

The New York City Bar Association’s International Commercial Disputes Committee 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 willingness of

courts to step into the employment arena and vacate or review the judgment of the arbitrators is not exceptional, given that many federal employment laws and regulations are mandatory. In other popular seats of arbitration, mandatory rules also carry heightened significance and serve as grounds for review of arbitral decisions, in particular when domestic labor law is concerned.

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 altogether.⁹ 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 cho-

sen to submit to unarticulated arbitration, are mystified by the result.”¹⁰

Unsurprisingly, the other Circuit Courts of Appeal have also adapted the manifest disregard doctrine for cases arising under the FAA. Although the lack of clarity from the Supreme Court concerning the standard’s application and scope has led to a recent degree of wavering about the continuing validity of the doctrine, by 1999 most Circuits had recognized the doctrine as applicable to, at the least, domestic arbitration arising under the FAA.

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. 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, the requirement that enforcement of an award not be repugnant to conceptions of justice and fairness echoes the Second Circuit’s manifest disregard case law.

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 used provisions of the Swiss Private International Law Act, such as the “right to be heard” and public policy, to conduct substantive review of arbitral awards. 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 on occasion 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. In so doing, French courts have implemented what appears to be a safety valve comparable, in its objective, to manifest disregard of the law.

“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.”

Conclusion

The “Report on Manifest Disregard of the Law and International Arbitration in New York” takes no position on the value of the manifest disregard doctrine, or whether it should continue to apply as a gloss on the FAA grounds for vacatur of international arbitral awards rendered in New York. The Committee simply notes that the doctrine has been applied infrequently and in a conservative 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. 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. *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).

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