The International Commercial Disputes Committee of the New York City Bar Association Reports on the Manifest Disregard of Law Doctrine and International Arbitration in New York

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In the face of the frequently heard criticism that the existence of the "manifest disregard of law" doctrine makes New York a poor choice as a seat for international arbitrations, the International Commercial Disputes Committee of the New York City Bar Association sought to evaluate whether such a position is justified. In particular, the Committee undertook an empirical review of the extent to which the manifest disregard doctrine has actually been applied in the Second Circuit (as well as in other Circuits) to set aside international arbitration awards, and examined whether the doctrine in fact renders New York a less desirable venue than other major international arbitration fora such as Paris, London, Switzerland, and Hong Kong.

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The Committee, in a report entitled "The Manifest Disregard Doctrine and International Arbitration in New York," issued in the fall of 2012, found that the doctrine has been applied exceedingly sparingly, especially in the context of international awards rendered in New York. In fact, since the Second Circuit began applying the doctrine in 1960, it appears from the Committee's research that *none* of the arbitral awards vacated on that ground was an international or Convention award. The Committee also found that, regardless of the legal rubric used, courts in other leading international arbitral seats have shown a comparable willingness to provide relief from awards that clearly depart from basic notions of fairness. Consequently, the existence of the manifest disregard doctrine does not make New York unique in this respect.

Empirical review of the application by the federal courts in New York of the manifest disregard doctrine reveals: (i) that manifest disregard of the law is rarely raised as the sole ground for challenging an arbitral award; (ii) that review for manifest disregard does not amount to a review of substantive arbitral decisions for errors of law; and (iii) that litigants are rarely successful in invoking the doctrine in either federal or state court. Moreover, almost fifty percent of all cases in which defendants successfully invoked manifest disregard involved domestic employment issues.

The limited actual impact of manifest disregard on international arbitration in New York is further reinforced by the very high threshold required to set aside an award on the ground of manifest disregard. Following the Supreme Court's holding that parties cannot contractually expand the grounds for judicial review of an arbitral award in *Hall Street Associates, LLC v. Mattel*,[1] the Second Circuit "reconceptualiz[ed] manifest disregard as judicial gloss on the specific grounds for vacatur of arbitration awards under 9 U.S.C. § 10."[2] In *Stolt-Nielsen*, the Second Circuit recognized that some of its previous pronouncements of the "manifest disregard" standard as an entirely separate ground for vacatur from the FAA enumerated grounds were "undeniably inconsistent" with the *Hall Street* holding.[3] Nonetheless, the Second Circuit later held that manifest disregard "remains a valid ground for vacating arbitration awards" as a gloss on the exclusive grounds for vacatur provided in the Federal Arbitration Act.[4] However, since Second Circuit jurisprudence is highly deferential to arbitrators' findings and reluctant to disturb the finality of arbitral awards, judicial review on manifest disregard grounds is "severely limited."[5] A party challenging an arbitration award on the basis of manifest disregard bears a "heavy burden."[6]

In determining whether a petitioner has carried the heavy burden for invoking the doctrine, the Second Circuit has required parties challenging awards on manifest disregard grounds to show that: (i) "the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators [as] an arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable[;]"[7] (ii) "the law was in fact improperly applied, leading to an erroneous outcome[;]"[8] and (iii) the arbitrator knew of a governing legal principle that was applicable to the facts of the dispute but refused to apply it or ignored it all together.[9] For example, the Second Circuit has repeatedly clarified that determinations of the applicable law,[10] or "disputes over contractual interpretation do not rise to the level of manifest disregard of the law."[11] As one federal judge in New York observed, the manifest disregard standard in the Second Circuit is so difficult to satisfy that it "will be of little solace to those parties who,

having willingly chosen to submit to unarticulated arbitration, are mystified by the result."[12]

Unsurprisingly, the other Circuit Courts of Appeal have also adapted the manifest disregard doctrine for cases arising under the FAA. Nevertheless, the lack of clarity from the Supreme Court concerning the standard's application and scope has led to a renewed circuit split. On the one hand—consonant with the Second Circuit's position—the Fourth,[13] Seventh,[14] Ninth[15] and Tenth[16] Circuits have held that manifest disregard remains viable (either as an additional ground for vacatur, or as a judicial interpretive gloss on the court's power to vacate pursuant to the FAA) after *Hall Street*. On the other hand, the Fifth,[17] Eighth[18] and Eleventh[19] Circuits have excluded it as a ground for vacating awards. While there is less clarity in the other Circuits,[20] none of the recent decisions addressing the manifest disregard of law doctrine resulted in a set-aside of international arbitral awards. Rather, the uncertainty lies in whether the manifest disregard of law doctrine should even continue to apply as a ground for judicial review of arbitral awards. However, the importance of the Circuit split should not be overstated. The Supreme Court has not granted certiorari on this issue recently, despite several petitions.[21] Many of the arbitral cases in the other Circuits only tangentially identified manifest disregard of the law as a possible ground for vacatur without any further consideration, or the doctrine only arose in the context of a domestic labor dispute.[22] Moreover, these Circuits did not vacate any international awards on manifest disregard grounds. Thus, the Second Circuit is not an exception in this regard.

Moreover, the United States, and certainly the Second Circuit, is not unusual when compared to the other leading arbitration-friendly jurisdictions. The Committee's review shows that, like the manifest disregard doctrine, standards of substantive review under the 1996 English Arbitration Act allow English courts to set aside arbitral decisions that create a risk of manifest injustice. For example, the English doctrines of public policy and exceeding powers under section 68 of the Act—especially as colored by the conscious disregard doctrine—are comparable to manifest disregard in that they entail a substantive review of arbitral awards. As with the manifest disregard doctrine in the United States, these doctrines are applied extremely sparingly by the English courts. While it may be too soon to say that England embraces a "conscious disregard" doctrine per se, English courts' review of arbitral awards under a variety of grounds for vacatur approaches the American doctrine of manifest disregard to a greater degree than other major arbitral seats.

The Committee found a similar result in studying its other common law subject, Hong Kong, which has adopted the UNCITRAL Model Law. Under Article 34(2), which provides the exclusive grounds for setting aside an international arbitral award, a party to an arbitration may move to set aside an award if the party can show that the matters decided by the award exceeded the scope of the arbitration agreement or were beyond the authority of the arbitrator. A court may also set aside an award if it finds that the award conflicts with State public policy. Though a narrow exception, this allows courts to set aside awards in extreme circumstances. Additionally, there is a requirement in Hong Kong that enforcement of an award not be repugnant to conceptions of justice and fairness.

The grounds upon which an arbitral award may be challenged in the two civil law jurisdictions the Committee studied, Switzerland and France, are limited and in line with the statutory grounds provided in other arbitration-friendly fora, including the United States. Swiss courts have reviewed arbitral awards pursuant to the enumerated grounds for setting aside in Article 190 of the Swiss Private International Law Act, such as the "right to be heard" and public policy. The French Code of Civil Procedure provides five grounds pursuant to which an international arbitral award may be set aside. A review of the French decisions on challenges to arbitral awards since 2000 shows that, like the courts of the other jurisdictions analyzed here, French courts do not revisit the merits of international arbitral decisions, but do vacate awards where there has been a flagrant and concrete breach of French international public policy or a violation by the arbitrators of their mission. Over the years, French courts have identified key principles and mandatory rules of French (or European) law that have been elevated to the level of principles of French international public policy.

Conclusion

The doctrine on manifest disregard of the law has been applied infrequently and in a restrained manner in the context of international arbitration, especially in the Second Circuit. Thus, any perception that New York is a less desirable seat because awards rendered there are more vulnerable to vacatur than those rendered in other major international venues is both inaccurate and unfair. In the "Report on Manifest Disregard of the Law and International Arbitration in New York," the International Commercial Disputes Committee of the New York City Bar Association did not take a position on the value of the manifest disregard doctrine or whether the doctrine should continue to apply as a gloss on the FAA grounds for vacatur of international arbitral awards rendered in New York. The Committee simply noted that, as the Second Circuit has done by means of the manifest disregard doctrine, leading foreign arbitral seats have each provided safety valves for the vacatur of particularly egregious arbitral awards. The Committee concluded that these jurisdictions have impliedly or expressly recognized the need for substantive safety-valve mechanisms, but that, like the Second Circuit, they have also exercised restraint in their application.

Endnotes

1. 552 U.S. 576 (2008).
2. *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (quoting *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. __, 130 S. Ct. 1758 (2010)).
3. 548 F.3d 85, 94 (2d Cir. 2008).
4. *T.Co Metals*, 592 F.3d at 339 (quoting *Stolt-Nielsen*, 548 F.3d at 94).
5. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*,,333 F.3d 383 (2d Cir. 2003) at 389.
6. *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003).
7. *Duferco*, 333 F.3d at 390 (citation omitted).
8. *Id*.
9. *Id*.
10. *See, e.g.*, *Abu Dhabi Inv. Authority v. Citigroup, Inc.*, 776 F.3d 126 (2nd Cir. 2015) (holding that the arbitral tribunal did not act in manifest disregard of the law or exceed its powers in deciding to apply the law of New York, rather than the law of Abu Dhabi, to investment authority's common-law fraud and negligent misrepresentation claims).
11. *See Landmark Ventures, Inc. v. Insightec, Ltd.*, 63 F.Supp.3d 343, 356 (S.D.N.Y. 2014), quoting *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997).
12. *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp.*, No. 10 Civ. 5622 (JSR), 2010 WL 4877847, at *2 (S.D.N.Y. Nov. 30, 2010), *judgment amended by Goldman Sachs Execution & Clearing, L.P. v. The Official Unsecured Creditors' Committee of Bayou Group, LLC*, No. 10 CIV. 5622 JSR, 2011 WL 2224629 (S.D.N.Y. May 31, 2011), *affirmed by Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Committee of Bayou Group, LLC*, No. 10-5049-CV, --- F.App'x ----, 2012 WL 2548927 (2d Cir. July 3, 2012).
13. *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (reading *Stolt-Nielsen* "to mean that manifest disregard continues to exist either 'as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.'").
14. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) ("Except to the extent recognized in *George Watts & Son*, 'manifest disregard of the law' is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act.").
15. *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1281 (9th Cir. 2009) ("in this circuit, an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act.").
16. *Lynch v. Whitney*, 419 Fed. Appx. 826, 833 (10th Cir. 2011) (expressly recognizing manifest disregard of the law as a current ground for vacatur).
17. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.").
18. *Medicine Shoppe International, Inc. v. Turner Investments, Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding that "an arbitral award may be vacated only for the reasons enumerated in the FAA.").
19. *Frazier v. CitiFinancial Corporation*, 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*. In so holding, we agree with the Fifth Circuit that the categorical language of *Hall Street* compels such a conclusion.").
20. *See, e.g.*, *Schafer v. Multiband Corp.*, 551 F. App'x 814, 819 (6th Cir.) *cert. denied*, 134 S. Ct. 2845, 189 L. Ed. 2d 808 (2014) ("Since *Hall Street*, we have continued to acknowledge 'manifest disregard' as a ground for vacatur—albeit not in a published holding. E.g., *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.Appx. 415, 418 (6th Cir.2009) (stating that manifest disregard survives *Hall Street); Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 n. 2 (6th Cir. 2008) (same); *Ozormoor v. T–Mobile USA, Inc.*, 08–11717, 2010 WL 3272620, at *2 (E.D.Mich. Aug. 19, 2010), aff'd, 459 Fed. Appx. 502 (6th Cir.2012); *but see Grain v. Trinity Health, Mercy Health Services Inc.*, 551 F.3d 374, 380 (6th Cir.2008) ("Hall Street's reference to the 'exclusive' statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory.')"). *See also Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 64-5 (1st Cir. 2015) ("Whether the manifest-disregard doctrine remains good law, however, is uncertain. […] We need not resolve the uncertainty over 'manifest disregard' here. As we explain below, even assuming the doctrine remains available, it would not invalidate the award in this case."); *Bellantuono v. ICAP Secs. USA*, LLC, 557 Fed. Appx. 168, 173-74 (3d Cir. 2014) ("This Court has not yet ruled on the issue. Because we find that the District Court was correct in concluding that the Panel did not act in manifest disregard of the law, we need not do so here.").
21. *See, e.g., Schafer v. Multiband Corp.*, 551 F. App'x 814, 819 (6th Cir.) *cert. denied*, 134 S. Ct. 2845, 189 L. Ed. 2d 808 (2014); *Republic of Argentina v. BG Group PLC*, 555 Fed. Appx. 2 (D.C. Cir.) *cert. denied*, 135 S.Ct. 441, 190 L.Ed.2d 329 (2014); *Dewan v. Walia*, 544 Fed. Appx. 240, 248 (4th Cir.), *cert. denied*, 134 S.Ct. 1788, 188 L.Ed.2d 757 (2014); *Frontera Eastern Georgia, Ltd. v. Arar, Inc.*, 483 Fed. Appx. 896 (5th Cir.) *cert. denied*, 133 S.Ct. 890, 184 L.Ed.2d 661 (2013). It should be noted, however, that certiorari may have been denied on other grounds than the circuit split on the viability of the manifest disregard of law doctrine.
22. *See, e.g., Dewan v. Walia*, 2013 U.S. App. LEXIS 21970; 2013 WL 5781207 (4th Cir. Oct. 28, 2013) (vacating arbitral award rendered in favor of a former employee who had previously executed a release agreement with his former employer).

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