arbitration. *Thus, the general rule remains that existing*

374. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 4:8 (2014). For one state’s experience recognizing the dual track system, see *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977) (“[C]ommon law arbitration continues to be a viable alternative to the statutory method.”); *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 134 n.5 (Tex. Ct. App. 2003) (discussing that common law arbitration was never abolished, however, although arbitration agreements are presumed to arise under the statute unless the parties provide otherwise); *Monday v. Cox*, 881 S.W.2d 381, 385 n.1 (Tex. Ct. App. 1994); *see also* *Wold Architects & Eng’rs v. Strat*, 713 N.W.2d 750 (Mich. 2006).

375. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 4:8 (2014).; *see* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:7 (4th ed. 2001).

376. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 4:8 (2014) (citing *Jackson v. Chambers*, 510 S.W.2d 74 (Tenn. 1974)); *see also* 3 TENN. JUR. *Arbitration and Award* § 2 (“However the statutes have added to and not abrogated the common law on this subject.”).

*common-law remedies are not abrogated unless such an intention is clearly expressed.*³⁷⁷

As mentioned above, the Tennessee General Assembly has never repealed common law arbitration, which means a strong argument exists that the usual principle of preserving both the common law and statutory procedures remain alive and well in Tennessee. Practitioners should strongly consider the strategy of arguing in the alternative that common law vacatur is a basis for overturning an arbitral award—even when they participate in TUAAs proceedings.

What, then, are the contours of common law arbitration and its vacatur component in Tennessee? The principles from common law arbitration closely resemble many TUAAs concepts. This correspondence explains why contemporary courts in TUAAs decisions continue to cite cases relying on common law arbitration rules.³⁷⁸ Perhaps the most fundamental refrain that has current day resonance is this quote from an 1874 Tennessee Supreme Court decision: “[A]rbitrators have no authority to go in their inquiries beyond the powers delegated by the terms of the submission.”³⁷⁹ In other examples of common law arbitration doctrines that could also support or oppose vacatur (some of which are either very similar or dissimilar to TUAAs grounds), earlier Tennessee court decisions stated:

377. THOMAS H. OEHMKE & JOAN M. BROVINS, *Arbitration Award Vacatur & Confirmation at Common Law—A 21st Century Option*, 112 AM. JUR. TRIALS 365 (2009) (emphasis added) (examining common law arbitration in comparison to statutory arbitration, including grounds for overturning an arbitral award).

378. See, e.g., *Team Design v. Gottlieb*, 104 S.W.3d 512, 518 n.7 (Tenn. Ct. App. 2002) (citing *Jocelyn v. Donnel*, 7 Tenn. (Peck) 274, 275 (1823)).

379. *Mays v. Myatt*, 62 Tenn. 309 (1874); see also *Smith v. Kincaid*, 26 Tenn. 28, 28–29 (1846) (stating that where parties to a suit submit the matter in controversy to arbitration, the arbitrators can make no award on matters not involved in the suit, except by express agreement of the parties). But see TENN. CODE ANN. § 29-5-313(a)(1)(C) (2012) (allowing vacatur when the arbitrator “exceeded [his] powers”).

- (1) A party waives an objection to a disqualified arbitrator by appearing before the board and taking part in the arbitration without objection;³⁸⁰
- (2) An arbitration award is not required to itemize the findings, unless the parties agree otherwise in their submission;³⁸¹
- (3) If the arbitrators depart from the parties' agreement in a material way or fail to act as a body, an arbitration award can be void;³⁸²
- (4) If the parties' arbitration agreement states that the arbitrators are required to comply with the applicable law, a reviewing court is authorized to determine whether the arbitrators have drawn the proper legal conclusions;³⁸³

380. *Graham v. Bates*, 45 S.W. 465, 466 (Tenn. Ch. App. 1898); *see also* *Dougherty v. McWhorter*, 15 Tenn. 239 (1934) (participating party did not object in a proceeding where the arbitrator was a relative of the opposing party).

381. *Graham*, 45 S.W. at 466.

382. *Palmer v. Van Wyck*, 21 S.W. 761, 761–64 (Tenn. 1893); *Reynolds v. Reynolds*, 15 Ala. 398, 403 (1849) (following common law rule). *But see* *Memphis & Charleston R.R. Co. v. Pillow*, 56 Tenn. 248, 249–54 (1872) (stating that all arbitrators must concur in an award to make it binding, unless the parties' agreement says otherwise); *Smith v. Kincaid*, 26 Tenn. 28, 28–29 (1846) (noting that arbitrators cannot make an award on matters not involved in a lawsuit except where based on the parties' express agreement); *Toomey v. Nichols*, 53 Tenn. 159, 162 (1871) (stating that an award is a nullity unless it strictly conforms to the submission, and the judgment is a nullity unless it conforms to the award).

383. *Galbraith v. Lunsford*, 9 S.W. 365, 366 (Tenn. 1888); *Powell v. Riley*, 83 Tenn. 153, 156 (1885); *see also* *Nance's Lessee v. Thompson*, 33 Tenn. 321, 325 (1953) (noting that an award may be set aside where the arbitrators attempt to decide a mixed question of law and fact, and the award shows on its face that they have mistaken the law); *State v. Ward*, 56 Tenn. (9 Heisk.) 100, 116 (1871) (stating that if the parties' agreement states that arbitrators will follow the law, then if the arbitrators clearly mistake the law, the award may be set aside); *Fain v. Headrick*, 44 Tenn. (4 Cold.) 327 (1867) (supporting a similar statement); *Conger v. James*, 32 Tenn. (2 Swan) 213, 216 (1852) (supporting a similar statement). *But see* *Jocelyn v. Donnel*, 7 Tenn. (Peck) 274, 274–75 (1823) (stating that arbitrators are to decide the case based on their own notions of equity and conscience and are not restricted to legal precedents or positive rules of law); *id.* (holding that a court may set aside an award where evidence exists of the receipt of “illegal evidence”).

- (5) A reviewing court may overturn an award based on a charge of arbitrator partiality;³⁸⁴
- (6) The proof must be clear and conclusive that an arbitrator has issued an award tainted by arbitrator corruption and misconduct;³⁸⁵
- (7) Arbitrators have greater discretion than law courts in deciding disputes;³⁸⁶ and
- (8) Parties cannot agree to judicial review that contradicts the rules of arbitration.³⁸⁷

Common law arbitration could favor either party to the case. An award that a court might deem voidable under TUAAs because it fails to comply with its provisions could be valid (and enforceable) under the common law.³⁸⁸ A respected commentator observes:

[W]here an arbitration agreement falls within the scope of the arbitration statute of a state, and is enforceable under the statute, it is not necessary to decide whether the agreement is enforceable under common law, but an award that may be voidable under the statute because it fails to comply with its provisions may be valid under the common law.³⁸⁹

The common-law grounds for vacating an arbitration award are fraud, misconduct, or gross mistake. The meaning of fraud and misconduct are evident enough whereas a gross mistake is a mis-

384. *Butler v. Boyles*, 29 Tenn. (10 Hum.) 155, 155 (1849) (recognizing ground but rejecting plaintiff's allegation on the facts).

385. *Hardeman v. Burge*, 18 Tenn. (10 Yer.) 202, 205 (1836). *But see* *Dougherty v. McWhorter*, 15 Tenn. (7 Yer.) 239 (1834) (finding that evidence of corruption was insufficient).

386. *Ezell v. Shannon*, 3 Tenn. Cas. 609, 611 (1875).

387. *Bone v. Rice*, 38 Tenn. (1 Head.) 149, 151–52 (1858).

388. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:24 (4th ed. 2001). For additional discussion of the common law principles of arbitration, with some slight variations between the jurisdictions, see Thomas H. Oehmke & Joan M. Brovins, *Arbitration Award Vacatur & Confirmation at Common Law—A 21st Century Option*, 112 AM. JUR. *Trials* 365 (2009).

389. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:24 (4th ed. 2001).

take that implies bad faith or a failure to exercise honest judgment and results in a decision that is arbitrary and capricious. No matter how erroneous, when the arbitrator's judgment is based on honest consideration of conflicting claims, this decision will not be arbitrary and capricious.³⁹⁰ The sharpest conflict between common law and statutory arbitration is the principle that in common law arbitration, if the agreement says the arbitrator will adhere to the law and he does not, the decision will necessarily be improper, but the rule is the opposite in statutory arbitration.³⁹¹

Many court decisions construing the FAA have followed what a number of modern-day courts consider to be two common law (judge-originated) grounds for reviewing an arbitration award: (1) the award occurred in "manifest disregard of the law" or (2) the award violated the public policy of the local state jurisdiction.³⁹² These two lines of authority merit extended discussion in the sections below.

I. "Manifest Disregard of the Law"

In numerous decisions, federal and state courts have addressed whether a party may allege grounds for vacatur above and beyond the explicit statutory reasons. The chief area of disagreement is whether a claimant may file a valid vacatur complaint because the arbitrator's decision was in "manifest disregard of the law."

One source of confusion is that several variations exist for this theory of overturning an arbitral award. Nevertheless, a working definition of "manifest disregard of the law" is that

A successful challenge . . . depends upon the challenger's ability to show that the award 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

390. *Werline v. E. Tex. Salt Water Disposal Co.*, 209 S.W.3d 888, 897–98 (Tex. App. 2006).

391. *See Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 450 (Tenn. 1996).

392. *See Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 857–58 (Tenn. Ct. App. 2001).

(3) mistakenly based on a crucial assumption that is concededly a non-fact.”³⁹³

Another well-known principle within the “manifest disregard of the law” doctrine in vacatur cases is that “manifest disregard” is not “mere error in the law or failure on the part of the arbitrators to understand or apply the law” but “may be found if the arbitrator understood and correctly stated the law but proceeded to ignore it.”³⁹⁴

In 2008, before the United States Supreme Court decided *Hall Street Associates, L.L.C. v. Mattel, Inc.*,³⁹⁵ the federal circuits were split on whether the FAA grounds for judicial review are exclusive or whether the common law “manifest disregard of the law” theory is viable (addressed below).³⁹⁶ Much controversy continues to surround the availability of this common law rule—there are even indications the rule is statutory and not common law.³⁹⁷

The United States Supreme Court in *Hall Street* decided the FAA provides the exclusive criteria for review of arbitration awards and disallows parties from expanding or heightening the scope of review by agreement to permit, among other matters, the manifest disregard theory.³⁹⁸ At the same time, the Court left the door ajar for such expanded agreements outside the FAA when it said that federal law does not preclude states from using “more searching review based on authority outside the [federal] statute,”

393. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8–9 (1st Cir. 1990) (quoting *Local 1445, United Food and Commercial Workers v. Stop & Shop Cos.*, 776 F.2d 19, 21 (1st Cir. 1985)). The same *Advest* decision states a different standard for the same concept: “[T]here must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.” *Id.* at 9 (quoting *O.R. Secs., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988)).

394. *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (citations omitted).

395. 552 U.S. 576 (2008).

396. See *infra* notes 530–38 and accompanying text.

397. In at least one circuit, the court defined the quoted phrase “so narrowly that it fits comfortably under the first clause of the fourth statutory ground—‘where the arbitrators exceeded their powers’ . . . [because] we have confined it to cases in which arbitrators ‘direct the parties to violate the law.’” *Wise v. Wachovia Sec., L.L.C.*, 450 F.3d 265, 268–69 (7th Cir. 2006) (citing decisions).

398. *Hall St. Assocs.*, 552 U.S. at 583–87.

including “state statutory or *common law*.”³⁹⁹ The California Supreme Court has used this qualification to hold that under state law, a court may review the merits of an arbitration award where the contracting parties expressly agree that the arbitrators have no authority to commit errors of law and a reviewing court may vacate the award or correct it on appeal for legal error.⁴⁰⁰

In a comprehensive opinion, the Mississippi Supreme Court, in *Robinson v. Henne*,⁴⁰¹ has construed the viability of the manifest disregard of the law exception after *Hall Street*. The *Robinson* court summarized the United States Supreme Court’s holding as making clear that if the manifest disregard doctrine is still viable, it is not a common law authority, but must come within the terms of the FAA.⁴⁰² Because the Supreme Court in *Hall Street* stated that “maybe the term ‘manifest disregard’ . . . merely referred to the statutory grounds collectively, rather than adding to them,”⁴⁰³ the *Robinson* decision observed that this lack of clarity in *Hall Street* has resulted in the federal circuits having reached differing conclusions on whether such grounds are allowed in vacatur cases.⁴⁰⁴ The *Robinson* court further noted that state courts also have gone both ways on the issue.⁴⁰⁵

The next source of confusion is that the United States Supreme Court, in its decisions post-*Hall Street*, has said it has yet to decide whether the manifest disregard doctrine is viable. In the most recent pronouncement, *Stolt-Nielsen S.A. v. AnimalFeds International Corp.*, the United States Supreme Court observed, “We do not decide whether ‘manifest disregard’ survives our decision in [*Hall Street*] as an independent grounds for review or as a judicial

399. *Id.* at 590 (emphasis added).

400. *See Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 604 (Cal. 2008).

401. 115 So. 3d 797 (Miss. 2013).

402. *Id.* at 801 (citing cases).

403. *Hall St. Assocs.*, 552 U.S. at 585.

404. *Robinson*, 115 So. 3d at 801 (analyzing decisions).

405. *Id.* at 800–02 (“State courts have split on the question with some jurisdictions applying the reasoning to their own state arbitration statutes. Texas, Alabama, and New York no longer recognize the doctrine, but California, Wisconsin, and Georgia still believe it to be valid.”) (analyzing *Hall St. Assocs.*, 552 U.S. at 584).

gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10.⁴⁰⁶

Tennessee courts have addressed the viability of this defense. In its *Arnold* decision, the Tennessee Supreme Court strongly indicated that a party under TUAA may *not* rely upon the arbitrator's "manifest disregard of the law" as grounds for relief.⁴⁰⁷ In the words of a subsequent Tennessee Court of Appeals decision considering this issue under the FAA, "We find that *Arnold* evidences an intent to severely limit judicial review of arbitration awards in Tennessee. As a result, we decline to adopt the non-statutory grounds of 'manifest disregard' and public policy for reviewing arbitration awards."⁴⁰⁸ Because other Tennessee cases construing TUAA necessarily indicate that only the statutory grounds for vacatur are available in Tennessee, it would appear that the "manifest disregard" principle is unacceptable as a statutory basis for relief.⁴⁰⁹

While expressing some uncertainty, the most recent Sixth Circuit case law indicates that manifest disregard in FAA cases is still a valid common law vacatur standard.⁴¹⁰ This differing state and federal treatment creates a dilemma. Tennessee federal and state courts construing the FAA and state courts applying the TUAA must follow opposite positions on this heavily litigated issue, which only creates challenges for Tennessee counsel and their clients depending on the happenstance of whether the case falls within the FAA or TUAA.⁴¹¹

406. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010).

407. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 449 (Tenn. 1996).

408. *Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 859 (Tenn. Ct. App. 2001).

409. *See Chattanooga Area Reg'l Transp. Auth. v. Local 1212 Amalgamated Transit Union*, 206 S.W.3d 448, 451 (Tenn. Ct. App. 2006) ("An arbitration award cannot be vacated because the arbitrator made a mistake of fact or law, and it also cannot be vacated because it is irrational." (citing *Arnold*, 914 S.W.2d at 450)).

410. *See Shafer v. Multiband Corp.*, 551 F. App'x 814, 819 n.1 (6th Cir. 2014); *see also Meyers Assocs., v. Goodman*, No. 3:14-cv-1174, 2014 WL 5488761, at *5 n.11 (M.D. Tenn. Oct. 29, 2014) (providing a comprehensive discussion of manifest disregard doctrine).

411. Note that if the state court is applying FAA and not TUAA, then the Sixth Circuit view would likely govern. *But see supra* notes 10–11 and accom-

J. Violation of Public Policy

In a theory with “obvious parallels” to the “manifest disregard” doctrine,⁴¹² the United States Supreme Court accepted the “public policy” ground for reviewing arbitration awards in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*.⁴¹³ The usual rationale for vacating an award on this theory stems from a court’s common law power to refuse enforcement of an arbitration contract—just as with any other contract—that violates public policy or law.⁴¹⁴ This inquiry is separate from whether the award decision was incorrect.⁴¹⁵

The party alleging this ground must show (1) a well-defined and dominant public policy and (2) a sufficient link—also called a “nexus”—between enforcement of the award and violation of the particular policy to support the court’s refusal to confirm the award.⁴¹⁶ Public policy grounds would exclude vague concerns that enforcement of arbitration awards would create “intolerable incentives to disobey court orders.”⁴¹⁷

A leading treatise makes an important point regarding the nature of the public policy that can qualify as grounds for overturning an award:

panying text (stating that Tennessee state courts must apply the FAA in cases under the FAA for a contract arising from interstate commerce).

412. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 783 (1996).

413. 461 U.S. 757, 766 (1983); *see also* *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

414. *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, Cork, Linoleum, and Plastic Workers*, 461 U.S. 757, 766 (1983). The Uniform Arbitration Act does not recognize the public policy theory as grounds for vacatur. *Ariz. Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995). Most jurisdictions view this exception as a judicially-created or common law basis for vacatur. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 38:24 (3d ed. 2013).

415. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 216 (2014).

416. *Dean Foods Co. v. United Steelworkers*, 911 F. Supp. 1116, 1125 (N.D. Ind. 1995); *c.f.* *U.S. Postal Serv. v. Nat’l Ass’n of Letter Carriers*, 330 F.3d 747, 751 (6th Cir. 2003) (“Public policy must be determined from laws and legal precedents, not general considerations of public interest.”).

417. *Emp’rs Ins. of Wausau v. Nat’l Union Fire Ins. of Pittsburg*, 933 F.2d 1481, 1488 n.5 (9th Cir. 1991).

In attacking the award on the basis of its violation of public policy, distinctions should be made between violations of arbitration policy and violations of policy regarding the substance of the controversy. Public policy on the arbitration process is generally set forth in its entirety in the arbitration statute; normally courts need go no further. On the other hand, in determining whether an arbitrator's award contravenes public policy on a substantive issue, the court looks to constitutional, judicial and statutory authority.⁴¹⁸

The U.S. Supreme Court has narrowly construed the public policy ground for challenging arbitral contract awards, observing that "general considerations of supposed public interests" are insufficient.⁴¹⁹

Several federal circuit and state courts also have recognized public policy as a common law ground for vacatur,⁴²⁰ but other states, such as Tennessee, oppose this view.⁴²¹ The opposing theory would be that this ground undermines the finality of arbitration decisions and opens the doors to routine sustained appeals.⁴²² This point becomes clearer when one considers that many—if not most—losing parties could argue that all statutory errors committed by the arbitrator offend public policy.

In line with the opposing view, the Tennessee Court of Appeals in the *Arbington* decision relied on the Tennessee Supreme Court's 1996 decision in *Arnold* rejecting the public policy ground. According to these Tennessee decisions, the strong doctrine favor-

418. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 38:24 (3d ed. 2013).

419. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co.*, 461 U.S. at 765; 4 AM. JUR. 2D *Alternative Dispute Resolution* § 215 (2014)).

420. *Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 857–58 (Tenn. Ct. App. 2001) (citing decisions).

421. See *Warbington*, 66 S.W.3d at 857–58; 4 AM. JUR. 2D *Alternative Dispute Resolution* § 214 (2014).

422. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 451 (Tenn. 1996) (citing *Carolina Va. Fashion Exhibitors, Inc. v. Gunter*, 255 S.E.2d 414, 420 (N.C. Ct. App. 1979)).

ing arbitration requires the rejection of the public policy rationale for vacating an arbitration award.⁴²³ The likely driving concern is that courts wish to avoid *sub silentio* review of the arbitrator's view of the case on the merits.⁴²⁴

Other Tennessee cases, however, support the interpretation that an arbitrator's violation of public policy is a ground for complaint, either as an independent common law ground or as a subset of the ground in Tenn. Code Ann. section 29-5-313 forbidding arbitrators from exceeding their powers. Thus, in *Lawrence County Education Ass'n v. Lawrence County Board of Education*,⁴²⁵ the same Tennessee Supreme Court in 2007 that in 1996 had earlier authored *Arnold* broadly stated that "public policy considerations" forbid arbitrators from acting "in contravention of statutes."⁴²⁶ The *Lawrence* court also said in unqualified language that an arbitrator's decision "may be vacated where the arbitrator exceeds [his] powers."⁴²⁷ These statements also advance settled law that courts should refuse to enforce a contract that violates public policy.⁴²⁸ To date, this conflict remains unresolved in the Tennessee decisions.

423. *Warbington*, 66 S.W.3d at 858–59 (citing *Arnold*, 914 S.W.2d at 452).

424. See *C&D Techs., Inc. v. Int'l Ass'n of Heat and Frost Insulators & Asbestos Workers*, 303 F. Supp. 2d 468, 470–71 (S.D.N.Y. 2004); *BBF, Inc. v. Alstom Power, Inc.*, 645 S.E.2d 467, 469–70 (Va. 2007) (stating that courts may not consider whether the arbitrator's decision was "legally correct" but only whether the arbitrator "had the power" to decide the case).

425. 244 S.W.3d 302 (Tenn. 2007).

426. *Id.* at 318 (applying rule to collective bargaining arbitration).

427. *Id.* at 318–19 (quoting TENN. CODE ANN. § 29-5-313(a)(3) (2012)).

428. *Whitley v. White*, 140 S.W.2d 157, 161 (Tenn. 1940) ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." (citation omitted)). Modern day cases construing the FAA have used the same reasoning in uphold vacatur based on a public policy violation. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (citing the "basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act").

VI. CRITIQUE OF VACATUR UNDER TENNESSEE
ARBITRATION LAW

A. *The Superiority of Arbitration Over Litigation:
Fact or Fiction?*

The Tennessee Supreme Court has endorsed the unqualified proposition that arbitration is a superior method of dispute resolution over litigation. In turn, this perceived aspect of arbitration drives the numerous pro-arbitration case law legal doctrines underlying TUAA, including the deliberately high bar for plaintiffs to overcome in seeking vacatur. Thus, in *Arnold v. Morgan, Keegan & Co.*,⁴²⁹ the leading case on vacatur in arbitration, the court said that TUAA was designed to promote settlement in bypassing the courts.⁴³⁰ The court also accepted without question the superiority of arbitration over litigation:

[A]rbitration is attractive because it is a more expeditious and final alternative to litigation.

The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation. Immediate settlement of controversies by arbitration removes the necessity of waiting out a crowded court docket⁴³¹

The problem with the *Arnold* analysis is that our courts have built an extensive body of law without any empirical support for the critical finding that arbitration is superior to litigation in terms of formalities, delay, expense, and vexation to the parties.

A number of commentators have challenged the notion that arbitration is necessarily a more cost effective and efficient means of case disposition superior to conventional litigation. After making a careful empirical analysis, Professor Thomas J. Stipanowich has observed, “[T]he arbitration experience has become increasing-

429. 914 S.W.2d 445.

430. *Id.* at 448–49.

431. *Id.* at 445 (quoting *Boyd v. Davis*, 897 P.2d 1239, 1242 (Wash. 1995)).

ly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including prehearing discovery and motion practice,” and observes that “arbitration generally is as expensive [as litigation] . . . less predictable, and not appealable.”⁴³² Professor Christopher Drahozal similarly observes that the upfront costs of arbitration will in many cases be higher than, and at best the same as, the upfront costs in litigation.⁴³³ Regarding the supposed superiority of arbitration over litigation, Professor W. Mark C. Weidemaier concludes that the evidence regarding outcomes in arbitration versus litigation “is mixed.”⁴³⁴ Next, as stated in *Williston on Contracts*,

It should be noted, however, that arbitration is not invariably “a simple, expeditious or inexpensive method of adjudicating commercial controversies.” Arbitration fees may be prohibitively high and substantially deter a worker from enforcing his or her statutory employment rights; therefore, an employer may be required to bear these costs as the *quid pro quo* for an agreement to arbitrate employment disputes. Thus, it is necessary to compare the direct costs of arbitration—which may be high, since the parties may be required to pay filing and administrative fees, the arbitrators’ compensation and travel expenses, and expenses for the rental of facilities—to the indirect costs of litigation, including billable hours of attorney time incurred in discovery, pretrial hearings, motions related to the evidence, and the trial itself.⁴³⁵

432. Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 9 (citing Thomas J. Stipanowich, *ADR and the “Vanishing Trial”*: *The Growth and Impact of “Alternative Dispute Resolution”*, 1 J. EMPIRICAL LEGAL STUD. 843, 895 (2004)).

433. Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U MICH. J.L. REFORM 813, 815 (2008).

434. W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1108–09 n.69 (2012).

435. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:11 (4th ed. 2001) (citations omitted); 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL*

Some judges are also starting to doubt the supposed truism of arbitral superiority over litigation. A South Carolina federal district judge has written,

In this court's view, the longstanding federal policy favoring arbitration perhaps should be revisited. The policy arose during a time when a reasonable percentage of federal cases went to trial and a burgeoning federal case load made arbitration an attractive, less expensive, and quicker form of dispute resolution. *Today, it appears that the arbitration dockets may be more congested than the dockets of most federal district courts.* On several occasions in recent years, when this court has granted a motion to compel arbitration, retaining the case on its docket so that the award can be formalized in a judgment, the arbitration process has required two to three years to run its course. This court would have been able to provide a much quicker forum for the resolution of those disputes.⁴³⁶

These preliminary observations warrant deeper study, but they should at least raise serious questions about the supposed superiority of arbitration over litigation in terms of efficiency and the advantages to the parties. Tennessee courts seem to give short shrift to the absence of well-conducted empirical studies in Tennessee (and elsewhere) in this regard.

Where a legal policy giving great weight to arbitration as a superior conflict resolution device lacks verifiable support, the legal doctrine becomes suspect. As courts have stated in other contexts, "A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both

ARBITRATION § 48:2 (3d ed. 2013). For other commentary strongly questioning the received wisdom that arbitration is superior to litigation in dispute resolution, see Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007).

436. *Cox v. Time Warner Cable, Inc.*, C/A No. 4:12-cv-03407-JFA, 2013 WL 5469992, at *1 n.1 (D.S.C. Sept. 30, 2013) (emphasis added) (citations omitted).

inherently unstable and an easy mark for critics.”⁴³⁷ Accordingly, the time has come for Tennessee courts to reexamine the many pro-arbitration case law policies that support (and are supposedly derived from) TUAAs, including the difficult standard for vacatur. If a principle no longer has (and maybe never had) empirical backing, then the highly pro-arbitration TUAAs making casual empirical assumptions about the pluses of these non-judicial proceedings need in-depth reconsideration.

B. TUAAs’ Judicial Gloss

Besides lacking empirical support in key respects, the Tennessee vacatur decisions have gone well beyond the literal terms of the statutory scheme and have added a substantial gloss to TUAAs. Nothing in TUAAs states that courts in vacatur cases must employ an extremely narrow and deferential standard of review—the words “severely” limited are a common judicial fixture⁴³⁸—or that awards will stand except in “very unusual circumstances.”⁴³⁹ Nothing in TUAAs states that courts in vacatur cases cannot consider the merits of the arbitral award or assess whether the arbitrator has committed a significant error of law or fact. Lastly, nothing in TUAAs specifically supports the case law doctrine establishing a “heavy presumption of arbitrability”⁴⁴⁰ or that a court must enforce an order to arbitrate “unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.”⁴⁴¹ Nonetheless, Tennessee courts routinely advance these principles merely by citing other cases that

437. *State v. Novembrino*, 519 A.2d 820, 848 (N.J. 1987).

438. *E.g.*, *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 (Tenn. 1996); *Millsaps v. Robertson-Vaughn Const. Co.*, 970 S.W.2d 477, 480 (Tenn. Ct. App. 1997).

439. *E.g.*, *Arnold*, 914 S.W.2d at 448 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)); *Davis v. Reliance Elec.*, 104 S.W.3d 57, 61 (Tenn. Ct. App. 2002).

440. *E.g.*, *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 357 (Tenn. Ct. App. 2001); *Dale Supply Co. v. York Int’l Corp.*, No. M2002-01408-COA-R3-CV, 2003 WL 22309461, at *4 (Tenn. Ct. App. Apr. 9, 2003).

441. *E.g.*, *Taylor v. Butler*, 142 S.W.3d 277, 281 (Tenn. 2004) (quoting *United Steelworks v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)); *Metro Const. Co. v. Cogun Indus., Inc.*, No. 02A01-9608-CH-00207, 1997 WL 538914, at *3 (Tenn. Ct. App. Sept. 4, 1997).

make these statements. Significantly, no cases were found where a court identified the *statutory* source for these precepts.

The counterargument might be that “[a]rbitration’s desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial de novo.”⁴⁴² This argument proves too much; this article advocates that the courts in TUAAs obey the legislative intent and apply the rule in Tenn. Code Ann. section 29-5-319(b) that appeals in TUAAs “shall be taken in the same manner and to the same extent as from orders or judgments in a civil action.” The quoted language comes from TUAAs, which says specifically that all arbitration appeals from Tennessee trial courts to the appellate courts are governed by such a standard.⁴⁴³ Thus, any common law doctrine mentioned above without a statutory anchor lacks the traditional forms of legal support and persuasiveness. Nothing else appearing, the courts are relying on pure policy preferences for doctrines having the effect of narrowing—and practically eliminating—a party’s ability to overturn an arbitral award.

Stripped of the courts’ circular reliance on their own opinions, our courts as adjudicators have encroached upon the legislature’s function. Courts are not properly arbitration policy makers, but serve only to resolve disputes about the application of statutory rules of arbitration to live cases and controversies. The question must then be asked, what legal basis do courts have to support the conclusion that “courts have long noted that judicial review of an arbitration decision is ‘one of the narrowest standards of judicial review in all of American jurisprudence[?]’”⁴⁴⁴ My answer is that mere policy cannot drive statutory interpretation. Because of the separation of powers provision in the state constitution, Tennessee appellate courts must remain adjudicators and not venture forth as policy makers.⁴⁴⁵

442. *Davis*, 104 S.W.3d at 61 (quoting *Arnold*, 914 S.W.2d at 449).

443. See TENN. CODE ANN. § 29-5-319(b) (2012) (“The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.”).

444. *Bronstein v. Morgan Keegan & Co.*, No. W2011-01391-COA-R3-CV, 2014 WL 1314843, at *2 (Tenn. Ct. App. Apr. 1, 2014) (quoting *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 305 (6th Cir. 2008)).

445. See *Nashville Ry. & Light Co. v. Lawson*, 229 S.W. 741, 744 (Tenn. 1921) (“This court can know nothing of public policy except from the Constitu-

The Tennessee Supreme Court bypassed an excellent opportunity to address this critical issue of the scope of review in *Arnold v. Morgan Keegan and Co.*,⁴⁴⁶ but the court ingrained the confusion more deeply. In this frequently cited case, the Tennessee Supreme Court said, “The limiting language of the statutes governing vacation and modification of arbitration awards evidences an intent to limit *severely* the trial court’s authority to retry the issues decided by arbitration.”⁴⁴⁷ Importantly, the *Arnold* court cited no statutes or in-state common law doctrine for these propositions of “severe” statutory construction but merely drew a policy conclusion.⁴⁴⁸

Oddly enough, the *Arnold* court most strongly relied on a New Mexico Supreme Court decision applying New Mexico, and not Tennessee, law for this outcome.⁴⁴⁹ Thus, Tennessee courts also have yet to explain why the arbitrators have not “exceeded their powers” as forbidden by Tenn. Code Ann. section 29-5-313(a)(1)(C) where arbitrators merely “arguably” construe or ap-

tion and the laws, and the course of administration and decision.” (quoting *United States v. Vassar*, 72 U.S. 462, 469 (1866)); *City of Memphis v. Hargett*, No. M2012-02141-COA-R3-CV, 2012 WL 5265006, at *5 (Tenn. Ct. App. Oct. 25, 2012) (citing TENN. CONST. art. II, §§ 1–2); *see also* *Hodge v. Craig*, 382 S.W.3d 325, 337 (Tenn. 2012) (“The determination of this state’s public policy is primarily the prerogative of the General Assembly.” (citations omitted)); *Cavender v. Hewitt*, 239 S.W. 767, 768 (Tenn. 1921) (“All questions of policy are for the determination of the Legislature, and not for the courts Where courts intrude into their decrees their opinion on questions of public policy, they in effect constitute the judicial tribunals as lawmaking bodies in usurpation of the powers of the Legislature.” (citation omitted)); *cf.* *Taylor v. Beard*, 104 S.W.3d 507, 511 (Tenn. 2003) (“[T]he judiciary may determine ‘public policy in the absence of any constitutional or statutory declaration’” (quoting *Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998))).

446. 914 S.W.2d 445, 445 (Tenn. 1996).

447. *Id.* at 448.

448. *Adams TV of Memphis, Inc. v. Int’l Bhd. of Elec. Workers, Local 474*, 932 S.W.2d 932, 934 (Tenn. Ct. App. 1996) (construing *Arnold* forthrightly). *Adams TV* commented that the Tennessee Supreme Court based its principle of limited judicial review in arbitration cases “upon the *policy* of providing finality of arbitration awards.” *Id.* (emphasis added). Thus, the *Adams* court implicitly acknowledged the reality that *Arnold* is a non-statutory policy based decision versus a rule-based decision. *Id.*

449. *Arnold*, 914 S.W.2d at 449 (citing *Hooten Constr. Co. v. Borsberry Constr. Co.*, 769 P.2d 726, 727 (N.M. 1989)).

ply the contract, but still commit “serious error” in contract interpretation.⁴⁵⁰ When Tennessee courts construe a statute, their task is to:

[C]arry out legislative intent without broadening or restricting the statute beyond its intended scope. [Courts] start by looking to the language of the statute, and if it is unambiguous, [they] apply the plain meaning and look no further. In doing so, [they] must avoid any forced or subtle construction that would limit or extend the meaning of the language.⁴⁵¹

By adding policies and doctrines that TUAA does not expressly reflect, our courts have inappropriately applied a layer of commands and policies to unambiguous legislative enactments. Put another way, “[i]f the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any ‘contrary judicial gloss.’”⁴⁵²

Of course, the courts’ answer to this argument would be that even if courts have misapplied TUAA, the maxim that “the fact that the legislature has not expressed disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction.”⁴⁵³ The argument would be “[t]he legislature is presumed to know the interpretation which courts make of its enactments.”⁴⁵⁴ In this circumstance, it must be acknowledged that the General Assembly has not intervened and modified the statutes to overrule the post-1983 decisions so construing TUAA. Nevertheless, the Tennessee case law gloss rests on a shaky foundation based on the courts taking on legislative

450. *Id.* at 448–51.

451. *West v. Schofield*, No. M2014-00320-COA-R9-CV, 2014 WL 4815957, at *6 (Tenn. Ct. App. Sept. 29, 2014) (citations omitted) (internal quotations omitted).

452. *See Dep’t of Agric. v. Appletree Mktg., L.L.C.*, 779 N.W.2d 237, 241 (Mich. 2010) (quoting *Morales v. Auto-Owners Ins.*, 672 N.W.2d 849 (Mich. 2003) (stating principle)).

453. *Hamby v. McDaniel*, 559 S.W.2d 774, 776 (Tenn. 1977).

454. *Sw. Tenn. Elec. Membership Corp. v. City of Jackson*, 359 S.W.3d 590, 603 (Tenn. Ct. App. 2012) (quoting *Hamby*, 559 S.W.2d at 776).

prerogatives through a partial adverse possession of the Tennessee Code.

C. Judicial Review, Transcripts, and Arbitrator Findings of Fact/Conclusions of Law

For vacatur to be an effective remedy, and not an impossible dream for claimants, there must be a sufficient record of the arbitral proceedings that a trial or appellate court can examine with confidence. As stated above, unless the agreement or a statute provides otherwise, Tennessee courts see nothing wrong or unfair that the record for an arbitration decision is missing a transcript on appeal or that the award might lack findings of fact or of law.⁴⁵⁵ The Tennessee Supreme Court said in *Arnold*,

The agreement in this case provided that the arbitrators were not required to make written findings of fact and law. Such is normally the case. Thus, under usual circumstances, any ground for vacating or modifying the arbitration award will usually appear on the face of the award, not within the transcript. It would be unfair and incongruous to hold that an arbitration award in hearings in which a transcript was made is more open to attack than in a case in which no transcript was made. Thus, the case under submission was no more open to review by the trial court than was any other arbitration case.⁴⁵⁶

The practical (and adverse) effects of this doctrine is that it “greatly restricts” a court’s ability to review the arbitral decision, it invites “speculation” on the arbitrator’s rationale, and it “emasculates effective judicial review.”⁴⁵⁷

The problem is more serious where the award lacks any sort of valid contemporaneous explanation. Here, the reviewing

455. See *supra* Section V.B.

456. *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 449 (Tenn. 1996).

457. *Chasser v. Prudential-Bache Secs.*, 703 F. Supp. 78, 79 (S.D. Fla. 1988). A prominent treatise takes a different perspective on use of transcripts in arbitration but does concede that the issue has long been a matter of debate and that they are advisable in technical or complex cases. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 29:18 (3d ed. 2013).

court frequently confirms the award because the precedents allow it to conclude that the arbitrator's "true intent is apparent" or that the grounds for the award "can be inferred from the facts."⁴⁵⁸ If it is proper for an arbitrator's award to be as brief as stating a dollar award for damages, an aggrieved claimant (contrary to *Arnold*) has little or no possible basis to determine the grounds for challenge merely from a number on a piece of paper.

Given the minimal information that can accompany an arbitration award decision, a real danger exists that the reviewing court's opinion will cure a deficient arbitral decision by supplying a post-hoc justification. The cases reveal the problems with how the courts have used this last-mentioned questionable judicial savings mechanism. A 2013 District of Columbia district court decision stated that a court under the FAA "is not at liberty to make assumptions as to the arbitral Tribunal's logic."⁴⁵⁹ Yet, in the same opinion the court approved a post-hoc rationale when it stated that "an award must be confirmed even where the reasoning is 'deficient or non-existent,' provided that 'any justification [for the decision] can be gleaned from the record.'"⁴⁶⁰ The problem with this federal district court decision is that no substantive distinction exists between an award based on impermissible "assumptions"—which the court condemned—and an award based on permissible "gleanings"—which the court approved.⁴⁶¹ Succinctly put, the line cannot be drawn that finely.

In defending the sufficiency of the arbitrator's reasoning, another court unapologetically said that an arbitrator's "improvident, even silly factfinding does not provide a basis for a reviewing court's to refuse to enforce an award."⁴⁶² As a federal appeals court judge observed in a concurring opinion in another appellate case, the truth is that when an arbitrator makes an award without a

458. *First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105, 110 (S.D.N.Y. 1994) (citations omitted).

459. *ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 261 (D.D.C. 2013) (construing 9 U.S.C. § 10(a)(1) (2012)).

460. *Id.* at 261 (quoting *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.D.C. 2006)).

461. *See id.* (making this distinction).

462. *Questar Capital Corp. v. Gorter*, 909 F. Supp. 2d 789, 799 (W.D. Ky. 2012) (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)).

satisfactory explanation, courts become participants in a “judicial snipe hunt” as they become a “rubber stamp” for unexplained or unsupported arbitrator decisions.⁴⁶³

Recognizing these potential flaws, not all jurisdictions let the arbitrators off the hook so easily. For example, Connecticut courts in adjudicating state arbitral awards reason that, because reviewing courts frequently lack access to a transcript of the proceedings, “it is particularly important and incumbent upon arbitrators to make express reference to the specific evidence on which they rely in support of their findings of fact, as opposed to simply making conclusory statements.”⁴⁶⁴ Further, as an FAA case has observed, “[W]hen the arbitrators do not give their reasons [for arbitral decisions], it is nearly impossible for the court to determine whether they acted in disregard of the law.”⁴⁶⁵

Courts defending the current approach on findings of fact/law argue that imposing a requirement upon the arbitrator to explain his decision (absent the parties’ agreement otherwise) “[w]ould serve only to perpetuate the delay and expense which arbitration is meant to combat.”⁴⁶⁶ This rationale is unconvincing because a concise but complete arbitral decision is hardly wasteful of resources. An adequate decision explaining the arbitrator’s rationale brings credibility and transparency to the process and instills confidence in the participants that each has received fair

463. *Federated Dep’t Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 871 (6th Cir. 1990) (Martin, J., concurring); *see also Matteson v. Ryder Sys., Inc.*, 99 F.3d 108, 113 (3d Cir. 1996) (“[C]ourts are neither entitled nor encouraged simply to ‘rubber stamp’ the interpretations and decisions of arbitrators.”).

464. *State v. AFSCME, Local 391*, 69 A.3d 927, 939 (Conn. 2013).

465. *Prudential-Bache Secs., Inc. v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995); *O.R. Secs., Inc. v. Prof’l Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988); *see also Dominick & Dominick Inc. v. Inv’r Servs. & Savs. Corp.*, No. 86 Civ. 7265 (MGC), 1991 WL 143716, at *5 (S.D.N.Y. July 22, 1991) (“The absence of a statement of reasons does not support [an] argument that the arbitrators based their decision on a particular finding or theory.”). *But see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1974) (observing that no requirement exists under the FAA for arbitrator findings of fact or conclusions of law). *See generally* R. D. Hursh, Annotation, *Necessity that Arbitrators, in Making Award, Make Specific or Detailed Findings of Fact or Conclusions of Law*, 82 A.L.R.2d 969 (1962).

466. *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994).

treatment.⁴⁶⁷ In fact, an explanation requirement would actually *improve* the efficiency of arbitration by giving the parties and reviewing courts the insights on what guided the arbitrator's thought processes. It also proves too little for courts to reason that if parties to arbitration wish a more detailed arbitral opinion, they should clearly state in the agreement the degree of specificity required.⁴⁶⁸

The current regime on arbitral transcripts and findings of fact/law harms the utility of the process because it encourages arbitrators to render careless and incorrect decisions secure in the belief that reviewing courts will likely supply judicial first aid as needed by providing legally defensible rationales by citing the "gleanings" from the record.⁴⁶⁹ Such judicial repair work also invites courts to provide rationales and justifications that the arbitrator might never have considered, thus turning courts into super-arbitrators.⁴⁷⁰

In their vigor to defend what should otherwise be dubious award decisions, some courts display a puzzling reticence to remand the case to an arbitrator for additional findings. The better view is that "[i]t is entirely appropriate for a [trial] court to direct arbitrators to explain their awards."⁴⁷¹ This technique advances the fairness of the arbitral system because it "avoids any judicial guessing" about the rationale for the award and gives the parties "what they bargained for—a clear decision from the arbitrator."⁴⁷² Nevertheless, a 1989 decision of the United States Court of Ap-

467. See *R. E. Bean Constr. Co. v. Middlebury Assocs.*, 428 A.2d 306, 309 (Vt. 1980) ("To the extent that justified confidence in arbitration is established, it can only aid the courts in meeting the public's need for speedy, inexpensive and fair dispute resolution.").

468. *Questar Capital Corp. v. Gorter*, 909 F. Supp. 2d 789, 822 (W.D. Ky. 2012).

469. See *ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 261 (D.D.C. 2013) (using this mode of analysis to uphold an arbitral award).

470. See *State Sys. of Higher Educ. v. State College Univ. Prof'l Ass'n*, 743 A.2d 405, 413 (Pa. 1999).

471. *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 674 F. Supp. 920, 923 (D.D.C. 1987), *rev'd*, 882 F.2d 529 (D.C. Cir. 1989); accord *Falcon Steel Co. v. HCB Contractors, Inc.*, Civ. A. No. 11557, 1991 WL 50139, at *2 (Del. Ch. Apr. 4, 1991) (citations omitted).

472. *Sargent*, 674 F. Supp. at 923; see also *Hilib, Rogal & Hobbs Co. v. Golub*, No. 3:05cv574, 2006 WL 2403390, at *6-7 (E.D. Va. Aug. 18, 2006) (citing an extensive collection of approving remands).

peals for the District of Columbia Circuit (“D.C. Circuit”) rejected that procedure for a damages award lacking backup calculations, reasoning that remand for an explanation of an award “would unjustifiably undermine the speed and thrift sought to be obtained by the ‘federal policy favoring arbitration.’”⁴⁷³ What the D.C. Circuit missed in this case is that an appellate court will have little insight in what it is being asked to enforce if serious doubt exists on the rationale that the arbitrator or trial court used to reach its decision.

No Tennessee cases were found addressing the trial court’s authority to order a remand to the arbitrator. Because the case law in Tennessee on remands is unclear, practitioners should rely on general case law principles in advocating this remedy. The United States Court of Appeals for the Sixth Circuit has ruled that “[a] remand is proper . . . at common law . . . to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award.”⁴⁷⁴

D. Misreading “Exceeding” Arbitrator “Powers”
(TENN. CODE ANN. Section 29-5-313(a)(1)(C))

An established ground for vacatur, both under the FAA⁴⁷⁵ and TUAA,⁴⁷⁶ is that the arbitrator “exceeded” his “powers.” While courts commonly state that arbitrators “exceed their powers” in deciding issues when they go outside the scope of the arbitration agreement,⁴⁷⁷ some extra-lenient doctrines apply in this area.

In one common statement, “As long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.”⁴⁷⁸ In-

473. *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 882 F.2d 529, 532 (D.C. Cir. 1989).

474. *M & C Corp. v. Erwin Behr GmbH & Co.*, 326 F.3d 772, 782 (6th Cir. 2003) (quoting *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000)).

475. 9 U.S.C. § 10(a)(4) (2012).

476. TENN. CODE ANN. § 29-5-313(a)(1)(C) (2014).

477. *E.g.*, *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 450 (Tenn. 1996) (citing *Int’l Talent Grp., Inc. v. Copyright Mgmt., Inc.*, 769 S.W.2d 217, 218 (Tenn. Ct. App. 1988)).

478. *Id.* at 449; *Millsaps v. Robertson-Vaughn Constr. Co.*, 970 S.W.2d 477, 480 (Tenn. Ct. App. 1997) (quoting *Arnold*, 914 S.W.2d at 480).

deed, “improvident, even silly” interpretations usually pass judicial muster,⁴⁷⁹ and some courts profess that the reasoning of the arbitrator is legally irrelevant because the only point at issue is “the result reached.”⁴⁸⁰ This dilution—and misreading—of the statutory standard that the arbitrator may not “exceed” his powers cannot withstand logical scrutiny.

In the words of Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, the question of whether the arbitrator exceeded his powers is not if he “erred” in the interpretation of the contract, “clearly erred” in the interpretation, or “grossly erred” in the interpretation.⁴⁸¹ The standard for the proper exercise of arbitral powers is whether the arbitrator interpreted the contract as opposed to ignoring it and substituted his own notion of what is reasonable or fair.⁴⁸² Judge Posner’s observation should not be over-construed, however, because “the grosser the apparent misinterpretation, the likelier it is that the arbitrators weren’t interpreting the contract at all.”⁴⁸³ Perhaps in recognition of this questionable classification of reasonable and unreasonable readings of

479. See *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 39 (1987); see also *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 330 (1st Cir. 2000) (“[E]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards.” (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990)) (noting that arbitrator inconsistently ruled that the parties had no contract but also said the parties had an adhesion contract); *Nat’l Wrecking Co. v. Int’l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 961 (7th Cir. 1993); *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 183 (7th Cir. 1985) (stating that errors of fact or law do not supply valid grounds for vacating an arbitration award). For a discussion of arbitration and adhesion contracts, see 1 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* §§ 8:26 to 8:27 (3d ed. 2013).

480. *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 n.3 (5th Cir. 1990). Some courts do not review the arbitrator’s interpretation of the contract but whether the arbitrator’s conduct displayed “an infidelity” to his obligation as an arbitrator. *Ancor Holdings, L.L.C. v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 831 (Tex. Ct. App. 2009) (citation omitted).

481. *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987).

482. *Id.*

483. *Id.*

the contract, some courts indicate that the arbitrator's interpretation of the contract to be upheld must be "plausible."⁴⁸⁴

Notwithstanding, if the standard per Tenn. Code Ann. section 29-5-313(a)(1)(C) that the court "shall vacate an award" when arbitrators "exceeded their powers"⁴⁸⁵ is to have any meaning, it should be insufficient depending on the arbitration agreement that the arbitrator was "arguably" construing the contract but was still dead wrong. Where an arbitration agreement expressly, or even impliedly, requires the arbitrator to follow the law, but his contract interpretation is irrational or illogical, he cannot be said to have stayed within his powers as defined by the parties' underlying contract. Case law from other jurisdictions specifically relies on this last perspective.⁴⁸⁶

Using a penetrating analysis, the Michigan Supreme Court convincingly has rebutted the widespread doctrine that arbitration decisions based on an error of law do not exceed the powers of arbitrators. In *Detroit Automobile Inter-Insurance Exchange v. Gavin*,⁴⁸⁷ the Michigan high court concluded that "just as a judge exceeds his power when he decides a case contrary to controlling principles of law, so does an arbitrator."⁴⁸⁸ It bears noting that the

484. *Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins. of Pittsburgh*, 933 F.2d 1481, 1486 (9th Cir. 1991).

485. Note that vacatur is mandatory under TENN. CODE ANN. § 29-5-313(a)(1)(C) (2012) if the grounds exist, which differs from the Federal standard under 9 U.S.C. § 10(a)(4) (2012), which states that a court "may" vacate the award when the statutory circumstances are present, which further emphasizes the "deferential nature" of federal judicial review. *Cat Charter, L.L.C. v. Schurtenberger*, 646 F.3d 836, 843 n.11 (11th Cir. 2011).

486. *See Prince George's Cty. Educators Ass'n v. Bd. of Educ. of Prince George's Cty.*, 486 A.2d 228, 232 (Md. App. 1995) ("If the language of the contract permits but one meaning, an arbitrator who does not follow such a clear contractual mandate exceeds his authority as surely as if had gone beyond the scope of his express arbitration authority."); *Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 349 (Mo. Ct. App. 1995) (indicating that an arbitrator will exceed his authority when his erroneous decision is not "rationally grounded in the agreement"); *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165-67 (D.C. Cir. 1981) (stating that an arbitral award considering a matter outside the scope of the agreement is both one made in excess of the arbitrator's authority and the basis for a decision that the arbitrator had no jurisdiction to decide the matter).

487. 331 N.W.2d 418 (Mich. 1982).

488. *Id.* at 435.

Michigan court did not hold that an error of law is automatic grounds for vacatur. More precisely, the court said that to vacate an award there “must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise.”⁴⁸⁹

Thus, the *Detroit Automobile* court considered the parties’ reasonable expectations of arbitrator conduct:

If the sole or even primary goal of private arbitration were the expeditious, inexpensive, and unreviewable resolution of private disputes, we might be persuaded of the justice of the no-review rule But those are not the goals or purposes of statutory arbitration.

. . . We are not ready to assume that the parties in these cases agreed to forego observance of a plainly applicable provision of their written contract, one which is dispositive of the only matter genuinely in dispute between them, in exchange for a speedy, thrifty, and final resolution of their differences in a way which disregards the law substantially determinative of their rights and duties. The process of dispute resolution and the procedural advantages of arbitration are the servants of the law governing the issues in dispute, not the reverse.⁴⁹⁰

Picking up on the majority opinion’s approach in *Detroit Automobile*, I ask what is the difference to a party between an arbitrator making a gross interpretive error of law or fact and deciding a question that was not clearly submitted to him under the arbitration agreement? Why is the first scenario not grounds for error in Tennessee, but the second fact pattern is grounds for complaint? Both missteps fall squarely within the text of Tenn. Code Ann. section 29-5-313(a)(1)(C), but to the average claimant, such a distinction seems hyper-technical and unjust. In *both* instances, the arbitrator is substituting his own notion of what is fair and reason-

489. *Id.* at 434.

490. *Id.* at 427.

able versus construing the law or the contract before him.⁴⁹¹ In *both* situations, the arbitrator is deciding questions not clearly submitted to him under the arbitration agreement and has exceeded the scope of his power in the submission.⁴⁹² By solid case law authority, a court (and by logical extension, an arbitrator) “‘abuses its discretion’ when it makes an error of law.”⁴⁹³

Therefore, the Michigan Supreme Court correctly held that

[W]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.⁴⁹⁴

Nothing in TUAA (as opposed to current case law) would stand as an obstacle to our courts’ adopting the Michigan approach.

E. Good Faith and Fair Dealing—A Little-Used Vacatur Theory

Another possible vacatur theory largely unmentioned in Tennessee is that the arbitrator will exceed his powers under the contract when he violates the implied covenant of good faith and fair dealing in conducting the proceedings or in rendering a decision. Only one unreported Tennessee decision was found mentioning this doctrine in an arbitration case, and that was in passing.⁴⁹⁵

491. See *Shearson Lehman Bros. v. Hedrich*, 639 N.E.2d 228, 232 (Ill. Ct. App. 1994) (“The ultimate award must be ‘grounded on the parties’ contract’ and arbitrators do not have the authority to ignore plain language and alter the agreement.” (quoting *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187–88 (8th Cir. 1988)).

492. See *T & M Props. v. ZVFK Architects & Planners*, 661 P.2d 1040, 1044 (Wyo. 1983); *Himco Sys., Inc. v. Marquette Elecs., Inc.*, 407 N.E.2d 1013, 1016 (Ill. Ct. App. 1980) (“An arbitrator exceeds his powers when he decides matters which were not submitted to him.” (citing cases)).

493. See *Boyd v. Comdata Network Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

494. *Detroit Auto.*, 331 N.W.2d at 442–43.

495. See *Hardaway v. Goodwill*, No. 03-A-01-9403CV000113, 1994 WL 585767, at *4 (Tenn. Ct. App. Oct. 19, 1994).

A Minnesota case lends direct support to this notion that arbitrators are contractually bound to act in good faith and fair dealing. The court indicated that when arbitrators are “unfaithful to their obligations,” a court reviewing the case can assume that the arbitrators did “exceed their authority.”⁴⁹⁶ Thus, claimants should have grounds for vacatur under Tenn. Code Ann. section 29-5-313(a)(1)(C) when the arbitrator exceeds his powers in this manner.

This theory of vacatur authority also finds substantial support from the common law of contracts. As stated in the *Restatement (Second) of Contracts* section 205, “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” No party to a contract has unbridled discretion to perform as he pleases.⁴⁹⁷ The arbitrator will act in “good faith” only when he demonstrates “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”⁴⁹⁸ By agreeing to serve in the role of arbitrator, this individual impliedly (and often expressly) agrees to decide the dispute impartially, conscientiously, and competently. Furthermore, the better view is that parties do not submit a case to arbitration with the expectation that the arbitrator will flout applicable law and that they are to sit by with no ability to make a complaint.⁴⁹⁹

496. *QBE Ins. v. Twin Homes of French Ridge Homeowners Ass’n*, 778 N.W.2d 393, 398 (Minn. Ct. App. 2010); *see also Hooters, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (“Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.”).

497. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 542 (4th Cir. 1998) (“The courts could leave all discretion in performance unbridled. . . . No U.S. court now takes this approach.” (quoting STEVEN J. BURTON & ERIC G. ANDERSON, *CONTRACTUAL GOOD FAITH* 46–47 (1995))).

498. *RESTATEMENT (SECOND) OF CONTRACTS* § 205 cmt. a (1981). *See generally Hooters*, 173 F.3d at 940 (summarizing implied duty of good faith and fair dealing). Tennessee courts are in accord on these principles of good faith and fair dealing. *See* 21 STEVEN W. FELDMAN, *TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE* §§ 8:32 to 8:34 (2006) (citing Tennessee decisions).

499. *Stolt-Nielsen SA v. Animal Feeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. 662 (2010). A qualifying word read

Tennessee common law supports this statement; the Tennessee Supreme Court said in 1871 that “[t]he agreement to submit to an arbitration necessarily implies that the award made is to be legal, and if it is not, that either party shall have the right to show its illegality by regular judicial proceedings.”⁵⁰⁰ No reason supports holding arbitrators to a lower standard of conduct in 2015 as compared with the generally more primitive legal landscape of 1871.

In another sense, the arbitrator’s serious error of fact or law is a breach of contract—and exceeds his powers under the arbitration contract—because it frustrates the disputing parties’ reasonable expectation that the arbitrator will discharge his duties in a competent fashion. The Tennessee Court of Appeals has said about this ubiquitous implied covenant:

Tennessee common law . . . imposes an implied covenant of good faith and fair dealing in the performance of contracts. This Court has stated that the purposes of this implied duty are two-fold: to honor the reasonable expectations of the contracting parties, and to protect the rights of the parties to receive the benefits of their agreement.⁵⁰¹

Further, Tennessee courts agree that “a claim based on the implied covenant of good faith and fair dealing is not a stand alone claim; rather, it is part of an overall breach of contract claim.”⁵⁰²

Given these reasonable ground rules for arbitral service, arbitrators under a contract that reflects the implied covenant have no authority to ignore plain contract language in their pact with the

into every contract is the word “reasonable” or its equivalent “reasonably;” thus, when a party undertakes a contractual duty, *it promises a reasonable effort to achieve it through ordinary, recognized means.* See 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE § 8:20 (2006) (citations omitted) (emphasis added).

500. *State v. Ward*, 56 Tenn. (9 Heisk.) 100, 112 (1871).

501. *SecurAmerica Bus. Credit v. Schledwitz*, No. W2009-02571-COA-R3-CV2011, 2011 WL 3808232 (Tenn. Ct. App. Aug. 26, 2011) (citations omitted).

502. *Jones v. LeMoyne–Owen Coll.*, 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009) (citing *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000)).

parties that expressly or impliedly requires the arbitrator to make supportable interpretations of clear contract language.⁵⁰³ If the arbitrator fails to meet this standard, and falls short of meeting a party's "reasonable expectation," he has breached the arbitral contract and exceeded his authority contrary to Tenn. Code Ann. section 29-5-313(a)(1)(C). Accordingly, this contract deviation properly affords the counsel for the aggrieved party a valid strategy for vacatur under TUAA.

*F. Judicial Interpretation of Arbitration Contracts:
Question of Law or Fact?*

No quarrel can exist with settled law that "[t]he standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing."⁵⁰⁴ Absent an express agreement to the contrary, the arbitrator's interpretation of his procedural powers are entitled to the same level of deference as with his merits determinations.⁵⁰⁵ What is not so clear, however, in a judicial contest over vacatur based on the "exceeded his powers" strand of Tenn. Code Ann. section 29-5-313 (a)(1)(C) is whether interpretation of the parties' submission or the arbitrator's contract is a matter of law or fact. The distinction is important because it will control on whether the trial and appellate courts will exercise *de novo* review over that interpretation.

Unfortunately, Tennessee decisions have abandoned "well-settled" principles of appellate review in matters of contract interpretation in arbitration cases. Tennessee courts repeatedly recognize these general rules,

[When] [t]he . . . issue on appeal involves contract interpretation, [this] is a matter of law that we review *de novo* on the record with no presumption of correctness for the determination of the trial court.

503. Shearson Lehman Bros. v. Hedrich, 639 N.E.2d 228, 232 (Ill. App. Ct. 1994).

504. Morgan Keegan & Co. v. Starnes, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *3 (Tenn. Ct. App. June 20, 2014) (quoting Nationwide Mutual Ins. Co. v. Home Ins. Co., 278 F.3d 621, 625 (6th Cir. 2002)).

505. Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 643-44 (9th Cir. 2010).

The “cardinal rule” of contract construction is to ascertain the intent of the parties and to effectuate that intent consistent with applicable legal principles. When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting and enforcing it as written.⁵⁰⁶

As just stated, because contract interpretation involves issue of law, the reviewing courts—*both* the trial court and the appellate courts—should consider the arbitrator’s contract interpretation issues *de novo*, with no presumption of correctness on appeal.⁵⁰⁷ The reviewing court must analyze the arbitrator’s award decision based on the contract document and other permissible evidence and make its own determination of the contract’s meaning and legal effect.⁵⁰⁸ Nothing in Tenn. Code Ann. section 29-5-319 (the TUAAs statute on judicial appeal and review) exempts arbitration cases from these prevailing rules of appellate contract interpretation.

The U.S. Supreme Court in a major arbitration case said, “We believe . . . that the majority of the Circuits is right in saying that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards.”⁵⁰⁹ The Tennessee Supreme Court has specifically approved the U.S. Supreme Court’s stance on this point,⁵¹⁰ but as will be seen below, the appellate courts in our state have yet to follow this established doctrine in reviewing arbitration cases.

506. Colonial Pipeline Co. v. Nashville & E. R.R., 253 S.W.3d 616, 621 (Tenn. Ct. App. 2007) (citations omitted).

507. O’Neil v. Clinically Home, L.L.C., No. M2013-01789-COA-R3-CV, 2014 WL 3540840, at *6 (Tenn. Ct. App. July 16, 2014).

508. See *id.* at *6–7 (citations omitted).

509. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 948 (1995). The *Arnold* court similarly observed that in reviewing a trial court’s decision in an arbitration case, that the court of appeals should apply “ordinary standards.” *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 449 (Tenn. 1996). Unaccountably, the *Arnold* court did not cite the standard rule of appellate review of contract interpretation that these issues are questions of law and reviewed *de novo*. See *id.*

510. Pugh’s Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 257 (Tenn. 2010).

Until recently, Tennessee appellate courts confused a number of issues in explaining judicial review of arbitration awards. Up to 2010, the Tennessee Supreme Court and the Tennessee Court of Appeals followed the dubious view that absent legislative direction, courts should consider matters of law in arbitration cases “with the utmost caution.”⁵¹¹ In *Pugh’s Lawn Landscape Co., Inc. v. Jaycon Development Corp.*,⁵¹² the Tennessee Supreme Court disavowed this statement from earlier decisions. In restating (and clarifying) the standards for appellate review, the *Pugh’s* case first noted that, based on a 2008 U.S. Supreme Court decision,⁵¹³ the Tennessee Court of Appeals should accept a trial court’s findings of fact regarding agreements to submit the issue to arbitration if they were supported by “substantial evidence.”⁵¹⁴ Also, the *Pugh’s* court said that the Tennessee Court of Appeals should decide questions of law *de novo*.⁵¹⁵ Thus, the *Pugh’s* decision commented that “‘ordinary, not special, standards’ of appellate review should apply in arbitration cases and that appellate courts need not ‘give *extra* leeway to district courts that uphold arbitrators.’”⁵¹⁶

While the *Pugh’s* court did correct this error from earlier decisions, the Tennessee Supreme Court did not go far enough. The problem is that the Tennessee Supreme Court has yet to take the next step and rule explicitly that trial and appellate courts in TUAAs should consider issues of contract interpretation as matters of law reviewed *de novo*. The prevailing view in American jurisdictions is that “[t]he existence and scope of an arbitration agreement are questions of law that the [appellate courts] review *de novo*, applying state law principles governing contract interpretation.”⁵¹⁷

511. See *Arnold*, 914 S.W.2d at 450 (cited in *Adams TV of Memphis, Inc. v. Int’l Bhd. of Elec. Workers, Local 274*, 932 S.W.2d 932, 934–35 (Tenn. Ct. App. 1996)).

512. 320 S.W.3d at 252.

513. *First Options of Chi.*, 514 U.S. at 947.

514. *Pugh’s Lawn*, 320 S.W.3d at 258.

515. *Id.* at 257.

516. *Id.* at 258 n.4 (quoting *First Options of Chi.*, 514 U.S. at 948).

517. *Radil v. Nat’l Union Fire Ins. Co. of Pittsburg*, 233 P.3d 688, 692 (Colo. 2010). *Accord PaineWebber Inc. v. Elahi*, 87 F.3d 589, 592 (1st Cir. 1996); *Sidney v. Allstate Ins.*, 187 P.3d 443, 447–48 (Alaska 2008); *J.M. Davison, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

Indeed, the United States Court of Appeals for the Sixth Circuit in interpreting the closely-related FAA follows the general rule that it will review *de novo* a district court's holding that the arbitration agreement is invalid and unenforceable (or by necessary inference that the agreement is valid and enforceable).⁵¹⁸ To the same end, the Tennessee Court of Appeals in a FAA case has said that "[a] trial court's order on a motion to compel arbitration addresses itself primarily to the application of contract law. We review such an order with no presumption of correctness on appeal."⁵¹⁹ Indeed, the Tennessee Supreme Court has repeatedly stated that "the scope of review advanced by the United States Supreme Court has *equal application* in a case under the [TUAA] to the extent that such review furthers the common goal of [the] acts."⁵²⁰ No Tennessee cases were found considering this TUAA/FAA discrepancy in reviewing contract interpretation questions.

G. Mutual, Final, and Definite Awards

The next issue pertains to the not-uncommon situation where the arbitration agreement bound the arbitrator to consider "all claims" that the parties presented at the hearing, but where the arbitrator failed to address all the claims. When a court adjudicates whether an arbitrator has accomplished this task, the court is not reviewing the decision on the merits. Instead, the court is merely validating whether the arbitrator has performed the duties under the agreement.⁵²¹

Unlike TUAA, the FAA explicitly covers this point as a ground for vacatur in the most frequent ground for vacating an award: "where the arbitrators exceeded their powers, *or so imperfectly executed them that a mutual, final, and definite award upon*

518. *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 497 (6th Cir. 2004) (stating that the trial court's fact findings will be upheld except where "clearly erroneous"); *see also* *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W.3d 892, 903 (Tenn. Ct. App. 2006) ("As a general rule, a court's enforcement of an arbitration provision is reviewed *de novo*.").

519. *Rosenberg*, 219 S.W.3d at 903.

520. *Pugh's Lawn*, 320 S.W.3d at 257–58 (quoting *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 n.2 (Tenn. 1996)) (emphasis added).

521. *Simmons v. Lucas & Stubbs Assocs.*, 322 S.E.2d 467, 469 (S.C. Ct. App. 1984) (construing the FAA).

the subject matter submitted was not made."⁵²² The TUAA is missing the language about the arbitrator "imperfectly execut[ing]" his powers such that a "mutual, final, and definite award" decision has occurred.⁵²³

A commentator makes the following important points in this area,

An award must, on its face, dispose of all issues raised by either party by demand or counterclaim. To avoid controversy as to whether all issues have been finally determined, arbitrators often say in the award that "the award is in full settlement of all claims submitted to arbitration by either party against the other." There is no requirement for a particular formula or wording, but this language has been accepted by courts as evidence that everything was considered by the arbitrator.⁵²⁴

While Tennessee does recognize that an incomplete arbitration award can be objectionable, the latest on point authority found was pre-TUAA cases.⁵²⁵ When faced with this issue, counsel should argue that an incomplete or non-final award violates Tenn. Code Ann. section 29-5-313(a)(1)(C) on the basis that the arbitrator has exceeded his powers, but the counter argument would be what really has occurred is the arbitrator has not fully performed his duties, which is an entirely different theory.

Because the Tennessee Supreme Court has construed TUAA to mean the grounds for overturning an arbitral award are "limited" and "narrowly construed" to effectuate the legislative

522. 9 U.S.C. § 10(a)(4) (2012) (emphasis added).

523. *Arnold*, 914 S.W.2d at 451 (noting this difference between state and federal arbitration law). *But see* *Bell Aerospace Co. Div. of Textron v. Local 516*, 500 F.2d 921, 923 (2d Cir. 1974) ("Courts will not enforce an [arbitration] award that is incomplete, ambiguous, or contradictory.").

524. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 33:4 (3d ed. 2013) (citations omitted).

525. *See generally* *Jackson v. Chambers*, 510 S.W.2d 74, 76 (Tenn. 1974) (holding that common law arbitral award was not final where the arbitrators rendered two different decisions, *i.e.*, the award was ambiguous); *Powell v. Ford*, 72 Tenn. 278, 286 (1880) (discussing that arbitrators disagreed on the decision).

intent,⁵²⁶ a serious question exists in Tennessee on whether an incomplete or non-final award is subject to challenge under the statutory test for vacatur or if the pre-TUAA cases might suffice. It also appears that the alternative theory of modification or correction of awards under Tenn. Code Ann. section 39-5-314 cannot be stretched so far as to cover this substantive oversight.⁵²⁷

Perhaps Tennessee should follow the FAA rule that as a matter of common law, judicial review of non-final arbitration awards should occur, if at all, “only in the most extreme cases.”⁵²⁸ Another alternative is that “[i]f an arbitrator’s decision is ‘clear enough to indicate unequivocally what each party is required to do,’ it will be considered a final award even if arithmetical or accounting calculations or similar technical acts remain to be completed.”⁵²⁹ In any event, it is apparent that a legislative fix would best address this issue.

H. Manifest Disregard of the Law—Is it a Viable Theory?

A number of jurisdictions, state and federal, recognize the arbitrator’s manifest disregard of the law as a basis for vacatur⁵³⁰ (analyzed above in Part VIII). The policy underlying the manifest disregard theory is that it encourages arbitrators to obey the law and assures that a claimant can vindicate its statutory rights in an effective way. “Thus, the manifest disregard standard seemingly balances the public’s interest in having arbitrators stay within applicable law with the public policy favoring a speedy and economical arbitration process.”⁵³¹

Unfortunately, this theory of review has an uncertain judicial legitimacy. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,⁵³²

526. See *Arnold*, 914 S.W.2d at 449.

527. See *supra* Section IV.B.

528. *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1022–23 (9th Cir. 1991) (quoting *Aerojet-Gen. Corp. v. Am. Arbitration Ass’n*, 478 F.2d 248, 251 (9th Cir. 1973)).

529. 2 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 33:6 (3d ed. 2013).

530. See *supra* notes 394–412 and accompanying text.

531. Marcus Mungoli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY’S L.J. 1079, 1114 (2000).

532. 552 U.S. 576, 584 (2008).

the U.S. Supreme Court made some confusing comments about whether the arbitrator's manifest disregard of the law was still a viable basis for vacatur.⁵³³ Accordingly, the federal appeals courts have divided on whether the arbitrator's manifest disregard of the law constitutes grounds for vacatur in arbitration cases.⁵³⁴

Some substantial arguments support the rejection of an arbitrator's "manifest disregard of the law" as a basis for vacatur. A number of states have concluded this theory lies outside the scope of the Uniform Arbitration Act.⁵³⁵ These dissenting jurisdictions believe that the exception weakens the effectiveness and utility of arbitration because this expansion of judicial review increases costs, reduces efficiencies, and undermines the finality of arbitral awards.⁵³⁶ This camp also maintains that the confusing variety of definitions of "manifest disregard" compounds the difficulties of applying vacatur theory in a consistent manner and also encourages the adoption of other non-statutory theories.⁵³⁷

The better resolution is that the manifest disregard of the law cause of action should be a proper *statutory* basis for vacatur in Tennessee. The theory would be proper when it follows the statutory grounds, i.e., where the arbitrator has exceeded his powers, and is a sufficiently comfortable fit on the facts. For instance, the Second and Ninth Circuits in the federal system accept the manifest disregard theory of vacatur on a statutory (not common

533. See *id.* at 585 ("Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.").

534. Compare *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (holding that manifest disregard theory is still valid), with *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (holding that the manifest disregard theory is no longer valid). The U.S. Court of Appeals for the Sixth Circuit has indicated that the manifest disregard standard remains viable. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418–19 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009).

535. See *Coors Brewing Co. v. Cabo*, 114 P.3d 60, 62 (Colo. App. 2004) (discussing a number of judicial approaches). For a collection of state court cases approving or disapproving the manifest disregard doctrine, see *Robinson v. Henne*, 115 So. 3d 797, 800–03 (Miss. 2013); *Sooner Builders & Invs., Inc. v. Nolan Hatcheries*, 164 P.3d 1063, 1072 (Okla. 2007).

536. *Coors Brewing*, 114 P.3d at 65–66 (citing *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 452 (Tenn. 1996)).

537. *Id.* at 62.

law) basis.⁵³⁸ In denying vacatur where the arbitrator plainly circumvents the law, those courts rejecting the manifest disregard doctrine can be properly criticized for assisting the arbitrator in poisoning the fount of justice. Thus, even though the arbitrator acts in his private capacity, courts rejecting the manifest disregard doctrine overlook that this official is an adjunct to the machinery of the state where the courts approve and enforce an otherwise legally insupportable arbitral outcome. Undoubtedly, the average claimant losing the case places little stock in the above legalisms justifying the result.

The manifest disregard doctrine, properly cabined, does not confer a roving commission upon courts to right perceived wrongs. Additionally, to say that courts should reject manifest disregard of the law because of the difficulty in drawing a line between serious and less serious statutory errors is no excuse for courts to throw up their hands and avoid line drawing altogether. As Justice Oliver Wendell Holmes wrote almost a century ago in a different context: “Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law.”⁵³⁹

I. The Status of the Public Policy Defense

As stated above, based on the discrepancy between *Arnold* and *Lawrence*, where both decisions remain good law,⁵⁴⁰ Tennessee case law is conflicted on the availability of the public policy defense in arbitration cases.

The better view allows use of the public policy defense in limited instances. In effect, when courts in arbitration cases fail to disapprove a contract that transgresses deeply-held notions of public policy, the courts are lending their imprimatur to the enforcement of a void contract.⁵⁴¹ It is “well settled that [a court] will not enforce obligations arising out of a contract or a transaction that is

538. *Visiting Nurse Ass’n of Fla., Inc. v. Jupiter Med. Ctr., Inc.*, No. SC11-2468, 2014 WL 6463506, at *14 (Fla. Nov. 6, 2014).

539. *Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (citation omitted); *see also* *Dominion Hotel v. Ariz.*, 249 U.S. 265, 269 (1919) (Holmes, J.) (“[T]he constant business of the law is to draw such lines.”).

540. *See supra* notes 425–30 and accompanying text.

541. *In re Standard Coffee Serv. Co.*, 499 So. 2d 1314, 1316 (La. Ct. App. 1986).

illegal.”⁵⁴² When courts review arbitral decisions, there should be nothing controversial about accepting the proposition that “[t]he public policy exception is rooted in the common law doctrine of a court’s power to refuse to enforce a contract that violates public policy or law.”⁵⁴³

Putting these statements together, it is a natural step to conclude that Tennessee may, and indeed must, recognize the public policy restraints on arbitrators regarding impermissible awards. Practitioners, in devising their strategy, should consider that it is not controversial to conclude, “[A] claim forbidden by the law cannot be enforced through the process of arbitration.”⁵⁴⁴

J. An Appeal Alternative

Given the strict and narrow grounds for judicial review of a statutory arbitration award, parties should consider the option of including in their arbitration agreement a procedure for a private contractual review panel of appellate arbitrators. The supporting theory would be that Tennessee courts allow parties wide discretion in devising their arbitral procedures.⁵⁴⁵ As one commentator points out:

Arbitral appellate review lacks many of the drawbacks of the appellate structure of the court system. Under such arbitral appellate review, the parties could contract to allow for another arbitration panel to review the first panel’s findings, and the parties could tailor this review to their own particular values and resources. For example, parties could pro-

542. See *Ledbetter v. Townsend*, 15 S.W.3d 462, 464–65 (Tenn. Ct. App. 1999).

543. *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 951 (Utah 1996) (quoting *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993)).

544. 21 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 57:138 (4th ed. 2001).

545. *Searcy v. Herold*, No. M2003-02037-COA-R3-CV, 2005 WL 2387159, at *3 (Tenn. Ct. App. Sept. 28, 2005) (citing *Team Design v. Gottlieb*, 104 S.W.3d 512, 517–18 (Tenn. Ct. App. 2002)); see also *Chi. Typographical Union v. Chi. Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) (Posner, J.) (“If the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award.”).

vide that appellate arbitrators can review only the original arbitrators' application of substantive law, or potential conflicts of the award with existing public policy, or the award's substantive basis in the facts. Moreover, since parties need not wait for their appeal to be taken up in the court system, an appeal could be conducted quickly, thus allowing an aggrieved party the opportunity to challenge the award, but not through a long and costly delay. Of course, both the scope of the arbitral review and the timing of that procedure should be set out in the arbitration agreement before later disputes arise. If given a choice, the losing party to an arbitration proceeding may hope to expand the scope of arbitral review, or to simply prolong that review, in the hopes of securing a more favorable settlement.⁵⁴⁶

K. A Vacatur Alternative

One could easily get the impression from examining the Tennessee decisions that an aggrieved party could be left without a remedy if it fails to make a valid case for vacatur. Such an impression would be mistaken. A theory available for any action litigated in court derives from Rule 60.02 of the Tennessee Rules of Civil Procedure, which provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated as intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective ap-

546. Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 934 (2010).

plication; or (5) any other reason justifying relief from the operation of the judgment.⁵⁴⁷

Tennessee appellate courts have applied Rule 60.02 to controversies arising from an arbitration matter before a trial court,⁵⁴⁸ and federal courts have done the same in construing the FAA under the parallel Fed. R. Civ. P. 60.⁵⁴⁹ Therefore, practitioners are advised to investigate this avenue in addition to vacatur.

L. The Gap Between the Award and its Confirmation

Tenn. Code Ann. section 29-5-314(a), (c) provides that the court cannot confirm the award until the statutory period (ninety days) has expired for the losing party to seek vacatur or modification of the arbitrator's award. This time lag creates a danger for the prevailing party, because the losing party has three months to dispose of his assets during the interim that could otherwise be used to satisfy the award. Therefore, to prevent possible unfairness to the winning party, Tennessee should adopt the procedure in the Revised Uniform Arbitration Act, Section 22,⁵⁵⁰ and the FAA⁵⁵¹ that the court's jurisdiction vests immediately after the award's entry, which helps ensure that the losing party is not tempted to circumvent the arbitral process.

VII. CONCLUSION

Arbitration as a technique for alternative dispute resolution can frequently be a desirable process for one or both parties. Counsel and their clients will decide this matter in light of the factual, legal, and strategic considerations favoring or disfavoring

547. TENN. R. CIV. P. 60.02; *see also* Harris v. Hall, No. M2000-00784-COA-R3-CV, 2001 WL 1504893, at *2-3 (Tenn. Ct. App. Nov. 28, 2001) (explaining Rule 60.02).

548. Vest v. Duncan-Williams, Inc., No. M2005-00466-COA-R3-CV, 2006 WL 2252750, at *4 (Tenn. Ct. App. Aug. 3, 2006).

549. Merit Ins. v. Leatherby Ins., 714 F.2d 673, 682 (7th Cir. 1983).

550. REVISED UNIF. ARBITRATION ACT § 22 ("After a party to an arbitration proceeding receives notice of an award, the party may make a [motion] to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.").

551. 9 U.S.C. § 9 (2012).

their position in the dispute. This article will have met its purpose where counsel for claimants and respondents, along with arbitrators, trial courts, and appellate courts, can use the information I have presented in such a way that it enhances the quality of civil justice in Tennessee.