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William G. Fowler II
University of Kentucky

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Arbitration: Kentucky Courts Should Not Liberally Vacate Awards —
*Carrs Fork v. Kodak Mining*

BY WILLIAM G. FOWLER II*

INTRODUCTION

Arbitration is a form of dispute resolution that was first implemented by the Greek city-states as early as the sixth century B.C.¹ Arbitration is:

a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based upon the evidence and arguments to be presented before the arbitrator. The parties agree in advance that the arbitrator's determination, the award, will be accepted as final and binding upon them.²

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* J.D. expected 1998, University of Kentucky; B.A. 1994, Georgetown College.

¹ See James E. Beckley, *Equity and Arbitration*, 949 PLI/CorP. 31, 37 (1996) ("Although the history of arbitration can be traced through archaeological finds dating as far back as 2800 B.C., it is the Greeks who created a procedure that closely resembles current arbitration procedures." (citation omitted)).

² DOMKE ON COMMERCIAL ARBITRATION § 1.01, at 1 (G. Wilner ed., 1984); see also BLACK'S LAW DICTIONARY 105 (6th ed. 1990) ("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."); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429-30 (1988) ("Arbitration is often described as everything that civil litigation is not. Observers frequently depict arbitration as a speedy and economical process characterized by informal hearings before one or more judges selected on the basis of knowledge and expertise in the commercial context of the dispute."
Because arbitration is economical, efficient, and informal, it has become a favored alternative to litigation.\(^3\) Before 1984, Kentucky law stated that contractual agreements between parties to arbitrate future disputes were invalid and unenforceable.\(^4\) The 1984 enactment of a version of the Uniform Arbitration Act\(^6\) and the decision of the Supreme Court of Kentucky in *Kodak Mining Co. v. Carrs Fork Corp.*\(^6\) constituted a reversal of the common law rule and "were intended to more effectively accommodate and encourage arbitration as a substitute for litigation."\(^7\)

Recognizing that arbitration is a viable alternative to litigation, most courts have afforded arbitration awards great deference.\(^8\) Consequently, judicial review of arbitration awards has been limited.\(^9\) The standard of review of arbitration awards in Kentucky, however, is less deferential than modern trends. In Part I, this Note examines the acceptance of arbitration in Kentucky, including the enactment of a version of the Uniform Arbitration Act and the Kentucky Supreme Court's decision in *Kodak Mining Co. v. Carrs Fork Corp.*\(^10\) Analyzing the standard of review applied in Kentucky in deciding whether to vacate an arbitration award, Part II of this Note focuses on the Kentucky Supreme Court's decision in *Carrs Fork Corp. v. Kodak Mining Co.*\(^11\) Part III contrasts the standard for vacating awards in

(footnotes omitted); Sylvan Gotshal, *The Art of Arbitration*, 48 A.B.A. J. 553, 553 (1962) ("Arbitration is a simple, uncomplicated system, created through need by trial and error, whereby mankind has settled and does settle disputes of every kind or nature through the acceptance of the judgment of one or more reasonable and competent honorable men as the final settlement of the dispute.").


\(^4\) See Gatilf Coal Co. v. Cox, 142 F.2d 876, 881 (6th Cir. 1944).


\(^6\) Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917 (Ky. 1984).


\(^8\) See Aptowitzer, *supra* note 3, at 1001.

\(^9\) See id.

\(^10\) See infra notes 16-33 and accompanying text.

\(^11\) Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699 (Ky. 1991). See infra notes 34-68 and accompanying text. The lawsuit between Kodak Mining
Kentucky with the standard in Georgia\(^\text{12}\) by examining the Georgia Arbitration Code and the Georgia Supreme Court’s decision in *Greene v. Hundley*.\(^\text{13}\) Part IV explores judicial interpretations of the Federal Arbitration Act and the standards for vacating awards exercised by various courts when applying the Federal Act.\(^\text{14}\) Finally, this Note concludes by demonstrating that the standard for vacating arbitration awards applied by the Kentucky Supreme Court in *Carrs Fork* is contrary to policy considerations favoring arbitration and arbitration awards.\(^\text{15}\) Consequently, Kentucky should adopt the standard applied by the Georgia Supreme Court in *Hundley* and the majority of courts under the Federal Arbitration Act.

I. THE ACCEPTANCE OF ARBITRATION IN KENTUCKY

In *Kodak Mining Co. v. Carrs Fork Corp.*,\(^\text{16}\) the Kentucky Supreme Court determined “whether an agreement to arbitrate disputes arising under a contract evidencing a transaction in interstate commerce is valid and specifically enforceable by stay of a judicial proceeding brought in Kentucky where the proceeding involves issues referable to arbitration.”\(^\text{17}\) The court held that such agreements are irrevocable and specifically enforceable, thus signifying a reversal of the Commonwealth’s common law.\(^\text{18}\)

A. The Kentucky Supreme Court’s Decision in Kodak Mining

*Kodak Mining* involved an action brought by Carrs Fork Corporation, a lessor under two coal mining leases.\(^\text{19}\) “Both of the leases contained a broad arbitration clause.”\(^\text{20}\) The clause in the first lease, dated March 31, 1956,
provided: "If at any time, at termination of this lease or otherwise, there shall be a controversy concerning any item or term of this lease, the said Lessee and Lessor agree to arbitrate as follows..."21 The clause in the second lease, dated April 1, 1956, provided:

In the event of any difference or dispute arising between the parties hereto, growing out of the terms of this lease, or the construction thereof, or the operations of the lessee or rights or obligations of the lessor or lessee hereunder, such questions shall be determined by arbitration in the manner provided for in this article and the fact that arbitration is especially provided for under certain clauses hereof shall not be deemed to exclude arbitration under other clauses where not so specifically provided.22

When Carrs Fork brought an action against Kodak, alleging violations of Kodak's obligations under the leases, Kodak raised Carrs Fork's failure to arbitrate the dispute as a defense. The trial judge rejected Kodak's arbitration defense and ordered the litigation to continue. Kodak sought interlocutory relief from the court of appeals, which denied Kodak's motion. Kodak then sought further interlocutory relief from the Supreme Court of Kentucky.23

In determining that agreements to arbitrate future disputes were specifically enforceable, the court referred to its 1977 decision in Fite & Warmath Construction Co. v. MYS Corp.24 In Fite, the court held that the U.S. Arbitration Act of 1925 applies "to actions brought in the courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing a transaction in interstate commerce."25 In Kodak Mining, the court clarified its holding in Fite and held that Kentucky has no public policy preventing enforcement of agreements to arbitrate future disputes irrespective of whether the Federal Arbitration Act or comparable legislation applies.26

B. The Codification of the Kentucky Uniform Arbitration Act

Following Kodak Mining's reversal of the common law treatment of agreements to arbitrate future disputes, the Kentucky legislature enacted a

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21 Id.
22 Id.
23 See id.
24 Fite & Warmath Constr. Co. v. MYS Corp., 559 S.W.2d 729 (Ky. 1977).
25 Id. at 734.
26 See Kodak Mining, 669 S.W.2d at 921.
modern, broad arbitration statute that made agreements to arbitrate future disputes “valid, enforceable and irrevocable.”

Although arbitration was first recognized by Kentucky legislation approximately two hundred years ago, the 1984 Kentucky Uniform Arbitration Act represented the first time agreements to arbitrate future disputes were enforceable.

The Uniform Arbitration Act was adopted by the National Conference of the Commissioners on Uniform State Laws in 1955 and amended in 1956, and approved by the American Bar Association in 1955 and 1956. Although Kentucky’s version of the Uniform Arbitration Act is somewhat limited, it represents a notable improvement in arbitration law in Kentucky. Furthermore, the Kentucky legislature expressly recognized the goal of making uniform the law of arbitration in states that adopt the Uniform Act. The effect of the Act should be a decrease in conflict-of-law issues in Kentucky and other jurisdictions.

II. VACATION OF ARBITRATION AWARDS: THE KENTUCKY STANDARDS

Before the enactment of the Kentucky Uniform Arbitration Act, Kentucky courts could vacate arbitration awards based on “equitable principles.” The Kentucky Uniform Arbitration Act, however, includes a specific provision that establishes when a court shall vacate an arbitration award. The primary focus of the remainder of this Note is to demonstrate that the statutory grounds for vacating arbitration awards

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28 See id. at 328. For a complete discussion of prior Kentucky statutes governing arbitration and arbitration awards, see Alvin L. Goldman, A Proposed Arbitration Act for Kentucky, 22 ARB. J. 193, 208-09 (1967).
29 See AMERICAN BAR ASSOCIATION, THE UNIFORM ARBITRATION ACT 2.
30 For a comprehensive analysis of the limitations of the Kentucky Uniform Arbitration Act, see Stipanowich, supra note 7, at 332-33. See also KRS § 417.050 (stating that this Arbitration Act does not apply to arbitration agreements between employers and employees or to insurance contracts).
31 See Stipanowich, supra note 7, at 333.
32 See id.
33 See id.
34 See Law of July 1, 1953, KRS § 417.018 (translating Civil Code § 451(8)) (repealed in 1984 by the Uniform Arbitration Act, KRS §§ 417.045-.240) [hereinafter KRS § 417.018 (repealed)].
35 See KRS § 417.160. This author has found no Kentucky case in which this statutory provision has been applied.
should be exclusive. Kentucky courts’ ability to vacate arbitration awards through their equitable powers should not survive the enactment of the Kentucky Uniform Arbitration Act.

A. Current Statutory Requirements for Vacating an Arbitration Award in Kentucky

Kentucky Revised Statutes ("KRS") § 417.160 governs when a Kentucky court shall vacate an arbitration award. Essentially, the

36 KRS § 417.160 provides:
(1) Upon application of a party, the court 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 arbitrators 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 the provisions of KRS 417.090, 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 KRS 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.

(2) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant; except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

(3) In vacating the award on grounds other than stated in paragraph (a) of subsection (1) of this section, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with KRS 417.070; or, if the award is vacated on grounds set forth in paragraphs (c) and (d) of subsection (1) of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with KRS 417.070. The time within which the agreement requires the award to be made is applicable to the rehearing and
Kentucky Act requires a court to affirm an arbitration award unless there was corruption, fraud, or partiality, or the arbitrator exceeded his or her powers. Although the Kentucky Uniform Arbitration Act was not controlling, the Supreme Court of Kentucky referenced this provision of the Kentucky Act in *Carrs Fork Corp. v. Kodak Mining Co.*, when the case was before it a second time in 1991.

B. *The Kentucky Supreme Court's Vacation of the Arbitration Award in Carrs Fork Corp. v. Kodak Mining Co.*

When *Kodak Mining Co. v. Carrs Fork Corp.* was before the Kentucky Supreme Court initially in 1984, Kodak argued for specific enforcement of its agreement with Carrs Fork to arbitrate future disputes. The Supreme Court of Kentucky held that the agreement between Kodak and Carrs Fork was valid and enforceable. On remand, a majority of the three-member arbitration panel ruled in favor of Carrs Fork, citing Kodak's failure to diligently mine the coal leases. The circuit court accepted the decision of the arbitrators but the court of appeals reversed. Carrs Fork then appealed to the Kentucky Supreme Court, which affirmed the decision of the appellate court to vacate the award.

The Kentucky Uniform Arbitration Act was not applicable in *Carrs Fork* because Carrs Fork and Kodak entered into their arbitration agreement in 1956. The Kentucky Uniform Act expressly states that it is applicable only to arbitration agreements entered into after its commencement on the date of the order.

(4) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

*Id.* (emphasis added).

37 See infra notes 46-47 and accompanying text.
38 Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699 (Ky. 1991).
39 See id. at 702.
40 Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917 (Ky. 1984).
41 See supra notes 19-26 and accompanying text.
42 See supra notes 19-26 and accompanying text.
43 *Carrs Fork*, 809 S.W.2d at 701.
44 See id.
45 See id.
46 See *Kodak Mining*, 669 S.W.2d at 918.
effective date, July 13, 1984. Common law and previous arbitration statutes, therefore, were controlling in Carrs Fork.

The applicable arbitration statute, enacted in 1942, contained a provision that governed judicial review of arbitration awards: "No award shall be set aside for the want of form. But courts shall have power over awards on equitable principles as heretofore." Although the appropriate scope of judicial review had been the subject of much debate, it was the common law rule that an arbitrator's decision would not be vacated for mere mistakes of law or fact; an arbitrator's judgment would be set aside only if there was "clear and convincing evidence of fraud, dishonesty or corruption in the arbitration proceedings." Prior to Carrs Fork, the 1942 Kentucky statute was interpreted consistently with these common law principles.

In Carrs Fork, the Kentucky Supreme Court acknowledged that "[i]t is well settled that the general rule is that an arbitration award will not be set aside for any error, whether in law or fact." In fact, the majority opinion, written by Justice Wintersheimer, emphasized the judicial deference afforded arbitration determinations. The court recognized that the Kentucky rule regarding judicial review of arbitration awards is found in Taylor v. Fitz Coal Co., where the Supreme Court of Kentucky stated:

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

47 See KRS § 417.230.
48 See id. § 417.018 (repealed).
49 Stipanowich, supra note 7, at 331-32. These common law grounds for vacation parallel the statutory grounds provided by the Kentucky Arbitration Act.
50 See Taylor v. Fitz Coal Co., 618 S.W.2d 432, 433 (Ky. 1981) (explaining that the scope of judicial review of an arbitration award is strictly limited and that an award may be set aside only if there has been a "gross mistake of law or fact constituting evidence of misconduct amounting to fraud or undue partiality" (citation omitted)).
51 Carrs Fork, 809 S.W.2d at 701 (emphasis added).
52 See id.
53 Taylor v. Fitz Coal Co., 618 S.W.2d 432 (Ky. 1981).
54 Id. at 433 (quoting Burchell v. March, 58 U.S. 344, 349 (1855)).
The court in Taylor also stated that an arbitration award may be vacated only if there has been a gross mistake of law or fact constituting evidence of misconduct amounting to fraud or undue partiality. Because neither party in Taylor suggested fraud or undue partiality by the arbitrators, the award was not reviewable by the judiciary.

In addition to acknowledging common law principles regarding the finality of an arbitration award, the court in Carrs Fork explained that under the Uniform Arbitration Act the grounds for vacating an arbitration award included "fraud, corruption, undue partiality, misconduct, exceeding the powers of the arbitrator, refusal to hear material evidence, prejudicial misconduct at the hearing, lack of a valid arbitration agreement, the issue not having been determined adversely in court." The court's presentation of the Kentucky rules regarding the finality of arbitration awards was correct; the injustice of the court's decision is its application of Kentucky law to the arbitration award and its unjustified encroachment upon the independence of the arbitration process through expansion of the legal principles enumerated in Taylor.

Even though the court emphasized it could not set aside an arbitration award due to a mistake of law or fact, it nevertheless vacated the award due to an alleged mistake of law. The court stated that the arbitration award must be vacated because the arbitrators "ignored the legal maxim that the law abhors a forfeiture of a coal lease." However, even though the arbitrators' decision did not reflect the legal abomination of the forfeiture of a coal lease, the decision, at worst, was based on a mistake of law. In such a case, the law of Kentucky dictated that the judiciary leave the award undisturbed. The court attempted to justify its decision by emphasizing its equitable powers over arbitration awards, stating that the legal principles enunciated in Taylor should be broadened because "[t]here are some situations which do require equitable treatment, and we believe this is such a case." The court also quoted Second Society of Universalists v. Royal Insurance Co. for the proposition that "an

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55 Id.; see also Smith v. Hillerich & Bradsby Co., 253 S.W.2d 629 (Ky. 1952); First Baptist Church (Colored) v. Hall, 246 S.W.2d 464 (Ky. 1952).
56 See Taylor, 618 S.W.2d at 433.
57 Carrs Fork, 809 S.W.2d at 702. See supra notes 46-47 and accompanying text.
58 Carrs Fork, 809 S.W.2d at 701.
59 See supra notes 51-56 and accompanying text.
60 Carrs Fork, 809 S.W.2d at 702.
award might be so *grossly* and *palpably* below the actual loss as to afford intrinsic evidence of fraud, bias or prejudice.'

However, there was no basis for the court to hold that the arbitrators' failure to recognize that the law disfavors the forfeiture of a coal lease was a palpable mistake. In addition, it was unwise to broaden the standard of judicial review of arbitration awards to allow the court to intervene in the name of equity. This decision contradicts the modern trend.

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62 *Carrs Fork*, 809 S.W.2d at 702 (quoting *Royal Ins.*, 109 N.E. at 387) (emphasis added).

63 See id. at 704 (Leibson, J., dissenting). Justice Leibson stated:

> The standard for vacating the arbitration award (as both parties agreed) is 'gross mistake of law or fact proving undue partiality.' At oral argument Kodak Mining conceded there was no single error of law or fact qualifying under this standard and that he was relying instead on the cumulative effect of a number of alleged errors.

> ... Kodak Mining insisted on its right to arbitrate and got it; it should now be prepared to accept the results absent proof of some illegality amounting to a fraud. ... 

> ... We should keep a clear line of demarcation between the standard for reviewing the decision of a lower court and an agreed arbitration. By failing to abide by the difference, the Majority Opinion strikes at the heart of the process of arbitration.

*Id.* (Leibson, J., dissenting).

The court attempted to cloak the impact of its decision in *Carrs Fork* by stating that the decision "should not be taken as a signal that arbitration awards will be casually overturned." The court further stated that it reversed the particular award in *Carrs Fork* "because of the failure of the award to provide equity so as to produce palpable error." Based on the facts of *Carrs Fork*, this reasoning makes it difficult to imagine that the court has not dramatically altered arbitration law in Kentucky. Moreover, it seems to confirm Justice Leibson's claim in

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65 *Carrs Fork*, 809 S.W.2d at 703.

66 Id.

67 The court's disapproval of the finality of arbitration regarding questions of law is best exemplified by Justice Combs' concurring opinion:

KRS 417.018 purports to close the courthouse doors as to mistakes of law and fact, to persons who have elected to be bound by arbitration. This statute represents a usurpation of the judicial power by the legislature in that it purports to give finality to the conclusions of law of the arbitrators. Only the people have the power to change the
his dissent that the "Majority Opinion strikes at the heart of the process of arbitration." The expansion of judicial power over arbitration awards in *Carrs Fork* is seemingly far-reaching and establishes a bad precedent. Primarily, the decision leaves open the issue of whether the grounds for vacating an arbitration award articulated in the Kentucky Uniform Arbitration Act will be exclusive in cases where the Act is applicable.

III. VACATION OF ARBITRATION AWARDS: THE GEORGIA STANDARDS

The Kentucky Arbitration Act is based on the Uniform Arbitration Act. Many other states have enacted similar legislation also based on the Uniform Arbitration Act. One state that has enacted legislation that

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constitution. Section 26 of our constitution provides that all things contrary to the Bill of Rights and this constitution are null and void.

There is a need to expedite the termination of controversies. Arbitration may be one such vehicle. But under our constitution neither the parties nor the arbitrators can tie the hands of the court on questions of law.

*Id.* at 703 (Combs, J., concurring).

68 *Id.* at 704 (Leibson, J., dissenting).

69 See *supra* notes 27-33 and accompanying text.

is substantially similar to the Kentucky Arbitration Act is Georgia.\textsuperscript{71} In

\begin{itemize}

Nebraska has also enacted a version of the Uniform Arbitration Act codified at NEB. REV. STAT. §§ 25-2601 to -2622 (1995). The Supreme Court of Nebraska has held, however, that the Act violates Article I, Section 13 of the Nebraska Constitution to the extent that the Act provides for arbitration of future disputes. See State v. Nebraska Ass'n of Pub. Employees, 477 N.W.2d 577 (Neb. 1991).


\textsuperscript{71} See GA. CODE ANN. § 9-9-1 to -13 (Supp. 1996). Although the Georgia Arbitration Code is not based on the Uniform Arbitration Act, the grounds for vacating an award enumerated in the Code parallel those in the Kentucky Arbitration Act. Section 9-9-13 governs when a Georgia court may vacate an arbitration award. It states:

(a) An application to vacate an award shall be made to the court within three months after delivery of a copy of the award to the applicant.

(b) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of the party were prejudiced by:

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\item (1) Corruption, fraud, or misconduct in procuring the award;
\item (2) Partiality of an arbitrator appointed as a neutral;
\item (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or
\item (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration
Greene v. Hundley, the Supreme Court of Georgia reversed the decision of the Georgia Court of Appeals to vacate an arbitration award. In Greene, the Georgia Supreme Court applied the Georgia Arbitration Code and determined that it provided the exclusive grounds for vacating an arbitration award.

Greene involved a contractual agreement between a homeowner, Hundley, and a construction contractor, Greene, whereby Greene agreed to build a residence for Hundley. The contract contained an arbitration clause that stated:

with notice of this failure and without objection.

(c) The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a demand for arbitration or order to compel arbitration if the court finds that:

(1) The rights of the party were prejudiced by one of the grounds specified in subsection (b) of this Code section;
(2) A valid agreement to arbitrate was not made;
(3) The agreement to arbitrate has not been complied with; or
(4) The arbitrated claim was barred by limitation of time, as provided by this part.

(d) The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(e) Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrators or before new arbitrators appointed as provided by this part. In any provision of an agreement limiting the time for a hearing or award, time shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court. The court’s ruling or order under this Code section shall constitute a final judgment and shall be subject to appeal in accordance with the appeal provisions of this part.


74 See Greene, 468 S.E.2d at 351. The court held that “[o]ur consideration of the Georgia Arbitration Code and the general purpose of arbitration leads us to conclude that an arbitration award may be vacated only if one or more of the four statutory grounds set forth in section 9-9-13(b) is found to exist.” Id.
75 See id.
Any controversy relating to the construction of the residence or any other matter arising out of the terms of this contract shall be settled by binding arbitration. The cost incurred and the fees of the arbitrators shall be assessed between the parties as determined by the arbitrators. A hearing shall be conducted pursuant to the Rules of the American Arbitration Association with regard to the Construction Industry Arbitration Rules. Notice of intention to arbitrate with the American Arbitration Association shall be sent by certified mail to the respective parties.76

When disputes arose over the construction of the residence, they were submitted for arbitration as required by the contract. Following an extensive two-day hearing, the arbitrator ruled in favor of both parties, awarding $17,000 to Hundley and $20,400 to Greene. The arbitration award, however, set forth no findings of fact.77

Hundley filed an application to vacate the arbitration award with the superior court. The superior court denied the application and entered an order confirming the award, explaining that Hundley failed to establish the existence of any of the four grounds for vacating an award set forth in the Georgia Arbitration Code. Hundley then appealed to the Georgia Court of Appeals.78

The Georgia Court of Appeals reversed the decision of the superior court and vacated the arbitration award.79 The appellate court stated that although arbitration awards are controlled exclusively by the Georgia Arbitration Code, they are still subject to the judicial requirement that they be based upon findings of fact supported by the evidence of record.80 The court acknowledged that it could not weigh evidence that was considered by the arbitrator; however, the court concluded that the rule applies only if there is evidence to support the award in the first place.81 The court reasoned that "[a]rbitration is part of the judicial process, for the legislature made arbitration subject to judicial review on the application of any party."82 Greene appealed the decision to vacate the arbitration award to the Supreme Court of Georgia.

In Greene, the Supreme Court of Georgia acknowledged that the Georgia Arbitration Code was controlling. The court stated that the enactment of the Arbitration Code "repealed common law arbitration in its entirety, and it

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76 Id.
77 See id.
78 See id.
79 See id. at 352.
81 See id.
82 Id. at 253.
must, therefore, be strictly construed.”\textsuperscript{83} The court further recognized the statutory grounds for vacating an arbitration award and stated that they were the \textit{exclusive} grounds for vacating an arbitration award.\textsuperscript{84} The court based this determination on relevant case law\textsuperscript{85} and the fact the Georgia Arbitration Code specifically states that “merely because the relief granted in the arbitration award ‘could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm an award.’”\textsuperscript{86}

In applying these principles of Georgia law, the Georgia Supreme Court reversed the decision of the Georgia Court of Appeals and reinstated the arbitration award. The court found that since no evidence that any of the statutory grounds for vacation existed, the court was “bound to confirm the award.”\textsuperscript{87} Furthermore, the Georgia Supreme Court held that the lower court erred in determining that the rule prohibiting a court from evaluating evidence that the arbitrator considered is dependent upon the existence of some evidence to support the award.\textsuperscript{88} The court explained:

The prohibition against considering the sufficiency of the evidence as grounds for vacating an arbitration award is unconditional. Therefore, a reviewing court is prohibited from weighing the evidence submitted before the arbitrator, regardless of whether the court believes there to be sufficient evidence, or even any evidence, to support the award.\textsuperscript{89}

\textsuperscript{83} Greene, 468 S.E.2d at 352 (emphasis added).
\textsuperscript{84} See id. The court will vacate an award only if the rights of the applying party are prejudiced by:

(1) Corruption, fraud or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping of the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) A failure to follow the procedure of the [Georgia Arbitration Code], unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.

GA. CODE ANN. § 9-9-13(b).
\textsuperscript{86} Greene, 468 S.E.2d at 352 (quoting GA. CODE ANN. § 9-9-13(d) (Supp. 1996)). KRS § 417.160 also contains this language. See supra note 36 and accompanying text.
\textsuperscript{87} Greene, 468 S.E.2d at 353.
\textsuperscript{88} See id.
\textsuperscript{89} Id. at 354.
Accordingly, the lower court's decision to vacate the arbitration award was reversed.

In further explaining its decision to limit judicial vacation of arbitration awards to the grounds set forth in the Georgia Arbitration Act, the *Greene* court discussed the policy considerations for allowing only very limited judicial review. The court stated that "allowing an appellate court to make a determination of the sufficiency of the evidence in arbitration cases would only frustrate the purpose of arbitration." The court explained:

A primary advantage of arbitration is the expeditious and final resolution of disputes by means that circumvent the time and expense associated with civil litigation. The legislature recognized this advantage by enacting the Arbitration Code, in which it made limited provisions [sic] for the judicial review of arbitration awards, and set forth four grounds upon which a court may vacate awards. However, that legislative action did not make arbitration a part of the judicial process, nor did it make arbitration subject to traditional rules of appellate review. To the contrary, arbitration is a unique procedure that exists in Georgia due to legislative fiat, and it is conducted in accordance with the rules established by the legislature. Were we to allow an appellate court to determine whether there is sufficient evidence to support an arbitration award, we would make such awards entirely subject to independent determinations by courts of law, and thereby frustrate the prompt resolution of arbitrated disputes and the finality of arbitration awards.

The Georgia Supreme Court's decision in *Greene* was praised by many arbitration supporters, including the Atlanta Bar Association and eleven construction trade organizations. These organizations had joined the case as amicus curiae, claiming that the lower court's decision would have crippled arbitration. A supporter of the holding in *Greene* stated that "[t]he opinion is in accord with the general rule of courts across the country. It's clearly in the spirit of the present judicial environment in this country which is seeking to incur alternative means of dispute resolution." It was pointed out that the parties had agreed to arbitrate disputes and that the *Greene*

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90 Id.
91 Id. (emphasis added).
92 See Lolita Browning, That's Why It's Called Binding, FULTON COUNTY DAILY REP. (Fulton County, Ga.), Apr. 12, 1996, at 1.
93 See id.
94 Id. (quoting Superior Court Judge Jack P. Etheridge, current head of the Atlanta office of Judicial Arbitration and Mediation Services/Endispute).
opinion merely honors that agreement and stresses that the purpose of arbitration is to avoid litigation. 95

IV. VACATION OF ARBITRATION AWARDS: THE FEDERAL STANDARDS

The Federal Arbitration Act also contains a provision that governs when a court shall vacate an arbitration award. 96 The grounds for vacating an arbitration award under the Federal Act parallel those in the Kentucky Uniform Arbitration Act. 97 This Part provides an overview of judicial

95 See id.


97 Section 10 of the Federal Arbitration Act governs when a court may vacate an arbitration award. It mirrors the grounds set forth in both the Kentucky Arbitration Act and the Georgia Arbitration Code. Section 10 of the Federal Arbitration Act provides:

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

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

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

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

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Id.; compare with KRS § 417.160 (see supra note 36 and accompanying text). Both KRS § 417.160 and section 10 of the Federal Arbitration Act are essentially aimed at judicial enforcement of arbitration awards, unless the award was procured through corruption or fraud. The Kentucky statute emphasizes that
application of the Federal Arbitration Act and the standards courts have
applied in determining whether to vacate an arbitration award.

Many courts have had the occasion to apply the terms of section 10 of
the Federal Arbitration Act and have generally afforded great deference to
arbitration decisions. Although courts have not consistently held that the
statutory grounds for vacation of an arbitration award under the Federal
Arbitration Act are exclusive, courts have seldom vacated arbitration
awards under the Federal Arbitration Act.

Arbitral awards cannot be vacated simply because such an award would not have
been granted by a court.

98 4 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 40.5.2.1
(1994).

99 Many courts have expressly stated that the Federal Arbitration Act
provides the exclusive grounds for vacating an arbitration award. See Barbier v.
Shearson Lehman Hutton, Inc., 948 F.2d 117 (2d Cir. 1991) (stating that judicial
review of an arbitration award is narrowly limited and may be vacated only if
at least one of the grounds specified in the Federal Arbitration Act is found to
exist); Saxis S. S. Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577 (2d Cir.
1967) (stating that where parties have agreed that any dispute between them shall
be submitted to arbitration, the role of the court is limited to determining
whether there exists one of the specific grounds for vacation of an award
provided by the Federal Arbitration Act); Maxus, Inc. v. Sciacca, 598 So. 2d
1376 (Ala.) (stating that under federal law, it is not the function of the court to
agree or disagree with the reasoning of the arbitrator, but only to ascertain
whether there exists one of the specific grounds for vacation of the award),
overruled on other grounds by Terminix Intern. Co. v. Jackson, 628 So. 2d 1376
(Ala. 1992). However, some courts have stated or suggested that grounds to
vacate an arbitration award exist in addition to the statutory grounds. See Lee v.
Chica, 983 F.2d 883 (8th Cir.) (stating that judicial review of arbitration awards
is narrowly limited and an arbitration award will not be set aside unless it is
completely irrational or evidences manifest disregard for law), cert. denied, 510
U.S. 906 (1993); Trustees of Lawrence Academy v. Merrill Lynch, Pierce,
to statutory basis for review of arbitration awards, the court may properly vacate
an arbitration award that is contrary to the plain language of the collective
bargaining agreement or that is made in manifest disregard of the applicable
law); Transit Cas. Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346
(S.D.N.Y. 1987) (stating that the standard of review for arbitration awards is
extremely narrow and that courts may vacate the award only upon a showing of
one of the statutory grounds enumerated in the Federal Arbitration Act, or if the
arbitrators acted in manifest disregard of the law, or if the award is incomplete,
ambiguous, or contradictory), aff'd, 841 F.2d 1117 (2d Cir. 1988). See infra
notes 111-40 and accompanying text.

100 See MACNEIL ET AL., supra note 98, § 40.6.2.
Even before the enactment of the Federal Arbitration Act, courts applied a consistent approach to arbitration awards: awards should be confirmed and enforced unless there is clear evidence of a gross impropriety. A leading case before the enactment of the Federal Arbitration Act is *Burchell v. Marsh,* where the United States Supreme Court stated that the general principles upon which a court will vacate an arbitration award are “too well settled by numerous decisions to admit of doubt.” The *Burchell* court explained:

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, *either in law or fact.*

The Federal Arbitration Act reflects this “pro-award stance” and has been consistently sustained by the courts.

In 1972, the United States Court of Appeals for the Second Circuit held that judicial review of arbitration awards is “severely limited, being confined to determining whether or not one of the grounds specified by [the Federal Arbitration Act] for vacation of an award exists.” The Second Circuit explained that this restriction is “to further the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation and often without any requirement that the arbitrators state the rationale behind their decision.” Courts have articulated “that the ‘strong policy’ favoring ‘voluntary commercial arbitration’ requires the judicial review of an arbitration award be ‘narrowly limited.’” Thus, in *Advest, Inc. v. McCarthy* (emphasis added).

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101 *See id. § 40.1.4 (citing Burchell v. Marsh, 58 U.S. (17 How.) 344 (1854)).*
102 *Burchell v. Marsh, 58 U.S. 344 (1854).*
103 *Id. at 349.*
104 *Id. (emphasis added).*
105 *See MACNEIL ET AL., supra note 98, § 40.1.4.*
107 *Id.*
108 *See MACNEIL ET AL., supra note 98, § 40.1.4.*
109 *Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990).*
the First Circuit Court of Appeals stated "[t]he statute does not allow courts to roam unbridled in their oversight of arbitral awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways."\textsuperscript{110}

Many courts state that the grounds for vacating an arbitration award enumerated in the Federal Arbitration Act are exclusive. This principle has been expressed by the Fifth,\textsuperscript{111} Sixth,\textsuperscript{112} Seventh,\textsuperscript{113} and Ninth\textsuperscript{114} Circuits. The United States Supreme Court stated in \textit{Wilko v. Swan}\textsuperscript{115} that judicial power to vacate an arbitration award is limited and that a court may vacate an award only when one of the statutory grounds is met.\textsuperscript{116}

Other courts, however, have developed what appear to be independent, non-statutory grounds for setting aside arbitration awards.\textsuperscript{117} The courts include the First,\textsuperscript{118} Third,\textsuperscript{119} Fifth,\textsuperscript{120}

\textsuperscript{110} \textit{Id.} at 8.

\textsuperscript{111} \textit{See} McIlroy v. Paine Webber, Inc., 989 F.2d 817, 820 (5th Cir. 1993) (rejecting argument to vacate arbitration award that was allegedly a result of "gross mistake").

\textsuperscript{112} \textit{See} Corey v. New York Stock Exch., 691 F.2d 1205, 1212 (6th Cir. 1982) ("The federal Arbitration Act provides the exclusive remedy for challenging an award . . . ").

\textsuperscript{113} \textit{See} Chameleon Dental Prod., Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991) (rejecting a "manifest disregard of the law" exception to review under the Federal Arbitration Act).

\textsuperscript{114} \textit{See} Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1059 (9th Cir. 1991) ("The Federal Arbitration Act, 9 U.S.C. § 10, sets out the grounds upon which a federal court may vacate the decision of an arbitration panel.").


\textsuperscript{116} \textit{See id.} at 436 & n.22 (citing 9 U.S.C. § 10 (West Supp. 1996)).

\textsuperscript{117} \textit{See} MACNEIL \textit{ET AL.}, \textit{supra} note 98, § 40.5.1.2.

\textsuperscript{118} \textit{See} Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990) (finding two categories of cases subject to review: 1) labor law cases where an award is contrary to plain meaning of agreement, and 2) cases where it is clear from the record that the arbitrator recognized applicable law and ignored it).

\textsuperscript{119} \textit{See} Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., 868 F.2d 52, 56 (3d Cir. 1989) ("We must determine if the form of the arbitrators' award can be rationally derived either from the agreement between the parties or the parties' submissions . . . "); \textit{Swift Indus., Inc. v. Botany Indus., Inc.}, 466 F.2d 1125, 1131-34 (3d Cir. 1972) (holding that under the agreement the arbitrator did not have the authority to award a $6 million cash bond).

\textsuperscript{120} \textit{See} Anderman/Smith Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215,
Eighth, Tenth, and Eleventh Circuits. These courts have articulated many different labels for these allegedly non-statutory grounds, including "arbitrary or capricious," "completely irrational," "manifest disregard of law and fact," "contrary to the plain language of the collective bargaining agreement," failure "to draw its essence" from the contract, "a sort of 'abuse of discretion' standard," "unfounded in reason and fact," and that the award is against public policy.

Regardless of what many courts say, it is unclear whether the allegedly non-statutory doctrines are independent of the Federal Arbitration Act's ground for vacation, or whether they simply define the statutory ground. Not only can these grounds be viewed as putting flesh on the bare bones of [the Federal Arbitration Act § 10(a)(4)], but

121 See Osceola County Rural Water Sys. v. Subsurfco, 914 F.2d 1072, 1075 (8th Cir. 1990) (holding that, in addition to the grounds specified in the Federal Arbitration Act, an award may be vacated if it fails to draw its essence from the contract).


123 See Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 779 (11th Cir. 1993) (citing two non-statutory bases for vacating an award: 1) if award is arbitrary and capricious; and 2) if award is contrary to public policy).


126 Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1025 (9th Cir. 1991).

127 Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990).

128 Anderman/Smith Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990).

129 Jenkins v. Prudential-Bache Sec., Inc. 847 F.2d 631, 634 (10th Cir. 1988).

130 Local 1445, United Food & Commercial Workers Int'l Union, AFL-CIO v. Stop & Shop Cos., 776 F.2d 19, 21 (1st Cir. 1985).

131 See MACNEIL ET AL., supra note 98, § 40.5.1.2.


133 See MACNEIL ET AL., supra note 98, § 40.5.1.3.
they should be so recognized . . .”\textsuperscript{134} Reasons the purportedly non-statutory grounds should be so viewed include the argument that “when these grounds are treated as independent, [the Federal Arbitration Act § 10(a)(4)] itself means very little, and its judicial recognition is slighted.”\textsuperscript{135}

In \textit{Todd Shipyards Corp. v. Cunard Line, Ltd.},\textsuperscript{136} the Ninth Circuit Court of Appeals accepted the principle that the “so-called non-statutory grounds” are methods of defining section 10(a)(4) of the Federal Arbitration Act.\textsuperscript{137} The court stated:

\begin{quote}
[Federal Arbitration Act § 10(a)(4)] sets out the grounds upon which a federal court may vacate the decision of an arbitration panel. The statute addresses decisions influenced by corruption or undue influence, and cases in which arbitrators exceed their power under the terms of the agreement to arbitrate. Courts have interpreted this section narrowly, in light of Supreme Court authority strictly limiting federal review of arbitration decisions. It is generally held that an arbitration award will not be set aside unless it evidences a “manifest disregard for law.”\textsuperscript{138}
\end{quote}

As explained in \textit{Todd Shipyards}, the Ninth Circuit believes that “manifest disregard for law,” a non-statutory ground for vacating an arbitration award, is subsumed within the “exceeded their powers” ground enumerated in section 10 of the Federal Arbitration Act.\textsuperscript{139} The treatment of non-statutory doctrines in \textit{Todd Shipyards} represents a sound approach that conforms to the spirit of the Federal Arbitration Act and furthers the policies of arbitration.\textsuperscript{140}

\section*{Conclusion}

The decision of the Georgia Supreme Court in \textit{Greene v. Hundley},\textsuperscript{141} and the application of the Federal Arbitration Act by the Fifth, Sixth,
Seventh, and Ninth Circuits as well as the United States Supreme Court\textsuperscript{142} demonstrate that the decision of the Kentucky Supreme Court in \textit{Carrs Fork Corp. v. Kodak Mining Co.}\textsuperscript{143} is unwise. Consequently, intervention by Kentucky courts in the name of equity to vacate arbitration awards should not survive the enactment of the Kentucky Uniform Arbitration Act.\textsuperscript{144}

Parties choose to arbitrate their disputes for several reasons. Arbitration affords privacy, flexibility, and an opportunity to avoid the court system.\textsuperscript{145} Avoiding the court system allows parties to resolve disputes in a more efficient, inexpensive, and prompt manner, and better preserves business relationships.\textsuperscript{146} Arbitration also benefits the judicial system because it eases congested court calendars.\textsuperscript{147} Because of these policy considerations favoring arbitration, judicial review of arbitration awards should be extremely limited. The statutory grounds for vacating an award should be exclusive, thereby preventing a court from vacating an award based on a mistake of law.

When parties incorporate arbitration clauses into a contract, they have essentially agreed that if a dispute arises, the determination of the designated neutral shall be substituted for that of a court. The parties expect that the decision of the arbitrator will be final, absent extreme circumstances, including corruption, fraud, partiality, and other circumstances codified by the statutes.\textsuperscript{148} By vacating awards on grounds other than those enumerated in the statutes, courts not only defeat the intent of the contracting parties, they also undermine many of the policies supporting arbitration.

\textsuperscript{142} See supra notes 69-95, 111-16 and accompanying text.
\textsuperscript{143} Carrs Fork Corp. v. Kodak Mining Co., 669 S.W.2d 917 (Ky. 1991).
\textsuperscript{144} KRS §§ 417.045-.240. This is further supported by the fact that the Kentucky Uniform Arbitration Act provides that "[t]he fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award." \textit{Id.} § 417.160(1)(e). This language mirrors that found in Section 9-9-13(d) of the Georgia Arbitration Code. See supra note 71 and accompanying text.
\textsuperscript{145} See Local No. 153, Office of Prof'l Employees Int'l Union v. Trust Co., 522 A.2d 992, 994-95 (N.J. 1987) (discussing the purpose of arbitration with respect to labor disputes).
\textsuperscript{146} See Aptowitz, supra note 3, at 999 (listing reasons why arbitration has become a favored alternative to litigation).
\textsuperscript{148} See supra note 36 and accompanying text.
Allowing the grounds for vacating an award enumerated in the Kentucky Arbitration Act to be exclusive would best further the purposes of arbitration — the prompt resolution of arbitrated disputes and the finality of arbitration awards. Consequently, the approach of the Kentucky Supreme Court in *Carrs Fork v. Kodak Mining* should be abandoned.