



*Report by the
Committee on International Commercial Disputes*

**The “Manifest Disregard of Law” Doctrine
and International Arbitration in New York**

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TABLE OF CONTENTS

	<u>Page</u>
Introduction.....	1
I. Manifest Disregard and Grounds for Vacatur in the Second Circuit.....	4
A. An Empirical Review of New York Court Decisions: The Manifest Disregard Doctrine is of Little Significance in Challenges to Awards Rendered in New York	6
B. The Manifest Disregard Test in the Second Circuit.....	7
II. Leading Arbitral Seats Outside the United States: Their Approach to Vacating Awards Based on Grounds Comparable to Manifest Disregard	12
A. England	13
1. Section 68 and “Conscious Disregard”	16
2. Public Policy	16
3. “Exceeding Powers”	17
B. Hong Kong.....	20
C. Switzerland	23
1. Right to Be Heard–PILA 190(2)(d)	24
2. Public Policy–PILA 190(2)(e)	25
D. France.....	26
1. Excess of Power	27
2. Adversarial Principle	28
3. International Public Policy.....	28
III. Conclusion	31

The “Manifest Disregard of Law” Doctrine and International Arbitration in New York

Report by the Committee on International Commercial Disputes
of the Association of the Bar of the City of New York

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Introduction

New York City is one of the world’s leading centers of international business, trade and finance. Its accessibility from anywhere around the world equals or exceeds that of any other world-class city. New York enjoys a legal system with a well-developed body of commercial law and a sophisticated legal community that is well versed in international business and legal issues. Its laws and courts enforce agreements to arbitrate and support the autonomy of the arbitral process. Moreover, its courts have adopted a clear policy of deference to awards issued by arbitral tribunals.¹ New York, then, is a logical seat for international commercial arbitrations.

However, some practitioners and commentators have questioned the desirability of New York as a seat for international arbitration upon the ground that the “manifest disregard of law” doctrine renders international awards issued in New York more vulnerable to being set aside.² Given the otherwise clear benefits of arbitrating international commercial disputes in New York, the International Commercial Disputes Committee (the “Committee”) considered it important to evaluate whether the expressed concern regarding the manifest disregard doctrine is justified. In particular, the Committee has examined whether the doctrine as applied by New York courts renders New York a less desirable venue than other major international arbitration seats such as Paris, London, Switzerland, or Hong Kong.

The Committee’s report on Manifest Disregard of the Law and International Arbitration in New York (the “Report”) does not analyze whether the Second Circuit is justified, under U.S. arbitration law, in relying upon the manifest disregard doctrine, or if, as a result, the doctrine

¹ See, e.g., *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003) (“It is well established that courts must grant an arbitration panel’s decision great deference.”).

² See e.g., Henri Alvarez, *Judicial Review of NAFTA Chapter 11 Arbitral Awards*, in *Fifteen Years of NAFTA Chapter 11 Arbitration* pp. 103-171 (Alvarez likens the manifest disregard of the law doctrine to other “domestic standards of review” that Canadian and Mexican courts apply to international awards and that “rais[e] the risk of producing uncertain results, compromising the finality and viability of [international] awards.”) at pp. 161, 162; Marta Varela, *Arbitration and the Doctrine of Manifest Disregard*, 49 DISP. RES. J. 64, 65 (June 1994) (“[M]anifest disregard has become a repository for all sorts of outlandish theories of arbitral misconduct, devised with but one aim in mind: the application of standards of appellate review to the arbitration process, and ultimately, to vacatur of a particular arbitral award.”); Stephen Hayford, *Reining in the Manifest Disregard of the Law Standard: Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RES. 117 (1998); William Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT’L L. 1241, 1306 (2003); Stephan Wilske & Nigel Mackay, *The Myth of the ‘Manifest Disregard of the Law’ Doctrine: Is this Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned?*, 24 ASA Bulletin 216 (2006).

should continue to apply.³ Rather, the Committee has considered whether, if the Second Circuit continues to apply the doctrine, the manifest disregard doctrine can be said to set New York apart as a less favorable arbitration seat than other well-known venues such as London, Paris, Geneva, or Hong Kong. Thus, the Committee has undertaken an empirical review of the extent to which the manifest disregard doctrine has actually been applied in the Second Circuit (encompassing New York) to set aside international arbitration awards rendered in the United States. For the benefit of practitioners considering arbitration in other Circuits, the Committee has also examined how other Circuits approach the manifest disregard of the law doctrine. Further, the Committee has compared those results with judicial determinations in other leading international arbitral seats of challenges to awards applying comparable standards of review.

As discussed below, the Committee found that the manifest disregard doctrine has been applied sparingly, especially so in the context of international awards challenged in New York state and federal courts. Indeed, to date, *no* international arbitral award rendered in New York has *ever* been set aside in the Second Circuit on the ground of manifest disregard.⁴ Whatever objections may be made to the use of the manifest disregard doctrine as a basis for setting aside an award rendered in the United States (i.e., where the seat of the arbitration is in the United States), it is now settled that a U.S. court may not refuse to recognize or enforce a foreign international arbitral award (i.e., where the seat is outside the United States) on the ground of manifest disregard.⁵ The Committee also found that, regardless of the legal rubric used (be it that the arbitrators exceeded their powers, public policy, or something else), courts in other leading international arbitral seats have shown a comparable willingness to provide relief from awards that represent a clear departure from basic notions of fairness. Consequently, neither the existence of the manifest disregard doctrine nor the other grounds for vacatur under Chapter 1 of the Federal Arbitration Act make New York unique in this respect.

It is worth noting at the outset that there seems to be a common misperception that “manifest disregard of law” means that a court may set aside an arbitral award because of an error of law. This is not the case. In the very decision that spawned the manifest disregard doctrine, *Wilko v. Swan*, the U.S. Supreme Court held that “the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”⁶ In the years since *Wilko*, the federal courts, particularly the Second Circuit, have repeatedly held that awards will not be set aside for mere errors of law or because the arbitrators misconstrued the contract.⁷ Rather, according to the Second Circuit,

³ The Third Restatement on International Commercial Arbitration conducts an analysis of the manifest disregard doctrine that leads its drafters to suggest that the U.S. courts should no longer apply the doctrine. Restatement (Third) U.S. Law of International Commercial Arbitration § 5.15, Reporter’s Note a (Tentative Draft No. 1).

⁴ See, e.g., *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” US, Inc.*, 126 F.3d 15 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998).

⁵ For a discussion of the distinction between “non-domestic” or “international awards” seated in the United States versus domestic U.S. awards, pursuant to the Federal Arbitration Act, see *infra* pp. 5-6.

⁶ *Wilko v. Swan*, 346 U.S. 427, 437 (1953).

⁷ See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (manifest disregard “clearly means more than error or misunderstanding with respect to law”); *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (an award should be enforced, despite a court’s disagreement with it on the merits, if there is a barely colorable justification for the outcome reached); *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d

manifest disregard requires that the allegedly ignored law be clear and plainly applicable to the matter before the arbitrators, that disregarding the law in fact led to an erroneous outcome, and that the arbitrators must have known of the law (either because the parties identified it to them or because the error “is so obvious that it would be instantly perceived as such by the average person qualified to serve as an arbitrator”).⁸

It is also worth noting that, while there remains disagreement among the U.S. Circuit Courts of Appeals over whether the manifest disregard doctrine survives the Supreme Court’s decision in *Hall Street Associates, LLC v. Mattel, Inc.*,⁹ the Second Circuit has adopted the view that the doctrine represents “a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA [Federal Arbitration Act].”¹⁰ This comports with the view that manifest disregard is a common law doctrine subsumed within the FAA grounds for vacatur.¹¹ Hence, at least within the Second Circuit, and therefore in New York, manifest disregard no longer constitutes (if it ever did) an independent extra-statutory ground for setting aside an arbitral award. As the Second Circuit has recently reiterated, the doctrine indeed exists.¹²

The two statutory grounds for vacatur most obviously identifiable with manifest disregard are those contained in the Federal Arbitration Act §§ 10(a)(3) (the arbitrators were guilty of misconduct) and 10(a)(4) (the arbitrators exceeded their powers). While neither of these grounds appears as such in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹³ (the “New York Convention” or “Convention”) as a basis for refusing to recognize or enforce a foreign award, the New York Convention does not purport to impose restrictions on signatories with respect to the grounds on which awards

200, 216 n.10 (2d Cir. 2002) (court is required to confirm awards despite “serious reservations about the soundness of the arbitrator’s reading of th[e] contract”); *I/S Starborg v. Nat’l Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974) (misinterpretation of contract is not a mistake of law that may be corrected); *Schwartz v. Merrill Lynch & Co, Inc.*, No. 10-0826, 2011 WL 5966616 (2d Cir. Nov. 30, 2011); *STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68 (2d Cir. 2011).

⁸ *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 93 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. ___, 130 S. Ct. 1758 (2010) (internal quotation marks and citation omitted).

⁹ 552 U.S. 576 (2008). In *Hall Street*, the Supreme Court held that the grounds for judicial review of an arbitral award under FAA Sections 10 and 11 are exclusive. *Id.*

¹⁰ *Stolt-Nielson SA*, 548 F.3d at 94.

¹¹ See James M. Gaitis, *Clearing the Air on “Manifest Disregard” and Choice of Law in Commercial Arbitration: A Reconciliation of Wilko, Hall Street, and Stolt-Nielsen*, 22 AM. REV. INT’L ARB. 21 (2011); Ian R. Macneil, AMERICAN ARBITRATION LAW 104 (1992); Thomas E. Carbonneau, *Chapter 8: The Enforcement of Arbitral Awards*, in CARBONNEAU’S ARBITRATION IN A NUTSHELL (3d Ed. 2012).

¹² *Schwartz v. Merrill Lynch & Co, Inc.*, No. 10-0826, 2011 WL 5966616 (2d Cir. Nov. 30, 2011); *STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68 (2d Cir. 2011); *Goldman Sachs v. Unsecured Creditors Committee of Bayou Group*, Nos. 10-5049-cv (Lead), 11-2446-cv (XAP), 2012 WL 2548927, at *1 (2d Cir. July 3, 2012) (“Although the Supreme Court’s decision in *Hall Street Associates L.L.C. v. Mattel, Inc.* . . . created some uncertainty regarding the continued viability of the manifest disregard doctrine, we have concluded that ‘manifest disregard remains a valid ground for vacating arbitration awards.’”) (citing *T.Co Metals, LLC v. Dempsey Pipe & Supply Inc.*, *Schwartz v. Merrill Lynch*, and *STMiroelectronics, N.V. v. Credit Suisse*).

¹³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (1958).

rendered within their territory may be set aside.¹⁴ The New York Convention’s drafters elected to address only the minimum permissible grounds for refusing enforcement or recognition of a foreign arbitral award,¹⁵ and did not seek to establish a uniform international standard for setting aside awards in the jurisdiction where the arbitration occurred.

Every arbitral seat applies its own national law to the determination of applications to set aside an arbitral award rendered within its territory. We have found that United States law, especially as applied by the federal courts in New York, is no less favorable to international arbitral awards than the laws of other major centers of international arbitration. On the contrary, in both word and practice, New York federal courts are respectful of arbitrators’ decisions, and will only set aside in the most egregious circumstances.

I. Manifest Disregard and Grounds for Vacatur in the Second Circuit

Manifest disregard of the law is not a valid defense to a New York Convention enforcement action where the seat of the arbitration is *outside* the United States and the law governing the arbitration is a foreign law.¹⁶ However, the Second Circuit has interpreted Article V(1)(e)¹⁷ of the New York Convention¹⁸ to allow the application of FAA vacatur standards to “non-domestic awards”¹⁹ rendered in the United States or under Chapter One of the FAA.²⁰

¹⁴ Only courts at the seat of arbitration may set aside an award. *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 21-22 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998).

¹⁵ *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011), Chapter I, pp. 26, 26.

¹⁶ *Yusuf Ahmed*, 126 F.3d at 20 (“There is now considerable case law holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award.”); *see also Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974); *Encycl. Universalis S.A. v. Encycl. Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (“The party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under [the Convention] applies.”); *NTT Docomo, Inc. v. Ultra D.O.O.*, No. 10 Civ. 3823 (RMB), 2010 WL 4159459, at *2 (S.D.N.Y. Oct. 12, 2010) (holding that the public policy exception to enforcement under Article V(2)(b) “is a narrow one and erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention”) (internal quotation marks and citation omitted).

¹⁷ Article V(1)(e) states that recognition and enforcement of an award may be refused where “[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

¹⁸ As the New York Convention “is silent on the treatment of an award in the country where it is made[,] . . . courts in that country alone have the power to annul (or ‘set aside’ or ‘vacate’) the award.” James Castello & Ben Love, “*Manifest Disregard of the Law, Minimum Contacts, and Forum Non Conveniens: Recent Developments in Judicially-Created Doctrines that May Defeat Enforcement of Arbitral Awards in the U.S.*,” 2010-3 LES CAHIERS DE L’ARBITRAGE 643, 653 (2010).

¹⁹ In interpreting 9 U.S.C. § 202, the Second Circuit has adopted the position that the term “non-domestic awards” “denotes awards which are subject to the Convention not because [they are] made abroad, but because [they are] made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.” *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983); *see also* Castello & Love, *supra* note 20, at 667 (“In the United States, the category of ‘non-domestic’ awards has been held to include most awards rendered in the United States that have some significant foreign element.”).

Accordingly, since the Second Circuit has recognized manifest disregard of the law as one of the implied grounds for vacatur under the FAA,²¹ “non-domestic” Convention awards seated in the United States may be vacated for manifest disregard of the law.²²

Some commentators interpret “disregard of the law” to imply a willingness on the part of the New York courts to control and review errors of law and other substantive elements of arbitral decisions upon a manifest disregard challenge.²³ However, neither the definition of manifest disregard nor its implementation in the Second Circuit has resulted in judicial review of the merits of arbitral decisions that would threaten the efficiency or autonomy of the arbitral process.

Both an empirical review of the case law and an analysis of the conditions in which awards have been vacated for manifest disregard support this proposition. First, empirical review of the application by the federal courts in New York of the manifest disregard doctrine reveals: (i) that manifest disregard is rarely raised as the sole ground for challenging an arbitral award; (ii) that review for manifest disregard of the law 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.²⁴ This empirical review reveals that the doctrine of manifest disregard of the law does not make court review of arbitral awards in New York more expansive than the judicial review exercised in other major arbitration venues, such as England, Hong Kong, France, or Switzerland.

²⁰ *Yusuf Ahmed*, 126 F.3d at 21, 23 (noting that “[t]he Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief”); see also GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2555 (2009) (“[V]irtually no commentary concludes that the Convention limits the grounds for annulment of an award at the arbitral seat.”).

²¹ See Introduction; *supra* notes 11-14 and accompanying text.

²² *Yusuf Ahmed*, 126 F.3d at 23 (citing *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515-16 (2d Cir. 1991); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986)); see also *Shanghai Foodstuffs Import & Export Corp. v. International Chemical, Inc.*, No. 99 CV 3320 RCC, 2004 WL 213109 (S.D.N.Y. Feb. 4, 2004).

²³ Varela, *supra* note 2, at 65 (“[M]anifest disregard has become a repository for all sorts of outlandish theories of arbitral misconduct, devised with but one aim in mind: the application of standards of appellate review to the arbitration process, and ultimately, to vacatur of a particular arbitral award.”); Karen A. Lorang, *Mitigating Arbitration’s Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. REV. 218, 221 (2011) (noting that U.S. courts engage in substantive judicial review by developing additional grounds for vacatur such as the doctrine of manifest disregard of the law).

²⁴ Most enforcement actions arising under the Convention can be removed to federal court pursuant to 9 U.S.C. § 205. However, in the rare instances in which state courts hear actions arising under the Convention or Chapter 1 of FAA, it is necessary to apply the federal standard of manifest disregard. See *Porzig v. Dresdner, Kleinwort, Benson, N.Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007). Moreover, the First Department, one of New York’s intermediate appellate courts, has held that when a party seeks to vacate an award made pursuant to an arbitral agreement that is subject to the Federal Arbitration Act, the federal standard of manifest disregard applies. *Wien & Malkin, LLP v. Helmsley Spear, Inc.*, 12 A.D.3d 65, 783 N.Y.S.2d 339 (1st Dept. 2004), *rev’d*, 6 N.Y.3d 471, 480-486 (2006) (reversed on the ground that the arbitral panel did not manifestly disregard clearly applicable law), *cert. dismissed*, 548 U.S. 940 (2006).

A. *An Empirical Review of New York Court Decisions: The Manifest Disregard Doctrine is of Little Significance in Challenges to Awards Rendered in New York*

In *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*,²⁵ the Second Circuit conducted its own statistical analysis of the manifest disregard doctrine. It calculated that since adopting the doctrine in 1960, the Second Circuit had vacated arbitral awards in no more than four cases out of approximately forty-eight.²⁶ In 2008, the court in *Stolt-Nielsen v. AnimalFeeds Int'l Corp.* updated these statistics, noting that since its opinion in *Duferco*, it heard eighteen cases involving manifest disregard challenges and vacated only one while remanding two cases for clarification.²⁷ Since *Stolt-Nielsen*, the Second Circuit has heard seventeen more cases²⁸ seeking to vacate an award on manifest disregard grounds, but has not vacated a single award on that basis.

At the federal district court level, the Committee's review of cases shows that out of approximately 367 manifest disregard challenges, the courts have vacated or partially vacated awards in only seventeen cases and remanded in five cases. These twenty-two cases represent approximately 6 percent of all cases in which an arbitral award was challenged on manifest disregard grounds. Of these twenty-two cases, the Second Circuit reversed six on the ground that the standard for manifest disregard had not been satisfied.²⁹

Above all, since the Second Circuit began applying the doctrine of manifest disregard in 1960, *none* of the arbitral awards vacated on that ground was an international or Convention³⁰

²⁵ 333 F.3d 383 (2d Cir. 2003).

²⁶ *Id.* at 389. The *Duferco* court also noted that in three of the four cases in which the manifest disregard doctrine was invoked successfully, the vacatur of the award was also justifiable on the 9 U.S.C. § 10(a)(4) ground that the arbitrators had exceeded their authority, and "it is arguable that manifest disregard need not have been the basis for vacating the award, since vacatur would have been warranted under the FAA." *Id.*

²⁷ *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. ___, 130 S. Ct. 1758 (2010).

²⁸ See *Goldman Sachs v. Unsecured Creditors Committee of Bayou Group*, Nos. 10-5049-cv (Lead), 11-2446-cv (XAP), 2012 WL 2548927, at *1 (2d Cir. July 3, 2012); *Duferco, S.A. v. Tube City IMS, LLC*, 464 F. App'x 28 (2d Cir. 2012); *Westminster Secs. Corp. v. Petrocom Energy Ltd.*, 456 F. App'x 42 (2d Cir. 2012); *Schwartz v. Merrill Lynch & Co, Inc.*, No. 10-0826, 2011 WL 5966616 (2d Cir. Nov. 30, 2011); *STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68 (2d Cir. 2011); *Cardell Fin. Corp. v. Suchodolski Assocs., Inc.*, No. 10-26-CV, 2011 WL 441384 (2d Cir. 2011); *County of Nassau v. Chase*, No. 09-3643-cv, 2010 WL 3853042 (2d Cir. Oct. 4, 2010); *Matthew v. Papua New Guinea*, No. 10-0074-cv, 2010 WL 3784198 (2d Cir. Sept. 30, 2010); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010); *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009); *Telenor Mobile Communic'ns AS v. Storm LLC*, 351 F. App'x 467 (2d Cir. 2009); *E.E. Cruz v. Coastal Caisson, Corp.*, 346 F. App'x 717 (2d Cir. 2009); *Bradley v. Merrill Lynch & Co., Inc.*, 344 F. App'x 689 (2d Cir. 2009); *Macromex Srl v. Globex Int'l Inc.*, 330 F. App'x 241 (2d Cir. 2009); *Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81 (2d Cir. 2009); *Dupont v. Tobin, Carberry, O'Malley, Riley, Selinger, PC*, 322 F. App'x 66 (2d Cir. 2009); *Rich v. Spartiis*, 307 F. App'x 475 (2d Cir. 2008).

²⁹ In New York state courts, out of approximately forty-five cases in which the courts considered a manifest disregard challenge under the federal standard, only eight awards were ultimately vacated or remanded. Two of the awards that were vacated were employment cases.

³⁰ *Supra* p. 2. See also *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (finding commercial dispute between United States and Israeli parties under Israeli law to fall under the New York Convention because, under 9 U.S.C. § 202, only disputes entirely between U.S. citizens are domestic); *F. Hoffmann-La Roche Ltd. v. Qiagen Gaithersburg, Inc.*, 730 F. Supp. 2d 318, 325 (S.D.N.Y. 2010) (holding that a dispute is "international" within the

award. Almost fifty percent of all cases in which defendants successfully invoked manifest disregard involved domestic employment issues; nine out of the twenty-two vacated or remanded awards were domestic employment-based arbitral awards.

Accordingly, in practice, the doctrine of manifest disregard does not hang “like a sword of Damocles,”³¹ endangering international arbitral awards rendered in New York. Moreover, the criticism that manifest disregard “gives losing parties an opportunity to disrupt the arbitral process” and “serves as a vehicle to renege on the bargain to arbitrate”³² is undermined by the fact that manifest disregard is rarely the sole ground upon which parties challenge arbitral awards. When parties seek to vacate awards, they usually rely upon the full panoply of defenses under section 10 of the FAA, with manifest disregard included as one of several alternative grounds.

The Committee’s review of the case law shows that only one hundred, out of a total of 367 cases, were challenged solely on manifest disregard grounds in New York federal district courts (twenty-seven percent of all challenges). In addition, the Federal District Court for the Southern District of New York has issued a clear warning to parties mounting desperate challenges, putting them “on notice that the [c]ourt will not tolerate the assertion of frivolous arguments in an attempt to delay payment of valid arbitration awards.”³³ In fact, the same court has sanctioned parties pursuant to Rule 11 of the Federal Rules of Civil Procedure for bringing a frivolous manifest disregard challenge.³⁴

The limited practical significance of manifest disregard on international arbitration in New York is further reinforced by the very high threshold required for a New York court to set aside an award on the ground of manifest disregard.

B. The Manifest Disregard Test in the Second Circuit

The doctrine of manifest disregard of the law originates from the U.S. Supreme Court’s decision in *Wilko v. Swan*, in which the Court observed, in passing, that “the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”³⁵ For several decades after *Wilko*, lower federal courts “uniformly held . . . that ‘manifest disregard’ was a judicially-created ground for vacatur

meaning of the New York Convention because it concerned patents registered outside of the United States and one of the four parties was not a U.S. citizen).

³¹ William Park, et. al, *International Commercial Dispute Resolution*, 37 INT’L L. 445, 447 (2003).

³² *Id.*

³³ *Cowle v. PaineWebber*, No. 98 civ. 2560 JSM, 1999 WL 194900 (S.D.N.Y. Apr. 7, 1999).

³⁴ *U.S. Offshore, Inc. v. Seabulk Offshore, Ltd.*, No. 90 Civ. 6209 (MBM), 1990 WL 204171 (S.D.N.Y. Dec. 12, 1990) (sanctioning a party that failed to sufficiently explain why the arbitral panel’s award was in manifest disregard of the governing Florida law). In *Enmon v. Prospect Capital Corp.*, Docket No. 10-2811-cv (2d Cir. April 6, 2012), the Second Circuit upheld a lower court decision that sanctioned a law firm for bad faith in opposing enforcement by a successful party to an arbitration. In *DigiTelCom, Ltd. v. Tele2 Sverige AB*, No. 12 Civ. 3082, 2012 WL 3065345 (July 25, 2012), the Federal Court for the Southern District of New York sanctioned a “dilatatory” manifest disregard challenge.

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

of awards, outside the text of section 10 of the FAA, which otherwise set forth such grounds as a matter of federal law.”³⁶

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*,³⁷ 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.”³⁸ 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.³⁹ 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 FAA.⁴⁰ As the courts in the Second Circuit are highly deferential to arbitrators’ findings and do not wish to disturb the finality of arbitral awards, their judicial review on manifest disregard grounds is “severely limited,”⁴¹ and a party challenging an arbitration award on the basis of manifest disregard bears a “heavy burden.”⁴²

As a result, in the Second Circuit, manifest disregard is limited to “those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.”⁴³ That impropriety has been interpreted to “clearly mean[] more than error or misunderstanding with

³⁶ Castello & Ben Love, *supra* note 20, at 661.

³⁷ 552 U.S. 576 (2008). In *Hall Street*, the Supreme Court held that the grounds for judicial review of an award under FAA sections 10 and 11 are exclusive, but declined to state how its ruling affected the continued viability of the manifest disregard doctrine. In recognizing the potential implications of its ruling for the doctrine, the Court expressed doubt as to whether “the term ‘manifest disregard’ was meant to name a new ground for review, [or whether] it merely referred to the § 10 grounds collectively, rather than adding to them.” *Id.* at 585. Alternatively, the Court recognized that “as some courts have thought, ‘manifest disregard’ may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’” *Id.*

³⁸ *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)). Commentators have noted that this re-conceptualization of the doctrine after *Hall Street* has not changed the way in which the Second Circuit has analyzed claims of manifest disregard. J. Pierce & D. Cinotti, *Challenging and Enforcing International Arbitral Awards in New York Courts*, in *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 402, 404 (J. Carter & J. Fellas eds. 2010).

³⁹ 548 F.3d 85, 94 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. ___, 130 S. Ct. 1758 (2010) (citing *Hoefl v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003) (describing manifest disregard as “an additional ground not prescribed in the [FAA]”), *overruled on other grounds by Hall Street*, 552 U.S. 576 (2008)); *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003) (observing that the doctrine’s use is limited to instances “where none of the provisions of the FAA apply”); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (referring to the doctrine as “judicially-created”), *cert. denied*, 522 U.S. 1049 (1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (same).

⁴⁰ *T.Co Metals*, 592 F.3d at 339 (quoting *Stolt-Nielsen*, 548 F.3d at 94).

⁴¹ *Duferco*, 333 F.3d at 389.

⁴² *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003).

⁴³ *Duferco*, 333 F.3d at 389.

respect to the law.”⁴⁴ Accordingly, the Second Circuit will enforce an arbitral award “despite a court’s disagreement with it on the merits, if there is a *barely colorable justification for the outcome reached*.”⁴⁵

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[;]”⁴⁶ (ii) “the law was in fact improperly applied, leading to an erroneous outcome[;]”⁴⁷ 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.⁴⁸

Accordingly, under the manifest disregard standard articulated by the Second Circuit, an award must be upheld “unless the arbitration panel intentionally and erroneously disregarded a clear and plainly applicable law. This is to be determined, moreover, by reference to a record where the arbitration panel typically . . . states neither its findings of fact nor its conclusions of law.”⁴⁹ 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.”⁵⁰

The first prong of the manifest disregard standard, often described as its objective component,⁵¹ requires a finding that the arbitrators “have ignored well defined and clearly applicable law” and have not merely erred.⁵² Therefore, an award will not be vacated if the applicable law is ambiguous,⁵³ or the “resolution of the controversy in arbitration thus required

⁴⁴ *Merrill Lynch*, 808 F.2d at 933. The *Merrill* court reasoned that “to adopt a less strict standard of judicial review would be to undermine [the] well established deference to arbitration as a favored method of settling disputes when agreed to by the parties.” *Id.*

⁴⁵ *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (emphasis added; internal quotation omitted); *see also Schwartz*, 2011 WL 2011 WL 5966616, at *7 (“If the arbitrator has provided even a barely colorable justification for his or her interpretation of the contract, the award must stand.” (internal quotation omitted)); *STMicroelectronics*, 648 F.3d at 79 (“[W]e do not require that a potential distinction be correct, only that it be at least ‘barely colorable’” (quoting *T.Co Metals*, 592 F.3d at 339)).

⁴⁶ *Duferco*, 333 F.3d at 390 (citation omitted).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Goldman Sachs Ex'ion & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp.*, 758 F. Supp. 2d 222, 226 (S.D.N.Y. 2010), *aff'd*, Nos. 10-5049-cv (Lead), 11-2446-cv (XAP), 2012 WL 2548927, at *1 (2d Cir. July 3, 2012).

⁵⁰ *Id.* at 225.

⁵¹ *Pierce & Cinotti*, *supra* note 44, at 402.

⁵² *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 92 (2d Cir. 2005).

⁵³ *T.Co Metals v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 341 (2d Cir. 2010) (“The legal distinction between diminution-in-value damages and consequential damages . . . resembles the kind of ‘ambiguous law’ that eludes

application of an unclear rule of law to a complex factual situation.”⁵⁴ Under this highly deferential standard of review, courts in the Second Circuit are not allowed, for example, to review claims that an arbitrator misconstrued a contract.⁵⁵ Similarly, the Second Circuit has held that manifest disregard of the evidence is not a proper ground for vacating awards.⁵⁶ And while this deferential standard may not apply “if the contract violated some explicit public policy,” such public policy “must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”⁵⁷

The second prong of the manifest disregard standard is relatively straightforward because it recognizes that vacatur is not proper where the erroneous application of the law led to the same result that would have followed from a proper application of the law.⁵⁸

The court in *Duferco* referred to the third prong of the manifest disregard standard as its “subjective element”⁵⁹ because, in analyzing this factor, courts should focus on “whether the arbitrator was aware of the governing law, and whether he consciously decided to ignore it.”⁶⁰ In other words, in ascertaining an arbitrator’s awareness of the law, courts are not to apply a reasonable arbitrator standard,⁶¹ but need to “impute only knowledge of governing law identified by the parties to the arbitration.”⁶² Because there is no requirement that arbitrators have a legal background, the Second Circuit has emphasized that courts “cannot presume that [an] arbitrator is capable of understanding and applying legal principles with the sophistication of a highly

analysis under the manifest disregard doctrine.”) (citing *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 93 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. ___, 130 S. Ct. 1758 (2010)).

⁵⁴ *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1217 (2d Cir. 2002).

⁵⁵ *T.Co Metals*, 592 F.3d at 339; *see also Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 216 (2d Cir. 2002) (stating that courts in the Circuit “do not sit in judgment over the wisdom of the arbitrator’s holdings”). In fact, “[w]hatever arbitrators’ mistakes of law may be corrected, simple misinterpretations of contracts do not appear one of them.” *I/S Stavborg v. Nat’l Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974); *see also InterDigital Commc’ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 531 (S.D.N.Y. 2005).

⁵⁶ *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004) (“To the extent that a federal court may look upon the evidentiary record of an arbitration proceeding at all, it may do so only for the purpose of discerning whether a colorable basis exists for the panel’s award so as to assure that the award cannot be said to be the result of the panel’s manifest disregard of the law.”); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, 204 F. App’x 40, 43 (2d Cir. 2006) (“It is the arbitrator’s role to make factual findings, weigh evidence, and assess the credibility of witnesses, and it is well-settled that a federal court may not conduct a reassessment of the evidentiary record.”) (internal quotation marks and citation omitted).

⁵⁷ *Schwartz v. Merrill Lynch & Co, Inc.*, No. 10-0826, 2011 WL 5966616, at *7 (2d Cir. Nov. 30, 2011) (internal quotation marks and citation omitted).

⁵⁸ *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 390 (2d Cir. 2003) (citing *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 13 (2d Cir. 1997)).

⁵⁹ *Duferco*, 333 F.3d at 390.

⁶⁰ *Hoefl v. MVL Group, Inc.*, 343 F.3d 57, 68 (2d Cir. 2003).

⁶¹ *Pierce & Cinotti*, *supra* note 44, at 402 (noting that “[i]t is not enough that a reasonable arbitrator would have known, and applied, the relevant law” to satisfy the third part of the manifest disregard test).

⁶² *Duferco*, 333 F.3d at 390.

skilled attorney.”⁶³ As a consequence, “an arbitrator under the test of manifest disregard is ordinarily assumed to be a blank slate unless educated in the law by the parties.”⁶⁴

In practical terms, this means that a court reviewing an award on a manifest disregard challenge will review the arbitral record and pleadings to ascertain if the parties educated the arbitrators on the controlling law. Stephen Hayford characterizes this way of applying the manifest disregard standard as a “presumption-based” approach, under which the courts “presume, through various devices, arbitral knowledge of the correct interpretation of the law at issue, based upon the courts[’] independent evaluation of the record made in arbitration, and . . . based on the presumption, . . . infer a conscious or intentional disregard of the law.”⁶⁵

Bear, Stearns & Co. v. 1109580 Ontario, Inc. exemplifies the workings of the presumption-based approach.⁶⁶ The arbitral panel had not given any explanation for its denial of a motion to apply collateral estoppel against one of the parties. The Second Circuit confirmed that no explanation from the arbitrators was required, and that, in such a case, “the reviewing court must attempt to infer from the record whether the arbitrators appreciated and ignored a clearly governing legal principle.”⁶⁷

The Manifest Disregard Doctrine in Other Circuits⁶⁸

The other circuits follow an equally restrictive practice when it comes to reviewing awards under the standard of “manifest disregard of the law.” No federal circuit court has ever rendered a decision vacating an international or non-domestic award based on the doctrine.

Unsurprisingly, the other circuit courts have sought, like the Second Circuit, to come to terms with *Wilko* and have adapted the manifest disregard standard for cases arising under the FAA. However, the other circuits have differed significantly in their approach, in grappling with the question whether the manifest disregard standard constituted an independent, non-statutory

⁶³ *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004).

⁶⁴ *Id.*

⁶⁵ Hayford, *supra* note 2, at 129. Hayford, however, warns that the courts’ manifest disregard review often “permutes from a test centering on the arbitrator’s state of mind . . . and his conduct . . . into an analysis concerned only with the purported correctness of the arbitration award on the law, and in some cases the facts.” *Id.* at 132. Even if Hayford is correct that courts are not always transparent in their manifest disregard analysis, this does not necessarily mean that judges are engaging in expansive judicial review of awards. On the contrary, the low number of cases in this Circuit in which manifest disregard was the basis for vacatur suggests that the judicial review under this doctrine is “severely limited.” *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 91 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. ___, 130 S. Ct. 1758 (2010).

⁶⁶ 409 F.3d 87 (2d Cir. 2005).

⁶⁷ *Id.* at 90. Moreover, the Second Circuit has explained that “[i]nternal inconsistencies in the [arbitrator’s] opinion are not grounds to vacate the award notwithstanding the [movant’s] plausible argument that the arbitrator’s decision was misguided.” *St. Mary Home, Inc. v. Serv. Emps. Int’l Union, Dist.*, 116 F.3d 41, 44-45 (2d Cir. 1997).

⁶⁸ Appendix A provides a circuit-by-circuit discussion of the approach to manifest disregard in the federal courts. The Federal Circuit is not discussed, as it appears to have addressed manifest disregard only once, before *Hall Street*. See *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365 (Fed. Cir. 2001). Citing *Wilko*, the court appeared to recognize the doctrine but did not comment further on its legitimacy since it found no manifest disregard on the facts before it. *Id.* 1366-67.

ground for vacating an award, shorthand for sections 10(a)(3) and 10(a)(4), or a summary of all the section 10(a) standards collectively.⁶⁹ Although the lack of clarity from the Supreme Court concerning both the application of the standard and the scope of its application led to a degree of wavering about the validity of the doctrine, by 1999 each circuit recognized the doctrine as applicable to domestic arbitration arising under the FAA.⁷⁰

Those circuits nonetheless apply it in a limited manner, reserving its application for cases in which an arbitrator clearly disregarded controlling legal principles in reaching a conclusion. In fact, our review revealed only thirty-nine domestic cases in which an arbitral award was vacated on manifest disregard grounds by a district court, out of a total of 475 purely domestic arbitral cases. Of those thirty-nine cases vacating an arbitral award, twenty-six were reversed on appeal, leaving a total of thirteen cases. Thus, only three percent of all arbitral awards in domestic cases were vacated. International awards rendered in the United States simply are not vacated on the ground of manifest disregard.

Many of the arbitral cases in the remaining circuits only tangentially identified manifest disregard of the law as a possible ground for vacatur without any further consideration, or arose in the context of a local labor dispute. Moreover, these circuits did not vacate any international awards on manifest disregard grounds. Even at the district court level, the Committee's research has uncovered only two cases, in the Eastern and Middle Districts of Pennsylvania, in which an international or non-domestic award was vacated on manifest disregard grounds.⁷¹ Thus, the Second Circuit is not an outlier in this regard. (For a detailed summary of the manifest disregard case law outside the Second Circuit, see Appendix A.)

II. Leading Arbitral Seats Outside the United States: Their Approach to Vacating Awards Based on Grounds Comparable to Manifest Disregard

As U.S. courts have 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 conducted a comparative analysis of grounds of substantive judicial review of arbitral awards in four of such leading foreign seats: England, Switzerland, France, and Hong Kong. The Committee concludes that these jurisdictions have impliedly or expressly

⁶⁹ See, e.g., *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (noting that some Circuits read the standard to refer to the FAA provisions collectively); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (manifest disregard standard is shorthand for §§ 10(a)(3) and 10(a)(4)); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007) (manifest disregard provides a non-statutory ground for vacating an award).

⁷⁰ See, e.g., *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225 (4th Cir. 1991); *Kanuth v. Prescott, Ball & Turban, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991); *Jenkins v. Prudential-Bache Secs., Inc.*, 847 F.2d 631 (10th Cir. 1988); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir. 1986); *Anaconda Co. v. Dist. Lodge No. 27 of Int'l Ass'n of Machinists & Aerospace Workers*, 693 F.2d 35 (6th Cir. 1982); *Trafalgar Shipping Co. v. Int'l Mill Co.*, 401 F.2d 568 (3d Cir. 1968).

⁷¹ *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F. Supp. 2d 631 (E.D. Pa. 2009); *Koken v. Cologne Reinsurance (Barbados) Ltd.*, No. 98-CV-0678, 2006 WL 2460902, at *6 (M.D. Pa. Aug. 23, 2006).

recognized the need for substantive “safety-valve mechanisms,” but that, like the Second Circuit, they have also exercised restraint in their application.

A. *England*

English law takes a cautious approach to disturbing arbitral awards issued by tribunals seated in England. The current scheme consisting of sections 67 (lack of jurisdiction), 68, and 69 of the Arbitration Act 1996; the prior scheme, section 22 of the Arbitration Act 1950, which was “heavily criticized for many years as giving the court too much power to intervene . . . has been abolished and there is no replacement for it in the new Act.”⁷²

Section 68 of the 1996 Arbitration Act provides a number of grounds on which awards can be overturned for “serious irregularity affecting the tribunal, the proceedings or the award.”⁷³ The statute further defines “serious irregularity” as one that “has caused or will cause substantial injustice to the applicant.”⁷⁴ Section 68(2) of the Arbitration Act enumerates the types of irregularities that may rise to the level of a “serious irregularity” causing “substantial injustice.”⁷⁵ Section 68 is “only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in [section] 68, that justice calls out for it to be corrected.”⁷⁶

⁷² *CNH Global N.V. v. PGN Logistics Ltd., Graglia SRL, Wincanton Trans European Ltd.*, [2009] EWHC 977 (Comm), ¶ 22.

⁷³ Arbitration Act 1996, c. 23, § 68(1).

⁷⁴ *Id.* § 68(2).

⁷⁵ Section 68(2) reads:

“Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.”

⁷⁶ *Ispat Indus. Ltd. v. W. Bulk Pte. Ltd.*; [2011] EWHC 93 (Comm) (quoting *Petroships Pte. Ltd. v. Petec Trading and Inv. Corp.* (“*Petro Ranger*”)); [2001] 2 Lloyd’s Reports 348, 351 (quoting DAC Report 1996).

The English Arbitration Act offers another, potentially broader avenue for overturning awards: appeal under section 69, a waivable provision allowing review of awards on any point of English law. Under section 69, the English courts may vacate an arbitral award for any legal error caused by the arbitrator's misapprehension or misapplication of the applicable law.⁷⁷

Unlike section 68, which is mandatory and cannot be waived, waiver of section 69 is common, but it must be actual and express.⁷⁸ The waiver provisions of some institutional rules, such as those of the LCIA and the ICC,⁷⁹ have been recognized to effectively waive appeal under section 69. However, the Court of Appeals recently held in *Shell Egypt West Manzala v. Dana Gas Egypt* that the terms in an arbitration agreement requiring that awards will be “final,” “binding,” and “conclusive,” without mention of the right to appeal, did not establish waiver of Section 69.⁸⁰ *Shell Egypt West Manzala* involved an arbitration seated in England conducted under the UNCITRAL Arbitration Rules. The court contrasted the UNCITRAL provisions with the more definitive language in the LCIA and ICC rules, which the court found to be sufficient to effect waiver.

In fifteen cases out of the seventy-three section 69 challenges examined here, the court either reversed an award, returned it to the arbitrators, or allowed some further appeal.⁸¹ Given that the bar is set much lower in section 69 than in section 68, applications under the former section are predictably more successful—20% successful in reported decisions as compared to 15% for challenges under section 68 (including domestic cases). Because the scope of review under section 69 of the English Arbitration Act is significantly broader than the scope of review under the U.S. doctrine of manifest disregard, the Committee did not consider the two mechanisms to be comparable. Unlike the section 69 review of arbitral decisions, the manifest disregard doctrine expressly does not consider the arbitral tribunal's *mistaken* interpretation or application of the law; only the conscious disregard of plainly applicable law will justify vacatur. The following analysis is therefore limited to awards vacated by English courts on the grounds of a tribunal exceeding its powers (68(2)(b)) or public policy (68(2)(g)). To some extent, these grounds entail a substantive review of arbitral awards and are comparable to the grounds for overturning an award that the manifest disregard doctrine adds (at least as a gloss) to the FAA.

Successful challenges to international awards in English courts on grounds of excess of power or public policy are rare. Like manifest disregard of the law, “[t]he rule of public policy in English law . . . represents an important judicial safety valve, which in extreme cases may be used to prevent injustice and to prevent the procedures of the court being abused.”⁸² Related to

⁷⁷ Andrew Cannon, *Appeals on a Point of Law in the English Courts: Further Restrictions*, KLUWER ARBITRATION BLOG, <http://kluwerarbitrationblog.com/blog/2012/01/27/appeals-on-a-point-of-law-in-the-english-courts-further-restrictions> (last visited Mar. 2, 2012) (discussing the decision in *Mary Harvey v. Motor Insurer's Bureau* (QBD (Merc) (Manchester), Claim No: OMA40077, 21 December 2011)).

⁷⁸ R. MERKIN & L. FLANNERY, *ARBITRATION ACT 1996* (4th Ed.), at 156.

⁷⁹ See 1998 ICC Rules of Arbitration Article 28(6) (Article 34(6) of the 2012 ICC Rules of Arbitration); LCIA Arbitration Rules § 26.9 (effective Jan. 1, 1998).

⁸⁰ [2010] 2 All E.R. (Comm) 442.

⁸¹ One reversal was itself later reversed, in *Stocznia Gdynia SA v. Gearbulk Holdings Ltd.*, [2009] EWCA Civ 75.

⁸² See A. Johnson, *Illegal Contracts and Arbitration Clauses*, 1999-2(1) INT'L A.R.L. 35-37 (1999).

the public policy ground is vacatur for “excess of powers” under section 68(2)(b)—that is, the arbitrators making decisions outside of the powers accorded them by the parties to the arbitration agreement. Unlike the public policy ground, however, excess of powers arguments are somewhat indistinct, and are on occasion brought under other heads of section 68 or combinations thereof.⁸³ An arbitrator’s reliance on an issue not briefed by the parties touches on multiple subsections, but particularly section 68(2)(b).⁸⁴ As a group, the following set of cases represents the majority of the awards set aside pursuant to section 68.

An analysis of seventy-three international and domestic cases relying on section 68 shows that eleven were overturned on the grounds of excess of powers in sections 68(b) and public policy.⁸⁵ This number⁸⁶ is not large (15% of arbitration awards overturned or certified for appeal on these two grounds): both case law and commentary note the atypical status of successful section 68 applications. *Lesotho Highlands*, an important section 68 case, emphasized how extreme the circumstances must be before the English courts will intervene.⁸⁷ According to Robert Merkin, “This appears to be borne out by the statistics, in that the vast majority of section 68 challenges fail.”⁸⁸

⁸³ However, the courts treat the heads as “exhaustive,” and cannot seek out novel grounds for overturning awards. MERKIN & FLANNERY, *supra* note 85, at 156.

⁸⁴ “The grounds upon which an award may be challenged as set out in section 68(2)(a)-(i) are not mutually exclusive.” *Id.* at 158.

⁸⁵ Sections 68(b) and (g). The eleven cases are: *Ronly Holdings Ltd v. JSC Zestafoni G Nikoladze Ferroalloy Plant*, [2004] EWHC 1354 (Comm); *St George’s Inv. Co. v. Gemini Consulting Ltd*, [2005] 1 EGLR 5; *Van Der Giessen-De-Noord Shipbuilding Div. BV v. Imtech Marine and Offshore BV*, [2008] EWHC 2904 (Comm); *F Ltd v. M Ltd*, [2009] EWHC 275 (TCC); *Ascot Commodities NV v. Olam Int’l Ltd.*, [2002] C.L.C. 277; *Metro. Prop. Realizations Ltd. v. Atmore Inv. Ltd.*, [2008] EWHC 2925 (Ch); *Newfield v. Tomlinson*, [2004] EWHC 3051 (TCC); *Vee Networks Ltd v. Econet Wireless Int’l Ltd*, [2004] EWHC 2909 (Comm); *Petroships Pte Ltd of Singapore v. Petec Trading and Inv. Corp. of Vietnam*, [2001] 2 Lloyd’s Rep 348; *Guardcliffe Props. Ltd. v. City & St James*, [2003] 2 EGLR 16; and *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co.*, [2000] EWHC 210. This list also includes successful appeals that do not reference subsections (b) and (g) as given above. Still, “serious irregularities” do not always fit into categories, and are sometimes characterized arbitrarily. For instance, *St. George’s* and *Metropolitan* presented essentially the same issue yet were decided under different subsections of section 68.

⁸⁶ This set of seventy-three cases is a sample drawn from published cases; it is possible that the actual percentage would be lower.

⁸⁷ *Lesotho Highlands Dev. Auth. v. Impregilo SpA and Others*, [2005] UKHL 43 (holding that choosing to make the award out in a currency other than the currencies given in the underlying contract, the arbitrators may have committed legal error and may have exercised their powers erroneously, but did not *exceed* their powers under section 68(2)(b)).

⁸⁸ MERKIN, & FLANNERY, *supra* note 85, at 157; *see also Lesotho*, ¶ 27 (noting that an analysis of legislative debates on the 1996 Act “observed about clause 68 that it ‘is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected’”) (quoting the Report of the Departmental Advisory Committee on Arbitration Law, at 59, ¶ 282). *Id.* ¶ 18 (noting that England’s interventionist view of arbitration before the 1996 Act put it at odds with the attitudes of many other legal systems: “The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here . . .”) (quoting a speech made by Lord Wilberforce, Hansard col. 778, Jan. 18, 1996).

1. Section 68 and “Conscious Disregard”

Of all the English cases, *B v. A*⁸⁹ comes the closest to articulating a standard parallel to the U.S. doctrine of manifest disregard of the law. In *B v. A*, the court addressed the dissenting arbitrator’s statement, echoed by the party appealing the award, that the tribunal had “consciously disregarded” applicable law. The court observed that for a tribunal’s failure to apply the law in question to qualify as exceeding its powers under 68(2)(b), “a conscious disregard of the provisions of the chosen law is a necessary but not a sufficient requirement.”⁹⁰ Further, the appealing party must also show that the arbitrator’s conscious disregard worked a substantial injustice.⁹¹ Here, the court upheld the award after finding that the tribunal *had* “carefully considered” the governing law, and thus did not disregard it.⁹²

B v. A appears to be the first English case to consider “conscious disregard” as such, and subsequent decisions have not yet commented on its language. The *B v. A* decision, however, appears to be consistent with prior English decisions. In *Hussman (Europe), Ltd. v. Al Ameen Dev. & Trade Co.*, for example, the High Court vacated an award in part, holding that the arbitrator improperly found implied consent by a party that lacked any knowledge of the event to which it had purportedly consented.⁹³ A party cannot consent to an event of which it has no knowledge, and the tribunal therefore had no power to issue an award holding otherwise.⁹⁴ Although the *Hussman* court did not state it in such terms, it seems that the tribunal could only have issued its award by disregarding the clear legal principles of implied consent.

B v. A and *Hussman* also suggest that the United States, and certainly the Second Circuit, at least post-*Hall Street*, is not an outlier when compared to the other leading common law arbitral jurisdiction, England. While it may be too soon to say that England embraces a “conscious disregard” doctrine *per se*, its review of arbitral awards under a variety of grounds for vacatur and the language the courts use in conducting that review approach the American doctrine of manifest disregard to a greater degree than other major arbitral seats.

2. Public Policy

Public policy also serves as a ground for overturning an arbitral award in England, although in a manner depending on where the underlying contract is performed. For contracts performed outside of England, the English courts may take a narrower view of English public policy. For contracts performed within England, however, the full extent of English public policy remains available as grounds for reversal under section 68(2)(g).

⁸⁹ *B v. A* [2010] EWHC 1626 (Comm).

⁹⁰ *Id.* ¶ 22.

⁹¹ *Id.* ¶ 25.

⁹² *Id.*

⁹³ *Hussman (Europe), Ltd. v. Al Ameen Dev. & Trade Co.*, [2000] EWHC 210, ¶ 20.

⁹⁴ *Id.*

Soleimany v. Soleimany is an important case that illustrates the operation of the public policy grounds for vacating an award.⁹⁵ A father and son contracted to sell carpets that the son would smuggle out of Iran. Having successfully conducted the smuggling operation, the son brought his father to arbitration for a share in the profits. After the tribunal (a religious court) decided for the son, the father appealed the decision, arguing that the contract was illegal. The court reversed the award, holding that it would be against English public policy to enforce a contract that was illegal when made. “The interposition of an arbitration award does not isolate the successful party’s claim from the illegality which gave rise to it.”⁹⁶

The public policy ground has been narrowed in subsequent cases. For contracts performed abroad, English courts held that it would be against international comity for a court to enforce a contract that was against the public policy of both the country where the contract was to be performed and of England, as shown in *Lemenda Trading Co. v. African Middle East Petroleum Co.*, [1988] Q.B. 448.⁹⁷ In *Westacre*,⁹⁸ responding to *Lemenda Trading*, the court stated that where contracts are to be performed abroad, “only the most serious universally condemned activities . . . would offend against English public policy.”⁹⁹ For such contracts, the *Westacre* adaptation of the *Lemenda* rule seems to have stuck: “In the context of more conventional international trade it is now clear that nothing short of actual bribery or corruption will take a contract outside of the *Lemenda* rule.”¹⁰⁰ The court in *Westacre* was more circumspect and considered that if the issue of illegality was argued before the arbitrators, it required a showing of new facts before it would be reexamined by the court.¹⁰¹ Even then, the court would balance the danger of illegality against the principle of finality of arbitration.

3. “Exceeding Powers”

Successful challenges under section 68(2)(b) involve arbitrators acting on powers they were not granted by the parties—as opposed to misapplying powers that were in fact granted. As stated in *Lesotho Highlands*, “it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under section 68(2)(b).”¹⁰² However, “an arbitrator must not make an award based on arguments or evidence which were not presented to him or on a basis which is

⁹⁵ [1999] Q.B. 785 (CA (Civ Div)). This case was decided under the Arbitration Act of 1950, but under the new Act the result would likely have been the same. See Shai Wade, *Westacre v. Soleimany: What policy? Which public?*, 1999-2(3) INT’L A.L.R. 97-102 (“[T]here can be no doubt that the law on challenges to enforcement of arbitration awards on the grounds of public policy was not affected by the introduction of the Arbitration Act 1996.”).

⁹⁶ *Id.* ¶ 823H.

⁹⁷ See also *Omnium De Traitement et de Valorisation S.A. v. Hilmarton Limited*, [1999] 2 Lloyds Rep. 222. Note that *Omnium* was not heard under the 1996 version of the Arbitration Act.

⁹⁸ *Westacre Investments Inc. v. Jugoinport-SDRP Holding Company Ltd.*, [1999] 3 All E.R. 864 (Comm).

⁹⁹ See Wade, *supra* note 102, at 97-102.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Lesotho Highlands Dev. Auth. v. Impregilo SpA and Others*, [2005] UKHL 43, ¶ 32.

contrary to the common assumption of the parties as represented to him.”¹⁰³ The following cases involve issues raised by arbitrators but never considered by parties, or, conversely, issues raised by the parties but never considered by the arbitrators.¹⁰⁴

In *Ronly Holdings, Ltd. v. JSC Zestafoni G Nikoladze Ferroalloy Plant*, the arbitrator determined that the Respondent owed the Petitioner approximately U.S. \$16 million, but then, without explanation, the arbitrator ordered payment of only U.S. \$10 million. This award presented several problems. Above all, for section 68 purposes, a final award must be just that, but the arbitrator apparently thought the remaining U.S. \$6 million would be handled in some other fashion. Thus, the award failed under section 68(2)(b) because the arbitrator had overstepped his powers—either by “fail[ing] to deal with an issue put to him” or by “tak[ing] upon himself a power to withhold payment of the shortfall amount pending a resolution of its fate by the parties or third parties.”¹⁰⁵

In *St. George’s Investment Co. v. Gemini Consulting, Ltd.*, the arbitrator combined the parties’ experts’ valuation methods in a way not contemplated by either party.¹⁰⁶ No applicable law required the use of a particular valuation method. The award was problematic, however, because the arbitrator’s chosen valuation method appeared for the first time in the award, so that neither party had an opportunity for comment. The arbitrator did not introduce new evidence,¹⁰⁷ but he used a method not contemplated by the parties. While an arbitrator “is entitled to arrive at his award by deploying the evidence in a way which is materially different from the way that the parties’ valuers deployed them,” he can only do so if “the award addresses a matter which has been put into the arena by the valuers and with which they have had an opportunity to deal[.]”¹⁰⁸

In *Vee Networks, Ltd. v. Econet Wireless International, Ltd.*, the arbitration involved two companies, EWN and EWI, collaborating to create a mobile phone service in Nigeria.¹⁰⁹ EWN terminated the parties’ Agreement, and EWI initiated arbitration. EWN argued that the Agreement was *ultra vires* for EWI, due to EWI’s articles of incorporation (“memorandum of association”). The arbitrator found that it was *ultra vires*, but, according to EWN, on legal

¹⁰³ *St. George’s Investment Co. v. Gemini Consulting, Ltd.*, [2004] EWHC 2353 (Ch); see also *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, at 15 K-M (Bingham, J., judgment); *Ascot Commodities NV v. Olam Int’l Ltd.*, [2002] C.L.C. 277.

¹⁰⁴ Issues raised by parties but ignored by the arbitrators is also covered in 68(2)(d), but see *Ronly Holdings Ltd v. JSC Zestafoni G Nikoladze Ferroalloy Plant*, [2004] EWHC 1354, ¶ 27 (Comm).

¹⁰⁵ *Ronly Holdings, Ltd.*, [2004] EWHC 1354 (Comm), ¶ 26.

¹⁰⁶ [2004] EWHC 2353 (Ch).

¹⁰⁷ The court’s treatment of the introduction of new evidence by the arbitrator can be seen in *Checkpoint Limited v. Strathclyde Pension Fund*, [2003] EWCA Civ 84.

¹⁰⁸ *St. George’s*, [2004] EWHC 1354 ¶ 25. In *Metropolitan*, the arbitrator committed the opposite error by failing to contend with all the issues set before him (at least, implicitly). [2008] EWHC 2925 (Ch). The court decided that case fell under section 68(2)(d). However, the errors in *Metropolitan* and *St. George’s* effectively fall under the same rule: the arbitrator must contend with what the parties put before him, nothing more and nothing less.

¹⁰⁹ [2004] EWHC 2909 (Comm).

grounds neither party submitted or contemplated, without alerting them. On review, the court agreed, and found that EWN may have suffered a substantial injustice as a result.¹¹⁰

In *F Ltd. v. M Ltd.*, the court determined that in this case the majority of the tribunal made a “clear mistake of fact,” by which it awarded an amount to the wrong party on grounds that no party had raised (it was “based on an unpleaded and unargued admission”).¹¹¹ The tribunal “confused a sum due from the client with a sum due from the claimant,” while “this sum was manifestly *not* due to the defendant from the claimant.”¹¹² Because no party raised the point, the court “also consider[ed] that the finding of an unqualified admission by the claimant was outside the Arbitral Tribunal’s jurisdiction: Section 68(2)(b) of the 1996 Act.”¹¹³ Furthermore, the court found that the error was a “serious irregularity,” as required by Section 68. Thus, the court concluded that the “risk of a substantial injustice is manifest.”¹¹⁴

Another case in which the English court invalidated a tribunal’s setting of an interest rate is *Van Der Giessen-De-Noord Shipbuilding Division BV v. Imtech Marine and Offshore BV*.¹¹⁵ Dutch statutes governed the applicable interest rates for suit awards. The parties disputed what time periods applied, but did not dispute the statutes themselves. The tribunal stated that it would “award interest under” the statute, but then without explanation imposed a higher rate.¹¹⁶ Neither party had demanded or defended against this new rate, since both parties relied on the Code rates.¹¹⁷ Further, the court determined, this inexplicable error led to a “substantial injustice,” causing the award to be some one million euros higher than the amount the claimant demanded, “without [the respondent] being given any opportunity to object”¹¹⁸ The court then noted that the lack of opportunity was significant, since the tribunal may have come to another conclusion if the respondent had been given the opportunity to object. As the court noted, section 68 does not require a showing that a different result *would* have occurred, only that it *could* have: “It is sufficient that the result is far from a foregone conclusion.”¹¹⁹

However, the mere fact that an arbitral tribunal acted in excess of its powers will not, by itself, be enough for a court to vacate an award. In *CNH Global*,¹²⁰ the arbitral tribunal revised its award to correct its erroneous award of dating interest only from the time of the award, instead of from an earlier date. The aggrieved party appealed the corrected award, arguing that

¹¹⁰ *Id.* ¶¶ 90-92.

¹¹¹ *F Ltd. v. M Ltd.*, [2009] EWHC 275 (TCC), ¶ 21, 60a.

¹¹² *Id.* ¶ 58.

¹¹³ *Id.* ¶ 57.

¹¹⁴ *Id.* ¶ 59.

¹¹⁵ [2008] EWHC 2904 (Comm).

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 28 (“It gave no indication that it proposed to ignore the Code rates when the parties had proceeded on the basis that the claimant’s entitlement should be governed by the Code”).

¹¹⁸ *Id.* ¶ 29.

¹¹⁹ *Id.* ¶ 30.

¹²⁰ *CNH Global N.V. v. PGN Logistics Ltd., Graglia SRL, Wincanton Trans European Ltd.*, [2009] EWHC 977 (Comm).

the ICC arbitration rules only allow arbitrators to correct for clerical errors. In agreeing with the appellants, the court found that the tribunal had exceeded its powers by revising its award to correct a significant error. Further, the court found that the tribunal's action had a significant effect in that it substantially altered the amount of the award. The court found that it is within its discretion, based on the circumstances of a particular case, whether to pursue an investigation into the facts to determine whether a substantial injustice resulted from the tribunal's erroneous actions.¹²¹ In this case, the court looked to the facts and held that the tribunal's exceeding its power did not result in a substantial injustice, despite its finding of its significant effect. Instead, the court determined that the revision of the award in fact made it more just. Rejecting a simplistic view of an adverse outcome, the court stated, "I am not at all persuaded that it is simply a question of before and after."¹²²

The court in *CNH Global* also rejected a simple intent test for whether a tribunal had exceeded its powers:

Nor, in my judgment, can it be right for me to conclude that the fact that the Arbitrators were acting bona fide in expressing that view is relevant – otherwise there could never be any challenge to what arbitrators have done, and it must always be a valid exercise of their power provided that they say so and/or believe so, as they plainly did here.¹²³

Such a holding is not inconsistent with an analysis of whether the arbitrator acted deliberately. Rather, the court in *CNH Global* appears merely to have refrained from analyzing whether the arbitrator, in taking deliberate action, believed that he was acting within his powers. In other words, if an arbitrator were to consciously disregard the law, his award would not be shielded from vacatur by the court simply because the arbitrator believed that he was empowered to disregard the law. On the other hand, an arbitrator's innocent (which, in this case is to say unknowing) act in excess of her powers will not be enough, alone, to justify vacatur.

Ultimately, like the manifest disregard doctrine, standards of substantive review under the 1996 Arbitration Act allow the English courts to set aside arbitral decisions that create a risk of manifest injustice.

B. Hong Kong

The Committee also considered Hong Kong, a common law jurisdiction that has adopted the UNCITRAL Model Law.¹²⁴ Until recently, Hong Kong maintained a bifurcated regime for the enforcement of arbitral awards.¹²⁵ Domestic law governed domestic arbitral awards, while the UNCITRAL Model Law applied to international awards. Under Hong Kong's new

¹²¹ *Id.* ¶ 35.

¹²² *Id.* ¶ 34.

¹²³ *Id.* ¶ 30.

¹²⁴ Hong Kong adopted the UNCITRAL Model Law in 2010 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Mar. 2).

¹²⁵ This regime was governed by Arbitration Ordinance 341 of the Laws of Hong Kong.

Arbitration Ordinance,¹²⁶ however, the UNCITRAL Model Law applies to all arbitration proceedings.¹²⁷

Article 34(2) of the UNCITRAL Model Law provides the exclusive grounds for setting aside an international arbitral award in Hong Kong. Under this provision, 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.¹²⁸ The court may also set aside an award on its own motion if it finds that the award conflicts with the public policy of the State.¹²⁹

Two published Hong Kong court decisions have analyzed whether an arbitral award should be set aside under Section 34 of the Model Law.¹³⁰ In *Brunswick Bowling & Billiards Corp. v. Shanghai Zhonglu Industrial Co.*,¹³¹ the court found that the arbitrator had applied the law of the People's Republic of China ("PRC") to certain elements of the claim in order to effect his own "secret" view of the law, without giving the parties the opportunity to be heard on that issue.¹³² The court set aside a portion of the award that was affected by the arbitrator's wrongful application of PRC law; however, the court declined to vacate those portions of the award for which the arbitrator's error was harmless.¹³³ Notably, the court held that applications for vacatur under the Model Law do *not* have to show that a violation of Article 34 caused a substantial injustice.¹³⁴ In a recent decision, *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd.*,¹³⁵ the Hong Kong Court of Appeal overturned a first-instance decision setting aside an ICC award for alleged violations of Article 34(2) of the UNCITRAL Model Law. The first-instance court had vacated the award on the basis that the arbitrators had "deviated from the procedure agreed" upon by the parties. Citing to "Craig, Park and Paulson in *International Chamber of Commerce Arbitration*, 3d edn," the Hong Kong Court of Appeal considered that "only in the most

¹²⁶ Hong Kong Arbitration Ordinance (Cap. 609) (effective June 1, 2011).

¹²⁷ Interestingly, the Arbitration Bill allows parties to expressly opt into certain provisions from the former domestic legal regime, including certain more liberal standards of review. Thus, the parties may expressly agree to allow Hong Kong courts to hear appeals on points of law and to vacate arbitral awards for arbitrator misconduct. For the first six years of the Arbitration Bill, parties may invoke all of these provisions simply by referring to the arbitration as "domestic" in the arbitration agreement.

¹²⁸ UNCITRAL Model Law on International Commercial Arbitration, art. 34(2), U.N. Doc. A/40/17 (June 21, 1985).

¹²⁹ *Id.* at art. 34(2)(b)(ii).

¹³⁰ *Brunswick Bowling & Billiards Corp. v. Shanghai Zhonglu Indus. Co., Ltd. & Another*, [2011] 1 HKLRD 707, HCCT66/2007 ("*Brunswick Bowling Case*"); *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd.*, CACV 136/2011, May 9, 2012.

¹³¹ *Brunswick Bowling Case*, [2011] 1 HKLRD 707, HCCT66/2007.

¹³² *Id.* ¶¶ 65, 67.

¹³³ *Id.* ¶¶ 30, 45, 72, 75.

¹³⁴ *Id.* ¶¶ 34-35 (observing that the drafters of the Model Law had rejected an attempt to graft a substantial injustice requirement onto article 34).

¹³⁵ CACV 136/2011, May 9, 2012.

egregious cases, the wide discretion of arbitrators and flexibility of the arbitral process have been confined by national courts . . .”¹³⁶

The decision in *Brunswick Bowling* accords with decisions of courts in the Second Circuit that have found that an arbitral tribunal’s disregard of governing agreements in favor of its own version of “industrial justice” may constitute manifest disregard of the law.¹³⁷ While Hong Kong courts do not expressly recognize the doctrine of manifest disregard, *Brunswick Bowling* illustrates that the doctrine as the Second Circuit understands it is not inconsistent judicial review in a Model Law jurisdiction. Further, *Brunswick Bowling*, and more recently, *Pacific China Holdings*, align with U.S. decisions declining to set aside an award where the arbitrator committed harmless error.¹³⁸ In obiter, citing to *Brunswick Bowling*, the *Pacific China Holdings* court accepted that a court had the discretion to confirm an award even if the court found that the arbitral tribunal violated Article 34(2) of the Model Law. The court considered that so long as the reviewing court was satisfied that the arbitral tribunal would have reached the same result notwithstanding the violation of Article 34(2), it could refuse to set aside the award.¹³⁹

In addition, it should be noted that the grounds for setting aside an award under Article 34 of the Model Law mirror the grounds for refusing to enforce an award under the New York Convention. Therefore, cases in which the Hong Kong courts have analyzed enforcement of an award under the New York Convention may demonstrate how those courts will interpret Article 34. In the 1999 decision in *Hebei Import & Export v. Polytek Engineering*, for example, the Hong Kong Court of Appeal first addressed the public policy exception to enforcement of awards under the New York Convention.¹⁴⁰ The court held that although courts will not enforce an award that is “substantially unjust,” refusal to enforce is appropriate only if enforcement would “violate the most basic notions of morality and justice.”¹⁴¹ Nevertheless, interests of comity may induce a Hong Kong court to enforce an award even if the arbitrator’s notion of substantial justice does not align with that of the court.¹⁴² Thus, in *Hebei Import* the court exercised its discretion to enforce the award, even though the arbitrator had deviated from Hong

¹³⁶ *Id.* at § 55.

¹³⁷ *See, e.g., Abondolo v. H. & M. S. Meat Corp.*, No. 07 Civ. 3870, 2008 BL 306439, at *4 (S.D.N.Y. May 8, 2008) (“Courts may find manifest disregard of the law only when the arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice.” (internal quotations marks and citations omitted)).

¹³⁸ *See, e.g., Coutee v. Barington Capital Grp., L.P.*, 336 F.3d 1128, 1136 (9th Cir. 2003) (reversing the district court’s vacatur of the attorney’s fee portion of the award because the tribunal’s manifest disregard of the parties’ choice of California law was harmless since the New York law applied by the tribunal also authorized an award of attorneys’ fees).

¹³⁹ *Pacific China Holdings*, §§ 101-05.

¹⁴⁰ *Hebei Import & Export v. Polytek Eng’g*, [1999] 1 HKLRD 665.

¹⁴¹ *Id.* at 691 (“The question then is whether the two matters of which the respondent complains . . . were contrary to the fundamental conceptions of morality and justice in Hong Kong.”). The public policy of Hong Kong is defined by the natural justice doctrines of the English common law.

¹⁴² *Id.* at 675.

Kong standards against apparent bias by conducting an inspection of the factory at issue in the arbitration in the absence of one of the parties.¹⁴³

In *A v. R*, the Hong Kong courts again addressed the public policy exception to enforcement of awards under the New York Convention.¹⁴⁴ The court opined that Hong Kong courts will narrowly construe the public policy exception because the parties have agreed to arbitration with the understanding that the arbitrator may reach wrongful conclusions.¹⁴⁵ Therefore, an error of fact or law by the arbitrator cannot offset the public policy interest in enforcement of arbitral awards.¹⁴⁶ Appeals based on public policy that merely seek to re-open the merits of the arbitration constitute an abuse of process and may result in indemnity costs awarded against the offending party.¹⁴⁷ Courts will refuse to enforce an award on public policy grounds only if the award creates a substantial injustice so shocking to the court's conscience as to render the enforcement repugnant.¹⁴⁸

The Hong Kong court's approach to the public policy exception, while narrow,¹⁴⁹ allows Hong Kong courts to set aside awards in extreme circumstances. Additionally, the requirement that enforcement of an award be repugnant to conceptions of justice and fairness echoes the Second Circuit manifest disregard case law.¹⁵⁰

C. Switzerland

The grounds upon which an arbitral award may be challenged in Switzerland are limited and in line with the statutory grounds provided in other arbitration-friendly fora, including the United States. A challenge to an arbitral award may only be brought before the Swiss Supreme Court, and only on the grounds listed in Article 190(2) of the Swiss Private International Law Act ("PILA"):

- (a) the arbitral tribunal was constituted irregularly;
- (b) the arbitral tribunal wrongly accepted or declined jurisdiction;

¹⁴³ *Id.* at 692. Importantly, the court's decision in *Hebei Import* was heavily influenced by the challenging party's failure to timely file a complaint, finding that the party's delayed challenge smacked of an impermissible attempt to re-litigate the case. The opinion's analysis of public policy issues may therefore be of limited precedential value.

¹⁴⁴ *A v. R.*, (2009) HCCT 54/2008.

¹⁴⁵ *Id.* ¶¶ 16, 22-23.

¹⁴⁶ *Id.* ¶ 23.

¹⁴⁷ *Id.* ¶ 68, 72. The *Hebei Import* court reasoned that if a losing party did not have to bear "the full consequences of its abortive application . . . it would turn what should be an exceptional and high-risk strategy into something which was potentially 'worth a go.'" *Id.* ¶¶ 70-71.

¹⁴⁸ *Id.* ¶ 22. Notably, the *A v. R* opinion appears to be dicta and thus may be of limited precedential value, since the court ultimately decided that the arbitrator's decision was legally sound.

¹⁴⁹ Other Hong Kong opinions have labeled the approach "mechanistic." *Xiamen Xinjingdi Group v. Eton Properties* [2008] 4 HKLRD 972.

¹⁵⁰ See, e.g., *Barkman v. Lehman Bros. Inc.*, No. 04 Civ. 07431, 2005 BL 24239, *7-8 (S.D.N.Y. Aug. 2, 2005) (denying a motion to vacate or modify an award and confirming same where the award "is not repugnant, and therefore does not demonstrate a manifest disregard of the law").

- (c) the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims submitted (*ultra petita* or *infra petita*);
- (d) the parties' rights of due process were violated; or
- (e) the award violates public policy.¹⁵¹

Of the over 200 relevant Supreme Court decisions since 1989, when the PILA grounds were promulgated, no more than 6.5% were successful in challenging an arbitral award.¹⁵² The grounds with the greatest chances of success were jurisdictional challenges under Art. 190(2)(b) (ten percent success rate) and *ultra/infra petita* challenges under Art. 190(2)(c) (five percent success rate).¹⁵³ The grounds that involve a substantive review of arbitral awards comparable to a manifest disregard review are found in Art. 190(2)(d) and (e).

1. Right to Be Heard—PILA 190(2)(d)

The Swiss Supreme Court has used PILA 190(2)(d) to set aside awards where arbitral tribunals are found to have applied contractual or statutory provisions upon which neither of the parties relied,¹⁵⁴ or to have disregarded a point of law argued by one of the parties.¹⁵⁵

In *X. ___ v. Y. ___*, the Supreme Court set aside an award rendered by the Court of Arbitration for Sport (“CAS”) between Spanish agents and a Brazilian football player involving a brokerage agreement.¹⁵⁶ The agreement was governed first and foremost by the relevant Fédération Internationale de Football Association (“FIFA”) regulations, and secondarily by Swiss law, in particular the provisions of Article 412 ff. of the Code of Obligations. The Spanish agents argued that the Brazilian football player had breached an agency agreement granting the exclusive right to negotiate transfers. The CAS Tribunal found that the contract did validly grant exclusivity under FIFA rules, the Swiss Code of Obligations, and relevant case law. However, the tribunal applied a mandatory provision of Swiss law—Article 8(2)(a) of the Federal Act of October 6, 1989 on Employment Services and the Leasing of Services (the “LSE”)—to declare the agreement prohibited. The LSE had been neither discussed nor relied upon by either party in their arguments. The Supreme Court granted the appeal and annulled the award because the CAS tribunal violated the Spanish agents' right to be heard.¹⁵⁷

As the Supreme Court discussed at length, the LSE was entirely inapplicable to the dispute at issue.¹⁵⁸ While the Supreme Court analyzed in detail the arbitral tribunal's manifest

¹⁵¹ See generally Elliott Geisinger and Vivian Frossard, *Chapter 8 – Challenge and Revision of the Award*, in INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 135-66 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., Kluwer Law International 2004).

¹⁵² See Nicolas Ulmer and Lionel Serex, *Switzerland: Update on Recent Arbitral Developments and Tendencies*, 25-12 MEALEY'S INT'L ARB. REP. 14 (Dec. 2010); see also Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland - An Updated Statistical Analysis*, in 28 ASA BULLETIN 1/2010.

¹⁵³ *Id.*

¹⁵⁴ See, e.g., *X. ___ Kft. v. Y. ___ AG*, 4A_108/2009 (Swiss Federal Tribunal 9 Jun. 2009).

¹⁵⁵ See, e.g. *X. GmbH v. Y. Sàrl A.S.*, 4A_46/2011 (Swiss Federal Tribunal 16 May 2011), ASA Bull. 2011 Vol. 29 Issue 3, pp.643-665.

¹⁵⁶ 4A_400/2008 (Swiss Federal Tribunal 9 Feb. 2009).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

misapplication of Swiss law, the court ultimately invalidated the award because the parties were given no opportunity to make submissions on the point of law on which the arbitral tribunal based its decision. The Supreme Court thus held that neither party could have foreseen that the CAS tribunal would base its reasoning on a manifestly inapplicable provision of Swiss law.¹⁵⁹

In *X. GmbH v. Y. Sàrl A.S.*, the Swiss Federal Tribunal set aside an *ad hoc* international arbitral award rendered in Geneva after it found that the arbitral tribunal had disregarded Respondent's arguments on statute of limitations. Interestingly, the Swiss court refused to vacate the award on substantive public policy grounds. Respondent had challenged the award on public policy grounds under PILA 190(2)(e), alleging that, by disregarding an argument it developed in its written submissions, the tribunal violated the principle of *pacta sunt servanda*. Following a traditionally restrictive approach to judicial review,¹⁶⁰ the Swiss Supreme Court held that there would have been a violation of substantive public policy if the arbitral tribunal had disregarded a position developed by, or a contractual obligation of, a party, after the tribunal had admitted such position or contractual obligation as valid. The Swiss Supreme Court considered that, in the case of *X. GmbH v. Y. Sàrl A.S.*, the arbitral tribunal had not previously admitted the validity or invalidity of Respondent's position on statute of limitations. The arbitral tribunal had rather altogether failed to take Respondent's position into account in its decision, thereby depriving Respondent of an opportunity to be heard.

2. Public Policy—PILA 190(2)(e)

The public policy analysis under Article 190(2)(e) includes both substantive and procedural components. Before its March 2012 decision,¹⁶¹ the Swiss Supreme Court had never set aside an award for violating substantive public policy. "The substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order."¹⁶² In *Matuzalem*, a CAS award banned Respondent from ever working as a football player until he reimbursed his creditors. It was, however, obvious that respondent would likely never be in a position to reimburse his debt. The Swiss Supreme Court concluded that in that context, the arbitral tribunal's ban amounted to a violation of Respondent's right to economic freedom, "which contains in particular the right to choose a profession freely and to access and exercise an occupational activity freely."¹⁶³ While the right to economic freedom is not listed among the recognized values enumerated in the Swiss Private International Law, the Swiss Supreme Court set aside the arbitral award on such non-enumerated ground of substantive review. In doing so, the Swiss Supreme Court reaffirmed a long-standing position that the recognized values listed in the Swiss PILA are not exhaustive standards of review.

¹⁵⁹ *Id.* The Court noted that since neither of the parties invoked the LSE, the Tribunal should have at least questioned the parties on the issue and invited them to make submissions.

¹⁶⁰ See 25-12 MEALEY'S INT'L ARB. REP. 14 (Dec. 2010); see also Dasser, *supra* note 159.

¹⁶¹ *Francelino da Silva Matuzalem v. Federation Internationale de Football Association (FIFA)*, 4A_558/2011, (Swiss Federal Tribunal, 27 March 2012).

¹⁶² *Matuzalem v. FIFA*, 4A_558/2011 (Swiss Federal Tribunal, 27 March 2012), § 4.1.

¹⁶³ *Id.* at § 4.3.1.

Breach of procedural public policy can also give rise to the Swiss Supreme Court's substantive review of arbitral decision. Under Swiss arbitration law, an arbitral tribunal breaches procedural public policy when its decision "violates fundamental procedural principles, the disregard of which is sufficiently intolerable that the decision appears incompatible with the rule of law."¹⁶⁴ In a recent decision, *Club Atlético de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD*, the Swiss Supreme Court found that a CAS tribunal had *wrongfully disregarded* the material legal force of a binding decision of the Zurich Commercial Court. Benfica claimed compensation from Atlético under FIFA Regulations for the Status and Transfer of Players. The FIFA Special Committee made an award to Benfica. Atlético challenged this award on an *ex parte* basis in the Zurich Commercial Court, which voided the FIFA Special Committee decision based on the ground that the relevant FIFA regulations violated European and Swiss competition laws. Benfica did not challenge the Swiss court's decision, but rather brought another claim before the FIFA Special Committee, which rejected the renewed claim for compensation. Benfica then appealed this decision to a CAS arbitral tribunal, which ordered Atlético to pay Benfica compensation, reasoning that the Zurich Commercial Court had only determined "the legality of FIFA's regulations" and not the merits of Benfica's original claim.¹⁶⁵

On review, the Swiss Supreme Court found that the CAS tribunal had *wrongfully disregarded* the material legal force of a binding decision of the Zurich Commercial Court. This constituted a breach of *res judicata* and therefore of procedural public policy.¹⁶⁶ While the Swiss Supreme Court pointedly disassociated itself from the analysis of any legal mistake committed by the tribunal, it nonetheless, like the U.S. and English courts, provided a safety valve for the annulment of awards issued in flagrant disregard of Swiss public policy or the confines of the dispute as submitted by the parties.

Although the Swiss courts do not formally embrace a doctrine equivalent to manifest disregard, the flexibility of the Swiss definition of public policy, such that it can cover, in very limited and exceptional circumstances, wrongful disregard of the applicable law, may allow for results similar to those reached by New York courts applying the manifest disregard doctrine.

D. France

The French Code of Civil Procedure ("CPC") provides for five grounds pursuant to which an international arbitral award may be set aside.¹⁶⁷ Both the old and new arbitration regulations in France provide different legal regimes for domestic and international arbitration

¹⁶⁴ *Club Atlético de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD*, 4A_490/2009 (Swiss Federal Tribunal 13 Apr. 2010); see also 25-12 MEALEY'S INT'L ARB. REP. 14 (Dec. 2010).

¹⁶⁵ See 25-12 MEALEY'S INT'L ARB. REP. 14 (Dec. 2010).

¹⁶⁶ *Club Atlético*; see also 25-12 MEALEY'S INT'L ARB. REP. 14 (Dec. 2010); Matthias Scherer, *Introduction to the Case Law Section*, 28(3) ASA BULLETIN 498-510 (2010).

¹⁶⁷ A new law on international arbitration entered into force on May 1, 2011. The grounds for setting aside an arbitral award are now listed under Article 1520 of the Code of Civil Procedure: 1. the arbitral tribunal wrongly upheld or declined jurisdiction; 2. the arbitral tribunal was not properly constituted; 3. the arbitral tribunal ruled without complying with the mandate conferred upon it; 4. due process of law was violated; and 5. the recognition or enforcement of the award is contrary to international public policy.

proceedings. International arbitration, the focus of this report, is construed broadly under French law to cover any arbitration involving “the interests of international commerce.”¹⁶⁸

A review of the French decisions since 2000 on challenges to arbitral awards shows that, like the courts of the other arbitration-friendly nations analyzed here, French courts do not revisit the merits of arbitral decisions, and construe narrowly the five grounds of vacatur enumerated in CPC Article 1520. While France did not develop non-statutory grounds of vacatur, the language of the statute, in particular Articles 1520-3 to 5, and the courts’ interpretation of such grounds provide France with the safety valve most jurisdictions maintain against egregious awards. As Yves Fortier notes, commenting on French judicial review of arbitral awards, the practice of the French courts achieves a necessary balance between supporting the autonomy of the international arbitral forum and ensuring that arbitral awards do not run afoul of essential principles of due process.¹⁶⁹ Three of the statutory grounds listed in the French arbitration law are most commonly used to prevent the recognition and enforcement of egregious international arbitration awards in France. These grounds can prevent recognition of: awards rendered in violation of the arbitrators’ mission,¹⁷⁰ awards rendered in violation of principles of due process,¹⁷¹ and awards the recognition of which would breach French international public policy.¹⁷² All three grounds were purposefully expressed in general terms in the 1981 French arbitration law and remained unchanged under the new law, leaving it to the French courts to define their precise contours.

1. Excess of Power

French courts rarely set aside international awards for excess of power or violation of the arbitrators’ mission under the prior CPC Article 1502-3. Our review shows only two international awards having been annulled on this ground since 2000.¹⁷³ As in other jurisdictions,¹⁷⁴ French courts have vacated awards when they found that the arbitrators had clearly failed to apply the standards that the parties had specified would govern the dispute. For example, the *Cour de Cassation*, France’s highest civil court, recently reaffirmed, in the context of a domestic award, that an award issued with no reference to equity where the arbitration agreement provided for the arbitrators to decide *ex aequo et bono*, should be vacated.¹⁷⁵ Conversely, the Court of Appeal in 2009 set aside the portion of an international award that was decided *ex aequo et bono* where the underlying arbitral agreements did not each call for its

¹⁶⁸ French CPC Article 1504 (previously Article 1492).

¹⁶⁹ L. Yves Fortier, *La Nouvelle Loi Française de l’Arbitrage: Vues d’Outre-Atlantique* (The New French Arbitration Law, Views from Across the Atlantic); Speech delivered on September 28, 2011 at the Annual Conference of the French Arbitration Association; available at http://www.arbitration-icca.org/media/1/13282757006560/la_nouvelle_loi_francaise_sur_larbitrage.pdf.

¹⁷⁰ CPC Article 1520-3.

¹⁷¹ CPC Article 1520-4. The principle would be more correctly translated as “adversarial principle,” but is generally understood to encompass the common law principle of procedural due process.

¹⁷² CPC Article 1520-5.

¹⁷³ CA Paris October 22, 2009, *Société Globale Ruckversicherungs AG v/ SCP Brouard Daude*: Partial annulment of arbitral decision to amend a decision on damages after a final award had been rendered.

¹⁷⁴ See discussion in Sections III. A, B and C.

¹⁷⁵ Civ. 1, 1er fevrier 2012, Pourvoi N. 11-11084 (domestic award).

use.¹⁷⁶ The award resulted from the consolidation of three arbitral proceedings, based on three contracts between the same parties, only two of which gave the arbitrators the authority to apply equity.

Like the Swiss courts under PILA section 190(2)(e), or the U.S. courts when reviewing manifest disregard or excess of powers, French courts under CPC Articles 1502-3/1520-3 are not concerned with *how* the arbitrators applied the rule chosen by the parties—an error in the application of a rule of law is not reviewable by the French courts. The scope of the review by French courts under CPC Article 1520-3 is limited to determining whether the parties requested that the arbitral tribunal apply certain rules or standards and controlling whether the tribunal did in fact apply such rule or standard. That the tribunal applied the rule or standard erroneously is beyond the scope of French judicial review, unless enforcing the award in France would, effectively, result in a “flagrant, real and concrete” violation of French rules of international public policy¹⁷⁷ discussed below.

2. Adversarial Principle

The Paris Court of Appeal recently vacated an international award because the arbitrators applied a method of calculating damages (i) that was not the method elected by the parties, and (ii) on which the parties were not given an opportunity to argue.¹⁷⁸ The court found that the arbitrators’ substitution of the method of calculating damages was not a simple calculation modality but rather constituted a change in the grounds for indemnification, on which the parties should have been given an opportunity to argue. The Court of Appeal annulled the award on the grounds of both Articles 1520-4 (due process) and Article 1520-5 (international public policy), which the court characterized as “procedural public policy.” The *Cour de Cassation* upheld and confirmed the Court of Appeal’s decision on the basis of CPC Article 1520-4 only.¹⁷⁹

This decision of the Court of Appeal, confirmed by France’s highest court, raised some concerns within the international arbitral community. Professor Park noted that the decision led to irreconcilable tensions between the arbitrators’ obligations¹⁸⁰ of even-handedness and efficiency. Professor Park noted that had the arbitrators given the opportunity to the parties to make further submissions on the valuation method, it would have exposed itself to the criticism that it was “suggesting [to the Claimants] that they amend their pleadings.”¹⁸¹

3. International Public Policy

As in other leading jurisdictions, French courts construe substantive French international public policy extremely restrictively. Our empirical review of cases showed that only three

¹⁷⁶ *Riverstone Insurance Ltd v. Liquidators of ICD*, Paris, 5 November 2009.

¹⁷⁷ Civ. 1, June 4, 2008, *SNF v. Cytec Industries BV*, n° 06-15.320.

¹⁷⁸ Paris, March 25, 2010, *Société Commercial Caribbean Niquel v. Société Overseas Mining Investments Ltd.*, n° 08/23901.

¹⁷⁹ Civ. 1. 29 juin 2011, Pourvoi N. 10-23.321.

¹⁸⁰ The arbitrators in that case included Jan Paulsson and Ignacio Grigera Naon.

¹⁸¹ Cited in GAR, August 3, 2011 issue.

challenges on this ground have succeeded between 2000 and 2011.¹⁸² To successfully challenge an award on international public policy grounds, one must establish that its recognition and enforcement (*exequatur*) would not merely result in merely *any* violation of international public policy. The French courts created their own “judicial gloss” on CPC Article 1520-5: the violation of international public policy must thus be “flagrant, real and concrete,”¹⁸³ in order to result in *vacatur*. In other words, a mere hypothetical violation of international public policy would not be sufficient to justify *vacatur*. Not all commentators appear to agree with this judicial gloss on Article 1520-5. Some have criticized it as depriving the courts of a necessary authority to guard against the possibility of a tribunal composed of “crooks or imbeciles.”¹⁸⁴

Substantively, French case law has defined international public policy as the “essential values gathered under the French judicial order.”¹⁸⁵ Over the years, French courts have identified key principles and mandatory rules of French (or European) law that were “elevated” to the level of principles of French international public policy. These judicial principles constitute “essential values” of the French legal order, from which an international award to be enforced in France may not depart. While it is generally recognized in France that international public policy is a much narrower standard of review than domestic public policy or mandatory rules of law, French courts, like the other courts in leading arbitral jurisdictions, have felt the need to implement what appears to be a safety valve comparable in its objective, if not in its methodology, to manifest disregard of the law.

Thus, principles of French bankruptcy law have been consistently characterized as constituting rules of both internal and international public policy. The relationship between bankruptcy and arbitration law is complex and the approach adopted by each jurisdiction differs. When the bankruptcy takes place in France, the French *Cour de Cassation* has consistently set out that arbitral tribunals retain the authority to adjudicate claims involving a bankrupt entity, but that certain rules of French bankruptcy law must apply, including in the context of international arbitral proceedings. Thus, France’s highest Court recently confirmed this principle by overturning a Paris Court of Appeal decision that had confirmed a monetary award rendered against a company after the award-debtor’s bankruptcy proceedings had been initiated in France.¹⁸⁶ The *Cour de Cassation* found that by disregarding Article L. 622-22 of the French Commercial Code, which freezes assets and payment of debts of a bankrupt entity, the arbitrators violated the principle of equality of creditors in a French bankruptcy proceeding, which contravenes French international public policy. It is notable that in this case, the *Cour de Cassation* considered that the French judicial gloss according to which violations of international public policy must be “manifest and flagrant” did not apply. Yet, in a later case, the Court of

¹⁸² Paris, March 25, 2010, *Société Commercial Caribbean Niquel v. Société Overseas Mining Investments Limited*, n° 08/23901, confirmed by Civ. 1. 29 juin 2011; T. des Conflits, May 17, 2010, *INSERM v. Fondation F. Saugstad*, n° C3754; Civ. 1, May 6, 2009, *Société Jean Lion v. Société Egyptienne Internationale Company For Commercial Exchanges (Income)*, n° 08-10.281;

¹⁸³ Civ. 1, June 4, 2008, *SNF v. Cytac Industries BV*, n° 06-15.320.

¹⁸⁴ Vincent Heuzé, *Arbitrage International: Quelles raisons à la Déraison?*, D. 2011, at 2880.

¹⁸⁵ CA Paris, May 11, 2006, *Société Groupe Antoine Tabet v. La République du Congo*.

¹⁸⁶ Cass. civ. 1, May 6, 2009, *Société Jean Lion v. Société Egyptienne Internationale Co. Commercial Exchanges (Income)*, n° 08-10.281, see comment by D. Cohen in Rev. Arb. 2010, p. 299.

Appeal confirmed an award that disregarded a foreign bankruptcy decision affecting one of the parties to the arbitration.¹⁸⁷ While the French court in that case endorsed the arbitral determination that the bankruptcy judgment did not comport with fundamental principles of procedural fairness, the decision raised the question, among French commentators, of the contours of international public policy in relation to foreign bankruptcy proceedings.¹⁸⁸

Likewise, France continues to refine its position on the place of European Union law in the judicial review of international awards that involve elements of European law. Thus, while French courts have yet to set aside an international award for violating French or European rules of competition law, they have recognized, since the decision in *SA Thales Air Defence v. GIE Euromissile*,¹⁸⁹ that “flagrant, real and concrete” violations of principles of European competition law would result in annulment under CPC Article 1520-5 (then 1502-5). However, in the more recent case of *SMEG v. Poupardine*,¹⁹⁰ both the Paris Court of Appeal and the *Cour de Cassation* appear to have fallen short of recognizing the principle of primacy of European over French law as a ground to invalidate international awards. In *SMEG*, the Paris Court of Appeal adjourned its decision to determine a challenge to an arbitral award, pending the European Commission’s determination of whether the French law applicable to the contract underlying the arbitral decision violated a European Regulation.¹⁹¹ The European Commission declared that the French regulation that led to the annulment of the contract at issue in the arbitration violated European law, a claim that the challenging party had previously made in the arbitration. Despite the European Commission’s decision, the *Cour de Cassation* confirmed the Court of Appeal’s decision that the arbitrators did not violate international public policy by refusing to consider whether the French regulation complied with European law.

Finally, the *Tribunal des Conflits*, the highest court charged with delineating the scope of the jurisdiction of administrative and civil courts in France, decided in 2010 that the administrative courts had jurisdiction to review international awards involving a French public entity when rendered in matters relating to occupation of the public domain, procurement procedures for public contracts, public-private partnerships, and delegations of public services.¹⁹² Following this decision, it is unclear which of the limited grounds of judicial review under CPC Article 1520 or the more expansive French administrative law rules would apply to challenges of international awards rendered in the matters listed above.

It therefore appears from the Committee’s review of the French case law over the last ten years that through a consistent but pragmatic application of enumerated and limited statutory grounds, the courts are able to establish the safety valves that they consider necessary to guard the French legal order against awards that would fail to meet a common standard of fairness and due process. Like the courts in New York, French courts navigate the line between providing a

¹⁸⁷ *Republique de Guinee Equatoriale v. Fitzpatrick Equatorial Guinea Ltd.*, Paris 11 avril 2011.

¹⁸⁸ Sylvain Bollee and Bernard Haffel, 3 Rev. Arb. 2011, pp. 752-760.

¹⁸⁹ Paris, November 18, 2004, *SA Thales Air Defence v. GIE Euromissile*, n° 02/19606.

¹⁹⁰ *Smeg NV. v. Poupardine S.A.*, Civ. 1, 29 juin 2011, Pourvoi N.10-16680, confirming Paris December 17. 2009.

¹⁹¹ Paris, December 20, 2007, *Société SMEG v. Société Poupardine*, n°05/06.012.

¹⁹² T. des Conflits, May 17, 2010, *INSERM v. Fondation F. Saugstad*, n° C3754.

predictable, arbitration-friendly forum and maintaining the flexibility to vacate awards that manifestly contravene fundamental values of the French legal order.

III. Conclusion

In light of the infrequent and conservative manner in which the manifest disregard doctrine has been applied, the standard for vacatur of international arbitral awards in the Second Circuit remains consistent with principles and practices in other arbitration-friendly jurisdictions. Despite the extreme infrequency with which the manifest disregard doctrine has been applied to vacate an international award rendered in the United States – indeed, it has never occurred in the Second Circuit – some commentators nevertheless suggest that the mere possibility of its application constitutes a disadvantage for New York as an international arbitral seat.¹⁹³

The Committee’s empirical review, however, suggests that this concern is not well-founded. As noted above, manifest disregard is rarely the sole ground invoked to set aside an award. The coupling of manifest disregard with other asserted grounds for vacatur is not likely either to add substantially to the delay or cost associated with vacatur proceedings or to impose significant additional burdens on the judiciary. Thus, the perception that arbitral awards rendered in New York are somehow more vulnerable to vacatur is both inaccurate and unfair.

Moreover, the notion that the national courts in other arbitration venues would not find comparable bases to set aside a shockingly defective award is incorrect. While not directly analogous to manifest disregard, courts in all major jurisdictions reviewed in the Report develop methods of interpretation and application of statutory grounds of vacatur that are comparable to the Second Circuit’s application of manifest disregard as a gloss on existing statutory grounds of vacatur of arbitral awards. Thus, regardless of the legal rubric, courts in all major jurisdictions find a way to protect against an irrational award.

The Committee notes that the current draft of the Restatement (Third) of International Commercial Arbitration (Chapter 4) takes the position that manifest disregard is not a proper ground for vacating an award. Without debating the merits of the Restatement’s view, the Committee would simply observe that it does not reflect the current state of the law. The prevailing Second Circuit approach, consistently reaffirmed in recent decisions, is that manifest disregard and the grounds set forth in Chapter 1 of the Federal Arbitration Act are applicable in applications to vacate international awards rendered in the United States.

However, the strict requirements that the Second Circuit has laid down and the infrequency with which the doctrine of manifest disregard of the law is applied should obviate any concern of undue intervention by New York’s courts. Simply stated, New York courts do not invite judicial review of the merits of an award.

Thus, the Committee believes that the existence of the manifest disregard doctrine, as narrowly construed by the Second Circuit, does not, and should not be viewed as, detracting from New York’s position as a highly desirable seat for international arbitration.

¹⁹³ Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AMERICAN REV. OF INT’L ARB. 45, 47-48 (2011).

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APPENDIX A – Other Circuits – July 2012

**The “Manifest Disregard of the Law” Doctrine
and International Arbitration in New York**

**by the
Committee on International Commercial Disputes
of the New York City Bar Association**

The Manifest Disregard Standard in Circuits Other Than The Second Circuit

Across the Circuits, there has been great reluctance to vacate international or non-domestic arbitral awards. Outside the Second and Ninth Circuits, there have been only twenty cases involving international or non-domestic arbitral awards and manifest disregard challenges. Unsurprisingly, the vast majority of these courts have applied the standard in a conservative fashion. The Committee’s research has uncovered only two cases, in the Eastern and Middle Districts of Pennsylvania, in which international arbitral awards were vacated on manifest disregard grounds.

In *PMA Capital Insurance Co. v. Platinum Underwriters Bermuda, Ltd.*, the petitioner sought to vacate a non-domestic arbitral award that permitted a party to recover a deficit notwithstanding a Deficit Carry Forward clause in the contract.¹ The petitioner claimed that the arbitrator effectively eliminated this clause from the contract, which would have required the respondent to meet certain conditions before recovering any deficit under the contract.² The district court agreed, stating:

Even broad discretion has limits, however. The [arbitration clause] allowed the Arbitrators to stray from "judicial formalities" and the 2003 Contract's 'literal language' to effectuate in a 'reasonable manner' the Contract's 'general purposes.' No court has held that such a clause gives arbitrators authority to re-write the contract they are charged with interpreting. Rather, courts have held just the opposite.³

The court found the arbitrator’s decision to be “irrational,” observing that it not only could not be drawn from the contract language itself, but it also could not be drawn from the parties’ submissions to the arbitrator.⁴ In fact, the parties only sought to arbitrate the size of the deficit, not the ability of the deficit to be carried forward.

While on its face the *PMA* decision appears to be a straightforward application of the manifest disregard standard, the decision is not entirely clear about the ground for vacatur. The court begins its analysis by explaining the manifest disregard standard, but later notes that the actions taken exceeded the arbitrator’s power, a statutory ground for vacatur under the FAA.⁵

1 659 F. Supp. 2d 631 (E.D. Pa. 2009).

2 *Id.* at 636.

3 *Id.*

4 *Id.* at 637 – 39.

5 *See* FAA § 10(a)(4).

Thus, it is unclear whether the district court would have reached the same result on a strictly manifest disregard analysis.

By contrast, the Middle District of Pennsylvania explicitly grounded its partial vacatur of a non-domestic arbitral award on manifest disregard grounds in *Koken v. Cologne Reinsurance (Barbados) Ltd.*⁶ In *Koken*, the petitioner sought vacatur of an arbitral award that a liquidator's claim was subject to a setoff under Pennsylvania law and that an insurance contract was still in force.

While the district court confirmed the arbitrator's ruling that the liquidator's claim was subject to a setoff, the court vacated the remainder of the arbitral award. In finding that the insurance contract was still in force, the court found that the award was directly contrary to statutory language that was "quite clear," and the court failed to see "how the arbitration panel could conclude otherwise."⁷ This case, then, fell into the well-defined and limited boundaries of the doctrine as described in the same decision:

A court can vacate an arbitration award under the manifest disregard standard if it finds that . . . (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.⁸

PBM and *Koken* demonstrate that district courts in the Third Circuit approach motions to vacate international or non-domestic arbitral awards in a manner similar to motions to vacate domestic awards. This conservative approach provides an effective "safety valve" for situations, such as that presented in *Koken*, where an arbitrator expressly ignores the prevailing law of the jurisdiction in reaching his conclusion.

There follows a circuit-by-circuit analysis of the case law on manifest disregard in Circuits other than the Second Circuit.

⁶ No. 98-CV-0678, 2006 WL 2460902, at *6 (M.D. Pa. Aug. 23, 2006).

⁷ *Id.* at *8.

⁸ *Id.* at *6 (internal quotation removed).

I. The Ninth Circuit's⁹ Deferential Manifest Disregard Standard

A. Historical Treatment¹⁰

Since 1961, the Ninth Circuit has considered manifest disregard as a ground for vacatur in arbitral awards.¹¹ The Ninth Circuit has also expressly adopted the Second Circuit's post-*Hall Street* approach to the manifest disregard doctrine.¹² While there was some initial ambiguity regarding *Hall Street's* impact on the application of the manifest disregard doctrine, the issue was firmly decided in *Comedy Club, Inc. v. Improv West Associates*,¹³ where the Supreme Court remanded review of an arbitral award in light of the *Hall Street* decision.¹⁴ On remand, the Ninth Circuit upheld its partial vacatur based upon manifest disregard and unambiguously reaffirmed that manifest disregard survives *Hall Street* because it is "shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4)."¹⁵

Among the majority of domestic cases involving manifest disregard standards in the Ninth Circuit, labor disputes and attorney fees comprise the most prevalent subject matters for judicial arbitral review. To date, the Ninth Circuit has reviewed arbitral awards under the manifest disregard doctrine in 224 cases. There were 119 cases at the District Court level, with 92% confirming arbitral awards, 8% vacating awards, and 1.6% partially confirming and partially vacating awards.¹⁶ At the appellate level, there were a total of 94 cases. Of these, 75%

9 We address the Ninth Circuit out of order because, after the Second Circuit, it is the busiest and arguably most influential venue for international arbitration and the legal precedent related to the review of arbitral awards.

10 Before *Hall Street*, the Ninth Circuit recognized manifest disregard as a ground for vacatur "[i]ndependent of section 10 of the [Federal Arbitration] Act." *Sheet Metal Workers Int'l Ass'n Local Union 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) ("Independent of section 10 of the Act, a district court may vacate an arbitral award which exhibits manifest disregard of the law."); see also *Carter v. Health Net of Cal. Inc.*, 374 F.3d 830, 838 (9th Cir. 2004); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991); *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 905-07 (9th Cir. 1986) (where manifest disregard was used to interpret the application of "erroneous . . . misinterpretations of the law"). While *Hall Street* abolished non-statutory grounds for vacatur in cases reviewed under the FAA, cases reviewed under California state law are still subject to manifest disregard review. See *Pearson Dental Supplies, Inc. v. Super. Ct.*, 229 P.3d 83, 91 n.3 (Cal. 2010) (State judicial standards of arbitral review "do not move in lockstep" with federal rules and manifest disregard remains an exception to review under California arbitration law).

11 *San Martine Companie de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) ("We apprehend that a manifest disregard of the law in the context of the language used in *Wilko v. Swan* might be present when arbitrators understand and correctly state the law, but proceed to disregard the same.")

12 See *LaPine v. Kyocera*, No. C-0706132 MHP, 2008 WL 2168914 (N.D. Cal. May 23, 2008) (*discussed infra*). 13 553 F.3d 1277, 1290 (9th Cir. 2009).

14 *Improv W. Assocs. v. Comedy Club, Inc.*, 555 U.S. 801 (2008).

15 *Comedy Club, Inc.*, 553 F.3d at 1290; see also *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 415 (9th Cir. 2011) (finding that "in this Circuit the 'manifest disregard' standard has survived *Hall Street* intact") (citing *Comedy Club, Inc.*, 553 F.3d at 1290-91). The arbitral award would have resulted in a covenant not to compete that "applies geographically to the contiguous United States and does not end until 2019." *Id.* at 1292. The Court of Appeals subsequently amended the award to enforce the non-compete covenant only in the counties where the Plaintiff currently owned clubs.

16 As of April 2011, District Courts in the Ninth Circuit had confirmed 107 awards; vacated 10; and partially vacated 2 others.

affirmed the District Court's confirmation, 4% affirmed the lower court's vacatur, 14% reversed vacatur, and 6% reversed confirmation.¹⁷

B. The 9th Circuit's Application of the Manifest Disregard Standard

As with all jurisdictions in the United States, the Ninth Circuit recognizes both the New York Convention and the FAA rules when an international arbitration is seated domestically in the United States or is rendered under U.S. law. Since the Ninth Circuit follows the Second Circuit's interpretation of FAA § 10, the result is an opportunity for manifest disregard grounds for vacatur in such cases. It should be remembered that only U.S.-seated international cases meet this criterion.¹⁸ In instances where a foreign arbitral award is sought to be enforced in the United States, only New York Convention grounds apply.¹⁹

The Ninth Circuit applies a highly deferential standard in manifest disregard cases. Of the few cases that explicitly discuss both New York Convention and FAA grounds for vacatur, *none* have vacated awards on the ground of manifest disregard of the law. Only one Convention award confirmation was reversed and remanded on unrelated jurisdictional grounds.²⁰

C. International (or Convention) Award Decisions

*LaPine v. Kyocera*²¹ solidified the application of post-*Hall Street* review in Convention awards, as *Comedy Club* did for domestic awards in the Ninth Circuit. LaPine brought an action against Kyocera to vacate an arbitration award issued by the International Court of Arbitration (ICC) governed by California law.²² At issue was whether the grounds for vacatur under the Federal Arbitration Act also applied to the review of Convention awards, or if the grounds for review under the Convention were exclusive. In accordance with decisions in the Second Circuit, the Ninth Circuit determined that both Article V of the New York Convention and Chapter One of the FAA govern applications to vacate arbitral awards rendered in the United States or under U.S. law.²³

17 As of April 2011, the Ninth Circuit had affirmed the confirmation of 71 awards, affirmed the vacatur of 4 awards, reversed the confirmation of 6 awards, and reversed the vacatur of 13 awards.

18 As of this date, of the 224 matters researched, only five explicitly cited both the FAA and the New York Convention. There are more than five cases in the Ninth Circuit that involve foreign parties, but these decisions are often decided exclusively within the interpretation of the FAA. *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

19 Though manifest disregard is implicitly "codified" in FAA § 10(a)(4), it cannot be applied simply because a party is of U.S. origin or seeks enforcement in the United States without the aforementioned prerequisites.

20 *Polimaster Ltd. V. RAE Sys., Inc.*, 623 F.3d 832 (9th Cir. 2009) (reversing confirmation of arbitral award because the forum was improper and the tribunal lacked jurisdiction).

21 No. C-0706132 MHP, 2008 WL 2168914 (N.D. Cal. May 23, 2008).

22 Proceedings began in May 1987, when LTC filed suit against Kyocera in the Ninth Circuit. Eventually, Prudential and LTC commenced arbitration against Kyocera and a panel decision was rendered against Kyocera. These proceedings and challenges are generally referred to as the "Prudential Arbitration." Upon review, the Ninth Circuit confirmed the award. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc).

23 This is in contrast with the review of arbitral awards rendered in a foreign jurisdiction, where only the Convention standards of review apply. *See Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531 (9th Cir. 1987) (finding that only the Convention governed review of an award rendered in Bermuda under Bermuda law).

The *LaPine* court described “manifest disregard of the law” as “coextensive with exceed[ing] their powers” within the § 10(a)(4) standard.²⁴ The court stressed the extremely deferential and narrow review allowed under the manifest disregard standard. On a “matter of first impression,” the court rejected LaPine’s argument that the arbitrators had exceeded their power by default by rendering an award for which there was no legal precedent. The court held that lack of legal precedent was not grounds for finding manifest disregard. Additionally, the court found that the panel’s decision to apply the ICC rules in place of California procedural laws was not demonstrative of manifest disregard.²⁵

Last year’s decision in *Kaliroy Produce Co., Inc., v. Pacific Tomato Growers, Inc.*²⁶ further underscores the deferential standard that courts will apply when reviewing non-domestic awards. The case involved review of a non-domestic award involving one foreign and two domestic parties.²⁷ The award was challenged on all four grounds available under FAA § 10. The movant argued that the arbitrator manifestly disregarded the law by awarding prejudgment interest contrary to Arizona law.²⁸

The district court decision in *Kaliroy Produce* reflected the deferential standard of review required for international and non-domestic arbitration awards.²⁹ The court held that the challenge was an impermissible attempt to revisit the merits of the case in its entirety. Finding no grounds for vacatur for manifest disregard, the district court confirmed the award, commenting that “arbitrators have ‘exceeded their powers’ only when their award is completely irrational, or exhibits a manifest disregard for the law. This basis for vacating an arbitration award is, however, ‘severely limited and for the most part, the court defers to the arbitrators’ determination of the award.’”³⁰ The court continued that “[t]o rise to the level of manifest disregard, the governing law alleged to have been ignored by the arbitrators must *be well defined, explicit, and clearly applicable.*”³¹ Additionally, the record must be clear that the “arbitrators recognized the applicable law and then ignored it.”³² A court should confirm an award “even in the face of erroneous findings of fact or misinterpretations of the law[,]” unless the party challenging the decision meets one of the narrow statutory exceptions. The court acknowledged that this standard places a difficult burden on the moving party, since “[a]rbitrators are not required to set forth their reasoning supporting an award.”³³

24 *Kyocera*, 2008 WL 2168914, at *7 (citing *Collings v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007)).

25 The arbitral panel had justified its choice of procedural law as follows:

[T]his award is international in nature, and although venued in California, is not subject to Californian procedural law not standing for core Californian public policy. For this reason, the Arbitral Tribunal does not deem itself bound by California statutes or case law regarding summary judgment disposal on the merits of this case.

Id. at *9.

26 730 F. Supp. 2d 1036 (Ariz. 2010).

27 Arizona law governed the arbitration, and the principal conduct at issue occurred in the United States and Mexico. *Id.*

28 *See id.* at 1046-47.

29 *Id.* at 1041 (“The FAA reflects a strong federal policy favoring arbitration. Moreover, the strong federal policy in favor of arbitration applies ‘with special force in the field of international commerce.’”).

30 *Id.* at 1041 (internal citation omitted).

31 *Id.* (internal citation omitted).

32 *Id.* (internal quotation omitted).

33 *Id.* (internal citations omitted).

Courts in the Ninth Circuit exhibit similar deference where a manifest disregard challenge turns on a question of contract interpretation. In *Hernandez v. Smart & Final*,³⁴ a party to a non-domestic joint venture agreement sought vacatur of an arbitral award on the ground that the dispute was not subject to arbitration. The movant argued that the joint venture agreement's arbitration clause did not govern the dispute because the dispute concerned entities that were not parties to the joint venture agreement. The ICC tribunal, however, interpreted the initial joint venture agreement as merely one of a series of agreements governing the joint venture, and found that a violation of any of those related agreements constituted a breach of the initial joint venture agreement and was thus governed by that agreement's arbitration clause.³⁵ The district court deferred to the arbitral tribunal, stating:

As long as [an arbitral ruling or award] draws its essence from the contract, meaning that on its face it is a plausible interpretation of the contract, then the courts must enforce it. The ICC's interpretation of the Agreement (and the arbitration clause set forth therein) in this case was, at a minimum, plausible. Accordingly, the Court finds the ICC did not exceed its powers under the Award.³⁶

II. The First Circuit's Unresolved Approach post-*Hall Street*

A. Historical Treatment

The courts of the First Circuit have a substantial history of narrowly applying the manifest disregard doctrine consistently with the courts of the Second and Ninth Circuits. The First Circuit has also reversed several decisions in which the district courts had fallen short of the "exceedingly deferential" standard of review required.³⁷

Further, the First Circuit has emphasized that vacatur for manifest disregard is appropriate only if there is "some showing in the record, *other than the result obtained*, that the arbitrators knew the law and expressly disregarded it."³⁸ The court may imply the arbitrators' knowledge of the law only where that law is of "such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug."³⁹

In one domestic case, however, the First Circuit reversed the confirmation of an award in an NASD arbitration for manifest disregard.⁴⁰ Specifically, the *Kashner Davidson* court found that the arbitrator had manifestly disregarded the NASD rules.⁴¹ The First Circuit characterized manifest disregard, not as an amalgamation of various common law grounds for vacatur.⁴² The

34 Nos. 09-cv-2266 BEN (NLS), 09-cv-2322, 2010 WL 2505683 (S.D. Cal. June 17, 2010).

35 *Id.* at *5.

36 *Id.* at *6 (internal citations omitted).

37 See, e.g., *McCarthy v. Citigroup Global Markets Inc.*, 463 F.3d 87 (1st Cir. 2006); *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321 (1st Cir. 2000).

38 *Baghdady v. Sadler*, 1992 U.S. App. LEXIS 23571, at *8 (1st Cir. Sept. 9, 1992) (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (emphasis original)).

39 *Id.*; see also *Cytyc Corp. v. DEKA Prods. Ltd. P'ship*, 439 F.3d 27 (1st Cir. 2006).

40 *Kashner Davidson Secs. Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008), *aff'd*, 601 F.3d 19 (1st Cir. 2010).

41 *Id.*

42 *Id.* at 74.

court rejected the non-moving party's argument that the NASD rules are private dispute resolution rules, not "law" that can be disregarded within the meaning of the manifest disregard analysis.⁴³ The court found that manifest disregard applies both to the governing law of the arbitration and to the parties agreement. When the parties' agreement incorporates a set of private rules, those rules become the law of the arbitration, disregard of which is grounds for vacatur.⁴⁴

B. Application of Manifest Disregard Standard

The First Circuit has, in dicta, stated that manifest disregard does not survive *Hall Street* as a ground for vacatur in cases governed by the FAA.⁴⁵ Thereafter, however, the First Circuit acknowledged that the continued viability of manifest disregard in the First Circuit remains unresolved.⁴⁶ In several unpublished decisions, district courts within the First Circuit have held that manifest disregard is no longer viable in light of *Hall Street*.⁴⁷

III. The Third Circuit's Embrace of a Limited Doctrine of Manifest Disregard Standard

A. Historical Treatment

The Third Circuit has drawn upon the Second Circuit's interpretation of the doctrine in defining the limited nature of review for manifest disregard of the law.⁴⁸ In *Smith v. PSI Services II, Inc.*, the Federal District Court for the Eastern District of Pennsylvania described manifest disregard as "severely limited" and emphasized that it "contemplates more than an error of fact or law."⁴⁹ Other district court decisions have further defined the "severely limited" nature of the doctrine:

A court can vacate an arbitration award under the manifest disregard standard if it finds that . . . (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.⁵⁰

Although courts in the Third Circuit have endeavored to limit the manifest disregard doctrine, the Third Circuit has the highest rate of vacating awards on manifest disregard grounds. In fact, district courts in the Third Circuit have vacated fifteen arbitral awards on manifest disregard grounds, 10% of all cases in which manifest disregard was asserted as a ground for

43 *Id.* at 77-78.

44 *Id.*

45 *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120 (1st Cir. 2008) (labor arbitration).

46 *Kashner Davidson Secs. Corp. v. Mscisz*, 601 F.3d 19 (1st Cir. 2010) (rejecting as untimely appeal to vacate award for manifest disregard), *aff'g*, 531 F.3d 68 (1st Cir. 2008).

47 *See, e.g., Thomas Diaz, Inc. v. Columbiana, S.A.*, Civ. No. 10-1426, 2011 WL 6056717, at *2 & n.2 (D.P.R. Dec. 6, 2011); *Horizon Lines of P.R., Inc. v. Local 1575, Int'l Longshoremen's Assoc. AFL-CIO*, Civ. No. 08-1611, 2009 WL 613778, at *3-4 (D.P.R. Mar. 6, 2009); *ALS & Assocs., inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 185 (D. Mass. 2008) (relying on *Ramos-Santiago*, 524 F.3d at 124 n.3).

48 *See infra* note 138 and accompanying text.

49 No. 97-6749, 2001 WL 41122, at *1 (E.D. Pa. Jan. 12, 2001).

50 *Koken v. Cologne Reinsurance (Barbados) Ltd.*, No. 98-CV-0678, 2006 WL 2460902, at *6 (M.D. Pa. Aug. 23, 2006) (internal quotation omitted).

vacatur.⁵¹ Although seven of those vacated were later reversed on appeal, some may still suggest that these numbers reveal that the Third Circuit generally is more willing to apply the doctrine than other circuits.⁵² The better explanation, however, may be that the Third Circuit appears to play host to an unusually high number of labor arbitrations (and subsequent judicial challenges), the awards from which make up a significant majority of the awards vacated for manifest disregard.⁵³

Significantly, however, it was courts in the Third Circuit that vacated the only two international arbitral awards known to the Committee to have been vacated by U.S. federal courts on the ground of manifest disregard of the law.⁵⁴

B. Application of the Manifest Disregard Standard

The Third Circuit has a long history with the manifest disregard standard, becoming one of the first Circuits to recognize it as a valid ground for vacating arbitral awards in 1968. In *Trafalgar Shipping Co. v. International Mill Co.*, the Third Circuit confirmed that an arbitral award could be reviewed for manifest disregard of the law, though the arbitral award in that case was not vacated.⁵⁵

However, the Third Circuit has a concomitant history of seeking to limit the application of the manifest disregard standard. As noted above, the Eastern District of Pennsylvania described the application of the manifest disregard standard as “severely limited” and “contemplates more than an error of fact or law.”⁵⁶ Other district court decisions in the Third Circuit have expressed a similar level of skepticism.

Moreover, courts in the Third Circuit have cited Second Circuit case law to describe the limited nature of the manifest disregard inquiry. For example, in declining to vacate an arbitral award on manifest disregard grounds, a Delaware bankruptcy court noted that “an arbitration panel is not required to explain its reasoning as to its award, and as long as there exists ‘a barely colorable justification for the outcome reached,’ the award should be enforced even if the reviewing court disagrees with it on the merits.”⁵⁷ Thus, despite the large number of civil actions reviewing arbitral awards, the Third Circuit is in accord with the other Circuits in treating the manifest disregard standard with caution.

⁵¹ See [Appendix A] Significantly, 7 of those 15 vacatures were later reversed on appeal.

⁵² Discussed *infra*.

⁵³ Labor cases implicate a unique set of statutes, rules, and precedents that make awards in labor arbitrations uniquely susceptible to review for manifest disregard. Moreover, these considerations are not unique to U.S. labor disputes. While labor cases may provide certain insights into the manifest disregard doctrine, observers should use caution in attempting to draw any direct parallels between those cases and the operation of the manifest disregard doctrine in international arbitration.

⁵⁴ *PMA Capital Ins. Co. v. Platinum Underwriters Berm., Ltd.*, 659 F. Supp. 2d 631 (E.D. Penn. 2009), *aff'd* 2010 U.S. App. LEXIS 23222 (3d Cir. Nov. 8, 2010); *Koken v. Am. Integrity Ins. Co.*, 2006 U.S. Dist. LEXIS 59540 (M.D. Pa. August 23, 2006) (vacating a portion of an award).

⁵⁵ 401 F.2d 568, 573 (3d Cir. 1968) (citing *Saxis Steamship Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967)).

⁵⁶ *PSI Servs. II*, 2001 WL 41122, at *1.

⁵⁷ *In re Fruehauf Trailer Corp.*, 414 B.R. 36, 40 (Bank. Del. Oct. 9, 2009) (citing Second Circuit case law).

IV. The Fourth Circuit’s Uncertain Post-Hall Street Approach

A. Historical Treatment

The Fourth Circuit has issued very few decisions regarding manifest disregard challenges. It has, however, reversed at least one domestic award in the labor and employment context for the arbitrator’s manifest disregard of the employment agreement.⁵⁸ In *Patten v. Signator Insurance Agency*, the court held that “the arbitrator failed to draw his award from the essence of the agreement,” when implying a statute of limitations not provided by the agreement.⁵⁹ Because it appeared that the arbitrator had “revised the governing arbitration agreement on the basis of his own personal notions of right and wrong,” vacatur for manifest disregard was appropriate.⁶⁰

One judge dissented from the *Patten* decision, arguing that while the arbitration award was “clearly erroneous,” it was not clear from the record that the arbitrator was aware of and deliberately disregarded plainly applicable law.⁶¹ As in the Second Circuit and elsewhere, Fourth Circuit precedent prohibits the vacatur of arbitral awards for errors of law.⁶²

B. Application of the Manifest Disregard Standard

It is unclear whether manifest disregard will survive in the Fourth Circuit post-*Hall Street*. In *Raymond James Financial Services, Inc. v. Bishop*, the Fourth Circuit heard an appeal from a district court order vacating an NASD arbitration award on three grounds, including manifest disregard.⁶³ The Fourth Circuit acknowledged that the *Hall Street* decision had rendered uncertain the future of the manifest disregard doctrine. The court declined to address the issue, however, affirming vacatur on other, statutory grounds.⁶⁴ If manifest disregard does survive, however, the Circuit’s prior case law makes clear that its application will be strictly limited.

V. The Fifth Circuit’s Rejection of Manifest Disregard

A. Historical Treatment

The Fifth Circuit has historically deviated from the majority approach to the manifest disregard standard. In fact, the Fifth Circuit refused to recognize the manifest disregard standard

58 *Patten v. Signator Ins. Agency*, 441 F.3d 230 (4th Cir. 2006), *cert. denied*, 2006 U.S. LEXIS 7811 (U.S. Oct. 16, 2006).

59 *Id.* at 235.

60 *Id.* 236 (internal quotation removed).

61 *Id.* (Lutig, J., dissenting)

62 *Id.* (citing *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994)); *see also Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991) (holding that an arbitrator’s reliance on less than perfectly analogous case law as persuasive authority did not constitute manifest disregard).

63 596 F.3d 183, 189 (4th Cir. 2010), *cert. denied, Bishop v. Raymond James Fin. Servs.*, 2010 U.S. LEXIS 6806 (U.S. Oct. 4, 2010); *see also Amerix Corp. v. Jones*, Civ. No. 09-2174, 2011 WL 6118535, at *6 (Dec. 9, 2011) (declining to decide whether manifest disregard in the Fourth Circuit survives *Hall Street*).

64 *Id.* at 193 n.13.

as a legitimate ground for vacating an arbitral award under the FAA until 1999,⁶⁵ when it became the last circuit to accept the doctrine, in *Williams v. Cigna Financial Advisors, Inc.*⁶⁶ This resistance to the manifest disregard doctrine is particularly significant due to the relatively high number of arbitrations arising out of the oil and gas industry and seated in Texas and Louisiana, and subsequent judicial challenges to awards. Since 1999, only six Fifth Circuit cases have vacated arbitral awards on manifest disregard grounds, *none* of which were international awards. Moreover, following *Hall Street*, the Fifth Circuit has once again rejected the viability of manifest disregard as a ground for vacating arbitral awards.⁶⁷

B. Application of the Manifest Disregard Standard

In its most recent decision, *Citigroup Global Markets Inc. v. Bacon*, the Fifth Circuit assessed the viability of the manifest disregard standard in light of *Hall Street*.⁶⁸ The court examined the history of judicial review of arbitral awards, and noted that application of the manifest disregard standard has been limited in the United States.⁶⁹

Surveying the state of manifest disregard after *Hall Street*, the Fifth Circuit rejected the Sixth Circuit’s approach in *Coffee Beanery, Ltd. v. WW, L.L.C.* that it would be “imprudent” to cease vacating awards made in manifest disregard of the law without further guidance from the Supreme Court.⁷⁰ The Fifth Circuit acknowledged that the Second and Ninth Circuit analyses—that manifest disregard survives *Hall Street* as a gloss on Section 10(a)(4)—were at least consistent with *Hall Street*’s holding that no non-statutory grounds for vacatur exist.⁷¹ Nevertheless, the Fifth Circuit was persuaded by the Supreme Court’s repeated admonition regarding the exclusivity of the FAA’s statutory grounds for vacatur⁷² and concluded that the manifest disregard standard did not survive *Hall Street*:

In 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

65 See, e.g., *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993) (refusing to recognize manifest disregard as “an addendum to section 10” of the FAA); *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 539 (5th Cir. 1992) (noting that the Fifth Circuit has not recognized manifest disregard of the law as a legitimate ground for vacating arbitral awards).

66 197 F.3d 752, 759 (5th Cir. 1999).

67 Discussed *infra* at p.31.

68 562 F.3d 349 (5th Cir. 2009).

69 *Id.* at 351 - 55.

70 *Id.* at 356 (discussing *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App’x 415 (6th Cir. 2008)); see also *infra* Section II(D)(6)(b) (discussing *Coffee Beanery*)

71 The Fifth Circuit described the Second Circuit’s reaction to *Hall Street* as follows:

Thus, the [Second Circuit] seems to conclude that manifest disregard – as the court describes it – does not add to the statutory grounds. The court simply folds manifest disregard into § 10(a)(4). In the full context of the Second Circuit’s reasoning, this analysis is not inconsistent with *Hall Street*’s speculation that manifest disregard may, among other things, “have been shorthand for § 10(a)(3) or § 10(a)(4).

Citigroup, 562 F.3d at 357.

72 *Id.* at 355.

rejected. Indeed, the term itself, as a term of art, is no longer useful in actions to vacate arbitration awards.⁷³

Thus, over the past twelve years, the Fifth Circuit has come full circle: (a) rejection of manifest disregard in its entirety, to (b) a circumscribed acceptance of the doctrine, and (c) back again to complete rejection of the doctrine.

VI. The Sixth Circuit's Wary Embrace of Manifest Disregard

A. Historical Treatment

Although the Sixth Circuit was one of the first Circuit Courts to address the manifest disregard of the law standard post-*Hall Street*, it did not have a long history of addressing the viability of the manifest disregard of the law standard. In several opinions, the Sixth Circuit held that the manifest disregard of the law standard is viable as a ground for vacatur.⁷⁴

Nevertheless, no international award has ever been set aside in the Sixth Circuit on the ground of manifest disregard. The Sixth Circuit's relative lack of debate concerning the manifest disregard standard made it an interesting candidate for announcing the first post-*Hall Street* decisions. It may also help explain why the Sixth Circuit seemingly had little difficulty in holding that the manifest disregard standard survived.

B. Application of the Manifest Disregard Standard

The Sixth Circuit has addressed the post-*Hall Street* viability of the manifest disregard standard in several decisions, and has adopted the approach taken by the Second and Ninth Circuits. In an unpublished decision issued shortly after *Hall Street*, the Sixth Circuit announced that manifest disregard remained viable in the Sixth Circuit:

[T]he Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10, but did not foreclose federal courts' review for an arbitrator's manifest disregard of the law. . . . However, with respect to the judicially invoked narrow exception for an arbitrator's manifest disregard of the law, the Court acknowledged that "[m]aybe the term 'manifest disregard' [in *Wilko*] was meant to name a new ground for review," though it also suggested that narrower interpretations of *Wilko* were equally plausible. . . . It is worth noting that since *Wilko*, every federal appellate court has allowed for the vacatur of an award based on an arbitrator's manifest disregard of the law. In light of the Supreme

⁷³ *Id.* at 358.

⁷⁴ See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 2000) ("As an alternative to these statutory grounds, a separate judicially created basis for vacation obtains where the arbitration award was made in manifest disregard of the law") (internal quotations omitted); *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000), *cert. denied*, 531 U.S. 878, 121 S. Ct. 187, 148 L. Ed. 2d 130 (2000) (an arbitration award can be vacated "where the arbitrators have manifestly disregarded the law."); *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990) ("This circuit has determined that 'manifest disregard of the law' means more than a mere error in interpretation or application of the law.")

Court's hesitation to reject the "manifest disregard" doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle. Accordingly, this Court will follow its well-established precedent here and continue to employ the "manifest disregard" standard.⁷⁵

Several months later, however, in *Grain v. Trinity Health*, the Sixth Circuit cast doubt on its previous declaration, stating that:

It is true that we have said that "manifest disregard for the law" may supply a basis for vacating an award, at times suggesting that such review is a "judicially created" supplement to the enumerated forms of FAA relief. *Hall Street's* reference to the "exclusive" statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory.⁷⁶

The *Grain* court did not address the issue further, since it determined that the movant in fact sought modification of the award, not vacatur.⁷⁷ For the moment, then, the manifest disregard doctrine appears to remain viable in the Sixth Circuit, but with an uncertain future.

VII. The Seventh Circuit's Inconsistency

A. Historical Treatment

The Seventh Circuit has taken an inconsistent approach to the doctrine. It initially declined to adopt manifest disregard, but yielded many years later.

In *National Railroad Passenger Corp. v. Chesapeake & Ohio Railway. Co.*, the Seventh Circuit rejected manifest disregard due to a practical hurdle frequently noted by other courts in later years: "[S]ince arbitrators have no obligation to state the rationale underlying their award, there may be no basis whatsoever for a court to determine whether they have manifestly disregarded the law or simply misinterpreted it."⁷⁸ *Chesapeake* remained the controlling Seventh Circuit decision for fifteen years.

In 1992, however, a panel of the Seventh Circuit reached a different conclusion in *Health Services Management Corp. v. Hughes*, and adopted the manifest disregard standard in cases arising under the FAA.⁷⁹ Two years later, in a long opinion authored by Judge Richard Posner, a panel again rejected the manifest disregard standard.⁸⁰ Judge Posner pronounced the manifest disregard doctrine inapplicable, noting that "[t]he grounds for setting aside arbitration awards are

⁷⁵ *Coffee Beanery, Ltd.*, 300 F. App'x at 419. (internal citations omitted).

⁷⁶ 551 F.3d 374, 380 (6th Cir. 2008) (internal citations omitted).

⁷⁷ *Id.* The court observed that modification, unlike vacatur, is indisputably limited to the grounds provided in the FAA. *Id.*

⁷⁸ 551 F.2d 136, 143 n.9 (7th Cir. 1977).

⁷⁹ 975 F.2d 1253 (7th Cir. 1992).

⁸⁰ *Baravati v. Josephthal*, 28 F.3d 704, 706 (7th Cir. 1994).

exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.”⁸¹

B. Application of the Manifest Disregard Standard

Since Judge Posner’s decision, a panel of the Seventh Circuit has again reversed course and concluded that the manifest disregard standard survives, albeit in an extremely limited form: where final arbitral awards “direct the parties to violate the law.”⁸² The Seventh Circuit has not yet ruled on the continued validity of the doctrine in the wake of *Hall Street*. The Seventh Circuit has been relectant to vacate arbitral awards on this ground. In fact, courts in the Seventh Circuit have vacated only five awards, all of which were labor arbitrations and two of which were reversed on appeal.⁸³

Thus, after several decades of struggling with whether to even recognize the manifest disregard standard for domestic arbitrations arising under the FAA, the future of manifest disregard in the Seventh Circuit remains uncertain.

VIII. The Eight Circuit’s post-Hall Street Rejection of Manifest Disregard

A. Historical Treatment

Like the Fourth Circuit, the Eighth Circuit has not seen few manifest disregard challenges. Even before *Hall Street*, the Eight Circuit emphasized that manifest disregard was “extremely narrow” in its application.⁸⁴ The Eight Circuit explicitly adopted the Second Circuit’s “safety valve” application of manifest disregard, saying that manifest disregard is “‘a doctrine of last resort’ reserved for ‘those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply.’”⁸⁵ This should not be misconstrued as an adoption of manifest disregard to cure all manner of ills in arbitral awards. Rather, it is a last resort for those awards in which “the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.”⁸⁶

In *Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, the Eighth Circuit vacated the portion of an arbitral award granting attorneys fees in spite of the arbitrators’ acknowledgement of governing law that would prohibit such fees.⁸⁷

⁸¹ *Id.*

⁸² *Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 269 (7th Cir. 2006).

⁸³ *Dist. No. 72 v. Teter Tool & Die, Inc.*, 630 F. Supp. 732 (N.D. Ill. 1986); *Tootsie Rolls Ind., Inc. v. Local Union No. 1*, 1986 U.S. Dist. LEXIS 21517 (N.D. Ill. August 14, 1986); *Jones Dairy Farm v. Local No. P-1236*, 755 F.2d 583 (7th Cir.), vacated and remanded on reh’g, 760 F.2d 173 (7th Cir.), cert. denied, 474 U.S. 845 (1985); *Sunbeam Appliance Co. v. Int’l Ass’n of Machinists and Aerospace Workers*, 511 F. Supp. 505 (N.D. Ill. 1981), aff’d, 679 F.2d 893 (7th Cir. 1982); *Smith Steel Workers DALU v. A.O. Smith Corp.*, 464 F. Supp. 690 (E.D. Wis. 1979), rev’d, 626 F.2d 596 (7th Cir. 1980). Further, it is doubtful whether the original vacatur in *Jones Dairy Farm* was, in fact, based on an un-articulated concept of manifest disregard. 755 F.2d 583.

⁸⁴ *St. John’s Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005)

⁸⁵ *Id.* at 884 n.1 (quoting *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004).

⁸⁶ *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1069 (8th Cir. 2003); see also *St. John’s Mercy Med. Ctr.*, 414 F.3d at 884.

⁸⁷ *Id.*

B. Application of the Manifest Disregard Standard

After *Hall Street*, some district courts in the Eighth Circuit suggested that manifest disregard remained viable.⁸⁸ The Eighth Circuit, however, has now put that suggestion to rest, repeatedly stating that manifest disregard no longer exists as a non-statutory ground for vacatur.⁸⁹ *Hall Street* “eliminated judicially created vacatur standards under the FAA, including manifest disregard of the law.”⁹⁰

IX. The Tenth Circuit’s Cautious Application of Manifest Disregard

A. Historical Treatment

In *U.S. Energy Corp. v. Nukem, Inc.*, the Tenth Circuit defined manifest disregard as “willful inattentiveness to the governing law,”⁹¹ a definition consistent with those of the other Circuits. The Tenth Circuit has remarked that “the standard of review of arbitral awards is among the narrowest known to the law.”⁹² Unlike some other Circuits, however, that have held that they cannot remand unreasoned or unclear awards to the arbitral tribunal for clarification, the *Nukem* court remanded the case to the arbitrator for clarification so that the court could better decide the moving party’s claims that the arbitrator manifestly disregarded the law and exceeded his power.⁹³

B. Application of the Manifest Disregard Standard

The Tenth Circuit has not yet decided whether manifest disregard survives as a ground for vacatur after *Hall Street*. In *Hicks v. Cadle Co.*, the court acknowledged the question but avoided answering it.⁹⁴ More recently, in *Abbot v. Law Office of Patrick J. Mulligan*, the Tenth Circuit noted its own cautious application of the manifest disregard doctrine before *Hall Street*, surveyed the Circuit Courts’ jurisprudence after *Hall Street*, and determined that it would not entirely jettison manifest disregard absent further guidance from the Supreme Court.⁹⁵

88 See, e.g., *Steward v. H & R Block Fin. Advs., Inc.*, (D. Minn. May 28, 2009) (stating that, in addition to the grounds provided in the FAA, courts may vacate an award that is “completely irrational or evidences a manifest disregard for the law”) (quoting *Gas Aggregation Servs.*, 391 F.3d 1065).

89 *Air Line Pilots Ass’n Int’l v. Trans States Airlines, LLC*, 638 F.3d 572 (8th Cir. 2011) (citing *Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Crawford Grp., Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008)).

90 *Id.*

91 400 F.3d 822 (10th Cir. 2005).

92 *Id.* at 830 (citations omitted).

93 *Id.* at 831-36. In contrast, the Eleventh Circuit has held such remands for clarification to violate the public policy of deference to arbitration. See *infra* at p 37. The *Nukem* court did not discuss whether the parties had bargained for a reasoned award.

94 355 Fed. App’x 186, 196-97 (10th Cir. Dec. 7, 2009) (surveying state of circuit court decisions after *Hall Street* and finding that it need not decide the issue because the moving party did not demonstrate manifest disregard), *cert. denied*, 131 S.Ct. 160 (2010).

95 440 Fed. App’x 612, 617-20 (10th Cir. Sep. 21, 2011).

Therefore, it seems most likely that, absent further guidance from the Supreme Court, the Tenth Circuit will continue to apply manifest disregard in a narrowly defined set of cases, consistent with the approach taken by the Second and Ninth Circuits.

X. The Eleventh Circuit’s Rejection of the Doctrine

A. Historical Treatment

Like the Fifth and Seventh Circuits, the Eleventh Circuit was slow to accept manifest disregard as a ground for vacating arbitral awards. In *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Eleventh Circuit declined to recognize the manifest disregard doctrine, stating “[this court] has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case).”⁹⁶ Over the next three years, the Eleventh Circuit repeatedly declined to adopt the manifest disregard standard.⁹⁷

In *Montes v. Shearson Lehman Bros., Inc.*, however, the Eleventh Circuit upheld a finding by the district court that the arbitrator had deliberately ignored the law in making his award.⁹⁸ The court surveyed the case law on manifest disregard and emphasized the narrow confines of the doctrine.⁹⁹ The *Montes* court concluded that “a manifest disregard for the law, in contrast to a misinterpretation, misstatement or misapplication of the law, can constitute grounds to vacate an arbitration decision.”¹⁰⁰ The court went on to hold that vacatur was appropriate in the case under consideration, where counsel had explicitly urged the tribunal to disregard governing law, the tribunal had acknowledged that request in its award, and issued an award that was ultimately unsupported by the record.¹⁰¹

Montes made clear that the Eleventh Circuit would vacate an award for manifest disregard in only the most egregious of circumstances. In fact, one justice authored a brief concurring opinion for the sole purpose of emphasizing the limited applicability of the manifest disregard doctrine.¹⁰² After recounting the rather extreme facts of the *Montes* case, Judge Carnes concluded, “The Court does not imply that it would find a manifest disregard of the law based on anything less than all of those factors.”¹⁰³

96 903 F.2d 1410, 1413 (11th Cir. 1990). The *Raiford* court further found that, even if it were to recognize manifest disregard, the lack of a reasoned opinion denied the court any evidence that the tribunal had manifestly disregarded the law. *Id.* Further, the court’s policy of deference to the arbitral process precluded the court from remanding the case to the panel for a reasoned opinion. *Id.*

97 See *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460-61 (11th Cir. 1997) (discussing cases). As the *Montes* court observed, the Eleventh Circuit had always managed to decide manifest disregard challenges on other grounds. *Id.*

98 *Id.*.

99 *Id.* at 1461 (“An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”).

100 *Id.* at 1461-62.

101 *Id.* at 1462.

102 *Id.* at 1464 (Carnes, J., concurring)

103 *Id.*

B. Application of the Manifest Disregard Standard

Now, however, even facts as extreme as those in *Montes* will not justify vacatur for manifest disregard. In *Frazier v. CitiFinancial Corp.*, the Eleventh Circuit joined the Fifth and Eighth Circuits in holding that *Hall Street* eliminated all non-statutory grounds for vacatur, including manifest disregard.¹⁰⁴ The Eleventh Circuit has recently reaffirmed this holding. “Even manifest disregard of the law is no longer a valid independent, non-statutory ground upon which an arbitration award may be set aside.”¹⁰⁵

XI. The D.C. Circuit’s Narrow Approach

A. Historical Treatment

The D.C. Circuit appears to have adopted a narrow interpretation of manifest disregard consistent with that of the other Circuits. In *U.S. Postal Service v. American Postal Workers Union AFL-CIO*,¹⁰⁶ for example, the district court vacated a labor arbitral award, finding that the arbitrator’s award was inconsistent with the nationwide collective bargaining agreement whose applicable provisions had been defined in previous arbitrations between the parties.¹⁰⁷ The D.C. Circuit reversed, observing that the arbitrator had not decided the arbitration based on irrelevant materials, nor did any allegation of misconduct exist.¹⁰⁸ Allegations that the arbitrator simply got it wrong are insufficient, even in the labor context, to vacate an award for manifest disregard of the law. “[T]he arbitrator has a right to be wrong in his interpretation of the parties’ [agreement].”¹⁰⁹

The D.C. Circuit has also joined the Second and Tenth Circuits, among others, in holding that a court may not infer manifest disregard from an arbitrator’s unreasoned opinion.¹¹⁰ Similarly, the court may not remand an award to the arbitrator to demand a clarification to assist the court in determining whether the arbitrator manifestly disregarded the law.¹¹¹

In *Mala Geoscience AB v. Witten Techs., Inc.*, the district court drew a clear distinction between the concepts of “exceeding the powers” and manifest disregard.¹¹² While granting vacatur in part for the arbitrator’s acts that exceeded his powers, the court denied the motion to

104 *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323-24 (11th Cir. 2010) (“We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*.”); see also *White Springs Agricultural Chem., Inc. v. Glawson Invs. Corp.*, 660 F.3d 1277, 1280 (11th Cir. 2011) (citing *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) (“[M]anifest disregard of the law as an independent, nonstatutory ground for setting aside an [arbitration] award must be abandoned and rejected.”)).

105 See *Aviles v. Charles Schwab & Co., Inc.*, 435 Fed. App’x 824, 829 (11th Cir. July 20, 2011).

106 536 F. Supp. 2d 12 (D.D.C. 2008), *rev’d*, 553 F.3d 586 (D.C. Cir. 2009).

107 *Id.* at 16-18.

108 *Id.* at 695-96.

109 *Id.* at 695. Indeed, citing Supreme Court precedent in prior labor arbitrations, the D.C. Circuit observed that “the arbitrator’s improvident, even silly, factfinding does not provide a basis for a reviewing court to refuse to enforce the award.” *Id.* at 689 (internal quotations removed).

110 *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 532-33 (D.C. Cir. 1989).

111 *Id.*

112 No. 06-1343, 2007 U.S. Dist. LEXIS 38767 (D.D.C. May 30, 2007), *appeal dismissed by Civ. No. 07-7104*, 2008 U.S. App. LEXIS 28121 (D.C. Cir. Apr. 18, 2008).

vacate on the ground of manifest disregard.¹¹³ In *Republic of Argentina v. BG Group PLC*, the district court suggested that at least some overlap exists between these two grounds for dismissal and that an arbitrator might exceed his powers by manifestly disregarding the law.¹¹⁴ The court in *BG Group* was not tasked with deciding manifest disregard. In any event, the court found, consistent with *Mala Geoscience*, that these two grounds for vacatur are not available under Article V of the Convention.¹¹⁵

B. Application of the Manifest Disregard Standard

The D.C. Circuit has not yet decided whether the doctrine survives *Hall Street*.¹¹⁶ The district court has heard several manifest disregard challenges since *Hall Street*, and has continued to apply the doctrine as it had before *Hall Street* and in a manner consistent with the application of the Second Circuit.¹¹⁷ The district court recently held, for example, that an arbitrator did not commit manifest disregard by refusing to apply law that was not clearly applicable to the case, by awarding damages based on his interpretation of the contract, or for issuing an unreasoned award.¹¹⁸

The context for the D.C. courts' post-*Hall Street* consideration of manifest disregard has included at least four international arbitral awards.¹¹⁹ In all cases, manifest disregard was rejected as a basis for vacatur. In *Republic of Argentina v. BG Group*, the district court held that the arbitral tribunal did not manifestly disregard the law by expressly construing a governing treaty and finding it to be inapplicable to the arbitration.¹²⁰ The court also held that an argument that the tribunal misunderstood and misapplied a legal doctrine is merely an allegation of legal error, not manifest disregard of the law.¹²¹ Similarly, in *International Thunderbird Gaming Corp. v. United Mexican States*, the court held that a NAFTA arbitral panel did not manifestly disregard the law of burden of proof when it determined that the party had simply failed to prove its *prima facie* case.¹²² In *Chromolloy Aeroservices v. The Arab Republic of Egypt*, the court held that a "procedural decision that allegedly le[ads] to a misapplication of substantive law" does not

113 *Id.* at *20-29.

114 764 F. Supp. 2d 21, 30 (D.D.C. 2011) (citing *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009)), *rev'd on other grounds*, Civ. No. 11-7021, 2012 WL 119558 (D.C. Cir. Jan. 17, 2012).

115 *Id.* at 29-30.

116 *See Regnery Pub., Inc. v. Minter*, 368 Fed. App'x 148, 149 (D.C. Cir. Mar. 17, 2010) (assuming without deciding that manifest disregard survived *Hall Street*); *Priority One Servs., Inc. v. W & T Travel Servs., LLC*, Civ. No. 10-1973, 2011 WL 3678907, at *5 (D.D.C. Aug. 23, 2011) (observing that the D.C. Cir. has not decided whether manifest disregard survives *Hall Street*).

117 *Affinity Fin. Corp. v. AARP Fin., Inc.*, 794 F. Supp. 2d 117, 120 n. 1 (D.D.C. 2011) ("In the absence of any guidance from the Supreme Court or the Circuit, it is prudent to assume that the 'manifest disregard' standard remains good law.")

118 *Id.* at 122.

119 *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12 (D.D.C. 2011); *Republic of Arg. v. BG Grp.*, 715 F. Supp. 2d 108 (D.D.C. 2010), *rev'd*, 2012 WL 119558 (D.C. Cir. Nov. 10, 2011) (reversed and award vacated because arbitrator had exceeded his powers); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 473 F. Supp. 2d 80 (D.D.C. 2007); *Chromalloy Aeroservices v. The Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

120 715 F. Supp. 2d 108, 123 (D.D.C. 2010).

121 *Id.* at 123-24.

122 473 F. Supp. 2d at 84.

constitute manifest disregard.¹²³ In *Int'l Trading and Indus. Inv. Co. v. Dyncorp Aerospace Tech.*, the district court held manifest disregard is not an available ground for denying confirmation of an award issued from a foreign seat.¹²⁴

¹²³ 939 F. Supp. at 911.

¹²⁴ 763 F. Supp. 2d at 26-27.